

HORIZONTAL COMPARISON OF LANGUAGE VERSIONS AS AN
INSTRUMENT
FOR IMPROVING LEGAL CERTAINTY IN THE EUROPEAN UNION

by

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Abstract

Certainty is fundamental to the mutual rights and obligations which arise in any relationship between a governing entity and its subjects. This thesis examines certainty in the context of the multilingual system of European Union (EU) law and its impact on individual EU citizens. It considers whether the multilingual EU legal regime allows EU citizens to know their rights and obligations fully, and thus to act in accordance with a correct understanding of these rights and obligations, given the existence of differences or divergences between the published language versions of EU legal texts. The thesis adopts an inter-disciplinary approach which draws on literature and theory from the fields of law and translation studies. Ultimately, the thesis proposes that so-called horizontal comparison of language versions could help prevent divergences during the production of multilingual EU legislation, and thereby improve legal certainty for EU citizens.

The seven chapters of the thesis describe and analyse the position of individual EU citizens under the multilingual EU legal regime. Chapter II discusses the theoretical framework for the thesis and the adopted methodology, while Chapter III considers how EU legal multilingualism works in practice, discussing EU language policy and how EU law is made. The chapter notes that EU legislation is published in the Union's 24 official languages, that the stated reasons for doing so include the objective of making EU law accessible to EU citizens, that the production of language versions entails extensive translation activity, that

the language versions have equal legal status and that EU citizens are told that they may rely on any language version they wish. Following consideration of the legal framework for relations between the EU and its citizens in Chapter IV, including both the question of the EU's status in law and key principles which EU law seeks to uphold, Chapter V examines how different language versions of EU legal texts come into being, and points out that divergences may not be caught by existing translation quality assessment methods. As a result – and despite assertions to the contrary – persons who rely on a given language version of an EU legislative act face the risk that they may obtain an incomplete, non-final and unreliable account of their rights and obligations. Ultimately, this may result in civil and/or criminal liability, a state of affairs which raises substantial rule of law concerns. Chapter VI of the thesis considers practical steps taken to minimise and eliminate divergences between language versions, including not least through interpretation by the European Court of Justice in the form of preliminary rulings. Chapter VII examines theoretical approaches proposed to address divergences between texts and ends with the presentation of a proposed new approach, while Chapter VIII sums up the content of the thesis.

This thesis makes several contributions to existing literature. First, it employs a novel theoretical framework for examining the impact of divergences between language versions on individual EU citizens, in the form a functionalist approach which views the multilingual EU legal regime as a system serving specific purposes, where the achievement of such

purposes can be evaluated by reference to resulting outcomes. Second, the thesis draws on both translation-related and legal literature to present a novel, integrated overview of the causes, outcomes and potential for alleviating the impact of divergences between language versions of EU legal texts. This contribution is bolstered by the empirical part of the thesis, which – in the form of interview data – adds to current knowledge through insights into the production processes of EU legal texts which are normally invisible to readers of such texts. Third, the thesis adds to current knowledge on the topic of social contract theory and its applicability to relations between the EU and its citizens, challenging the prevailing view that the EU is not a state and that social contract theory is thus irrelevant. Fourth, perhaps the most significant contribution of the thesis to current literature relates to the topic of legal certainty, highlighting two conflicting positions on legal certainty in the EU, respectively termed the systemic and individual views, but ultimately concluding that divergences between language versions undermine legal certainty under both views. Fifth, the thesis contributes to current knowledge in the translation studies field by proposing a classification of approaches to translation quality assessment by reference to the number of informational sources on which they draw. Finally, the thesis presents a novel approach, referred to as horizontal comparison, as a tool for addressing the problematic phenomenon of divergences between EU legal texts and thereby improving legal certainty for EU citizens.

Dedication

For my parents, whose commitment to their calling I greatly admire, for T – thank you for everything – and for S and L: dare to dream and to be different – you can be anything and everything you set your mind to.

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I. Introduction

Certainty is of fundamental value and importance with respect to the mutual rights and obligations which arise in any relationship between a governing entity and those subject to its rules. This thesis examines certainty in the context of the multilingual system of European Union (EU) law and its impact on individual EU citizens.¹ More specifically, it considers whether the multilingual EU legal regime allows EU citizens to know their rights and obligations fully, and thus to act and otherwise arrange their affairs in accordance with a correct understanding of these rights and obligations. The thesis shows that this is not always the case, i.e. that the EU legal regime fails to afford EU citizens legal certainty when there are differences or divergences between the published language versions of EU legal texts. Ultimately, the thesis proposes a new approach for discovering and addressing divergences in multilingual EU legislation prior to publication, and thereby for improving legal certainty for EU citizens.

The thesis develops an argument based on a number of findings. The first is that the EU and its citizens have a relationship based on mutual rights and obligations, where citizens have to follow certain laws and are granted certain rights and the EU has undertaken to uphold certain standards relevant to citizens, including the rule of law, fundamental rights and,

¹ While EU law applies to all natural and legal persons falling under the EU's jurisdiction, thus including both EU citizens and non-EU citizens, for ease of reference the terms "citizen(s)" and "EU citizen(s)" are used in this thesis. EU citizenship is discussed further in Chapter IV.

especially, legal certainty. Secondly, legal certainty can be viewed on two levels – collective and individual – and divergences between language versions undermine legal certainty and are undesirable on both levels. At the collective/systemic level, this is because the law does not bind all EU citizens in the same way (i.e. uniform application of EU law across the member states is undermined), while at the individual level legal certainty suffers because citizens cannot know the precise content of a legal text and thus cannot rely on it without running the risk that their understanding of the text may be deemed incorrect. The undesirability of divergences is also clear from the extensive work done to prevent, detect and eliminate them during the production of EU legislative texts. The third key finding in the thesis is that efforts to avoid divergences can be divided into practical and theoretical categories, where practical measures focus on the translation process and range from translation and style guides to prescribed translation processes and technical aids, and theoretical measures focus on the assessment of target texts to determine whether they are fit for purpose. Fourthly, elements can be taken from existing practical and theoretical approaches and combined in a new approach – referred to as horizontal comparison in the thesis – which can help identify and eliminate divergences between language versions prior to publication. The proposed approach combines comparison of different target texts with two specific measures. One is to restrict the comparison exercise to five or six so-called pivot languages to limit the work involved and make such a comparison manageable. The second is to revive concordance meetings as previously held by the EU as a forum for discussing divergences identified through the horizontal comparison exercise and ensuring the

greatest possible alignment of the pivot-language versions prior to further translation. The thesis also notes the potential offered by recent advances in the field of artificial intelligence, and large language models in particular, to automate horizontal comparison and expand the comparison exercise beyond a limited number of pivot languages. Fifthly and finally, the thesis proposes and substantiates that the proposed new approach could help eliminate divergences and thereby improve legal certainty in the EU.

This thesis makes several contributions to existing bodies of literature. First, it draws on theories of functionalism in the legal, translation and sociological fields to construct an argument in support of viewing the multilingual EU legal regime as a system which serves specific purposes, where the achievement of those purposes can be evaluated by reference to the outcomes or impacts produced by the system, in this instance meaning the language versions resulting from the EU's multilingual legislative process. Second, the thesis adopts a novel integrated view of legislative process, covering both how divergences between language versions arise during the translation process and the practical legal impact of such divergences. Relevant literature tends to fall into two categories: translation studies and law. While translation studies literature usually examines translation-related topics such as the processes by which EU legal texts are produced, and not least drafting and translation within EU institutions, legal literature tends to focus on questions such as the harmonisation of EU law across the member states. This relatively strict delimitation by academic field has resulted in a lack of inter-disciplinary literature offering an integrated perspective on EU legal texts

stretching from production to impact, and the links between the two. The thesis bridges the gap between translation and the law in this context by drawing on both bodies of literature to present an integrated overview of the causes of divergences between language versions of EU legal texts, as well as the potential for alleviating their impact. This contribution is bolstered by the empirical part of the thesis, which – in the form of interview data – adds to current knowledge through insights into the production processes of EU legal texts which are normally invisible to readers of such texts.

The third contribution of the thesis to the existing literature is its discussion of the legal framework for relations between the EU and its citizens, which adds to current knowledge on the applicability of social contract theory to such relations. The thesis challenges the prevailing view that the EU is not a state and that social contract theory is thus irrelevant by considering arguments for and against EU statehood and demonstrating that formal legal status is no bar to social contract theory-focused analysis. Further, the thesis argues that even if the EU lacks statehood *in law*, it functions as a state *in fact* such that its relations with its citizens can be examined from a government-governed perspective which allows such relations to be reframed as a system of mutual rights and obligations whose functioning can be evaluated by reference to principles such as the rule of law, access to justice and legal certainty. As an alternative ground for such analysis, the thesis also presents the novel proposition that the scope of social contract theory itself can and should be expanded to cover new forms of supranational government such as the European Union.

Fourthly, the thesis contributes to current knowledge in the translation studies field through its analysis of approaches to translation quality assessment. It expands on a novel classification previously proposed by the author, which categorises such approaches by reference to the number of informational sources on which they draw. This classification and examples cited from within the category of multi-source approaches provide context for the final and main contribution of the thesis: a new approach for identifying and addressing divergences between language versions. The proposed new approach incorporates empirical findings from interview data, addresses potential limitations and objections and takes into account new findings which have emerged during the thesis studies, not least regarding known processes previously used by the EU institutions and in comparable legal regimes.

Several potential research topics remain open at the conclusion of the thesis study. These include practical testing of horizontal comparison to determine its utility and realism. While tests could be conducted using human translators, it appears potentially more fruitful to explore how artificial intelligence could be leveraged. Once developed, automated horizontal comparison tools could potentially be used to expand the scope of comparison into the field of comparative law, for example by examining implementing legislation across the EU member states to identify deviations from the policy objective of harmonisation. More practical and immediate topics for further research include further investigation of

both concordance meetings as previously held by the EU and the co-redaction and co-editing processes employed by Switzerland and Canada, to identify relevant lessons learned from the comparison exercises conducted in those jurisdictions.

II. Theoretical framework, methodology and evaluation framework

1. Theoretical framework

This thesis adopts an inter-disciplinary approach which draws on literature and theory from two academic fields – law and translation studies – to examine the functioning of a legal system with respect to the rights and obligations of participants in the system. The legal system in question is that of the European Union (EU), while the participants are EU citizens. A unique feature of the EU legal regime is its unprecedented multilingual breadth, with EU legal texts being published in 24 official languages.² EU legal texts in the form of regulations and directives are binding on member states,³ and the purpose of publishing such instruments in all the official languages is, not least, “to ensure that EU citizens have equal access to EU institutions and the legislation that they adopt, without language barriers.”⁴ Further, it has been stated that EU citizens have a “fundamental right”⁵ to “fully understand in their own language the content of the law that binds them”,⁶ i.e. “whether and how [such a law] impacts on [their] daily life.”⁷ In other words, natural and legal persons subject to EU law should have the opportunity to familiarise themselves with their rights and obligations

² European Union, ‘Languages’ <https://european-union.europa.eu/principles-countries-history/languages_en> accessed 1 November 2024.

³ See Article 288 of the Treaty on the Functioning of the European Union (TFEU).

⁴ Cornelis JW Baaij, ‘The EU Policy on Institutional Multilingualism: Between Principles and Practicality’ [2012] *International Journal of Language & Law (JLL)* Vol 1: Global Perspectives on the Language of Law, 16.

⁵ European Commission (ed), *Speaking for Europe: Languages in the European Union* (Office for Official Publications of the European Communities 2008) 13.

⁶ Baaij, ‘The EU Policy on Institutional Multilingualism’ (n 4) 16.

⁷ European Commission, *Speaking for Europe* (n 5) 13.

under EU legislation. All language versions of EU legislation are stated to be “equally authentic”,⁸ a status which implies that meaning resides in all the language versions collectively – where ‘meaning’ can be defined as “the meaning which best reconciles the texts, having regard to the object and purpose of the [instrument]”⁹ – and thus also that no single language version is authoritative or authentic on its own. At the individual level, however, meaning may be uncertain if there are differences or divergences between language versions, and system participants may thus be left in doubt about their rights and obligations. Any uncertainty about the meaning or content of applicable laws – for example what they require, grant and/or enforce – represents a potential challenge to both the coherence and the effectiveness of the legal system.

Unlike the situation where there is only one authentic text and any additional language versions are acknowledged to be translations created on the basis of the (authoritative) source text, the different language versions of EU legislative texts are created in parallel during the legislative process. Accordingly, any divergences between such language versions necessarily arise during the process of parallel drafting and translation which precedes the final adoption of a legal text. This thesis therefore considers the process by

⁸ See Article 55(1) of the Treaty on European Union (TEU), which states that, “This Treaty, drawn up in a single original in the [official] languages, the texts in each of these languages being equally authentic...” This principle also applies to the Treaty on the Functioning of the European Union; see Article 358 TFEU. See further e.g. Łucja Biel, ‘Translation of Multilingual EU Legislation as a Sub-Genre of Legal Translation’ in WD Kierzkowska (ed), *Court Interpreting and Legal Translation in the Enlarged Europe 2006* (Translegis 2007) 146.

⁹ Article 33(4) of the Vienna Convention on the Law of Treaties.

which new EU laws are created, examining how and when divergences between language versions may arise, in what circumstances such divergences may be problematic and how they can be addressed. The thesis adopts a systemic view of the EU legal order, whereby the EU legal order is both a sub-system within the overall system of the EU and a parent system to further sub-systems, one of which is the EU legislative process. Both the overall EU system and its component sub-systems and processes serve defined purposes and result in outcomes which represent achievement or non-achievement of those defined purposes. The thesis thus views the EU legislative process as a series of interlinked operations leading from objective to implementation to outcome, and in this regard draws particularly on functionalist theories as discussed further below. The theoretical discussion is supplemented by empirical investigation of the EU legislative process and its functioning from the perspective of individuals involved in it, with a particular focus on the occurrence and potential prevention of divergences between language versions. For this empirical component, the thesis adopts a process- and participant-oriented focus, as discussed below. In its examination of the functioning of the EU's multilingual legal system, this thesis considers three factors: 1) the objectives to be achieved by the system, 2) the processes put in place to achieve those objectives, and 3) actual outcomes. The discussion which follows draws on functionalist theories in the fields of sociology, law and translation to construct a theoretical framework for examining multilingual EU lawmaking. Insights from each of the three fields are identified in turn before being combined to form the final proposed framework.

1.1 Functionalism in sociology

In the social sciences context, functionalism has been defined as “a framework for building theory that sees society as a complex system whose parts work together and interconnect – often to promote solidarity and stability.”¹⁰ The view of society as consisting of interdependent parts or sub-systems can be traced to the work of Spencer, who identified parallels between natural organisms and societies in terms of their being composed of component parts, functional powers or units,¹¹ leading to the insight that “the various parts of society work together to keep society functioning”.¹² Building on this, Durkheim posited that social solidarity and cohesion stem from a “common conscience”¹³ shared by the members of a society, and that this common conscience is expressed in ‘repressive’ (i.e. prohibiting or penal) law. Law, furthermore, was stated to provide stability and precision in the organisation of social life.¹⁴ Like Spencer, Durkheim employed a physiological analogy, comparing the law to an organism’s nervous system and the latter’s role in regulating “the different functions of the body in such a way as to make them harmonize.”¹⁵ Although Spencer and Durkheim’s focus was on society as a whole, it seems logical to conclude that

¹⁰ John Macionis and Ken Plummer, *Sociology: A Global Introduction* (Pearson Education, Limited 2012) 38.

¹¹ Herbert Spencer, *The Principles of Biology*, vol 1 (D Appleton and Company 1910) 237, 363.

¹² Heather Griffiths and Nathan Keirns, *Introduction to Sociology 2e* (OpenStax 2015), “Functionalism”.

¹³ Emile Durkheim, *The Division of Labor in Society* (George Simpson tr, The Free Press of Glencoe, Illinois 1933) 109.

¹⁴ *ibid* 65.

¹⁵ *ibid* 128.

what applies to a society may also apply to sub-systems within that society, or indeed to any larger systems of which the society may be a member. This conclusion permits a shift in focus from (national-level) societies to supranational organisations composed of individual (national-level) societies. On this basis, the thesis proposes that the EU can, for analysis purposes, be treated as a society or social system in which various sub-systems or functions operate in service of the whole. Laws play a key role in regulating the organisation of any social system, including the EU. Not least, the EU's legislative function – i.e. the process of proposing, formulating and adopting new laws – serves defined systemic objectives, including harmonisation of different societal functions as noted by Durkheim (see above).¹⁶ Legal regulation is consistent with Parson's view that societies (including supra-national societal systems like the EU) "need to be able to adapt, achieve their goals, maintain themselves and have members who are well socialised into their order. Without this, societies may begin to break down."¹⁷ The potential for societal breakdown is particularly clear in the legal field, where inadequate regulation may result not only in undesirable conduct (for example when a domain is poorly regulated), but also erosion of confidence in the overall system (for example when legal provisions are considered to be inaccessible, incomprehensible, arbitrary or otherwise unfair).

¹⁶ See Article 151 TFEU: "The Union and the Member States... shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation..."

¹⁷ Macionis and Plummer (n 10) 38.

Further, Merton has suggested that a society (or social system) may feature manifest (i.e. overt) or latent (i.e. covert) functions, where manifest functions are “objective consequences contributing to the adjustment or adaptation of the system which are intended and recognized by participants in the system”¹⁸ and latent functions are “those which are neither intended nor recognized.”¹⁹ Both manifest and latent functions can be positive or negative. Thus in the multilingual EU legislative context, manifest functions might be said to include legal regulation and providing legal information in the official languages. Latent functions might include, for example, an increase in business for multilingual lawyers and, on the other hand, the need to take multilingual legal advice to cover all possible interpretations. In addition to functions which are positive or negative for certain parties, a social system may also feature functions which are systemically negative. Merton referred to these as ‘social dysfunctions’, defining them as “observed consequences which lessen the adaptation or adjustment of the system”.²⁰ Put another way, social dysfunctions are “undesirable consequences for the operation of society”.²¹ In the multilingual EU legislative context, social dysfunctions could include confusion resulting from divergences between language versions, ‘forum shopping’ based on which member state’s language version is considered most favourable, and non-compliance motivated by perceived illegitimacy due to varying or unpredictable enforcement of legal rules. It has also been observed that dysfunctions

¹⁸ Robert K Merton, *Social Theory and Social Structure* (The Free Press 1968) 105.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Macionis and Plummer (n 10) 38.

may arise when a practice (or other activity) is “only functional for a dominant individual or a group.”²² This implies that a practice may be functional (in the sense of beneficial or expedient) for one group but dysfunctional for another, and thus that trade-offs may occur between the interests of different groups. One potential trade-off of particular relevance in this thesis is that between individual and systemic interests within the EU legal regime. This manifests itself particularly in the question of whose legal certainty should be served – that of individuals or that of the system.

1.2 Functionalism in law

Additional insights can be taken from applications of a functionalist perspective in the legal domain, with three particular applications being considered below: the functionalist view of lawmaking, legal functionalism and functionalist comparative law. First, the *functionalist view of lawmaking* concerns how laws come into being, and proposes that laws are institutionalised customs, where customs are defined as “norms or rules... about the ways in which people must behave if social institutions are to perform their tasks and society is to endure.”²³ Laws, on the other hand, are customs which have been reinstitutionalised, i.e. been “restated in order to make [them] amenable to the activities of... legal institutions.”²⁴ In this context, legal institutions have been defined as means by which “the people of a

²² John Holmwood, ‘Functionalism and Its Critics’ in Austin Harrington (ed), *Modern social theory: an introduction* (Oxford University Press 2005) 91.

²³ Paul Bohannan, ‘The Differing Realms of the Law’ (1965) 67 *American Anthropologist* 33, 35.

²⁴ *ibid* 36.

society settle disputes that arise between one another and counteract any gross and flagrant abuses of the rules... of at least some of the other institutions of society.”²⁵ Under this view, “[l]awmaking is the restatement of some customs... so that legal institutions can enforce them.”²⁶ The functionalist view of society has been stated to entail a number of key postulates, some of which may be helpful when examining EU lawmaking. These include that “[s]ocieties must be looked at holistically as systems of interrelated parts”; that drivers of change include “inventions or innovations by members of groups within society”; and that the “most important and basic factor making for social integration is value consensus, i.e. ... broad aims or principles which most members of a given social system consider desirable and agree on.”²⁷ Applied to the EU, these postulates imply that the EU is a system of interrelated parts (or sub-systems), that innovation by individual sub-systems is a driver of change in the overall EU system and that value consensus is a key determinant of social integration within the EU. Second, the concept of *legal functionalism*, known particularly in US law, has been defined as a method for explaining and analysing “the law based on the functions that law and legal rules serve for society, the branches of government, interest groups, and other legal actors.”²⁸ Specific applications of functionalism in this context

²⁵ *ibid* 35.

²⁶ Steven Vago and Steven E Barkan, *Law and Society* (11th edn, Routledge 2018) 102.

²⁷ Pierre L van den Berghe, ‘Dialectic and Functionalism: Toward a Theoretical Synthesis’ (1963) 28 *American Sociological Review* 695, 696.

²⁸ Ballotpedia, ‘Functionalism (Law)’ <[https://ballotpedia.org/Functionalism_\(law\)](https://ballotpedia.org/Functionalism_(law))> accessed 1 November 2024.

include constitutional interpretation²⁹ and analysis of US federalism,³⁰ although these are of lesser interest in the present discussion. More relevant for present purposes is the proposition that “the *function* of a rule can be part of a causal explanation of the content of the rule.”³¹ Third, *functionalist comparative law* is said to feature a number of commonly agreed elements, including two of particular interest here. The first of these is the factual orientation of the functionalist approach to comparative law, which implies a focus “not on rules but on their effects, not on doctrinal structures and arguments, but on events. As a consequence, its objects are often judicial decisions as responses to real life situations”.³² Secondly, “functionalist comparative law combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society.”³³ In addition, it has been suggested that “country-specific contextual factors”³⁴ are also an important consideration because “the same legal rule may produce different results in different countries (and perhaps no significant results in some countries) due to such

²⁹ Suzanne Prieur Clair, ‘Separation of Powers: A New Look at the Functionalist Approach’ (1989) 40 Case Western Reserve Law Review 331.

³⁰ Erwin Chermensky, ‘Formalism and Functionalism in Federalism Analysis’ (1997) 13 Georgia State University Law Review 959.

³¹ Lawrence Solum, ‘Legal Theory Lexicon: Functionalist Explanation in Legal Theory’ (*Legal Theory Blog*, 10 June 2007) <https://lsolum.typepad.com/legaltheory/2007/06/legal_theory_le_1.html> accessed 1 November 2024.

³² Ralf Michaels, ‘The Functional Method of Comparative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Online edition, Oxford Academic 2012) 342.

³³ *ibid.*

³⁴ Christopher A Whytock, ‘Legal Origins, Functionalism, and the Future of Comparative Law’ [2009] Brigham Young University Law Review 1879, 1898.

contextual factors.”³⁵ This is underlined by the fact that, “without understanding the potentially complex interactions between legal rules and contextual factors, it is difficult to estimate the causal effects of legal rules with a useful degree of certainty.”³⁶ In the specific environment of the multilingual EU legal regime, language appears to be an obvious – and perhaps the most fundamental and significant – contextual factor, as achieving the intended function of adopted legal rules becomes much harder if persons subject to those rules are unable to understand them.

1.3 Functionalism in translation studies

The main tenets of functionalism in the translation studies context are said to be three-fold. First, that “translation and interpreting are goal-oriented actions embedded in a sociocultural environment that directly influences them and their outcomes”.³⁷ Second, that “the aim of the target text is the most important factor determining the translation procedures”.³⁸ Third, that “translators and interpreters are expert professionals who are responsible for the production of functionally adequate target texts.”³⁹ While translation studies scholarship traditionally focused on equivalence between source and target text, scholars recognised that ‘equivalence’ could mean different things in different contexts. For

³⁵ *ibid.*

³⁶ *ibid.* 1899.

³⁷ Celia Martín de León, ‘Functionalism’ in Mona Baker and Gabriela Saldanha (eds), *Routledge Encyclopedia of Translation Studies* (Third edition, Routledge, Taylor & Francis Group 2020) 199.

³⁸ *ibid.*

³⁹ *ibid.*

example, Nida distinguished between formal and dynamic equivalence, defining the formal-equivalence approach as one where “the translator attempts to reproduce as literally and meaningfully as possible the form and content of the original”⁴⁰ with the aim of ensuring that “the message in the receptor language should match as closely as possible the different elements in the source language.”⁴¹ Under the dynamic-equivalence approach, on the other hand, the translator “aims at complete naturalness of expression and tries to relate the receptor to modes of behavior relevant within the context of his own culture; [the translator] does not insist that he understand the cultural patterns of the source-language context in order to comprehend the message.”⁴² Similarly, Newmark referred to ‘semantic translation’ – which “attempts to render, as closely as the semantic and syntactic structures of the second language allow, the exact contextual meaning of the original”⁴³ – and ‘communicative translation’, which “attempts to produce on its readers an effect as close as possible to that obtained on the readers of the original.”⁴⁴ Despite recognition that different translation approaches may be appropriate in different contexts – i.e. “certain types of messages for certain types of audiences”⁴⁵ – until the 1970s “[e]quivalence between source and target language units was the quality yardstick which was never questioned”.⁴⁶ Over time, however,

⁴⁰ Eugene A Nida, *Toward a Science of Translating* (EJ Brill 1964) 159.

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Peter Newmark, *Approaches to Translation* (Pergamon Press 1981) 39.

⁴⁴ *ibid.*

⁴⁵ Nida (n 40) 166.

⁴⁶ Christiane Nord, ‘Functionalist Approaches’ in Yves Gambier and Luc van Doorslaer (eds), *Handbook of Translation Studies*, vol 1 (John Benjamins Publishing Company 2010) 121.

growing awareness of globalisation processes brought with it increased recognition of the communicative function of translation, summed up by the statement that “communication has become inconceivable without translation”.⁴⁷ Communication is a key factor in the so-called *skopos* rule,⁴⁸ an explicitly functionalist approach developed by Reiss and Vermeer, which posits that “any action is determined by its purpose, i.e. it is a function of its purpose or *skopos*”,⁴⁹ where the *skopos* is the “intended communicative function”.⁵⁰ *Skopos* theory shifted the focus from the source text onto the target text and its functionality or adequacy, where adequacy “describes a quality *with regard to* a particular goal, [i.e.] the intended purpose.”⁵¹ Further, *skopos* theory “assigns a central role to the target audience – more precisely, to the translator’s expectations about the target audience – in determining translation strategies.”⁵² As such, *skopos* theory is conceptually related to both Nida’s dynamic equivalence (focusing on naturalness of expression and relating the receptor to

⁴⁷ Katharina Reiss, *Translation Criticism - The Potentials and Limitations* (Erroll F Rhodes tr, Routledge 2014) xi.

⁴⁸ It should be noted that communicative function is also emphasised by other approaches. These include the theory of translational action, which is based on achieving a particular purpose through the act of translation (Christiane Nord, *Translating as a Purposeful Activity: Functionalist Approaches Explained* (Taylor & Francis Group 2018) 12), and the User-Centered Translation (UCT) model, in which “information about users is gathered iteratively throughout the process and through different methods, and this information is used to create a usable translation” (Tytti Suojanen, Kaisa Koskinen and Tiina Tuominen, ‘Usability as a Focus of Multiprofessional Collaboration’ (2015) 3 *Connexions - International Professional Communication Journal* 147, 149).

⁴⁹ Katharina Reiss and Hans J Vermeer, *Towards a General Theory of Translational Action: Skopos Theory Explained* (Christiane Nord tr, Routledge 2014) 90.

⁵⁰ Nord (n 46) 121.

⁵¹ *ibid* 122.

⁵² Martín de León (n 37) 200.

modes of behaviour relevant in the target culture) and Newmark's communicative translation (focusing on achieving an effect as close as possible to the effect experienced by readers of the original). From a functionalist perspective, therefore, translation can be defined as an act of inter-cultural communication in which information formulated in an originating (or source) culture is processed for the purpose of informing a recipient (or target) culture. In the legislative context, the legislature can be regarded as the originating culture, while the target audience represents the recipient culture. In other words, consideration of the target audience may include consideration of the target-audience culture, where culture can be defined as "a complex system determining any human action or behaviour including language".⁵³ In this context, 'language' may arguably refer not only to the words, tone and style of a translated text, but also the languages which members of the target audience can comprehend. Language is therefore a key factor in a multilingual context where different audience members have differing language skills and thus differing access to texts in different languages.

1.4 Criticism

It is also important to note that functionalist approaches are subject to criticism. In the sociological field, it has been proposed that contemporary criticism of functionalism can be grouped into four categories.⁵⁴ The first of these – critique of explanatory functionalism –

⁵³ Nord (n 46) 123.

⁵⁴ Peter Sohlberg, *Functionalist Construction Work in Social Science: The Lost Heritage* (Routledge 2021) 52–53.

questions the theoretical validity of functional explanations when they do not lead to causal explanations of isolated social phenomena. However, as the present analysis is not seeking to provide a causal explanation of any isolated social phenomenon, this critique holds little relevance here. The same is true of the third criticism – critique of functional methodology – which focuses on a perceived lack of systematic scientific method, conceptual vagueness and a speculative orientation. Again, as this thesis is not attempting to present a causal explanation, this critique is of limited relevance. Of greater potential relevance are the second and fourth criticisms. The second criticism – critique of the functionalist view of the system – questions the validity of analyses employing structural functionalism, due to perceived weaknesses in the structural-functionalist approach, including the adoption of a static perspective, conservatism and limited empirical relevance. Similarly, the fourth criticism – critique of the functionalist worldview – concentrates on conservatism and assumptions as to the stability of and consensus within society. Critiques in these two categories encompass, for example, the criticism that society is not necessarily comprehensible, orderly and stable, given that “social patterns vary from place to place and change over time”.⁵⁵ Further criticisms are that functionalism fails to provide an adequate explanation of social change,⁵⁶ and that its underlying assumption of social integration overlooks inequalities and conflict arising from factors like social class, race, ethnicity and gender.⁵⁷ Other criticisms include that society does not have needs like those of humans, and that functionalism does not

⁵⁵ Macionis and Plummer (n 10) 39.

⁵⁶ Griffiths and Keirns (n 12), “Functionalism”.

⁵⁷ Macionis and Plummer (n 10) 39.

allow for individual agency. As already indicated in relation to the first and third critiques, this thesis does not utilise functionalism as an overall explanatory mechanism. Rather, the functionalist perspective provides a basis for viewing the EU as a system in which defined functions (specifically, the adoption of legislation) serve defined objectives, and for assessing the impact of those functions and whether the objectives are achieved. At the same time, it is important to acknowledge that the EU is a body composed of member states, and not a nation state *per se* (although the question of EU statehood does provide grounds for discussion, see further Chapter IV). Nevertheless, it seems logical to conclude that the functionalist insights outlined above can be applied to both an individual society and a supranational system, not least because the EU functions as a single, cohesive system in many respects, and indeed pursues harmonisation within its areas of jurisdiction.

Similarly, the EU legislative context presents a translation environment far removed from the usual translation scenario of a single source text and a single target text, given that – as discussed further below – the multilingual EU legislative translation process converts a single source text into 23 target texts. While functionalist approaches have also been criticised in the field of translation studies,⁵⁸ as stated the purpose of discussing functionalist approaches is not to invoke them as general explanatory models, and their explanatory power and correctness are thus less relevant. Instead, the reason for considering functionalist approaches in the translation domain is to substantiate a focus on the recipient, or target,

⁵⁸ Nord (n 48) 100–112.

audience. For present purposes, the key insight to be taken from the preceding discussion is that different audiences have differing communicative needs. In the multilingual EU legal regime, legal texts serve purposes which are consistent in the sense of promoting uniformity across the member states, but the target audience for these legal texts comprises diverse groups and individuals with differing communicative needs. A key determinant of communicative needs in this context is language skills, as different target audience members will inevitably have varying language skills and proficiency. As noted above, the process of introducing new EU laws involves translation into the official languages. Further, it was stated that functionalism in the translation studies context is based on three main tenets.⁵⁹ In its consideration of divergences between language versions of EU legislation, this thesis adopts a target text-related perspective which is consistent with these tenets – and therefore functionalist in nature – as it 1) views translation as a ‘goal-oriented action’, where the goal is to communicate EU law in the official languages of the Union, not least to achieve uniform application of EU law; 2) treats the aim of the target text as a primary consideration; and 3) sees the overall purpose as being to produce functionally adequate target texts, i.e. texts which achieve their intended purpose.

⁵⁹ Namely 1) that “translation and interpreting are goal-oriented actions embedded in a sociocultural environment that directly influences them and their outcomes”; 2) that “the aim of the target text is the most important factor determining the translation procedures”; and 3) that “translators and interpreters are expert professionals who are responsible for the production of functionally adequate target texts.” See Martín de León (n 37) 199.

A final potential criticism relates to the application of functionalist approaches to legal texts. As indicated above, a functionalist approach to translation in line with *skopos* theory prescribes a focus on the target audience.⁶⁰ Taken to its logical conclusion, *skopos* theory implies that, "A text is made meaningful by its receivers. Different receivers, or even the same receiver at different times, may find different meanings in the same linguistic material of a text. Therefore, there may be as many different translations of one source text as there are purposes in the target culture which could be achieved by the target text."⁶¹ This statement – and by extension functionalist approaches – could be criticised on the basis that while it is true that different receivers (or readers) of a text may adopt their own interpretations of it, this becomes problematic in the case of legislation which – perhaps more than any other text type – seeks to achieve specific outcomes by regulating the behaviour of its addressees. In other words, although different receivers may adopt differing interpretations of the meaning of legal texts, the meaning of legislative texts cannot be left to individual discretion. Thus, if defined legal objectives are to be achieved, meaning cannot be permitted to vary from receiver to receiver, or over time. This is also the reality observable in the EU legal regime, in which the ECJ acts as the ultimate authority on the interpretation (and thus the meaning) of EU law. However, this does not mean that functionalist approaches hold no relevance for legal texts, for several reasons. First, on a strict reading the suggestion that "there may be as many different translations of one source text as there

⁶⁰ *ibid* 200.

⁶¹ Nord (n 46) 122.

are purposes in the target culture which could be achieved by the target text"⁶² allows for the position that there is only one such purpose in the case of a legal text, namely the legal text's defined objective. Second, the insight that perceived meaning may vary among receivers and over time underlines the importance of communicating intended meaning precisely to the target audience in order to restrict the scope for divergent interpretations. Finally, the applicability of functionalist approaches like *skopos* theory to legal texts may vary by textual sub-types. For example, it has been suggested that such approaches can be adopted for sworn translations.⁶³ Overall, therefore, none of the criticisms which can be levelled at functionalist approaches in the sociological, legal and translation studies fields preclude drawing on them to develop the theoretical framework adopted for examining EU lawmaking in this thesis.

1.5 EU lawmaking from a functionalist perspective

The functionalist approach is of interest in this thesis for two fundamental reasons. The first is the premise that "all aspects of a society—institutions, roles, norms, etc.—serve a purpose".⁶⁴ Such 'aspects' logically include the mechanisms by which a society regulates the conduct of its citizens – not least the adoption of laws. In line with the above premise,

⁶² *ibid.*

⁶³ Fernando Prieto Ramos, 'Beyond The Confines Of Literality: A Functionalist Approach To The Sworn Translation Of Legal Documents' [2002] *Puentes* 27, 32.

⁶⁴ The Editors of the Encyclopaedia Britannica, 'Functionalism', *Encyclopaedia Britannica* (2024) <<https://www.britannica.com/topic/functionalist-social-science>> accessed 1 November 2024.

therefore, adopted laws can be assumed to serve a purpose (or legislative intent). This purpose or intent may be set out explicitly in a legal text (for example in the preamble to an EU Directive), or be found in preparatory works setting out the background to a particular piece of legislation. Regardless of whether legislative intent is expressed explicitly or implicitly, however, it is important to consider how it is formed. At the simplest level, for example in a dictatorship, legislative intent may be determined by an individual or limited group of persons. The formation of legislative intent becomes somewhat more complex in a parliamentary democracy, where it is the product of debate between elected representatives based on personal and political convictions. In the EU, the process is further complicated by the involvement of multiple institutions⁶⁵ in such debate, each representing numerous interest groups.⁶⁶ Moreover, members of the EU's legislature, the European Parliament, represent a range of differing interests. These include not only their personal views, but also the views of their party, the views of any political blocs of which their party is a member, and – not least – the views of the member state they represent. Given the need to find positions which accommodate this broad range of interests, it is logical that the adoption of new legislation entails “consensus formation and political compromise”,⁶⁷ which

⁶⁵ EU lawmaking is discussed further in Chapter III.

⁶⁶ The European Commission represents the interests of the European Union, the Council of the European Union represents the interests of member states and the European Parliament represents, through the elected members of parliament, the interests of EU citizens.

⁶⁷ Emma Wagner, Svend Bech and Jesús M Martínez, *Translating for the European Union Institutions* (Routledge 2014) 69.

may result in “artful wording... used to conceal... diverging positions”⁶⁸ and/or “heavily achieved compromises using vague terms”.⁶⁹ As one interviewee in the present study put it, “Translation is very often influenced by political decisions, like to keep a text vague on purpose [so] as to allow more than one possible reading or interpretation because the legislator wants to leave, rather, discretion to the member states.”⁷⁰ Nevertheless, the EU does ultimately form legislative intent, such that a given EU legal text can be said to serve one or more defined purposes (or functions) as defined by that legislative intent. Accordingly, the process by which the EU creates and adopts laws (i.e. its legislative process) also serves a purpose, and is thus functional in nature.

The second reason why a functionalist approach is interesting is the further premise that “[a] social system [has] a functional unity in which all parts of the system work together with some degree of internal consistency.”⁷¹ This thesis is concerned with interactions between the EU and persons who are granted rights and obligations under EU law. These interactions, and the legal framework for them, constitute a social system. When the two reasons cited above are combined, therefore, a functionalist perspective might lead to the conclusion that ‘all parts of the multilingual EU legal regime should work together with some degree of

⁶⁸ Christiaan Timmermans, ‘How Can One Improve the Quality of Community Legislation?’ (1997) 34 *Common Market Law Review* 1229, 1233.

⁶⁹ European Commission Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (Publications Office 2012) 24.

⁷⁰ Interview with European Parliament Head of Unit, ‘Interview 1’ (28 September 2023).

⁷¹ The Editors of the *Encyclopaedia Britannica* (n 64).

internal consistency to achieve the intended purpose/functions of the system'. At a general level, these purposes/functions include promoting "peace... the well-being of [] citizens... freedom, security and justice... social justice and protection... [and] economic, social and territorial cohesion and solidarity among EU countries".⁷² In the legal context specifically, a significant purpose is to ensure uniform application of EU law throughout the Union.⁷³ It seems intuitive that the same 'internal consistency principle' should apply at all levels of a social system, whether in service of general or more specific objectives. In other words, not only should primary EU institutions like the European Parliament and European Commission work together consistently in pursuit of adopted purposes, but so too should specialist directorates, departments and their staff. Moreover, processes or functions within the EU system should serve the aim of internal consistency. Thus, in the case of the legislative process, both the bodies and the individuals involved in multilingual EU lawmaking should work together with consistency if the purpose of their cooperation – including, not least, the uniform application of EU law – is to be achieved. The above discussion of functionalist approaches suggests at least three possible tests for assessing whether the purpose of the legislation process has been achieved: 1) from the sociological perspective, we can ask whether the outcome achieved by legislation is functional (i.e. beneficial or expedient) or dysfunctional (i.e. undermines the system); 2) from the legal perspective, we can ask whether

⁷² European Union, 'Aims and Values | Aims' <https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en> accessed 1 November 2024.

⁷³ European Union, 'Enforcement of EU Law' (*EUR-Lex*) <<https://eur-lex.europa.eu/EN/legal-content/glossary/enforcement-of-eu-law.html>> accessed 1 November 2024.

outcomes differ due to contextual factors – particularly language; and 3) from the translation studies perspective, we can ask whether the intended communicative function is achieved.

The preceding discussion suggests that a number of conclusions can be drawn about EU lawmaking, namely: 1) that the EU's legislative activity can be viewed as a sub-system within the EU system; 2) that changes in the EU system are effected through innovation in the form of new legislation; 3) that the form and content of new legislation are shaped by i) commonly accepted norms (a.k.a. customs or value consensus); ii) intended functions (a.k.a. intentions, objectives or purposes); and iii) the contributions of individual drafters, translators and other involved persons; 4) that new legislation is enforced by legal institutions (specifically the ECJ in its capacity as the ultimate authority on the interpretation of EU law); 5) that new legislation has an impact on participants in the EU system, and that two areas are of particular interest in this regard: i) the actual, real-life effects of adopted legislation, particularly in the form of judicial decisions; and ii) the functional relation of adopted legislation to society, e.g. whether legislation achieves intended functions (i.e. outcomes); 6) that it is important to consider i) the target audience; and ii) contextual factors related to EU member states when evaluating the effects and/or functional relations of new legislation; and 7) that language is an especially important contextual factor. These conclusions inform the discussion in the chapters which follow.

1.6 Product-, process- or participant-focused research?

This thesis examines the process of multilingual EU lawmaking, which results in legal texts being issued in 24 language versions. Since such language versions sometimes diverge from one another, the thesis traces the multilingual EU legislative process to identify how such divergences arise, not least by examining the actors involved and their roles. It has been suggested that process-tracing can serve both positivist and constructivist objectives,⁷⁴ where the former category focuses on the identification of causal mechanisms and the latter on “how uncertainties of meaning and outcome are gradually transformed into stable interpretations”.⁷⁵ In other words, tracing the EU legislative process may provide insight into both the causes of divergences between language versions and how the meaning of EU legislative texts crystallises over time. As indicated previously, this thesis posits that the meaning of EU legislative texts can be unclear due to the multilingual nature of the EU legal regime, a proposition which can potentially be substantiated by means of a confirmatory approach. Although taking a confirmatory approach can be criticised, it has been suggested that it is “legitimate when trying to promote a new analytical perspective that contradicts dogma.”⁷⁶ Dogma in this context includes, for example, the belief that the EU legal regime provides (adequate) legal certainty. In this regard, a discrepancy suggests itself between

⁷⁴ Jens Arnholtz, ‘Reconstructing the Construction of Laval. Studying EU Law as a Social Interpretive Process’ in Mikael Rask Madsen, Fernanda Nicola and Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law’s Embeddedness* (Cambridge University Press 2022) 271.

⁷⁵ *ibid* 272.

⁷⁶ *ibid* 270.

what is claimed and what is experienced in practice, i.e. between theoretical and actual legal certainty. A proposed three-fold approach to contradicting dogma appears relevant in this context. This entails 1) focusing on divergences, uncertainties or contradictions; 2) examining the actors involved; and 3) taking a chronological approach to identify when and how uncertainties have been resolved to build certainty.⁷⁷ Applied to the EU legislative process, step 1 shows that divergences arise between versions of EU legal texts in different languages, indicating the absence of a uniform, clear message in all languages. In other words, textual indeterminacy exists because readers of such texts cannot know which version (if any) contains correct information. Step 2 shows that multiple parties are involved in creating and determining the meaning of EU law. *Prima facie*, these are the proposer (in most cases the European Commission), the legislature (i.e. the European Parliament and the Council of the European Union) and the judiciary (i.e. the ECJ). However, closer examination reveals that these institutions comprise directorates and departments, which in turn consist of individuals with specific roles and functions, all of which have – to a greater or lesser degree – an impact on the finally adopted form of legislation. The legislative process thus involves multiple parties within these institutions, such as Commission staff, parliamentarians, drafters, translators, quality coordinators and lawyer-linguists. Similarly, the judicial process involves different courts (both the ECJ and national courts), and a variety of individual actors, ranging from judges to legal secretaries (*référéndaires* in the case of the ECJ), legal counsel and individual litigants. Step 3 – considering a timeline of when and how divergences are

⁷⁷ *ibid.*

resolved – helps illustrate the roles played by the actors identified in step 2, and ultimately shows that legal meaning is constructed over time as the different actors involved give their input on a legal text as it moves from conception through adoption and to application. With respect to case law, it has been stated that the purpose of the “processual approach is to show how the meaning and importance of a case is constructed gradually, over time and through a social, interpretive process.”⁷⁸ This thesis posits that the same can be said of the meaning of EU legal texts, i.e. that such meaning emerges over time through an interpretative process that is social in the sense of involving a host of contributors.

An important consequence of divergences between language versions is that these add an element of indeterminacy to EU legislation.⁷⁹ It has been suggested that indeterminacy can take two forms,⁸⁰ namely indeterminacy of textual meaning and indeterminacy from a sociological perspective. The first category of indeterminacy refers to whether the meaning of a given text can be established, while the second concerns “how the meaning of legal texts is established [and] how they get the force to affect society.”⁸¹ Both forms of indeterminacy are relevant in the EU legislative context. First, where language versions of EU legislation diverge, it is difficult – if not impossible – to establish textual meaning, thus

⁷⁸ *ibid* 271.

⁷⁹ *Opinion of Mr Advocate General Jääskinen in Case C-492/08 European Commission v French Republic* [2010] European Court of Justice, para. 53; see also Janny HC Leung, *Shallow Equality and Symbolic Jurisprudence in Multilingual Legal Orders* (Oxford University Press 2019) 203.

⁸⁰ Arnholtz (n 74) 266.

⁸¹ *ibid*.

rendering meaning indeterminate. Second, the fact that the EU has appointed a dedicated court tasked with interpreting EU law and thus giving it social effect entails recognition that the meaning of EU legislation does not reside solely in legislative texts and that, in some cases, meaning is indeterminate until determined by the ECJ. The above suggests that the meaning of EU legislation is indeterminate in two respects. Firstly, the meaning of a given statute is not readily apparent from a literal reading of the legislative text (in whatever language). Secondly, it is not apparent from a legislative text (in whatever language) whether a definitive interpretative ruling by the ECJ will be required. In short, readers of such texts have no certainty that what they are reading reflects the actual legal state of affairs and the standard(s) by which their conduct will be measured. Compliance with legislation necessarily entails its application to a given set of circumstances, and thus also a degree of interpretation, even if only to ascertain rights and obligations. The EU legislative corpus⁸² is immensely and uniquely complex in terms of both absolute numbers⁸³ and language diversity, giving room for individual readers of EU legislative texts to develop their own, divergent perceptions of meaning. Thus laypersons may interpret a text differently from legal professionals, whose interpretation may in turn differ from that intended by the parliamentarians who debated and passed the legislation, while the judges in national courts or serving in the ECJ may adopt yet another interpretation. Indeterminacy of meaning has

⁸² Comprising regulations, directives and decisions in the categories legislative, non-legislative, implementing and other.

⁸³ The EU has adopted numerous pieces of legislation, with thousands being in force at any given time. See generally European Union, 'Legal Acts - Statistics' (*EUR-Lex*) <<https://eur-lex.europa.eu/statistics/2023/legislative-acts-statistics.html>> accessed 1 November 2024.

serious implications at both the individual and the institutional level: while individuals may find it difficult to understand, invoke and fulfil their rights and obligations, indeterminacy of meaning threatens the achievement of legislative intent and institutional (or systemic) objectives.

Above, it was stated that both the bodies and the individuals involved in creating and adopting multilingual EU law should work together in a consistent manner if the purpose of their cooperation is to be achieved. Consistency has been described as “often more important than any other criterion”⁸⁴ in the context of translation work by the European Commission, and encompasses both consistency in terminology and recurrent phrasing, and consistency within and between different legal acts.⁸⁵ A lack of consistency is undesirable, as “high levels of inconsistency for the same concept in a comparable translation context will usually imply some risk of semantic deviation among renderings of the same original term.”⁸⁶ It was also stated above that, in the context of the EU legislative process, cooperation on the creation and adoption of multilingual EU law serves the purpose of ensuring uniform application of EU law across the member states (and, in

⁸⁴ Karolina Stefaniak, ‘Terminology Work in the European Commission: Ensuring High-Quality Translation in a Multilingual Environment’ in Svoboda, Tomáš, Łucja Biel and Krzysztof Łoboda (eds), *Quality aspects in institutional translation* (Language Science Press 2017) 117.

⁸⁵ *ibid* 116.

⁸⁶ Fernando Prieto Ramos, ‘Ensuring Consistency and Accuracy of Legal Terms in Institutional Translation’ in Fernando Prieto Ramos (ed), *Institutional Translation and Interpreting* (1st edn, Routledge 2020) 128.

practical terms, communication of the content of legal texts in the EU's official languages). Achievement of a purpose can be evaluated by reference to both the process adopted to achieve the intended purpose and the outcome or product of that process. As discussed in greater detail in section 3.3 of Chapter III, translation is central to the multilingual EU legal regime, with 23 out of 24 language versions of all legal instruments being translations. In other words, translation accounts for approximately 23/24ths of all EU legal texts published in the official languages, including not only primary and secondary law in the form of treaties, directives, regulations and decisions, but also ECJ case law. The term 'translation' may refer to either the process of translating or the product of that process. In this regard, it is important to note that the term 'process' encompasses not only the procedure by which an individual translator produces a piece of translated work, but also the broader process of which the individual translator's work is a component. The process/product classification is particularly relevant to the question of research focus. Particularly in the translation studies field, a distinction has traditionally been made between product-oriented and process-oriented research, where process-oriented research "seeks to understand translator or interpreter behaviour, competence, expertise, the cognitive processes that orient these, and the relations between cognition and the translated or interpreted product"⁸⁷ and product-oriented research focuses on "the textual product that is the outcome of the translation... process".⁸⁸ In addition, efforts have been made to integrate process- and product-oriented

⁸⁷ Gabriela Saldanha and Sharon O'Brien, *Research Methodologies in Translation Studies* (Routledge 2014) 109.

⁸⁸ *ibid* 50.

research approaches, based not least on the observation that the two approaches “are interrelated in that what we observe as the specific characteristics of translated texts may, at least to some degree, be correlated with behavior directly or indirectly observable during the translation process.”⁸⁹ This implies that any examination of the EU legislative process (including its translation components) should consider, to some degree at least, both the resulting product and the individual and overall processes which produce it.

The product of a process may often provide the first indication of a problem with that process. Applying this to the legislative process of the EU, the fact that the ECJ is tasked

⁸⁹ Fabio Alves and others, ‘Translation Units and Grammatical Shifts: Towards an Integration of Product- and Process-Based Translation Research’ in Gregory M Shreve and Erik Angelone (eds), *Translation and Cognition*, vol XV (John Benjamins Publishing Company 2010) 110.

with⁹⁰ ruling on cases concerning divergences between language versions⁹¹ (i.e. has to resolve deficiencies in EU legislative texts) suggests that the product of the legislative process (i.e. the different language versions) does not always achieve the purpose of that process (i.e. harmonised legal regulation in the EU member states), since differences between

⁹⁰ Note that the opportunity of the Court to address divergences between language versions is limited to cases where it is asked to rule on a question of interpretation. Article 267 of the Treaty on the Functioning of the European Union gives the ECJ jurisdiction to issue preliminary rulings on the interpretation of EU treaties and the validity and interpretation of EU legal acts. However, the ECJ has no power to take up issues on its own initiative. Rather, it only considers questions of interpretation referred to it by courts and tribunals of the EU member states, and it is clear that by no means all questions of interpretation are submitted to the ECJ. National courts have a 'duty to refer' in certain instances, and a 'right to refer' in others (Article 267 TFEU, second and third paragraphs), but in both cases have some discretion to decide whether a ruling by the ECJ is required. In the case of the duty to refer, which applies when a national court is the court of last instance (i.e. when no further judicial remedy is available under national law), longstanding ECJ case law (see *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] European Court of Justice Case 283/81 and *Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* [2021] European Court of Justice Case C-561/19), has established three exceptions to the duty to refer, i.e. "where the question raised is irrelevant; where the EU provision in question has already been interpreted by the Court; or where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt" (François-Xavier Millet, 'Cilfit Still Fits' (2022) 18 European Constitutional Law Review 533, 534.) In other words, even when a duty to refer exists *prima facie*, a national court may conclude that no referral needs to be made to the ECJ, and then adopt its own interpretation. Further, regarding the right to refer, a national court has discretion to assess whether "a decision on the question is necessary to enable it to give judgment" (Article 267 TFEU, third paragraph). Once again, this leaves room for national courts to apply their own interpretations when a question is not considered necessary for judgment. National courts in different member states may thus reach differing conclusions and impose differing legal outcomes based on divergent language versions, without the ECJ ever having an opportunity to resolve the differences between them.

⁹¹ Notwithstanding the observations in the preceding footnote, such cases are in fact not uncommon, with 170 judgments involving divergences identified in the period 1960–2010; see Cornelis JW Baaij, 'Fifty Years of Multilingual Interpretation in the European Union' in Peter Meijes Tiersma and Lawrence Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 219. This is discussed further in Chapter V(2) below.

language versions increase the likelihood of non-uniform application of EU law. When the product of a process is unsatisfactory, it is logical to examine the process to see if an explanation can be found there.⁹² While recognising that process and product are interrelated, this thesis focuses primarily on the process by which EU legislation comes into being. The product of that process (i.e. the different language versions) is primarily of interest as evidence of a problem with the process itself, namely that it produces divergent language versions. It was noted above that the EU legislative process comprises both individual and overall processes. More precisely, the overall legislative process can be broken down into sub-processes – such as proposal, consultation, feedback, drafting/translation and adoption – some of which are executed by individual persons. Even when sub-processes are collaborative or collective, they still involve a degree of individual contribution. Of the noted sub-processes, drafting/translation is of particular interest. It has been suggested that the “notion of translation process may be understood at three levels”,⁹³ where the first level concerns the translator’s mental state and mental operations during translation and the second involves practical translation tasks and operations. The

⁹² While it might be tempting to conclude that the ECJ would be best placed to conduct such an examination, it can be noted that the Court has no powers to do so, as its jurisdiction is clearly defined and limited to particular types of proceedings (see Court of Justice of the European Union, ‘Jurisdiction’ <https://curia.europa.eu/jcms/jcms/Jo2_7024/en/> accessed 1 November 2024). In other words, the ECJ is a reactive body. Its lack of proactive powers means that it cannot, for example, investigate why divergences have arisen between given language versions; its involvement is limited to dealing with such divergences through interpretation, and even then only if a case involving such divergences comes before it.

⁹³ Ricardo Muñoz Martín, ‘On Paradigms and Cognitive Translatology’ in Gregory M Shreve and Erik Angelone (eds), *Translation and Cognition*, vol XV (John Benjamins Publishing Company 2010) 178.

observation that the second level “does not always properly reflect the state of affairs at a real workplace”⁹⁴ has resulted in a proposed third level of process-oriented research, which views “the translation process... as the period commencing from the moment the client contacts the translator and ending when the translation reaches the addressee”.⁹⁵ This third-level view can be equated to the overall process of creating EU law, from initial proposal to drafting/translation and publication in the official languages. From this perspective, “translating includes the roles and cognitive contributions of all co-workers in the chain for the production of the final communicative product, their relationships and interaction”.⁹⁶ The process by which EU legislation comes into being is discussed further in Chapter III, and it is sufficient at this stage to note the involvement of multiple parties, including individuals whose workplace conditions may affect their output. This focus has implications for the adopted research methodology, which must facilitate not only examination of the drafting/translation process at the third – overall – level, but also of the individuals involved in that process.

The fact that the EU legislative process involves multiple parties has further implications for the empirical part of the thesis. Key in this regard is recognition of translation as a socially-situated practice, and of its function in the production or reproduction of local and/or global

⁹⁴ *ibid* 179.

⁹⁵ *ibid*.

⁹⁶ *ibid*.

social order.⁹⁷ As indicated above, translation is not only a product and a process, but also an activity performed by individuals,⁹⁸ sometimes referred to as 'agents'.⁹⁹ In other words, translators can be regarded as "social and cultural agents actively participating in the production and reproduction of textual and discursive practices."¹⁰⁰ The environment in which translators operate has been described as the sociological context¹⁰¹ of translation, i.e. a "focus on people (especially translators), their observable group behaviour, their institutions etc."¹⁰² This sociological context includes the dimension of translation dynamics, i.e. "the structure of the space of reception and... the way in which relevant intermediaries (translators, critics, agents, publishers) shape social demand."¹⁰³ Moreover, it has been suggested that the so-called 'localism' approach can be useful. Under this approach, "attention is not restricted merely to the end products of the process of translation (that is

⁹⁷ Moira Inghilleri, 'The Sociology of Bourdieu and the Construction of the "Object" in Translation and Interpreting Studies' (2005) 11 *The Translator* 125, 126.

⁹⁸ Andrew Chesterman, 'Questions in the Sociology of Translation' in João Ferreira Duarte, Alexandra Assis Rosa and Teresa Seruya (eds), *Translation Studies at the Interface of Disciplines*, vol 68 (John Benjamins Publishing Company 2006) 12.

⁹⁹ Whilst it has traditionally been assumed that such agents are human (Saldanha and O'Brien (n 87) 150) or human and institutional – presumably because translations have long been prepared by human translators – this assumption is no longer necessarily valid. Given the growing effectiveness and use of machine translation software and AI-based translation services, the definition of 'agents' may have to be expanded to include both human and AI/machine agents. However, this question falls outside the scope of this thesis, and 'agents' is thus taken to mean 'human agents' in the present discussion.

¹⁰⁰ Inghilleri (n 97) 126.

¹⁰¹ As distinct from the cultural (values, ideas, ideologies, traditions, etc.) and cognitive (mental processes, decision-making, etc.) contexts of translation; see Chesterman (n 79) 11.

¹⁰² *ibid.*

¹⁰³ Johan Heilbron and Giselé Sapiro, 'Outline for a Sociology of Translation: Current Issues and Future Prospects' in Michaela Wolf and Alexandra Fukari (eds), *Benjamins Translation Library*, vol 74 (John Benjamins Publishing Company 2007) 93.

translated texts), but is more productively directed towards the dialogic relations between products themselves and those complex social factors or agencies (individuals, institutions, communities, the market of translation, etc.) which make up the broad scenario of translation."¹⁰⁴ This broader view of the translation production environment implies that questions about the quality of translation output (i.e. the product) can be examined by reference not only to the translation process, but also the parties involved in that process. Translation evaluation thus becomes more than a question of translation mechanics, expanding to encompass "the implications [of] the text's surroundings [for] text production",¹⁰⁵ i.e. the constraints, pressures, trade-offs and other factors which influence the final form of a translation. Put another way, "[t]ranslations... always reflect the historical and cultural conditions under which they have been produced."¹⁰⁶ As mentioned previously, multiple parties (agents) are involved in producing EU legal texts, including not only translators, but also legislators (i.e. members of the European Parliament and representatives of the Council of the European Union), drafters (i.e. persons charged with preparing a legislative proposal), lawyer-linguists (i.e. persons who hold a law degree and have proficiency in one or more foreign languages) and quality coordinators and managers (i.e. persons responsible for monitoring and promoting translation quality in different

¹⁰⁴ Mirella Agorni, 'Locating Systems and Individuals in Translation Studies' in Michaela Wolf and Alexandra Fukari (eds), *Constructing a Sociology of Translation* (John Benjamins Publishing Company 2007) 132.

¹⁰⁵ Michaela Wolf, 'Mapping the Field: Sociological Perspectives on Translation' [2011] *International Journal of the Sociology of Language* 1, 3.

¹⁰⁶ *ibid.*

translation units). Accordingly, the EU legislative process can be said to involve “a set of agents... who collaborate in the activity of translation while struggling to preserve... the hierarchy of values”¹⁰⁷ applicable in EU legislative activity. The purpose of the empirical part of the thesis is to develop insights into how EU legislative texts come into being – taking particular account of the perspective of relevant agents, including translators – in pursuit of the overarching objective of identifying how and why divergences arise between language versions.

It was stated above that any examination of the EU legislative process should cover both the resulting product and the individual and overall processes which produce it. Drawing on the preceding discussion, the research focus can now be clarified further based on the following conclusions: 1) consideration of the product (i.e. language versions) indicates that the EU legislative process does not guarantee fulfilment of adopted objectives (i.e. uniform application of the law across the member states); 2) the EU legislative process is composed of various sub-processes, both institutional and individual, including translation; 3) the translation component involves individuals who operate in a specific environment (i.e. sociological context) in which they are subject to demands from other parties which may impact their work. Based on these conclusions, the research focus of the thesis can be said to encompass not only the multilingual EU legislative product, but also the translation

¹⁰⁷ Heilbron and Sapiro (n 103) 104.

process involved in producing that product, as well as the participants in it. This has methodological implications, as discussed below.

2. Methodology

As noted above, this thesis adopts a process- and participant-oriented approach to examining how EU legislation comes into being. This implies that information has to be gathered not only on the processes involved in issuing EU legislative texts in multiple languages, but also on the experiences of participants in those processes. While processes are inanimate and information on them thus has to be gleaned from relevant literature, participants in such processes can be interrogated directly. Accordingly, two main sources of information suggest themselves: institutional and academic publications and direct consultation of participants, for example through interviews. The thesis thus employs both conceptual and empirical methods, with comprehensive conceptual analysis in the form of a literature review being supplemented by qualitative work in the form of interviews.

2.1 Conceptual methods

The conceptual elements of the study are vital for constructing a proposed new approach to the elimination of divergences between language versions of EU legislative texts. Specifically, functionalist theories from the fields of sociology, law and translation studies are synthesised to develop a framework for examining EU lawmaking from a functionalist perspective (see section 1.5 above). Further, critical examination of the question of EU

statehood and social contract theory challenges the assumption that social contract theory is inapplicable to the EU and paves the way for expanding the scope of social contract theory to supranational organisations, as a basis for examining relations between the EU and its citizens from the perspective of mutual rights and obligations (see Chapter IV). Related to this, the thesis critically considers the weight given by the EU to systemic or institutional – as opposed to individual – considerations related to legal certainty, and identifies a conflict of priorities. Moreover, existing translation quality assessment measures are investigated as a basis for developing a novel classification of such measures based on the number of informational sources they employ. Finally, the thesis develops a proposed new approach for eliminating divergences between language versions of EU legislative texts. The proposed approach is contextualised by situating it in the landscape of known translation quality assessment measures and by tailoring it to the distinctive characteristics of the EU legislative system.

2.2 Empirical methods

While a literature review provides helpful descriptions of and insights into the EU legislative process, such official accounts may not necessarily agree with experience ‘on the ground’,¹⁰⁸ and anecdotal evidence suggests that certain aspects of EU lawmaking are less clear-cut

¹⁰⁸ Mikael Rask Madsen, Fernanda Nicola and Antoine Vauchez, ‘From Methodological Shifts to EU Law’s Embeddedness’ in Mikael Rask Madsen, Fernanda Nicola and Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law’s Embeddedness* (Cambridge University Press 2022) 12.

than described in relevant literature. Therefore, in a second step the official narrative is challenged and evaluated on the basis of data collected empirically through interviews with participants in the EU legislative process. One objective of this 'bottom-up' aspect of the study is to verify whether and/or to what extent the description provided in relevant literature reflects reality, i.e. to examine the accuracy of the official narrative. A bottom-up approach has been said to offer various advantages in the litigation context which arguably also apply with respect to legislation. Specifically, the bottom-up approach allows a focus on the subjective experience of litigants, facilitates critical examination of assumptions about behaviour and choices, and puts micro-level processes in their proper socio-political context,¹⁰⁹ thereby helping to reveal behind-the-scenes dynamics.¹¹⁰

Although the facts that a) divergences arise between language versions and b) the ECJ has been tasked with resolving such divergences strongly suggest that the official, theoretical position does not always hold true in practice, hearing from direct participants in the process may strengthen or weaken this conclusion. While the above proposition could be interrogated without collecting and analysing primary data,¹¹¹ data collection can both help substantiate conclusions and provide insights into the causes of discrepancies between the

¹⁰⁹ Jos Hoevenaars, 'EU Law Mobilization' in Mikael Rask Madsen, Fernanda Nicola and Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022) 98–99.

¹¹⁰ *ibid* 100.

¹¹¹ Dawn Watkins and Mandy Burton, *Research Methods in Law* (Taylor & Francis Group 2017) 67.

official/theoretical and actual positions. At this juncture, it is important to note that the focus of data collection is qualitative, rather than quantitative.¹¹² The aim is not to generate representative quantitative data or statistics. Rather, the purpose is to draw insights into the EU legislative process from the experiences of participants in it in order to either bolster or challenge the proposition that legal certainty suffers under the multilingual EU legal regime.

2.2.1 Choice of data collection method

A related question is what form of data collection is most appropriate to use for participants in the legislative process. The range of possible methods is broad, and includes observation, questionnaires and focus groups, in addition to interviews.¹¹³ Above, it was noted that an objective of the thesis is to challenge and evaluate the official narrative. With this purpose in mind, interviews offer the twin advantages of highlighting “differences between perceptions and reality in a way that even actors involved in the processes being analyzed may not be able to see”,¹¹⁴ and shedding “light on the processes and institutional culture... which are otherwise invisible, and which have a significant impact on the ‘output’”.¹¹⁵

¹¹² Where quantitative research is “exemplified by the social survey and by experimental investigations” and qualitative research is “associated with participant observation and unstructured, in-depth interviewing.” (Alan Bryman, *Quantity and Quality in Social Research* (Routledge, Taylor & Francis Group 1988) 1.)

¹¹³ Watkins and Burton (n 111) 72.

¹¹⁴ Karen McAuliffe, Liana Muntean and Virginia Mattioli, ‘Through the Lens of Language’ in Mikael Rask Madsen, Fernanda Nicola and Antoine Vauchez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022) 166.

¹¹⁵ *ibid.*

Moreover, “to understand and analyze... institutional culture, one must understand the priorities and preoccupations of those who work there.”¹¹⁶ These individual participants in the EU legislative process are tasked with functions such as drafting, translating, revising and quality assurance but, as indicated previously, operate in an environment where they are subject to factors – such as demands and other working conditions – which may impact their work. It has been suggested that “most interviews are understood, not as reciprocal or two-way exchanges, but as a mechanism by which one party (i.e. the interviewer) extracts vital information from another (i.e. the interviewee).”¹¹⁷ Moreover, interviews “give privileged access to a person’s thoughts and opinions about a particular subject”,¹¹⁸ and are said to offer an advantage over other methods when examining participant accounts, due to their subjective nature.¹¹⁹ Interviews can be structured, semi-structured or unstructured.¹²⁰ While structured interviews produce quantifiable data and offer the advantage of comparability between respondents, they do not allow for new insights falling outside the scope of the interview questions. In unstructured interviews, on the other hand, respondents’ insights can be gathered but there is little scope for developing quantifiable data and securing comparability.

¹¹⁶ *ibid* 165.

¹¹⁷ Nigel Edley and Lia Litosseliti, ‘Critical Perspectives on Using Interviews and Focus Groups’ in Lia Litosseliti (ed), *Research Methods in Linguistics* (2nd edn, Bloomsbury Academic 2018) 197.

¹¹⁸ Saldanha and O’Brien (n 87) 169.

¹¹⁹ *ibid* 170.

¹²⁰ *ibid* 172.

The aim of conducting interviews in the context of this thesis is two-fold: to interrogate the official narrative relating to the EU legislative process by comparing it to the actual experience of individuals involved in it, and to gain potential new insights based on the experiences of such individuals. With these dual purposes in mind, semi-structured interviews – which have been described as “the dominant form for *qualitative* interviews”¹²¹ – appear to provide a good balance between structure and flexibility. This approach involves the preparation of an interview guide for the dual purposes of providing a checklist of relevant topics and questions, and ensuring that the same issues are covered with each interviewee. Moreover, a robust guide facilitates the building of “trust or rapport with the participant... so they feel comfortable disclosing personal information... Rapport and well-planned questions are important for generating rich and detailed accounts relevant to [the] research question.”¹²² The semi-structured approach leaves “the interviewer... free to build a conversation within a particular subject area, to word questions spontaneously, and to establish a conversational style but with the focus on a particular subject that has been predetermined.”¹²³ This has also been described as “co-construction of knowledge”¹²⁴ by the interviewer and interviewee. In other words, the interviewer has significant discretion and leeway to, for example, pursue topics which come up outside of the interview guide, omit

¹²¹ Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (SAGE Publications 2013) 78.

¹²² *ibid* 81.

¹²³ Michael Quinn Patton, *Qualitative Research & Evaluation Methods* (4th edn, SAGE Publications 2015) 613–615.

¹²⁴ Saldanha and O’Brien (n 87) 173.

planned questions and/or ask unplanned questions prompted by the course of the conversation. This discretion logically also extends to adapting the interview schedule as successive interviews reveal new avenues of investigation and/or the redundancy of initially included questions.

2.2.2 Potential limitations and difficulties

Various factors have been identified as potential limitations on or difficulties with the use of interviews in research. Some of these relate to the role of the interviewer, some relate to the circumstances and preferences of the interviewee, and some are general concerns about the efficacy of interviews. Regarding the interviewer, identified issues include reactivity (i.e. the researcher's impact on the respondent),¹²⁵ and various researcher biases (confirmation bias, noting the exception rather than the norm, elite bias and going native).¹²⁶ Interviewee-related issues include the impact of the interviewee's hierarchical position and own agenda,¹²⁷ social desirability and impression management,¹²⁸ reluctance to provide sensitive information due to a lack of anonymity, and reluctance to participate due to both the lack of anonymity and the required time commitment.¹²⁹ More general concerns include a lack of breadth (due to a smaller sample size than with e.g. a questionnaire-based survey) and the time-consuming nature of interviews for both researchers (in terms of organisation,

¹²⁵ McAuliffe, Muntean and Mattioli (n 114) 160.

¹²⁶ Saldanha and O'Brien (n 87) 188.

¹²⁷ McAuliffe, Muntean and Mattioli (n 114) 160.

¹²⁸ Saldanha and O'Brien (n 87) 169.

¹²⁹ Braun and Clarke (n 121) 80.

implementation and transcription) and participants (in terms of the time it takes to conduct an interview).¹³⁰ A limited sample size could limit the generalisation of findings.¹³¹ However, as the thesis does not aim to produce representative or generalisable data, but rather to “expand knowledge about the things that can happen and how they are interpreted in a particular social world”,¹³² this is of lesser concern. Moreover, other potential concerns can be addressed by taking steps to ensure interviewer neutrality and interviewer awareness of potential sources of bias, including by using a structured interview guide or schedule.¹³³ As noted above, an interview guide serves the dual purposes of functioning as a checklist of relevant topics and questions and ensuring coverage of the same issues with each respondent. Additionally, it can also aid time management and thus help limit the individual time commitment. The interview guide prepared for use in the present study was structured by topic and contained a series of primary and secondary questions under each topic.¹³⁴

2.2.3 Ethical considerations and ethics approval

It has been suggested that two ethical questions should be asked about research projects. These are, firstly, “Why are we researching this topic?” and, secondly, “Do we want to help... the people we study?”¹³⁵ On one level, the study has clearly beneficial objectives due to its

¹³⁰ *ibid.*

¹³¹ Saldanha and O’Brien (n 87) 169.

¹³² Watkins and Burton (n 111) 73.

¹³³ Saldanha and O’Brien (n 87) 169.

¹³⁴ The interview guide can be found in Annex 2.

¹³⁵ David Silverman, *Interpreting Qualitative Data* (3rd edn, SAGE Publications 2006) 313.

focus on the multilingual EU legal order and the consequences of divergences between language versions for individuals, not least in terms of legal certainty. Moreover, the potentially severe individual impact of divergences suggests that the study may “contribute... towards the solution of a problem, an imbalance, an unfairness”.¹³⁶ In this regard, it is seeking to help such individuals. However, the above ethical question is directed not at the general aims of the study, however beneficial or laudable those might be, but at whether the research project will be beneficial to the people being studied, i.e. the participants. In this instance, ‘participants’ means both EU institutions involved in the EU legislative process and individuals who work for them in relevant functions, such as drafters, translators, quality coordinators and lawyer-linguists.¹³⁷ In other words, the study should hold some benefit for these individuals and institutions, over and above any potential advantage to end users of multilingual EU legislative texts. This requirement is met, since a further aim of the study is to determine whether currently used translation quality assessment techniques can be improved or supplemented to boost the quality of language versions of EU legislation. It is therefore clear that the study is potentially beneficial to the interview subjects – both institutional and individual – as the findings of the study may help improve their work product.

¹³⁶ Saldanha and O’Brien (n 87) 42.

¹³⁷ For example, the European Personnel Selection Office has suggested that “translators, proofreaders, lawyer-linguists and interpreters play a fundamental role” in “connecting the EU to its citizens by speaking in their own language”, i.e. in EU multilingualism. See European Personnel Selection Office, ‘Languages’ <<https://eu-careers.europa.eu/en/domain/languages>> accessed 4 November 2024.

Further ethical considerations apply with respect to the individual research participants, in addition to the two overarching questions outlined above. Specifically, it is important to ensure that participation is voluntary and that interviewees do not feel under pressure to participate.¹³⁸ Further, while it has been noted that anonymity may not be necessary in some cases,¹³⁹ anonymity has been deemed vital in the present context based on the respondents' role and position as participants in institutional processes involving their employers. In these circumstances, anonymity is key, not least, to secure the expression of honest views and opinions, and to alleviate any concerns regarding consequences of participation. This, together with the importance of obtaining informed consent and avoiding harm,¹⁴⁰ has influenced the content of the invitation to participate and consent form sent to all respondents.

In accordance with the University of Birmingham's procedures, an Ethical Review Form was submitted to seek ethics approval for the planned research. The project was granted clearance, allowing the author to proceed with recruitment of interviewees.¹⁴¹

¹³⁸ Saldanha and O'Brien (n 87) 179.

¹³⁹ *ibid* 180.

¹⁴⁰ Watkins and Burton (n 111) 70.

¹⁴¹ The confirmation of ethics approval can be found in Annex 3.

2.2.4 Recruitment of respondents

The decision was made to contact the three EU institutions responsible for the EU legislative process – the European Parliament, the European Commission and the Council of the European Union – with the aim of recruiting individual respondents with some role and/or personal involvement in the process. As a first step, the EU Whosiwho service¹⁴² was used to identify relevant individuals and find their contact details. Emails were then sent to individuals in relevant departments and/or functions, with initial contact being established at a senior level.¹⁴³ These initial contacts provided the names of potential interviewees, who were contacted individually by the author to request participation. All interviewees were sent a formal invitation to participate containing background information on the research topic, the interview format, confidentiality, anonymity and contact details. The invitation also included a consent form to be signed by all interviewees.¹⁴⁴ In total, interviews were secured with nine interviewees representing the European Commission, the Council of the European Union and the European Parliament. While small, this number of interviewees was deemed adequate because the objectives of the study did not include the generation of statistics or data of broader relevance or application. Rather, as previously indicated, the aim was to

¹⁴² European Union, 'EU WHOiswho' <<https://op.europa.eu/en/web/who-is-who>> accessed 4 November 2024.

¹⁴³ For example: at the European Commission's Directorate-General for Translation, the Deputy Director-General Responsible for Directorates A, B, C and D; at the European Parliament the Head of Unit of the Quality Coordination Unit within the Directorate-General for Translation; and at the Council of the European Union the Director of the Quality of Legislation unit.

¹⁴⁴ The invitation to participate and consent form can be found in Annex 1.

interrogate and supplement the 'official' or theoretical description of the functioning of the multilingual EU legislative process as found in relevant literature with insights from participants in that process, and a sample of five to 10 individuals was deemed sufficient for that purpose. The interviewees represented different functions and roles within their respective institutions.¹⁴⁵ All of the interviewees returned a signed version of the consent form to the author.

2.2.5 Interview process

Interviews were conducted in the period September to November 2023, and took the form of one-on-one online meetings. In eight instances, the interviews were recorded using the recording function in Word 365, available via the University of Birmingham's Microsoft 365 solution. One interviewee refused consent to record the interview. The interviews ranged in length from approximately 47 minutes to approximately 1 hour and 19 minutes. During each interview, the author used the interview guide as a checklist and as an aid to keep the conversation flowing. Utilising the leeway offered by the semi-structured interview format, the author omitted questions which appeared irrelevant in particular conversations and pursued new lines of discussion which suggested themselves, even if these were not included in the interview guide. In all cases, the author also made manual notes as each interview progressed, recording these directly in a dedicated copy of the interview guide.

¹⁴⁵ The nine interviewees included a head of unit in a pre-translation unit, a legal language professional, several quality coordinators and a quality manager.

After completion of each interview, the author used Word 365's transcription function to prepare an automated transcript of the conversation. However, the resulting transcripts were of inadequate quality, and the decision was therefore made to use the author's interview notes as the documentary basis for data analysis. The author therefore reviewed the audio recording of each interview to allow supplementation of each individual set of interview notes. The final notes were then coded using the NVivo 12 software, and an inductive approach was taken to coding,¹⁴⁶ in that nodes were not predetermined but derived from the interview data and the interview questions.¹⁴⁷ Multiple nodes were allocated where a response was relevant to more than one topic.¹⁴⁸

2.3 Combined approach

Together, the conceptual and empirical strands of the study have informed both the direction of the study and its results. Specifically, the conceptual part of the study has informed the design of the empirical part, with insights gained from the review of relevant literature shaping the questions included in the interview schedule. For example, where the conceptual analysis indicated a conflict between systemic and individual interests related to legal certainty, the interviews provided confirmation of a focus on institutional efficiency and production, and revealed that resource limitations in terms of personnel and time pressures limit the scope for promoting individual legal certainty by eliminating divergences, despite

¹⁴⁶ A list of the nodes created and used in NVivo 12 can be found in Annex 4.

¹⁴⁷ Saldanha and O'Brien (n 87) 189.

¹⁴⁸ *ibid* 190.

awareness of their undesirability. Moreover, the empirical work strongly influenced the conceptual development of the proposed new approach by providing key insights which allowed the approach to be tailored to factors such as processes previously used by EU institutions (i.e. concordance meetings) and multilingual legislative drafting approaches employed by certain countries (i.e. co-drafting in Switzerland).

Overall, the combination of conceptual and empirical methods was highly appropriate for the purposes of this thesis. The approach supported thorough analysis of the EU legislative regime and its strengths and weaknesses, particularly from the perspective of individual legal certainty of EU citizens. It also provided insights into theoretical and practical approaches for eliminating divergences between language versions, as well as methods actually used by the EU institutions. Further, assumptions and propositions developed on the basis of the literature review could be tested in the interviews, which also provided critical information incorporated into the final presented proposal. At the same time, the approach has limitations, not least the relatively small number of interview respondents and the resulting potential for incomplete insight into relevant processes and activities.

3. Evaluation framework

It has been suggested that “consideration has to be given to how... research will be evaluated in terms of reliability, representativeness and validity”¹⁴⁹ in the selection of the most appropriate research methods, and that this raises questions about replicability, generalisation and credibility of research results.¹⁵⁰ While these factors may be legitimate concerns in research which, for example, aims to make generally applicable statements about a given population or to generate findings of broader relevance, such concerns are potentially less relevant in smaller research projects which are “not aimed at making claims of representativeness [but where] the researchers may be aiming to expand knowledge about the things that can happen and how they are interpreted in a particular social world.”¹⁵¹ In the present study, the objective was not to produce representative data or more broadly applicable statistics. Rather, as noted previously, the purpose of conducting the semi-structured interviews was to gather information on both the processes involved in issuing EU legislative texts in multiple languages and the experiences of participants in those processes. A further objective was to explore anecdotal evidence suggesting that the process of EU lawmaking may be less clear-cut than described in relevant literature, and thus to challenge and evaluate the official narrative. With these objectives in mind, the project can be said to imply elements of both deductive and inductive reasoning.

¹⁴⁹ Watkins and Burton (n 111) 73.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

Specifically, the author's expectations regarding what respondents would say was based on available literature describing the EU legislative process and the functions involved in that process. In this sense, interview findings could be compared to preconceived notions of the process and how the process impacts the quality of final language versions. On the other hand, the inductive aspect of the research relates to the author's openness regarding what the respondents had to say, i.e. a willingness to revise expectations or develop new theories based on recognisable patterns in interview data. This type of research strategy allows the identification of themes "in a data-driven, 'bottom-up' way, on the basis of what is in the data; alternatively, they can be identified in a more 'top-down' fashion, where the researcher uses the data to explore particular theoretical ideas, or brings those to bear on the analysis being conducted (bottom-up and top-down approaches are often combined in one analysis)."¹⁵² Accordingly, the adopted analysis method can be described as thematic analysis incorporating elements of inductive, theoretical and experiential analysis.¹⁵³

Discussion

This chapter began with a brief summary of the problem the thesis seeks to explore and help to resolve. In particular, it was pointed out that divergences between language versions of EU legislative texts are of concern from both an individual and a systemic perspective. At the individual level, the concern relates primarily to the objective of legal certainty, while at

¹⁵² Braun and Clarke (n 121) 178.

¹⁵³ *ibid* 175.

the systemic level, divergent language versions can raise questions about the legitimacy of the EU legal regime and, ultimately, the EU as a whole. In addition, two recurring themes were noted, namely a distinction between theory and practice and a conflict between collective and individual interests. The argument presented in the thesis was then summarised by way of introduction to the adopted theoretical framework. Drawing on the sociological, legal and translation studies fields, the second part of the chapter outlined a theoretical framework incorporating a functionalist analysis of EU lawmaking which led to the conclusion that the target audience, and language in particular, are especially important contextual factors when considering the impact of multilingual legislation on EU citizens. As a lead-in to methodological considerations, it was then clarified that the thesis adopts a hybrid research focus encompassing not only a particular product, but also its originating process and participants in that process. The adopted research approach was stated to incorporate both a literature review and semi-structured interviews with participants in the EU's legislative process. Potential limitations and difficulties, ethical considerations and practical matters were discussed, as was the evaluation framework. The next chapter provides necessary background information for the further discussion of the multilingual legal regime of the EU.

III. Multilingualism in the European Union

1. Introduction

Multilingualism has been described as “a condition of life of considerable antiquity, possibly as old as the human species.”¹⁵⁴ In a general sense, multilingualism can be said to describe the use of multiple languages by individuals¹⁵⁵ or in society at large.¹⁵⁶ This thesis focuses on the phenomenon of societal rather than individual multilingualism, and more specifically on institutional multilingualism as practised in the European Union (EU). Perhaps unsurprisingly, the question of what to call a situation where an individual or institution uses more than one language is debated. Historically, the term ‘bilingualism’ was used, with definitions of the term including “native-like control of two languages”¹⁵⁷ and “[c]ompetence in more than one language”.¹⁵⁸ Various definitions likewise exist for multilingualism, including communication “in more than one language”,¹⁵⁹ “the use of more than one language”¹⁶⁰, “competence in more than one language”¹⁶¹ and the “ability to use three or more languages,

¹⁵⁴ Suzanne Romaine, ‘Multilingualism’ in Mark Aronoff and Janie Rees-Miller (eds), *The Handbook of Linguistics* (John Wiley & Sons, Ltd 2017) 542.

¹⁵⁵ In this thesis, ‘individuals’ is defined as including both natural and legal persons.

¹⁵⁶ Jasone Cenoz, ‘Defining Multilingualism’ (2013) 33 *Annual Review of Applied Linguistics* 3, 5.

¹⁵⁷ Leonard Bloomfield, *Language* (George Allen & Unwin Ltd 1935, reprint 1967) 56.

¹⁵⁸ John Edwards, *Multilingualism* (Taylor & Francis Group 1994) 55.

¹⁵⁹ Wei Li, ‘Research Perspectives on Bilingualism and Multilingualism’ in Wei Li and Melissa G Moyer (eds), *The Blackwell Guide to Research Methods in Bilingualism and Multilingualism* (Blackwell Publishing Ltd 2009) 4.

¹⁶⁰ Michael Clyne, ‘Multilingualism’, *The Handbook of Sociolinguistics* (John Wiley & Sons, Ltd 2017), summary.

¹⁶¹ *ibid*, summary.

either separately or in various degrees of CODE-MIXING".¹⁶² Detailed discussion of the distinction between bilingualism and multilingualism¹⁶³ (and the latter's analogue plurilingualism¹⁶⁴) falls outside the scope of this thesis. To avoid unnecessary terminological confusion, 'multilingualism' and its related forms are used throughout, based on the proposition that bilingualism and multilingualism both mean comprehension and/or use of two or more languages.¹⁶⁵ This chapter begins with a brief overview of EU language policy as it relates to multilingualism, narrowing down the area of interest to the EU legal regime and, particularly, multilingual legislation.

¹⁶² Tom McArthur, Lise Fontaine and Jacqueline Lam-McArthur (eds), 'Multilingualism', *The Oxford Companion to the English Language* (2nd edn, Oxford University Press 2018).

¹⁶³ See e.g. Jasone Cenoz, 'Multilingualism' in Carol A Chapelle (ed), *The Encyclopedia of Applied Linguistics* (Wiley Blackwell 2012); Cenoz (n 156) 7 and Charlotte Kemp, 'Defining Multilingualism' in Larissa Aronin and Britta Hufeisen (eds), *Exploration of Multilingualism: Development of research on L3, multilingualism and multiple language acquisition* (John Benjamins Publishing Company 2009) 24.

¹⁶⁴ Cenoz (n 156) 5.

¹⁶⁵ Following the approach taken by *ibid* 7, Clyne (n 160), and Romaine (n 154) 541.

2. EU multilingualism

The EU represents perhaps the most fully developed example¹⁶⁶ of a supranational multilingual system, with its current membership of 27¹⁶⁷ countries and 24 official¹⁶⁸ languages. Since its inception, the EU has given emphasis to safeguarding cultural and linguistic diversity, including through the “founding principle”¹⁶⁹ of multilingualism. In line with the European Commission’s definition of multilingualism as “the ability of societies, institutions, groups and individuals to engage, on a regular basis, with more than one language in their day-to-day lives”,¹⁷⁰ EU multilingualism is said to serve purposes including

¹⁶⁶ Also described as “unique” (see Susan Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (2013) 3 *International Journal of Law, Language & Discourse* 1, 1), “wholly exceptional” (see Theodor Schilling, ‘Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law’ (2009) 16 *European Law Journal* 47, 48, footnote 4) and as distinguishing the EU “from all other international organizations” Annarita Felici, ‘Multilingualism in EU Law: How Promulgation Authenticates Equality’ (2010) 2 *Comparative Legilinguistics* 153, 154.

¹⁶⁷ European Union, ‘EU Countries’ <https://european-union.europa.eu/principles-countries-history/eu-countries_en> accessed 4 November 2024.

¹⁶⁸ European Union, ‘Languages’ <https://european-union.europa.eu/principles-countries-history/languages_en> accessed 4 November 2024. Official status has in most cases been attained at or around the time of a relevant country’s accession to the EU, with the notable exception of Irish, which had treaty language status from 2007 until it attained full official status on 1 January 2022. English, French and German additionally have the status of procedural languages of the European Commission and thus the EU institutions. In the European Parliament, however, all official languages have the status of working languages.

¹⁶⁹ European Union, ‘Multilingualism’ <https://european-union.europa.eu/principles-countries-history/languages_en> accessed 4 November 2024.

¹⁷⁰ European Commission, *Final Report - High Level Group on Multilingualism* (Office for Official Publications of the European Communities 2007) 6. Incidentally, this definition of multilingualism is said to include bilingualism; see Cenoz (n 163), chapter 2. An alternative definition is offered by the Council of Europe: “the presence of languages in a given geographical area”; see Council of Europe, ‘From Linguistic Diversity to Plurilingual Education: Guide for the Development of Language Education Policies in Europe’ (2007) 10.

communication with citizens in their own language, protection of linguistic diversity and promotion of language learning,¹⁷¹ as well as objectives such as promotion of employment¹⁷² and economic growth.¹⁷³ The multilingual EU system has been characterised as unique among international organisations,¹⁷⁴ and even been described as “a heroic multilingual endeavour... without precedence in international relations and among international institutions”.¹⁷⁵ Various reasons for promoting multilingualism have been identified, ranging from the symbolic importance of member countries using their own languages¹⁷⁶ to the function of EU multilingualism as a “guarantor of democratic values”¹⁷⁷ by enabling EU citizens to participate in democratic processes within the EU,¹⁷⁸ the role of multilingualism as “an essential factor in cultural, economic and social integration, enhancing citizens’ skills and facilitating their mobility”, “an element of social cohesion and a source of tolerance,

¹⁷¹ European Union, ‘Multilingualism’ (n 169). See also Council of the European Union, ‘Conclusions on Multilingualism and the Development of Language Competences’ (2014) 2, 3.

¹⁷² Council of the European Union, ‘Council Recommendation on a Comprehensive Approach to the Teaching and Learning of Languages’, OJ 2019/C 189/03, para. 10.

¹⁷³ European Union, ‘Languages, Growth and Jobs’ <https://ec.europa.eu/education/policies/multilingualism/languages-growth-and-jobs_en> accessed 8 November 2021. (Inactive as at 4 November 2024.)

¹⁷⁴ Domenico Cosmai, *The Language of Europe - Multilingualism and Translation in the EU Institutions: Practice, Problems and Perspectives* (David Albert Best ed, Institut d’études européennes 2014) 36.

¹⁷⁵ Maria Stoicheva, ‘What Policy of Multilingualism Can Foster European Identity Formation?’ (2015) 12 *Politeja* 107, 108.

¹⁷⁶ Werner Weidenfeld and Wolfgang Wessels, *Europe from A to Z: Guide to European Integration* (Office for Official Publications of the European Communities; European Commission [distributor] 1997) 241.

¹⁷⁷ Cosmai (n 174) 38.

¹⁷⁸ *ibid*; Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 78.

acceptance of differences, identification and mutual understanding among peoples” and a factor in “preventing... active or passive conflicts between different language communities”¹⁷⁹ and, not least, making EU legislation accessible in EU citizens’ own languages.¹⁸⁰ It has been stated that the EU “officially presents itself as a multilingual entity and the commitment to multilingualism is central to its functioning” in pursuit of “a vision that incorporates multilingualism as respect for linguistic diversity and as capacity of multilingual functioning that is often worded as the European *multilingual dream*.”¹⁸¹

Drawing on a typology proposed by House and Rehbein, multilingualism in the EU can be described generally as, “The use of several languages for the common purposes of participants”.¹⁸² Objectives and considerations such as communication with citizens in their own language, protection of linguistic diversity, making EU legislation accessible in EU citizens’ own language and enabling EU citizens to participate in democratic processes clearly demonstrate that multilingualism in the EU has a strong individual component. It has

¹⁷⁹ European Parliament, ‘European Parliament Resolution on a New Framework Strategy for Multilingualism’, preamble, paras. D, G and H.

¹⁸⁰ Cosmai (n 174) 37.

¹⁸¹ Stoicheva (n 175) 108.

¹⁸² See Juliane House and Jochen Rehbein, ‘What Is Multilingual Communication?’ in Juliane House and Jochen Rehbein (eds), *Hamburg Studies on Multilingualism*, vol 3 (John Benjamins Publishing Company 2004) 1. The typology suggests that “multilingual communication” can be characterised by four features: “The use of several languages for the common purposes of participants”; “Multilingual individuals who use language(s) to realize these purposes”; “The different language systems which interact for these purposes” and “Multilingual communication structures, whose purposes make individuals use several languages.”

been suggested that there are two types of multilingualism within the EU – functional and official – where functional multilingualism is multilingualism as practised within the EU institutions and official multilingualism is multilingualism as practised outside those institutions, particularly in dealings with EU citizens.¹⁸³ Official multilingualism has also been defined as “the situation where two or more languages are legally recognized as the language of... an organization”,¹⁸⁴ where so-called ‘legal multilingualism’ is a “formal marker of official multilingualism”¹⁸⁵ in “the situation where legal systems function in two or more languages”.¹⁸⁶ Further, a distinction has been made between *de jure* multilingualism, i.e. the ideal of multilingualism as enshrined in law,¹⁸⁷ and *de facto* multilingualism, i.e. the reality of multilingualism as practised under the influences of factors such as “rationalising measures motivated by practical purposes.”¹⁸⁸ The area of particular interest in this thesis is what could be described as ‘*de facto* EU legal multilingualism’ – i.e. multilingualism as experienced by individuals who are subject to the legal regime of the EU. However, since the individual experience within the multilingual EU legal regime is the product of both EU language policy and EU lawmaking, which are explored further below, it is clear that *de facto* EU multilingualism cannot be understood without first developing an understanding of *de jure* EU multilingualism. Both *de facto* and *de jure* multilingualism are discussed further below.

¹⁸³ Cosmai (n 174) 190.

¹⁸⁴ Leung (n 79) 17.

¹⁸⁵ *ibid* 18.

¹⁸⁶ *ibid* 17–18.

¹⁸⁷ See e.g. Article 1 of Regulation no 1 determining the languages to be used by the European Economic Community, OJ 1958/ 17/385.

¹⁸⁸ Cosmai (n 174) 47.

3. *De jure* EU multilingualism

3.1 EU language policy

When the European Economic Community (EEC) was founded through the Treaty of Rome in 1957,¹⁸⁹ there were six signatories¹⁹⁰ representing four official languages.¹⁹¹ Since its inception, the body which has subsequently become the European Union (EU) has pursued a policy of linguistic pluralism¹⁹² in recognising multiple languages as “official languages”¹⁹³ and establishing legal requirements to use these official languages in a variety of contexts.¹⁹⁴ While successive enlargements since 1957 added 23¹⁹⁵ additional member states and 20 further languages,¹⁹⁶ the policy of linguistic pluralism has remained in place, despite the

¹⁸⁹ See Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft 1957, Article 1.

¹⁹⁰ Belgium, France, Italy, Luxembourg, the Netherlands and Germany.

¹⁹¹ Dutch, French, German and Italian. See Article 1 of Regulation no 1 determining the languages to be used by the European Economic Community (n 187).

¹⁹² Cosmai (n 174) 36.

¹⁹³ See Article 1 of Regulation no 1 determining the languages to be used by the European Economic Community (n 187).

¹⁹⁴ See Articles 2–5 of *ibid.* Note that while Article 6 and Article 7 of the Regulation did not impose use of the official languages on community institutions and the Court of Justice, they did envisage the use of more than one language (“which of the languages are to be used” (Article 6); “The languages to be used” (Article 7)).

¹⁹⁵ Now 22, following withdrawal of the United Kingdom from the EU on 31 January 2020.

¹⁹⁶ Two languages were added in 1973 (Danish and English), one in 1981 (Greek), two in 1986 (Portuguese and Spanish), two in 1995 (Finnish and Swedish), nine in 2004 (Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovakian and Slovene), three in 2007 (Bulgarian, Irish and Romanian) and one in 2013 (Croatian). The withdrawal of the United Kingdom from the EU in 2020, while reducing the number of members states, did not reduce the number of official languages, as English is an official language of both Ireland and Malta.

inevitable growing complexity of following the policy as the number of languages has increased. Among international institutions, the EU's broad-based approach to linguistic pluralism can be contrasted with the rather more limited approach adopted by other supranational bodies such as the United Nations (UN), North Atlantic Treaty Organization (NATO), World Trade Organization (WTO) and Council of Europe, which have not made all "primary languages spoken in member states... official"¹⁹⁷ and thus have significantly more member states than official languages.¹⁹⁸

The EU has implemented its policy of linguistic pluralism through both legislative measures which grant language rights and policy measures to safeguard these. It has been suggested that language rights serve three purposes: preserving peace and security, preserving linguistic diversity and ensuring fair treatment of individuals (also described as individual justice).¹⁹⁹ The latter two objectives are particularly prominent in the European context. On the legislative front, linguistic diversity is explicitly protected by Article 3(3) of the Treaty on European Union, which states that the EU "shall respect its rich cultural and linguistic diversity".²⁰⁰ Similarly, Article 22 of the Charter of Fundamental Rights of the European Union

¹⁹⁷ Leung (n 79) 75.

¹⁹⁸ As at 6 November 2024, the UN had 193 member states but only six official languages. NATO had 32 member states and two official languages. The WTO had 166 member states and three official languages, while the Council of Europe had 46 members and two official languages.

¹⁹⁹ Lauri Mälksoo, 'Language Rights in International Law: Why the Phoenix Is Still in the Ashes' (1998) 12 Florida Journal of International Law 431, 440.

²⁰⁰ Treaty on European Union (Consolidated Version) 2012 (C 326/15) 34, C 326/15, Article 3(3).

provides that, "The Union shall respect cultural, religious and linguistic diversity."²⁰¹ In the area of policy – despite the observation that, for many years, "the European Community refrained from developing an overt language policy at Community level or from intervening in areas of language learning or teaching, which were considered to be exclusively the responsibility of the member states"²⁰² – linguistic diversity has manifested itself in initiatives to promote multilingualism. A significant development in this regard took place in 2005, when the European Parliament adopted a new framework strategy²⁰³ for multilingualism. Around the same time, multilingualism was included "within the remit of a European Commissioner for the first time",²⁰⁴ and in December 2006 "a European Commissioner specifically in charge of multilingualism and intercultural dialogue... was appointed".²⁰⁵ The framework strategy had 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."²⁰⁶ The latter aim is of particular interest in the present thesis.

²⁰¹ Charter of Fundamental Rights of the European Union 2012 (2012/C 326/02), 2012/C 326/02, Article 22.

²⁰² Stoicheva (n 175) 108; Lid King and others, *Languages in Europe: Towards 2020: Analysis and Proposals from the LETPP Consultation and Review* (The Languages Company 2011) 9.

²⁰³ European Parliament, 'Framework Strategy for Multilingualism' (n 179).

²⁰⁴ Cosmai (n 174) 189.

²⁰⁵ *ibid.*

²⁰⁶ Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 81. No such explicit reference to legal texts was included in the subsequent Council Resolution on a European strategy for multilingualism European Council, 'Council Resolution on a European Strategy for Multilingualism', which replaced the framework strategy.

The reason for the EU's provision of legal texts in a range of languages is that EU legislation applies directly to EU citizens.²⁰⁷ In other words, the EU makes laws which grants EU citizens rights and imposes obligations on them. These rights and obligations are set out in EU legislative texts, which citizens must be able to access in order to know the content of their rights and obligations under EU law. The EU therefore recognises the need to inform EU citizens of EU laws and regulations applicable to them. Three principles of EU law are particularly relevant in this regard: the principle of direct effect, the principle of direct applicability and the principle of the primacy (or precedence) of EU law. The *principle of direct effect* provides that – subject to certain conditions – individuals may invoke EU law (i.e. provisions in, for example, regulations and directives) before both national and European courts.²⁰⁸ Based on Article 288 of the Treaty on the Functioning of the European Union,²⁰⁹ the *principle of direct applicability* states that treaties and regulations take effect in EU member states upon publication, and therefore do not require an implementing instrument in a given member state in order to become effective. The *principle of primacy* (or precedence) of EU law provides that, in areas in which countries have ceded sovereignty to

²⁰⁷ Cosmai (n 174) 37.

²⁰⁸ See generally European Union, 'The Direct Effect of European Union Law' (*EUR-Lex*) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114547>> accessed 4 November 2024.

²⁰⁹ 'Treaty on the Functioning of the European Union'. Article 288: "A regulation... shall be... directly applicable in all Member States."

the EU, EU law takes precedence over national law in the event of a conflict.²¹⁰ Detailed discussion of these principles falls outside the scope of this thesis, as it is sufficient to note that EU citizens are directly subject to EU law, and thus have a need for information on their rights and obligations under it.²¹¹ The laws to which EU citizens are subject are the product of EU lawmaking, which is discussed in section 3.2 below.

At this juncture, it is important to note that the objective of giving “citizens access to European Union legislation, procedures and information in their own languages”²¹² faces various challenges. For one thing, it is clear that many more languages are used in Europe than the 24 languages granted official status by the European Union. Moreover, the fact that most member states have only one official EU language may entail the exclusion of sizable linguistic minorities within member states from the aimed-for access to EU legislation, procedures and information. In fact, the 24 official languages only represent approximately 10% of all languages claimed to be spoken in Europe,²¹³ raising the possibility that some EU citizens may not be sufficiently proficient in any official EU language to access

²¹⁰ See generally European Union, ‘Primacy of EU Law (Precedence, Supremacy)’ (*EUR-Lex*) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:primacy_of_eu_law> accessed 4 November 2024.

²¹¹ European Union, ‘Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation’ (2015) 6.

²¹² Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 81.

²¹³ See Ofer Tirosh, ‘European Languages: Exploring the Languages of Europe’ (5 March 2024) <<https://www.tomedes.com/translator-hub/european-languages>> accessed 4 June 2025.

legal information. In addition, not all of the EU's 24 official languages are equally well resourced,²¹⁴ meaning that differences may arise in the actual accessibility of EU legal texts to speakers of different official languages. Finally, some official EU languages have higher *de facto* status as procedural languages,²¹⁵ while English dominates in practice as the language used in legislative drafting.²¹⁶

In Chapter II, a potential trade-off was noted between individual and systemic interests in the EU legal regime with regard to the question of whose legal certainty should be served – that of individuals or that of the system. The preceding discussion indicates a similar trade-off appears in the area of language policy, for several reasons. First, in adopting the 24 official languages, the EU has necessarily made a selection from among the many languages spoken in Europe, thereby including some and excluding others. Second, it is clear that not all official EU languages carry equal weight in practice, given both that some languages are under-resourced within the EU institutions and others have special status either officially (as procedural languages) or unofficially (as languages preferred in practice). In other words, the individual linguistic and cultural needs of speakers of minority languages are outweighed by the communicative and administrative needs of the EU's institutions, and it can be questioned whether the EU will ever be able to provide all its citizens with access to EU law in their own language. Examining this issue in its full breadth falls outside the scope of this

²¹⁴ See footnote 1294.

²¹⁵ See further below.

²¹⁶ See page 177 below.

thesis, and the discussion which follows therefore focuses on achievement of the EU's legal information objective by reference to the 24 official languages.

3.2 Lawmaking in the multilingual EU legal regime

EU law as a body of literature is composed of public legal information, i.e. "legal texts published officially, including acts, statutes, legislative proposals, judgments, and reference documents."²¹⁷ In the discussion which follows, 'legal texts' and 'EU law' are adopted as catchall terms encompassing both legislation and case law. EU law is commonly divided into two categories: primary and secondary. Primary EU law refers to treaties entered into by the EU, as well as the Charter of Fundamental Rights.²¹⁸ Secondary EU law refers to legal acts of the EU (of which there are five types: regulations, directives, decisions, recommendations and opinions), general principles of EU law as developed by the ECJ in case law, and international law.²¹⁹ Regulations, directives and decisions are binding and considered to be legislative acts if adopted through legislative procedure. Recommendations and opinions are non-binding and non-legislative, and therefore not of further interest here. Case law, on the other hand, is binding by virtue of its status as secondary law, and because "within the

²¹⁷ Leung (n 79) 222.

²¹⁸ European Union, 'The European Union's Primary Law' (*EUR-Lex*) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14530>> accessed 4 November 2024.

²¹⁹ European Union, 'The European Union's Secondary Law' (*EUR-Lex*) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ai0032>> accessed 4 November 2024.

EU legal order judgments of the ECJ count as sources of law”.²²⁰ Given the very broad scope of EU regulatory and thus also legislative activity, EU legal texts impact on the affairs of natural and legal persons in the EU in a broad range of contexts, not least through their function as a source of information on permitted and prohibited actions and conduct. This can be linked to the suggestion that legal texts can be divided into three groups based on communicative function: (a) primarily prescriptive texts; (b) primarily descriptive but also prescriptive (i.e. hybrid) texts; and (c) purely descriptive texts.²²¹ European legislation and case law have been identified as falling into categories (a) and (b), respectively, with category (a) comprising “normative instruments containing legally binding rules of conduct” (i.e. “laws and regulations, codes, treaties, and conventions”²²²) and category (b) encompassing “judicial decisions and litigation documents”.²²³ Category (c) – purely descriptive texts as found in “textbooks, commentaries and articles”²²⁴ – is less relevant and not discussed further here, given the focus of the discussion on EU legal texts in the form of legislation and case law.

²²⁰ Rafał Mańko, ‘Multilingualism, Divergent Authentic Versions of a Legal Rule and Legitimate Expectations of Individuals’ (2016) 45 *Studies in Logic, Grammar and Rhetoric* 141, 152.

²²¹ Susan Šarčević, ‘Challenges to the Legal Translator’ in Peter Meijes Tiersma and Lawrence Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 189.

²²² *ibid.*

²²³ *ibid.*

²²⁴ *ibid.* 190.

At this juncture, it may be helpful to consider who makes up the target audience for EU legal texts. As noted above, such texts impact on the affairs of both natural and legal persons, but these two categories are very broad in themselves. As regards natural persons in particular, members of this group may range from legal experts (such as judges, lawyers and academics) to laypersons with no particular legal background. This is consistent with the observation that, due to greater accessibility of legislation through electronic publication “drafters “speak” not only to lawyers and judges, but also to untrained users.”²²⁵ At the same time, it is interesting to note that different views can be taken of “whether legislative texts can and should be drafted in a clear and transparent language at all.”²²⁶ Briefly, these differing views comprise the idealistic view (that laws should be understood by everyone), the sceptic view (that the consequences of laws can only be understood by persons with legal training, so it makes no sense to aim for transparency) and the pragmatic view (that while absolute transparency is unachievable, content can be presented in a more or less transparent manner).²²⁷ Based on the latter view, “many jurisdictions around the globe have... taken measures to facilitate the production of legislative texts that are easier to understand and more transparent.”²²⁸ This is also true of the EU, which can be said to have adopted a broader view of legislative transparency, expanding it to encompass not only

²²⁵ Helen Xanthaki (ed), *Enhancing Legislative Drafting in the Commonwealth* (Routledge, Taylor & Francis Group 2015) i.

²²⁶ Stefan Höfler, ‘Making the Law More Transparent’ in Friedemann Vogel (ed), *Legal Linguistics Beyond Borders: Language and Law in a World of Media, Globalisation and Social Conflicts* (2019) 230.

²²⁷ *ibid* 230–231.

²²⁸ *ibid* 231.

semantic and structural considerations related to individual legal texts, but also giving “citizens access to EU legislation, procedures and information in their own languages.”²²⁹ More specifically, in the EU context respect for linguistic diversity is held to include non-discrimination on the basis of language in the legal sphere: “The Commission ensures that fundamental rights and, in particular, the right to non-discrimination, are respected when EU law is implemented.”²³⁰ Perhaps the clearest manifestation of this respect for linguistic diversity and the objective of informing EU citizens is the longstanding requirement and practice of publishing EU legal texts in all official languages pursuant to Articles 4 and 5 of Council Regulation 1/1958/EEC,²³¹ a measure which is said to provide “for the equality of the official languages of the EU and [preserve] multilingualism.”²³²

This approach has links with the direct applicability of EU law to EU citizens as discussed above, as well as the previously noted objective of fair treatment of individuals with regard to language rights, or “individual justice”.²³³ When laws apply to individuals, those individuals

²²⁹ Ivana Katsarova, ‘Multilingualism: The Language of the European Union’ (European Parliament 2019) 2; European Parliament, ‘Framework Strategy for Multilingualism’ (n 179), Specific Comment 8; Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 81.

²³⁰ European Commission, ‘Charter of Fundamental Rights’ (*European Education Area*) <<https://education.ec.europa.eu/focus-topics/improving-quality/multilingualism/linguistic-diversity>> accessed 4 November 2024.

²³¹ Regulation no 1 determining the languages to be used by the European Economic Community (n 187).

²³² Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 79.

²³³ Mälksoo (n 199) 440.

need to be able to access those laws if they are to know and understand any rights and obligations granted and/or imposed. In order to ascertain their rights and obligations under EU law, EU citizens have to consult both prescriptive and hybrid²³⁴ texts as discussed previously, i.e. both legislation and case law interpreting such legislation. These prescriptive and hybrid texts are the product of EU lawmaking on two fronts: by the EU's legislative bodies (in the form of legislation) and by the ECJ (in the form of interpretative judgments and rulings). Both of these lawmaking processes result in the publication of legal texts in the 24 official languages of the EU. In other words, both lawmaking by the EU's legislative bodies and lawmaking by the EU courts result in the provision of legal information to EU citizens in multiple (and potentially divergent) language versions. This makes it relevant to examine the two forms of lawmaking and how the language versions come into being in each.

3.2.1 Lawmaking by EU legislative bodies

In Chapter II above, it was stated that the three EU institutions responsible for the EU legislative process – the European Commission, the Council of the European Union and the European Parliament – were contacted to recruit relevant respondents. These three institutions were selected due to their central, albeit differing, roles in the adoption of EU legislation. The roles of the institutions encompass not only procedural matters related to

²³⁴ In this context, the word 'hybrid' is used in its general sense, not in the more specific sense applicable in translation theory.

the drafting and issuing of EU legislation (discussed further below), but also the preparation of language versions intended to communicate new legislation to EU citizens. In this regard, therefore, it is also relevant to examine the translation services which undertake such work. These services are discussed briefly in the paragraphs which follow, with a particular focus on quality-related policies and measures and how these compare to information provided by interviewees from the various institutions.

The European Commission's Directorate-General for Translation

This translation service, commonly referred to as the 'DGT', serves the European Commission. It has issued guidance documents on a range of topics,²³⁵ including translation quality. The DGT Translation Quality Guidelines contain guidance for translators, revisers/reviewers and managers,²³⁶ and identify various measures for improving translation quality. These include matching translation assignments with translators with the requisite expertise, taking into account factors like "technicality of the text (domain competence), but also familiarity with text type conventions for legislation, press releases, web texts (textual competence), the need for background information (research competence), the need for localisation (cultural competence), IT literacy to take full advantage of quality-related tools, etc.",²³⁷ as well as "individual strengths and weaknesses, for instance speed, resistance to

²³⁵ Tomáš Svoboda, 'Translation Manuals and Style Guides as Quality Assurance Indicators: The Case of the European Commission's Directorate-General for Translation' (Zenodo 2017) 77.

²³⁶ Directorate-General for Translation, 'DGT Translation Quality Guidelines' (2015) 1.

²³⁷ *ibid* 2.

stress, accuracy, etc.” and experience.²³⁸ The guidelines also describe two types of quality control. Revision is defined as “bilingual examination of target language content against source language content for its suitability for the agreed purpose”,²³⁹ while review is defined as “monolingual examination of target language content for its suitability for the agreed purpose.”²⁴⁰ Although revision and review may sometimes be combined,²⁴¹ the DGT Translation Quality Guidelines identify revision as the most appropriate quality control measure for most types of EU legal act due to the legal and financial risks these entail, which can best be addressed by combining the expertise of translators and revisers.²⁴²

The Translation Service of the General Secretariat of the Council of the European Union

This translation service, often referred to as the ‘GSC’, serves the Council of the European Union and the European Council. The GSC employs various quality control measures. Chapter VI below discusses three phases of efforts to prevent divergences before legislation

²³⁸ *ibid.*

²³⁹ *ibid.* 3; see also International Organization for Standardization, ‘International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services’ (2015) 2. While it has been noted that the term ‘revision’ is not used uniformly among EU translation services (Cosmai (n 174) 121) and may mean different things (such as simple reading (aka editing), cross-reading, lexical and terminological revision, or lexical and stylistic revision), this general definition is sufficient for present purposes.

²⁴⁰ Directorate-General for Translation, ‘DGT Translation Quality Guidelines’ (n 236) 3; see also ‘International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services’ (n 239) 2.

²⁴¹ European Commission Directorate-General for Translation, *Quantifying Quality Costs and the Cost of Poor Quality in Translation: Quality Efforts and the Consequences of Poor Quality in the European Commission’s Directorate-General for Translation* (Publications Office 2012) 15.

²⁴² Directorate-General for Translation, ‘DGT Translation Quality Guidelines’ (n 236) 6.

is officially issued, namely pre-drafting/translation, drafting/translation and post-drafting/translation – a categorisation which reflects the GSC’s use of different measures at different stages of the translation production process. For example, in the pre-translation phase, translation best practice recommendations have been developed for different document types.²⁴³ Moreover, during the translation phase, translators can consult with drafters when they consider this necessary.²⁴⁴ Finally, in the post-translation phase, most GSC translations are revised by a second staff member.²⁴⁵ Like the DGT, the GSC distinguishes between review and revision and uses different combinations of these tools for quality control purposes. In order of comprehensiveness, these are: (1) thorough revision (bilingual revision + monolingual review); (2) standard revision (bilingual comparison of the target text with the source text); (3) light revision (monolingual review of the target text + bilingual revision of potential problems and key passages); (4) review (monolingual examination of the target text); and (5) optional revision (no revision or review unless requested by the translator).²⁴⁶ A further aspect of quality control at the post-translation stage is so-called ex-post quality monitoring.²⁴⁷ This incorporates both results quality monitoring (in which randomly selected translation samples are evaluated by quality

²⁴³ Jan Hanzl and John Beaven, ‘Quality Assurance at the Council of the EU’s Translation Service’ in Svoboda, Tomáš, Biel, Łucja and Łoboda, Krzysztof (eds), *Quality aspects in institutional translation* (Language Science Press 2017) 146.

²⁴⁴ *ibid* 145.

²⁴⁵ *ibid*.

²⁴⁶ *ibid*.

²⁴⁷ *ibid* 146.

controllers or delegated senior translators)²⁴⁸ and individual quality monitoring (annual monitoring of individual translators).²⁴⁹ Both types of quality monitoring focus on linguistic and technical criteria, where the linguistic criteria are “meaning, omission, terminology, grammar, style”²⁵⁰ and the technical criteria are “styles, characters, typos, other”.²⁵¹ In a sense this category of quality control measures is both post- and pre-translational in nature, since it serves the purpose of improving overall translation output, and thus also fosters higher quality in future translation projects.

The Directorate-General for Translation of the European Parliament

The European Parliament’s translation service, abbreviated as ‘DG TRAD’, serves the European Parliament. The service has a strong focus on using and developing tools and technologies to “speed up the translation process, reduce the risk of human error and improve consistency”.²⁵² Such technologies include translation memories, document databases and terminology databases, as well as computer-assisted translation (CAT) tools and technology facilitating the re-use of earlier translations. Further, the service engages in extensive terminology work in support of translation quality, including the provision of terminology support to translators, identification of new terminology (including the

²⁴⁸ *ibid* 147.

²⁴⁹ *ibid* 148.

²⁵⁰ *ibid*.

²⁵¹ *ibid*.

²⁵² European Parliament, ‘Technology to Support Translation’ (*Translation*) <<https://www.europarl.europa.eu/translation/en/translation-at-the-european-parliament/technology-to-support-translation>> accessed 4 November 2024.

development of glossaries and definitions for legislative procedures), terminology-focused training sessions and workshops, and interinstitutional terminology cooperation.²⁵³ These efforts are premised on the view that “[c]orrect and consistent terminology is... essential for ensuring uniform EU-wide application of laws, which contributes to legal certainty in the EU.”²⁵⁴

As stated above, the European Commission, the Council of the European Union and the European Parliament play central roles in the formal procedures by which EU legislation is adopted. In practice, three types of procedures are used: special legislative procedures, the ordinary legislative procedure and other, where ‘other’ comprises various procedures followed in specific areas and instances.²⁵⁵ Below, one of these ‘other’ procedures – the adoption of implementing and delegated acts – is considered alongside special legislative procedures and the ordinary legislative procedure to illustrate both how the EU legislative bodies make law and how many institutions are involved in preparing language versions

²⁵³ European Parliament, ‘What We Do’ (*Translation*) <<https://www.europarl.europa.eu/translation/en/terminology/what-we-do>> accessed 4 November 2024.

²⁵⁴ *ibid.*

²⁵⁵ These are opinions under Article 140 Treaty on the Functioning of the European Union (monetary union), procedures relating to dialogue between management and labour, procedures for the consideration of voluntary agreements, codification, and implementing and delegated provisions. See European Parliament, ‘Legislative Powers’ (*About Parliament*) <<https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/legislative-powers>> accessed 7 December 2023.

under the different procedures. In other words, the review provides an indication of the level of scrutiny given to language versions prior to publication.

3.2.1.1 Special legislative procedures

In the EU legislative system, the European Parliament and Council of the European Union are so-called co-legislators who adopt the majority of EU laws jointly.²⁵⁶ In some instances, however, the Council or the Parliament may act as sole legislator, with the other co-legislator either giving its consent to or being consulted on the proposed legal act.²⁵⁷ Specifically, there are two types of special procedure: consent and consultation. Under the consent procedure, the Council prepares and issues a legislative proposal which Parliament can accept or reject, but not amend. Under the consultation procedure, Parliament may accept, reject or propose amendments to the Council's proposal. While the use of special legislative procedures is limited, as these are "followed only in certain cases",²⁵⁸ the procedures are important to consider from the perspective of when the different language versions come into being and who creates them. From the preceding description of the consent and consultation procedures, it is clear that the different languages versions of a legislative proposal made by the Council are prepared by the Council. Moreover, since Parliament has

²⁵⁶ European Commission, 'Adopting EU Law' <https://commission.europa.eu/law/law-making-process/adopting-eu-law_en#parliament-and-council-adopt> accessed 4 November 2024.

²⁵⁷ European Commission, 'Special Legislative Procedures' <https://commission.europa.eu/law/law-making-process/adopting-eu-law_en#special-legislative-procedures> accessed 4 November 2024.

²⁵⁸ *ibid.*

no power of amendment under the consent procedure, the language versions logically remain unchanged during the procedure. The same is true of the consultation procedure, although Parliament may suggest amendments, leaving open the possibility of changes to language versions prior to publication. Overall, it is clear that, under the special legislative procedures, only one institution is involved in drafting the different language versions, and that the input of other institutions is limited.

3.2.1.2 Adoption of implementing and delegated acts

In certain instances, EU legal acts may be adopted directly, without following either the ordinary legislative procedure or special procedures. The reasons for the adoption of such delegated and implementing acts include, not least, a need for speed and flexibility not offered by the ordinary legislative procedure,²⁵⁹ even though it is recognised that “[s]uch decisions... can be politically important and... can directly impact citizens”.²⁶⁰ In the case of implementing acts (which serve the purpose of ensuring uniform implementation of EU legislation across the member states), the Commission – or in exceptional cases the Council – adopts these. Delegated acts, on the other hand, are adopted by the Commission pursuant to authority granted in previously adopted EU legislation, and serve the purpose

²⁵⁹ European Parliament, ‘European Parliament Decision Extending Rule 168 of Parliament’s Rules of Procedure until the End of the Tenth Parliamentary Term’ 43 <https://www.europarl.europa.eu/doceo/document/B-9-2024-0159_EN.pdf>.

²⁶⁰ *ibid.*

of supplementing such legal instruments.²⁶¹ Accordingly, since the power to adopt implemented and delegated acts rests with one institution (in most case the Commission), it is clear that just one institution is involved in preparing published language versions.

3.2.2.3 Ordinary legislative procedure

According to the European Parliament, “[t]he vast majority of European laws are adopted jointly by the European Parliament and the Council”²⁶² in accordance with the ordinary legislative procedure, under which the European Commission issues legislative proposals on various grounds: on its own initiative, in response to a European Citizens’ Initiative or based on an invitation from the European Council, the Council of the European Union or the European Parliament.²⁶³ Each proposal is submitted to the European Parliament and the Council of the European Union, who review and if necessary revise the draft text. In terms of the number of institutions involved in preparing published language versions, the ordinary legislative procedure entails far more comprehensive consideration of the language versions prior to publication than the special legislative procedures and the adoption of implementing and delegated acts. As indicated above, the ordinary legislative

²⁶¹ European Commission, ‘Delegated Acts’ <https://commission.europa.eu/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts_en> accessed 4 November 2024.

²⁶² European Parliament, ‘Legislative Powers’ (*About Parliament*) <<https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/legislative-powers>> accessed 4 November 2024.

²⁶³ European Commission, ‘Where EU Laws and Policies Come From’ <https://commission.europa.eu/law/law-making-process/planning-and-proposing-law_en> accessed 4 November 2024.

procedure involves three institutions: the European Commission as the proposer of new legislation and the European Parliament and Council of the European Union as participants in interinstitutional processes aimed at securing agreement on the proposed draft legislation. These processes include consideration by Parliament through various 'readings' as well as interinstitutional negotiations (also called 'trilogues') and, in some cases, a conciliation procedure between the two co-legislators (i.e. Parliament and the Council) aimed at securing agreement on amendments proposed by Parliament. As regards the preparation of language versions specifically, the Commission prepares versions of legislative proposals in all the official languages²⁶⁴ in a process involving both linguistic experts and legal experts. The language versions prepared by the Commission are submitted to the Council and Parliament. These two institutions consider the Commission's proposal in parallel. As regards translation activity, the translation services supporting the Council and Parliament update the language versions originally issued by the Commission with translations of amendments proposed by EU parliamentarians and Council members. Accordingly, these translation services do not revise the Commission's translations beyond incorporating amendments.²⁶⁵ The process culminates in new (amended) versions of the adopted act in all the official languages. Overall, it is clear that under the ordinary legislative procedure language versions are the subject of extensive examination, translation, review

²⁶⁴ Except where an act is addressed to a particular EU member state or a private party, or when an act constitutes a purely factual document. See European Commission, 'EU Laws' <https://commission.europa.eu/about-european-commission/service-standards-and-principles/commissions-use-languages_en#eulaws> accessed 4 November 2024.

²⁶⁵ Interview with European Commission Quality Manager, 'Interview 7' (12 October 2023).

and finalisation by the staff of several institutions, and particularly language and legal experts.

As shown above, the level of scrutiny given to EU legal acts prior to publication in the multiple language versions depends on the procedure by which such legal acts are adopted. In the case of acts adopted by special legislative procedures, only one institution is involved in drafting the different language versions, with limited input from other institutions. Implementing and delegated acts are in a similar position, since just one institution is involved in preparing the published language versions. In terms of overall effort invested in and oversight of language versions, these two procedures can be contrasted with the ordinary legislative procedure, which entails a completely different level of scrutiny. The differing levels of scrutiny can perhaps be explained by reference to the types of legislation adopted through the different procedures, i.e. that acts adopted through the ordinary legislative procedure stake out the framework for or general direction of legal regulation, while the special legislative procedures and, particularly, implementing and delegated acts flesh these out.

At this juncture, it is important to note that the involvement of a single institution in preparing language versions does not mean that the language versions are necessarily of poor quality. On the contrary, extensive efforts are made to ensure that language versions are of high quality. When considering the three types of procedure – or rather the language

versions which result from them – from the perspective of the individual EU citizen, however, it seems clear that the ordinary legislative procedure offers the greatest ‘security’ in terms of broadness of review, and thus also the lowest probability of divergences. Regarding the individual perspective, it is also of interest to consider the volumes of legal acts adopted through the different procedures. According to EU statistics, these volumes vary significantly, with implementing and delegated acts accounting for approximately 54%, special legislative procedures for approximately 43% and the ordinary legislative procedure for approximately 3% of acts adopted in 2023.²⁶⁶ The figures suggest that a substantial proportion of legal acts adopted by the EU are published in language versions which are only worked on by a single institution. Moreover, each language version may only be worked on by a limited number of individuals, possibly as low as one or two. Given the statement noted above that legal acts “can directly impact citizens”²⁶⁷ regardless of the procedure by which they are adopted, it could be seen as concerning that different categories of lawmaking by EU legislative bodies entail differing levels of scrutiny of the official language versions of legal acts.

²⁶⁶ Based on figures for the year 2023, see European Union, ‘Legal Acts - Statistics’ (n 83). Excluding European Central Bank acts, the total number of regulations, directives and decisions adopted by the European Parliament, Council of the European Union and European Commission in 2023 is 2,276. Delegated and implementing acts accounted for 1,222 of these, while Commission and Council regulations, directives and decisions (special legislative procedures) totalled 977 acts. Just 77 acts were adopted under the ordinary legislative procedure.

²⁶⁷ European Parliament, ‘Recommendation for a Decision pursuant to Rule 168(4) of the Rules of Procedure extending Rule 168 of Parliament’s Rules of Procedure until the end of the tenth parliamentary term, B9-0159/2024’ 43.

3.2.2 *Lawmaking by the Court of Justice of the European Union*

Generally speaking, lawmaking by the courts takes the form of judgments and rulings (referred to collectively as case law). Since EU law is applied by national courts, it is logical that interpretative questions initially arise at national level. When, for example, a national court deems a question sufficiently clear to allow the court to rule on it, it can do so. This implies that not all questions regarding the interpretation of EU law actually reach the ECJ. Accordingly, national courts can be said to 'make EU law' to some degree. As discussed further in Chapter VI, however, interpretation of the law is not the exclusive preserve of the courts. Regulatory bodies, and even individuals, may also make decisions as to what they consider to be a correct interpretation of an EU legal text. Taking this line of thinking to its logical conclusion, it could be argued that any person who reads and applies an EU legal text to his/her particular circumstances is 'making EU law', or at least is fashioning a version of it. However, such an interpretative 'free for all' is undesirable, not least from the perspective of harmonisation within the Union, and the EU has thus given a single court a monopoly on the definitive interpretation of EU law, mandating the Court of Justice of the European Union (CJEU) to ensure its uniform application and interpretation. As part thereof, the CJEU "reviews the legality of the acts of the institutions of the European Union", "ensures that the Member States comply with obligations under the Treaties" and "interprets

European Union law at the request of the national courts and tribunals,²⁶⁸ with the latter function including the interpretation of “any provision which is unclear or ambiguous in the language version of the referring national court or is alleged to diverge from the other language versions.”²⁶⁹ The CJEU comprises two courts: the Court of Justice (also known as the European Court of Justice (ECJ)²⁷⁰) and the General Court.²⁷¹ The ECJ hears cases concerning the application and interpretation of EU law, while the General Court hears cases brought against the EU or its institutions. The CJEU explicitly identifies as a “multilingual institution”,²⁷² and this status is also evidenced by the court’s practice of communicating “with the parties in the language of the proceedings” and its objective of ensuring that “case-law is disseminated throughout the Member States.”²⁷³ In practice, this means allowing persons or parties who bring a case to do so in their preferred (official EU) language and publishing rulings in all 24 official languages of the EU. Strictly speaking, such decisions are binding only on the parties to whom they are addressed,²⁷⁴ but in practice they also serve

²⁶⁸ Court of Justice of the European Union, ‘General Presentation’ <https://curia.europa.eu/jcms/jcms/Jo2_6999/en/> accessed 4 November 2024.

²⁶⁹ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 11.

²⁷⁰ Below, the term ‘ECJ’ is used generally, while ‘CJEU’ is used only in specific references to the Court of Justice as a whole.

²⁷¹ A third court with a role in EU lawmaking is also worth noting briefly at this juncture. The European Court of Human Rights (ECtHR) is a body of the Council of Europe – a human rights organisation independent of the European Union and its institutions. While there have been proposals for the EU to accede to the Council of Europe, it has not yet done so (as at 6 November 2024). However, as the ECJ appears to take ECtHR rulings and reasoning into account in its own decisions, the ECtHR also plays role – albeit indirectly – in EU lawmaking.

²⁷² Court of Justice of the European Union, ‘General Presentation’ (n 268).

²⁷³ *ibid.*

²⁷⁴ See Article 288 of the ‘Treaty on the Functioning of the European Union’ (n 209).

as important sources of law.²⁷⁵ The fact that many of the cases heard by ECJ are requests for so-called preliminary rulings²⁷⁶ from national courts further illustrates the precedent-setting (and thus lawmaking) nature of the court's activities. At the same time, the role of the ECJ in lawmaking has been questioned. While the ECJ is not, in theory, a precedent-setting body, in practice its rulings do carry precedential weight, at least in the sense of having persuasive force.²⁷⁷ Incidentally, this implies that a *de jure–de facto* distinction can be made not only with respect to EU multilingualism as a whole, but also with respect to the more specific question of the precedential significance of ECJ rulings. Further consideration of this particular issue, however, falls outside the scope of the thesis. What is helpful to note here is that while both lawmaking by the EU legislative bodies and lawmaking by the ECJ produce legal texts in the official languages which have the potential to influence EU citizens in their decision-making, the two forms of lawmaking differ with respect to the legal status of those language versions. As the ECJ plays a role in EU lawmaking and its rulings are communicated to EU citizens in the form of different language versions of relevant documents, it is – as in the case of the previously discussed EU legislative bodies – of interest to consider not only the lawmaking institution, but also the translation service responsible for preparing the language versions which communicate ECJ decisions to EU citizens.

²⁷⁵ Jan Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts' [2011] LSE Law, Society and Economy Working Papers 2.

²⁷⁶ See Article 267 of the 'Treaty on the Functioning of the European Union' (n 209). The Article 267 procedure, under which the ECJ deals with requests for interpretative clarification, is discussed in greater detail in Chapter VI.

²⁷⁷ Komárek (n 275) 31, 36.

The Directorates for Legal Translation of the Court of Justice of the European Union and the General Court

This legal translation service (also called “Directorates A and B for Legal Translation”²⁷⁸) is part of the CJEU’s Directorate-General for Multilingualism, and serves the Court of Justice of the European Union and the General Court. The translation service’s quality assurance practices have been said to incorporate two distinct elements: (a) quality assurance at the human resources level; and (b) quality assurance at the workflow level.²⁷⁹ Category (a) relates to “translators, revisers, auxiliary staff, and project managers, etc.”,²⁸⁰ while category (b) encompasses the stages of translation, revision and proofreading.²⁸¹ A separate language unit is maintained for each official language.²⁸² As in the case of the DGT and GSC, the CJEU translation service conducts quality control at three stages: pre-drafting/translation, during drafting/translation and post-drafting/translation. The primary pre-drafting measure is the targeted recruitment of translation staff. Unlike the previously discussed translation services, the CJEU’s service uses only lawyer-linguists (i.e. translators

²⁷⁸ Court of Justice of the European Union, ‘Directorate-General for Multilingualism’ <https://curia.europa.eu/jcms/jcms/Jo2_10742/en/> accessed 4 November 2024.

²⁷⁹ Dariusz Koźbiał, ‘Two-Tiered Approach to Quality Assurance in Legal Translation at the Court of Justice of the European Union’ in Tomáš Svoboda, Łucja Biel and Krzysztof Łoboda (eds), *Quality aspects in institutional translation* (Language Science Press 2017) 163.

²⁸⁰ *ibid* 164.

²⁸¹ Joseph Izzo Clarke, ‘Translating Justice: The ECJ Perspective’. Paper presented at the QUALETRA Final Conference, KU Leuven, Antwerp, 16–17 October 2014.

²⁸² Stefaan van der Jeught, ‘Translation: Court of Justice of the European Union (CJEU)’ in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedias of International Procedural Law* (Online edition, Oxford University Press 2019), para. 46.

who hold a law degree or equivalent qualification),²⁸³ based on Article 42 of the Rules of Procedure of the Court of Justice, which requires the service to be “staffed by experts with adequate legal training”.²⁸⁴ Another pre-translation measure is cooperation both between units and between institutions²⁸⁵ with the aim of maintaining “the highest level of coherence with the translated documents of other EU institutions”.²⁸⁶ Terminological databases, which “allow translators to use appropriate terminology in a consistent manner within and across texts”,²⁸⁷ are a key aspect of intra- and interinstitutional coordination, and span all three stages of quality control, as they are developed in preparation for future translation work, are used during the translation process and are employed as a quality control tool after translations have been completed.²⁸⁸ In addition, some use is made of automatic translation.²⁸⁹

²⁸³ Court of Justice of the European Union, ‘Language Arrangements’ <https://curia.europa.eu/jcms/jcms/Jo2_10739/regime-linguistique-de-la-cour-de-justice-du-tribunal-de-premiere-instance-et-du-tribunal-de-la-fonction-publique> accessed 4 November 2024; see also Łucja Biel, ‘Quality in Institutional EU Translation: Parameters, Policies and Practices’ (Zenodo 2017) 45.

²⁸⁴ Court of Justice of the European Union, ‘Rules of Procedure of the Court of Justice’, Article 42.

²⁸⁵ Koźbiał (n 279) 169.

²⁸⁶ *ibid* 170.

²⁸⁷ *ibid* 161; see also Elena Chiocchetti and others, ‘Quality Assurance in Multilingual Legal Terminological Databases’ [2017] *The Journal of Specialised Translation* 164, 166.

²⁸⁸ Koźbiał (n 279) 161; see also Chiocchetti and others (n 287) 166, which states that, “Quality assurance is actually considered one of the main goals of terminology work”.

²⁸⁹ Koźbiał (n 279) 169.

The above discussion has described the two central forms of EU lawmaking – by EU legislative bodies and by the ECJ – as well as the translation services which prepare official language versions of new legislation and case law for communication to EU citizens. As a next step, and for the purposes of further discussion, it is also important to consider the legal status of such language versions, as this varies.

3.3 Legal status of language versions of EU legal texts

Both EU legislation and case law are made available to the public in the official languages,²⁹⁰ a practice which entails extensive translation activity. In fact, it has even been suggested that “[t]ranslation *is* the official language of the EU, as translations *are* law, and the law is translations.”²⁹¹ In the case of legislation, the fact of translation is clear not least from EU translation quality guidelines, which state explicitly that “23 of the 24 language versions are translations and depend on a source text”.²⁹² Similarly, EU drafting guidelines prescribe that “the original text must be particularly simple, clear and direct, since any over-complexity or ambiguity, however slight, could result in inaccuracies, approximations or complete

²⁹⁰ See, by way of illustration, European Union, ‘Access to European Law’ (*EUR-Lex*) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0283>> accessed 4 November 2024 (case law) and European Union, ‘Access to European Union Law’ (*EUR-Lex*) <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32014L0065>> accessed 4 November 2024 (legislation).

²⁹¹ Joxerramon Bengoetxea, ‘Text and Telos in the European Court of Justice’ (2015) 11 *European Constitutional Law Review* 184, 209.

²⁹² Directorate-General for Translation, ‘DGT Translation Quality Guidelines’ (n 236) 2.

mistranslations in one or more of the other Union languages”.²⁹³ As discussed above, translation within the EU is undertaken by a number of bodies serving different institutions,²⁹⁴ with the main translation services involved in the production of legislation being the DGT (which translates documents such as legislation, policy papers, reports and correspondence for the European Commission), the GSC (which undertakes translation for the European Council and the Council of the European Union, focusing on policy documents and legislation)²⁹⁵ and DG TRAD, which supports the European Parliament, not least with translations of legislative amendments. In addition, the CJEU’s translation service translates rulings and other case law for publication.

Despite both legislation and case law being translated, the resulting translations differ significantly in terms of their legal status. Fundamentally, when a document exists in multiple

²⁹³ European Union, ‘Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation’ (n 211) (para. 5.2, p. 16). For further examples, see paragraphs 1.4.2, 4.6, 5.5 and 18.13.1.

²⁹⁴ Examples include bodies serving the European Parliament, the European Council, the European Commission, the Court of Justice and the Court of Auditors, as well as the European Economic and Social Committee and the Committee of the Regions. See e.g. Cosmai (n 174) 100–109 and paragraph 4 in ‘Court of Auditors Special Report No 9/2006 Concerning Translation Expenditure Incurred by the Commission, the Parliament and the Council Together with the Institutions’ Replies’, OJ 2006/C 284/01, 5. The volume of undertaken translation work is very large. For example, in 2023, the European Commission’s Directorate-General of Translation (DGT) had a total production of 2,553,813 translated pages, 39.5% of which was outsourced to external providers; see European Commission, ‘Annual Activity Report 2023 - DG Translation’ (2024) 6.

²⁹⁵ Council of the European Union. General Secretariat of the Council, *The Language Service of the General Secretariat of the Council of the European Union: Making Multilingualism Work* (Publications Office 2012) 7.

languages the different language versions can be regarded in one of two ways.²⁹⁶ The first is to treat one version as authentic and all the other versions as translations, while the second is to treat all versions as equally authentic²⁹⁷ originals. These approaches are reflected in the differing status given to translated legislation and translated case law in the EU context. The first approach, whereby one language version is treated as authentic and all the other versions are deemed to be translations, represents the classical source text-target text perspective, and accurately describes the status of translated ECJ case law. This approach has also been adopted by, for example, the United Nations (UN) and the Organisation for Economic Co-operation and Development (OECD), “where only the original is the authentic version.”²⁹⁸ Cases heard by the ECJ have an official “language of procedure”²⁹⁹ (or “language of the case”³⁰⁰) which is used during the proceedings and in which the resulting judgment is issued. Crucially, only the version issued in this language of procedure is deemed to be

²⁹⁶ Theodor Schilling, ‘Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication?’ (2011) 12 German Law Journal 1460, 1463.

²⁹⁷ It has been noted that ‘authentic’ in this context means ‘authoritative’ in the sense of ‘legally valid’, ‘legally binding’ or ‘having legal force’, rather than ‘original’, ‘genuine’ or ‘not copied’, see Agnieszka Doczekalska, ‘Drafting and Interpretation of EU Law – Paradoxes of Legal Multilingualism’ in Günther Grewendorf and Monika Rathert (eds), *Formal Linguistics and Law* (Mouton de Gruyter 2009) 358.

²⁹⁸ Ivana Katsarova, ‘Multilingualism: The Language of the European Union’ (European Parliament 2022) 3. In contrast, the EU generally seeks to secure authentic status for all its official languages when the EU enters into treaties with third countries; see Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 39.

²⁹⁹ Harald Koch, ‘Legal Aspects of a Language Policy for the European Communities: Language Risks, Equal Opportunities, and Legislating a Language’ in Florian Coulmas (ed), *A Language Policy for the European Community* (DE GRUYTER 1991) 155.

³⁰⁰ See generally Articles 36–41 of the Rules of Procedure of the Court of Justice and Articles 44–49 of the Rules of Procedure of the General Court.

authentic.³⁰¹ At the same time, however, all judgments issued in a language of procedure other than French are in reality translations, since French is the ECJ's "language of deliberation"³⁰² and judgments are drafted in that language before being translated to produce the (authentic) version in the language of procedure and the (non-authentic³⁰³) versions in the other official languages.³⁰⁴

The situation with regard to EU legislation is different, and thus reflects the second approach referred to above, namely to treat all versions as equally authentic originals. The EU has given its 24 official languages equal status in accordance with what is commonly referred to as the principle of equal authenticity.³⁰⁵ Early applications of the principle have been

³⁰¹ Karen McAuliffe, 'Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union' (2016) 3 *Language and Law* 5, 11 and Court of Justice of the European Union, 'Language Arrangements' (n 283): "the only authentic version of the judgment handed down by either the Court of Justice or the General Court is that which appears in the language of the case". See also Article 41 of the Rules of Procedures of the Court of Justice and Article 49 of the Rules of Procedure of the General Court.

³⁰² Court of Justice of the European Union, 'Language Arrangements' (n 283).

³⁰³ See Koźbiał (n 279) 158: "as opposed to legislation, not all language versions of judgments are equally authoritative".

³⁰⁴ McAuliffe, 'Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union' (n 301) 11.

³⁰⁵ Also referred to as the principle of plurilingual equality (TJM van Els, 'The European Union, Its Institutions and Its Languages: Some Language Political Observations' (2001) 2 *Current Issues in Language Planning* 311, 311) and the principle of equality of authentic texts (PEAT) (Doczekalska, A. (2005), "Production and Application of Multilingual Law. The Principle of Equality of Authentic Texts and the Value of Subsequent Translation", Paper read at *Language and the Law 2005: East meets West*, 12–14 September 2005, cited in Biel (n 8) 146).

identified in Switzerland and Canada,³⁰⁶ and its roots in international law have been traced to the Vienna Convention on the Law of Treaties, Article 33(1) of which states that, “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.”³⁰⁷ Correspondingly, Article 55(1) of the Treaty on European Union states that the Treaty has been “drawn up in a single original in the [official] languages”, and that all of these versions are “equally authentic”.³⁰⁸ The same applies to other legislation adopted by the EU: all language versions are “equally valid and authentic”³⁰⁹ and presumed to be identical in meaning,³¹⁰ and the EU “does not recognize that the various language versions emanated from multiple translations of an original text.”³¹¹ Moreover, it is considered that “[a]cknowledging the translation history in which one version was the source of another violates the principle of equal authenticity”.³¹² As a result, readers of legal texts are required to “suspend their disbelief and pretend that original and translated

³⁰⁶ Šarčević, ‘Challenges to the Legal Translator’ (n 221) 192.

³⁰⁷ Vienna Convention on the Law of Treaties (1969), Article 33(1).

³⁰⁸ Treaty on European Union (Consolidated Version), C 326/15, Article 55(1). The principle of equal authenticity has also been recognised in case law. For example, in Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (n 90), para. 18, the ECJ stated that “it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic.”

³⁰⁹ Biel (n 8) 146.

³¹⁰ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 7.

³¹¹ Lawrence M Solan, ‘Multilingualism and Morality in Statutory Interpretation’ (2014) 1 *Language and Law* 5, 16.

³¹² *ibid.*

texts carry exactly the same meaning”,³¹³ and the term ‘translation’ is no longer indicative of origin, instead denoting a document’s authenticity status.³¹⁴ It has been suggested that EU legal texts exist in 24 “language versions which all have the same legal status as ‘authentic’, or ‘source’ texts”.³¹⁵ Moreover, based on the rationale that “multilingual communication in the law can be effective only if the persons affected by a piece of legislation are guaranteed equality before the law in all language versions, all authentic texts of a single instrument are presumed to have the same meaning”.³¹⁶ It has also been suggested that this ‘same meaning’ is “presumed to be the “true” meaning, that is the meaning intended by the source text producers”.³¹⁷ The equal authenticity principle is a corollary or product of equal language rights, in that “the principle of equal authenticity is based on the theory of original texts, according to which all the language versions of a single instrument (called parallel texts) are treated as ‘originals’ and thus are not referred to as translations.”³¹⁸ Equal authenticity has been described as “a fundamental principle of multilingualism, according to which all authentic texts of a single instrument are deemed to be of equal authority, as a result of which no text shall prevail in the event of a divergence between the parallel texts.”³¹⁹

³¹³ Leung (n 79) 191; see also Theo Hermans, *The Conference of the Tongues* (Taylor & Francis Group 2016) 9–10.

³¹⁴ Leung (n 79) 191.

³¹⁵ Colin Robertson, ‘The Problem of Meaning in Multilingual EU Legal Texts’ (2012) 2 *International Journal of Law, Language & Discourse* 1, 2.

³¹⁶ Šarčević, ‘Challenges to the Legal Translator’ (n 221) 192, based on Article 33(3) of Vienna Convention on the Law of Treaties (1969): “The terms of the treaty are presumed to have the same meaning in each authentic text.”

³¹⁷ Šarčević, ‘Challenges to the Legal Translator’ (n 221) 192.

³¹⁸ *ibid* 190; see also Cosmai (n 174) 42–44 and Leung (n 79) 164–165.

³¹⁹ Šarčević, ‘Challenges to the Legal Translator’ (n 221) 192.

This situation – where “no [language] version can be read solely on its own [and] [e]ach is a part of the whole, since each text exists only as a single strand of a multilingual text 23 languages wide”³²⁰ – presents EU citizens with a unique challenge when seeking to determine the nature, content and scope of their rights and obligations under EU law. The contrast between *de jure* multilingualism as described above and *de facto* multilingualism as experienced by EU citizens is explored further in the next section.

4. *De facto* EU multilingualism

The previous section has shown that persons living within the EU are subject to EU law made by various institutions in the form of legislation and case law, and that the EU seeks to make the content of such legal texts available to EU citizens by preparing versions in the various official languages, not least in order to protect linguistic diversity and in pursuit of the principle of multilingualism. It has also been shown that the authenticity status of legislation and case law varies, with legislation being authentic in all languages and case law being authentic only in the language of procedure. *Prima facie*, EU citizens are therefore entitled to regard the version of a legislative act which has been published by the EU in their preferred language as valid and authentic. In other words, “[s]ince each language version of the law is supposed to be authentic, one would expect that citizens could rely on a version they understand to regulate their conduct”.³²¹ The same applies to the authoritative

³²⁰ Robertson (n 315) 7.

³²¹ Leung (n 79) 198.

language versions of case reports. It has been claimed that “harmonious co-existence of 24 official languages is one of the most distinctive features of the European project”.³²² From the individual perspective, ‘harmonious co-existence’ might be thought to mean consistency in meaning and effect between language versions, so that, for example, readers of a given legal text in Dutch and Romanian could expect to read and apply the same rules. However, it is clear that situations arise in practice when not all of the 24 language versions “considered in isolation, have the same meaning”.³²³ Practical reliance on EU legal texts presents challenges when there are one or more “divergence[s] between the parallel texts”,³²⁴ i.e. “inaccuracies, approximations or complete mistranslations in one or more of the... languages”.³²⁵ In other words, readers of EU legal texts face “a considerable margin of uncertainty”³²⁶ when considering a given language version, due to the possibility of divergences or differences compared to other language versions. In the context of legislation, differences in meaning translate “into different commands, or different legal consequences”³²⁷ for those who are subject to the legislation.³²⁸ Pursuant to the principle of

³²² Katsarova (n 298) 1.

³²³ Schilling (n 166) 52.

³²⁴ Šarčević, ‘Challenges to the Legal Translator’ (n 221) 192.

³²⁵ European Union, ‘Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation’ (n 211) (para. 5.2, p. 16).

³²⁶ Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (Publications Office 2010) 138.

³²⁷ Schilling (n 166) 52.

³²⁸ For example, as discussed in greater detail in Chapter V, in Case 238/84 *Criminal proceedings against Hans Röser*, there was uncertainty about whether the German version of Regulation No 337/79 covered only wine enrichment resulting in basic and intermediate products or also enrichment resulting in final products intended for sale to the public. Mr

equal authenticity, these different meanings, commands or consequences “are equally authentic, or equally binding”³²⁹ despite the differences between them, and despite the fact that they will necessarily produce differing outcomes. In other words, the Dutch and Romanian readers in the hypothetical example above could end up following different rules, and potentially suffer consequences through doing so, despite referring to what is ostensibly the same legal text. Divergences between language versions thus necessarily entail divergence between the expressed or claimed status of EU legal texts and the reality of operating in the multilingual EU legal regime. This state of affairs challenges the principle of equal authenticity and illustrates the fragility of the underlying assumption that textual or translational equivalence between different language versions is possible.

4.1. The question of equivalence

It has been suggested that “[t]he expectation for textual equivalence is especially high where the source and the target texts have equal legal status, as compared with legal translation in monolingual jurisdictions, where the target text is provided for reference and carries no legal force.”³³⁰ In very general terms, equivalence can be defined as “the fact of having the

Röser claimed that the latter type of wine enrichment was not covered, and thus that he had not breached the Regulation. In other words, Mr Röser had engaged in an activity he believed to be lawful but which another party (the German prosecuting authorities) subsequently deemed to be unlawful. This situation might not have arisen if he had relied on a different language version. Accordingly, he was subject to different commands and different legal consequences than persons who consulted some other language version which did not include the ambiguity of the German version.

³²⁹ Schilling (n 166) 52.

³³⁰ Leung (n 79) 158.

same amount, value, purpose, qualities, etc.”³³¹ *Prima facie*, therefore, equivalence in the EU legal context might be taken to mean, for example, that different language versions of a legal text are equal in content (i.e. that they set out identical rights and/or obligations) or equal in effect (i.e. that they achieve the same outcome). However, it is highly questionable whether equivalence (whether in terms of content, effect or other parameters) can ever be achieved.³³² The statement that “[n]o two words—taken from the same or different languages—are fully equivalent in all dimensions of meaning”,³³³ implies that certain words or terms may not be translatable at all due to lack of a corresponding term in the target language. The question of translatability alone therefore indicates that it may not be possible to create fully equivalent versions of a document in two (or more) different languages. Conceptual equivalence³³⁴ (or lack thereof) represents a further potential complication: a target language may lack a word or term for a given concept – legal or otherwise – because the relevant country does not have a corresponding concept. Untranslatability and lack of conceptual equivalence are thus relevant considerations with regard to EU legal texts, given both the number of official languages and the fact that the EU member states include both

³³¹ Cambridge Dictionary, ‘Equivalence’ <<https://dictionary.cambridge.org/dictionary/english/equivalence>> accessed 4 November 2024.

³³² At the same time, as discussed further in Chapter V below, the view can be taken that, “the multilingual system seems to work, from a pragmatic point of view” (Bengoetxea (n 291) 207), and that “most of the time law works fairly well” (Leung (n 79) 207.) In other words, equivalence of content or effect may not actually be necessary to achieve the objectives of the EU legal system, as long as those objectives themselves feature some pragmatism or flexibility.

³³³ Leung (n 79) 158.

³³⁴ *ibid* 159.

civil law³³⁵ and common law³³⁶ jurisdictions, resulting in what has been described as “a definitive inability to harmonise, through the process of translation, legal concepts belonging to different theoretical constructions and linguistic systems.”³³⁷ At the same time, a distinction can be made between general legal concepts and specific technical and other terminology developed within the framework of EU law, with the latter being “devoid of any nuances in meaning between one language and another.”³³⁸

The concept of equivalence is also highly debated in the field of translation studies. While the detailed discussion falls outside the scope of this thesis, some key points are worth considering briefly. At a basic level, it might be assumed that ‘equivalence’ between a source text (ST) and a target text (TT) means ‘sameness’ in the sense of achieving “equivalent effect”.³³⁹ Two significant objections to this view can be noted: 1) the difficulty of determining effect, since “the translator remains ultimately the only arbiter of the imagined effects of both the ST and the TT”,³⁴⁰ and 2) the difficulty of “bridging the cultural gap between monolingual speakers of different languages.”³⁴¹ It has therefore been suggested that

³³⁵ I.e. lawmaking based on codified law. Most current EU member states have a civil law system.

³³⁶ I.e. precedent-based lawmaking (or lawmaking by the courts). Examples include present EU member state Ireland and, until 31 January 2020, the United Kingdom.

³³⁷ Cosmai (n 174) 149.

³³⁸ *ibid* 150.

³³⁹ Sándor Hervey, Ian Higgins and Michael Loughridge, *Thinking German Translation: A Course in Translation Method* (Taylor & Francis Group 1995) 11.

³⁴⁰ *ibid* 12, ST being an abbreviation of ‘source text’ and TT being an abbreviation of ‘target text’.

³⁴¹ *ibid*.

equivalence should be viewed as a matter of minimising dissimilarities, rather than maximising sameness, and that the term 'equivalent' should be taken to mean "not dissimilar in certain relevant respects".³⁴² It has also been stated that "although equivalence can usually be obtained to some extent, it is influenced by a variety of linguistic and cultural factors and is therefore always relative."³⁴³ "[E]quivalence of intention"³⁴⁴ (i.e. conveying the intended message without strict adherence to the source text) has been proposed as an effective approach in some cases. This echoes the suggestion that legal translations are approximations.³⁴⁵

Nevertheless, it can be argued that legal texts differ fundamentally from other text types, not least regarding the question of equivalent effect. It has been suggested that a translation has to meet four basic requirements, namely that it must 1) make sense; 2) convey the spirit and manner of the original; 3) have a natural and easy form of expression; and 4) produce a similar response (to the original).³⁴⁶ In many cases, EU legislative acts serve the objective of harmonising laws within the member states to some degree,³⁴⁷ and it appears logical to

³⁴² *ibid* 13.

³⁴³ Mona Baker, *In Other Words: A Coursebook on Translation* (Routledge 2011) 5.

³⁴⁴ Basil Hatim and Ian Mason, *Discourse and the Translator* (Taylor & Francis Group 1990) 202.

³⁴⁵ Jean-Claude G emar, 'What Legal Translation Is and Is Not—Within or Outside the EU' in Barbara Pozzo and Valentina Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Kluwer Law International 2006) 77.

³⁴⁶ Nida (n 40) 164.

³⁴⁷ Through either 'minimum harmonisation' (ensuring that all member states have minimum common standards in place) or 'maximum harmonisation' (ensuring that all member states have identical common standards in place).

conclude that harmonisation (which could perhaps also be understood as standardisation or uniformity in this context) can only be achieved if the legislative act has the same effect(s) in the different member states (and thus impliedly in the different language versions). Two of the four basic requirements noted above are therefore particularly relevant if EU legislative acts are to achieve the objective of harmonisation. These are that any translations of an act must make sense (i.e. be intelligible and comprehensible to the target audience), and that the translation must produce a similar response (e.g. compliance with rules). In this specific context, therefore, equivalence of effect is not only desirable but required. Unless readers of EU legislative acts can understand the rights and obligations granted and imposed by EU law, they will be unable to exercise those rights and comply with those obligations. Additionally, if different language versions fail to convey the same content, and as a result fail to produce the same effect in their target audiences, the objective of harmonisation will not be achieved, as the readers of different language versions may develop differing understandings of the rights and obligations set out there. Further, when those readers are persons or bodies tasked with applying or enforcing rights and obligations under EU law (such as national courts and regulatory authorities), there will also be an impact on individuals beyond the immediate circle of readers. Whether at the individual, regulatory or judicial level, differences and divergences between language versions can have far-reaching consequences. The achievement of equivalence arguably becomes even more difficult when the aim is equivalence across 24 languages. The observation that the “probability of confusion, errors and discrepancies is multiplied in direct proportion to the

number of authentic texts"³⁴⁸ is therefore particularly relevant, and it has even been suggested that reproducing the same meaning in all parallel texts is virtually impossible³⁴⁹ and that "significant divergences between different language versions of [EU legislative texts] are the rule rather than the exception".³⁵⁰ The EU's own drafting guidelines explicitly acknowledge the possibility of "semantic divergences between the various language versions",³⁵¹ and the DGT has even indicated acceptance of the proposition (put forward in the context of multilingual treaty drafting) that "differences in meaning between different authentic language versions... are not only possible, but inevitable".³⁵²

Finally, a further highly relevant consideration with respect to EU law is the conferral of status through authentication,³⁵³ i.e. confirmation of a text as authentic and definitive.³⁵⁴ When authentication occurs in relation to multiple language versions of the same document, "equivalence is imposed on [the texts] through an external intervention in [the] particular

³⁴⁸ Tabory, M. (1980). "Multilingualism in International Law and Institutions", Alphen aan den Rijn: Sijthoff & Noordhoff, p. 146, cited in Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (n 166) 9.

³⁴⁹ Doczekalska (n 297) 353.

³⁵⁰ Schilling (n 166) 51.

³⁵¹ European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 211) 18. (para. 5.3.1).

³⁵² Christopher B Kuner, 'The Interpretation of Multilingual Treaties: Comparison of Texts Versus the Presumption of Similar Meaning' (1991) 40 *International and Comparative Law Quarterly* 953, 958; see also Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 5, 69 and Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (n 166) 3.

³⁵³ Hermans (n 313) 8.

³⁵⁴ See e.g. Article 10 of the Vienna Convention on the Law of Treaties (1969).

institutional context. In other words, equivalence is proclaimed, not found.³⁵⁵ Such multilingual authentication by proclamation can be observed in both international law³⁵⁶ and EU law, as discussed above.³⁵⁷ In the European context, authentication through the principle of equal authenticity has been defined as “[e]quality among different language versions of a legal text”.³⁵⁸ The dichotomy between the claimed state of affairs and the actual situation (where the actual situation may feature differences and divergences between language versions which the claimed status denies) has been described as “the fiction of total equivalence and correspondence”,³⁵⁹ which is said to “preserve[] the perception that there is only one law, notwithstanding potential linguistic indeterminacies introduced by multilingualism.”³⁶⁰ This is considered further in the next section.

4.2. Equal authenticity – a legal fiction?

The principle of equal authenticity seeks to resolve the dichotomy between the claimed and actual situations of language versions by attributing equal meaning to all of them. However, it has been suggested that “diversity of meaning is inevitable in the parallel texts of a single

³⁵⁵ Hermans (n 313) 6.

³⁵⁶ See Article 33(1) of the Vienna Convention on the Law of Treaties (1969), which envisages that more than one language version may be authenticated.

³⁵⁷ Although identical meaning “by stipulation” has been challenged; see CJW Baaij, *Legal Integration and Language Diversity: Rethinking Translation in EU Lawmaking* (Oxford University Press 2018) 27.

³⁵⁸ Leung (n 79) 187.

³⁵⁹ Hoven, Paul van den (1998) “Een vertaling die geen vertaling mag zijn. Over artikel 33 van het verdrag van Wenen en andere vreemde zaken” in Bloemen et al. 1998, pp. 40-47, cited in Hermans (n 313) 8.

³⁶⁰ Leung (n 79) 165.

instrument, thus reducing the presumption of equal meaning to a fiction".³⁶¹ It has been stated that, "A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility".³⁶² Interestingly, the equal authenticity principle as applied in the EU context appears to incorporate elements of both conditions. Firstly, it constitutes a statement which is known to be false and is acknowledged to be so by all parties other than the ECJ, including those responsible for drafting EU law.³⁶³ Secondly, the principle has utility in terms of serving the political and policy aims of preserving – and being seen to preserve – both linguistic diversity within the EU and the harmonisation of EU law. It has also been suggested that "the purpose of any fiction is to reconcile a specific legal result with some premise or postulate."³⁶⁴ Applying this to the EU principle of equal authenticity, the 'premise or postulate' can be said to be that all language versions are equivalent, while the 'legal result' which needs to be reconciled with this premise is the contradictory reality of divergent language versions. The resulting fiction – i.e. the false statement that there is "[e]quality among different language versions of a legal text",³⁶⁵ also referred to as "negat[ing] the existence of an original source text which, when necessary, may be referred to when clarification of the meaning of certain

³⁶¹ Šarčević, 'Challenges to the Legal Translator' (n 221) 192.

³⁶² Lon L Fuller, *Legal Fictions* (University Press 1986) 9.

³⁶³ See European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 211) 18, para. 5.3.1; Kuner (n 352) 958; Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 5 and Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (n 166) 3.

³⁶⁴ Fuller (n 362) 51.

³⁶⁵ Leung (n 79) 187.

points is required"³⁶⁶ – has been described as “essential... for the adoption of the equal authenticity principle in bilingual and multilingual jurisdictions.”³⁶⁷ This legal fiction also encompasses an assumption of textual equivalence since, “[i]f authentic language versions of a legal text are truly equal in meaning and status, then any single language version should carry the intended legal meaning, and multilingual legal interpretation should not differ significantly from monolingual legal interpretation.”³⁶⁸ This is clearly not the case when multilingual interpretation is required to overcome an (undesirable) monolingual interpretation, as occurs when divergent language versions would result in divergent, i.e. non-harmonised, application of EU law in different member states.³⁶⁹

The preceding discussion has shown that the EU’s policy of linguistic pluralism manifests itself in a policy of making EU legal texts available in all official EU languages. This necessitates extensive translation work during which differences and divergences arise between language versions. In practice, it is difficult if not impossible to ensure that these different language versions are equivalent in what they convey and achieve. The principle of equal authenticity seeks to ‘paper over the cracks’ between divergent language versions

³⁶⁶ Cosmai (n 174) 43.

³⁶⁷ Leung (n 79) 190.

³⁶⁸ *ibid.*

³⁶⁹ Note that the notion that the EU principle of equal authenticity is a legal or linguistic fiction has been challenged on the basis that “equally authentic language versions do not carry equal meaning but, instead, have *equal status*.” See Baaij, *Legal Integration and Language Diversity* (n 357) 28. However, further consideration of this discussion falls outside the scope of the present thesis.

to create a harmonised whole, and thus entails adoption of a legal fiction intended to negate the reality of divergences between language versions. At the same time, it has been observed that where “total equivalence and correspondence in meaning [are] instituted by authentication [and may thus] be a fiction, this fiction is a legal reality that has force of law. It permits some readings and prohibits others.”³⁷⁰ In other words, regardless of whether equal authenticity is a legal fiction or not, its assertion and upholding by the ECJ gives it real-world effects and means that it has to be considered.

Discussion

As illustrated by the above review, while various parties are involved in EU lawmaking and thus the production of EU legal texts, these parties operate within a set system and framework which limits their influence on the end product, and thus arguably also their responsibility for any resulting divergences. Nevertheless, it can be argued that the meaning of EU legal texts comes into being by two distinct mechanisms, of which document production only constitutes the first, namely *creation*. Creation comprises the stages of drafting, translation and publication. The second mechanism is *application*, which is required because meaning may not be apparent (and indeed may not need to be determined) until a legal text is to be used. The application mechanism encompasses a) interpretation by persons subject to a given legal provision (asking questions like ‘Does this rule apply to me?’ and ‘What must I do or not do?’), b) interpretation by regulatory authorities tasked with

³⁷⁰ Hermans (n 313) 11.

applying a provision (asking questions like 'What does this rule prohibit/permit?'), c) interpretation by national courts asked to interpret and/or enforce a provision (asking questions like 'Is this activity prohibited?' and 'Does a penalty need to be applied?') and d) interpretation by the ECJ (when asked by a national court to determine and/or rule on the meaning or scope of a particular provision of EU law in the form of a preliminary ruling). Accordingly, multiple parties are involved in establishing the meaning of EU legal texts, and thus share responsibility for addressing divergences. Consideration of all persons and parties involved goes beyond the scope of this thesis, and the discussion which follows therefore concentrates on selected stakeholders such as translators, lawyer-linguists and quality managers, as well as individuals, national courts and the ECJ. Having established that EU multilingualism means, in practice, a multilingual legal regime, the next chapter the thesis examines the functioning of that multilingual legal regime by reference to the regulation of relations between the EU and its citizens.

IV. The legal framework for relations between the EU and its citizens

As in the case of nation states – and quite independently of its multilingual nature – the EU’s legal regime provides a legal framework for relations with its citizens. As indicated in Chapter II, this thesis is concerned with the impact of the EU’s multilingual legislative regime at the individual level. This focus on the individual level (as opposed, for example, to effects on entities such as organisations or governments), is validated by two considerations: (1) the fact that European legislation affects the lives of EU citizens directly, and (2) the EU’s own recognition that it impacts individuals, as reflected in its stated aim of giving “citizens access to EU legislation, procedures and information in their own languages”.³⁷¹ Any discussion of the impact and consequences of EU legislation on individuals must begin with an examination of the legal framework governing relations between the Union and its citizens, a framework composed of mutual rights and obligations. As a starting point for the analysis which follows, this chapter considers the potential relevance of social contract theory as an analysis tool, based on its premise that a state and its citizens enter into an implicit or explicit agreement with one another which governs their mutual rights and obligations. In this regard, it is important to clarify that the aim is not to assert or demonstrate that the EU is in fact a state. Rather, social contract theory is proposed as a framework or lens for examining whether the EU, in its role as a governing entity whose multilingual legislative regime directly

³⁷¹ Katsarova (n 298) 2; European Parliament, ‘Framework Strategy for Multilingualism’ (n 179), Specific Comment 8.

impacts individuals, meets its obligations to make the law accessible and to afford legal certainty to its citizens. As a first step towards applying social contract theory in this context, it is necessary first to consider the extent to which the EU can be regarded or treated as a state for analysis purposes.

1. The question of EU statehood

European Union law states explicitly that the EU has legal personality.³⁷² In practice, this means that the EU is an independent entity with power to enter into international agreements, join international organisations and accede to international conventions.³⁷³ Further, the EU has many of the trappings of a nation state, including an elected parliament,³⁷⁴ a single currency,³⁷⁵ an official anthem³⁷⁶ and an official flag.³⁷⁷ At the same time, however, the EU has expressly stated that, “The European Union is not a state, but a unique partnership between European countries”.³⁷⁸ Others have variously described the

³⁷² See Article 47 of the Treaty on European Union (Consolidated Version): “The Union shall have legal personality.”

³⁷³ European Union, ‘Legal Personality of the EU’ (*EUR-Lex*) <<https://eur-lex.europa.eu/EN/legal-content/glossary/legal-personality-of-the-eu.html>> accessed 4 November 2024.

³⁷⁴ European Parliament, ‘Welcome to the European Parliament’ (*About Parliament*) <<https://www.europarl.europa.eu/about-parliament/en>> accessed 4 November 2024.

³⁷⁵ European Union, ‘Official EU Currency’ <https://european-union.europa.eu/institutions-law-budget/euro/official-eu-currency_en> accessed 4 November 2024.

³⁷⁶ European Union, ‘European Anthem’ <https://european-union.europa.eu/principles-countries-history/symbols/european-anthem_en> accessed 4 November 2024.

³⁷⁷ European Union, ‘European Flag’ <https://european-union.europa.eu/principles-countries-history/symbols/european-flag_en> accessed 4 November 2024.

³⁷⁸ European Commission (ed), *EU & ME* (Manuscript completed in June 2017, Publications Office of the European Union 2017) 7.

EU as having “more characteristics in common with federal states”,³⁷⁹ as “an unfinished federal quasi-state”,³⁸⁰ and as a “federal union of states” or “confederation”.³⁸¹ Moreover, the very concept of the ‘state’ and questions such as what a state is and does are debated and the subject of disagreement.³⁸² While the absence of a consensus complicates determination of the EU’s status with respect to statehood, a basic analysis can be carried out based on Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which proposes that, “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”³⁸³

How does the EU measure up to these criteria? Firstly, according to EU data, the Union has “more than 448 million inhabitants”.³⁸⁴ While the number of people living in the territory of the EU can clearly be quantified, this does not necessarily equate to a ‘permanent population’. Specifically, the existence of a cohesive European population has been challenged on the basis that “Europe lacks a European people”³⁸⁵ – or *demos* – with a

³⁷⁹ European Union Center of North Carolina, EU Briefings, ‘Europe as a Political Entity’ 3.

³⁸⁰ Anton Pelinka, ‘The European Union as an Alternative to the Nation-State’ (2011) 24 *International Journal of Politics, Culture, and Society* 21, 23.

³⁸¹ European Union Center of North Carolina (n 379) 3.

³⁸² Erika Cudworth, Tim Hall and John McGovern, *The Modern State: Theories and Ideologies* (2007) 1.

³⁸³ Montevideo Convention on the Rights and Duties of States 1933, Article 1.

³⁸⁴ European Union, ‘People, Size and Open Borders’ <https://european-union.europa.eu/principles-countries-history/facts-and-figures-european-union_en> accessed 4 November 2024.

³⁸⁵ European Union Center of North Carolina (n 379) 4.

common identity and values.³⁸⁶ Not least, it has been argued that “Europeans identify first and foremost with their nation-state”.³⁸⁷ At the same time, however, it has been suggested that “the contemporary nation-state is not the nation-state as described by the textbooks of the past”,³⁸⁸ due to developments such as globalisation and internationalisation of national economies, mass migration and resulting relativity of citizenship, and the increasing prominence of non-state networks and non-state organisations in the exercise of military power.³⁸⁹ Further, it can be argued that commonality of identity and values is a question, not least, of degree and the context in which identification occurs. So, while a German might not identify as European when meeting a Swede, the German and Swede collectively might well identify as European when interacting with persons from another continent or different culture. Therefore, as globalisation continues and the number of persons with significant ties to multiple countries (for example in the form of residence time, work and familial connections and – not least – dual citizenship) grows, the historical understanding of a ‘permanent population’ as a group of persons with a common identity and values may be declining in relevance with respect to the delineation of nation states.

Secondly, the EU has stated that its geographical size is “4 million km²”,³⁹⁰ which must presumably be interpreted as a reference to the territories of the EU member states on the

³⁸⁶ *ibid.*

³⁸⁷ *ibid.*

³⁸⁸ Pelinka (n 380) 21.

³⁸⁹ *ibid.*

³⁹⁰ European Union, ‘People, Size and Open Borders’ (n 384).

basis that the EU is the sum of its parts. Although specification of a quantified area implies fulfilment of the requirement of a 'defined territory', it could be objected that the EU's territory is not fixed, but rather flexible, for several reasons. At the supranational level, it can be argued that the past and potential future accession of new member states leaves the EU's territory subject to change, and thus uncertain. Moreover, the outer bounds of the EU may vary depending on how the term 'border' is defined,³⁹¹ and on how borders are expressed,³⁹² for example in territorial or non-territorial terms³⁹³ or in terms of freedom of movement.³⁹⁴ National borders may also be redrawn over time, for example through mechanisms like secession.³⁹⁵ Nevertheless, it is clear that – at any given time – the EU has an outer border (or set of borders) comprising the borders of its member states, even though those national borders may flex periodically and thus be subject to uncertainty.

³⁹¹ See e.g. Noel Parker and Nick Vaughan-Williams, 'Lines in the Sand? Towards an Agenda for Critical Border Studies' (2009) 14 *Geopolitics* 582, 583: "Borders are not *only* found at territorially identifiable sites such as ports, airports, and other traditional 'border crossings'. Instead, they are increasingly ephemeral and/or impalpable: electronic, non-visible, and located in zones that defy a straightforwardly territorial logic."

³⁹² See Noel Parker and Rebecca Adler-Nissen, 'Picking and Choosing the "Sovereign" Border: A Theory of Changing State Bordering Practices' (2012) 17 *Geopolitics* 773, 787.

³⁹³ Examples of non-territorial borders include, for example "biometric identification to control movement and other technologies designed to track mobility such as social security data, records of financial transactions, spyware placing individuals in distinct groups of consumers, and the many other systems of surveillance"; see Parker and Vaughan-Williams (n 391) 583.

³⁹⁴ Specifically, not all EU member states are also members of the Schengen Area, i.e. the zone composed of European countries which have abolished their internal borders. The Schengen countries include most – but not all – EU member states, as well as some non-EU countries, and the Schengen border thus differs from the collective border of the EU member states; see SchengenVisaInfo, 'Schengen Area Countries' <<https://www.schengenvisa.info.com/schengen-area/>> accessed 4 November 2024.

³⁹⁵ As in the case, for example, of the former Yugoslavia.

Accordingly, the EU can be said to have a defined territory because its borders are determinable at any given time, corresponding to the borders of its member states. Moreover, territorial expansion and contraction have not, historically, been seen as barriers to statehood.³⁹⁶ Further, it has been proposed that the twin processes of constitutionalisation and territorialisation have resulted in “a hardening of the ‘core’ of the European Union”³⁹⁷ in terms of “underlying norms and values”³⁹⁸ and thus a more “clearly defined outer boundary”.³⁹⁹ It has also been suggested that the EU is becoming a “civilizational state” with a “distinct identity in the face of rival value systems.”⁴⁰⁰ In other words, even if – contrary to its own quantitative assertions as quoted above – the EU does not have a ‘permanent population’ and a ‘defined territory’, these may be materialising over time. Moreover, if it is correct that “the contemporary nation-state is not the nation-state as described by the textbooks of the past”,⁴⁰¹ it can be questioned whether a permanent population and defined territory remain absolute requirements for statehood.

³⁹⁶ For example in the case of the United States of America (expansion through addition of new states), Serbia (contraction through unilateral declaration of independence by Kosovo) and Ukraine (contraction through occupation of the Crimean peninsula by Russia).

³⁹⁷ Thomas Christiansen, ‘Towards Statehood? The EU’s Move towards Constitutionalisation and Territorialisation’, Centre for European Studies, University of Oslo, Working Paper No. 21 (2005) 23.

³⁹⁸ *ibid.*

³⁹⁹ *ibid.* 24.

⁴⁰⁰ Andrew Glencross, ‘The EU and the Temptation to Become a Civilizational State’ (2021) 26 *European Foreign Affairs Review* 331, 332.

⁴⁰¹ Pelinka (n 380) 21.

Thirdly, regarding the requirement for a 'government' as a condition of statehood, it can be helpful to consider what a government is by reference to the doctrine of separation of powers. This provides that government should comprise three branches – executive, legislative and judicial – to ensure mutual checks and balances and avoid concentration of power. In other words, if these branches are present within a regulatory structure, this indicates that the structure may constitute a type of governmental entity. The EU has seven primary institutions,⁴⁰² and it has been suggested that all three branches of government are represented among these, with the European Council and the European Commission comprising the executive, the European Parliament and the Council of the European Union comprising the legislative and the Court of Justice of the European Union and the European Court of Auditors comprising the judiciary.⁴⁰³ As noted above, the EU has legal personality and thus power to enter into international agreements, join international organisations and accede to international conventions. In practice, the EU acts as an independent governmental entity in exercising these powers, as exemplified by its membership of and participation in inter-governmental organisations like the World Trade Organization

⁴⁰² The European Council, European Commission, European Parliament, Council of the European Union, Court of Justice of the European Union, European Court of Auditors and European Central Bank.

⁴⁰³ The seventh institution, the European Central Bank, was classed as 'financial'; see Council on Foreign Relations, 'What Are the Main Institutions of the EU?' <<https://www.cfr.org/backgrounders/how-does-european-union-work#chapter-title-0-2>> accessed 4 November 2024.

(WTO)⁴⁰⁴ and Organisation for Economic Co-operation and Development (OECD).⁴⁰⁵ In addition, and fourthly, the EU clearly has 'capacity to enter into relations with the other states', as exemplified by its negotiation and conclusion of bilateral agreements with nation states, particularly in the area of trade.⁴⁰⁶ A further example is the ongoing process of EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Prima facie*, therefore, the EU appears to fulfil all four formal criteria for definition as a state as per Article 1 of the Montevideo Convention.

A further relevant consideration is that nationals of EU member states are explicitly described as EU citizens⁴⁰⁷ and are granted EU citizenship,⁴⁰⁸ a status which confers both rights and obligations.⁴⁰⁹ In this regard, it is interesting to note that EU citizenship is inextricably linked

⁴⁰⁴ See World Trade Organization, 'The European Union and the WTO' <https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm> accessed 4 November 2024.

⁴⁰⁵ See OECD, 'The European Union and the OECD' <<https://www.oecd.org/en/countries/european-union.html>> accessed 4 November 2024.

⁴⁰⁶ See European Commission, 'Negotiations and Agreements' <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en> accessed 4 November 2024.

⁴⁰⁷ See European Commission, 'EU Citizenship and Democracy' <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/eu-citizenship-and-democracy_en> accessed 4 November 2024.

⁴⁰⁸ See Article 20(1) of the 'Treaty on the Functioning of the European Union' (n 209): "Every person holding the nationality of a Member State shall be a citizen of the Union." See also Article 9 of the Treaty on European Union (Consolidated Version): "Every national of a Member State shall be a citizen of the Union."

⁴⁰⁹ See Article 20(2) of the 'Treaty on the Functioning of the European Union' (n 209): "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties."

with and “an ‘additional’ status vis-à-vis Member State nationality”,⁴¹⁰ where “Member States control the *acquisition* of Union citizenship through their competence to grant nationality”.⁴¹¹ EU citizenship can be viewed as an added layer of supranational rights which is founded and dependent on member state nationality, as exemplified by the entitlement of EU citizens to protection by embassies of other EU member states in situations where their home state is not represented in the location where they require assistance.⁴¹² Despite conferring separate and additional supranational rights, however, EU citizenship does not exist independently of member state nationality. The ECJ has held that “citizenship of the Union requires possession of the nationality of a Member State”,⁴¹³ based on “an inseparable and exclusive link between possession of the nationality of a Member State and not only the acquisition, but also the retention, of the status of citizen of the Union.”⁴¹⁴ In the context of the UK’s withdrawal from the European Union, therefore, the ECJ has held that, “The loss of

⁴¹⁰ J Shaw and N Nic Shuibhne, ‘General Report: Union Citizenship: Development, Impact and Challenges’ in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen*, vol 2 (1st edn, DJØF Publishing 2014) 222; see also Article 20(1) of the ‘Treaty on the Functioning of the European Union’ (n 209), which states, in part: “Citizenship of the Union shall be additional to and not replace national citizenship.” See also Article 9 of the Treaty on European Union (Consolidated Version), which contains identical wording.

⁴¹¹ Shaw and Nic Shuibhne (n 410) 224.

⁴¹² See Article 20(2)(c) of the ‘Treaty on the Functioning of the European Union’ (n 209).

⁴¹³ *EP v Préfet du Gers, Institut national de la statistique et des études économiques* [2022] European Court of Justice Case C-673/20, para 46.

⁴¹⁴ Case C-673/20, *ibid*, para. 48; see also para. 57: “possession of the nationality of a Member State is an essential condition for a person to be able to acquire and retain the status of citizen of the Union”.

nationality of a Member State⁴¹⁵... entails, for the person concerned, the automatic loss of his or her status as a citizen of the Union.⁴¹⁶ Regardless of the means by which EU citizenship is gained (or lost), however, it is clear that the rights granted to EU citizens are extensive, encompassing access to institutional EU documents,⁴¹⁷ data protection,⁴¹⁸ non-discrimination,⁴¹⁹ freedom of movement,⁴²⁰ voting and political participation,⁴²¹ diplomatic protection,⁴²² language⁴²³ and contacting and/or petitioning EU institutions.⁴²⁴ While attempts to introduce a formalised EU constitution have been unsuccessful to date,⁴²⁵ the EU has adopted the European Union Charter of Fundamental Rights, which “sets out... the whole range of civil, political, economic and social rights of European citizens”.⁴²⁶ The Charter rights include rights recognisable from the constitutions of individual nation states,

⁴¹⁵ Meaning, in this context, continuing nationality of an ex-EU member state, rather than loss/withdrawal of nationality of/by a country which remains an EU member state. Different considerations may apply in the latter category of cases; see Case C-673/20, *ibid*, para. 62.

⁴¹⁶ Case C-673/20, *ibid*, para. 57.

⁴¹⁷ See Article 15(3) of the ‘Treaty on the Functioning of the European Union’ (n 209).

⁴¹⁸ *ibid*, Article 16(1).

⁴¹⁹ *ibid*, Article 18 and Article 19(1).

⁴²⁰ *ibid*, Article 20(2)(a) and Article 21(1).

⁴²¹ *ibid*, Article 20(2)(b) and Article 22.

⁴²² *ibid*, Article 20(2)(c) and Article 23.

⁴²³ *ibid*, Article 20(2)(d) and Article 24.

⁴²⁴ *ibid*, Article 24.

⁴²⁵ See European Parliament, ‘Draft Treaty Establishing a Constitution for Europe (Not Ratified)’ (*About Parliament*) <<https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe>> accessed 4 November 2024.

⁴²⁶ European Parliament, ‘The Charter of Fundamental Rights of the European Union’ <https://www.europarl.europa.eu/charter/default_en.htm> accessed 4 November 2024.

with examples including protection of human dignity,⁴²⁷ the right to life,⁴²⁸ freedom of thought, conscience and religion⁴²⁹ and equality before the law.⁴³⁰ The fact that the draft EU constitution sought to incorporate – and thus give constitutional status to – the Charter of Fundamental Rights indicates that the EU regards itself as a body with constitutional powers. Further, the European Union has developed a body of law analogous to EU constitutional law. Some parts of this body of law have been established through case law – notably the principles of direct effect⁴³¹ and state liability⁴³² – while others like the primacy

⁴²⁷ See Article 1 of the Charter of Fundamental Rights of the European Union and Article 1 of the Basic Law for the Federal Republic of Germany. For a non-EU member state example, see Article 7 of the Federal Constitution of the Swiss Confederation.

⁴²⁸ See Article 2 of the Charter of Fundamental Rights of the European Union and Article 2 of the Basic Law for the Federal Republic of Germany. For a non-EU member state example, see Article 10 of the Federal Constitution of the Swiss Confederation.

⁴²⁹ See Article 10 of the Charter of Fundamental Rights of the European Union and Article 4 of the Basic Law for the Federal Republic of Germany. For a non-EU member state example, see Article 15 of the Federal Constitution of the Swiss Confederation.

⁴³⁰ See Article 20 of the Charter of Fundamental Rights of the European Union and Article 3 of the Basic Law for the Federal Republic of Germany. For a non-EU member state example, see Article 8 of the Federal Constitution of the Swiss Confederation.

⁴³¹ Established in *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] European Court of Justice Case 26-62 and defined as the “ability of a piece of European Union (EU) legislation to be enforced by an individual in a court of a member state”; see Thomson Reuters Practical Law, ‘Direct Effect (EU)’ <[https://uk.practicallaw.thomsonreuters.com/6-107-6114?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/6-107-6114?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 4 November 2024.

⁴³² Established in *Joined cases C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] European Court of Justice *Joined cases C-6/90 and C-9/90* (para. 37) and defined as the principle “which allows an individual to claim damages from a Member State for non-compliance with Union law”; see LexisNexis, ‘State Liability Definition’ <<https://www.lexisnexis.co.uk/legal/glossary/state-liability>> accessed 4 November 2024.

of EU law⁴³³ are enshrined in treaties which have been ratified and are binding on the EU member states and grant individual rights.⁴³⁴ In addition, as a consequence of the allocation of competences between the EU and its member states, the EU has power to legislate in areas of direct relevance to EU citizens, i.e. to “subject human conduct to the governance of legal and other types of rule”.⁴³⁵ Article 2 of the Treaty on the Functioning of the European Union (TFEU) sets out various allocations of competence between the EU and its member states. The two primary categories of EU competence for present purposes are “exclusive competence in a specific area” (Article 2(1)) and shared “competence... with the Member States in a specific area” (Article 2(2)).⁴³⁶ Exclusive and shared competence are further defined in Articles 3 and 4 of the Treaty, respectively. Exclusive competence is reserved for the EU in relation to customs union, competition rules necessary for the functioning of the internal market, monetary policy for Member States which have adopted the euro as their currency, conservation of marine biological resources under the common fisheries policy, common commercial policy and the conclusion of certain types of international

⁴³³ Defined as the principle that “where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law will prevail”; see European Union, ‘Primacy of EU Law (Precedence, Supremacy)’ (n 210).

⁴³⁴ See Declaration 17 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

⁴³⁵ William Lucy, ‘Access to Justice and the Rule of Law’ (2020) 40 *Oxford Journal of Legal Studies* 377, 386.

⁴³⁶ Further competences include competence to provide arrangements for “Member States [to] coordinate their economic and employment policies” (Article 2(3)), “competence... to define and implement a common foreign and security policy, including... a common defence policy” (Article 2(4)) and “competence to carry out actions to support, coordinate or supplement the actions of the Member States” (Article 2(5)).

agreement.⁴³⁷ Shared competence, on the other hand, applies to the internal market, certain aspects of social policy, economic, social and territorial cohesion, agriculture and fisheries (excluding the conservation of marine biological resources), environment, consumer protection, transport, trans-European networks, energy, freedom, security and justice, certain common safety concerns related to public health, research, technological development and space, and development cooperation and humanitarian aid.⁴³⁸ The exact delimitation of competences is the subject of debate and sometimes litigation between members states and the EU. While detailed consideration of this topic falls outside the scope of the present thesis, it is interesting – in view of the discussion which follows – to note that the EU has reserved for itself a degree of exclusive competence with respect to the rule of law, with the ECJ ruling that “[c]ompliance by a Member State with the values enshrined in Article 2 TEU⁴³⁹ is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law”.⁴⁴⁰ Put another way, “while national authorities have ‘a certain degree of discretion’ when it comes to implementing rule of law principles in light of the specific features of each national legal system, this cannot be construed as *carte blanche* not to

⁴³⁷ Article 3(1)(a)–(e) and Article 3(2) TFEU.

⁴³⁸ Articles 4(2), 4(3) and 4(4) TFEU.

⁴³⁹ Article 2 TEU states that, “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”

⁴⁴⁰ *Hungary v Parliament and Council* [2021] European Court of Justice Case C-156/21, para. 214.

respect EU rule of law principles or backsliding post accession".⁴⁴¹ Based on the above, it is clear that the Union has a direct impact on individuals within its territory in a broad range of areas, some subject to the EU's exclusive competence and some in which competence is shared with member states but the EU still has scope for exerting influence. These areas include ones with potentially wide-ranging, direct impacts on individuals, such as consumer protection, monetary policy, and – not least – the rule of law. An additional consideration is that individuals can be held criminally liable for non-compliance with EU legal rules through national courts' application of EU legal texts (in relevant cases based on interpretative rulings issued by the European Court of Justice).⁴⁴²

Despite the numerous indicators of EU statehood discussed above, the legal status of the EU remains debated, and the EU does not regard itself as a state. Nevertheless, the above discussion suggests that the EU fulfils formal criteria for definition as a state (exemplified by the Montevideo criteria), regards and treats citizens of its member states as EU citizens, grants EU citizens rights and recognises that they have duties, and issues legal rules which directly affect individuals. As stated previously, this thesis is concerned with the impact of the EU's multilingual legislative regime at the individual level, and from the perspective of the individual citizen there do not appear to be any significant differences between the EU

⁴⁴¹ Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) Hague J Rule Law 14, 117.

⁴⁴² See, for example, *Criminal proceedings against Hans Röser* [1986] European Court of Justice Case 238/84 and *Criminal proceedings against Dirk Endendijk* [2008] European Court of Justice Case C-187/07.

and a nation state. Accordingly, there are grounds for concluding that – at least in terms of individual impact – the EU functions as “a super-state, where citizens of all member states enjoy electoral rights [and where EU] law is supreme to the national law of member states... and has direct effect on citizens of member states”.⁴⁴³ If this view is adopted, it becomes unnecessary to determine the Union’s precise statehood status in international law, as the focus is not on formal classification, but rather on actual effect. Accordingly, the discussion which follows is based on the proposition that a distinction can be made between *de jure* statehood and *de facto* statehood, where *de jure* statehood equates to fulfilment of formal statehood requirements under international law (whether in the form of the Montevideo criteria or others) and *de facto* statehood concerns the actual, real, everyday impact of a state-like entity on persons within its territory. Regardless of whether or not the EU has *de jure* statehood, it can be argued that it exercises *de facto* statehood based on considerations such as the citizenship status it assigns to nationals of its member states, the rights and duties it grants to and imposes on its citizens, and its lawmaking powers over EU citizens. At the same time, it is important to acknowledge that the EU has, at most, limited statehood, in the sense that its statehood is not consolidated, i.e. that the EU does not “control the entire territory, do[es] not completely enjoy a monopoly on the means of violence, and/or [has] limited [capacity] to enforce and implement decisions, at least in some policy areas”.⁴⁴⁴

⁴⁴³ Leung (n 79) 103, see also Cosmai (n 174) 37.

⁴⁴⁴ Thomas Risse, ‘Limited Statehood: A Critical Perspective’ in Stephan Leibfried and others (eds), *The Oxford Handbook of Transformations of the State* (Oxford University Press, 2015) 156.

That this applies to the EU is clear, not least, from the allocation of competences between the Union and its member states as discussed above. While it could perhaps be argued that this “inter-dependent coexistence of societal orders”⁴⁴⁵ is a factor indicating the existence of a form of hybrid statehood,⁴⁴⁶ detailed classification is not required for the purposes of the present discussion. What is key is the conclusion that in areas relevant to individuals subject to the EU’s governance, the EU functions as a state *in fact*, if not *in law*. This insight paves the way for examining relations between the EU and its citizens through the lens of social contract theory.

2. The social contract

Above, it has been suggested that the European Union can be brought within the scope of social contract theory by treating it as a *de facto* state. However, this argument is not the only ground on which social contract theory is relevant as a tool for analysing relations between the EU and its citizens. An alternative approach is to consider whether the scope of social contract theory itself can be expanded from covering states alone to including state-like entities. A brief historical overview of what social contract theory is and posits is helpful in this regard.

⁴⁴⁵ Lene Faust and Christian Franke, ‘Hybrid statehood – a new perspective on the limits of statehood in (Southern) EU-Europe’ (2024) *Cogent Social Sciences* 10(1), 4.

⁴⁴⁶ *ibid.*

Relations between a state and its subjects can be viewed as being regulated by an explicit or implicit agreement on mutual benefits and obligations, sometimes referred to as the 'social contract'.⁴⁴⁷ The concept of the social contract has deep historical roots, with different authors employing a variety of terms to refer to overlapping concepts at different times. For example, Plato argued that anyone who agrees to remain within the jurisdiction of a state after seeing how that state governs has entered into a "compact" with the authorities to do what they order.⁴⁴⁸ Hobbes wrote of a "mutuall Contract",⁴⁴⁹ while Locke referred to an "original compact" by which individuals "incorporate into one society" and "submit to the determination of the majority".⁴⁵⁰ Rousseau used the term "social pact"⁴⁵¹ to describe an arrangement under which individuals submit to "the supreme direction of the general will" and in return become "an indivisible part of the whole."⁴⁵² Finally, Kant referred to a *contractus originarius* (original contract) or *pactum sociale* (social pact or agreement) "on which alone a civil and thus consistently legal constitution among men can be based and a

⁴⁴⁷ In the present discussion, the relevance of social contract theory is limited to the theory's description of the basic mechanism of interaction between individuals and the state and the obligations and expectations that arise in this interaction. Debates on whether social contract theory is applicable to all aspects of society, and thus also critiques of the theory based on, for example, feminist and race grounds, fall outside the scope of the discussion.

⁴⁴⁸ Henry Cary, *Plato's Apology, Crito and Phaedo of Socrates* (Andrews UK Ltd 2013) 64.

⁴⁴⁹ Thomas Hobbes, *Leviathan* (Lerner Publishing Group 2018) 133.

⁴⁵⁰ John Locke and Ian Shapiro, *Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press 2003), para. 97.

⁴⁵¹ Jean-Jacques Rousseau and others, *The Social Contract and the First and Second Discourses* (Yale University Press 2002) 163.

⁴⁵² *ibid* 164.

community established”.⁴⁵³ Following an extended period out of favour, social contract theory was revived by Rawls in his work *A Theory of Justice*, which refers to a “social contract” or “original agreement” of which “the principles of justice for the basic structure of society are the object”.⁴⁵⁴ More specifically, Rawls envisaged “social cooperation”, i.e. cooperation between individuals and the state, which (1) is “guided by publicly recognized rules and procedures which those who are cooperating accept and regard as properly regulating their conduct”; (2) entails “[f]air terms of cooperation [which] specify an idea of reciprocity or mutuality”; and (3) is to “each participant’s rational advantage”.⁴⁵⁵ As Gauthier subsequently put it, the contractarian approach provides a basis for “distinguishing what one may and may not do.”⁴⁵⁶ Finally, it is interesting to note that the ECJ has adopted similar reasoning when considering the EU’s competence to regulate matters related to the rule of law, stating – as noted above – that “[c]ompliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State.”⁴⁵⁷

⁴⁵³ Immanuel Kant, George Miller and EB Ashton, *On the Old Saw: That May Be Right in Theory But It Won't Work in Practice* (University of Pennsylvania Press 1974) 65.

⁴⁵⁴ John Rawls, *A Theory of Justice: Revised Edition* (Belknap Press (Harvard University Press) 1999) 10.

⁴⁵⁵ John Rawls, ‘Justice as Fairness: Political Not Metaphysical’ (1985) 14 *Philosophy & Public Affairs* 30, 232.

⁴⁵⁶ David Gauthier, *Morals by Agreement* (Oxford University Press 1987), section 3.1.

⁴⁵⁷ *Hungary v Parliament and Council* [2021] European Court of Justice Case C-156/21, para. 214.

The brief review above shows that social contract theory as expounded by various authors over time has focused on relations between individuals and the authorities who rule them, with the latter typically being personified as government or the nation state. While it is clear that no individuals have entered into a compact, contract, pact or agreement with the EU, member states have done so in the form of various treaties⁴⁵⁸ by which they have submitted (as per Rousseau) to “the supreme direction of the general will” and in return become “an indivisible part of the whole.”⁴⁵⁹ Moreover, a key aspect of European cooperation is (as per Rawls), the adoption of “rules and procedures which those who are cooperating accept and regard as properly regulating their conduct” and “[f]air terms of cooperation [which] specify an idea of reciprocity or mutuality” which are to “each participant’s rational advantage”.⁴⁶⁰ These two factors suggest that relations between the EU and its member states can, at any rate, be regarded as a form of social contract. The analysis can be taken further, however, since the EU is not simply an international body concerned with political dialogue and/or limited international treaty-making. Unlike the United Nations, for example, it engages – as discussed in Chapter III – in extensive lawmaking which takes precedence over national member state law, and many of the laws it adopts affect the lives of individuals. It is thus arguable that by ceding sovereignty to the EU in a variety of policy areas, EU member states

⁴⁵⁸ In the form of the so-called founding agreements, ranging from the Treaty establishing the European Coal and Steel Community (1951–2002) to the latest iteration, the Treaty of Lisbon (2007–); see European Union, ‘Founding Agreements’ <https://european-union.europa.eu/principles-countries-history/principles-and-values/founding-agreements_en> accessed 4 November 2024.

⁴⁵⁹ Rousseau and others (n 451) 164.

⁴⁶⁰ Rawls (n 455) 232.

have assigned or surrendered control of many elements of the state-citizen relationship to a third party. On this view, many important aspects of the daily lives of EU citizens can be said to be governed more by the EU than by their home (member) state.⁴⁶¹ Adopting the definition of 'government' as "the system used for controlling a country, city, or group of people"⁴⁶² or "the activities involved in controlling a country, city, group of people",⁴⁶³ the EU can be viewed as an additional level of government, or even as the supreme governing body, with respect to many aspects of the daily lives of people within its territory. Factors such as the grant of EU citizenship and individual rights and obligations, as discussed above, further support this view. Given that EU member states have handed extensive aspects of governance over to the EU, there cannot be any objection in principle to examining relations between individuals within the EU and their highest governing body from the perspective of social contract theory. Put another way, social contract theory can (and must) be expanded to encompass new forms of supranational government such as that represented by the European Union.

⁴⁶¹ Specifically, EU member states have ceded some or all of their sovereignty in numerous areas including, for example, monetary policy, trade (the single market), employment and social affairs, consumer protection, transport, energy and – not least – justice and fundamental rights; see European Commission, 'Areas of EU Action' <https://commission.europa.eu/about-european-commission/role-european-commission/law/areas-eu-action_en> accessed 4 November 2024.

⁴⁶² Cambridge Dictionary, 'Government' <<https://dictionary.cambridge.org/dictionary/english/government>> accessed 4 November 2024.

⁴⁶³ *ibid.*

Above, three distinct grounds have been presented for the use of social contract theory to analyse relations between the EU and individuals subject to its governance. The first argument is that the EU fulfils formal criteria for recognition as a state irrespective of the legal status the EU itself claims to have. The second argument is that, even if the EU is not a state in law, it functions as a state in fact. The third and final argument is that the scope of social contract theory can and must be expanded to include state-like actors such as the EU. While it is clear, as noted above, that the EU has limited statehood at most, due to lacking – for example – exclusive territorial control, a monopoly on coercive powers and complete fiscal sovereignty, it is equally clear that the EU exercises legislative power, confers rights on its citizens and passes legislation imposing obligations on individuals. On this basis, it is legitimate to analyse relations between the EU and its citizens from a contractarian perspective, particularly with respect to individual legal certainty in the multilingual EU legal regime. Moreover, other analytical approaches such as multi-level governance, post-national constitutionalism and regulatory legitimacy are not a viable alternative for present purposes, as their structural and/or procedural focus does not provide a normative basis for evaluating the fairness or otherwise of the EU's multilingual legislative regime from the individual perspective. In contrast, social contract theory – through its emphasis on mutual rights and obligations – provides a basis for examining the moral obligations of a governing entity vis-à-vis its subjects, and therefore constitutes a more suitable platform for assessing the legitimacy of that entity's implemented legal regime.

The starting point for such an analysis of the EU's multilingual legislative regime is the emphasis (as per Rawls and Gauthier), on informing citizens so that they can know the bounds of their rights and obligations vis-à-vis the state. According to Rawls, such bounds (and the system in which they apply) can be described as "a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation."⁴⁶⁴ Further, just (or fair) rules "establish a basis for legitimate expectations",⁴⁶⁵ and when the basis for such expectations is unsure "so are the boundaries of men's liberties."⁴⁶⁶

In the context of this thesis, the above implies that a lack of clarity with respect to the rights and obligations of EU citizens resulting from differences between language versions of EU legislation would not only create uncertainty about the "boundaries of men's liberties"⁴⁶⁷ within the EU, but would also be contrary to the EU's stated objective of giving its citizens access to EU law in their own languages.⁴⁶⁸ In other words, it is desirable both that EU citizens have access to information and that they are able to understand it, i.e. to comprehend the rules that apply to them.⁴⁶⁹ In this regard, reference can be made to a

⁴⁶⁴ Rawls (n 454) 207.

⁴⁶⁵ *ibid.*

⁴⁶⁶ *ibid.*

⁴⁶⁷ *ibid.*

⁴⁶⁸ Katsarova (n 298) 2; European Parliament, 'Framework Strategy for Multilingualism' (n 179), Specific Comment 8

⁴⁶⁹ In this respect, an analogy can be drawn with the criminal-law context, in which accused persons must be able to understand the charges they face. See, for example, European

number of principles, or “precepts of the rule of law”,⁴⁷⁰ developed by Rawls to define the “framework for social cooperation”.⁴⁷¹ The first of these, that “ought implies can”,⁴⁷² proposes that anything a person ‘ought’ (i.e. is required) to do should also be something they ‘can’ (i.e. is within their power to) do. By extension, the “legal system should recognize impossibility of performance as a defense, or at least as a mitigating circumstance... It would be an intolerable burden on liberty if the liability to penalties was not normally limited to actions within our power to do or not to do.”⁴⁷³ Rawls’ second precept is that “similar cases be treated similarly” (also formulated as “that like decisions be given in like cases” and the “requirement of consistency”).⁴⁷⁴ The third precept outlined by Rawls is summarised as “no offense without law”, and includes the requirement that “laws be known and expressly promulgated, that their meaning be clearly defined”, not least so that “statutes are [...] clear in what they enjoin and forbid [so that] the citizen [can] know how he is to behave.”⁴⁷⁵ Potential breaches of this requirement include vagueness and imprecision.⁴⁷⁶ Rawls’ fourth precept is that of “natural justice”, i.e. “guidelines intended to preserve the integrity of the judicial process”.⁴⁷⁷ This precept can be linked to Rawls’ proposition that, “Each member of

Commission Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report*. (Publications Office 2012) 69.

⁴⁷⁰ Rawls (n 454) 208.

⁴⁷¹ *ibid* 207.

⁴⁷² *ibid* 208.

⁴⁷³ *ibid*.

⁴⁷⁴ *ibid* 208–209.

⁴⁷⁵ *ibid* 209.

⁴⁷⁶ *ibid* 210.

⁴⁷⁷ *ibid* 209–210.

society is thought to have an inviolability founded on justice [...] which even the welfare of every one else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded. Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests."⁴⁷⁸ In summary, therefore, Rawls proposed that it must be possible for citizens to comply with imposed obligations, that citizens must be treated consistently, that citizens' obligations must be communicated and clear, and that the judicial process must be fair in the sense of both procedural integrity and exclusion of extraneous considerations. In other words, "for an agreement to be valid, the parties must be able to honor it under all relevant and foreseeable circumstances. There must be a rational assurance that one can carry through."⁴⁷⁹

In the context of relations between the EU and its citizens, the above suggests that EU citizens must be able to comply with their obligations under EU law under all relevant and foreseeable circumstances, and that ensuring this is the responsibility of the Union. What happens when EU citizens cannot fulfil their obligations, either generally or in specific circumstances? Are there grounds for objecting to a situation where compliance is expected and non-compliance is penalised even though compliance is impossible due to a lack of

⁴⁷⁸ *ibid* 24–25.

⁴⁷⁹ *ibid* 153.

(correct) information? The next section considers these questions by references to a number of conceptions of the rule of law.

3. Conceptions of the rule of law

The rule of law has high priority for the EU, with the European Commission stating that “[t]he EU is based on the rule of law”⁴⁸⁰ and Article 2 of the Treaty on European Union providing that “[t]he Union is founded on... the rule of law”. At a general level, the rule of law has been defined as a “mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally prevents the arbitrary use of power.”⁴⁸¹ Further, it has been suggested that the rule of law demands that “people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, *ad hoc*, or purely discretionary manner on the basis of their own preferences or ideology.”⁴⁸² In other words, the rights and obligations of citizens vis-à-vis a state arise, exist and are enforced within a legal framework or system defined by legal rules adopted by the state, and this system must fulfil certain conditions in order for the ideal of the rule of law to be

⁴⁸⁰ European Commission, ‘Rule of Law’ <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/policy-highlights/rule-law_en> accessed 4 November 2024.

⁴⁸¹ Naomi Choi, ‘Rule of Law’, *Encyclopaedia Britannica* (2024) <<https://www.britannica.com/topic/rule-of-law>> accessed 4 November 2024.

⁴⁸² ‘The Rule of Law’, *Stanford Encyclopedia of Philosophy* (2016) <<https://plato.stanford.edu/entries/rule-of-law/#RuleLawRuleLaw>> accessed 4 November 2024.

upheld. That this applies equally to the legal system created and enforced by the EU is apparent from the EU's own definition of the rule of law: "Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts."⁴⁸³ In practice – according to the EU itself – "[t]he rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law."⁴⁸⁴ This is echoed, for example, by the rule-of-law conception adopted by the United Nations (UN), which states that the rule of law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."⁴⁸⁵

⁴⁸³ European Commission, '2020 Rule of Law Report' (2020) COM(2020) 580 final 1.

⁴⁸⁴ *ibid.*

⁴⁸⁵ United Nations Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) S/2004/616 4.

Elements of the UN's definition of the rule of law can also be found in Fuller's work *The Morality of Law*, in which Fuller proposed eight so-called "demands of the law's inner morality"⁴⁸⁶ (also referred to as 'precepts' or 'desiderata') which – according to Simmonds – must be fulfilled in order for a legal system to exist.⁴⁸⁷ These are that rules must be (i) made and (ii) promulgated; (iii) consistent and (iv) non-retrospective; and neither (v) require the impossible nor (vi) be radically unclear; nor be (vii) contradictory. Finally, within a system of such rules, there must be (viii) congruence between official action and the content of those rules. Other writers have subsequently rephrased the desiderata, albeit without materially altering their content. For example, Lucy refers to "generality (there must be rules), promulgation, non-retroactivity, clarity, consistency (the law being free of contradictions), possibility (the law-setting standards with which human beings can comply), stability (or constancy of law over time), and congruence between declared law and official conduct",⁴⁸⁸ while Simmonds has summarised the desiderata as "(i) rules [which] must be (ii) published, (iii) prospective, (iv) intelligible, (v) free from conflict and contradiction, (vi) possible to comply with, (vii) not constantly changing, and there should be (viii) congruence between the declared rule and official action."⁴⁸⁹ These desiderata can perhaps be summarised by the statement that "all [societies] require stability and predictability, and above all they must

⁴⁸⁶ Lon L Fuller, *The Morality of Law* (Revised edition, Yale University Press 1969) 39.

⁴⁸⁷ Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press 2008) 65.

⁴⁸⁸ William Lucy, 'The Normative Standing of Access to Justice: An Argument from Non-Domination' [2016] *Windsor Yearbook of Access to Justice* 32, 254.

⁴⁸⁹ Simmonds (n 487) 65.

be intelligible to those subject to them, for people to feel at home within the framework of the law, and to have the confidence and self-reliance to plan their life."⁴⁹⁰

The desiderata above can be supplemented by rule-of-law principles proposed by Raz for the purpose – not least – of ensuring that government actions “maintain stability and predictability, and thus enable individuals to find their way and to live well.”⁴⁹¹ Raz has identified five principles⁴⁹² as common to most accounts of the rule of law, namely that the law must be (1) reasonably clear, (2) reasonably stable, and (3) publicly available, and that there must be (4) general rules and standards which are (5) applied prospectively and not retroactively. He also elaborated a number of additional requirements, including that, “The process of reaching the decision should be fair and unbiased” and that, “The decisions should be reasonable, relative to their declared reasons.”⁴⁹³ Further, “if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it.”⁴⁹⁴ Put another way, it can be asked, “How can law’s

⁴⁹⁰ Joseph Raz, ‘The Law’s Own Virtue’ (2019) 39 Oxford Journal of Legal Studies 1, 2.

⁴⁹¹ *ibid.*

⁴⁹² *ibid.* 3.

⁴⁹³ *ibid.* 8. In summary, the other requirements are: (6) The reasons for which decisions are made should be publicly declared; (8) The process of reaching a decision should allow proper opportunities to consider relevant arguments and information; (10) Presumptive conventions: establishing that government actions were undertaken in the belief that they serve the interests of the governed; and (11) The doctrine of the rule of law and its main implications should be part of the public culture, embedded in education and public discourse, and taken as obvious and vital by all.

⁴⁹⁴ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 214.

addressees be guided by either contradictory injunctions or injunctions with which it is impossible to comply?"⁴⁹⁵ As Lucy has commented, "That a legal system, to comply with the rule of law, must have general rules of some kind, and that those rules must be promulgated, surely implies that addressees of a legal system can know the demands that this system makes upon them".⁴⁹⁶ Maxeiner has stated that the application of the law must be "impartial; provide parties who are sanctioned an opportunity to be heard; and deliver predictable, consistent decisions in individual cases",⁴⁹⁷ and further suggested that, "These requirements... make voluntary compliance with law possible[,] mean that law can guide those subject to it [and] protect persons subject to the law from the arbitrary use of the power to make and apply law."⁴⁹⁸

It has been suggested that the rule of law can be viewed in two distinct ways. The first perspective is what Dworkin calls the 'rule-book' conception. This "insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all."⁴⁹⁹ This conception also implies, however, that as long as rules are in the rule book, they can be applied. In other words, the content of rules is considered "a matter of substantive justice,

⁴⁹⁵ Lucy (n 435) 388.

⁴⁹⁶ Lucy (n 488) 254.

⁴⁹⁷ James R Maxeiner, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2007) 15 *Tulane Journal of International and Comparative Law* 69, 546.

⁴⁹⁸ *ibid.*

⁴⁹⁹ Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1985) 11.

and that substantive justice is an independent ideal, in no sense part of the ideal of the rule of law.”⁵⁰⁰ Echoing social contract theory as discussed above, Dworkin’s second conception of the rule of law – the so-called ‘rights’ conception – “assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole.”⁵⁰¹ In the second conception, there is no distinction “between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.”⁵⁰² If the rights conception equates to substantive justice, the rule-book conception can perhaps be said to equate to procedural justice. It is clear that justice as a concept spans a range of different forms which are determined not least by the focus of the person defining or pursuing it.⁵⁰³ Justice has been variously defined as, for example, “greatest equal liberty”, “equality of opportunity” and “average utility”.⁵⁰⁴ As noted above, the focus of this thesis is on the impact of the EU’s multilingual legislative regime at the individual level, i.e. on individual outcomes and thus on substantive justice. Accordingly, the discussion which follows fits best with the rights conception, which integrates substantive justice as an integral aspect of the rule of law.

⁵⁰⁰ *ibid.*

⁵⁰¹ *ibid.*

⁵⁰² *ibid.* 12.

⁵⁰³ Such as corrective, retributive and distributive justice; see Lucy (n 435) 379. Further consideration of alternative forms of justice falls outside the scope of this thesis, although it is recognised that they are also the subject of debate (for example in the case of distributive justice – i.e. “the proper distribution of the benefits and burdens of social cooperation”, see *ibid.* – which has been identified as “currently justice’s most difficult and contested aspect”, see *ibid.*).

⁵⁰⁴ Rawls (n 454) 107.

Moreover, the EU's own definition of the rule of law as noted above suggests that the EU itself has adopted a rights-based conception of the rule of law, given the incorporation of principles such as legality, legal certainty, impartiality of the courts, separation of powers and equality before the law. These principles both provide guidance on what the rule of law requires and indicate – at least in general terms – areas in which a failure to uphold the rule of law may arise. This illustrates that violations or breaches of the rule of law by a state may take various forms, as also suggested by Dworkin's identification of three "dimensions of failure" with respect to the rule of law, namely (1) failure by the state "in the *scope* of the individual rights it purports to enforce";⁵⁰⁵ (2) failure "in the *accuracy* of the rights it recognizes";⁵⁰⁶ and (3) failure "in the *fairness* of its enforcement of rights".⁵⁰⁷ Central to the concept of the social contract is what Rawls has described as a notion of reciprocity or mutuality.⁵⁰⁸ According to Fuller, "there is a kind of reciprocity between government and the citizen with respect to the observance of rules"⁵⁰⁹ whereby government communicates rules to citizens and assures them that "they are the rules that will be applied to your conduct."⁵¹⁰ However, "[w]hen this bond of reciprocity is finally and completely ruptured by

⁵⁰⁵ Dworkin (n 499) 12, further defined as declining "to enforce rights against itself, for example, though it concedes citizens have such rights."

⁵⁰⁶ *ibid*, illustrated by the scenario that a state "might provide for rights against the state, but through official mistake fail to recognize important rights".

⁵⁰⁷ *ibid*, exemplified by the possibility that the state "might adopt rules that put the poor or some disfavored race at a disadvantage in securing the rights the state acknowledges they have."

⁵⁰⁸ Rawls (n 455) 232.

⁵⁰⁹ Fuller (n 486) 39.

⁵¹⁰ *ibid* 40.

government, nothing is left on which to ground the citizen's duty to observe the rules."⁵¹¹ Put another way, "A law maker cannot treat her addressees as responsible beings if she refuses to make general rules by which they can guide their conduct, does not bother to tell them the rules by which she will judge them, or announces impossible, retrospective, inconsistent, unintelligible or utterly contradictory rules."⁵¹² Moreover, in Chapter II above, close links were noted between the legitimacy of a system of rules and the perceived legitimacy of the rules or laws applicable to participants in the system, and specifically the suggestion that "[t]he more plausible a community's perception of a rule's legitimacy, the more persuasive that rule's claim to fairness..."⁵¹³ This suggests that a situation as described above – where participants (citizens) in a legal regime are subject to rules which are impossible, retrospective, inconsistent, unintelligible or contradictory – can arguably be described not only as a failure to treat citizens as responsible beings, but also as fundamentally unfair or unjust. In line with Lucy's suggestion that reciprocity is an access to justice issue,⁵¹⁴ the next section considers access to justice specifically.

4. Access to justice

As noted above, justice can take different forms and is, to some extent at least, defined by the focus of the person pursuing it. This carries over to the concept of access to justice,

⁵¹¹ *ibid.*

⁵¹² Lucy (n 435) 396.

⁵¹³ Thomas M Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998) 30.

⁵¹⁴ Lucy (n 435) 396.

which encompasses not only “access to legal justice” (i.e. procedural justice relating to the mechanics of seeking legal recourse and enforcing rights) but also “access to the machinery of justice specific to the welfare state” and “access to “Justice””.⁵¹⁵ The previously noted distinction between substantive and procedural justice is also relevant in this context, as neatly summarised by Storskrubb and Ziller, who equate “Justice with a capital J” with the German term *Gerechtigkeit* (fairness or equity), contrasting it with *Justiz* (justice) and stating that “we are here not only dealing with the law administered and enforced by the courts but with a broader view of the realization of fairness and equity in society.”⁵¹⁶ While the variety of definitions and views of what justice is can make it difficult to define access to justice,⁵¹⁷ it has been suggested that a legal system – i.e. “the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state”⁵¹⁸ – serves two purposes. The first is that the system must be “equally accessible to all”,⁵¹⁹ while the second is that the system must produce results that are “individually and socially just.”⁵²⁰ These purposes underpin the basic premise that “social justice, as sought by our modern societies, presupposes effective access.”⁵²¹ Effective access can be contrasted with

⁵¹⁵ André Tunc, ‘The Quest for Justice’ in Cappelletti, Mauro (ed), *Access to Justice and the Welfare State* (European University Institute 1981) 316.

⁵¹⁶ Eva Storskrubb and Jacques Ziller, ‘Access to Justice in European Comparative Law’ in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 188.

⁵¹⁷ Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* 113, 182.

⁵¹⁸ *ibid.*

⁵¹⁹ *ibid.*

⁵²⁰ *ibid.*

⁵²¹ *ibid.*

formalistic⁵²² access, and concerns the question of whether justice is actually accessible to people in practice. Effective access has been identified as “the most basic requirement – the most basic “human right” – of a system which purports to guarantee legal rights.”⁵²³ This rights focus broadens the concept of access to justice “*beyond advocacy*” to include “the full panoply of institutions and devices, personnel and procedures used to process, and even prevent, disputes in modern societies.”⁵²⁴ This is highly consistent with Dworkin’s rights conception of the rule of law as discussed previously, and mirrors the distinction between procedural and substantive justice pointed out above. Specifically, it has been suggested that access to justice has moved “beyond the idea that it is enough to guarantee that there is a judge for everyone” and now emphasises “obstacles to achieving redress, whether... of a personal or generic nature, due to economic or cultural reasons, or... resulting from the complexities of the procedural rules.”⁵²⁵

As discussed above, the EU and UN definitions of the rule of law evidence a rights-based conception. This has clearly influenced how those bodies view access to justice. For example, the United Nations Development Programme (UNDP) has defined access to justice as, “The ability of people to seek and obtain a remedy through formal or informal institutions of

⁵²² Mauro Cappelletti, Bryant Garth and Nicolo Trocker, ‘ACCESS TO JUSTICE: Comparative General Report’ (1976) 40 *The Rabel Journal of Comparative and International Private Law* 50, 671.

⁵²³ *ibid* 672.

⁵²⁴ *ibid* 704, 705.

⁵²⁵ Storskrubb and Ziller (n 516) 185.

justice, and in conformity with human rights standards”,⁵²⁶ and described access to justice as “a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts.”⁵²⁷ From the perspective of access to the justice system, the UNDP considers barriers to access to justice to include “[l]ack of adequate information about what is supposed to exist under the law, what prevails in practice, and limited popular knowledge of rights.”⁵²⁸ Ultimately, access to justice is seen as a means of “ensuring that legal and judicial outcomes are just and equitable.”⁵²⁹ Some conceptions of access to justice go even further, envisaging access to justice as a social movement based on the idea that “justice necessitates that people receive what they deserve”.⁵³⁰ This can be seen as an extension of social contract theory beyond mere rights and obligations as discussed, whereby justice is said to be “a social contract that represents fairness in the distribution of societal benefits and burdens”,⁵³¹ with the aim being to ensure “fairness of outcomes, policies and practices and treatment”.⁵³² Others see access to justice as “the individual empowerment and enforcement component of the rule of law”,⁵³³ or as a means of securing “fair solutions to

⁵²⁶ United Nations Development Programme, *Programming for Justice: Access for All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (UNDP 2005) 5.

⁵²⁷ United Nations Development Programme, ‘Access to Justice Practice Note’ (UNDP 2004) 3.

⁵²⁸ *ibid* 4, Box 1.

⁵²⁹ *ibid* 6.

⁵³⁰ Quinetta Roberson, ‘Access to Justice as a Human Right, Organizational Entitlement and Precursor to Diversity and Inclusion’ (2020) 39 *Equality, Diversity and Inclusion: An International Journal* 787, 788.

⁵³¹ *ibid* 788.

⁵³² *ibid* 789.

⁵³³ Charles P Sabatino, ‘Access to Justice: The People’s Principle’ [2020] *Journal of the American Society on Aging* 6.

citizens' justice problems".⁵³⁴ Yet others consider access to justice to have social and societal aspects. The OECD, for example, has emphasised "people-centred access to justice" and "people-focused access to justice", linking the concept to factors such as "inclusive growth", undermining of "human potential" and "investment climate".⁵³⁵ A further aspect emphasised by the OECD is legal empowerment (defined as "the ability of people to understand and use the law for themselves"⁵³⁶). Going even further, it has been suggested that, "Justice and governance can also help *preserve the environment*" and address inequalities in health, employment, education, housing, and entrepreneurship.⁵³⁷ While detailed discussion of the societal and economic aspects of access to justice fall outside the subject matter of this thesis, the concern of just outcomes, i.e. that "people [should] receive what they deserve"⁵³⁸ or – conversely – that people should not receive what they do not deserve, lies at the heart of the present discussion.

Access to justice in the sense of legal justice has been defined as access "to the 'justice' meted out in the legal systems of contemporary nation states, with their various subsystems

⁵³⁴ American Bar Association and Rule of Law Initiative, *Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations* (American Bar Association 2012) 1.

⁵³⁵ OECD, Ministry of Justice Republic of Latvia and Task Force on Justice, 'Riga Statement "Investing in Access to Justice for All!"' (2018)

⁵³⁶ OECD and Open Society Foundations, 'Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All' (OECD & Open Society Foundations 2016) 3.

⁵³⁷ *ibid* 5.

⁵³⁸ Roberson (n 530) 788.

of criminal justice, civil justice, family justice, etc.”⁵³⁹ It has been suggested that there are three components of access to justice:⁵⁴⁰ (1) production and promulgation of legal knowledge; (2) guidance about legal knowledge (i.e. what the law requires⁵⁴¹) and (3) access to institutions of justice (usually courts and tribunals). In the digital age, legal information is readily accessible,⁵⁴² but access may be a question of degree: “difficult, easy, or anything in between.”⁵⁴³ As regards different language versions of legal texts, it is clearly easier for individuals to access legal information if the information is available in a language they comprehend. On the other hand, access is more difficult (or even impossible) if information is only available in other languages. Even when a person has the requisite language skills and can therefore know what the law states, this does not guarantee compliance. As Simmonds has suggested, a set of rules may comply with all conditions implied by Fuller’s eight desiderata and still be “impracticably *difficult* to comply with.”⁵⁴⁴ Moreover, rules must “add up to an intelligible and viable way of life which is compatible with the various projects that humans wish to pursue”⁵⁴⁵ if they are to be complied with. In determining whether the

⁵³⁹ Lucy (n 435) 379.

⁵⁴⁰ Lucy (n 488) 234; Lucy (n 435) 381–382.

⁵⁴¹ Lucy (n 435) 381.

⁵⁴² Lucy (n 488) 235.

⁵⁴³ *ibid* 237.

⁵⁴⁴ Simmonds (n 487) 163.

⁵⁴⁵ *ibid*.

EU legal regime provides EU citizens with an intelligible and viable legal framework for their lives, it can be helpful to consider core legal principles developed and applied by the EU.

5. Principles of EU law

Thus far, the discussion in this chapter has focused on general principles of law. Since this thesis is concerned with the individual impact of multilingual EU legislation, it is necessary also to consider relevant provisions of EU law, and specifically general principles of EU law as recognised and developed by the ECJ. These include proportionality, equal treatment and non-discrimination, protection of fundamental rights and the right to a hearing and defence,⁵⁴⁶ as well as the principle of subsidiarity,⁵⁴⁷ the precautionary principle⁵⁴⁸ and transparency.⁵⁴⁹ Consideration of all the principles goes beyond the scope of this thesis, and the discussion which follows therefore concentrates on one particular principle – the protection of fundamental rights – and more specifically one fundamental right – legal certainty – as a reference point for evaluating the individual impact of the EU’s multilingual legislative regime.

⁵⁴⁶ See e.g. Maxeiner (n 497) 547–548.

⁵⁴⁷ See Article 5 of the Treaty on European Union and e.g. Karen Davies, *Understanding European Union Law* (Taylor & Francis Group 2013) 28.

⁵⁴⁸ See e.g. Paul Craig, *EU Law* (7th edn, Oxford University Press 2020) 608–609.

⁵⁴⁹ See e.g. *ibid* 608.

5.1 Protection of fundamental rights

As noted previously, the EU includes “respect for fundamental rights”⁵⁵⁰ in its expanded definition of the rule of law. It has been proposed⁵⁵¹ that conceptions of the rule of law can be categorised as ‘thick’ or ‘thin’, where ‘thick’ rule of law includes human rights and ‘thin’ rule of law does not. The ‘thick’ conception is exemplified by an account provided by Bingham which – echoing Fuller – proposes eight principles of the rule of law,⁵⁵² including that “[t]he law must afford adequate protection of fundamental human rights”.⁵⁵³ What does this mean in the EU context? EU case law has long recognised the importance of not “prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.”⁵⁵⁴ The ECJ has stated that “[r]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice”,⁵⁵⁵ and that the court “cannot... uphold measures which are incompatible

⁵⁵⁰ European Commission, ‘2020 Rule of Law Report’ (n 483) 1.

⁵⁵¹ Tom Bingham, *The Rule of Law* (Penguin Books 2011) 67.

⁵⁵² *ibid*, chapters 3-10. As summarised by Raz (n 490) 9, the other seven principles are: (1) The law must be accessible, intelligible, clear and predictable; (2) Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion; (3) Laws should apply equally to all; (4) Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred—reasonably and without exceeding the limits of such powers; (6) The state must provide a way of resolving disputes which the parties cannot themselves resolve; (7) The adjudicative procedures provided by the state should be fair; and (8) The rule of law requires compliance by the state, with its obligations in international as well as national laws.

⁵⁵³ Bingham (n 551), chapter 7.

⁵⁵⁴ *Erich Stauder v City of Ulm - Sozialamt* [1969] European Court of Justice Case 29-69, Grounds, para. 7.

⁵⁵⁵ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] European Court of Justice Case 11-70, Grounds, para. 4.

with fundamental rights".⁵⁵⁶ Moreover, it has stated that "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."⁵⁵⁷ However, these statements leave open the question of what specific rights EU law requires to be protected. A helpful starting point in this regard is Article 6 of the Treaty on European Union, which states that, "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union"⁵⁵⁸ and that, "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."⁵⁵⁹

Any detailed account of the fundamental rights of persons within the European legal system would therefore need to examine the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms and other general principles of EU law (i.e. principles developed by the European Court of

⁵⁵⁶ *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] European Court of Justice Case 4-73, Grounds, para. 13.

⁵⁵⁷ Case 4-73, *ibid*, Grounds, para. 13.

⁵⁵⁸ Treaty on European Union (Consolidated Version), Article 6(1).

⁵⁵⁹ *ibid*, Article 6(3).

Justice). While the Charter and the Convention contain some language-related rights,⁵⁶⁰ the focus of the present discussion is primarily on whether the EU's multilingual legislative regime as it currently functions is consistent with relevant principles of EU law developed by the ECJ. Such principles may be derived not only from human rights statutes, but also from public international law, the national laws of member states⁵⁶¹ and the ECJ's own reasoning. The purposes behind these court-developed principles have been said to include avoiding denial of justice, filling in gaps in European Union law and strengthening the coherence of European Union law.⁵⁶² The legal principles developed by the ECJ include, for example, the principle of proportionality,⁵⁶³ the principle of subsidiarity,⁵⁶⁴ the precautionary principle⁵⁶⁵

⁵⁶⁰ See, for example, Article 21 of the Charter (bar on language-based discrimination) and Article 6(3)(a) of the Convention (right of defendants in criminal cases to be informed of accusations against them in a language they understand).

⁵⁶¹ See e.g. Article 6(3) of the Treaty on European Union and Article 340 of the Treaty on the Functioning of the European Union.

⁵⁶² Alina Kaczorowska, *European Union Law* (3rd edn, Routledge 2013) 115.

⁵⁶³ Expressed as the requirement that "prohibitory measures [must be] appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued." See *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] European Court of Justice Case C-331/88, para. 13.

⁵⁶⁴ Expressed as ensuring "that decisions are taken as closely as possible to the citizens of the Union", see Treaty on the Functioning of the European Union (Consolidated Version), Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality OJ 2012/C 326/206, and Davies (n 547) 28.

⁵⁶⁵ Expressed as "a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests." See *Artegoda GmbH and Others v Commission of the European Communities* [2002] Court of First Instance T-74/00, para. 184.

and – not least – legal certainty. The discussion below concentrates on the latter principle as one of particular relevance to the individual impact of the EU’s multilingual legislative regime.

5.2 Legal certainty

The idea that the law and legal obligations should be certain is not a modern one, and is recognisable in, for example, Locke’s reference to “established standing laws, promulgated and known to the people”,⁵⁶⁶ and Adam Smith’s identification – in the context of taxation – of the importance of “certainty of what each individual ought to pay”⁵⁶⁷ and his statement that taxes “ought to be certain and not arbitrary”.⁵⁶⁸ Legal certainty is one of three general precepts (along with purposiveness and justice) adopted by the legal philosopher Gustav Radbruch in defining his concept of law. It has been stated that a key aspect of legal certainty is providing justice through predictability,⁵⁶⁹ and legal certainty has also been said to serve the “primary goal of [ensuring] peace and order.”⁵⁷⁰ Moreover, it has been described as a “central tenet of the rule of law as understood around the world”,⁵⁷¹ and as “central to the creation of the legal methods by which law is made, interpreted, and applied”.⁵⁷² It has also

⁵⁶⁶ Locke and Shapiro (n 450) 156.

⁵⁶⁷ Adam Smith, *The Wealth of Nations* (Electric Book Company 2000) 1104.

⁵⁶⁸ *ibid.*

⁵⁶⁹ Heather Leawoods, ‘Gustav Radbruch: An Extraordinary Legal Philosopher’ (2000) 2 *Journal of Law and Policy* 28, 493.

⁵⁷⁰ *ibid.*

⁵⁷¹ James R Maxeiner, ‘Some Realism about Legal Certainty in the Globalization of the Rule of Law’ (2008) 31 *Houston Journal of International Law* 21, 28.

⁵⁷² *ibid.* 38.

been acknowledged in EU law since the 1960s,⁵⁷³ and been identified as “one of the fundamental principles of the law of the European Union”.⁵⁷⁴ Legal certainty has been linked to the rule of law in the latter’s capacity as a core value pursuant to Article 2 of the Treaty on European Union (TEU) and the general principles outlined in Article 6 TEU (see section 5.1 above).⁵⁷⁵ Moreover, “European courts acknowledge the existence of a “principle of the certainty of the law”⁵⁷⁶ – also referred as the principle of legal certainty – and it has been stated that “[l]egal certainty is... closely connected with the protection of individual rights.”⁵⁷⁷

Legal certainty has been defined in a variety of ways in legal literature and case law. ‘Real legal certainty’, for example, has been defined as the chances that various factors will apply in a given legal situation, with the most relevant factor in the present context being “clear, consistent and accessible legal rules [which] government institutions [and] judges apply... consistently”.⁵⁷⁸ In the EU context, it has been stated that “national legislation implementing EU law must be worded in such a way as to be clearly understandable to those concerned

⁵⁷³ See Joined cases 42 and 49/59, *Société nouvelle des usines de Pontlieue - Acières du Temple (SNUPAT) v High Authority of the European Coal and Steel Community* [1961] Court of Justice of the European Union Joined cases 42 and 49/59, p. 87.

⁵⁷⁴ Markus Krajewski, ‘Balancing Legal Certainty with Regulatory Flexibility’ in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade* (Cambridge University Press 2014) 82.

⁵⁷⁵ *ibid.*

⁵⁷⁶ Patricia Popelier, ‘Five Paradoxes on Legal Certainty and the Lawmaker’ (2008) II(1) *Legisprudence* 47.

⁵⁷⁷ Krajewski (n 574) 82.

⁵⁷⁸ See Jan Michiel Otto, ‘Toward an Analytical Framework: Real Legal Certainty and Its Explanatory Factors’ in Jianfu Chen, Yuwen Li and Jan Michiel Otto (eds), *Implementation of Law in the People’s Republic of China* (Kluwer Law International 2002) 25.

as to the content of their rights and obligations”,⁵⁷⁹ or – as per the ECJ – “Member States’ legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations”.⁵⁸⁰ Further, the ECJ has stated that the principle of legal certainty “requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them”.⁵⁸¹ The European Court of Human Rights (ECtHR), on the other hand, has defined the “general principle of legal certainty”⁵⁸² as follows in a case concerning deprivation of liberty: the requirement that “the conditions... be clearly defined and that the law itself be foreseeable in its application”.⁵⁸³ Specifically, the ECtHR required that “all law be sufficiently precise to allow the person... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.⁵⁸⁴

⁵⁷⁹ Kaczorowska (n 562) 116.

⁵⁸⁰ *Commission of the European Communities v Italian Republic* [1988] Court of Justice of the European Union Case 257/86, para. 12; see also *Commission of the European Communities v Kingdom of Denmark* [1985] Court of Justice of the European Union Case 143/83, para. 10.

⁵⁸¹ *Vereniging voor Energie, Milieu en Water, Amsterdam Power Exchange Spotmarket BV, Eneco NV v Directeur van de Dienst uitvoering en toezicht energie* [2005] European Court of Justice Case C-17/03, para. 80. This requirement has subsequently also been formulated somewhat more broadly, as requiring “on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them”; see *Prezes Urzędu Komunikacji Elektronicznej, Petrotel sp z o.o w Płocku v Polkomtel sp z o.o* [2016] European Court of Justice Case C-231/15, para. 29.

⁵⁸² *Korchuganova v Russia* [2006] European Court of Human Rights 75039/01, para. 47.

⁵⁸³ *ibid*, para. 47.

⁵⁸⁴ *ibid*, para. 47.

Although it might be tempting to refer to a lack of clarity about consequences as legal uncertainty, it is important to note that the term 'legal uncertainty' has a specific application in the specialised law-and-economics field.⁵⁸⁵ While economic analysis of legal uncertainty falls outside the scope of this thesis, definitions of legal uncertainty are of interest.⁵⁸⁶ Specifically, a distinction is made between subjective and objective forms of legal uncertainty, where subjective legal uncertainty is "a property of people's beliefs about the law",⁵⁸⁷ i.e. "uncertainty as to what the law is"⁵⁸⁸ and objective legal uncertainty is "a property of laws themselves",⁵⁸⁹ i.e. "an objective reality that has to be accepted to an equal extent by all involved".⁵⁹⁰ Of particular interest in the present context is the recognition that the objective and subjective forms of legal uncertainty are interlinked, especially when analysing how behaviour is influenced by the law.⁵⁹¹ This is because "[b]ehavioral incentives created by any given law are a function of people's beliefs about the law rather than what some objective observer would say about it. At the same time, it is typically reasonable to presume

⁵⁸⁵ See e.g. Orlin Yalnazov, 'Two Types of Legal Uncertainty' (2018) 10 *European Journal of Legal Studies* 11, 12.

⁵⁸⁶ These include "variance of the expected judgment of the court" (Uri Weiss, 'The Regressive Effect of Legal Uncertainty' (2019) 2019 39, 154), "the situation that obtains when the rule that is relevant to a given act or transaction is said by informed attorneys to have an expected official outcome at or near the 0.5 level of predictability" (Anthony D'Amato, 'Legal Uncertainty' (1983) 71 *California Law Review* 1, 2), and "the situation that obtains in a legal system when that system contains at least one case that in principle cannot be decided in an identifiably and uniquely correct way" (ibid, footnote 4).

⁵⁸⁷ Kevin E Davis, 'The Concept of Legal Uncertainty' [2011] *SSRN Electronic Journal* 6.

⁵⁸⁸ Helmut Wagner, 'Legal Uncertainty – Is Harmonization of Law the Right Answer? A Short Overview', *Discussion Paper No. 444* (FernUniversität in Hagen 2009) 3.

⁵⁸⁹ Davis (n 587) 5.

⁵⁹⁰ Wagner (n 588) 3.

⁵⁹¹ Davis (n 587) 6.

that beliefs about law are determined to some extent by its objective features.”⁵⁹² In other words, people are guided in their actions not only by the strict wording of a legal text, but also by their own view or interpretation of this wording, i.e. their understanding of what the act requires or prohibits. This insight underlines the significance of Rawls’ third precept as discussed in section 2 above, which requires that “laws be known and expressly promulgated, that their meaning be clearly defined”, not least so that “statutes are [...] clear in what they enjoin and forbid [so that] the citizen [can] know how he is to behave.”⁵⁹³

When considering definitions of legal certainty, it is important to distinguish between systemic and individual legal certainty. This is linked to the distinction between formalistic and effective access to justice (or fairness of process and fairness of outcome) noted in section 4. The formalistic approach to access to justice concludes that the requirements of access to justice are met as long as the legal process is fair, and thus serves foreseeability or legal certainty at the systemic level.⁵⁹⁴ Effective/substantive access to justice, on the other hand, considers individual outcomes. It has been suggested that formal legal certainty

⁵⁹² *ibid.*

⁵⁹³ Rawls (n 454) 209.

⁵⁹⁴ This can be illustrated by reference to the official language of procedure in ECJ cases, as discussed in Chapter III above, where only the judgment in the language of procedure is authentic. The argument that reliance on ‘non-authentic’ language versions is the responsibility of the persons involved exemplifies a formalistic approach. An individual perspective, on the other hand, might suggest that citizens are unlikely to refer to an ‘authentic’ version in a language they do not speak, and that any expectation in this regard is unrealistic.

corresponds to predictability and substantive legal certainty to acceptability,⁵⁹⁵ with adopted legal interpretations representing a trade-off between the two, where the ECJ has to “convince the EU legal community of the acceptability of its interpretations.”⁵⁹⁶ The implication is that individual legal certainty (predictability) may have to be – or is in fact – sacrificed in practice in order to secure systemic legal certainty (acceptability). This has been described as a paradox in the context of EU multilingualism, on the basis that “[w]hile 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.”⁵⁹⁷ This observation can be linked to Alexy’s reference to the real/factual and ideal dimensions of law, where “[t]he factual side is represented by the defining elements of authoritative issuance and social efficacy, whereas the ideal side finds its expression in the element of correctness of content”.⁵⁹⁸ According to Alexy, “correctness of content concerns, above all, justice, for justice is nothing other than correctness with respect to distribution and balance... and distribution and balance present the central concern of law. Questions of justice, however, are moral questions. For this reason, it is possible to speak of moral correctness

⁵⁹⁵ Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice* (Routledge 2016) 51.

⁵⁹⁶ 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, 1492.

⁵⁹⁷ Stefaan van der Jeught, ‘Current Practices with Regard to the Interpretation of Multilingual EU Law: How to Deal with Diverging Language Versions?’ (2018) 11 *European Journal of Legal Studies* 5, 6.

⁵⁹⁸ Robert Alexy, ‘Legal Certainty and Correctness’ (2015) 28 *Ratio Juris* 12, 441.

or, simply, of justice instead of correctness of content.”⁵⁹⁹ However, Alexy has also distinguished between legal certainty and justice, stating that, “The principle of legal certainty is a formal principle. It requires a commitment to what is authoritatively issued and socially efficacious. By contrast, the principle of justice is a material or substantive principle. It requires that the decision be morally correct.”⁶⁰⁰ Based on Alexy’s definition, legal certainty can be equated with formalistic access to justice (fairness of process/systemic access to justice, on the basis of what is ‘socially efficacious’, while substantive justice is what is morally correct (fairness of outcome/individual access to justice). This view is not shared by all commentators, however. It has been stated, for example, that “the principle of legal certainty requires that an individual is able to predict the legal consequences of her or his actions.”⁶⁰¹ Further, it is established ECJ case law that legal certainty “requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by European Union law”.⁶⁰² Popelier phrases this requirement as being that “the law [must] make clear in advance which legal consequences are attached to certain actions or omissions.”⁶⁰³ As Alexy himself has stated, “The principle of legal certainty requires that the norms of a legal system be as determinate

⁵⁹⁹ *ibid.*

⁶⁰⁰ *ibid.* 444.

⁶⁰¹ Krajewski (n 574) 82.

⁶⁰² *LVK – 56 EOOD v Direktor na Direktsia ‘Obzhalvane i upravlenie na izpalnenieto’ – Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* [2013] Court of Justice of the European Union C-643/11, para. 51.

⁶⁰³ Popelier (n 576) 53.

as possible and that they be observed to the maximum degree possible.”⁶⁰⁴ Moreover, the ECtHR has required “the law [to] be adequately accessible”⁶⁰⁵ and sufficiently precise “to enable the citizen... to foresee... the consequences which a given action may entail.”⁶⁰⁶ In other words, “When the rule of law is safeguarded, when legal certainty is accorded, subjects can rely on the law and can foresee application of state power. They secure and safeguard personal autonomy.”⁶⁰⁷

The preceding discussion can be summarised as follows: “Legal certainty... is a wide concept which cannot easily be explained in a few words, though predictability is probably the core aspect of it.”⁶⁰⁸ However, how can individuals be afforded predictability in practice? It has been suggested that the principle of legal certainty imposes a number of requirements, namely that “(1) laws and decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected.”⁶⁰⁹ These requirements can be distilled down into a number of categories for the purposes of further discussion, as follows:

⁶⁰⁴ Alexy (n 598) 441.

⁶⁰⁵ *Case of the Sunday Times v The United Kingdom* [1979] European Court of Human Rights Case 6538/74, para. 49.

⁶⁰⁶ *ibid*, para. 49.

⁶⁰⁷ Maxeiner (n 497) 546.

⁶⁰⁸ Trevor C Hartley, *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union* (Oxford University Press 2014) 162.

⁶⁰⁹ Maxeiner (n 571) 32; Maxeiner (n 497) 549.

5.2.1 *Publication*

Laws can only be followed if those who are subject to them can ascertain their content and applicability to such a degree that they can arrange their conduct to be compliant. Such knowledge, however, can only be gained if sources of relevant information are accessible. In other words, compliance is impossible if legal texts are inaccessible. As described in Chapter III, the EU makes extensive efforts and invests considerable resources⁶¹⁰ in making its legal texts available. Indeed, the existing multilingual regime is the result of the high priority given to making EU law accessible to the general public.

5.2.2 *Clarity*

The requirement that laws must be clearly expressed has been formulated in a variety of ways. For example, it has been suggested that a key question is whether a law makes “plain to the apprehension of the people what conduct on their part is forbidden”.⁶¹¹ An alternative expression of the requirement states that the “[l]aw must be known to those who should adhere to it”,⁶¹² and that language used “must be clear and non-contradictory”.⁶¹³ The clarity requirement is also found in European case law: “legal certainty... requires that legal rules

⁶¹⁰ In the form of, for example, translation into all official languages and publication in the open online EUR-Lex database; see European Union, ‘Access to European Union Law’ (*EUR-Lex*) <<https://eur-lex.europa.eu/homepage.html>> accessed 4 November 2024.

⁶¹¹ Thomas M Cooley, ‘The Uncertainty of the Law’ (1888) 22 *American Law Review* 347, 355.

⁶¹² Krajewski (n 574) 81.

⁶¹³ *ibid.*

be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable.⁶¹⁴ Further, individuals “should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts”.⁶¹⁵

5.2.3 Stability

This requirement, which can also be referred to as “*consistent practice*”,⁶¹⁶ can be linked to the previously noted principle that decisions of courts must be binding.⁶¹⁷ Both the requirement for binding decisions and the stability requirement target arbitrary decision-making. In other words, “[i]ndividuals need to rely on actions and decisions of government agencies and officials which have been taken in their favour or which confer a benefit to them. The central question in this context is, however, if and how those agencies and officials are allowed to change their policies and withdraw certain benefits or decisions.”⁶¹⁸ If the amendment of benefits (for example through withdrawal) breaches the stability requirement, it seems logical to conclude that the same is true of the revision of obligations, i.e. that obligations imposed by law should also remain stable or consistent. Moreover, one

⁶¹⁴ *Duff and Others v Minister for Agriculture and Food* [1996] Court of Justice of the European Union Case C-63/93, para. 20.

⁶¹⁵ *Commission of the European Communities v Hellenic Republic* [1996] Court of Justice of the European Union Case C-236/95, para. 13.

⁶¹⁶ AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (16th edn, Pearson Education UK 2014) 651.

⁶¹⁷ See Maxeiner (n 571) 32; Maxeiner (n 497) 549.

⁶¹⁸ Krajewski (n 574) 81.

of the key objectives of EU law is the harmonisation of legal regulation across the EU member states. Together, these observations strongly suggest that obligations under EU law should not vary from member state to member state, i.e. between different groupings of EU citizens.

5.2.4 *Non-retroactivity*

Non-retroactivity has been described as “a key element of legal certainty”.⁶¹⁹ According to the ECJ, “in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication”⁶²⁰ (although the ECJ has also stated that exceptions are permitted when a purpose requires it, as long as legitimate expectations are “duly respected”,⁶²¹ see further below). The ECJ has also stated that, “The principle of legal certainty requires... that every Community measure having legal effects... must be brought to the notice of the person concerned in such a way that he can ascertain exactly the time at which the measure comes into being and starts to have legal effects.”⁶²² Above, it was suggested that obligations under EU law should not vary from member state to member state. To this can be added that such obligations should not vary over time, at least not in the sense that an individual is subject to an unforeseen outcome because the meaning of a legal rule changes over time.

⁶¹⁹ *ibid.*

⁶²⁰ *Weingut Gustav Decker KG v Hauptzollamt Landau* [1979] Court of Justice of the European Union Case 99/78, para. 8.

⁶²¹ Case 99/78, *ibid.*, para. 8.

⁶²² Case T-115/94, (*Opel Austria GmbH v Council of the European Union*, 1997), para. 6.

5.2.5 *Legitimate expectations*

The principle of legitimate expectations posits that “those who act in good faith on the basis of law as it is or seems to be should not be frustrated in their expectations”.⁶²³ The principle is recognised not only by the ECJ,⁶²⁴ but also, for example, in European patents law, where the European Patent Office (EPO) acknowledges the “principle of the protection of legitimate expectations”.⁶²⁵ In EPO practice, the principle states that “measures taken by the EPO should not violate the reasonable expectations of parties to [the] proceedings”.⁶²⁶ It has also been stated that protection of legitimate expectations focuses on “striking a fair balance between the public interest the lawmaker attempts to promote and the private interests of the individual”,⁶²⁷ and that “legitimate expectations are taken more seriously when the individual has acted upon a law”.⁶²⁸ At the same time, “expectations are considered to be less legitimate, when the old legislation was unlawful: in that case the rule did not predict legitimate legal consequences on which one could rely. Even when a person was unaware of the invalidity of the law, the legality principle usually takes priority”.⁶²⁹

⁶²³ Kaczorowska (n 562) 116.

⁶²⁴ Originally formulated as “any position acquired by the applicant for which it could claim protection”, see *Lemmerz-Werke GmbH v High Authority of the ECSC* [1965] European Court of Justice Case 111-63, p. 691.

⁶²⁵ Legal Research Service of the Boards of Appeal, *Case Law of the Boards of Appeal of the European Patent Office* (European Patent Office 2019) 564.

⁶²⁶ *ibid.*

⁶²⁷ Popelier (n 576) 62.

⁶²⁸ *ibid.*

⁶²⁹ *ibid.* 63.

Discussion

This chapter has developed a framework for examining and evaluating the impact of the EU's multilingual legislative regime at the individual level. It has been shown that relations between the EU and EU citizens are akin to those between a nation state and its citizens, and that social contract theory provides an approach for considering mutual rights and obligations. Specifically, citizens need to be sufficiently informed to know the bounds of their rights and obligations in relation to the state. A lack of clarity in this regard makes it difficult or impossible to comply with obligations and assert rights, and failure to ensure such clarity constitutes a breach of the rule of law and the principle of access to justice. Further, EU law itself requires the protection of certain fundamental rights, including legal certainty. In the specific context of the EU's multilingual legal regime, two diametrically opposed views can be taken of the effect on legal certainty of "the Court's basic requirement that all language versions must be compared and given equal weight when resolving divergences between authentic texts".⁶³⁰ The first view can be said to represent systemic legal certainty, and posits that the requirement guarantees legal certainty for EU citizens on the basis that "[l]egal certainty can be achieved... only if the law binds all citizens in the same way; in other words, only if the law is applied uniformly in all the Member States. In order to achieve a uniform application of Community law, the law has to be interpreted in a uniform way. Consequently,

⁶³⁰ Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (n 166) 13.

all language versions should contribute to the meaning of the legal act... and ought to be considered for interpretation purposes.”⁶³¹ The second, and contrary, view states that the requirement breaches individual legal certainty and “[i]nstead of promising the reliability of one’s language version without the threat of discrimination, it sends the very opposite message, warning Union citizens that they cannot rely on their own language version of a EU legislative text, even in cases where it is sufficiently clear.”⁶³²

In this regard, it is interesting to note that a lack of individual legal certainty also has implications for the EU as an institutional and political entity. It has been suggested that “any political community is underpinned by some kind of theoretical rationale, one that, invariably, seeks to provide a measure of collateral political, even moral, legitimacy”,⁶³³ and further that “[a]s global and regional institutions assume powers which were once the sole preserve of sovereign states... it is very much to the advantage of such institutional endeavors that their initiatives be perceived as legitimate and fair.”⁶³⁴ On the one hand, it can be argued that the EU is legitimated by a ‘trickle-up’ mechanism, i.e. that its “action is legitimate by virtue of the fact that its members are democracies and thus legitimate in

⁶³¹ Doczekalska (n 297) 365.

⁶³² Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 13.

⁶³³ Ward, I. “A Critical Introduction to European Law” (2009), Cambridge, Cambridge University Press, p. 212, cited in Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 45.

⁶³⁴ Franck (n 513) 90.

themselves”.⁶³⁵ This view, however, is possibly too narrow, since it can also be argued that “[i]ntergovernmental organizations are more than the sum of their members, with both an autonomous and independent existence and personality.”⁶³⁶ Accordingly, the EU can be viewed not only as the sum of its members, but also as an independent entity with authority over and influence on the citizens and residents of its member states. Thus any discussion of factors which could affect the legitimacy of the EU legal regime must incorporate the perspective of those who are subject to the rules and obligation imposed by the regime. It is insufficient to cite legitimacy by virtue of voluntary cooperation between democratic member states. In a sense, the member states can be regarded as intermediaries in the relationship between the EU and its citizens, and their existence does not invalidate the existence of such a relationship between the EU and its citizens. It has been suggested that the legitimacy of a community can only be understood by reference to the “wellspring of association”,⁶³⁷ and that the social contract is “the only associational theory relevant to the inter-state system”.⁶³⁸ Moreover, social contract theory has been stated to be “largely applicable to states, which join in common protective measures and institute institutional processes to secure safety, peace, and the promotion of prosperity.”⁶³⁹ Since individuals are also participants in the EU system of rules, it is arguable that social contract theory can be

⁶³⁵ Iain Scobbie, ‘Tom Franck’s Fairness’ (2002) 13 *European Journal of International Law* 909, 922.

⁶³⁶ *ibid.*

⁶³⁷ Franck (n 513) 26.

⁶³⁸ *ibid.*

⁶³⁹ *ibid.* 27.

applied to their relations with the EU, despite the fact that they are not state actors on a par with the EU member states.

Further, the question arises of whether a legal regime which leaves scope for civil and/or criminal liability on the part of those who follow its rules can be regarded as legitimate or fair. This question is relevant not only to EU citizens, but also – as noted above – to the EU as an institutional and political entity. Legitimacy can be viewed from a substantive perspective – i.e. “the degree to which... rules satisfy the participants’ expectations of justifiable distribution of costs and benefits”⁶⁴⁰ – and/or a procedural perspective, i.e. “the extent to which... rules are made and applied in accordance with what the participants perceive as right process.”⁶⁴¹ Together, these expectations inform “a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied.”⁶⁴² The question of whether the EU legal regime is in fact – or at least is perceived to be – legitimate and fair goes to the heart of the European project. Participants in the EU legal regime include not only the political community of member states, but also citizens of EU member states and other persons living within the EU, who in their capacity as persons subject to EU law may be assumed to have substantive and procedural expectations as to the functioning of the EU legal regime and, ultimately, regarding the legitimacy and fairness of EU legal rules. The

⁶⁴⁰ *ibid* 7.

⁶⁴¹ *ibid*.

⁶⁴² *ibid* 7–8.

legitimacy of a system of rules is closely linked to the perceived legitimacy of the rules (or laws) which apply to participants in the system: "The more plausible a community's perception of a rule's legitimacy, the more persuasive that rule's claim to fairness, the stronger its promotion of compliance, and the firmer its re-enforcement of the sense of community."⁶⁴³ Moreover, it has been observed that rules are "likely to be perceived as more or less legitimate in accordance with four variables",⁶⁴⁴ namely determinacy, symbolic validation, coherence and adherence. In this context, *determinacy* refers to "the ability of a text to convey a clear message",⁶⁴⁵ *symbolic validation* refers to "attributes... which signal [a rule's] significant part in the overall system of social order",⁶⁴⁶ *coherence* refers to "application [of a rule which] treats like cases alike and... relates in a principled fashion to other rules of the same system"⁶⁴⁷ and *adherence* refers to "the vertical nexus between a single primary rule of obligation... and a pyramid of secondary rules governing the creation, interpretation, and application of such rules by the community."⁶⁴⁸ Two of these factors – *determinacy* and *coherence* – are of particular relevance to the topic of EU lawmaking. Specifically, it can be questioned whether a legal text which exists in different language versions can be described as determinate – in the sense of conveying a clear message – if different language versions contain divergent provisions. A lack of determinacy is likely to

⁶⁴³ *ibid* 30.

⁶⁴⁴ *ibid*.

⁶⁴⁵ *ibid*.

⁶⁴⁶ *ibid* 34.

⁶⁴⁷ *ibid* 38.

⁶⁴⁸ *ibid* 41.

have consequences at both the individual and the systemic levels, since “[i]ndeterminate normative standards make it harder to know what conformity is expected, which in turn makes it easier to justify noncompliance.”⁶⁴⁹ It can also be questioned whether a legal regime can be said to be coherent – in the sense of treating like cases alike, or applying rules uniformly in all similar or applicable instances⁶⁵⁰ – if individual citizens who rely on different language versions face differing legal outcomes.

Given that it can be questioned whether the EU legal regime affords determinacy and coherence in some instances, there are grounds for asking whether the legal regime is fair toward individual citizens. At the systemic level, the question arises whether the EU is undermining its own legitimacy by practising a system of rules which imposes an unfair burden on its citizens. Burdens on citizens can take the form of, for example, obligations to do certain things and/or penalties for failing to do so. Thus an uneven distribution of burdens within a legal regime may include not only applying differing rules to different individuals, but also enforcing rules in an inconsistent manner. Both of these scenarios may arise when language versions of an EU legal text diverge, i.e. when they contain differing provisions or legal rules. In such circumstances, burdens may be unevenly distributed, such that citizens in one EU member state face a heavier regulatory burden than citizens in another member state because the member states’ respective enforcement mechanisms

⁶⁴⁹ *ibid* 31.

⁶⁵⁰ *ibid* 38.

are based on divergent language versions. Moreover, rules may be enforced inconsistently and, for example, criminal proceedings may have differing outcomes when courts in different member state refer to divergent language versions as the basis for legal rulings. Not only may legitimacy and fairness of the governing legal regime be questioned in such circumstances, but it has also been noted that an “unfair law, that is: one that distributes burdens unfairly, is likely to provoke resistance”.⁶⁵¹ Thus if EU citizens face differing legal burdens depending on the language version referred to, this may be regarded as a failure of the EU legal regime to deliver fairness in the form of substantive and procedural legitimacy, and may result in questioning of the legitimacy of the regime itself.

Regardless of the ideological view taken – i.e. irrespective of whether one emphasises the systemic consideration of uniform application or the individual consideration of reliability – legal certainty is challenged when there are divergences between language versions. This makes it important to examine not only how such divergences can and do arise, but also the extent to which divergences conflict with the EU’s obligations as implied by the social contract, rule-of-law principles, access to justice, fundamental rights and, in particular, the component elements of legal certainty. These questions are the subject of Chapter V.

⁶⁵¹ *ibid* 8.

V. Divergences and objections to them

The multilingual nature of the EU has a range of consequences for EU citizens. As discussed previously, in the context of the EU legal regime multilingualism results in the publication of EU legal texts in all 24 official languages, in service of the objective that individuals should be able to access EU law in a language comprehensible to them. As discussed in Chapter IV, comprehension of EU law is a fundamental prerequisite for individual certainty about applicable rights and obligations. As noted in Chapter III, the publication of different language versions of EU legal texts necessarily involves extensive translation activity, and it is thus clear that translation is a factor in, and perhaps even a key determinant of, individual legal certainty in the European Union. However, as also noted in Chapter III the official EU languages do not always co-exist harmoniously, and various parties have pointed out that divergences can and do arise between language versions of EU legal texts.⁶⁵² Above, 'divergences' were defined as differences "between... parallel texts",⁶⁵³ i.e. "inaccuracies, approximations or complete mistranslations in one or more of the... languages".⁶⁵⁴ In other

⁶⁵² Kuner (n 352) 958, see also Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 5, and Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (n 166) 3.

⁶⁵³ Šarčević, 'Challenges to the Legal Translator' (n 221) 192.

⁶⁵⁴ European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 211) 16. (para. 5.2). In this context, 'inaccuracy' can be taken to mean a translation that is lacking in accuracy (see 'Inaccurate' <<https://www.merriam-webster.com/dictionary/inaccurate>> accessed 4 November 2024), an 'approximation' to mean a translation that is close to or near a correct translation (see Merriam-Webster, 'Approximation' <<https://www.merriam-webster.com/dictionary/approximation>> accessed 4 November 2024) and a 'mistranslation'

words, divergences may comprise errors and/or ambiguities.⁶⁵⁵ Divergences between legal texts are not a rare phenomenon, and it has been suggested that they are the rule rather than the exception,⁶⁵⁶ with the quantity of divergences even being described as “innumerable”.⁶⁵⁷ Given that individuals may access EU legal texts and that divergences between different language versions are not only possible but commonplace, it appears logical to conclude that divergences could have consequences when language versions are read and relied on. Accordingly, divergences represent a potential concern in view of the significance of translated EU legal texts with regard to individual legal certainty. To identify possible consequences and what effects – if any – divergences may have, it is helpful to consider what types of divergences may arise, their causes and whether they are desirable or undesirable.

to mean “an incorrect translation” (see Merriam-Webster, ‘Mistranslation’ <<https://www.merriam-webster.com/dictionary/mistranslation>> accessed 4 November 2024).

⁶⁵⁵ See European Union, ‘Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation’ (n 211) 19, para. 5.5.2.

⁶⁵⁶ Schilling (n 166) 51.

⁶⁵⁷ Susan Šarčević, ‘Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften: Der Kampf gegen Sprachdivergenzen’ in Maurizio Gotti and Susan Šarčević (eds), *Insights into Specialized Translation* (Peter Lang GmbH, Internationaler Verlag der Wissenschaften 2012) 125; author’s own translation of the phrase, “Wegen der unzähligen Sprachdivergenzen zwischen den Parallelfassungen”.

1. Types of divergences and how they arise

In Chapter III, it was noted that there are two lawmaking processes in the EU: lawmaking by EU legislative bodies and lawmaking by the courts. With regard to the latter, the ECJ has a monopoly on the issuance of definitive rulings on the interpretation of EU law, although it appears likely that not all interpretative questions reach the ECJ, and thus that national courts also 'make EU law' to some extent. At least two types of divergences have been identified with respect to EU legislation: divergences "between various versions of primary or secondary law, as well as, in the case of directives, between a language version of a directive and the norm transposing into national law that directive in the same language."⁶⁵⁸

The focus of this thesis is on divergences of the first kind, i.e. between language versions of EU legal texts produced through the EU legislative process. In this regard, a distinction can be made between the *pre-legislative* and *post-legislative* stages,⁶⁵⁹ where the pre-legislative stage constitutes the process of producing legal texts and the post-legislative stage involves their application and interpretation. The pre- and post-legislative stages are discussed further in Chapter VI. In considering the what, why and how of divergences between language versions of such legal texts, it can be helpful to consider when they *occur* and when they are *addressed* or *resolved*. While it might seem intuitive to attribute divergences between language versions solely to errors and omissions made during the translation process (i.e. at the pre-legislative stage), and to conclude that divergences are addressed

⁶⁵⁸ van der Jeught (n 597) 9–10.

⁶⁵⁹ Based on Peter Agius, 'Aspects of Interpretation of Multilingual Acquis Communautaire', *Id-Dritt*, vol XIX (The Law Students' Society of the University of Malta (GhSI) 2006) 213–214.

or resolved at the post-legislative stage, the occurrence and addressing or resolving of divergences do not align exactly with the pre- and post-legislative stages of text production. While it is true that many divergences can be attributed to pre-legislative processes, they can also arise or be maintained at the post-legislative stage, for example when national courts in different member states adopt divergent interpretations of a given legal text, or when the ECJ indirectly affirms a divergence by failing to discover, address or resolve it. Similarly, many (potential) divergences are already discovered and eliminated at the pre-legislative stage, i.e. during quality assurance work done by relevant institutional translation services and others who work on EU legal texts prior to publication.

Various sources of divergences occurring at the pre-legislative stage have been identified, including the varying cultural backgrounds of the persons involved in drafting legislation, as “national identities do not dissolve within a European identity”,⁶⁶⁰ the use of differing legal terminology in different jurisdictions⁶⁶¹ (i.e. in different EU member states) and drafters’ previous experience under different legal traditions,⁶⁶² differences between linguistic

⁶⁶⁰ Irène Bellier, ‘A Europeanized Elite? An Anthropology of European Commission Officials’, *Yearbook of European Studies*, vol 14 (1st edn, BRILL 2000) 155. Further, “... individuals who could consider themselves as representatives of the Union... are vectors of culture. They are inclined to use the language of which they have the best command in fashioning their interpretation of the world and in defining the organizational rules which govern it. By more or less indirect channels, these representations of the world and the working languages that are used influence the manner in which European policies are formulated.” *ibid* 153.

⁶⁶¹ Agius (n 659) 213, footnote 301.

⁶⁶² *ibid*, footnote 300.

families,⁶⁶³ the process by which EU law is produced (including negotiations and compromises that result in “unclear, yet very sensitive, expressions of political commitment (or the lack of it)”⁶⁶⁴), and human error on the part of translators.⁶⁶⁵ As illustrated by the account given of EU lawmaking in Chapter III, draft legislative proposals are considered multiple times at the pre-legislative stage. Logically, divergences between different language versions can only exist when different language versions exist, and in this regard it is important to note that the ordinary legislative procedure is very much a multilingual process. Although the Commission’s initial legislative proposal is drafted in a single language, it is translated into all the official languages for the purpose of interinstitutional consultation, i.e. circulation to the Parliament and Council.⁶⁶⁶ Thereafter, translation occurs on two fronts: in support of further interinstitutional consultation during additional readings and conciliation proceedings; and in support of intra-institutional consultation, with amendments and revisions being translated on an ongoing basis to allow, for example, Members of the

⁶⁶³ *ibid.* Note that differences can also arise between languages in the same linguistic family, for example through the existence of so-called ‘false friends’, which exist where “a word in one language... is similar in form or sound to a word in another language but has a different meaning” (see Dictionary.com, ‘False Friend’ <<https://www.dictionary.com/browse/false-friend>> accessed 4 November 2024). Examples include the English word *gift* (present) and the German word *Gift* (poison), as well as the French word *magasin* (shop) and the English word *magazine* (periodical).

⁶⁶⁴ Agius (n 659) 213; see also Dinah Shelton, ‘Reconcilable Differences--The Interpretation of Multilingual Treaties’ (1997) 20 *Hastings International and Comparative Law Review* 611, 622.

⁶⁶⁵ Agius (n 659) 214, see also Shelton (n 664) 621.

⁶⁶⁶ Francesca L Seracini, *The Translation of European Union Legislation: A Corpus-Based Study of Norms and Modality* (LED, Edizioni universitarie di lettere economia diritto 2020) 26.

European Parliament (MEPs) to consider proposals in their respective languages. Interestingly, no clear distinction can be made between the roles of drafters and translators in the legislative process, given the prevalence of collaborative or 'co-' drafting. This is illustrated by the statement in the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* that "drafters should realise that comments from translators... provide an opportunity to identify any errors and ambiguities in the original text... In many cases, the best solution will be to alter the original text, rather than the translation."⁶⁶⁷ The DGT itself has gone even further, stating that since 23 of the 24 language versions of EU documents have to be translated, "the *de facto* drafters are the translators."⁶⁶⁸ Moreover, as noted previously it has even been suggested that "[t]ranslation is the official language of the EU".⁶⁶⁹ Intuitively, each new round of consultation – whether inter- or intra-institutional – would appear to offer an additional opportunity for a divergence to arise, as new feedback, revisions and proposals are translated. The very nature of the legislative process, where "texts are collectively produced with disparate input from various sources, in the process of consensus formation and political compromise",⁶⁷⁰ plays a decisive role in this. First, drafters

⁶⁶⁷ European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 211) 19, para. 5.5.2.

⁶⁶⁸ Directorate-General for Translation, 'DGT Translation Quality Guidelines' (n 236) 2; Interview with Quality Manager (n 265).

⁶⁶⁹ Bengoetxea (n 291) 209.

⁶⁷⁰ Wagner, Bech and Martinez (n 67) 69.

and editors may not be native speakers of the languages they are using⁶⁷¹ because “[m]ost of the texts written inside the EU institutions are produced in English or French by non-native speakers of those languages.”⁶⁷² In this regard, it is interesting to note that English appears to dominate almost wholly as the default source language for most EU legislative texts. According to the DGT, “most texts are drafted in English”⁶⁷³ and then translated. This was confirmed by the responses of various interviewees, through statements such as: “[W]ith enlargement, English has very much taken over as the dominant language”; “What you would very often see, increasingly, is that the English version is the one that they are just using from start to finish”; and “The version that we would receive from the Commission, in the form of a proposal, would more often than not be in English in the first place.”⁶⁷⁴ Further, another respondent stated, “Now I would say, like, 90% of originals are English.”⁶⁷⁵ The fact that most individuals involved in the production of EU legal texts are non-native speakers of the dominant source language has implications for the translators charged with preparing versions in the official languages, as also indicated by interview responses. For example, one interviewee stated that “we have a lot of drafters that write things in English but they are not

⁶⁷¹ Šarčević, ‘Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften: Der Kampf gegen Sprachdivergenzen’ (n 657) 128; Wagner, Bech and Martinez (n 67) 69–70.

⁶⁷² Wagner, Bech and Martinez (n 67) 69.

⁶⁷³ European Commission, ‘Translation and Multilingualism’ (European Commission 2014) 7. See also Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 8 and Colin Robertson, ‘Multilingual Legislation in the European Union. EU and National Legislative-Language Styles and Terminology’ (2011) 9 *Research in Language* 51, 51.

⁶⁷⁴ Interview with European Parliament Legal Language Professional, ‘Interview 2’ (29 September 2023).

⁶⁷⁵ Interview with European Parliament Quality Coordinator, ‘Interview 6’ (10 October 2023).

English-speaking... that makes it really, really hard sometimes... to understand exactly what they want... It's... like you're interpreting... is this really ok what I've written? Like, should I write like this, or should I try to interpret what I think... what they want to say?"⁶⁷⁶ Second, while numerous individuals provide input during the drafting process and their involvement might be assumed to "make for a better and more balanced text",⁶⁷⁷ the involvement of individuals with "varying drafting skills"⁶⁷⁸ can result in "excessively long documents of uneven style, in which the original argument has been distorted or submerged by provisos."⁶⁷⁹ This further complicates the task of translators. Third, an intermediate translation (potentially containing errors due to, for example, the previously mentioned factors) may be adopted as a new source text during the drafting process.⁶⁸⁰ This raises the possibility that errors may be transposed into other language versions. Finally, the ready availability of technology which "allows texts to be tweaked and amended (not necessarily improved) up to the last possible minute"⁶⁸¹ means there may be last-minute changes to source texts which translators then have to incorporate under time pressure (as discussed in Chapter III), leaving insufficient time for quality control measures. This constitutes an additional risk factor. The collective, multilingual nature of the process thus increases the

⁶⁷⁶ *ibid.*

⁶⁷⁷ Wagner, Bech and Martinez (n 67) 70.

⁶⁷⁸ *ibid* 69.

⁶⁷⁹ *ibid* 70.

⁶⁸⁰ Šarčević, 'Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften: Der Kampf gegen Sprachdivergenzen' (n 657) 129.

⁶⁸¹ Wagner, Bech and Martinez (n 67) 69.

likelihood of ambiguities, terminological inconsistencies and a lack of clarity in different language versions.

It has been suggested that “[e]ven if co-drafting is practiced and translation is kept at a minimal [sic], bilingual or multilingual jurisdictions sometimes fail to produce the same meaning in two or more language versions of their law.”⁶⁸² This illustrates a key problem with respect to the uniform application of EU law. A lack of clarity about what rules apply and/or the content of applicable rules equates to a lack of certainty as to the rights and obligations imposed by EU law, and may result in different legal outcomes in different legal forums. This underlines the importance of avoiding divergences or discrepancies between language versions. A helpful categorisation in this context is the division of divergences into two categories: semantic and conceptual divergences,⁶⁸³ where *semantic* divergences may comprise ambiguities⁶⁸⁴ which are apparent from an examination of an individual language version alone⁶⁸⁵ or ambiguities which only become apparent through comparison of

⁶⁸² Leung (n 79) 190.

⁶⁸³ See Loehr, K. (1998), “Mehrsprachigkeitsprobleme in der Europäischen Union”, Frankfurt am Main/Berlin/Bern: Peter Lang, pp. 75, 81, cited in Šarčević, ‘Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften: Der Kampf gegen Sprachdivergenzen’ (n 657) 126.

⁶⁸⁴ Collins Dictionary, ‘Mehrdeutigkeit’ <<https://www.collinsdictionary.com/dictionary/german-english/mehrdeutigkeit>> accessed 4 November 2024.

⁶⁸⁵ I.e. where a text is inherently ambiguous for example because it uses different terms to refer to the same thing.

different language versions.⁶⁸⁶ *Conceptual divergences*⁶⁸⁷, on the other hand, may comprise terms which are identical in form but different in content⁶⁸⁸ and terms which differ in both form and content.⁶⁸⁹ Semantic divergences are associated with drafting-related factors such as syntax, use of unclear expressions, excessively formalistic register, use of abstract or generic terms, and juxtaposition of apparent synonyms.⁶⁹⁰ Other examples in this category include “linguistic discrepancies”⁶⁹¹ such as technical errors (typographical errors and omissions). Conceptual divergences, on the other hand, are attributable to variances between the legal systems of different member states (see also the earlier discussion of conceptual equivalence in Chapter III), and to “the difficulty of expressing legal concepts in

⁶⁸⁶ I.e. where different language versions are ambiguous when read together, for example because they use different terms to refer to the same thing.

⁶⁸⁷ Loehr, K. (1998), “Mehrsprachigkeitsprobleme in der Europäischen Union”, Frankfurt am Main/Berlin/Bern: Peter Lang, p. 81, cited in Šarčević, ‘Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften: Der Kampf gegen Sprachdivergenzen’ (n 657) 126, describes what are here called ‘conceptual divergences’ as ‘divergences of thought’ (German: “Divergenzen im Denken”), describing these as a special sub-category of semantic divergences. Citing Schübel-Pfister, I. (2004), “Sprache und Gemeinschaftsrecht”, Berlin: Duncker & Humblot, p. 105, however, Šarčević also notes that divergences of this type may not be recognised as a special category by linguists.

⁶⁸⁸ I.e. where the same term or word has different meanings in different jurisdictions. For example, the term “age of majority” has a quantitatively different meaning in, for example, the United Kingdom and New Zealand, as the age of majority in the UK is 18 (see section 1 of the Family Law Reform Act 1969), whereas it is 20 in New Zealand (see section 4 of the Age of Majority Act 1970).

⁶⁸⁹ I.e. where different jurisdiction use different terms in a similar context. For example, while the UK uses the term “age of majority” and this means 18 years of age (see footnote 688), Scotland uses the term “age of legal capacity” and this means the age of 16 (see section 1(1)(b) of the Age of Legal Capacity (Scotland) Act 1991).

⁶⁹⁰ Cosmai (n 174) 75.

⁶⁹¹ Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 22.

several languages”,⁶⁹² exemplified by “the use of expressions and phrases... that are too specific to a particular language or national legal system”.⁶⁹³ More particularly, conceptual divergences can be linked to the absence of “an equivalent [term] in other Union languages”.⁶⁹⁴ In the specific context of EU legal texts, moreover, this category includes “divergences between the various language versions of EU legislation”,⁶⁹⁵ also described as “differences in meaning between different authentic language versions”.⁶⁹⁶ Such divergences or differences in meaning can take the form of mistranslations and ambiguities which result in “different perceptions”.⁶⁹⁷ In the context of international treaty drafting, the Directorate General for Translation of the European Commission (DGT) has identified different types of “linguistic discrepancies”,⁶⁹⁸ which could arguably also arise in the context of non-treaty drafting and translation. According to the DGT, discrepancies can take the form of “technical errors” (i.e. typing errors and omissions) or “classical mistranslations”.⁶⁹⁹

⁶⁹² Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 5.

⁶⁹³ European Union, ‘Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation’ (n 211) 18. (para. 5.3).

⁶⁹⁴ *ibid.* (para. 5.3.1). Note that this source refers to the resulting divergences in the form of “circumlocutions and approximations” as “semantic divergences”. However, it can be argued that such divergences should more correctly be classified as conceptual, as they stem from conceptual differences between legal systems. The resulting semantic difference is a consequence of the conceptual divergence.

⁶⁹⁵ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 3.

⁶⁹⁶ Kuner (n 352) 958.

⁶⁹⁷ Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 22.

⁶⁹⁸ *ibid.*

⁶⁹⁹ *ibid.*

Although the DGT itself has not further defined what it means by 'classical mistranslations', the term 'mistranslation' can be taken to refer to both 'errors in translation' and 'translation errors', where 'errors in translation' are "breaches of the target language system and idiomatic errors... i.e., usual problems of language and text production",⁷⁰⁰ while 'translation errors' represent "something [which] has gone wrong during the transfer and movement from the ST to the TT", with potential causes including "misunderstandings of the translation brief or of the content of the ST... not rendering the meaning of the ST accurately... factual mistakes, terminological or stylistic flaws, and... different kinds of interferences between ST and TT", where 'interferences' are "projections of unwanted features from one language to the other and from ST to TT" attributable to "an assumption of symmetry between... languages and/or cultures".⁷⁰¹ In terms of divergence typology, 'errors in translation' appear most closely related to semantic divergences, and 'translation errors' to conceptual divergences. Discrepancies (or divergences) may also be attributable to organisational/logistical factors, such as "the rushed nature of the process" or separation of "the negotiation and translation phases [so that] delegates are no longer available to ensure that translations reflect the exact sense of the [legal instrument]."⁷⁰²

⁷⁰⁰ Gyde Hansen, 'Translation 'Errors'' in Yves Gambier and Luc van Doorslaer (eds), *Handbook of Translation Studies*, vol 1 (John Benjamins Publishing Company 2010) 386.

⁷⁰¹ *ibid* 385.

⁷⁰² Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 24.

When errors and mistranslations arise during the document production process, it might be tempting to hold drafters and translators responsible for them. However, it is by no means clear that responsibility rests (solely) with these parties. In this regard, it is helpful to consider potential sources of ambiguity in EU documents, based on Cosmai's list of five particular factors which play a role in this context. The first of these is *conceptual tensions*. Drafting in the EU context features a "need to use a language that is adept enough to depict the novelties of Community legislation and which does not bring to mind any legislative arrangements already existing at the national level"⁷⁰³ while at the same time meeting "the need to conserve a certain degree of terminological and conceptual consistency across all the official languages".⁷⁰⁴ As discussed above, drafters and translators have to find terminology that satisfies the sometimes competing requirements to avoid terms that that could cause confusion with existing national legal regimes but at the same time seek the greatest possible harmonisation of terminology across the member states. The potential causative link between such conceptual tensions and conceptual divergences as discussed above is readily apparent. Second, EU texts are subject to the influence of *political considerations*. This factor relates to "the political character of texts... which are sometimes intentionally drafted in a vague form",⁷⁰⁵ the fact that "an intentional lack of clarity may be left in place as a form of compromise to satisfy differences of opinion"⁷⁰⁶ and the fact that

⁷⁰³ Cosmai (n 174) 76.

⁷⁰⁴ *ibid.*

⁷⁰⁵ *ibid* 77.

⁷⁰⁶ *ibid.*

“the vagueness of a final draft may often depend on the need to overcome the issue of fundamentally different positions which could otherwise rule out any possibility of reaching agreement.”⁷⁰⁷ In other words, political priorities may outweigh the objective of terminological clarity, such that ambiguity may sometimes be necessary or even desirable. Consequently, maintaining ambiguity may entail accepting divergences between target texts. The third identified factor is *drafting conditions*. As indicated previously, this concerns “EU officials who write in languages in which they have only a functional knowledge”,⁷⁰⁸ and the fact that “in many instances texts have to be produced within stringent deadlines and in chaotic conditions.”⁷⁰⁹ Intuitively, working under pressure and in a foreign language would seem to be clear risk factors in terms of final output quality, i.e. drafters and translators working in such conditions are more likely to make mistakes themselves or overlook mistakes made by others. When such conditions apply in a multilingual document production environment where multiple persons are working on parallel texts in different languages, the potential for divergences between the different target texts is clear. The fourth identified source of ambiguity is – perhaps paradoxically – the *pursuit of uniformity*, i.e. “the need for legal texts to guarantee the highest level of conformity and least possible disparity both in form and in substance... between all different language versions.”⁷¹⁰ This need manifests itself in “a conscious effort to maintain a degree of uniformity throughout

⁷⁰⁷ *ibid.*

⁷⁰⁸ *ibid.* 78.

⁷⁰⁹ *ibid.*

⁷¹⁰ *ibid.*

EU official languages both in terms of content and in form, mainly with the aim of avoiding problems in the interpretation and application of the given regulatory instrument.”⁷¹¹ Ambiguity may result because “certain versions can easily seem forced and unnatural, since they have been adapted to exogenous models of articulation of written discourse.”⁷¹² In other words, the pursuit of uniformity restricts the discretion of drafters and/or translators, who may adopt – voluntarily or involuntarily – terms, phrases, sentence structures and other lexical features that do not transfer equally well into all target languages. Ambiguity may thus result when, for example, an ‘unnatural’ word order or a neologism is adopted to accommodate a compromise negotiated with the overriding objective of uniformity in mind. Fifthly and finally, ambiguity may be caused by *adherence to conventional forms and terminology*. This has been described as “a lack of sensitivity concerning the language being used... due to poor drafting skills and/or the propensity to use catchy terminology... as well as a dull lexicon that may well be more understandable.”⁷¹³ It is worth noting that this source of ambiguity can take effect in two areas: in source texts and in target texts. First, ambiguities in a source text may be transferred into target texts simply because “translators are... reluctant to employ solutions that appear to stray too far from the original text – especially if their interpretation may be complex – and which may therefore seem a little too daring or innovative”.⁷¹⁴ Second, ambiguities may arise in target texts when translators “stick to

⁷¹¹ *ibid* 79.

⁷¹² *ibid*.

⁷¹³ *ibid* 80.

⁷¹⁴ *ibid*.

generic terminology... which can itself hamper understanding.”⁷¹⁵ In the first instance, translators can be said to perpetuate ambiguities, while in the second instance they create them.

Nevertheless, it seems clear that few, if any, of the factors outlined above are under the control of the individuals involved in document production. Fundamentally, the EU is a political and institutional project, and drafters and translators are therefore subject to policies, guidelines, expectations and framework conditions which greatly restrict their individual discretion, as exemplified by the previously discussed limited discretion of translators to resolve ambiguities in source texts due to the pursuit of uniformity. Šarčević’s distinction between avoidable and unavoidable divergences is also helpful to consider in this context, where avoidable divergences are attributable to human error⁷¹⁶ and unavoidable divergences arise when, for example, they are already present in the draft instrument,⁷¹⁷ or when a final text is a compromise resulting from negotiations, for example between the EU institutions⁷¹⁸ or governments.⁷¹⁹ Negotiated compromises may thus contain “artful wording... used to conceal... diverging positions”,⁷²⁰ and ultimately “obscure

⁷¹⁵ *ibid.*

⁷¹⁶ Although even in such cases there may be external contributory factors like time pressures: Šarčević, ‘Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften: Der Kampf gegen Sprachdivergenzen’ (n 657) 127.

⁷¹⁷ *ibid.* 128.

⁷¹⁸ *ibid.*

⁷¹⁹ Timmermans (n 68) 1232.

⁷²⁰ *ibid.* 1233.

drafting".⁷²¹ Koskinen, writing about the Translation Service of the Commission of the European Union, has suggested that translators have limited freedom and thus "little individual responsibility, but... great collective responsibility", in that "all translators are collectively responsible for each and every translated document."⁷²² Moreover, as discussed above, translators may well be subject to factors like time pressure and high-paced translation work which reduce their responsibility for any divergences.⁷²³ The same appears to be true of other parties involved in the production of legal texts, such as drafters and revisors. Above, it was suggested that the collaborative approach taken to the drafting of EU legal texts means that no clear distinction can be made between the roles of drafters and translators in the process of document production. Despite the differing roles and responsibilities of drafters and translators, where drafters are charged with creating and defining content and translators are responsible for reproducing and conveying adopted content into other languages, it appears difficult to assign responsibility for divergences to one or the other, as both drafters and translators have limited power to eliminate divergences.

Differences which arise between language versions at the pre-legislative stage are likely to remain undiscovered until certain circumstances arise. Specifically, in order for a divergence

⁷²¹ *ibid.*

⁷²² Kaisa Koskinen, 'Institutional Illusions: Translating in the EU Commission' (2000) 6 *The Translator* 49, 60.

⁷²³ Šarčević, 'Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften: Der Kampf gegen Sprachdivergenzen' (n 657) 127–128.

to be discovered, it is necessary not only that the relevant provision is read, but also that some type of comparison is made of one language version with another. This may occur, for example, when a conflict arises between one language version and another because the authorities in two member states apply differing rules. Another possibility is when a person or entity is seeking to ascertain the content of an EU legal text, or a provision in such a text, and its applicability to that person or entity's particular circumstances. Accordingly, the need to *resolve* previously arisen divergences crystallises in the context of interpretation and/or application. As discussed in greater detail in Chapter VI, such application and interpretation can occur on several levels: individual, national and supranational. It is divergences which slip through the quality assurance net which are of particular interest in the present discussion, i.e. those divergences which arise during text production at the pre-legislative stage, are not caught by implemented quality measures and thereafter firstly have to be discovered by persons and entities with a need to apply EU legal texts and secondly have to be addressed and/or resolved by the courts. At the same time, it is worth considering whether divergences between language versions always represent a problem which has to be solved, or whether there may be circumstances in which divergences are unproblematic.

2. Are divergences undesirable?

As indicated in the above discussion of the second driver of ambiguity in EU texts – political considerations – ambiguities in EU legal texts are not necessarily undesirable in all circumstances. In addition to avoidable and unavoidable divergences as discussed above,

documents may include ambiguous terminology or wording which leaves room for differing interpretations,⁷²⁴ and the inclusion of such ambiguous phrasing may be intentional, not least since the final text may incorporate “heavily achieved compromises using vague terms”.⁷²⁵ Moreover, some “divergences are not classical mistranslations but rather a reflection of certain political wills”.⁷²⁶ As noted above, EU legal instruments may reflect a negotiated compromise which incorporates deliberate ambiguity in meaning to gloss over differences in political opinion between member states,⁷²⁷ and in some instances “the Community legislator deliberately uses vague notions (or vague definitions) in order to allow for a large variety of solutions existing in Member States for which harmonization was not deemed necessary.”⁷²⁸ In other words, in some instances ambiguities – or even divergences – may in fact be desirable because they allow all parties to claim success in implementing their particular agenda. Moreover, vagueness leaves room for meaning to be created later – a useful option for negotiators in cases where getting a political deal done is more important than nailing down all the legislative details.

Intent is therefore a key factor in determining the (un)desirability of divergences. Ambiguities may be deliberate and thus desired, but when ambiguous terms are included inadvertently,

⁷²⁴ Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 24.

⁷²⁵ *ibid.*

⁷²⁶ *ibid* 22; Silvia Ferreri, ‘Multilingual Interpretation of European Union Law’, CDCT Working Paper 40-2015/European Legal Culture 23, p. 16.

⁷²⁷ Timmermans (n 68) 1233.

⁷²⁸ *ibid* 1232.

they are undesirable, just like “technical errors” and “classical mistranslations”.⁷²⁹ This undesirability is founded on a number of factors. First, divergences between language versions undermine the appearance of uniformity of EU legal rules. Second, divergences undermine the proposition of equal authenticity and validity. Third, divergences may result in differences in application, in that they may produce differing outcomes depending on which language version is applied. Such application may be done by users who decide their own conduct or actions based on their understanding of applicable rules, by regulatory authorities tasked with applying and enforcing legal rules, by national courts asked to rule on potential breaches of the rules and/or questions of interpretation, and by the ECJ when asked to issue an interpretative (officially known as a preliminary) ruling. Fourth, differences in application will undermine the objective of harmonisation within the EU in cases where this is an aim. Finally, divergences render the state of the law unclear and/or uncertain, thereby increasing the likelihood of legal challenges and associated time and financial costs for both individuals and the judicial system. As discussed in Chapter IV, two views can be taken of legal certainty, respectively representing the collective/systemic perspective and the individual perspective. At the collective level, legal certainty serves the objective of uniform application of EU law across the member states. The individual perspective, on the other hand, focuses on the reliability of language versions and the consequences thereof for individual legal certainty. However, it was noted that legal certainty may be undermined

⁷²⁹ Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 22.

by divergences between language versions irrespective of the ideological perspective adopted. This can be illustrated by reference to the five factors outlined briefly above: from the collective/systemic perspective, divergences threaten to undermine uniform application of EU law, while from the individual perspective, they reduce the reliability of language versions by rendering the law unclear, not least for individual EU citizens.

A different perspective on divergences has been adopted by Cosmai, who has suggested that “[c]onsidering the concrete impact of the most glaring inconsistencies among the different language versions of EU treaties and legal acts – which, it should be stated, occur infrequently⁷³⁰ – these are more to be taken as harmless incidents along the way and are seldom so serious as to have real effects on the validity of a legal text or hamper the activities of the Union.”⁷³¹ Put another way, “the multilingual system seems to work, from a pragmatic point of view”⁷³² or, alternatively, “most of the time law works fairly well.”⁷³³ While this may be true of, for example, simple mistranslations which can be rectified by means of a corrigendum, Cosmai also recognises that divergences “become problematic when a lack of equivalence leads to different interpretations of a given legal instrument, creating

⁷³⁰ Although in Chapter II it was noted that the number of cases where the ECJ has been asked to resolve differences between language versions is not small (with 170 judgments involving divergences being identified in the period 1960–2010; see Baaij, ‘Fifty Years of Multilingual Interpretation in the European Union’ (n 91) 219.) It is an open question, however, whether all of these cases involved ‘glaring inconsistencies’ as per Cosmai.

⁷³¹ Cosmai (n 174) 148.

⁷³² Bengoetxea (n 291) 207.

⁷³³ Leung (n 79) 207.

situations where a degree of disparity emerges between Member States.”⁷³⁴ In addition, relevant EU institutions acknowledge the importance of keeping the number of divergences in EU legal texts to a minimum. For example, the DGT has stated that “the quality of... EU legislation remains... of [the] utmost [sic] importance, not only as a means to exclude undesirable consequences at the national level, but also to prevent private litigants from appearing before the EU courts with actions that undermine the trustworthiness of EU legal instruments.”⁷³⁵ To these considerations can be added the consequences of disparities between EU member states for persons who rely on EU legal texts in individual languages.

3. The individual impact of divergences

The preceding discussion suggests that divergences can be categorised not only by *type* – as semantic or conceptual – but also by *cause* and *responsibility*. The causes of divergences are neither uniform nor consistent, with individual divergences being attributable to mistranslations, unintentional ambiguity and intentional ambiguity. Responsibility for the divergences which result from these causative factors must necessarily rest with translators, drafters and/or policymakers, where translators can potentially be held responsible for mistranslations, drafters for unintentional ambiguities and policymakers for both intentional (e.g. included for political reasons) and unintentional ambiguities (e.g. resulting from a lack of language skills). Regardless of type, cause and responsibility, however, divergences may

⁷³⁴ Cosmai (n 174) 148.

⁷³⁵ Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 142.

have an individual impact. In Chapter III above, it was noted that EU lawmaking produces public legal information in the form of officially published legal texts such as acts, statutes, legislative proposals, judgments and reference documents. While divergences may in principle arise between any source text and a translation or translations of it, certain document types are of greater interest and importance to individuals.⁷³⁶ Specifically, individuals are likely to refer to legislation (i.e. acts and statutes) first (and perhaps also exclusively, unless case law is also considered) when seeking to identify rights and obligations under EU law. It is therefore relevant to consider the audience(s) to which these sources of public legal information are addressed. As regards ECJ case law, since the preliminary ruling procedure⁷³⁷ under Article 267 of the Treaty on the Functioning of the European Union is initiated by national courts, rulings by the ECJ in such cases are formally addressed to the referring court. However, rulings and opinions in such cases are released publicly and in all the official languages, so that the addressed audience is broader than just the referring court and involved parties. It has been proposed that communication regarding ECJ judgments occurs in five spheres (or circles), namely i) “communication between the parties, interveners and the ECJ”;⁷³⁸ ii) “the broader context of similar cases”,

⁷³⁶ Note that in Chapter III, it was stated that the category of ‘individuals’ includes both natural and legal persons. Accordingly, individual engagement with EU legal texts may encompass both private persons and, for example, in-house counsel employed by a company.

⁷³⁷ See further the detailed discussion of the Article 267 procedure in Chapter VI below.

⁷³⁸ Paunio (n 595) 137; see also Mark Van Hoecke, *Law as Communication* (Reader in European Community Law Francis Snyder ed, 1st edn, Bloomsbury Publishing Plc 2002) 176.

i.e. “dialogical interaction with previous case law”;⁷³⁹ iii) “discussion on ECJ case law in legal doctrine”;⁷⁴⁰ iv) “cases in which the Court’s judgments attract attention in the media so that they are discussed by a non-legal audience”;⁷⁴¹ and v) “society at large: in cases where judgments concern fundamental ethical or political questions”.⁷⁴² Further, it has been suggested that, “The great majority of cases are discussed in the first three communicative spheres whereby communication is limited to the community of legal professionals. Legal certainty in its substantive form relates first and foremost to these three spheres, although not exclusively.”⁷⁴³ On this view, the primary audience for ECJ case law comprises a “juristic community”⁷⁴⁴ of “professional jurists, lawmakers and lawyer-linguists”.⁷⁴⁵ However, there is also recognition that the ECJ engages with two audiences, one consisting of the stakeholders in an individual case – i.e. “the parties, interveners, referring courts, *amici curiae*”⁷⁴⁶ – and the other composed of parties who engage with case law as a whole – i.e. “national and international courts, the juristic community of law professionals, the EU legislators, academics.”⁷⁴⁷ Even if the majority of the audience for EU case law comprises members of the legal community, this does not preclude the possibility that (non-legal professional) members of the public may read and rely on case law. Moreover, it has been suggested

⁷³⁹ Paunio (n 595) 137–138; see also Van Hoecke (n 738) 176.

⁷⁴⁰ Paunio (n 595) 138; see also Van Hoecke (n 738) 176.

⁷⁴¹ Paunio (n 595) 139; see also Van Hoecke (n 738) 176.

⁷⁴² Paunio (n 595) 139; see also Van Hoecke (n 738) 177.

⁷⁴³ Paunio (n 595) 139.

⁷⁴⁴ Bengoetxea (n 291) 205.

⁷⁴⁵ *ibid.*

⁷⁴⁶ *ibid.* 211.

⁷⁴⁷ *ibid.*

that legal certainty is linked to the rational acceptability of ECJ decisions,⁷⁴⁸ and that “the more inclusive the audience, the greater the degree of ‘certainty’ obtained.”⁷⁴⁹ Communication with relevant parties is part of securing acceptability,⁷⁵⁰ where ‘relevant parties’ include “all citizens of the Union, and not only the professional jurists, lawmakers and lawyer-linguists”.⁷⁵¹ While it seems logical to conclude that (non-legal professional) individuals are unlikely to engage with an ECJ judgment unless it is of some relevance to them – for example because it is of public interest and/or establishes the bounds of their rights and obligations – and that legal certainty thus relates primarily to spheres i)–iii) noted above, participation in spheres ii) and iii) is not restricted to legal professionals. In other words, there is no guarantee that (non-legal professional) individuals will not engage with case reports themselves and rely on what they find there.⁷⁵²

As regards legislation, many items of EU legislation are formally addressed to the member states. As the focus of this thesis is on the impact of multilingual EU legislation at the individual level, however, it is logical to consider under what circumstances individuals may form part of the audience addressed by EU legislation. In Chapter III, it was noted that the

⁷⁴⁸ Paunio (n 595) 51.

⁷⁴⁹ Bengoetxea (n 291) 206.

⁷⁵⁰ *ibid* 205.

⁷⁵¹ *ibid*.

⁷⁵² The question of whether such individuals are capable of forming a correct understanding of the legal information they access, and thus the (un)reasonableness of relying on this understanding, is not considered further here. For present purposes, it is sufficient to note that (non-professional) individuals may consult and rely on different language versions of case reports.

target audience for EU legal texts includes both natural and legal persons and that the category of natural persons encompasses a range of individuals, from legal experts to laypersons. It was also observed that legislation 'speaks' to both legal professionals and untrained users.⁷⁵³ As mentioned previously, the principle of EU law known as direct effect allows individuals to invoke EU law before both national and European courts. In the case which established the principle, it was stated that, "Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."⁷⁵⁴ Subject to various conditions, individuals may assert such rights against both their own member state⁷⁵⁵ and other individuals.⁷⁵⁶ In other words, individuals may need to consult EU legislation to identify the nature and content of their rights and obligations under EU law. At the same time, it can be argued that such reviews of EU legislation are not primarily conducted by individual members of the general public, but rather by the 'community of legal professionals' or 'juristic community' as discussed in relation to case law above. While it is logical to distinguish generally between "those who use EU law on a daily basis, (national courts, practitioners in the national and European arenas, legal academics etc.)"⁷⁵⁷ and (non-legal professional) individuals, the existence and use of, for example, legal advisers in some cases does not exclude the possibility that

⁷⁵³ Xanthaki (n 225) i.

⁷⁵⁴ Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (n 431), Summary, para. 3.

⁷⁵⁵ Known as vertical direct effect.

⁷⁵⁶ Known as horizontal direct effect.

⁷⁵⁷ McAuliffe, 'Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union' (n 301) 23.

individuals may review EU legislation personally in other instances, especially if they are aware of the principle of direct effect.

In Chapter III, it was noted that translated EU legislation and translated ECJ case law have differing status in law, with language versions of judgments (case law) other than in the language of procedure being recognised as non-authentic translations but different language versions of legislation being treated as equally authentic originals. On this basis, it could be argued that divergences between different language versions of a judgment are less of a concern than divergences between different language versions of an act or statute because any reliance by a person on a 'non-authentic' language version represents an error which is the responsibility (and is made at the risk) of the individual involved. This view can be challenged on various grounds. First, it runs contrary to the objective of giving "citizens access to EU... information in their own languages."⁷⁵⁸ Second, different language versions of reported judgments of the ECJ can contain divergences which could affect interpretation and enforcement or "even change the entire meaning of a legal provision."⁷⁵⁹ Third, it ignores the realities of the situation of ordinary (non-professional) readers, who may not be aware that there is an official language of procedure and who are therefore highly likely to

⁷⁵⁸ Katsarova (n 298) 2; European Parliament, 'Framework Strategy for Multilingualism' (n 179), Specific Comment 8.

⁷⁵⁹ Aleksandra Čavoški, 'Interaction of Law and Language in the EU: Challenges of Translating in Multilingual Environment' [2017] *The Journal of Specialised Translation* 58, 61.

rely on the version of a document which is in their preferred language.⁷⁶⁰ In other words, it appears unrealistic to expect citizens to refer to an authentic version written in a language they do not comprehend.⁷⁶¹ This is supported by the statement that “Europe remains a monolingual habitus for a considerable part of the European citizens. Multilingual practices are far from becoming a part of the daily routine of large groups of European citizens.”⁷⁶² Fourth, although individuals may well refer to both legislation and case law in determining the scope of rights and obligations under EU law, it is by no means clear that they will distinguish between authentic and non-authentic texts when doing so. All in all, therefore, it seems clear that divergences between different language versions of case law can have an impact at the individual level, despite the fact that citizens are only formally entitled to rely on the version in the language of procedure. Nevertheless, given that all case reports not in the language of procedure have the status of non-authentic translations, divergences between different language versions of case reports will not be considered further here. Instead, the discussion will focus on divergences between different language versions of legislation and the case law on how they are resolved.

⁷⁶⁰ See, by way of analogy, Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 25: “[I]ndividuals upon whom [a] treaty might confer rights will most probably consult the non-authentic translation of the treaty they are able to understand it [sic]. Substantial discrepancies between the authentic version and the translation might therefore lead to misunderstanding, misinterpretations and even misapplication of the treaty. The impact of non-authentic translations thus can in no way be underestimated and their linguistic quality is of crucial importance.”

⁷⁶¹ In this regard, it is important to distinguish between private individuals, i.e. citizens, and professional advisers of whom greater efforts and/or in-depth knowledge may be expected, analogously to the higher duty of care applicable to persons who claim to be professionals.

⁷⁶² Stoicheva (n 175) 115.

Divergences between language versions of primary and secondary EU law are not uncommon. For example, in the English version of the Treaty on the Functioning of the European Union (TFEU), the terms ‘crimes’ and ‘criminal offences’ are used interchangeably in Articles 83 and 87, while the German version uses only the term “Straftaten” (criminal offences).⁷⁶³ Another example is inconsistent translation of the English term ‘arrangement(s)’ into French, for example as “a system” (Article 48 TFEU) or as “rules” (Article 28 of Protocol (No 5)) based on contextual considerations.⁷⁶⁴ Divergences can also be found in secondary EU law, for example in Article 7 of Council Regulation 1/1958/EEC⁷⁶⁵ and various other instances.⁷⁶⁶ When divergences between language versions of primary and secondary EU law come to the attention of national courts which feel unable to resolve them, they are referred to the ECJ for resolution. Although the ECJ only issues a preliminary (i.e. interpretative) ruling and it is therefore the national court which ultimately issues the ruling which binds the individuals involved, the binding nature of the ECJ’s interpretative ruling vis-à-vis the national court means that ECJ decisions do in practice determine the outcome of national cases, at least where a national ruling rests on the question of interpretation. In other words, the ECJ’s rulings have individual impact, albeit indirectly. This is illustrated below

⁷⁶³ Čavoški (n 759) 64.

⁷⁶⁴ *ibid* 64–65. A further example can be found in the English and French versions of Article 191 of the Treaty on the Functioning of the European Union.

⁷⁶⁵ Čavoški (n 759) 60.

⁷⁶⁶ See Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 100–108.

by reference to a number of examples taken from ECJ case law. It was posited above that divergences are attributable to mistranslations, unintentional ambiguity and intentional ambiguity, and that responsibility for mistranslations and ambiguity rests with translators, drafters and/or policymakers. Moreover, as discussed above, divergences may be desirable or undesirable. Desirable divergences are most likely⁷⁶⁷ to arise when they are deliberately incorporated, retained or otherwise approved by policymakers. The intentional nature of desirable divergences makes them difficult to eliminate, as doing so would be contrary to conscious policy. Undesirable divergences, however, can and should be eliminated, since “reducing... divergences would, to a large extent, prevent linguistic discrepancy problems.”⁷⁶⁸ When the ECJ is asked to resolve an ambiguity, it can be inferred that the ambiguity is not intentional and that the greatest potential for preventing divergences thus lies in areas falling within the remit of translators and drafters, i.e. in the categories of mistranslations and unintentional ambiguity. In the brief case descriptions presented below, therefore, efforts have been made to classify the divergences not only by type, but also by cause and responsibility. The purpose of classifying the divergences in this way is to identify where efforts to eliminate divergences could best be focused.

⁷⁶⁷ Although it is theoretically possible that divergences could be deliberately introduced by individuals with access to draft texts, for example with malicious intent or under the influence of corruption, this appears extremely unlikely and is not considered further here.

⁷⁶⁸ van der Jeught (n 597) 20.

In *Konservenfabrik Lubella Friedrich Büber GmbH & Co. KG v Hauptzollamt Cottbus*,⁷⁶⁹ the ECJ was required to rule on the question of differences between language versions of Regulation (EEC) No 1035/72, which imposed charges on certain imports of fresh sour cherries. For a period of time before a corrigendum was issued, however, the German version of the Regulation referred to 'Süßkirschen' (sweet cherries), rather than 'Sauerkirschen' (sour cherries). In other words, there was a semantic divergence between the German and other versions of the document. The claimant (Lubella) had imported sour cherries in the period before the corrigendum was issued, and was served with a notice of assessment requiring it to pay charges based on those imports. Lubella argued that it was not required to pay the charges, not least because "the German version of the contested regulation, although referring to the CN codes⁷⁷⁰ corresponding to sour cherries, uses the term 'Süßkirschen' ('sweet cherries') in its title, its preamble and the wording of Article 1(1) to describe the products covered by the protective measures."⁷⁷¹ Accordingly, there was an ambiguity within the German version, i.e. between the CN code and the descriptor 'sweet cherries'. The German court referred the matter to the ECJ for an interpretative ruling, and the ECJ held that while "the German version originally contained a material error, in that it

⁷⁶⁹ *Konservenfabrik Lubella Friedrich Büber GmbH & Co KG v Hauptzollamt Cottbus* [1996] European Court of Justice Case C-64/95.

⁷⁷⁰ In this context, 'CN' is an abbreviation of the term 'Combined Nomenclature', which is "a tool for classifying goods, set up to meet the requirements both of the Common Customs Tariff and of the EU's external trade statistics"; see European Commission, 'The Combined Nomenclature' <https://taxation-customs.ec.europa.eu/customs-4/calculation-customs-duties/customs-tariff/combined-nomenclature_en> accessed 4 November 2024.

⁷⁷¹ Case C-64/95, *Konservenfabrik Lubella Friedrich Büber GmbH & Co. KG v Hauptzollamt Cottbus* (n 769), paragraph 5.

used the term 'Süßkirchen' [sic] rather than [sic] 'Sauerkirschen'" the "ambiguity could perfectly well have been resolved by reference to the other language versions of the regulation."⁷⁷² In other words, *Lubella* was required to pay the charges despite having acted in compliance with the German version of the Regulation as it was worded at the relevant time. Above, it was noted that semantic divergences may comprise ambiguities which are apparent from an examination of an individual language version alone, or ambiguities which only become apparent through comparison of different language versions. As noted above, the *Lubella* case features both types. First, the German text was inherently ambiguous because it used two different designations for the cherries in question (the CN code for sour cherries and the term 'sweet cherries'). Second, there was a semantic divergence between the German version and the other language versions due to the use of 'Süßkirchen' (sweet cherries) rather than 'Sauerkirschen' (sour cherries). As regards the causal element of the analysis, it seems clear that both ambiguities were attributable to a mistranslation, rather than some deeper ambiguity of meaning. This conclusion is supported by the description of the difference between the language versions as "a drafting error",⁷⁷³ and the court's reference to a "material error... which was subsequently rectified."⁷⁷⁴ Coupled with the fact

⁷⁷² Case C-64/95, *ibid*, para. 18

⁷⁷³ By the European Commission and the Spanish Government; see Case C-64/95. *ibid*, para. 16.

⁷⁷⁴ Case C-64/95, *ibid*, para. 18

that a corrigendum⁷⁷⁵ was issued to remedy the divergence, this strongly indicates that the divergence represented a mistranslation, i.e. a mistake made during the translation process.

In *Marianne Worsdorfer, née Koschniske, v Raad van Arbeid*,⁷⁷⁶ social security benefits (specifically family allowance) were withdrawn from a woman living in the Netherlands on the basis that her husband was engaged in work in Germany and was receiving child benefits there. However, the Dutch version of the relevant legislative basis for the decision – Article 10(1)(B) of Regulation No 574/72 – referred to such work being done by an “echtgenote” (wife), while other language versions referred to both partners to a marriage.⁷⁷⁷ In other words, “the wording of the provision in question, considered solely in the Dutch version, [was] capable of giving the impression that the term used refers exclusively to a person of the female sex.”⁷⁷⁸ The ECJ held that “the need for a uniform interpretation of Community regulations makes it impossible for [the relevant legislative] passage to be considered in isolation and requires that it should be interpreted and applied in the light of the versions existing in the other official languages.”⁷⁷⁹ Accordingly, the term ‘wife’ was held to include a married man, and the benefits had been legitimately withdrawn despite the explicit wording

⁷⁷⁵ European Union, ‘Berichtigung der Verordnung (EWG) Nr. 1932/93 der Kommission vom 16. Juli 1993 mit den bei der Einfuhr von Süßkirschen anzuwendenden Schutzmaßnahmen’ OJ 1993/ L 176/29.

⁷⁷⁶ *Marianne Worsdorfer, née Koschniske, v Raad van Arbeid* [1979] European Court of Justice Case 9/79.

⁷⁷⁷ Specifically terms such as “Ehegatte” (German) and “spouse” (English); see Case 9/79 *ibid*, Decision, para. 7.

⁷⁷⁸ Case 9/79 *ibid*, Decision, para. 5.

⁷⁷⁹ Case 9/79 *ibid*, Decision, para. 6.

of the Dutch version of the regulation. *Prima facie*, there was a semantic divergence between the Dutch and other language versions of the legislative text. In this regard, the case represents the second type of semantic divergence discussed above, i.e. an ambiguity which only became apparent through comparison of different language versions. However, in this case the divergence can also be regarded as conceptual in nature, as the Dutch language does not appear to offer an equivalent of the gender-neutral term 'spouse',⁷⁸⁰ and the divergence therefore represented an example of "the use of expressions and phrases... that are too specific to a particular language or national legal system"⁷⁸¹ which resulted from "the difficulty of expressing legal concepts in several languages".⁷⁸² The status of the error as either semantic or conceptual has consequences for identification of the cause of the divergence and responsibility for it. A *semantic* divergence could be categorised as a mistranslation on the basis that the divergence must represent an error because no other language version contains the same ambiguity. However, this is an inference necessitated by the unique nature of translations in the EU context, where the equal authenticity principle implies that "all the language versions of a single instrument... are... 'originals'".⁷⁸³ In the absence of further information on the drafting process of a given text, the equal authenticity

⁷⁸⁰ dict.cc, 'Spouse' <<https://enl.dict.cc/?s=spouse>> accessed 4 November 2024, where 'echtgenote' is translated as "spouse [female]" and 'echtgenoot' as "spouse [male]".

⁷⁸¹ European Union, 'Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation' (n 211) 18. (para. 5.3).

⁷⁸² Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 5.

⁷⁸³ Šarčević, 'Challenges to the Legal Translator' (n 221) 190; see also (Cosmai, 2014, pp.42-44) and Leung (n 79) 164–165. See also further discussion in Chapter III.

principle renders it impossible to determine which language version comprised the source text and thus which language versions are translations. In the present case, it is therefore impossible to determine whether the female-specific term 'echtgenote' represents a mistranslation, not least because the Dutch text could, in theory at least, be the source text. A *conceptual* divergence, on the other hand, may only become apparent through comparison of different language versions. Where a semantic divergence is due to a mistranslation, it seems logical to conclude that responsibility rests with the translator(s) because any such issue must necessarily become apparent during translation and must therefore be resolved at that stage. In other words, the Dutch version of the legislative text should not have been allowed to progress to publication without the terminology issue being resolved, if necessary in consultation with other stakeholders (i.e. drafters or policymakers). On this view, the divergence can be classified as a mistranslation attributable to the responsible translator(s). In the case of a conceptual divergence which only becomes apparent through comparison with other language versions, however, it is not certain that the translator could have discovered it and can be held responsible.

In *Skatteministeriet v Aktieselskabet Forsikringselskabet Codan*,⁷⁸⁴ a Danish insurance company had been required to pay tax on a transaction involving shares. The relevant legislation – Article 12(1)(a) of Directive 69/335/EEC – detailed taxes and duties which could

⁷⁸⁴ *Skatteministeriet v Aktieselskabet Forsikringselskabet Codan* [1998] European Court of Justice Case C-236/97.

be charged on certain transactions. The Danish and German versions of this provision referred to equivalents of the phrase 'stock exchange turnover taxes', and the insurance company argued that it was exempt from taxation because it was not stock-exchange listed. Other language versions employed the phrase 'taxes on the transfer of securities' (or equivalents). The ECJ held that "the interpretation of a provision of Community law involves a comparison of the different language versions thereof"⁷⁸⁵ and that "[t]o disregard the clear wording of the great majority of the language versions of Article 12(1)(a) of the Directive... would... run counter to the requirement that the Directive be interpreted uniformly".⁷⁸⁶ Accordingly, the insurance company was liable to pay the levied tax despite the wording of the Danish version of the Directive. The divergence in this case can be described as conceptual because it fundamentally concerned differences in the transposition of a legal concept (specifically a tax on share transactions) into various national legal systems. The possibility cannot be excluded that the wording selected by the Danish and German translators – and the translators into the other target languages – was informed and influenced by the respective national legal regimes, for example because the closest equivalent term existing in the national system was used. To the extent that the divergence is conceptual in nature, it presumably represents an unintentional ambiguity, rather than a mistranslation. However, the divergence between the Danish and German versions on the one hand and the other language versions on the other can also be regarded as semantic

⁷⁸⁵ Case C-236/97 *ibid*, para 25.

⁷⁸⁶ Case C-236/97 *ibid*, para 29.

in nature, since different wording was used for the same concept. Moreover, the case falls into the second category of semantic divergence (i.e. ambiguities which only become apparent through comparison of different language versions), and exemplifies a necessary differentiation within that category. The situation in the *Codan* case was less clear-cut than that in *Worsdorfer* because the Danish text did not diverge from all other language versions. Rather, the language versions fell into two camps, with the Danish and German versions employing one phrase and the remaining language versions another. As a result, the court resorted to referring to “the great majority of the language versions”.⁷⁸⁷ In other words, within the ‘apparent through comparison’ category of semantic divergences, there may be instances where a text is incompatible with all other language versions, and instances where a text is incompatible with a majority of other language versions. The more even the numbers in each group, the less certain a reader can be of the correct interpretation, and arguably the less legitimate a ‘majority rule’ approach.⁷⁸⁸ When viewed as a conceptual divergence, the divergence must also be classified as an unintentional ambiguity, although it is unclear whether it can be defined as a mistranslation. As in the *Worsdorfer* case, no information is available on source and target text status. Unlike in *Worsdorfer*, however, where no directly equivalent term was available, the translators in *Codan* did potentially have access to an alternative phrase, which was in fact employed by the translators of the other language versions. Nevertheless, it is unclear whether the translators in question would

⁷⁸⁷ Case C-236/97 *ibid*, para 29.

⁷⁸⁸ For a further example of the ‘majority rule’ approach, see *Road Air BV v Inspecteur der Invoerrechten en Accijnzen* [1997] European Court of Justice Case C-310/95, paras. 31-32.

have been aware of the alternative phrase in the absence of a comparison of different language versions with one another, and they may thus not have had occasion to question their choice of phrase. Unlike in *Worsdorfer*, translators may not have been aware that there was an issue which required resolution prior to publication, and it is therefore questionable whether they can be held responsible for the divergence.

Finally, two criminal cases are also interesting to consider. First, in *Criminal proceedings against Dirk Endendijk*,⁷⁸⁹ a Dutch stockbreeder was prosecuted for tethering calves in contravention of Dutch legislation based on an EU directive. He had used a rope to tether his calves, while the Dutch legislation used the word *kettingen* (chains). This represented a divergence from other language versions, which used less specific terms such as *tether* (English), *attache* (French) and *attacco* (Italian). Among other things, the ECJ reiterated that “the word in question cannot be examined solely in the Dutch version... as Community provisions must be interpreted and applied uniformly in the light of the versions existing in all European Community languages”⁷⁹⁰ and that “the wording used in one language version of a Community provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of Community law”.⁷⁹¹ In other words, the ECJ held that Mr Endendijk could be held criminally

⁷⁸⁹ Case C-187/07 *Criminal proceedings against Dirk Endendijk* (n 442).

⁷⁹⁰ Case C-187/07 *ibid*, para. 22.

⁷⁹¹ Case C-187/07 *ibid*, para. 23.

liable despite his reliance on the Dutch version of the relevant EU legal text.⁷⁹² Second, in *Criminal proceedings against Hans Röser*,⁷⁹³ a German national was prosecuted on the basis that he had breached a provision of the German Wine Law making it an offence to contravene Article 36(1), first subparagraph, first sentence, of Regulation No 337/79, which provided that wine enrichment must be carried out in the wine-growing zone where the grapes in question have been harvested. Mr Röser had enriched his fermented drink 'Federweißer' in Germany by adding grape must concentrate from Italy. At first instance, Mr Röser argued that the relevant provision did not apply to the enrichment he had undertaken because his 'Federweißer' product was intended for sale directly to the public and not for further processing into table wine or a wine suitable for producing table wine. In other words, he argued that Article 36(1) did not prohibit his activity because it only applied to final products, not basic or intermediate products like 'Federweißer'. Mr Röser was acquitted. On appeal, the appellate court found that Mr Röser's interpretation of the provision was not implausible, but nevertheless argued that other articles of the Regulation (specifically Articles 32 and 33) indicated that Mr Röser's activities should nevertheless be unlawful. The question was referred to the ECJ for an interpretative ruling. In its ruling, the ECJ acknowledged that "the German version of Article 36 is unclear... and is open to another interpretation, namely that the prohibition on carrying out the process of enrichment more than once or outside

⁷⁹² In the end, however, the Dutch court declined to impose a penalty based on the mitigating circumstance that the case had clarified the scope of EU rules; see van der Jeught (n 597) 35.

⁷⁹³ Case 238/84 *Criminal proceedings against Hans Röser* (n 442).

the wine-growing zone in which the grapes have been harvested applies only to the specified processing of the products mentioned in that article.⁷⁹⁴ It then went on to reject this interpretation based on a “comparative examination of the different language versions”⁷⁹⁵ (particularly the English, French and Italian versions). Ultimately, this meant that Mr Röser could be held liable for the enrichment he had undertaken.⁷⁹⁶ Turning to classification of the divergence between the German and other language versions, it seems clear that the divergence is semantic in nature, rather than conceptual, as it arose from the wording of the German text. Moreover, the divergence arguably falls into both categories of semantic divergence. First, the provision was drafted in a way that permitted differing interpretations of its content, i.e. it contained an ambiguity which was apparent from an examination of the individual language version alone. Second, since the other language versions did not offer such room for interpretation, comparison of the different language versions also pointed to the ambiguity. In the case, the European Commission submitted that the failure of the provision to refer to intermediate products constituted “an omission in the existing version of the provision, which needs to be rectified by redrafting the provision so that it expressly includes intermediate beverages which have not yet been turned into table wine or into wine suitable for yielding table wine.”⁷⁹⁷ Above, it was stated

⁷⁹⁴ Case 238/84 *ibid*, para. 22.

⁷⁹⁵ Case 238/84 *ibid*, para. 22.

⁷⁹⁶ Ultimately, it appears that Mr Röser was acquitted by the German court on the basis that he had committed a minor fault and further prosecution was not in the public interest; see van der Jeught (n 597) 35, footnote 123.

⁷⁹⁷ Case 238/84 *Criminal proceedings against Hans Röser* (n 442), para. 13.

that omissions are an example of a semantic divergence, and this would seem to support classification of the divergence as a mistranslation. However, there is a difference between omission of a word and omission of a necessary provision. Where a drafted provision fails to cover all relevant possibilities, the omission is more complex than a simple missing word. Although it might be tempting to view the divergence as more conceptual than semantic in nature in these circumstances, it is important to remember that the conceptual category of divergences relates to differences between member state legal systems. In other words, the semantic category of divergences encompass not only individual missing words but also missing phrases. Where a missing word might represent a mistranslation, missing phrases may result in an unintentional ambiguity. This view is supported by the terminology adopted by the court, which in its judgment referred not to an omission, but rather to an "ambiguity",⁷⁹⁸ i.e. the fact that "the German version... is unclear... and... open to another interpretation".⁷⁹⁹ The language versions referenced for comparison purposes did not include this ambiguity.

At this juncture, it is important to note that the ECJ has ruled, in *Criminal proceedings against Luciano Arcaro*, that the "obligation of [a] national court to refer to the content of [a] directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down

⁷⁹⁸ Case 238/84 *ibid*, para. 22.

⁷⁹⁹ Case 238/84 *ibid*, para. 22.

by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions".⁸⁰⁰ In other words, the position of individuals – at least with respect to criminal liability – cannot be made worse through reliance on a national language version, including an incorrectly translated language version. In both of the criminal cases discussed above – *Röser* and *Endendijk* – the national courts ultimately declined to impose a penalty. These decisions were, however, based on different reasons which did not include the principle laid down in *Arcaro*. While this is logical in the case of *Röser*, which predated *Arcaro*, different reasons were also given in *Endendijk*, which post-dates it. Specifically, in *Röser* the reasons cited by the German court were that the defendant bore only minor fault and a lack of public interest in pursuing the case, while in *Endendijk*, the Dutch court found mitigating circumstances in the fact that the case had helped to clarify EU rules.⁸⁰¹ As illustrated by the cases reviewed above, however, not all questions of interpretation necessarily involve criminal law, and it has been indicated that the applicability of the interpretative principle outlined in the *Arcaro* case to civil and administrative cases is unclear.⁸⁰² The extent of the protection afforded to individuals by the principle in non-

⁸⁰⁰ *Criminal proceedings against Luciano Arcaro* [1996] European Court of Justice Case C-168/95, para. 42; see also *Joined Cases C-387/02, C-391/02 and C-403/02* (2005) European Court of Justice, para. 74.

⁸⁰¹ van der Jeught (n 597) 35.

⁸⁰² Gerrit Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' (2002) 22 *Oxford Journal of Legal Studies* 397, 406.

criminal cases is therefore uncertain, even though penalties falling short of criminal conviction (such as tax bills and withdrawal of benefits) may still have a severe individual impact. Moreover, divergences between language versions of EU legal texts can cause difficulties for individuals even if those individuals cannot be held liable for relying on an incorrect interpretation. This is because many interpretative processes occur at lower levels than the ECJ or national courts, primarily when individuals interpret and apply legal texts in the context of deciding on a course of action or otherwise arranging their affairs (see further Chapter VI). It is unrealistic to think that all readers of published EU legal texts will take expert advice on application and interpretation (and further that any expert could advise adequately on all 24 language versions). Moreover, different types of EU legislation place different demands on member states. Whereas regulations and decisions must be applied directly in member states, directives must be incorporated into the national legislation of the member states.⁸⁰³ Once incorporated, legal provisions stemming from directives will be applied by national courts as national law. In other words, the ECJ will have no involvement in the vast majority of interpretation processes in such cases, and the protections developed in ECJ case law – like the interpretative principle in the *Arcaro* case – are unlikely to be followed, resulting in reduced protection for individuals. Those cases in which the ECJ does become involved in the interpretation process are discussed further in Chapter VI, in connection with the Article 267 preliminary ruling procedure.

⁸⁰³ European Commission, 'Implementing EU Law' <https://commission.europa.eu/law/application-eu-law/implementing-eu-law_en> accessed 4 November 2024.

4. Potential objections

As discussed previously, it is important to acknowledge that the question of divergences between language versions can be viewed from two perspectives – that of the individual and that of the collective or system. It has been suggested that “the EU addresses multilingualism at two levels: at the level of the individual whose language rights are protected... and at the level of Member States whose competence is to foresee language related issues connected with... the smooth functioning of the internal market”.⁸⁰⁴ This implies, for example, that criticism based on consequences at the individual level may be negated by systemic considerations.⁸⁰⁵ From the systemic perspective, it could be argued that the present state of affairs represents the best solution in service of the ultimate objective of uniform application of EU law. From the individual perspective, however, the existence of divergences between language versions of EU legal texts, and how these are dealt with, raises the fundamental question of whether it is fair, just or equitable for an individual to be penalised for relying on a national version of a legal rule when the rule-making body – in this case the European Union – states that all language versions are equally authentic and valid, and thereby implies that persons are entitled to rely on them. Building on this question, at least five distinct concerns can be raised about instances like those

⁸⁰⁴ Dorota Czyżewska, ‘Challenges of Multilingualism in the EU’ (2014) 14 *Poznań University of Economics Review* 85, 89, see also Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 83.

⁸⁰⁵ Leung (n 79) 206.

discussed above, where individuals suffer consequences due to divergences between language versions of an EU legal text. First, when individuals are held liable in criminal or civil law as a result of relying on a text which they were in principle entitled to rely on, this appears to *contravene the principle of equal authenticity and validity*, in that the version on which the individual has relied was clearly not equally valid and authentic relative to other language versions. Second, when a citizen suffers negative consequences despite having acted as he/she was entitled to, this appears *problematic from the perspective of protecting individual language rights and linguistic diversity*, as the protection of such rights and diversity appears illusory when reliance on them results in disadvantageous outcomes. Third, such cases are *morally problematic* because an incorrect representation is made which leads individuals to believe one thing (that they can rely on a given language versions of a legal rule) when the reality is another. Fourth, such cases may raise the issue of *state liability* based on incorrect transposition of EU law⁸⁰⁶ and non-contractual liability of the EU.⁸⁰⁷ Fifth and finally, such cases are *problematic from a jurisprudential standpoint*. It is this latter concern on which the following discussion concentrates.

The cases outlined above have in common that an individual suffered a negative consequence of some kind which was *prima facie* inconsistent with the wording of relevant legislation in the (presumably) most relevant language version. In Chapter IV above, it was

⁸⁰⁶ Čavoški (n 759) 59–60.

⁸⁰⁷ Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 141.

proposed that relations between the EU and EU citizens can be viewed through the lens of social contract theory because the system of mutual rights and obligations governing relations between the EU and its citizens is analogous to the relationship between a government and those it governs, in which legal principles like the rule of law, access to justice and legal certainty are key considerations. It is therefore logical to consider what objections can be made to cases such as those reviewed based on their consistency or otherwise with the legal principles discussed in Chapter IV.

4.1 Objections based on social contract theory

It was noted previously that a contractarian view as per Rawls and Gauthier emphasises that the state must inform its citizens in such a way that they can know the bounds of their rights and obligations, and further that when the bases for citizens' expectations "are unsure, so are the boundaries of men's liberties."⁸⁰⁸ This neatly summarises the problem faced by individuals in cases like those described above: while they believe that they are acting within the boundaries of what is permitted by law, they cannot know exactly where those boundaries lie. They can check where boundaries have been set in the language version(s) accessible to them, but the discussed cases show that the court may redraw the boundaries, leaving individuals facing what has been described as "the great and apparently irreducible uncertainty of the outcome of uniform interpretation."⁸⁰⁹ In other words, individuals cannot

⁸⁰⁸ Rawls (n 454) 207.

⁸⁰⁹ Schilling (n 166) 59.

know where the boundaries will lie after the court's interpretation.⁸¹⁰ As indicated previously, this lack of clarity undermines the objective of giving citizens access to EU law in their own languages.⁸¹¹ This can be further illustrated by reference to Rawls' precepts of the rule of law.

Rawls' first precept ("ought implies can"⁸¹²) requires that the "legal system should recognize impossibility of performance as a defense, or at least as a mitigating circumstance. In enforcing rules a legal system cannot regard the inability to perform as irrelevant. It would be an intolerable burden on liberty if the liability to penalties was not normally limited to actions within our power to do or not to do."⁸¹³ The previously discussed legal cases illustrate that individuals may be required to perform (or be penalised for not performing) actions falling outside their 'power to do or not to do', as they cannot know the rules applicable to them – clear examples of 'impossibility of performance' and 'inability to perform'. Potential responses to this problem include an 'authentic version' defence "which individuals could raise, on the basis of their national authentic version, especially in tax, customs and criminal cases which turn on EU legal acts".⁸¹⁴ Similarly, it has been proposed that national courts

⁸¹⁰ It is a separate discussion whether the court's ruling actually moves the boundaries or simply clarifies them. However, this is irrelevant from the perspective of individual citizens, who are first told one thing and then, later, another.

⁸¹¹ Katsarova (n 298) 2; European Parliament, 'Framework Strategy for Multilingualism' (n 179), Specific Comment 8.

⁸¹² Rawls (n 454) 208.

⁸¹³ *ibid.*

⁸¹⁴ Mańko (n 220) 144.

could exercise leniency in the sense of interpreting doubtful, vague or ambiguous provisions in favour of a defendant,⁸¹⁵ i.e. that national courts could be empowered to make exceptions to potential criminal liability (i.e. accept mitigating circumstances) where a defendant has relied on a particular language version in good faith and did not foresee the consequences of doing so.⁸¹⁶ In short, such proposals are based on the proposition that “individuals should be allowed to rely on their national language versions”.⁸¹⁷ Rawls’ second precept (that “similar cases be treated similarly” and that “like decisions be given in like cases”, also referred to as the “requirement of consistency”⁸¹⁸) is also relevant. It appears clear that persons who are in the same position as one of the individuals involved in the discussed cases but who have relied on a different language version of the relevant EU legal text will not suffer the same consequences. When the only difference between two cases is which language version of a legal text has been examined, it is arguable that like cases are not being treated alike and that – adopting Dworkin’s phraseology – the legal rule puts a “disfavoured [group] at a disadvantage in securing the rights the state acknowledges they have.”⁸¹⁹ The third precept outlined by Rawls (“no offense without law”⁸²⁰) provides, among other things, that “laws be known and expressly promulgated, that their meaning be clearly

⁸¹⁵ van der Jeught (n 597) 32.

⁸¹⁶ *ibid* 36, 38.

⁸¹⁷ Mańko (n 220) 154. See also Schilling (n 166) 61: “it is necessary that in those cases in which the citizen, on the basis of her own language version, has no reason to doubt the meaning or the validity of a law, the protection of legitimate expectations based on that language version generally must take precedence over the non-discrimination principle.”

⁸¹⁸ Rawls (n 454) 208–209.

⁸¹⁹ Dworkin (n 499) 12.

⁸²⁰ Rawls (n 454) 209.

defined”, not least so that “statutes are [...] clear in what they enjoin and forbid [so that] the citizen [can] know how he is to behave.”⁸²¹ Examples of possible breaches of this requirement include vagueness and imprecision.⁸²² As the preceding discussion of EU case law has shown, divergences between language versions can take a variety of forms. Semantic divergences attributable to mistranslation – as in the *Lubella* case (‘Süßkirschen’ – sweet cherries – instead of ‘Sauerkirschen’ – sour cherries) – may not materialise as vagueness or imprecision for readers of the language version in which they appear. Conceptual divergences as in the *Worsdorfer* case, on the other hand, are likely to result in vagueness or ambiguity when the target language lacks an appropriate equivalent term (in this case a gender neutral equivalent of the word ‘spouse’ in Dutch). In the latter type of case, the cause may not be mistranslation, but rather unintentional ambiguity. Nevertheless, even if a document has been translated correctly, if the exact meaning of a provision requires interpretation by a court, it seems clear that persons subject to the legal rule cannot know with certainty how they are to behave. Finally, Rawls’ fourth precept – “natural justice”, i.e. “guidelines intended to preserve the integrity of the judicial process”⁸²³ – can be linked to the proposition that, “Justice denies that the loss of freedom for some is made right by a greater good shared by others... Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the

⁸²¹ *ibid.*

⁸²² *ibid.* 210.

⁸²³ *ibid.* 209–210.

calculus of social interests.”⁸²⁴ Moreover, as noted in Chapter IV, Rawls also proposed that, in order for an agreement to be valid, the “parties must be able to honor it under all relevant and foreseeable circumstances”.⁸²⁵ Viewing relations between the state and its subjects through the lens of a social contract thus supports the argument that citizens must be able to comply with their obligations ‘under all relevant and foreseeable circumstances’. This raises the question of whether it is just or fair to expect compliance when citizens cannot fulfil their obligations due to a lack of correct information. In the cases reviewed above, the court seems to have concluded that a “loss of freedom for some [was] made right by a greater good shared by others”,⁸²⁶ and accordingly “the rights secured by justice [were made] subject to... the calculus of social interests”.⁸²⁷ Applying Rawls’ logic, therefore, it can be concluded that outcomes as in the discussed cases are unjust. This directly challenges the prioritisation of the systemic objective of uniform application of EU law over the interests of individuals, as discussed in section 4 above.⁸²⁸ Uniform application and uniform interpretation in the member states are dependent on the availability of uniform sources of law. At the same time, sources of law cannot be described as uniform if there are differences between language versions. In other words, avoiding divergences is a key priority from the perspective of ensuring just outcomes. As discussed in section 1 above, divergences arise

⁸²⁴ *ibid* 25.

⁸²⁵ *ibid* 153.

⁸²⁶ *ibid* 3.

⁸²⁷ *ibid* 4.

⁸²⁸ See also, for example, Leung (n 79) 202.

during drafting and, not least, translation. This illustrates the central role of translation in safeguarding justice in dealings between the EU and its citizens.

4.2 Objections based on rule-of-law considerations

The views expressed by commentators such as Raz (“if the law is to be obeyed *it must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it”⁸²⁹), Lucy (“How can law’s addressees be guided by either contradictory injunctions or injunctions with which it is impossible to comply?”⁸³⁰ and, “That a legal system, to comply with the rule of law, must have general rules of some kind, and that those rules must be promulgated, surely implies that addressees of a legal system can know the demands that this system makes upon them”⁸³¹) and Maxeiner (“laws should be validly made and publicly promulgated, of general application, stable, clear in meaning, consistent, and prospective”, where the application of the law must be “impartial; provide parties who are sanctioned an opportunity to be heard; and deliver predictable, consistent decisions in individual cases”⁸³²) illustrate how cases like those discussed above severely challenge the requirements of the rule of law and raise the possibility that decisions may be unjust. The suggestion that a legislature does not treat its citizens as responsible beings if it “refuses to make general rules by which they can guide their conduct, does not bother to tell them the

⁸²⁹ Raz (n 494) 214.

⁸³⁰ Lucy (n 435) 388.

⁸³¹ Lucy (n 488) 254.

⁸³² Maxeiner (n 497) 546.

rules by which [it] will judge them, or announces impossible, retrospective, inconsistent, unintelligible or utterly contradictory rules”⁸³³ neatly summarises the situation in which the individuals involved in the discussed cases found themselves when they suffered consequences pursuant to rules they could not know (or at least could not access in a relevant language), and were thus unable to comply with. The conceptions of the rule of law discussed in Chapter IV provide an additional starting point for considering in what respects divergences between different language versions of EU law may be problematic. Adopting Dworkin’s conception and dimensions of failure, it can be argued that in the example cases there was a failure by the state (as personified by the European Union) with respect to individual rights, in the sense that different individuals have differing rights when different language versions of legislative texts lead to different outcomes. In this situation, it is clear that a rule has been adopted which puts “some disfavored [group] at a disadvantage in securing the rights the state acknowledges they have.”⁸³⁴ Quite simply, speakers of certain language were disadvantaged by divergences between one version of a legal text and other language versions. This represents a clear failure in fairness of enforcement.

Further insight into the problematic nature of a situation where there are inconsistencies between different language versions of EU legal rules is provided by Fuller’s desiderata. In the illustrative cases, the relevant legislative provisions had been both made and

⁸³³ Lucy (n 435) 396.

⁸³⁴ Dworkin (n 499) 12.

promulgated (published). Fuller's third desideratum provides that rules must be consistent. Lucy defines this as "the law being free of contradictions",⁸³⁵ while Simmonds calls it "not constantly changing".⁸³⁶ It can be argued that where there are divergences between different (but equally valid and authentic) language versions of a statutory text, the law is not consistent and thus includes contradictions. If the individuals in the discussed cases had relied on a different language version, they would not have suffered the consequences they did. The requirement of non-retroactivity is arguably also breached when an individual is held liable following the court's interpretation. Once again, this consequence would not have resulted in the event of reliance on a different language version. In all the cases, the relevant legal rule was only definitively clarified once an interpretative ruling was issued, and the individuals thus suffered retroactive consequences for their original actions, even though the law (at least in their accessible language) was apparently clear at the time of those actions. Fuller's fifth desideratum – namely, that rules should not require the impossible or, in Lucy's words, that standards are ones "with which human beings can comply"⁸³⁷ – is clearly breached when individuals cannot know the rules which apply to them because they are not available in a language accessible to them (or more precisely, where no correct and complete statutory text is available in that language). It is also arguable that legislation which is not complete or error-free fails to fulfil Fuller's sixth desideratum, which demands clarity

⁸³⁵ Lucy (n 488) 254.

⁸³⁶ Simmonds (n 487) 65.

⁸³⁷ Lucy (n 488) 254.

(or intelligibility, according to Simmonds⁸³⁸). The law may have appeared clear to the affected individuals, but was not in fact sufficiently clear for them to comply with it. Divergences between different (but equally valid and authentic) language versions clearly raise contradictions. Lucy has suggested that laws must have stability, or constancy over time.⁸³⁹ In the illustrative cases, there were contradictions not only in geographical terms (as different rules effectively applied in different countries), but also over time, as the law changed between the time of the individuals' reliance on a *prima facie* valid and authentic statutory text and the time of the court's interpretation. Finally, it can be argued that Fuller's eighth desideratum is also breached in cases like this. Congruence between official action (or "official conduct"⁸⁴⁰) and the content of rules (or "declared law"⁸⁴¹ or a "declared rule"⁸⁴²) requires consistency between the text of a statute and enforcement of that statute. Put another way, persons who read, rely and act on a statutory text should not suffer consequences for doing so. The individuals in the cited cases found themselves in a situation where the authorities first defined the bounds of permitted conduct but later redrew these, resulting in liability for non-compliance with the redefined rules. In other words, official action was inconsistent with declared law. Ultimately, this inconsistency is attributable to the process of translation and the divergences which arose during it. This underlines the

⁸³⁸ Simmonds (n 487) 65.

⁸³⁹ Lucy (n 488) 254.

⁸⁴⁰ *ibid.*

⁸⁴¹ *ibid.*

⁸⁴² Simmonds (n 487) 65.

importance of translation in terms of safeguarding legal certainty in the multilingual EU legal context.

Raz emphasises factors like stability/predictability, intelligibility, confidence and self-reliance, none of which were safeguarded in the illustrative cases. Two of Raz's additional requirements are particularly relevant in this discussion, namely that decision processes should be fair and unbiased and that decisions should be reasonable relative to their declared reasons.⁸⁴³ In the discussed cases, while it seems most unlikely that the judges had personal bias against the individuals involved and it can therefore be assumed that the decision process was fair (reflecting the formalistic standpoint discussed in Chapter IV), it is arguable that the decisions cannot be deemed reasonable in light of the principle of equal authenticity and validity on which the individuals were entitled to rely. Moreover, finding against them can be considered unreasonable in view of the stated basis for doing so, namely that that other language versions make the meaning of the relevant legislative provisions clear. It seems most unlikely that the affected individuals were in a position to read all other language versions (see further Chapter VI) and, even if they had possessed the necessary language skills, they were entitled to rely on the principle of equal authenticity and validity and thus not required to check any other version than the one they chose to read. Finally, adopting Bingham's phraseology, it can be argued that the court did not

⁸⁴³ Raz (n 490) 8.

resolve liability “by application of the law”, but rather by “the exercise of discretion.”⁸⁴⁴ Any exercise of discretion is, by definition, unforeseeable and thus also contrary to the requirements of consistency⁸⁴⁵ and stability.⁸⁴⁶ Further, given that the individuals were held liable while persons who read and relied on other language versions of the same statute were presumably not, it seems that the law was not applied equally to all.

It should be clear from the above discussion that language can play a vital role in individuals’ access to justice, and this is also recognised in the European context. For example, the *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union* discussed basic rights in the criminal justice system, including “the right to understand the “nature and cause of the accusation”, from which is derived the right to translation of documents and access to an interpreter where the defendant does not understand the language of the proceedings.”⁸⁴⁷ Moreover, the Proposal envisaged “common minimum standards” in relation to “access to free interpretation and translation”,⁸⁴⁸ based on Article 6(3) of the European Convention on Human Rights (ECHR). Case law of the European Court of Human Rights (ECtHR) has settled that the translation obligation in Article 6(3), while not unlimited, does extend to “oral

⁸⁴⁴ Bingham (n 551), chapter 4.

⁸⁴⁵ Fuller (n 486) 92, also described as the absence of contradictory rules (ibid 39).

⁸⁴⁶ Lucy (n 488) 254.

⁸⁴⁷ Commission of the European Communities, ‘Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union’, COM(2004) 328 final, 4, para. 11.

⁸⁴⁸ ibid 7, para. 24.

statements... documentary material and... pre-trial proceedings” and “all those documents or statements in the proceedings... which it is necessary for [the defendant] to understand... in order to have the benefit of a fair trial”.⁸⁴⁹ Further, the “interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself”.⁸⁵⁰ Article 8 of the Proposal makes it clear that the same applies to translation assistance: “The standard of interpretation and translation must be good enough to enable the suspect to understand the nature and cause of the accusation.”⁸⁵¹ The ECJ has recognised that a similar principle applies in the civil context, holding that “a Community regulation which is not published in the language of a Member State is unenforceable against individuals in that State”.⁸⁵² *Storskrubb and Ziller*⁸⁵³ see the provisions of the Proposal as a mechanism for guaranteeing access to justice. It is difficult to see why the obligation to ensure that a defendant understands and has “knowledge of the case against him and [can] defend himself”⁸⁵⁴ should not also apply prior to prosecution, i.e. that persons should be able to understand their legal obligations in everyday life. This can be linked to Rawls’ third precept (“no offense without law”) as discussed in Chapter IV above and the requirement that “statutes are [...] clear in what they enjoin and forbid [so that] the citizen

⁸⁴⁹ *Case of Kamasinski v Austria* [1989] European Court of Human Rights Application no. 9783/82, para. 74.

⁸⁵⁰ *ibid*, para. 74.

⁸⁵¹ Commission of the European Communities (n 847) 15, para. 67.

⁸⁵² *Skoma-Lux sro v Celní ředitelství Olomouc* [2007] Court of Justice of the European Communities Case C-161/06, para. 61.

⁸⁵³ *Storskrubb and Ziller* (n 516) 201.

⁸⁵⁴ *Case of Kamasinski v Austria* (n 849), para. 74.

[can] know how he is to behave.”⁸⁵⁵ Returning to one of the illustrative examples discussed above, in the case of Mr Röser, he chose to investigate what obligations applied to him in his capacity as an importer. Due to divergences between the German and other versions of the regulation, however, it was impossible for him to know – and thus also to comply with – the precise obligations applicable to him under the Regulation. Compliance would have required clarification of the obligations, and no such clarification was available until the court issued its interpretative ruling. In view of the considerations underpinning Article 6(3) ECHR, the Proposal and *Kamasinski v. Austria*,⁸⁵⁶ it seems clear that ensuring provision of correct legal texts in EU citizens’ own languages is a key component of safeguarding their right to a fair trial under Article 6(3). This can be linked to the question discussed in Chapter IV: “How can law’s addressees be guided by either contradictory injunctions or injunctions with which it is impossible to comply?”⁸⁵⁷

4.3 Objections related to access to justice

Information and access to it are key components of access to justice. As previously noted in Chapter IV, although information is readily available in the digital age, ease of access may vary in line with factors such as an individual’s technical proficiency, access to necessary equipment and general skills (including – not least in the multilingual EU context – language skills, see further Chapter VI). The ability to read and comprehend EU legal texts is a core

⁸⁵⁵ Rawls (n 454) 209.

⁸⁵⁶ *Case of Kamasinski v. Austria* (n 849).

⁸⁵⁷ Lucy (n 435) 388.

determinant of the accessibility of EU law, and is therefore a key consideration in the present discussion. Quite simply, individuals will find it easier to access legal information if it is written in a language they understand. However, if – as implied by the requirement to consult all language versions – crucial details are only available in other languages, access is at the very least more difficult and, in all likelihood, impossible to ensure. A related consideration is whether people personally have the ability to understand the content of legal information or have to engage help.⁸⁵⁸ Lucy, for example, has rejected the proposition that, in cases where individuals lack this ability, access to justice can be ensured simply by covering the cost of legal advice and representation⁸⁵⁹ (i.e. a formalistic approach), and has raised the problem of “a situation in which those with funds can obtain access to justice and those without cannot.”⁸⁶⁰ Reframed for the purposes of the present discussion, the following question can be asked: “What about a situation where those with certain language skills can obtain access to justice and those without cannot?” Or, put another way: “What if access to justice is only available to persons with the financial resources to engage advisers to check all language versions?”⁸⁶¹

⁸⁵⁸ Although it has been suggested that “even clarifications by a lawyer of a possible uniform interpretation by the ECJ will be tentative at best.” (Schilling (n 166) 64.)

⁸⁵⁹ Lucy (n 488) 238.

⁸⁶⁰ *ibid* 257.

⁸⁶¹ A further important question is what steps are required to secure access to justice. This has also been phrased as follows: “which efforts are legally required from the government to make its legislation accessible and which burden rests upon the citizen to get become [sic] acquainted with the law?” Popelier (n 576) 58. Case law makes it clear that individuals are expected to take at least some steps to understand their rights and obligations under the law. There are indications that the ECtHR considers that individuals may need to seek legal advice, see *Case of the Sunday Times v. The United Kingdom* (n 605) 54, but the court

As noted previously, rules must “add up to an intelligible and viable way of life which is compatible with the various projects that humans wish to pursue”⁸⁶² if individuals are to be expected to comply with them. The likelihood of compliance can also be linked to the perceived fairness of a rule, “for the evident reason that it is thought fairer to impose rights and duties which can be understood and anticipated by those to whom they are addressed than to impose rights and duties which leave the reader unable to anticipate the vagaries of its interpretation by bureaucrats, police, or judges.”⁸⁶³ Applying this to the problem of divergences between language versions, it can be argued that even if rules can technically be complied with because the persons subject to them could theoretically refer to other language versions to establish their correct meaning, this cannot be expected of individual citizens. In other words, “When a citizen’s own language version of a Community law having direct effect is formulated in such a way that she has no reason to doubt its meaning or its validity, she may legitimately expect that the legal consequences foreseeable under the wording of that version of a law are also the consequences foreseeable under its other

has also recognised the differing capacities of persons to understand legal texts, i.e. “the status of those to whom [legislation] is addressed”, see *Case of Refah Partisi (The Welfare Party) and Others v Turkey* [2003] European Court of Human Rights Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, para. 57. In that case, the court noted that the addressed party “had legal advisers conversant with constitutional law and the rules governing political parties” (para. 62) and concluded that “the applicants were reasonably able to foresee that they ran the risk of proceedings” (para. 63). This suggests that a higher standard may apply to persons who possess (or have access to) legal expertise.

⁸⁶² Simmonds (n 487) 163.

⁸⁶³ Franck (n 513) 33.

versions and therefore under the law in its entirety.”⁸⁶⁴ Even if individuals were to possess the requisite language skills,⁸⁶⁵ it is by no means clear that they would also know (1) that a particular legal instrument applies to them; (2) that the instrument is a European law which (3) exists in multiple language versions; (4) that the language version that is most accessible to them may not be definitive in the sense that it may later be interpreted to mean something else; (5) that they have to look at other language versions to establish the correct meaning; and (6) where they can find the other language versions. In Simmonds’ words, “Although technically possible to comply with, such rules would almost certainly encounter extensive non-compliance.”⁸⁶⁶ Moreover, “to assume that the citizen must always look at all the language versions of a Community law to find out its meaning would imply Community law has lost that quality of accessibility which under the rule of law is required of laws”,⁸⁶⁷ and “a law, which must be looked for in 23 different places, the true importance of none of which is really clear, cannot be deemed easily or even truly accessible.”⁸⁶⁸

4.4 Objections based on principles of EU law and fundamental rights

It has been suggested that the Charter of Fundamental Rights of the European Union is “the most recent constitutional emanation of access to justice”.⁸⁶⁹ The Charter contains certain

⁸⁶⁴ Schilling (n 166) 58.

⁸⁶⁵ See van der Jeught (n 597) 31: “linguistic proficiency in one or more foreign languages... is far from being general.”

⁸⁶⁶ Simmonds (n 487) 163.

⁸⁶⁷ Schilling (n 166) 58.

⁸⁶⁸ *ibid* 66.

⁸⁶⁹ Storskrubb and Ziller (n 516) 184.

language-related rights which are worth considering briefly here. First, it can be questioned whether the fundamental principle expressed in Article 20 (“Everyone is equal before the law.”) is met if some individuals are penalised for relying on a given language version of a rule or regulation while others who rely on a different language version are not. Such a practice has the appearance of differential treatment, and thus inequality before the law. The same question can be asked about Article 21 (barring discrimination on the basis of language, among other things). Once again, if persons are treated differently depending on which language version of a law they rely on, this suggests that they are discriminated against on the basis of their chosen language.⁸⁷⁰ The same argument can be made based on Article 22 on cultural, religious and linguistic diversity, in that treating persons differently depending on which language version they use suggests breach of the principle of linguistic diversity. As regards Article 41 (on the right to good administration, including the right to impartial and fair handling of administrative proceedings), it can be questioned whether differential treatment based on reliance on different language versions of the same instrument entails ‘impartial and fair treatment’. Nevertheless, as noted previously, the main focus of this thesis is on principles of EU law as developed by the ECJ and legal certainty in particular, and the further discussion therefore concentrates on objections to the current functioning of the multilingual EU legal regime with respect to individual outcomes from this perspective.

⁸⁷⁰ See also Schilling (n 166) 56.

4.5 Objections based on legal certainty

As illustrated by the previous discussion of selected ECJ cases, various concerns arise with regard to the position of individuals under the multilingual EU legal regime as currently practised. These are considered further below by reference to key components of legal certainty as identified in Chapter IV above, namely clarity, non-retroactivity, stability and legitimate expectations.

4.5.1 Clarity

It appears self-evident that persons who do not have access to a complete and correct description of their rights and obligations under EU law due to divergences between language versions of a legal instrument such as a directive or regulation do not “have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights”⁸⁷¹ and cannot know “what conduct on their part is forbidden”.⁸⁷² In other words, the legal rules they face are not “clear and precise”,⁸⁷³ and thus fail to provide legal certainty.

4.5.2 Non-retroactivity

A situation where an interpretative ruling intended to resolve a divergence between language versions of an EU legal text exposes an individual to liability of some kind is

⁸⁷¹ Case C-236/95, *Commission of the European Communities v Hellenic Republic* (n 615), para. 13.

⁸⁷² *Cooley* (n 611) 355.

⁸⁷³ Case C-63/93, *Duff and Others v Minister for Agriculture and Food* (n 614), para. 20.

concerning from the perspective of retroactivity. This is because the individual would not have had such liability if he or she had relied on a different language version. It is arguable that any resulting penalty is applied retroactively because the legal rule was not clear until the court issued its ruling, and the individual has thus been subjected to a retroactive penalty for his or her original actions, even though the law (at least in the language in question) was not clear or certain until an interpretative ruling was issued. This view is supported by the ECJ's own statement that, "A regulation which creates a situation in which two contradictory rules of law co-exist... cannot be regarded as Community legislation which is certain and its application foreseeable by those subject to it; accordingly, it infringes the principle of legal certainty."⁸⁷⁴

4.5.3 *Stability*

When a source of EU law differs, in terms of its content, depending on which language version is referred to, it is difficult to see how any individuals can be certain that the legal rules contained in that source of law will be applied consistently. Moreover, if it is the case that legal rules may be interpreted with retroactive effect, there is little to give individuals confidence that the authorities (as represented by the courts) will apply legal rules consistently, i.e. that the regulatory environment will be stable and/or certain. As noted above, however, criticism based on consequences at the individual level may be negated

⁸⁷⁴ Case T-115/94, (*Opel Austria GmbH v Council of the European Union*, 1997), para. 7

by systemic considerations.⁸⁷⁵ Accordingly, although the stability element of legal certainty may be breached from the perspective of the individual, the opposite view may be taken from a systemic perspective. The outcomes in the illustrative cases indicate that in those cases the balance fell in favour of systemic considerations, i.e. uniform interpretation across the EU member states, rather than the individuals' interest in being able to rely on 'their' specific language version.

4.5.4 *Legitimate expectations*

It has been stated that "citizens have a legitimate expectation of being able to understand the law that is applicable to them."⁸⁷⁶ Further, the ECJ has expressed that a party which has taken steps based on EU law "may legitimately expect not to be subject... to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions."⁸⁷⁷ It thus appears logical to conclude that a person who has complied with legal rules set out in an official language version of an EU legal text may legitimately expect not to suffer restrictions (or to be otherwise penalised) based on his/her (compliant) conduct. Put another way, "the Community itself has... created a situation which can give rise to a legitimate expectation",⁸⁷⁸ and the "principle of the protection of legitimate

⁸⁷⁵ Leung (n 79) 206.

⁸⁷⁶ Roderick A Macdonald, 'Legal Bilingualism' (1997) 42 McGill Law Journal 119, 138, note 71.

⁸⁷⁷ *J Mulder v Minister van Landbouw en Visserij* [1988] Court of Justice of the European Union Case 120/86, statement of grounds, second question, fourth paragraph.

⁸⁷⁸ *Ralf-Herbert Kühn v Landwirtschaftskammer Weser-Ems* [1992] Court of Justice of the European Union Case C-177/90, para. 14.

expectations may [therefore] be invoked... against [the] Community rules".⁸⁷⁹ Similar arguments have been made with regard to the issue of multiple language versions. For example, as noted previously, it has been suggested that, "When a citizen's own language version of a Community law... is formulated in such a way that she has no reason to doubt its meaning or its validity, she may legitimately expect that the legal consequences foreseeable under the wording of that version of a law are also the consequences foreseeable under its other versions and therefore under the law in its entirety."⁸⁸⁰ Moreover, it has been stated that, "Since EU legislation is drafted in one language and translated into the other official languages, the question arises whether the language versions of EU legislation are "sufficiently clear" so as to enable citizens to foresee the consequences of the particular instrument on the basis of the text in their own language."⁸⁸¹ In other words, the "right to rely on a single-language version [may only] persist as long as this version is unambiguous and free from doubt."⁸⁸² As noted above, understanding applicable law is a legitimate expectation, and this expectation "need[s] to be protected by the courts; any decision contrary to the principle of legal certainty should be considered discriminatory".⁸⁸³

⁸⁷⁹ Case C-177/90 *ibid*, para. 14.

⁸⁸⁰ Schilling (n 166) 58.

⁸⁸¹ Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (n 166) 6.

⁸⁸² Mattias Derlén, 'In Defence of (Limited) Multilingualism' in Anne Lise Kjær and Silvia Adamo (eds), *Linguistic Diversity and European Democracy* (Routledge 2011) 145.

⁸⁸³ Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (n 166) 6–7.

Discussion

Certainty has been identified as a highly valued feature in law, with “[d]ivergent textual meanings that have equal authority, as illustrated in cases of multilingual statutory interpretation, [being] the worst nightmares in legal interpretation.”⁸⁸⁴ Legal certainty has been stated to serve two purposes: to guide individuals in their compliance with the law and to protect individuals against arbitrary government action.⁸⁸⁵ Further, legal certainty gives guidance to persons subject to it, allowing them to “plan their lives with less uncertainty.”⁸⁸⁶ Legal certainty has been linked with personal freedom (on the basis that “a clear legal framework enables personal choices and action”⁸⁸⁷), economic considerations (as a basis for investment decisions) and the legitimacy of the legal system through public confidence in it.⁸⁸⁸ In the absence of a clear legal framework, therefore, individuals cannot plan their lives without uncertainty. In other words, “[i]f the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require”.⁸⁸⁹

⁸⁸⁴ Leung (n 79) 262.

⁸⁸⁵ Maxeiner (n 571) 36.

⁸⁸⁶ *ibid* 30.

⁸⁸⁷ Popelier (n 576) 66.

⁸⁸⁸ *ibid*.

⁸⁸⁹ Michael C Dorf, ‘Legal Indeterminacy and Institutional Design’ (2003) 78 *New York University Law Review* 107, 877.

It has been suggested that there are three legal methods “by which law content is made clear and by which law application is made predictable”,⁸⁹⁰ i.e. that there are three contexts in which legal certainty is required. These are *lawmaking*, *law finding* and *law applying*. Regarding the first of these, lawmaking, it has been observed that legal rules “ought to be made with care and in the interest of the population at large. While their substance is debatable politically, their form should be noncontroversial: they should guide those subject to them.”⁸⁹¹ The second method, law finding, is equated with accessibility,⁸⁹² based on the observation that rules cannot guide individual members of society unless they are accessible. Moreover, “all those affected by law should find the same law. Legal certainty is not promoted if potential plaintiffs [sic] and potential defendants have equally valid but different conceptions of the applicable law. The guidance function of law suffers if determining the meaning of law must await judicial intervention.”⁸⁹³ This neatly expresses the fundamental problem illustrated by the previously discussed cases. Finally, with regard to law applying, it has been argued that, “Syllogistic law application is what the public expects. It is what the public can understand. It is how the public can apply law to itself. Self-application of laws depends upon the confidence that laws will be applied generally and neutrally.”⁸⁹⁴ It can be argued that in cases like those discussed above, the legal rules were not applied ‘generally and neutrally’, but rather on an arbitrary basis determined by the language version to which

⁸⁹⁰ Maxeiner (n 497) 552.

⁸⁹¹ *ibid* 602.

⁸⁹² *ibid* 603.

⁸⁹³ *ibid*.

⁸⁹⁴ *ibid* 604.

an individual had referred. Somewhat paradoxically, the ECJ has in its case law recognised and highlighted the need for legal certainty among parties subject to legal rules. For example, the court has stated that, "It is therefore essential... that each Member State should implement the directives... in a way which fully meets the requirements of clarity and certainty in legal situations which directives seek".⁸⁹⁵ The court has also stated that the principle of legal certainty "requires that the publicity for [implemented national] measures be of such a nature as to inform the natural or legal persons concerned by the measures of their rights and obligations under them."⁸⁹⁶ Moreover, the principle that directives must be implemented "with the specificity, precision and clarity required by the case-law of the Court in order to satisfy the requirement of legal certainty"⁸⁹⁷ has been upheld in numerous subsequent cases.⁸⁹⁸ The ECJ has itself acknowledged that "[t]he 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."⁸⁹⁹

⁸⁹⁵ *Commission of the European Communities v Kingdom of Belgium* [1980] Court of Justice of the European Union Case 102/79, para. 11.

⁸⁹⁶ *Gerard Mulligan and Others v Minister for Agriculture and Food, Ireland et Attorney General* [2002] Court of Justice of the European Union Case C-313/99, para. 54.

⁸⁹⁷ *Commission of the European Communities v Federal Republic of Germany* [1991] Court of Justice of the European Union Case C-59/89, para 24.

⁸⁹⁸ For example *Commission of the European Communities v French Republic* [1999] European Court of Justice Case C-225/97, para. 37; *Commission of the European Communities v Italian Republic* [2001] European Court of Justice Case C-159/99, para. 32; and *Commission of the European Communities v Kingdom of Belgium* [2003] European Court of Justice Case C-415/01, para. 21.

⁸⁹⁹ *North Kerry Milk Products Ltd v Minister for Agriculture and Fisheries* [1977] European Court of Justice Case 80/76 13, para. 11.

Accordingly, it has been suggested that “based on the case-law, it is not reasonable to expect the Court to strike a balance between legal certainty and multilingualism if favouring the individual would undermine the effectiveness of EU law.”⁹⁰⁰ This echoes the previously noted conflict between collective and individual interests, and it is questionable whether a conclusion in favour of the collective is reconcilable with the ideal outlined by Rawls that, “Each member of society [has] an inviolability founded on justice [...] which even the welfare of every one [sic] else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others.”⁹⁰¹ Given the ECJ’s approach, it can be questioned “how... legal certainty [can] be said to be safeguarded if the literal interpretation of the written word of law... can no longer be regarded as definitive testimony of the legal position.”⁹⁰² The resulting position of individual EU citizens can be described as follows: “Unable to rely on their own language version and unable to foresee how the Court will rule after comparing the other language versions of a disputed provision, Union citizens are trapped in a discriminatory position which denies them their right to legal certainty.”⁹⁰³

The EU clearly aspires to uphold the rule of law. As noted in Chapter IV, the European Commission has stated that “[t]he EU is based on the rule of law”⁹⁰⁴ and Article 2 of the

⁹⁰⁰ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 16.

⁹⁰¹ Rawls (n 454) 24–25.

⁹⁰² Agius (n 659) 217.

⁹⁰³ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 16.

⁹⁰⁴ European Commission, ‘Rule of Law’ (n 480).

Treaty on European Union provides that “[t]he Union is founded on... the rule of law”. It is therefore logical to conclude that the EU seeks to meet certain rule-of-law ideals or standards, summarised by the Commission’s statement that “[t]he rule of law includes principles such as... legal certainty... respect for fundamental rights... and equality before the law”.⁹⁰⁵ On this basis, it is legitimate to evaluate the EU’s performance in the area of the rule of law by reference to relevant principles outlined in literature, such as those proposed by Raz as an aid to ensure that government actions “maintain stability and predictability, and thus enable individuals to find their way and to live well.”⁹⁰⁶ Raz’s suggested principles include, for example, ensuring that the law is clear, stable and publicly available, that it comprises general rules and standards, and that it is applied prospectively rather than retroactively. Perhaps most significantly, Raz has suggested that, in order to be obeyed, the law must “*must be capable of guiding the behaviour of its subjects*. It must be such that they can find out what it is and act on it.”⁹⁰⁷ It can be questioned whether this ideal is achieved where there are divergences between the official language versions of EU legal texts. Another measure which can be applied is Dworkin’s previously-discussed dimensions of failure related to protection of the rule of law by a state, namely (1) failure by the state “in the *scope* of the individual rights it purports to enforce”;⁹⁰⁸ (2) failure “in the *accuracy* of the

⁹⁰⁵ European Commission, ‘2020 Rule of Law Report’ (n 483) 1.

⁹⁰⁶ Raz (n 490) 2.

⁹⁰⁷ Raz (n 494) 214.

⁹⁰⁸ Dworkin (n 499) 12.

rights it recognizes”;⁹⁰⁹ and (3) failure “in the *fairness* of its enforcement of rights”.⁹¹⁰ The first of these dimensions – scope – concerns the situation where a state fails to enforce rights granted to citizens against itself, and is less relevant in the present discussion. However, the other two dimensions are of interest. The second dimension – accuracy – concerns the scenario where a state grants its citizens rights against itself but fails to safeguard them by reason of official mistake. This would appear to be the case when divergences between language versions (which as discussed above can often be described as mistakes due to their unintentional nature) have negative consequences for EU citizens. The third dimension – fairness – concerns circumstances where the adoption of rules puts “the poor or some disfavored race at a disadvantage in securing the rights the state acknowledges they have.”⁹¹¹ This consideration is relevant when, for example, citizens who speak only one official language are at a disadvantage because they have relied on a particular language version which is later held to be incorrect, or when their position is less advantageous than that of citizens who speak several languages and/or have access to greater resources and can thus compare different language versions. Given the problematic nature of divergences between language versions from the perspective of individual citizens, it is logical to consider what efforts are made in practice to prevent and eliminate their occurrence. This is the focus of Chapter VI.

⁹⁰⁹ *ibid.*

⁹¹⁰ *ibid.*

⁹¹¹ *ibid.*

VI. How divergences are addressed in practice

The previous chapter has shown that divergences can and do arise between different language versions of EU legal texts. In fact, it has been suggested that “[e]nsuring that all the 24 authentic texts of EU legislation carry the same meaning is... practically impossible.”⁹¹² Moreover, divergences are not an uncommon phenomenon, as indicated by an analysis covering the period 1960–2010, which identified 170 “judgments in which the ECJ observed discrepancies between language versions”.⁹¹³ As shown in Chapter V, divergences between language versions are undesirable in the context of multilingual European law, and the European Commission’s Directorate-General for Translation (DGT) advocates “a continuous effort of strengthening the quality of the drafting and the translation of the multilingual EU law.”⁹¹⁴ At this juncture, it is important to note that the elimination of divergences comprises two fundamental processes: efforts to *prevent* divergences, and efforts to *address* or *resolve* them. Applying the categorisation proposed by Agius,⁹¹⁵ the first category – prevention – equates to the pre-legislative stage (document production or creation), and the second category – resolution – to the post-legislative stage (interpretation and application). The pre-legislative stage, i.e. the process of producing and issuing EU legislation, has been

⁹¹² Leung (n 79) 200.

⁹¹³ Baaij, ‘Fifty Years of Multilingual Interpretation in the European Union’ (n 91) 219.

⁹¹⁴ Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 141.

⁹¹⁵ Agius (n 659) 213.

discussed and described elsewhere.⁹¹⁶ In brief, the following steps are involved: 1) drafting, 2) review and consultation, 3) approval, 4) translation, and 5) adoption. The discussion which follows concentrates on the drafting and translation steps, as these arguably have the greatest impact on the form and content of different language versions. Accordingly, mechanisms such as pre-legislative consultation processes⁹¹⁷ and impact assessments⁹¹⁸ are not considered further. An additional point to note is that, in the EU context, the distinction between drafting and translation is not as clear as might be assumed. For example, the development of EU legislative texts is sometimes referred to as occurring by “co-drafting”,⁹¹⁹ which has been described as a process “not based on pure translation, but... rather [entailing] multilingual legal drafting with some elements of translation”.⁹²⁰ It has been suggested that translators play “a role at par with that of a drafter”,⁹²¹ while the DGT’s Translation Quality Guidelines state that “the *de facto* drafters are the translators”⁹²² and

⁹¹⁶ See e.g. Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 21; Anna Doliwa-Klepacka, ‘Preparation of a Legislative Proposal in the Multilingual Legal System of the European Union’ (2016) 45 *Studies in Logic, Grammar and Rhetoric* 37, 38–47; Agius (n 659) 212.

⁹¹⁷ See European Parliament, Council of the European Union and European Commission, ‘Interinstitutional Agreement on better law-making’, “Improving the quality of legislation”, para. 26; see also European Parliament, Council of the European Union and European Commission, ‘Interinstitutional Agreement on Better Law-Making’, “Public and stakeholder consultation and feedback”, para. 19.

⁹¹⁸ European Parliament, Council of the European Union and European Commission, ‘Interinstitutional Agreement on Better Law-Making’ (n 917), “Impact assessment”, paras. 12–18.

⁹¹⁹ See e.g. T Gallas, ‘Evaluation in EC Legislation’ (2001) 22 *Statute Law Review* 83, 92.

⁹²⁰ Doczekalska (n 297) 359.

⁹²¹ Agius (n 659) 212.

⁹²² Directorate-General for Translation, ‘DGT Translation Quality Guidelines’ (n 236) 2.

"[t]he translation that takes place in this setting is *institutional translation* and *multilingual law-making*."⁹²³ However, the extent of the overlap and distinctions between the drafting and translation functions are not central to the discussion which follows, as both activities form part of the pre-legislative stage. The discussion below therefore starts with the document-creation stage (encompassing both drafting and translation) before moving on to the application stage, for example by national courts and the ECJ. It is worth noting that this latter, post-legislative, stage can also be defined more broadly than simply interpretation by the courts. The expanded definition includes the monitoring and/or review of legislation after publication (for example pursuant to a compliance monitoring system, an evaluation provision in the legislation in question,⁹²⁴ fitness and performance reviews⁹²⁵ or *ex post* evaluation⁹²⁶). However, since the monitoring/review category of actions is primarily concerned with achievement of intended legal effects and less with the details of the production and content of EU legislative instruments, the expanded definition is of limited relevance to this thesis and is not considered further.

⁹²³ *ibid.*

⁹²⁴ Gallas (n 919) 93.

⁹²⁵ European Commission, 'Better Regulation for Better Results - An EU Agenda' 10.

⁹²⁶ European Parliament, Council of the European Union and European Commission, 'Interinstitutional Agreement on Better Law-Making' (n 917), "Ex-post evaluation of existing legislation", paras. 20–24.

1. The pre-legislative stage: preventing divergences in legislative texts

Ensuring that legislative texts are of high quality is a key concern for EU institutions, as reiterated in numerous official publications. For example, the general principles in the *Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation* include the objectives that, "Community legislative acts shall be drafted clearly, simply and precisely",⁹²⁷ that, "The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously"⁹²⁸ and that, "The terminology used in a given act shall be consistent both internally and with acts already in force".⁹²⁹ Similarly, the *Interinstitutional Agreement on better law-making* serves the express purpose of promoting "simplicity, clarity and consistency in the drafting of Union legislation",⁹³⁰ as reiterated in the European Commission's communication on EU Regulatory Fitness: "Managing the quality of [...] legislation also means making sure it is as clear, accessible and easy to comply with as possible."⁹³¹ These aspirations are challenged by the previously discussed issue of fairness to individuals who suffer consequences through reliance on a divergent language version

⁹²⁷ European Parliament, Council of the European Union and European Commission, 'Interinstitutional Agreement on Common Guidelines for the Quality of Drafting of Community Legislation', Principle 1.

⁹²⁸ *ibid*, Principle 3.

⁹²⁹ *ibid*, Principle 6.

⁹³⁰ European Parliament, Council of the European Union and European Commission, 'Interinstitutional Agreement on better law-making' (n 917). "Common commitments and objectives", para. 2.

⁹³¹ European Commission, 'EU Regulatory Fitness' 9.

of an EU legal text, and related concerns.⁹³² Moreover, interviewee feedback in the present study suggests that the objective of preparing clear, simple and precise legislative drafts may not always be achieved in practice, as illustrated by the statement of one interviewee that the fact that there are “a lot of drafters that write things in English but... are not English-speaking... makes it really, really hard... to understand exactly what they want...”,⁹³³ and the same interviewee’s further observation that translators consequently have to decide whether to translate the text as is or to prepare a version which incorporates their interpretation of the drafter’s intentions.

It has been suggested that “large institutions may develop translational cultures of their own”,⁹³⁴ with various factors playing a role in such a development. These factors include media like “glossaries, style guides, codes of practice”, “shared experience” over a period of years, a need “to find common approaches to recurring problems” and training of new staff.⁹³⁵ In relation to the EU, it has been suggested that it has developed its own culture and “its own idiom – in eleven dialects”⁹³⁶ (now presumably 24). One identifier of a distinct

⁹³² I.e. contravention of the principle of equal authenticity and validity, deficient protection of individual language rights and linguistic diversity; the moral problem of incorrect representations, the possibility of state liability, and various jurisprudential concerns; see further Chapter V.

⁹³³ Interview with Quality Coordinator, ‘Interview 6’ (n 675).

⁹³⁴ Ian Mason, ‘Text Parameters in Translation: Transitivity and Institutional Cultures’ in Lawrence Venuti (ed), Lawrence Venuti, *The Translation Studies Reader* (4th edn, Routledge 2021) 424.

⁹³⁵ *ibid.*

⁹³⁶ Koskinen (n 722) 59.

culture is particularly apparent in the case of the EU, namely a degree of coherence or uniformity – a clear priority for the EU, along with translation quality and quality management.⁹³⁷ In the area of language, measures are taken to promote uniformity and quality across language versions of official documents. In the legislative context, this entails eliminating divergences between language versions of legal texts. The measures taken to achieve this at the pre-legislative stage can be categorised according to their focus, in that they may target a) the pre-drafting/translation phase; b) the drafting/translation phase; and/or c) the post-drafting/translation phase. Category a) comprises measures such as terminology and standardisation work, as well as style guides and translation manuals.⁹³⁸ Category b) consists of measures targeting or implemented during the actual collaborative or co-drafting process. Finally, category c) comprises post-completion revision/review processes and translation quality assessment (TQA) approaches, models and methods. The different categories are considered further below.

1.1 The pre-drafting/translation phase: standardisation of terminology and style

The first category of pre-legislative measures encompasses tools designed to pre-empt divergences by standardising the output of drafters and translators.⁹³⁹ Such tools include

⁹³⁷ Joanna Drugan, Ingemar Strandvik and Erkkka Vuorinen, 'Translation Quality, Quality Management and Agency: Principles and Practice in the European Union Institutions' in Joss Moorkens and others (eds), *Translation Quality Assessment: From Principles to Practice*, vol 1 (Springer International Publishing 2018) 40.

⁹³⁸ Svoboda (n 235) 76.

⁹³⁹ See e.g. (Robertson, 2012, pp.10-11); Gallas (n 919) 92.

guidelines to promote standardisation and/or institutional style, staff specialisation,⁹⁴⁰ terminology coordination within and between EU institutions,⁹⁴¹ computer-aided translation tools⁹⁴² and automated translation of standard phrases.⁹⁴³ In the area of style standardisation, style guides are commonly used. Examples in the EU context include the European Commission's *English Style Guide*, which is explicitly described as a "handbook for authors and translators"⁹⁴⁴ and contains not only general writing rules to promote consistency,⁹⁴⁵ but also specific input on legal language⁹⁴⁶ and primary and secondary legislation.⁹⁴⁷ Further examples are the EU's *Interinstitutional Style Guide*, which contains guidance on matters such as structuring legal acts⁹⁴⁸ and document drafting,⁹⁴⁹ and the Council of Europe's English style guide for, among others, writers and translators of Council documents and publications.⁹⁵⁰ The EU also maintains a dedicated "Translation and drafting

⁹⁴⁰ William Robinson, 'Drafting EU Legislation in the European Commission: A Collaborative Process' (2014) 2 *The Theory and Practice of Legislation* 25, 262; see also Hanzl and Beaven (n 243) 145–146.

⁹⁴¹ Stefaniak (n 84) 110.

⁹⁴² Hanzl and Beaven (n 243) 144.

⁹⁴³ Koźbiał (n 275) 169.

⁹⁴⁴ European Commission, 'English Style Guide', title page.

⁹⁴⁵ See for example *ibid.* p. 5 and p. 18, para. 3.2.

⁹⁴⁶ *ibid.*, Part I, Chapter 12.

⁹⁴⁷ *ibid.*, Part II, Chapters 18 and 19.

⁹⁴⁸ European Union, 'Interinstitutional Style Guide' (2021), Chapter 2.

⁹⁴⁹ *ibid.*, Chapter 3.

⁹⁵⁰ Council of Europe, 'Council of Europe English Style Guide' 5.

resources” website⁹⁵¹ containing resources such as writing tips,⁹⁵² translation quality information sheets for translation contractors, character sets, language and country codes and information on country names and currencies. Other relevant publications include *Clear English – Tips for Translators*⁹⁵³, *The Essential Guide to drafting documents on EU competition law*⁹⁵⁴ and the *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation*.⁹⁵⁵ The intent behind these documents and resources appears to be to promote uniformity or standardisation of written output and official documents and – implicitly – therefore to avoid non-uniform or varying language and content, including divergences between language versions.

As regards terminology, in the EU context (and specifically within the DGT), terminology work has been stated to serve both “high-quality translation” and “legal certainty and clarity”.⁹⁵⁶ The potential consequences of terminological errors are said to include

⁹⁵¹ European Commission, ‘Translation and Drafting Resources’ <https://commission.europa.eu/resources-partners/translation-and-drafting-resources_en> accessed 4 November 2024.

⁹⁵² For example “How to write clearly” European Commission Directorate-General for Translation, ‘How to Write Clearly’ and “Claire’s Clear Writing Tips” European Commission, ‘Claire’s Clear Writing Tips’.

⁹⁵³ European Commission, ‘Clear English - Tips for Translators’.

⁹⁵⁴ Felix Ronkes Agerbeek, ‘The Essential Guide to Drafting Documents on EU Competition Law’ (2016).

⁹⁵⁵ European Union, ‘Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation’ (n 211).

⁹⁵⁶ Stefaniak (n 84) 109.

misunderstanding of rights and obligations, hindering of harmonisation of EU law and increased litigation, and reputational damage to the EU and its institutions.⁹⁵⁷ Other identified consequences include additional work such as corrigenda requests and “difficulties and problems -- and potentially errors -- of interpretation and implementation at the national level”.⁹⁵⁸ Various tools have been developed to promote terminological coordination and standardisation. For example, the Interactive Terminology for Europe (IATE) database serves the purpose of “enhancing the availability and standardisation” of “EU terminology”.⁹⁵⁹ IATE is coordinated by the Terminology Coordination Unit of the European Parliament, which also operates the EU Glossaries website⁹⁶⁰ containing numerous glossaries from EU institutions and bodies relating to a wide range of fields.

1.2 The drafting/translation phase: supporting collaborative/collective drafting

The second category of pre-legislative measures addresses the drafting/translation phase. This phase comprises steps taken as part of the collaborative process by which much EU legislation is produced, where legislative proposals by the European Commission are “the work of many hands, and minds.”⁹⁶¹ Examples of the collaborative and collective nature of the process include, not least, collective drafting in “committees, working groups and

⁹⁵⁷ *ibid.*

⁹⁵⁸ Directorate-General for Translation, ‘DGT Translation Quality Guidelines’ (n 236) 6.

⁹⁵⁹ IATE, ‘About IATE’ <<https://iate.europa.eu/home>> accessed 4 November 2024.

⁹⁶⁰ European Parliament, ‘Glossaries from EU Institutions and Bodies’ <<https://termcoord.eu/eu-glossaries-overview/>> accessed 31 August 2023. (Inactive as at 4 November 2024.)

⁹⁶¹ Robinson (n 940) 249.

teams”,⁹⁶² discussion in working parties⁹⁶³ and revision as part of the inter-service consultation procedure,⁹⁶⁴ which also involves numerous persons.⁹⁶⁵ The drafting processes of the European Parliament and the Council are similarly complex and raise corresponding issues.⁹⁶⁶ To alleviate the potential challenges presented by the involvement of numerous individuals, extensive efforts are made to ensure the quality of final texts, as exemplified by the activities of the Legal Service of the European Commission, whose mission statement describes its function as an advisor to the Commission on “legislative and regulatory tasks seeking to ensure that all legal texts adopted by the Commission fully respect the Treaties and are drafted with the necessary legal clarity and in the interest of EU citizens.”⁹⁶⁷ To achieve this purpose, the service’s Quality of Legislation team undertakes various activities including intervention in the preparation of acts to help “ensure the legal and linguistic consistency of Commission acts in the various official languages of the European Union” and that “draft acts are drawn up clearly and precisely”, and to “check that the legal terminology used in each language is correct and the scope of the act is the same in the different languages”.⁹⁶⁸ Further service functions include the provision of “standard wording

⁹⁶² Koskinen (n 722) 59.

⁹⁶³ Hanzl and Beaven (n 243) 140.

⁹⁶⁴ Robinson (n 940) 258–261.

⁹⁶⁵ *ibid* 266.

⁹⁶⁶ *ibid* 266–267.

⁹⁶⁷ European Commission, ‘Mission Statement’ (*Legal Service*) <https://commission.europa.eu/about-european-commission/departments-and-executive-agencies/legal-service_en> accessed 4 November 2024.

⁹⁶⁸ European Commission, ‘Mission and Activities of the Quality of Legislation Team’ (*Legal Service*) <https://ec.europa.eu/dgs/legal_service/legal_reviser_en.htm> accessed 31 August 2023. (Inactive as at 4 November 2024.)

in order to make the task of drafting an act easier”, the holding of seminars on legislation quality and the drafting of courses concentrating on legal acts.⁹⁶⁹

1.3 The post-drafting/translation phase: translation quality assessment

As noted above, the third category of pre-legislative measures concerns the post-drafting/translation phase and includes measures to review and revise translations and assess translation quality. Such measures can be considered from two perspectives: the theoretical and the practical. The *theoretical* perspective encompasses models and approaches proposed in relevant literature, while the *practical* perspective examines what institutions actually do in practice to ensure that their translations are of the requisite quality. Translation in the EU institutional context is not centralised,⁹⁷⁰ with numerous translation and linguistic services in operation, including dedicated bodies serving the European Parliament, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank, the European Court of Auditors, the European Economic and Social Committee and the European Committee of the Regions, the European Investment Bank and the Translation Centre for the Bodies of the European Union.⁹⁷¹ Although some interinstitutional resources exist,⁹⁷² different translation units operate independently. Of the above institutions, four can be said to play a direct part in

⁹⁶⁹ *ibid.* (Inactive as at 4 November 2024.)

⁹⁷⁰ Drugan, Strandvik and Vuorinen (n 937) 42.

⁹⁷¹ European Union, ‘By Institution’ (*Translation at the EU institutions*) <<https://europa.eu/translation/>> accessed 4 November 2024.

⁹⁷² Drugan, Strandvik and Vuorinen (n 937) 44–45.

EU lawmaking, in that the European Commission, the European Parliament and the Council of the European Union collaborate closely to produce legislative texts in all their language versions, while the Court of Justice of the European Union deals with questions of interpretation arising from or in relation to published EU legislative texts. The four translation services supporting these institutions and their approaches to review/revision and quality control have been previously discussed in Chapter III.

2. The post-legislative stage: resolving divergences in legislative texts

It has been suggested that, in the context of statutory interpretation, there are two theories of meaning applicable to statutory texts. These are denoted strong and weak, respectively, where strong meaning theory views “statutory texts... as autonomous entities carrying autonomous and determinate meaning, thus being normative in their own right”⁹⁷³ and weaker meaning theories state that “meaning is not in the text, but in the minds of people, created on the basis of context, therefore not the text but the interpreter is in charge of legal decisions”.⁹⁷⁴ In a sense, the strong/weak distinction mirrors the previously made distinctions between systemic and individual legal certainty, and between formalistic and effective access to justice (aka fairness of process and fairness of outcome). In Chapter IV, it was noted that a formalistic approach to access to justice implies that access to justice is safeguarded if a legal process is fair. This aligns with the strong theory of meaning. The

⁹⁷³ Jan Engberg, ‘Statutory Texts as Instances of Language(s): Consequences and Limitations on Interpretation’ (2004) 29 Brooklyn Journal of International Law 1135, 1140.

⁹⁷⁴ *ibid* 1149.

contrasting view, i.e. effective or substantive access to justice, focuses on individual outcomes and aligns with weaker meaning theories. Moreover, this latter view can be linked to the discussion in Chapter II regarding the central role of the target audience from a functionalist perspective and the viewing of translation as an act of inter-cultural communication where, in the legislative context, the legislature is the originating culture and the target audience the recipient culture. In particular, it was noted that while the term 'language' may refer to the words, tone and style of a translated text, it may also refer to the languages comprehended by target-audience members, making language a key factor when target audience members have differing language skills and, as a result, differing access to legal texts. Under the strong theory, there is little room for interpretation in connection with application, whereas it is a prerequisite for application under weaker meaning theories. Similarly, the strong theory offers little room for dealing with divergences between language versions, which by necessity require interpretation prior to resolution and application. From this perspective, the present thesis can be said to adopt a weaker theory of meaning. As briefly noted in Chapter III, a need to determine meaning may arise on the part of individuals, regulatory authorities, national courts and the ECJ. Logically, divergences which are not prevented at the pre-legislative stage will persist until they are resolved. Such resolution, however, must necessarily be preceded by recognition of a divergence, which can only occur through the comparison of different language versions. Ultimately, resolution of divergences requires interpretation of each individual language version. While it seems

clear that not all readers of multilingual EU legal texts will engage in comparison,⁹⁷⁵ all readers have to engage in some degree of interpretation to determine meaning and facilitate application to their individual circumstances. This suggests that interpretation occurs on three distinct levels: the individual level, the national level and the supranational (i.e. EU) level. These levels are considered individually below.

2.1 Interpretation at the individual level

A need to determine the meaning of multilingual EU legal texts may arise at the individual level when, for example, individuals are seeking to ascertain rights and obligations under EU law, whether on their own behalf or on behalf of others,⁹⁷⁶ as well as when alternative dispute resolution bodies have to apply EU law, for example in the context of arbitration. This can also be referred to self-application of the law.⁹⁷⁷ As noted previously, the EU has 24 official languages, and the principle of equal authenticity means that all language versions have to be considered to determine the meaning of a given provision. However, the asserted equal authenticity of all language versions of multilingual EU legal texts can be

⁹⁷⁵ In practice, it appears most likely that the majority of readers will refer to a single language version when seeking information relevant to their individual circumstances. Reasons for this include that readers may be unaware that multiple language versions exist and/or where they can access them, may be unfamiliar with the equal authenticity principle and relevant ECJ case law which mandate a comparison, and may lack the language skills to conduct a comparison. Together, these factors are likely to result in reliance on the most accessible language version in most cases.

⁹⁷⁶ In Chapter III, it was noted that the category of 'individuals' includes both natural and legal persons. Accordingly, individual engagement with EU legal texts may encompass both private persons and, for example, in-house counsel on behalf of a company.

⁹⁷⁷ See Maxeiner (n 497) 604.

challenged. When all versions have to be consulted to establish meaning, no individual document can provide a final answer to any question of interpretation, and thus no individual document has (definitive or sole) legal force.⁹⁷⁸ Put another way, “It is paradoxical that the language versions of a legal instrument, which are presumed to have identical meaning, must all be considered and compared in order to find out the meaning of the legal instrument.”⁹⁷⁹ As explained in Chapter III, any such set of language versions includes 23 translations. Bearing this in mind, the status of different language versions of a multilingual EU legal text does not differ substantially from that of non-authoritative translations of a given source text. Both scenarios – i.e. where non-authoritative translations lack legal force and where language versions have collective but not individual legal force – entail the state “transferring the consequences of textual discrepancies to the readers of such [texts]”⁹⁸⁰ with the result that “it may be considered negligent to rely only on one version of the law”.⁹⁸¹ This implies that parties at the individual level – whether private persons, advisers or dispute resolution bodies – have to determine what they consider to be the correct interpretation of an EU legal text by reference to multiple (or even all) language versions, even if the text itself contains no prompt to do so.⁹⁸² In practice, however, it seems likely that most – if not all – individual interpretations will be founded on incomplete information because comprehensive consideration of all language versions is impractical for

⁹⁷⁸ See Agius (n 659) 215.

⁹⁷⁹ Doczekalska (n 297) 362.

⁹⁸⁰ Leung (n 79) 204.

⁹⁸¹ *ibid.*

⁹⁸² Schilling (n 166) 58.

time and cost reasons, or not undertaken at all due to linguistic impossibility (i.e. lack of the requisite language skills) or unfamiliarity with the requirement to do so. This leaves room for decisions at the individual level to be contrary to the collective meaning of a relevant EU legal text without individual decision-makers being able to know this. In other words, individual parties cannot know whether their interpretative decisions are correct or incorrect under EU law. In this respect, “the obligation to read all language versions is... a burden for the average citizen and may compromise transparency and predictability of the law”⁹⁸³ by making it “difficult for individuals to anticipate their legal rights and obligations.”⁹⁸⁴ One way of alleviating this burden is to seek clarification from a third party, such as a national court or regulatory authority.

2.2 Interpretation at the national level

There appear to be three main scenarios in which a need for interpretation arises at the national level. The first of these is when EU law is to be implemented at national level, for example in a member state or another state with a legal obligation to implement EU law. An example of this scenario can be found in the case of Switzerland, which is required to implement certain EU legal acts pursuant to its bilateral treaties with the EU. Switzerland translates its legislation into three of its four national languages, namely German, French

⁹⁸³ Leung (n 79) 204.

⁹⁸⁴ Mattias Derlén, ‘Multilingualism and the European Court of Justice: Challenges, Reforms and the Position of English After Brexit’ in Emmanuel Guinchard and Marie-Pierre Granger (eds), *The New EU Judiciary. An Analysis of Current Judicial Reforms*, vol 102 (Wolters Kluwer 2017), section 19.02 [B].

and Italian. Regarding these languages (plus English), a Swiss legislative editor has stated that “when incorporating EU law into Swiss law, we also sometimes discover divergences between the EU versions”.⁹⁸⁵ Moreover, when such divergences exist, those charged with incorporating the relevant provision into Swiss law face the difficulty of deciding whether to adopt the German text as the basis for the French and Italian versions or vice versa. Neither solution is entirely satisfactory, however, since – depending on the chosen source text – the result is either “internally consistent versions in Switzerland’s official languages (which may, however, be inconsistent with EU law) or versions which are not internally consistent for Swiss purposes but which do reflect the (disparate) versions under EU law”.⁹⁸⁶

⁹⁸⁵ Author’s translation of the German original: “bei der Übernahme von EU-Recht in schweizerisches Recht stellen auch wir ab und zu Divergenzen zwischen den EU-Fassungen fest”; taken from a comment on the online edition of Christoph Sobotta, ‘Die Mehrsprachigkeit als Herausforderung und Chance bei der Auslegung des Unionsrechts’ [2015] *Zeitschrift für Europäische Rechtslinguistik* 1; see Barbara Grüter, ‘Kommentar Aus Der Schweizerischen Bundesverwaltung’ <<https://zerl.uni-koeln.de/rubriken-sections/forschung-research/sobotta-die-mehrsprachigkeit-als-herausforderung-und-chance-bei-der-auslegung-des-unionsrechts>> accessed 4 November 2024.

⁹⁸⁶ Author’s translation of the German original: “inner-schweizerisch kongruente amtssprachliche Fassungen (die aber möglicherweise inkongruent zum EU-Recht sind) oder inner-schweizerisch disparate Fassungen, die aber den (disparaten) Fassungen des EU-Rechts entsprechen”; taken from a comment on the online edition of Sobotta (n 985); see Grüter (n 985).

The second scenario in which a need for interpretation at the national level arises is when national bodies such as courts, tribunals⁹⁸⁷ and regulatory authorities⁹⁸⁸ are asked to determine the meaning of multilingual EU legal texts because no definitive interpretation can be established at the individual level. Thirdly, national authorities and courts may have to apply an EU legal text in the context of regulatory supervision or legal enforcement, and may thus need to determine the meaning of the text. Unlike parties at the individual level, national courts and regulatory authorities are specialist bodies which may be assumed to have greater awareness of the equal authenticity principle and its related comparison requirements, but similar practical limitations are likely to apply in terms of time, cost and – not least – linguistic ability,⁹⁸⁹ with a lack of language skills being likely to result in reliance on the most accessible (i.e. national) language version.⁹⁹⁰ It has been suggested that national courts only “compare language versions of EU law... 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

⁹⁸⁷ See McAuliffe, ‘Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union’ (n 301) 18–19, discussing application by the UK Competition Appeal Tribunal.

⁹⁸⁸ See Agius (n 659) 223 and the statement there that the principle that no language version overrides the other language versions “translates itself into a duty on national authorities dealing with the implementation of Community rules to consult various language versions of a particular Community law.”

⁹⁸⁹ Mattias Derlén, *Multilingual Interpretation of European Union Law*, vol 67 (Wolters Kluwer 2009) 289; see also van der Jeught (n 597) 17.

⁹⁹⁰ Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 27.

omissions).⁹⁹¹ It is, of course, possible that contradictions and incompatibilities may go unnoticed by national courts, thus raising the spectre of divergent national case law in member states.⁹⁹² However, this particular possibility falls outside the scope of this discussion. For present purposes, it is sufficient to note the observation that “the requirement of full multilingualism is practically impossible for all actors, except the [ECJ] itself”⁹⁹³ to fulfil, and that “national courts have given up any ambition to fulfil this requirement”,⁹⁹⁴ instead adopting “their own approaches to issues such as how many and which languages to use, how to access the meaning of foreign language versions and how to reconcile diverging language versions.”⁹⁹⁵ In addition, it seems that some national courts restrict multilingual assessments to a limited selection of languages, in many cases as low as one or two in addition to the national language.⁹⁹⁶ Finally, it is unclear whether full comparison of all language versions is mandatory in all cases.⁹⁹⁷ Ultimately, if a national

⁹⁹¹ van der Jeught (n 597) 16.

⁹⁹² *ibid* 21.

⁹⁹³ Derlén, ‘Multilingualism and the European Court of Justice: Challenges, Reforms and the Position of English After Brexit’ (n 984), section 19.02 [B]. See also McAuliffe, ‘Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union’ (n 301) 22, regarding the “interpretation of ECJ case law at the national level, where it is practically impossible to compare 23 different language versions of either EU legislation or ECJ case law.”

⁹⁹⁴ Derlén, ‘Multilingualism and the European Court of Justice: Challenges, Reforms and the Position of English After Brexit’ (n 984), section 19.02 [B].

⁹⁹⁵ *ibid*, section 19.02 [B].

⁹⁹⁶ Derlén, *Multilingual Interpretation of European Union Law* (n 989) 287; see also van der Jeught (n 597) 16.

⁹⁹⁷ See Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 11–12 and Doczekalska (n 297) 363–364. Further, para. 65 of the *Opinion of Advocate General Jacobs in Case C-338/95, Wiener v Hauptzollamt Emmerich* [1997] European Court of Justice includes the statement that, “I do not think that the *CILFIT* judgment should be

court is unable to resolve a divergence itself, it has the option of referring the question to the ECJ under the so-called preliminary ruling procedure.⁹⁹⁸

2.3 Interpretation at the supranational level

In Chapter IV, it was noted that the EU grants supranational rights, and it was proposed that the EU can be regarded as a supranational organisation. The designation 'supranational' can also be applied to both the legislation adopted by the EU and the interpretation thereof, both of which logically entail a supranational level of governance. As discussed below, the

regarded as requiring the national courts to examine any Community measure in every one of the official Community languages... That would involve in many cases a disproportionate effort on the part of the national courts; moreover reference to all the language versions of Community provisions is a method which appears rarely to be applied by the Court of Justice itself, although it is far better placed to do so than the national courts." See also the discussion of Case C-561/19, *Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* (n 90) below.

⁹⁹⁸ Note that individuals do not have a right to initiate the preliminary ruling procedure themselves. Although the ECJ has stated that, "It is... through references for a preliminary ruling that any European citizen can seek clarification of the European Union rules which affect him" (Court of Justice of the European Union, 'The Various Types of Proceedings' <https://curia.europa.eu/jcms/jcms/Jo2_7024/en/> accessed 5 November 2024), it has also stated that "such a reference can be made only by a national court" (ibid). Moreover, in Court of Justice, 'Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings', para. 3, the ECJ has stated that, "The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court." Guidance on the preliminary ruling procedure expresses this as follows: "The national court or tribunal before which a dispute is brought takes sole responsibility for determining both the need for a request for a preliminary ruling and the relevance of the questions it submits to the CJEU." (European Union, 'Preliminary Ruling Proceedings – Recommendations to National Courts' (*EUR-Lex*) <<https://eur-lex.europa.eu/EN/legal-content/summary/preliminary-ruling-proceedings-recommendations-to-national-courts.html>> accessed 5 November 2024.)

primary mechanism for supranational interpretation of EU law is the preliminary ruling procedure.

2.3.1 *The preliminary ruling procedure*

The above discussion shows that divergences between language versions (and logically also other questions of interpretation) may not necessarily be resolved at the individual or national levels. At the individual level, this may be due to a lack of awareness of the need to make a comparison and/or costs, time constraints and lack of necessary language skills. Similar time, cost and linguistic limitations may apply at the national level, and national courts may thus conduct incomplete comparisons or decline to compare language versions at all. Unlike individuals, however, national courts may consult the ECJ to resolve an underlying question of interpretation. Such consultation is more commonly known as a request for a preliminary ruling (or Article 267⁹⁹⁹ ruling by reference to the relevant article in the Treaty on the Functioning of the European Union). The purpose of the preliminary ruling mechanism is “to prevent a body of national case-law not in accord with the rules of Community law from coming into existence in any member state”,¹⁰⁰⁰ and preliminary ruling

⁹⁹⁹ See also Article 19(3)(b) of the Treaty on European Union, which provides that the court shall “give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions”.

¹⁰⁰⁰ *Hoffmann-La Roche AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] European Court of Justice 107-76, para. 5. See also *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (n 90), Decision, para. 7: “to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law.”

proceedings comprise one of three types of cases heard by the ECJ – the others being cases initiated by a member state, an EU institution or a natural or legal person,¹⁰⁰¹ and other cases provided for in an EU treaty¹⁰⁰² – and have been described as “a fundamental mechanism of EU law... designed to ensure the uniform interpretation and application of EU law within the European Union, by offering the courts and tribunals of the Member States a means of bringing before the Court of Justice of the European Union... questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.”¹⁰⁰³ Moreover, since the ECJ has exclusive jurisdiction to declare such acts invalid,¹⁰⁰⁴ interpretation of EU law at the supranational level occurs primarily¹⁰⁰⁵ in cases heard by the court.

¹⁰⁰¹ See Article 19(3)(a) of the Treaty on European Union, which provides that the court shall “rule on actions brought by a Member State, an institution or a natural or legal person”. Note, however, that individuals only have standing to bring proceedings before the ECJ if they are the addressees of a decision. As indicated in footnote 994 above, individuals do not have standing to request a preliminary ruling.

¹⁰⁰² See Article 19(3)(c) of the Treaty on European Union, which provides that the court shall “rule in other cases provided for in the Treaties.”

¹⁰⁰³ “Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings”, Court of Justice (n 998), para. 1.

¹⁰⁰⁴ “Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings”, *ibid*, para. 7.

¹⁰⁰⁵ Although the ECJ has exclusive jurisdiction to declare acts invalid, it is worth noting that interpretation at the supranational level may also be done by other parties, such as European regulatory authorities. One example is found in the field of financial supervision, where the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority all have power to investigate “alleged breach or non-application of Union law” pursuant to Article 17(2) of their respective establishment statutes (see Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) 2010 36; Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational

Article 267 of the Treaty on the Functioning of the European Union specifies what the preliminary ruling procedure entails, describing it as the ECJ's "jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; [or] (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union".¹⁰⁰⁶ While preliminary rulings are in principle only binding on the referring national court, it is clear that such rulings must be applied by all national courts.¹⁰⁰⁷ Guidance on the preliminary ruling procedure states that it is "considered useful when, in a case before a national court, a question of interpretation that is new and of general interest for the uniform application of EU law is raised, or where the existing case-law does not appear to give the necessary

Pensions Authority) 2010 36; and Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) 2010.

A further example is the European Medicines Agency, whose tasks include "checking that the conditions laid down in Community legislation on medicinal products and in the marketing authorisations are observed" in certain cases; see Article 57(1)(o) of Regulation (EC) No 726/2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency 2004.

¹⁰⁰⁶ The preliminary ruling procedure has also been defined as follows: "A procedure used in cases where the interpretation or validity of an EU law is in question, and:

- where a decision is necessary for a national court to give judgment; or
- where there is no judicial remedy under national law."

See European Union, 'Preliminary Ruling Proceedings – Recommendations to National Courts' (n 998), under "KEY TERMS/Preliminary ruling".

¹⁰⁰⁷ See European Union, 'Preliminary Ruling Proceedings – Recommendations to National Courts' (n 998), under "KEY POINTS/Subject matter and scope" and the statement there that, "Preliminary rulings are **binding** both on the referring court and on **all courts in Member States.**"

guidance to deal with a new legal situation.”¹⁰⁰⁸ Article 267 also underlines the ECJ’s role as the ultimate authority on the interpretation of EU law, stating that a preliminary ruling *may* be applied for by a national court or tribunal which considers it necessary to resolve an interpretative question in order to be able to issue its own judgment, but that such rulings *must* be applied for when there is no further domestic appeal opportunity from the national court or tribunal hearing the case.¹⁰⁰⁹ It is important to note, on this point, that Article 267 does not grant the ECJ any proactive power to institute a preliminary ruling proceeding on its own initiative.¹⁰¹⁰ In practice, therefore, the ECJ’s preliminary ruling caseload is largely shaped by national court discretion. This is because national courts “have... discretion... to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment [and] are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law... if that question is not relevant”.¹⁰¹¹ This discretionary leeway introduces a degree of arbitrariness into the inflow of cases to the ECJ, in that a question which one national court considers unclear and requiring clarification may not be viewed the same way by a court in a different member state. Moreover, it has been stated that “courts of last instance of the member states regularly refrain from a referral because

¹⁰⁰⁸ See European Union, ‘Preliminary Ruling Proceedings – Recommendations to National Courts’ (n 998), under “KEY POINTS/Significance of the preliminary ruling procedure”.

¹⁰⁰⁹ In fact, the European Commission may enforce Article 267 by referring member states to the ECJ if they fail to apply for a preliminary ruling in a relevant case; see C-416/17 *Commission v France* [2018] European Court of Justice C-416/17, para. 114.

¹⁰¹⁰ See Article 267, which refers only to a “court or tribunal of a Member State” as having this right.

¹⁰¹¹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (n 90), Decision, para. 10.

they believe that they can solve the respective Union law question on their own with the necessary self-confidence or they want to elude the complex examination of all language versions of the Union law in question and jurisdiction of the other member states.”¹⁰¹² That said, national courts may only resolve issue of interpretation of EU law themselves if they are satisfied 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 [and] that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.”¹⁰¹³ Even so, this leaves open the possibility that national courts (in the person of the individual judges who make up the courts) may reach differing conclusions as to what is obvious¹⁰¹⁴ and whether or not they can resolve a divergence between language versions themselves or whether they require the ECJ’s help. In addition, divergences may remain undiscovered unless and until a conflict between language versions

¹⁰¹² Max Oberfeld, Gesche Ripken and Kristina Rempel, ‘The Preliminary Ruling Procedure: A Legal Vacuum in Union Law?’ Submission, THEMIS 2022 Semifinal C: EU and European Civil Procedure (Team Germany II) 8.

¹⁰¹³ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (n 90), Decision, para. 16.

¹⁰¹⁴ As expressed by Advocate General Jacobs, “To what extent will it be possible... to expect a Portuguese court to be satisfied that a matter is obvious to an Estonian court, or a Hungarian court to verify that the same interpretation flows from the Dutch or Greek version of a regulation? [...] [E]ven if the relevant court is in a position to perform such a task, how is it then to proceed when the language versions conflict?” (Francis G Jacobs, ‘Approaches to Interpretation in a Plurilingual Legal System’ in Mark Hoskins and William Robinson (eds), *A True European: Essays for Judge David Edward* (Hart Publishing 2003) 303). The point is further underlined by cases in which a court has concluded that there is no interpretative issue requiring resolution but the ECJ has disagreed; see e.g. *João Filipe Ferreira da Silva e Brito and Others v Estado português* [2015] European Court of Justice Case C-160/14, para. 45.

is raised as an issue in national legal proceedings, whether by the presiding judge(s) or the parties involved. In other words, some divergences may continue to exist unaddressed and unresolved on any level, others may be resolved by a court at national level and some may be referred to the ECJ for resolution at the supranational level. Moreover, even if a national court deems a given interpretation obvious to all relevant parties, this does not automatically mean that the ECJ would agree. This illustrates that the preliminary ruling procedure is not a watertight system for eliminating divergences between language versions of EU legal text. However, it is the only available mechanism for definitive resolution of such divergences, and the ECJ has – as noted previously – ruled on a significant number of such cases over the years.¹⁰¹⁵ In doing so, it has developed one principle of particular significance with respect to multiple language versions, namely that all language versions must be consulted to determine the meaning of a given provision of EU law.

In *Bestuur der Sociale Verzekeringsbank v J. H. van der Vecht*, the ECJ stated 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.”¹⁰¹⁶ This view was affirmed in *Erich Stauder v City of Ulm – Sozialamt*, in which the ECJ observed that, “the

¹⁰¹⁵ For example, some 170 “judgments in which the ECJ observed discrepancies between language versions” were noted for the period 1960–2010; see Baaij, ‘Fifty Years of Multilingual Interpretation in the European Union’ (n 91) 219.

¹⁰¹⁶ *Bestuur der Sociale Verzekeringsbank v J H van der Vecht* [1967] European Court of Justice Case 19-67, Grounds of judgment, sixth paragraph.

necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages.”¹⁰¹⁷ The scope of this obligation has increased as new member states have joined the EU, and the comparison obligation now encompasses 24 official languages, rather than four as at the time of *Stauder*. The comparison requirement has been upheld in various cases since *van der Vecht*.¹⁰¹⁸ One particular case which has played a central role in the ECJ’s approach to resolving divergences is *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*,¹⁰¹⁹ in which the ECJ was asked to determine the extent of the obligation to make a reference for a preliminary ruling when there is no further domestic appeal opportunity from the national court or tribunal hearing the case (the *must* obligation under Article 267¹⁰²⁰). The ECJ equated the *must* obligation with the *may* option insofar as “the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a

¹⁰¹⁷ Case 29-69 *Erich Stauder v City of Ulm - Sozialamt* (n 554), Grounds, para. 3.

¹⁰¹⁸ See e.g. Case C-310/95 *Road Air BV v Inspecteur der Invoerrechten en Accijnzen* (n 788), para. 32, *Ferriere Nord SpA v Commission of the European Communities* [1997] European Court of Justice C-219/95 P, para. 15, *UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos* [2007] European Court of Justice Case C-63/06, para. 13, and *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG* [2009] European Court of Justice Case C-347/08, para. 26.

¹⁰¹⁹ Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (n 90).

¹⁰²⁰ At the time *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* was heard, this provision was found in Article 177 of the EEC Treaty.

decision on a question of Community law is necessary to enable them to give judgment.”¹⁰²¹

This made the court’s further comments relevant to both the *must* and *may* alternatives.

The ECJ then detailed a number of circumstances relevant in a national court’s assessment regarding whether or not an interpretative question may affect the outcome of a case before

it. Of particular relevance to the present discussion is the consideration 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.”¹⁰²² Regarding the

determination of such obviousness, the ECJ stated 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.”¹⁰²³ In other words, in the *CILFIT* case the ECJ laid down two apparently

contradictory principles in successive sentences. First, it affirmed that all language versions are equally authentic, i.e. that each version is authentic on its own. Second, it stated that EU

law could only be properly interpreted by reference to all the language versions, i.e. that the true meaning of a legal text could not be established by reference to a single language

version. This latter principle has been subsequently reiterated in, for example, the Court’s statement that, “It is settled case-law that the wording used in one language version of a

provision of European Union law cannot serve as the sole basis for the interpretation of that

¹⁰²¹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (n 90), Decision, para. 10.

¹⁰²² Case 283/81 *ibid*, Decision, para. 16.

¹⁰²³ Case 283/81 *ibid*, Decision, para. 18.

provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for uniform application of European Union law."¹⁰²⁴

This position has been strongly criticised for the lack of legal certainty it creates. Specifically, the "promise made by the EU to all citizens... that their respective language version be authentic"¹⁰²⁵ creates a legitimate expectation for a citizen that "legal consequences brought about by her own language version of a Community law are as foreseeable as those brought about by whatever national law."¹⁰²⁶ No such foreseeability is assured if an individual language version is not definitive. In this regard, it has been commented that "the fact that each text is authentic essentially means that no text is authentic. It is equivalent to saying to someone that the law will be written in your language, but you should not rely on it."¹⁰²⁷ In other words, citizens have "no way of ascertaining what the law says by reading it in an official language that they can understand."¹⁰²⁸ This lack of legal certainty "is particularly sensitive in cases where plaintiffs or applicants who bring an action based on a provision in

¹⁰²⁴ See *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben* [2010] European Court of Justice Case C-451/08, para. 38.

¹⁰²⁵ Schilling (n 166) 53.

¹⁰²⁶ *ibid.*

¹⁰²⁷ Leung (n 79) 205.

¹⁰²⁸ *ibid.*

their own language stand to suffer economic loss or criminal consequences as a result of conflicting interpretations that may not be evident in their own language version.”¹⁰²⁹

Further criticism relates not to the individual perspective, but rather to the impossibility of the task involved in comparing all language versions. As noted during discussion of the individual and national levels of interpretation above, comparing all language versions is an impossible task for any party bar the ECJ, and even the ECJ does not always engage in full comparison.¹⁰³⁰ Although the ECJ has recently taken a step towards addressing criticism of the full comparison requirement, this appears to be motivated more by practical considerations relating to the possibility of the task than considerations related to individual legal certainty. In 2021, the ECJ revisited the position under *CILFIT* in the case of *Conorzio*,¹⁰³¹ in which it affirmed that “the preliminary ruling procedure... is the keystone of the judicial system established by the Treaties [and serves] the object of securing uniform

¹⁰²⁹ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 14. In this regard, it can be noted that the ECJ may take the need for individual legal certainty into account where diverging interpretations are possible but none of these undermine the objectives of the provision. See *Privat-Molkerei Borgmann GmbH & Co KG v Hauptzollamt Dortmund* [2004] European Court of Justice Case C-1/02, paras. 30–32.

¹⁰³⁰ See the statement that, “reference to all the language versions of Community provisions is a method which appears rarely to be applied by the Court of Justice itself” in para. 65 of the *Opinion of Advocate General Jacobs in Case C-338/95, Wiener v Hauptzollamt Emmerich* (n 997). See also McAuliffe, ‘Hidden Translators: The Invisibility of Translators and the Influence of Lawyer-Linguists on the Case Law of the Court of Justice of the European Union’ (n 301) 22: “the ideal situation of automatic comparison of different language versions of multilingual legal instruments in order to determine their ‘common meaning’, before beginning any interpretation process, is a relatively rare occurrence.”

¹⁰³¹ Case C-561/19, *Conorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* (n 90).

interpretation of EU law”,¹⁰³² and further that the preliminary ruling mechanism “aims to ensure that... EU law has the same effect in all Member States and thus to avoid divergences in its interpretation”.¹⁰³³ The ECJ affirmed the equal authenticity principle under *CILFIT*,¹⁰³⁴ also stating that “one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union”.¹⁰³⁵ However, the ECJ then went on to make a slight modification of the comparison requirement, stating that, “While a national court or tribunal of last instance cannot be required to examine... each of the language versions of the provision in question... it must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified.”¹⁰³⁶ Through this clarification, the ECJ curtailed the obligation to compare all language versions somewhat, restricting it to cases where the national court is aware of a divergence, not least because it has been pointed out by a party to the proceedings. In other words, there is now an increased onus on parties to an action to raise divergences as an issue. Fundamentally, however, the position remains the same, since supposedly equally valid and authentic language versions of EU legislation are not. The situation of individuals thus remains

¹⁰³² C-561/19 *ibid*, para. 27.

¹⁰³³ C-561/19 *ibid*, para. 28.

¹⁰³⁴ C-561/19 *ibid*, para. 42.

¹⁰³⁵ C-561/19 *ibid*, para. 43.

¹⁰³⁶ C-561/19 *ibid*, para. 44.

unchanged. At this juncture, it is important to note that not all cases heard by the ECJ in the context of the preliminary ruling procedure concern divergences. It is therefore important to distinguish between cases concerning divergences between language versions (which are of particular interest in the present context and therefore considered further below), and cases concerning interpretative questions not associated with divergences (which are not considered further here). As indicated above, while questions of interpretation of all kinds may arise and be resolved at the individual, national and supranational levels, divergences can only be resolved definitively by the ECJ in its capacity as the ultimate authority on the interpretation and validity of EU law.¹⁰³⁷ The approach adopted by the ECJ to resolving divergences is therefore of particular interest.

2.3.2 *Interpretative approaches of the ECJ*

While exclusive responsibility for the interpretation of EU law – including issues related to multilingualism¹⁰³⁸ – rests with the ECJ,¹⁰³⁹ the interpretation of EU law is not regulated in

¹⁰³⁷ See, for example, para. 7 of the “Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings”, Court of Justice (n 998), which states that “the Court has exclusive jurisdiction to declare [acts of an institution, body, office or agency of the Union] invalid.”

¹⁰³⁸ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 11.

¹⁰³⁹ See Article 267 of the Treaty on the Functioning of the European Union: “The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”. See also Article 344 of the Treaty on the Functioning of the European Union: “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”

either primary or secondary EU law.¹⁰⁴⁰ As a result, the ECJ is “free to choose the method of interpretation that best serves the EU legal order.”¹⁰⁴¹ At the same time, however, it has been noted that the ECJ has never adopted a “systematic scheme of interpretative principles”,¹⁰⁴² instead developing “implicit legal norms on the interpretation of Community law”¹⁰⁴³ in the form of customary norms, legal doctrine and case law.¹⁰⁴⁴ Divergences between language versions of EU legal texts represent a “legal conundrum”,¹⁰⁴⁵ in that “different meanings—in the case of laws, this translates into different commands, or different legal consequences—are equally authentic, or equally binding.”¹⁰⁴⁶ Such a state of affairs is contrary to “the object of ensuring that in all circumstances [EU] law is the same in all states of the Community”¹⁰⁴⁷ and avoiding “divergences in the interpretation of Community law”.¹⁰⁴⁸ Three possible solutions have been proposed to the problem of divergent language versions: “either all the diverging versions are somehow interpreted uniformly, or every language version is treated

¹⁰⁴⁰ Giulio Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’ (2009) 10 *German Law Journal* 537, 539. This can be contrasted with the position regarding international treaties, whose interpretation is regulated by, for example, Article 31 of the Vienna Convention on the Law of the Treaties.

¹⁰⁴¹ Koen Lenaerts and Jose A Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’ (2014) 20 *The Columbia Journal of European Law* 3, 6.

¹⁰⁴² Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (1st edn, Cambridge University Press 2012) 147.

¹⁰⁴³ Itzcovich (n 1040) 540.

¹⁰⁴⁴ *ibid.*

¹⁰⁴⁵ Schilling (n 166) 52.

¹⁰⁴⁶ *ibid.*

¹⁰⁴⁷ *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] European Court of Justice Case 166-73 8, Grounds of judgment Section 2, first paragraph.

¹⁰⁴⁸ Case 166-73, *ibid.*, Grounds of judgment Section 2, second paragraph.

on its own merits so that it depends on the citizen's language what version of the law is applied to her, or... the law is considered as null and void because it is self-contradictory".¹⁰⁴⁹ It is the first of these solutions – uniform interpretation – which the ECJ has adopted as its guiding principle when dealing with divergences. Moreover, the ECJ's approach rests on the assumption that linguistic problems arising with respect to EU law are ordinary interpretative problems which can be resolved by ordinary methods.¹⁰⁵⁰ Accordingly, when interpreting EU law to address divergences between different language versions, the ECJ seeks to achieve uniform interpretation of those language versions by means of traditional interpretative methods, including "textual, historical, contextual, comparative, teleological and multilingual interpretations."¹⁰⁵¹ While different writers have emphasised different approaches, there appears to be agreement that "the Court's methods of interpretation do not depart from the traditional repertoire; including literal interpretation, contextual interpretation and teleological interpretation"¹⁰⁵² – a categorisation reflecting Article 31(1) of the Vienna Convention on the Law of Treaties: "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*."¹⁰⁵³ At the same time, it has also been

¹⁰⁴⁹ Schilling (n 166) 52.

¹⁰⁵⁰ Pierre Pescatore, 'Interprétation des lois et conventions plurilingues dans la Communauté européenne' (1984) 25 *Les Cahiers de droit* 989, 1008.

¹⁰⁵¹ Directorate-General for Translation, *Study on Language and Translation in International Law and EU Law: Final Report* (n 69) 51.

¹⁰⁵² Irene Otero Fernández, 'Multilingualism and the Meaning of EU Law' (European University Institute 2020) 143.

¹⁰⁵³ Author's emphasis.

suggested that “the Court does not appear to uphold a specific hierarchy between the interpretation methods that it uses.”¹⁰⁵⁴ A closer look at each interpretative approach is therefore warranted.

2.3.2.1 Literal interpretation

The literal¹⁰⁵⁵ – also referred to as the grammatical or textual – approach to legal interpretation posits that a legal provision must be interpreted “in accordance with... ordinary meaning”,¹⁰⁵⁶ or “usual meaning”.¹⁰⁵⁷ Moreover, it has been suggested that “literal interpretation of a clear and precise provision is the method of interpretation that best reflects the principle of legal certainty, as it guarantees a high degree of predictability in the judgments of the ECJ.”¹⁰⁵⁸ However, even this apparently simple approach encompasses nuances in terms of the degree to which consideration may be given to information extraneous to the text in question. At one end of the scale, a strictly textual approach provides that no extraneous information whatsoever may be considered. A slightly broader view referred to as the ‘plain meaning rule’ provides that “when the language is

¹⁰⁵⁴ Fernández (n 1052) 144.

¹⁰⁵⁵ Detailed discussion of criticism of the literal approach to interpretation, while acknowledged here, falls outside the scope of this thesis. For the purposes of the present discussion, it is sufficient to note that a literal approach can be challenged on the grounds that words do not have a fixed meaning over time and that an interpreter of a legal text may be influenced by personal preferences and prejudices when adopting the meaning of a word. See further *ibid* 145.

¹⁰⁵⁶ Article 31(1) of the Vienna Convention on the Law of Treaties.

¹⁰⁵⁷ Lenaerts and Gutiérrez-Fons (n 1041) 8.

¹⁰⁵⁸ *ibid*.

unambiguous and clear on its face the meaning of the statute... must be determined from the language of the statute... and not from extrinsic evidence."¹⁰⁵⁹ In other words, extraneous information may be taken into account in the event of ambiguity or a lack of clarity. Yet further along the spectrum are approaches which permit consideration of the outcome of literal interpretation and modification thereof to avoid absurd outcomes (for example where there are grammatical errors in a statutory text or where strictly textual interpretation will not safeguard legislative intent). Regardless of the degree of 'softness' adopted, a literal approach may present substantial difficulties in the multilingual context, where language which is 'unambiguous and clear' in one language version may conflict with equally 'unambiguous and clear' language in another language version.¹⁰⁶⁰ This has influenced the ECJ's application of the literal method of interpretation, with the court adopting what has been described as "two main categories: the majority argument in which the Court gives preference to the meaning attributed to the majority of language versions, and the clarity argument where preference is given to the language versions that the Court considers clearer or less ambiguous than the other versions."¹⁰⁶¹ The frequency of use of the two arguments has been calculated as two-thirds to one-third in favour of the majority argument

¹⁰⁵⁹ Merriam-Webster, 'Plain Meaning Rule' <<https://www.merriam-webster.com/legal/plain%20meaning%20rule>> accessed 5 November 2024.

¹⁰⁶⁰ See, for example, Case C-64/95 *Konservenfabrik Lubella Friedrich Büber GmbH & Co. KG v Hauptzollamt Cottbus* (n 769) ('sweet cherries' and 'sour cherries') and Case 9/79 *Marianne Worsdorfer, née Koschniske, v Raad van Arbeid* (n 776) ('wife' and 'spouse'), as discussed in Chapter V above.

¹⁰⁶¹ Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union' (n 166) 14.

in the period 1960–2010.¹⁰⁶² In addition, it has been noted that “on several occasions the ECJ has departed from the proper and ordinary meaning of... words”,¹⁰⁶³ and it has been suggested that “there is no doubt that the ordinary meaning of the words is not a conclusive argument within the ECJ’s case law; it is an argument that may be overridden by competing considerations, which may suggest the interpreter [sic] to adopt a more creative approach.”¹⁰⁶⁴ In other words, the ECJ considers itself free to adopt non-literal approaches when tasked with resolving interpretative conundrums, including divergences between language versions of EU legal texts.

2.3.2.2 Contextual/systematic interpretation

In considering a contextual approach to interpretation, it is important to note that ‘contextual’ can be understood in two ways: firstly, as the intra-textual context of a given legal instrument, and secondly as the extra-textual context of the broader framework in which the legal text sits. This can be illustrated by reference to the previously discussed *Lubella*¹⁰⁶⁵ case, in which the German version of the relevant regulation referred to ‘Süßkirschen’ (sweet cherries), but also the CN (customs) code for sour cherries. An intra-textual examination of the regulation would thus have revealed that, as noted previously, the German text was inherently ambiguous. A contextual examination can also extend

¹⁰⁶² Baaij, ‘Fifty Years of Multilingual Interpretation in the European Union’ (n 91) 221.

¹⁰⁶³ Itzcovich (n 1040) 550.

¹⁰⁶⁴ *ibid.*

¹⁰⁶⁵ Case C-64/95, *Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v Hauptzollamt Cottbus* (n 769).

beyond the intra-textual, however, to include external factors (or “metalinguistic interpretative criteria”¹⁰⁶⁶) such as “the purpose, the overall legal context, the general scheme of the Treaties, the practicalities of applying the legislation, or, less commonly, the legislative history or comparative criteria.”¹⁰⁶⁷ The category of ‘comparative criteria’ arguably includes – not least – consistency across language versions. Divergences between language versions cannot necessarily be resolved by examining intra-textual context alone. Rather, they may require consideration of the broader framework or legislative landscape including, not least, “the common intent of the treaty-makers.”¹⁰⁶⁸ Once the analysis is expanded to incorporate factors such as intent, it arguably becomes difficult to differentiate between the contextual approach and a teleological or purposive one. The legal status of language versions is also a key factor in this regard. Where, as in the case of EU legislative texts, all language versions are equally valid and authentic, there is no authoritative or definitive extra-textual source to which reference can be made in cases of doubt. Put another way, “there is no uncontested language reference amongst the equally valid official language

¹⁰⁶⁶ Fernández (n 1052) 149.

¹⁰⁶⁷ *ibid.* See also, for example, Case 30/77 *Régina v Pierre Bouchereau* [1977] European Court of Justice 30/77, para. 14: “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 provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.” See also *Skatteministeriet v Henriksen* [1989] European Court of Justice Case 173/88, para. 11: “the scope of the contested phrase cannot be determined exclusively on the basis of an interpretation of its terms. In order to determine its meaning, recourse must therefore be had to the context in which it occurs and to the structure of the Sixth Directive.”

¹⁰⁶⁸ Hermans (n 313) 10.

versions in which the law is expressed.”¹⁰⁶⁹ In fact, it has been suggested that divergences “emphatically must not be resolved by retracing the history of the different language versions”,¹⁰⁷⁰ since drawing on knowledge of “a prototext in a given language... would privilege a particular language version over the others.”¹⁰⁷¹ This in turn would undermine the equal authenticity of all language versions. Article 33(4) of the Vienna Convention on the Law of Treaties states that “when a comparison of... 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.” This is consistent with the view expressed by Advocate General Jacobs in an opinion delivered in *Wiener v Hauptzollamt Emmerich* that, “the very existence of many language versions is a further reason for not adopting an excessively literal approach to the interpretation of Community provisions, and for putting greater weight on the context and general scheme of the provisions and on their object and purpose.”¹⁰⁷² By way of example, in *Jean-E. Humblet v. Belgian State*, the ECJ stated that “it is not sufficient for the Court to adopt the literal interpretation and the Court considers it necessary to examine the question whether this interpretation is confirmed by other criteria concerning in particular the common intention of the High Contracting Parties and the *ratio legis*.”¹⁰⁷³ It therefore seems

¹⁰⁶⁹ Bengoetxea (n 291) 204.

¹⁰⁷⁰ Hermans (n 313) 10.

¹⁰⁷¹ *ibid.*

¹⁰⁷² *Opinion of Advocate General Jacobs in Case C-338/95, Wiener v Hauptzollamt Emmerich* (n 997), para. 65.

¹⁰⁷³ *Jean-E Humblet v Belgian State* [1960] European Court of Justice Case 6/60, Grounds of judgment, Part III, Section 2, final paragraph.

clear that, in the view of the ECJ, extra-textual factors to be considered include not only the object and purpose (*ratio legis*) of a legal text, but also its context and general scheme, including the intention of the member states (the contracting parties). The purpose, object or intention of a legal text may refer to its specific individual objectives and/or broader or overarching objectives such as uniform interpretation and application of EU law. When the contextual examination is defined so broadly, there is little to distinguish it from the third category of interpretative approaches – namely teleological/purposive interpretation. In fact, it has been suggested that the contextual and purposive methods are so closely related as to make it valid to consider them together.¹⁰⁷⁴

2.3.2.3 Teleological/purposive interpretation

It has been suggested that, “Interpreting [a] provision of law is often hindered by ambiguity and linguistic disparities which are practically impossible to reconcile, given the frequent multiple meanings of the terms employed and the grammatical and morphosyntactic specificity of different versions. Legal interpretation cannot therefore be confined to a straightforward reading, but must necessarily be approached teleologically according to the general sense of the regulation.”¹⁰⁷⁵ In addition, it has been stated that “a teleological and contextual approach... to questions of interpretation [is] not only especially well suited to

¹⁰⁷⁴ CJW Baaij, ‘Legal Integration and Language Diversity: The Case for Source-Oriented EU Translation’ (University of Amsterdam 2015) 124.

¹⁰⁷⁵ Cosmai (n 174) 46.

the requirements of the Community legal order, but also unavoidable.”¹⁰⁷⁶ At the same time, it is clear that ECJ has resorted to both a literal approach and a teleological approach in resolving divergences between language versions,¹⁰⁷⁷ with it being reported that, in the period 1960–2010, the ECJ adopted a literal argument in approximately 56% of such cases, and a teleological approach in around 44% of such cases.¹⁰⁷⁸ Overall, the ECJ’s interpretative approach has been summarised as one which “corresponds, as far as possible, to the concept of the equal authenticity of the language versions of the EU legal acts, completed by the application of a teleological rather than a grammatical interpretation.”¹⁰⁷⁹ In practice, the steps involved¹⁰⁸⁰ are that the ECJ “looks at the various language versions and triangulates in an effort to capture the legislative intent [using] the purpose of the law as a safety valve when the linguistic analysis produces uncertainty or produces a result at odds with furthering the law’s goals.”¹⁰⁸¹ Put another way, the court “examines the purpose of the disputed rule after having determined the majority or clearer language versions in order to

¹⁰⁷⁶ Fernández (n 1052) 148.

¹⁰⁷⁷ See e.g. Agius (n 659) 221.

¹⁰⁷⁸ Baaij, ‘The EU Policy on Institutional Multilingualism’ (n 4) 221.

¹⁰⁷⁹ Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 138.

¹⁰⁸⁰ In this context, it is interesting to note that the court is aware that a range of approaches may be taken to the resolution of divergences between language versions. Specifically, in paras. 16–20 of the *Opinion of Advocate General Stix-Hackl in Case C-265/03, Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] European Court of Justice, the Advocate General outlined five possible approaches to resolving divergences, namely to proceed on the basis of i) the common minimum of all language versions; ii) the clearest text; iii) the language versions forming the majority; iv) the original text; or v) the intention of the parties and the object of the provision; see also Robertson (n 315) 19–20.

¹⁰⁸¹ Solan (n 311) 13.

ensure their compatibility.”¹⁰⁸² When supplemented by the requirement for uniform application and interpretation of EU law, this results in decision-making founded first and foremost on the identified objective of the statute in question (i.e. “the real intention of its author and the aim he seeks to achieve”¹⁰⁸³). When language versions diverge, the court seeks to avoid undermining the equal authenticity principle by implying that a particular language version is incorrectly worded, and thus eschews interpretations which are “at variance with the natural and usual meaning of the words”,¹⁰⁸⁴ instead proceeding on the basis that “it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved.”¹⁰⁸⁵ However, “the Court reserves the right to give priority to a teleological argument even though it contradicts the clear meaning.”¹⁰⁸⁶ Thus, “even when the ECJ finds a legislative text to be clear, it might invoke a teleological argument to contradict that clear meaning”.¹⁰⁸⁷ Despite some views to the contrary,¹⁰⁸⁸ it seems clear that in relevant cases purposive considerations may override even

¹⁰⁸² Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 14.

¹⁰⁸³ Case 29-69 *Erich Stauder v City of Ulm - Sozialamt* (n 554), Grounds, para. 3.

¹⁰⁸⁴ Case 80/76 *North Kerry Milk Products Ltd v Minister for Agriculture and Fisheries* (n 899), Law, para. 11.

¹⁰⁸⁵ Case 80/76 *ibid*, Law, para. 11.

¹⁰⁸⁶ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 14.

¹⁰⁸⁷ Bredimas, A. (1978), “Methods of Interpretation and Community Law”, Amsterdam, New York, Oxford: North-Holland Publishing Company, p. 70, cited in Baaij, ‘Fifty Years of Multilingual Interpretation in the European Union’ (n 91) 224.

¹⁰⁸⁸ See, for example, Geert van Calster, ‘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’ (1997) 17 *Yearbook of European Law* 363, 376–377.

literal meaning.¹⁰⁸⁹ In fact, it has been stated that, in such cases, “the hallmark of... interpretation by reference to the purpose and general scheme of a law [is] that the wording at least of some of the versions simply is set aside; as the ECJ explicitly has held, ‘a comparative examination of the various language versions... does not enable a conclusion to be reached in favour of any of the arguments put forward and so *no legal consequences can be based on the terminology used*’.”¹⁰⁹⁰

2.3.3 Plurilingual treaty interpretation

In Chapter III, it was noted that the EU is a supranational body, a group which also includes, for example, the World Trade Organization (WTO). Like the EU, the WTO develops, adopts, applies and interprets legal texts applicable to its member states. As in the EU’s case, WTO treaties are adopted in multiple, equally authentic language versions (albeit three rather than 24). Accordingly, the WTO also faces the issue of potential divergences between equally authentic language versions. While a detailed discussion of WTO interpretative practices falls outside the scope of this thesis, one suggested approach to the interpretation

¹⁰⁸⁹ See, for example, Case 29-69 *Erich Stauder v City of Ulm - Sozialamt* (n 554), Grounds, paras. 2 and 6, according to which the express wording of two out of four language versions was set aside in favour of the court’s preferred interpretation. Moreover, in Case C-129/95 *P Ferriere Nord SpA v Commission of the European Communities* (n 1018), paras. 12–16, the ECJ held that the Italian version of a legal provision could not take precedence over the other language versions, despite “the Italian version... considered on its own [being] clear and unambiguous” (para. 15).

¹⁰⁹⁰ *Schilling* (n 166) 61, citing Case 30/77, *Régina v Pierre Bouchereau* (n 1067), Decision, para. 13, and *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1985] European Court of Justice Case 100/84, para. 16.

of authentic versions of WTO treaties is of interest, and worth considering briefly. This is so-called 'plurilingual interpretation'.¹⁰⁹¹ The approach, which entails "routine comparison [of all] three authentic language texts of the WTO Agreements"¹⁰⁹², is based on the argument that Article 33(4) of the Vienna Convention on the Law of Treaties – which refers to "a comparison of the authentic texts"¹⁰⁹³ – prescribes a comparison of all authentic texts. The approach has been described as "good practice in the WTO context",¹⁰⁹⁴ but it has also been suggested that a "rule of mandatory comparison is probably impractical for most plurilingual treaties".¹⁰⁹⁵

Discussion

As shown above, it is by no means clear which interpretative approach the ECJ will choose in a given case, and it has been suggested that "the ECJ is compelled to apply different interpretation techniques that correspond to the nature of the actual discrepancy between the language versions of EU legal acts that it is called upon to interpret."¹⁰⁹⁶ The suggestion

¹⁰⁹¹ BJ Condon, 'Lost in Translation: Plurilingual Interpretation of WTO Law' (2010) 1 Journal of International Dispute Settlement 191.

¹⁰⁹² *ibid* 216.

¹⁰⁹³ See Article 33(4): "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."

¹⁰⁹⁴ Bradley J Condon, 'Translation: Dispute Settlement System of the World Trade Organization (WTO)' in H  l  ne Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Online edition, Oxford University Press 2020), para. 27.

¹⁰⁹⁵ Condon (n 1091) 216.

¹⁰⁹⁶ Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 140.

that the ECJ has no choice but to apply different interpretative methods can be linked to the overarching requirement it faces to uphold the equal authenticity of language versions and ensure uniform application of EU law in the member states, a position which has been summarised as follows: “The existence of [24] equally authentic language versions of the same legal instrument must not mislead us into believing that we have [24] potentially different legal interpretations but rather one interpretation conveyed in [24] different languages whose interaction is only meant to contribute to a better understanding of the legislators [sic] intention in the particular legal instrument.”¹⁰⁹⁷ In consequence, “the ECJ applies different interpretation techniques in certain cases, leaving a considerable margin of uncertainty for national authorities and private parties applying EU legal acts.”¹⁰⁹⁸ It has been noted that “giving priority to uniformity rather than legal certainty makes its [sic] difficult for individuals to anticipate their legal rights and obligations. It is particularly disturbing that the CJEU upholds the insistence on full multilingualism even in the interpretation of provisions with criminal¹⁰⁹⁹ or taxation¹¹⁰⁰ consequences for individuals.”¹¹⁰¹ At the same time, the ECJ has stated both that, “[a] fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned

¹⁰⁹⁷ Agius (n 659) 220–221.

¹⁰⁹⁸ Directorate-General for Translation, *Lawmaking in the EU Multilingual Environment* (n 326) 138.

¹⁰⁹⁹ See, for example, Case 238/84, *Criminal proceedings against Hans Röser* (n 442).

¹¹⁰⁰ See, for example, Case 173/88, *Skatteministeriet v Henriksen* (n 1067).

¹¹⁰¹ Derlén, ‘Multilingualism and the European Court of Justice: Challenges, Reforms and the Position of English After Brexit’ (n 984), section 19.02[B]

before they have the opportunity to make themselves acquainted with it”,¹¹⁰² and – on that basis – that EU law is only enforceable “against natural and legal persons in a Member State [who] have the opportunity to make themselves acquainted with it by its proper publication in the *Official Journal of the European Union*.”¹¹⁰³ In Chapter V, it was noted that the ECJ has held that “a Community regulation which is not published in the language of a Member State is unenforceable against individuals in that State”,¹¹⁰⁴ on the basis that allowing “an act which has not been properly published to be enforceable... in the name of the principle of effectiveness would result in individuals in the Member State concerned bearing the adverse effects of a failure by the Community administration to comply with its obligation to make available to those individuals... the entire *acquis communautaire* in all the official languages of the Union”.¹¹⁰⁵ It has been suggested that this principle can be extended to the situation where “a citizen... has to bear the negative consequences of a legal provision which was unclear in his own language”.¹¹⁰⁶ The argument must presumably be that if a failure to publish EU law – i.e. a failure to make EU law available to EU citizens – renders it unenforceable against them, the same must apply to a failure to make EU law available to EU citizens in their language, because when there are differences between language versions of an EU legal text, the EU has failed to make EU law clear in all the official languages

¹¹⁰² *A Racke v Hauptzollamt Mainz* [1979] European Court of Justice Case 98/78, Decision, para. 15, fourth paragraph.

¹¹⁰³ Case C-161/06, *Skoma-Lux sro v Celní ředitelství Olomouc* (n 852), para. 37.

¹¹⁰⁴ Case C-161/06, *ibid*, para. 61.

¹¹⁰⁵ Case C-161/06, *ibid*, para. 42.

¹¹⁰⁶ *van der Jeught* (n 597) 33.

and EU citizens who are detrimentally affected by this lack of clarity should not bear negative consequences as a result.

It has been suggested that “legal certainty should operate mainly for the benefit of the individual and not for the powers that be, namely the EU”,¹¹⁰⁷ and the above discussion indicates an inescapable conflict between – on the one hand – upholding the uniformity of EU law and – on the other hand – providing the intended target audience of EU law with legal certainty. It has been noted that, “It is inadequate to consider the interpretation of multilingual legal texts only from the perspective of the legal decision-maker. An official multilingual policy creates the expectation that the corresponding language communities could have better linguistic access to the law”.¹¹⁰⁸ The focus of this thesis on the individual impact of the multilingual EU legal regime has been underlined several times, as has the view that individuals should know, with certainty, what rules apply to them. Those rules are defined not only by legislation, but also by case law which interprets and applies legislation,¹¹⁰⁹ and the legal certainty of individuals thus rests on both of these sources of law. The provision of legal certainty through case law specifically relates closely to the explanations given for decisions, i.e. legal reasoning. It has been posited that “the requirement to justify judgments and other decisions in law by proving good reasons –

¹¹⁰⁷ Jérémie Van Meerbeeck, ‘The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust’ (2016) 41 *European Law Review* 275, 276.

¹¹⁰⁸ Leung (n 79) 199.

¹¹⁰⁹ See further the discussion of EU lawmaking in Chapter III above.

acceptable reasons according to the legal culture – is a factor *constraining* decision-makers' *discretion*, and *limiting the arbitrariness* of decision-makers' decisions, and ultimately making them *accountable* to citizens and society at large."¹¹¹⁰ Additional objectives include inducing compliance with a decision and facilitating criticism of it.¹¹¹¹ Arguably, the relevance of these objectives extends beyond case law alone to legislation, based on the view that legislation should also constrain discretion,¹¹¹² limit arbitrariness, foster accountability, induce compliance and allow debate or criticism of applicable rules. However, it is questionable whether such objectives can be achieved if there are substantive differences between the rules applicable in different EU member states due to divergences between language versions, and if no legal rule is definite until ruled on by the ECJ.¹¹¹³ In short, legal certainty is dependent on the availability of sufficiently definite sources of law (whether in the form of unambiguous statutory texts or clearly reasoned case law), but this is complicated by the pursuit of uniformity in the EU context.

The literal and teleological approaches to interpretation represent two options for resolving the tension between uniformity and certainty. A literal system of interpretation provides

¹¹¹⁰ Bengoetxea (n 291) 215–216.

¹¹¹¹ Jan Komárek, 'Legal Reasoning in EU Law' in Damian Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 29.

¹¹¹² For example, the concern has been raised that, "interpreters may be encouraged to look for discrepancies among language versions in order to depart from the texts of the law altogether"; see Leung (n 79) 197.

¹¹¹³ An additional factor is that the ECJ always has discretion to depart from previous precedent in a future ruling, although that risk is, of course, present regardless of the adopted interpretative approach.

some degree of certainty in the sense that a given written text is construed as worded. However, the literal approach runs into difficulties in the multilingual context, where divergences between language versions undermine uniformity. The teleological approach looks to external factors such as purpose and context for help in defining textual meaning in a uniform manner, but encounters problems with respect to the authoritativeness of individual language versions. One proposed means of addressing this weakness of the teleological approach is to redefine legal certainty by “going *beyond words*, or at least beyond the plain, seemingly objective meaning of a word in one particular language version, and looking for a more autonomous, cross-language or harmonised meaning, taking into account context, system, objectives, effectiveness and consequences.”¹¹¹⁴ This approach rejects “the notion that legal certainty must necessarily be based on objectivity and a static notion of language”¹¹¹⁵ and refutes the possibility of objective meaning due to “vagueness, generality and ambiguity of words [and resulting] indeterminacy”,¹¹¹⁶ instead viewing legal certainty “as factual, sociological, certainty”¹¹¹⁷ which “focuses on judicial reasoning and rational acceptability of judicial decision-making within a particular legal community.”¹¹¹⁸ With this approach, predictability is argued to increase because the interpreting court has greater leeway to adjust decisions to the “predictions and expectations of those governed

¹¹¹⁴ Bengoetxea (n 291) 206–207.

¹¹¹⁵ Paunio (n 595) 2.

¹¹¹⁶ Bengoetxea (n 291) 208.

¹¹¹⁷ *ibid.*

¹¹¹⁸ Paunio (n 595) 2.

by law".¹¹¹⁹ However, the approach implies that "norms are only determined at the judicial application stage",¹¹²⁰ necessarily implying that "there is no pre-determined meaning of the provisions which are the object of interpretation".¹¹²¹ In other words, the legal norm or rule is established "only after the provision gets interpreted and a specific meaning is opted for",¹¹²² a development which has also been described as "the departure of legal meaning from the texts that represent it".¹¹²³ This implies that "[w]e simply cannot know what the norms are beforehand, we need to interpret them... in the sense of attributing a meaning to their terms."¹¹²⁴ It has been acknowledged that abandoning a literal interpretation can raise concerns, or – put another way – "[a] certain uneasiness... as regards the rule of law values of predictability and knowledge of the law."¹¹²⁵ In a sense, redefining legal certainty entails shifting the goalposts for individuals, or changing the rules of a game after it has started. It has been stated that, "The fact that the Court may resort to the teleological argument to correct a literal interpretation has serious implications for legal certainty. First, it makes it impossible for individuals to predict with any degree of certainty which interpretive methods will be used by the Court in a particular case, thus creating even greater legal uncertainty. Secondly, it sends a strong signal suggesting that there is no reason to expect the Court to strike a balance between legal certainty and multilingualism

¹¹¹⁹ *ibid* 53.

¹¹²⁰ Bengoetxea (n 291) 210.

¹¹²¹ *ibid* 209.

¹¹²² *ibid* 210.

¹¹²³ Leung (n 79) 197.

¹¹²⁴ Bengoetxea (n 291) 210.

¹¹²⁵ *ibid* 208.

if it would put the effectiveness of EU law at risk.”¹¹²⁶ Since the ‘effectiveness of EU law’ rests, not least, on its uniform interpretation and application across the member states, the preceding discussion of the ECJ’s interpretative approach again highlights the conflict between systemic and individual legal certainty as previously noted in Chapter IV. It appears paradoxical that, despite the EU’s strong focus on individual rights and freedoms,¹¹²⁷ systemic considerations appear to weigh most heavily in the ECJ’s preferred approach to resolving divergences between language versions. Ultimately, the question whether the system is more important than the individual is a political one, but it seems legitimate to ask what the purpose of the EU is, if not to benefit its citizens or – as a minimum – its participants (i.e. the member states), and what the purpose of the member states is, if not to benefit their citizens. A similar tension is observable within the category of ‘individuals’, in that it can be questioned whether the objective should be the greatest possible collective certainty or the greatest possible individual certainty, on the basis that “multilingual law makes it easier for more people to know roughly what the law says, but simultaneously makes it harder for them to know... exactly what it means.”¹¹²⁸

¹¹²⁶ Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 14.

¹¹²⁷ As exemplified by the second paragraph of the Preamble to the Charter of Fundamental Rights of the European Union, which states that the EU “places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”

¹¹²⁸ Leung (n 79) 250.

At the beginning of Chapter II, it was stated that this thesis will consider whether the multilingual EU legal regime allows EU citizens to know and understand their rights and obligations fully. The above discussion makes it clear that, for the ECJ at least, systemic and collective legal certainty trump individual legal certainty. This stance leaves individual EU citizens exposed to risk if they choose to rely a literal (or indeed their own) reading and thus interpretation of official language versions of EU legal texts. The preceding discussion has focused on the practical efforts made to prevent and eliminate divergences. Since, as noted previously, the creation of multilingual EU law necessarily involves extensive translation activity, it is logical also to consider whether and how translation theory could contribute to the elimination of divergences between language versions. This is the focus of Chapter VII.

VII. Theoretical approaches to addressing divergences and proposed new approach

This chapter sets out the theoretical foundation for a new approach for detecting and addressing divergences between language versions of EU legal texts. It then examines and classifies existing approaches described in translation theory to situate the proposed new approach in the existing literature. Thereafter, it discusses possible limitations and how these may be addressed, before presenting a final proposal.

1. The need to safeguard translation quality

As noted in Chapter III, the provision of European Union (EU) legislation to the public in the EU's official languages involves extensive translation activity, for which purpose the EU institutions maintain a number of dedicated translation services. Basic definitions of the term 'translation' include "something that is translated, or the process of translating something, from one language to another",¹¹²⁹ and "[t]he provision of an expression in one language meaning the same as that of another."¹¹³⁰ Translation can also be described as "an operation performed on languages: a process of substituting a text in one language for a text in another",¹¹³¹ i.e. as *"the replacement of textual material in one language... by equivalent*

¹¹²⁹ Cambridge Dictionary, 'Translation' <<https://dictionary.cambridge.org/dictionary/english/translation>> accessed 5 November 2024.

¹¹³⁰ Oxford Reference, 'Translation' <<https://www.oxfordreference.com/display/10.1093/oi/authority.20110803105352776>> accessed 5 November 2024.

¹¹³¹ JC Catford, *A Linguistic Theory of Translation* (Oxford University Press 1965) 1.

textual material in another language".¹¹³² It is clear, however, that translation goes beyond mere replacement of words in one language with corresponding words in another language. For example, it has been suggested that, "Translating consists in reproducing in the receptor language the closest natural equivalent of the source-language message, first in terms of meaning and secondly in terms of style"¹¹³³ – a process which has been described as a science, a skill, an art and a matter of taste.¹¹³⁴ At the same time, definitions of translation vary depending on theoretical standpoint. In Chapter II, for example, it was noted that from a functionalist perspective translation can be defined as an act of inter-cultural communication in which information formulated in an originating (or source) culture is processed for the purpose of informing a recipient (or target) culture. Moreover, it was stated that – in the legislative context – the originating culture equates to the legislature, and the recipient culture to the target audience. Applied to the EU legal regime, this implies that the legislative bodies of the EU (i.e. the European Commission, the Council of the European Union and the European Parliament) represent the originating culture in respect of EU legislation, while EU citizens constitute the recipient culture or target audience. Chapter II also indicated that the term 'language' can be viewed more broadly than just referring to the words, tone and style of a translated text, i.e. as also encompassing the languages which members of the target audience can comprehend. This demonstrates the

¹¹³² *ibid* 20.

¹¹³³ Eugene Albert Nida and Charles Russell Taber, *The Theory and Practice of Translation* (EJ Brill 1982) 12.

¹¹³⁴ Peter Newmark, *A Textbook of Translation* (Prentice Hall International 1988) 6.

importance of getting language versions 'right' in a multilingual context where the access of target audience members to legal texts varies in line with their language skills. As noted in Chapter III, EU legislative acts frequently serve the objective of harmonising laws within the member states, and it was suggested that such harmonisation can only be achieved if EU legislative acts have the same effect(s) in different member states (and impliedly in different language versions). In other words, language – and thus the quality of language versions as a means of communication with the target audience – is a key factor in the achievement of the harmonisation objective. Chapter VI has outlined two theories of meaning applicable to statutory texts – strong and weak – where strong meaning theory views "statutory texts... as autonomous entities carrying autonomous and determinate meaning, thus being normative in their own right"¹¹³⁵ and weaker meaning theories state that "meaning is not in the text, but in the minds of people, created on the basis of context, therefore not the text but the interpreter is in charge of legal decisions".¹¹³⁶ As regards the harmonisation objective, it seems clear that language versions of EU legal texts must, in order to achieve harmonisation, be framed in such a manner that the target audience can comprehend them. A need to comprehend EU legal acts and/or to determine their meaning may, as noted previously, arise on the part of individuals, regulatory authorities, national courts and the ECJ. In other words, individual language version have to be interpreted to some degree. This suggests that EU legislative texts do not carry entirely autonomous and

¹¹³⁵ Engberg (n 973) 1140.

¹¹³⁶ *ibid* 1149.

determinate meaning, and that – at least to some degree – their meaning resides in the minds of the target audience and is created on the basis of context. As previously noted, this indicates that the strong theory of meaning is not fully applicable to the language versions of EU legislative texts, due to the need for interpretation prior to resolution and application. A weaker theory of meaning appears to provide greater allowance for the reality that all members of the target audience have to engage in some degree of interpretation to facilitate application to their individual circumstances.

Translation “has been an important cross-linguistic and cross-cultural practice since earliest times”,¹¹³⁷ providing “an important service in that it mediates between different languages, overcoming linguistic and cultural barriers”,¹¹³⁸ and thus serves a communicative purpose. This is particularly true in the multilingual context of the EU legal regime, where different document types serve to convey legal information to a variety of end users. It has been suggested that legal texts can be defined by the context in which they are produced, as legislative, judicial, contractual or administrative,¹¹³⁹ and – correspondingly – by reference to the identity of the producer, i.e. “(a) the legislator (e.g. constitution, law, decree) (b) the judge (e.g. judgements) and (c) other institutions such as other legally empowered officials,

¹¹³⁷ Juliane House, *Translation as Communication across Languages and Cultures* (Routledge, Taylor & Francis Group 2016) 5.

¹¹³⁸ *ibid.*

¹¹³⁹ Patricia Vanden Bulcke and Armand Héroguel, ‘Quality Issues in the Field of Legal Translation’ in Ilse Depraetere (ed), *Perspectives on Translation Quality*, vol 9 (De Gruyter, Inc 2011) 212, citing Mayoral Asencio, Roberto (2003) “Translating Official Documents”, Manchester: St. Jerome Publishing.

a notary for example (e.g. contracts).¹¹⁴⁰ Moreover, legal texts can be sub-divided into categories and genres according to their intended purpose, i.e. as “(a) prescriptive texts (e.g. constitution, laws, decrees), (b) judicial texts (e.g. summons, pronouncements, search warrants, judgements), (c) jurisprudence (compilations of judgements), (d) reference works (encyclopaedias, dictionaries, templates), (e) the legal doctrine (e.g. essays, legal studies, articles), (f) texts that are applications of the law (e.g. authentic or private documents, contracts, wills, articles of association, acts of the Civil Register)”.¹¹⁴¹ This implies that EU legislation and ECJ case law are legal texts by virtue of being prescriptive and judicial texts produced by the legislature and judges, respectively. It thus seems logical to conclude that translations of such documents are also legal texts in their own right. Although not produced by individual legislators or judges, such translations are prepared in a legislative or judicial context and serve the same prescriptive purposes, in that the reasons for preparing such translations go beyond the mere provision of information and include normative and judicial purposes.¹¹⁴² Accordingly, translations of EU legal texts serve not only the *informational* purpose of enabling the public to access EU legislation and case law and the *judicial* purpose of allowing national courts to refer to relevant texts in a language they comprehend, but

¹¹⁴⁰ Gémar, Jean-Claude (2002) “Le plus et le moins-disant culturel du texte juridique”, *Langue, culture et equivalence*, Meta 2/47, pp. 163–176, cited in *ibid.*

¹¹⁴¹ Borja Albí, Anabel and Amparo Hurtado Albir (1999) “La traducción jurídica” in Amparo Hurtado Albir (ed.), *Enseñar a Traducir*, Madrid: Edelsa, Grupo Didascalía, pp. 154–160, cited in *ibid.*

¹¹⁴² Šarčević, ‘Challenges to the Legal Translator’ (n 221) 187.

also the *normative* purpose of EU harmonisation.¹¹⁴³ Legal translation in the EU context can thus be considered “an act of communication across legal, language, and cultural barriers enabling the law to function in more than one language at national, international, and supranational levels.”¹¹⁴⁴ However, this purpose cannot be achieved, or will at least be hindered, if translations fail to create “a relation of equivalence between a source text in one language and its resulting translation text in another language”.¹¹⁴⁵ In such cases, “The consequences of inadequate legal translations can be dire... for individuals, for private or public entities, and for legal certainty in general.”¹¹⁴⁶

Legal translation in the EU context is uniquely complex due to the number of official languages involved, with – as noted previously – “23 of the 24 language versions [being] translations”.¹¹⁴⁷ Moreover, it has been stated that, “The probability of confusion, errors and discrepancies is multiplied in direct proportion to the number of authentic texts”,¹¹⁴⁸ and been suggested that reproducing the same meaning in all parallel texts is virtually

¹¹⁴³ Where harmonisation is the pursuit of uniformity of law in EU member states. See, for example, Article 288 of the Treaty on the Functioning of the European Union, which gives regulations direct applicability in all member states. Directives are also directly applicable, although the implementation mechanism is left up to national authorities to decide.

¹¹⁴⁴ Šarčević, ‘Challenges to the Legal Translator’ (n 221) 187.

¹¹⁴⁵ House, *Translation as Communication across Languages and Cultures* (n 1137) 9.

¹¹⁴⁶ Fernando Prieto Ramos, ‘Quality Assurance in Legal Translation: Evaluating Process, Competence and Product in the Pursuit of Adequacy’ (2015) 28 *International Journal for the Semiotics of Law* 11, 12.

¹¹⁴⁷ Directorate-General for Translation, ‘DGT Translation Quality Guidelines’ (n 236) 2.

¹¹⁴⁸ Tabory, M. (1980). “Multilingualism in International Law and Institutions”, Alphen aan den Rijn: Sijthoff & Noordhoff, p. 146, cited in Šarčević, ‘Multilingual Lawmaking and Legal (Un)Certainty in the European Union’ (n 166) 9.

impossible.¹¹⁴⁹ In other words, some way is needed of checking and/or assuring that legal translations achieve the desired level of quality. Various approaches, processes, models and mechanisms have been developed and proposed for this purpose, and a correspondingly broad terminology has been developed and is used in practice. While it might be tempting to use terms such as (translation) quality control, quality assessment and quality assurance interchangeably¹¹⁵⁰ in this context, it is important to note that these terms refer to distinct aspects of quality management, i.e. the system(s) adopted with the aim of achieving desired translation quality. In such a system, quality *control* “encompasses checking whether the products or services meet stated quality specifications”,¹¹⁵¹ quality *assessment* refers to the evaluation (measurement and assessment) of “the quality of an end product of the translation process”¹¹⁵² – i.e. “the extent to which a product complies with quality specifications”¹¹⁵³ – and quality *assurance* describes “the full set of procedures applied not just after... but also before and during the translation production process, by all members

¹¹⁴⁹ Doczekalska (n 297) 353.

¹¹⁵⁰ Arle Lommel, Aljoscha Burchardt and Hans Uszkoreit (eds), ‘Multidimensional Quality Metrics (MQM) Definition’, section 1.2, <<https://www.qt21.eu/mqm-definition/definition-2015-12-30.html>>, accessed 20 June 2022.

¹¹⁵¹ Chiocchetti and others (n 287) 169; see also Joanna Drugan, *Quality in Professional Translation: Assessment and Improvement* (Bloomsbury Academic 2013) 76). An interviewee in this study also described quality control as product-related, and as including measures such as product assessment and sample-based tracking of common errors as a basis for feedback to translators. (Interview with European Parliament Quality Coordinator, ‘Interview 4’ (5 October 2023).)

¹¹⁵² Koźbiał (n 275) 156.

¹¹⁵³ Lommel, Burchardt and Uszkoreit (n 1150), section 1.2.

of a translating organization, to ensure that quality objectives... are met".¹¹⁵⁴ In other words, quality assurance concerns "systems put in place to pre-empt and avoid errors or quality problems at any stage of a translation job"¹¹⁵⁵ and thus encompasses both quality control and quality assessment.¹¹⁵⁶ The question of whether quality specifications have been fulfilled (i.e. quality control) is of lesser interest in this thesis, and the further discussion therefore concentrates on measures taken to assure (i.e. "systems and processes used to help create or maintain quality"¹¹⁵⁷) and assess ("the step in the translation process that involves the counting and classification of translation errors"¹¹⁵⁸) the quality of translations. While quality assurance relates to the translation process, quality assessment concerns the translation product. Since it is the translation product – i.e. the different language versions of EU legislative texts – which is of primary interest in this thesis, the discussion below concentrates mainly on translation quality assessment.

¹¹⁵⁴ Brian Mossop, *Revising and Editing for Translators* (Routledge 2020) 131. An interviewee in this study also described quality assurance as process-related, and as encompassing measures such as knowledge management/retention, information-sharing, the development of handbooks/manuals for translators, holding meetings to facilitate knowledge-sharing/discussion, providing training for translators who experience problems, issuing notes or instructions on certain document types, answering questions from translators and inter-institutional liaising. (Interview with Quality Coordinator, 'Interview 4' (n 1151).)

¹¹⁵⁵ Drugan (n 1151) 76.

¹¹⁵⁶ Drugan (n 1151) 76.

¹¹⁵⁷ Saldanha and O'Brien (n 87) 95.

¹¹⁵⁸ *ibid* 96.

It is worth noting that translation quality assessment is “not part of the translation production process”,¹¹⁵⁹ but rather a means of determining the extent to which the translation product “meets professional standards and the standards of the translation provider, with respect to [defined] parameters”.¹¹⁶⁰ While the variety of terms used to describe quality assessment of translations is broad – encompassing terms such as “translation criticism”,¹¹⁶¹ “translation quality evaluation”,¹¹⁶² “translation quality control”¹¹⁶³ and, of course, “translation quality assessment”¹¹⁶⁴ – and it has been suggested that the exact choice of term depends on the focus of the assessment procedure¹¹⁶⁵ – this thesis adopts the term ‘translation quality assessment’ (or TQA). It has been proposed that TQA must entail three steps: 1) defining quality; 2) adopting a methodology; and 3) practical assessment by reference to the defined quality and adopted methodology.¹¹⁶⁶ However, “it seems that there is no common ground when it comes to defining quality either from a practical or from a theoretical viewpoint

¹¹⁵⁹ Mossop (n 1154) 130.

¹¹⁶⁰ *ibid* 131.

¹¹⁶¹ See generally Reiss (n 47).

¹¹⁶² See e.g. Sonia Colina, ‘Translation Quality Evaluation: Empirical Evidence for a Functionalist Approach’ (2008) 14 *The Translator* 97; Sonia Colina, *Fundamentals of Translation* (Cambridge University Press 2015) 221; Prieto Ramos, ‘Quality Assurance in Legal Translation’ (n 1146) 11.

¹¹⁶³ See e.g. Britta Upsing and Marc Rittberger, ‘The Translator’s Perspective on Translation Quality Control Processes for International Large-Scale Assessment Studies’ (2018) 10 *The International Journal of Translation and Interpreting Research* 55.

¹¹⁶⁴ See e.g. Malcolm Williams, *Translation Quality Assessment: An Argumentation-Centred Approach* (University of Ottawa Press 2004); Juliane House, *Translation Quality Assessment: Past and Present* (Routledge 2015).

¹¹⁶⁵ Marcel Thelen, ‘Translation Quality Assessment or Quality Management & Quality Control of Translation?’ (2008) 8 *Translation and Meaning* 411, 412.

¹¹⁶⁶ Roberto Martínez Mateo, ‘A Deeper Look into Metrics for Translation Quality Assessment (TQA): A Case Study’ 21, 73.

[and] many scholars [...] believe that quality in translation is a *relative* and *subjective* concept".¹¹⁶⁷ Perceived quality is determined, not least, by the priorities, preferences and knowledge of readers, as well as applied assessment metrics, models and approaches. Perceptions and expectations of high (or low) quality may, for example, vary from institution to institution, from reader to reader, over time as standards and expectations develop or in line with intended use.¹¹⁶⁸ It therefore seems clear that translation quality is not an objective standard to be achieved, but rather something to be set individually for documents, user categories, institutions, etc. In other words, "The reason why no single standard will suffice is that quality is context dependent."¹¹⁶⁹ The level of quality implied by this relative view of translation quality has been variously termed adequacy,¹¹⁷⁰ suitability¹¹⁷¹ and fitness for purpose, with the latter being the standard adopted by the European Commission's Directorate-General for Translation (DGT).¹¹⁷² Given the importance of ensuring that translations are of the requisite quality and achieve their intended purpose, it is unsurprising

¹¹⁶⁷ *ibid.*

¹¹⁶⁸ See e.g. Miguel A Jiménez-Crespo, 'Crowdsourcing and Translation Quality: Novel Approaches in the Language Industry and Translation Studies' in Joss Moorkens and others (eds), *Translation Quality Assessment: From Principles to Practice*, vol 1 (Springer International Publishing 2018) 77, referring to situations where "translation quality is not defined per se, but rather replaced by a scale of potential value or worth of different types of content, from trivial to highly important", and further *ibid* 78, citing an example of "two quality levels: "good enough" and "publishable quality"."

¹¹⁶⁹ Alina Secară, 'Translation Evaluation - a State of the Art Survey', *Workshop Proceedings* (University of Leeds Press 2005) 39.

¹¹⁷⁰ I.e. "the appropriateness of a translated text to fulfil a communicative purpose"; see Mateo (n 1166) 74.

¹¹⁷¹ I.e. "the translation is suited to the people who will be reading it and the reason they will be reading it"; see Mossop (n 1154) 8.

¹¹⁷² Directorate-General for Translation, 'DGT Translation Quality Guidelines' (n 236) 1.

that relevant literature, normative standards and other sources describe numerous models and approaches for conducting translation quality assessment. Later in this chapter, a new approach will be proposed as a potential aid in overcoming some of the previously identified challenges and concerns linked to the current functioning of the EU legal system. In order to situate the proposed approach in the landscape of existing models and approaches, these are first considered further below.

2. Existing models and approaches

One way to navigate the plethora of TQA approaches and models proposed over the years is to categorise them into headline groups like psychosocial, response-based, and text and discourse-oriented approaches, as well as sub-groups like mentalist, behaviourist and functionalist (or *skopos*-related), descriptive-historical, post-modernist and deconstructionist, and linguistically oriented approaches.¹¹⁷³ The author has previously proposed an alternative classification of TQA approaches, based not on the theoretical outlook or stance of a model or its author(s), but rather on the number of informational sources on which an approach or model (primarily) draws. The proposed classification states that *unidimensional* approaches incorporate one, *bidimensional* approaches incorporate two and *multidimensional* approaches incorporate more than two sources of information.¹¹⁷⁴

¹¹⁷³ House, *Translation as Communication across Languages and Cultures* (n 1137) 67–71.

¹¹⁷⁴ Michael Krallmann, 'Horizontal Translation Quality Assessment – a Third Way for Multilingual Translations?' (Masters dissertation (unpublished), University of Birmingham 2020) 5.

In this context, 'informational sources' means the source text, one or more target texts and other relevant data. While developing this thesis, the author has amended the previously proposed classification terminology to underline its focus on the number of incorporated informational sources. Accordingly, in the discussion which follows the terms *single-source*, *dual-source* and *multi-source* are used to refer to TQA approaches which concentrate on a single source, two sources or more than two sources, respectively, as exemplified below.¹¹⁷⁵

2.1 Single-source TQA approaches

While it might be assumed that any assessment of translation quality must entail comparison of the source text (ST) with the target text (TT), methods have been proposed which focus exclusively on one source of information, namely the TT. One early example is the "Cloze Technique",¹¹⁷⁶ which consists of "asking recipients to fill gaps of words deleted in [the] TT... to measure the degree of comprehensibility and predictability without reference to [the] ST."¹¹⁷⁷ Further examples of single-source methods include the so-called hermeneutic category of TQA approaches, which emphasises "subjective interpretations of the worth of

¹¹⁷⁵ Although the terms unilingual, bilingual and multilingual were also considered, it was concluded that "-source" better reflects the underlying concept, since 'multi-source' and 'multilingual' are not synonymous under all circumstances. Specifically, the term 'multilingual' implies that the individual sources in a multilingual approach are in different languages, and this excludes the possibility of an approach employing several sources of information in the same language. See further the discussion in sections 2.3.2 and 2.3.3 below.

¹¹⁷⁶ Nida and Taber (n 1133) 169.

¹¹⁷⁷ Jamal al-Qinai, 'Translation Quality Assessment. Strategies, Parametres and Procedures' (2002) 45 *Meta* 497, 498.

a translation¹¹⁷⁸ over the objective textual meaning of an ST (and reproduction of that meaning in a TT), implying that “[t]ranslational equivalence is rejected outright”,¹¹⁷⁹ and “[t]he original text, the relation between original and translation and the expectations of target text readers are not given the attention they deserve”.¹¹⁸⁰ The so-called behaviourist category of TQA approaches also evidences strong reliance on a single informational source, as exemplified by the proposition that a good translation is one which achieves “equivalence of response rather than equivalence of form”.¹¹⁸¹ Approaches in this category have been criticised precisely because “the source text is largely ignored in such tests”.¹¹⁸²

The existence and application of single-source TQA approaches is also evidenced by an empirical study of Belgian translation agencies conducted in 2008, which examined the use in practice of seven defined “translation revision procedures”,¹¹⁸³ including one which considered only the TT, described as follows: “the TT is read once, the ST is not read at all (or partly)”.¹¹⁸⁴ This procedure was sub-divided into two further options: “A the reviser reads the TT alone without the ST, and makes changes” and “B the reviser reads the TT alone,

¹¹⁷⁸ House, *Translation Quality Assessment* (n 1164) 9.

¹¹⁷⁹ *ibid.*

¹¹⁸⁰ *ibid.* 10.

¹¹⁸¹ Nida (n 40) 166.

¹¹⁸² House, *Translation Quality Assessment* (n 1164) 11.

¹¹⁸³ Isabelle Robert, ‘Translation Revision Procedures: An Explorative Study’ in Pieter Boulogne (ed), *Translation and Its Others. Selected Papers of the CETRA Research Seminar in Translation Studies 2007* (Centre for Translation Studies (CETRA) 2008) 9.

¹¹⁸⁴ *ibid.*

refers to ST when he thinks there may be a problem, and makes changes".¹¹⁸⁵ The study results confirmed that this single-source procedure was used in practice (although less often than other approaches).¹¹⁸⁶ Practical translation standards provide a further example in this regard, with International Organization for Standardization (ISO) standard 17100:2015 – *Translation services – Requirements for translation services* – describing an optional review process in which "the target language content is reviewed"¹¹⁸⁷ but no comparison with the ST is required. This can be contrasted with a second procedure set out in the ISO standard – revision¹¹⁸⁸ – which does mandate ST-TT comparison. In other words, the ISO standard specifies both a single-source "activity in which the target text only is checked"¹¹⁸⁹ (i.e. review) and a dual-source "activity in which the translation is checked for adequacy with regard to the source text"¹¹⁹⁰ (i.e. revision). This can be linked to the concept of monolingual and bilingual feedback,¹¹⁹¹ in that review only requires monolingual expertise but revision requires bilingual ability, as confirmed by the ISO standard's definitions of review ("monolingual examination of *target language content*... for its suitability for the agreed

¹¹⁸⁵ *ibid.*

¹¹⁸⁶ With 2% of respondents reporting use of procedure A and 5% of respondents reporting use of procedure B; see *ibid.* 10.

¹¹⁸⁷ 'International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services' (n 239) 11.

¹¹⁸⁸ *ibid.* 10–11.

¹¹⁸⁹ Colina, *Fundamentals of Translation* (n 1162) 298.

¹¹⁹⁰ *ibid.*

¹¹⁹¹ JA Harkness and A Schoua-Glusberg, 'Questionnaires in Translation' in JA Harkness (ed), *Cross-cultural survey equivalence*, vol 3 (Zentrum für Umfragen, Methoden und Analysen (ZUMA) 1998) 108.

purpose"¹¹⁹²) and revision ("bilingual examination of *target language content*... against *source language content*... for its suitability for the agreed purpose"¹¹⁹³). Moreover, it has been stated that the Council of the EU's Translation Service employs "review, i.e. monolingual examination of the target text".¹¹⁹⁴

The distinction between single-source approaches and approaches which incorporate more than one informational source is not always clear-cut. In some cases, single-source TQA approaches form part of a broader methodology, for example where both review and revision are mandated. Another example is provided by an approach which includes the initial evaluative step of considering target texts "without reference to their corresponding source texts [and] irrespective of the very question of the *existence* of those texts"¹¹⁹⁵ before the TTs are mapped "on their counterparts in the appropriate source system and text".¹¹⁹⁶ Thus, although single-source TQA methods are not always used in isolation, they do comprise a category distinct from the dual- and multi-source approaches considered below.

¹¹⁹² 'International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services' (n 239) 2.

¹¹⁹³ *ibid.*

¹¹⁹⁴ Hanzl and Beaven (n 243) 145.

¹¹⁹⁵ Gideon Toury, 'A Rationale for Descriptive Translation Studies' in Theo Hermans (ed), *The Manipulation of Literature: Studies in Literary Translation* (Routledge 2014) 21.

¹¹⁹⁶ *ibid.*

2.2 Dual-source TQA approaches

While the number of single-source approaches to TQA is quite small, there are numerous models which can be classified as dual-source on the basis that they concentrate on two sources of information (i.e. the ST and TT) in determining whether a given translation has achieved the requisite quality, reflecting the statement that “translation criticism requires a comparison of the target and source texts.”¹¹⁹⁷ This echoes the suggestion that “the relationship between the original text and its translation”¹¹⁹⁸ is a basic criterion for systematising different approaches to TQA. An ST-TT focus is evident in numerous approaches and models proposed in relevant literature, although the relative merits and demerits of the various methods are not of primary interest in this context. Rather, as in the case of single-source approaches, the critical factor is the orientation of the approaches. For example, a model proposed by Newmark includes “a selective but representative detailed comparison of the translation with the original”;¹¹⁹⁹ Colina’s translation evaluation tool tasks ‘raters’ with evaluating a translation on a range of factors including “relationship to the source text”;¹²⁰⁰ Williams’ approach culminates in “assessment of TT against ST”;¹²⁰¹ Waddington’s four assessment methods all involve comparison of the ST with the TT;¹²⁰² van

¹¹⁹⁷ Reiss (n 47) 3.

¹¹⁹⁸ House, *Translation Quality Assessment* (n 1164) 8.

¹¹⁹⁹ Newmark (n 1134) 186.

¹²⁰⁰ Colina, ‘Translation Quality Evaluation’ (n 1162) 106.

¹²⁰¹ Williams (n 1164) 73.

¹²⁰² Christopher Waddington, ‘Different Methods of Evaluating Student Translations: The Question of Validity’ (2002) 46 *Meta* 311, 313–316.

den Broeck's three-stage analysis mandates "comparison of a target text with its source"¹²⁰³ and determination of "the factual degree or type of equivalence between TT and ST";¹²⁰⁴ Amman's approach requires, among other things, the evaluator to "determine the intertextual coherence between the translation and the source text";¹²⁰⁵ Al-Qinai's practical model entails in-depth comparison of the ST and TT, including the "linguistic and narrative structure of ST and TT",¹²⁰⁶ the "degree of proximity of TT to the intended effect of ST"¹²⁰⁷ and "the illocutionary function of ST and TT";¹²⁰⁸ and in Prieto Ramos's adequacy-based approach "adequacy can be traced backwards from the textual surface of the TT or draft in a contrastive analysis with the ST and in relation to the translation brief."¹²⁰⁹ Further, a TQA model proposed by Nord entails comparison of an ST with a target-text profile covering factors such as intended text function(s), TT addressee(s), time/place of text reception, transmission medium and production/reception motive.¹²¹⁰ In short, "[a]nalysis of the source text guides the translation process".¹²¹¹ Finally, one of the most well-known translation quality

¹²⁰³ Raymond van den Broeck, 'Second Thoughts on Translation Criticism A Model of Its Analytic Function' in Theo Hermans (ed), *The Manipulation of Literature (Routledge Revivals)* (Routledge 2014) 57.

¹²⁰⁴ *ibid* 58.

¹²⁰⁵ House, *Translation Quality Assessment* (n 1164) 17, citing Amman, Margret (1990) "Anmerkungen zu einer Theorie der Übersetzungskritik und ihrer praktischen Anwendung", *TEXTconTEXT* 6: 55– 62.

¹²⁰⁶ al-Qinai (n 1177) 499.

¹²⁰⁷ *ibid*.

¹²⁰⁸ *ibid*.

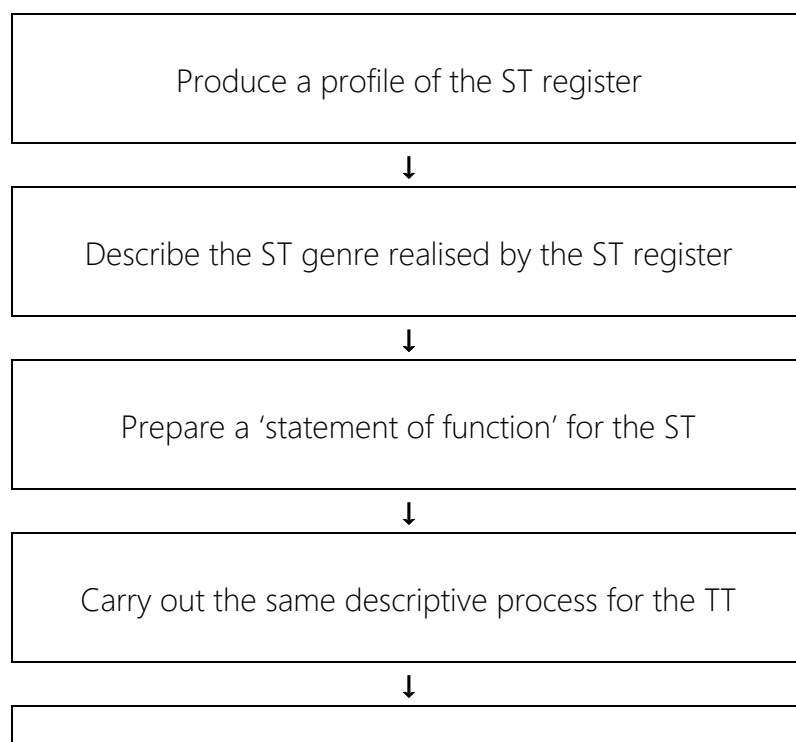
¹²⁰⁹ Prieto Ramos, 'Quality Assurance in Legal Translation' (n 1146) 21.

¹²¹⁰ Nord (n 48) 57.

¹²¹¹ *ibid* 58.

assessment models – that proposed and developed by House¹²¹² – also evidences a dual-source focus, and is worth considering in a little more detail. The practical application framework developed for House’s approach by Munday¹²¹³ (see Figure 1) illustrates the centrality of ST-TT comparison to the approach, with the profile comparison and statement of quality in particular evidencing the utilisation of two informational sources (i.e. the ST and TT) in the assessment:¹²¹⁴

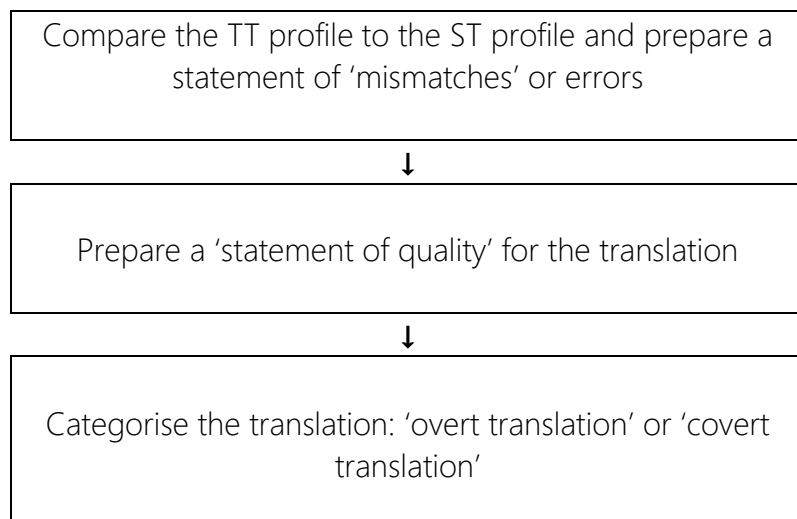
Figure 1: Munday’s application framework



¹²¹² See Juliane House, *A Model for Translation Quality Assessment* (2nd (1981), Narr 1977), Juliane House, *Translation Quality Assessment: A Model Revisited* (Narr 1997) and House, *Translation Quality Assessment* (n 1164).

¹²¹³ Jeremy Munday, *Introducing Translation Studies: Theories and Applications* (Routledge 2016) 147.

¹²¹⁴ This overview has previously been presented in Krallmann (n 1174) 12, and is reproduced here.



Dual-source approaches are not only described in academic literature, however. As noted with regard to single-source approaches above, translation standards also describe TQA methods which refer to both the ST and the TT. One example has already been noted, namely the revision procedure found in ISO standard 17100:2015, under which “the translation is checked for adequacy with regard to the source text”.¹²¹⁵ Other standards also evidence an ST-TT orientation.¹²¹⁶ Moreover, it was noted above that translation is both a process and a product, and it has been commented that translation standards are “generically process-oriented, rather than product-oriented”.¹²¹⁷ Nevertheless, a combined

¹²¹⁵ Colina, *Fundamentals of Translation* (n 1162) 298.

¹²¹⁶ For example, the standard which ISO 17100 replaced in 2015 – EN 15038 Translation services – Service requirements – defined ‘review’ as “examine a **target text**... for its suitability for the agreed purpose” (‘EN 15038 Translation Services - Service Requirements’ 5) and ‘revise’ as “examine a translation for its suitability for the agreed purpose, compare the **source**... and **target texts**” (ibid 6). Similarly, the SAE J2450 Quality Metric for Language Translation of Service Information – used to assess translations in the automotive industry – involves assessment of source and target texts by reference to error types.

¹²¹⁷ Jiménez-Crespo (n 1168) 76; see also Sue Ellen Wright, ‘The Creation and Application of Language Industry Standards’ in Kieran J Dunne (ed), *Perspectives on Localization* (John Benjamins Publishing Company 2006) 256.

product and process focus is evident in another category of dual-source approaches – client-developed translation guidelines, style guides, and other similar instruments – in that they provide procedural guidance with the aim of securing a desired level of product quality. An example of such a document is the Translation Quality Guidelines issued by the European Commission’s Directorate-General for Translation,¹²¹⁸ which aim to “help drafters¹²¹⁹ understand what the institution wants to achieve with different text types and how drafting techniques can contribute to meeting these legal requirements and political goals.”¹²²⁰ The major quality control tools adopted in the guidelines are review and revision in line with the ISO definitions noted above.¹²²¹ A final type of dual-source quality assessment tool worth mentioning is automated TQA tools, which offer functionality to “create and export a report covering inconsistencies in both the source and target.”¹²²²

2.3 Multi-source TQA approaches

The preceding discussion has provided examples of TQA approaches and methods incorporating either one or two informational sources. It is clear, however, that approaches exist which incorporate more than two sources of information. A conceptual starting point

¹²¹⁸ Directorate-General for Translation, ‘DGT Translation Quality Guidelines’ (n 236).

¹²¹⁹ Note that, in this context, ‘drafters’ equates to ‘translators’. The guidelines state that since 23 of the 24 language versions of EU documents have to be translated, “the *de facto* drafters are the translators.” *ibid* 2.

¹²²⁰ *ibid* 1–2.

¹²²¹ *ibid* 2–3.

¹²²² Viktoriya Petrova, ‘Translation Quality Assessment Tools and Processes in Relation to CAT Tools’ in I Temnikova and others (eds), *Proceedings of the Second Workshop on Human-Informed Translation and Interpreting Technology* (Incoma Ltd 2019) 92.

for such multi-source approaches can be found in Assis Rosa's proposed target-oriented approach, in which "attention is shifted from the comparison of source and target text to the study of the relations between target texts and between target texts and their context, the target culture."¹²²³ As noted above, multi-source approaches to TQA are ones which base the assessment of translation quality on more than two informational sources. While such sources clearly include both the ST and TT, they may equally include 'relations between target texts' as noted above. Several approaches which evidence at least some degree of reliance on multiple informational sources are discussed below. Although the first of these – crowdsourcing – is more a quality assurance than a quality assessment measure, it is included in the discussion due to its explicit multi-source nature and its relevance to the TQA approach presented in section 3 below.

2.3.1 *Crowdsourcing*

Numerous definitions of the term 'crowdsourcing' have also been proposed,¹²²⁴ including the view that it is "an online, distributed problem-solving and production model that leverages the collective intelligence of online communities to serve specific organizational goals."¹²²⁵ More specifically, crowdsourcing has been stated to occur when "an

¹²²³ Alexandra Assis Rosa, 'Descriptive Translation Studies (DTS)' in Yves Gambier and Luc van Doorslaer (eds), *Handbook of Translation Studies*, vol 1 (John Benjamins Publishing Company 2010) 99.

¹²²⁴ For a summary, see Enrique Estellés-Arolas and Fernando González-Ladrón-de-Guevara, 'Towards an Integrated Crowdsourcing Definition' (2012) 38 *Journal of Information Science* 189, 3–5.

¹²²⁵ Daren C Brabham, *Crowdsourcing* (The MIT Press 2013), p. xix.

organization... has a task it needs performed... a community (crowd)... is willing to perform the task voluntarily... an online environment [exists] that allows the work to take place and the community to interact with the organization, and [there is] mutual benefit for the organization and the community."¹²²⁶ In other words, crowdsourcing involves the delegation of a task (or parts thereof) to (the members of) a community of contributors, most commonly by digital means. Crowdsourcing has been successfully applied in a broad range of areas, ranging from t-shirt design to app development and transcription.¹²²⁷ Crowdsourcing has also been adopted in the translation field, resulting in the term 'translation crowdsourcing',¹²²⁸ which has been defined as, "Collaborative translation processes performed through dedicated web platforms that are initiated by companies or organisations and in which participants collaborate with motivations other than strictly monetary."¹²²⁹ In translation crowdsourcing, therefore, translation work is outsourced to multiple translators, and the need arises to "aggregate, validate, and evaluate the participation of crowd(s) of different nature and compositions."¹²³⁰ These steps are elements

¹²²⁶ *ibid* 3.

¹²²⁷ David Alan Grier, *Crowdsourcing for Dummies* (Wiley 2013) 335–337.

¹²²⁸ Also referred to as, among other things, 'community translation', 'collaborative translation', 'social translation', 'user-generated translation' (Julie McDonough Dolmaya, 'Analyzing the Crowdsourcing Model and Its Impact on Public Perceptions of Translation' (2012) 18 *The Translator* 167, 172), and 'lay translation', 'non-professional translation' and 'volunteer translation' (Anthony Pym, 'Translation Research Terms: A Tentative Glossary for Moments of Perplexity and Dispute' in Anthony Pym (ed), *Translation Research Projects 3* (Intercultural Studies Group 2011) 78–79, 84).

¹²²⁹ Miguel A Jiménez-Crespo, *Crowdsourcing and Online Collaborative Translations: Expanding the Limits of Translation Studies* (John Benjamins Publishing Company 2017) 25.

¹²³⁰ Jiménez-Crespo (n 1168) 76.

of quality assurance, and responsibility for this process may rest not only with translation providers and translators, but also with workflow developers, community managers or the end customer.¹²³¹ As indicated previously, review and revision of translated texts are key quality assurance measures. Extension of the collaborative aspect of translation crowdsourcing to post-editing¹²³² is therefore of particular interest. For example, in a scenario referred to as the “hidden alternative translations pattern”,¹²³³ machine translation output was independently post-edited by three contributors and automated comparison of the post-edited translations was then used to approve translation solutions based on the majority view (i.e. approval was given if two translations were alike; if all three contributors disagreed, a human reviewer made a final decision¹²³⁴). Moreover, the ‘many eyes principle’ – which proposes that more reviewers are better than few¹²³⁵ – suggests that output quality could be further improved by expanding the number of contributors.

¹²³¹ *ibid* 80.

¹²³² Defined as “the correction of raw machine translated output by a human translator according to specific guidelines and quality criteria”; see Sharon O’Brien, ‘Towards Predicting Post-Editing Productivity’ (2011) 25 *Machine Translation* 197, 197. See also ‘International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services’ (n 239) 2, which defines post-edit as “edit and correct *machine translation output*”.

¹²³³ Aram Morera-Mesa, JJ Collins and David Filip, ‘Selected Crowdsourced Translation Practices’, *Proceedings of Translating and the Computer* 35 (Aslib 2013), under “Asia Online Wikipedia translation case”.

¹²³⁴ *ibid*, under “Asia Online Wikipedia translation case”.

¹²³⁵ Open Data Handbook, ‘Many Eyes Principle’ <<https://opendatahandbook.org/glossary/en/terms/many-eyes-principle/>> accessed 5 November 2024. Perhaps the most high-profile example of this principle in practice is provided by the open encyclopaedia Wikipedia, whose articles (and their translations) can (with some exceptions) be written and edited by anyone, forever, in a process described as “unrestricted community participation in the translation and editing process” (Jiménez-Crespo (n 1168) 87).

From the above, it is clear that translation crowdsourcing necessarily includes quality assurance measures, and that such measures – particularly at the post-editing stage – incorporate multiple sources of information. Specifically, amalgamating the contributions of participants in a translation crowdsourcing project may involve stitching together hundreds or even thousands of individually translated text portions or – as in the case of the ‘hidden alternative translations pattern’ referenced above – referring to multiple alternative translations. In both cases, quality is assessed and ensured by reference to multiple sources of information. Moreover, when the ‘many eyes principle’ is followed, post-editing becomes an ongoing process potentially involving thousands of contributors, and thus thousands of sources of information. Despite the potential confusion this might entail, it has been suggested that, “Although many... individual non-expert translators produce low-quality, disfluent translations... it is possible to get high quality translations in aggregate by soliciting multiple translations, redundantly editing them, and then selecting the best of the bunch”.¹²³⁶ The idea that referring to multiple informational sources can improve a final translation is also found in more traditional translation quality mechanisms, as discussed below.

¹²³⁶ Omar F Zaidan and Chris Callison-Burch, ‘Crowdsourcing Translation: Professional Quality from Non-Professionals’, *Proceedings of the 49th Annual Meeting of the Association for Computational Linguistics* (Association for Computational Linguistics 2011) 1220–1221.

2.3.2 Back translation

Back translation, i.e. the “*translation of a translation* back into the source language”¹²³⁷ is a quality assessment technique¹²³⁸ used extensively in a variety of fields including survey research,¹²³⁹ cross-cultural research¹²⁴⁰ and the evaluation of machine translation systems,¹²⁴¹ and has been identified as “one of the first quality control procedures developed for survey and test translation.”¹²⁴² In this context, back translation entails “the ‘re-translation’ of a translated [text] back into the original language and the subsequent comparison of the original version and the back translation”.¹²⁴³ Such comparison is based on the underlying assumption that “if the adaptation [i.e. back translation] has been effective, the back-adapted [i.e. back-translated] version of the [text] should look very much like the original”,¹²⁴⁴ although this assumption has been challenged.¹²⁴⁵ However, the detailed

¹²³⁷ Harkness and Schoua-Glusberg (n 1191) 111.

¹²³⁸ *ibid.*

¹²³⁹ See e.g. Susan P Douglas and C Samuel Craig, ‘Collaborative and Iterative Translation: An Alternative Approach to Back Translation’ (2007) 15 *Journal of International Marketing* 30.

¹²⁴⁰ See e.g. Sonia Colina and others, ‘Translation Quality Assessment in Health Research: A Functionalist Alternative to Back-Translation’ (2017) 40 *Evaluation & the Health Professions* 267.

¹²⁴¹ See e.g. H Somers, ‘Round-Trip Translation: What Is It Good For?’, *Proceedings of the Australasian Language Technology workshop 2005 (ALTW 2005)* (2005).

¹²⁴² Upsing and Rittberger (n 1163) 57.

¹²⁴³ Dorothee Behr, ‘Assessing the Use of Back Translation: The Shortcomings of Back Translation as a Quality Testing Method’ (2017) 20 *International Journal of Social Research Methodology* 573, 573.

¹²⁴⁴ RK Hambleton and L Patsula, ‘Increasing the Validity of Adapted Tests: Myths to Be Avoided and Guidelines for Improving Test Adaptation Practices’ (1999) 1 *Journal of Applied Testing Technology* 1, 6.

¹²⁴⁵ See e.g. Harkness and Schoua-Glusberg (n 1191) 112.

debate on the usefulness and efficacy of back translation¹²⁴⁶ falls outside the scope of this thesis. What is of interest here is the mechanism involved, i.e. "(a) translation (target text [TT₁]) of the source text (ST), (b) translation (TT₂) of TT₁ back into the source language, and (c) comparison of TT₂ with ST to make sure there are no discrepancies."¹²⁴⁷ Logically, the comparison stage must also involve addressing or resolving any discrepancies found between the considered texts. Above, it was noted that the incorporation of more than two sources of information is the distinguishing feature of multi-source TQA approaches. From the above description, it is clear that the back translation process encompasses not only the source text (ST) and its translation (TT₁), but also the back translation of TT₁ (i.e. TT₂) and an evaluation and reconciliation stage. When evaluating the quality of TT₁, the assessor thus considers three informational sources (ST, TT₁ and TT₂), putting back translation in the category of multi-source TQA. Back translation is not limited to three sources, however. For example, more than one translator may be asked to prepare a back translation from a TT into the source language.¹²⁴⁸ In such cases, the output of each additional translator adds a further informational source to the 'pool' of sources to be considered at the evaluation stage. Thus when two back translations are prepared, a total of four sources are considered (ST, TT₁, back translation no. 1 (TT₂) and back translation no. 2 (TT₃)), and so on.

¹²⁴⁶ See e.g. Behr (n 1243); Somers (n 1241); Colina and others (n 1240).

¹²⁴⁷ Colina and others (n 1240) 267–268.

¹²⁴⁸ See e.g. M Talbert and others, 'PRM121 - Dual Back Translation Versus Single Back-Translation Methodology When Translating Patient Reported Outcomes (PRO)' (2013) 16 Value in Health A596.

2.3.3 Multiple forward translation

The principles underlying back translation have also been applied at an earlier stage of the translation process, namely during the preparation of target texts – an approach referred to as multiple forward translation¹²⁴⁹ (or the parallel translation method,¹²⁵⁰ committee method¹²⁵¹ or cross-translation method¹²⁵²). Under this approach, rather than back-translating a previously prepared translation, multiple translations of an ST into the target language are prepared – often by two or more translators working independently¹²⁵³ – before a third party or panel compares and amalgamates the independent translations into a consolidated version.¹²⁵⁴ The multiple forward translation method can also be combined with back translation, for example in the forward-backward method,¹²⁵⁵ where a text is first translated ‘forward’ in multiple versions before a reconciled version is prepared which is then translated ‘backward’ for comparison purposes. Discussion of such variants is not of

¹²⁴⁹ Beverley Maxwell, ‘Translation and Cultural Adaptation of the Survey Instruments’ in MO Martin and DL Kelly (eds), *Third International Mathematics and Science Study (TIMSS) Technical Report*, vol I: Design and Development (Boston College 1996), p.8-3). Note the conceptual link with the “*Reactions to alternatives*” approach proposed by Nida and Taber (n 1133) 171.

¹²⁵⁰ Harkness and Schoua-Glusberg (n 1191) 101.

¹²⁵¹ Ramzi Nasser, ‘A Method for Social Scientists to Adapt Instruments From One Culture to Another: The Case of the Job Descriptive Index’ (2005) 1 *Journal of Social Sciences* 232, 232.

¹²⁵² *ibid.*

¹²⁵³ Harkness and Schoua-Glusberg (n 1191) 101.

¹²⁵⁴ Upsing and Rittberger (n 1163) 59.

¹²⁵⁵ See e.g. Wan Ling Lee and others, ‘The Forward-Backward and Dual-Panel Translation Methods Are Comparable in Producing Semantic Equivalent Versions of a Heart Quality of Life Questionnaire’ (2019) 25 *International Journal of Nursing Practice* e12715, 3 and Sonya L Eremenco, David Cella and Benjamin J Arnold, ‘A Comprehensive Method for the Translation and Cross-Cultural Validation of Health Status Questionnaires’ (2005) 28 *Evaluation & The Health Professions* 212, 217.

primary interest in this context, however. As stated in relation to back translation above, the key consideration here is the mechanism involved in multiple forward translation, which has been summarised as “the use of bilingual translators or judges who check for errors in meaning in the two or more versions of the [text by comparing] the source and translated versions of each [text] and decid[ing] whether any differences between translations could result in non-equivalence of meaning”.¹²⁵⁶ The fundamental assumption underpinning multiple forward translation is thus that comparing the output of two (or more) translators working from the same source text can provide insights which help improve the final translation into the target language. There is nothing to suggest that this ‘improvement effect’ must necessarily be limited to two languages, however. Accordingly, if preparing and subsequently comparing and amalgamating, for example, two German translations of an English source text secures a better final German version, it appears logical that similar insights and benefits could be gained when an ST is translated into several different languages. Extending the above example, therefore, if the English ST is translated not only into German, but also into Dutch, could comparison of the German and Dutch versions generate information which improves those translations? This question summarises the thinking behind the concept of horizontal translation quality assessment, which is discussed below.

¹²⁵⁶ RK Hambleton, ‘Translating Achievement Tests for Use in Cross-National Studies’ (1993) 9 *European Journal of Psychological Assessment* 57, 16.

2.3.4 *Horizontal translation quality assessment*

The author has previously proposed a TQA approach for multilingual translation (i.e. the translation of a single source text into multiple target languages) termed *horizontal translation quality assessment*.¹²⁵⁷ While use of the phrase ‘horizontal translation quality assessment’ to describe such an approach is – to the best of the author’s knowledge – novel, relevant literature evidences use of the descriptors ‘horizontal’ and ‘vertical’ to indicate the orientation of a given approach or focus.¹²⁵⁸ For example, in the EU legislative context a distinction has been made between “horizontal and vertical consistency”,¹²⁵⁹ where vertical consistency refers to terminological consistency “throughout a single act, including its annexes, but also with related acts already in force, especially in the same area”,¹²⁶⁰ and horizontal consistency¹²⁶¹ refers to “consistency in content, and linguistic concordance of the different versions [of a legal rule]... with the version in which the rule has been drafted”.¹²⁶² The applicability of this vertical-horizontal perspective in the field of translation quality assessment becomes more apparent when TQA approaches are considered spatially.¹²⁶³ When the informational sources used in TQA are viewed as a hierarchy in which the source

¹²⁵⁷ Krallmann (n 1174) 16–17.

¹²⁵⁸ See Robertson (n 315) 6.

¹²⁵⁹ Maria Font i Mas, ‘European Legal Language and the Rules of Private International Law: Practical Legal-Linguistic Problems’ [2017] *Journal of Language and Law* 19, 24.

¹²⁶⁰ Lucie Pacho Aljanati, ‘Promoting Multilingual Consistency for the Quality of EU Law’ (2017) 30 *International Journal for the Semiotics of Law* 67, 69. See also e.g. Font i Mas (n 1259) 24.

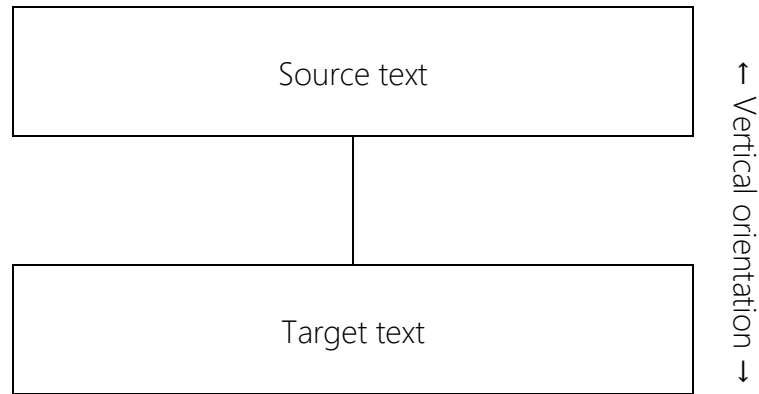
¹²⁶¹ Also referred to as “multilingual concordance”; see Font i Mas (n 1259) 24.

¹²⁶² *ibid.*

¹²⁶³ See Robertson (n 315) 6.

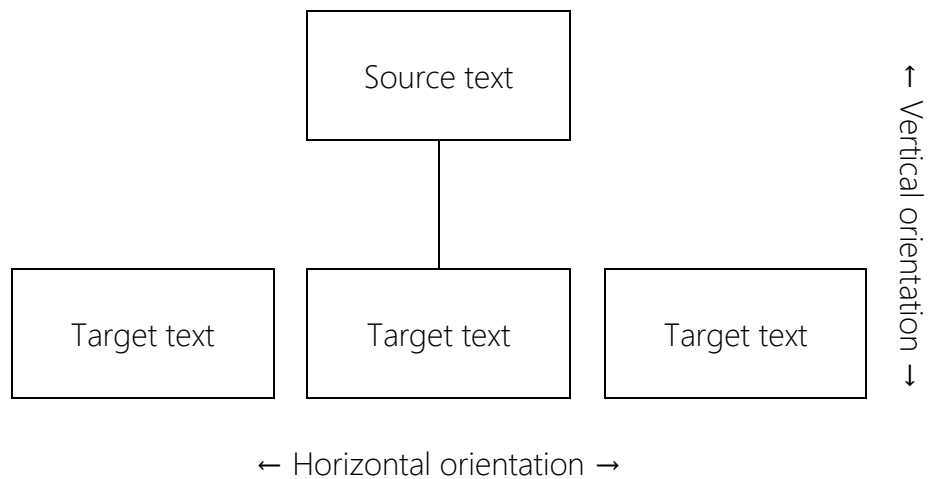
text occupies the highest level and the target text a subordinate level, a vertical relationship between them becomes apparent (see Figure 2):

Figure 2: Illustration of vertical relationship between ST and TT



In the multilingual context, i.e. where an ST is translated into multiple target languages, the subordinate level is expanded to include several TTs, and a horizontal orientation becomes apparent (see Figure 3):

Figure 3: Illustration of horizontal relationship between ST and multiple TTs



The vertical and horizontal orientations described above align with the previously discussed classification into dual-source and multi-source approaches. Dual-source approaches entail comparison of a source text with a target text, and are therefore aligned along the (vertical) ST-TT axis. Multi-source approaches, on the other hand, evidence a horizontal orientation because they entail comparison of two or more informational sources on the same level. Further support for a vertical/horizontal distinction is found in the observation that “if one examines other language versions, one may find the same terms being used consistently or alternatively that there are clear differences.”¹²⁶⁴ Moreover, in the context of revision of EU legal texts, it has been noted that such “[l]egal-linguistic revision has a broader scope than the typical bilingual revision and may include a revision of the source text, linguistic and legal consistency check of a target text with other language versions as well as an occasional check of all language versions for consistency”.¹²⁶⁵ Such horizontal consistency checks could also be referred to as checks for ‘multilingual concordance’, defined as “[e]quivalence of translation... in relation to other language versions”.¹²⁶⁶ Moreover, as discussed in Chapter VI, the ECJ has adopted a horizontal comparative approach when addressing divergences

¹²⁶⁴ *ibid* 7.

¹²⁶⁵ Biel (n 279) 45. A similar process is apparent from information provided to prospective EU lawyer-linguists: “Furthermore, [lawyer-linguists] check the legal and linguistic consistency of legislative texts (already translated and revised) in the language of the competition with other language versions of the texts.” See European Union, ‘Notice of Open Competitions’ (*EUR-Lex*) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2021:022A:FULL&from=EN>> accessed 5 November 2024. under “WHAT TASKS CAN I EXPECT TO PERFORM?”.

¹²⁶⁶ Biel (n 279) 35.

between language versions of EU legal texts, acknowledging that comparison of different TTs can help with the identification and resolving of differences between them.¹²⁶⁷ The inclusion of 'horizontal' in the name of the proposed TQA method is therefore intended to create a contrast with other TQA approaches with a 'vertical' orientation. How such a method could be structured is discussed in the next section.

3. A new approach?

The preceding review of multi-source approaches has demonstrated a basis in existing literature for a new approach to quality assessment of multilingual translations which adopts a horizontal rather than vertical orientation. Specifically, it has been proposed that final translations may be improved through comparison of different language versions with one another. It was also shown that, although developed independently, the idea of horizontal translation quality assessment (or horizontal TQA) has conceptual links with back translation and, particularly, multiple forward translation. By reference to a practical example, this section discusses the shortcomings of existing approaches, the possible advantages of

¹²⁶⁷ See e.g. Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (n 90) (para. 18: "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"); C-219/95 P *Ferriere Nord SpA v Commission of the European Communities* (n 1018), (para 15: "it is settled case-law that Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages"); and Case C-64/95 *Konservenfabrik Lubella Friedrich Büber GmbH & Co. KG v Hauptzollamt Cottbus* (n 769), (para. 18: an "ambiguity could perfectly well have been resolved by reference to the other language versions of the regulation").

horizontal TQA and how it could be conducted in practice, as well as potential challenges and limitations of the proposed new approach.

3.1 A practical example

As noted previously, the focus of this thesis is on multilingual legal texts issued in the EU context. The potential usefulness of horizontal TQA can be illustrated by applying single-source and dual-source approaches to a simple translation scenario and then demonstrating how horizontal TQA could add value above and beyond these. Perhaps the simplest example of a multilingual scenario is where a source text (ST) is translated into two target languages, thus producing two target texts (TTs). A hypothetical example¹²⁶⁸ might thus be as follows:

A translation assignment necessitates translation of a contract which includes the sentence, "The purchase conditions are set out in a contract" from the source language (English) into two target languages (German and Norwegian¹²⁶⁹). The translations are to be used to implement the same contract in Germany and Norway.

¹²⁶⁸ An earlier version of this illustrative example can be found in Krallmann (n 1174) 15–17.

¹²⁶⁹ German and Norwegian have been chosen here as these are languages the author is able to translate to/from. In addition, German is an official language of the EU. While Norwegian is not an official EU language, Norway is a member of the European Economic Area (EEA) and thus translates and implements large volumes of EU legislation domestically. Moreover, the point illustrated by the hypothetical example chosen here can also be made in relation to two official EU languages: Swedish and Danish (see further below).

The translators produce the following translations:

- German: "Die Kaufsbedingungen sind in einem Vertrag festgehalten."
- Norwegian: "Kjøpsbetingelsene fastlegges i en avtale."

3.1.1 Single-source assessment

One of the simplest forms of translation quality assessment is review, i.e. "monolingual examination of the target text".¹²⁷⁰ An approach for such reviews is found in the ISO 17100 standard, which specifies that a reviewer must "assess the suitability of the target language content for the agreed upon purpose and domain"¹²⁷¹ and recommend corrections... The review includes assessing domain accuracy and respect for the relevant text-type conventions.¹²⁷² Accordingly, a review might result in the following findings for both target languages (see Table 1):¹²⁷³

Table 1: Example findings, single-source translation quality assessment

Agreed purpose	Use of contract in other jurisdictions
Domain	Law; contract law
Suitability for purpose	The translation is appropriate to the purpose
Domain accuracy	The terminology used is appropriate to the domain

¹²⁷⁰ Hanzl and Beaven (n 243) 145; see also the definition at 'International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services' (n 239) 2: "monolingual examination of *target language content*".

¹²⁷¹ Defined as a "subject field, sphere of knowledge or activity having its own specialized culture, social context, and linguistic characteristics"; see 'International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services' (n 239) 3.

¹²⁷² *ibid* 11.

¹²⁷³ Since the findings are identical for both TTs, only one assessment grid is shown here.

Text-type conventions	The translation is consistent with contract-drafting conventions
Recommended corrections	None

From the above, it is clear that TQA approaches which rely on a single informational source (in this case the target text in each language), can only serve to identify potential issues within that informational source. They do not incorporate sufficient data to assess the correctness of the translation in relation to the source text. Such an assessment requires a dual-source approach entailing the inclusion of an additional informational source, in this case the source text.

3.1.2 *Dual-source assessment*

The benefits of including an additional informational source in a TQA process can be illustrated by reference to two of the dual-source approaches mentioned above: *revision* pursuant to the ISO 17100 standard and *translation quality assessment* according to the model proposed by House (using Munday's application framework). The ISO 17100 standard states that the revision process requires a reviser to "examine the target language content against the source language content for any errors and other issues, and its suitability for purpose."¹²⁷⁴ This entails "comparison of the source and target language content"¹²⁷⁵ with respect to factors such as compliance with terminology, reference materials and

¹²⁷⁴ 'International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services' (n 239) 10–11.

¹²⁷⁵ *ibid* 11.

terminological consistency, semantic accuracy and phraseology.¹²⁷⁶ Any "corrections to be implemented by the translator"¹²⁷⁷ must also be noted. Applied to the previously discussed example, a simplified revision process might thus result in the following findings (see Table 2 and Table 3):¹²⁷⁸

Comparison of English ST ("The purchase conditions are set out in a contract.") with German TT ("Die Kaufsbedingungen sind in einem Vertrag festgehalten.):

Table 2: Example findings, dual-source translation quality assessment, English-German

Errors/mismatches in	
• Terminology	None
• Terminological consistency	None
• Semantic accuracy	None
• Phraseology	None
Other issues	None
Necessary corrections	None
Suitability for purpose	Yes

Comparison of English ST ("The purchase conditions are set out in a contract.") with Norwegian TT ("Kjøpsbetingelsene fastlegges i en avtale.):

¹²⁷⁶ *ibid* 10.

¹²⁷⁷ *ibid* 11.

¹²⁷⁸ The revision grid has been simplified for the purposes of the example, and therefore does not include all factors listed at *ibid* 10.

Table 3: Example findings, dual-source translation quality assessment, English-Norwegian

Errors/mismatches in	
• Terminology	Potential issue
• Terminological consistency	Potential issue
• Semantic accuracy	Potential issue
• Phraseology	None
Other issues	None
Necessary corrections	The word “contract” in the ST has been translated as “avtale” (agreement), rather than “kontrakt” (contract) in the TT. In English, there is a clear difference in meaning between ‘agreement’ and ‘contract’, ¹²⁷⁹ and the comparison thus suggests a mismatch between the ST and TT.
Suitability for purpose	To be assessed

The same potential issue can also be identified by applying House’s TQA model as previously discussed. Specifically, preparing a simple statement of mismatches or errors as per Munday for each ST-TT pair would show that while no issues arise with regard to the German translation, there is an apparent semantic mismatch between the English ST and Norwegian TT, again concerning the translation of “contract” as “avtale” (agreement).

¹²⁷⁹ A contract is “a *legal document* that states and explains a formal agreement between two different people or groups, or the agreement itself” (author’s emphasis), see Cambridge Dictionary, ‘Contract’ <<https://dictionary.cambridge.org/dictionary/english/contract>> accessed 5 November 2024, whereas an agreement is “a *decision or arrangement*, often formal and written, between two or more groups or people” (author’s emphasis); see Cambridge Dictionary, ‘Agreement’ <<https://dictionary.cambridge.org/dictionary/english/agreement>> accessed 5 November 2024.

3.1.3 Multi-source assessment

From section 3.1.1 above, it is clear that the discussed single-source TQA approach would be insufficient to identify the apparent semantic mismatch. While the dual-source TQA approaches described in section 3.1.2 *identify* the potential mismatch, they do not appear to facilitate its *resolution*, as additional data are required for the latter step. More particularly, both of the dual-source approaches identify an apparent semantic mismatch in the Norwegian TT which needs to be resolved. However, such resolution requires consideration of how the terms “avtale” (agreement) and “kontrakt” (contract) are ordinarily used and understood in Norwegian, and whether they actually represent a mismatch. In this specific case, further investigation would show that the two terms are used synonymously.¹²⁸⁰ In other words, two different translators translating the same sentence into Norwegian might choose different solutions, with one opting for “avtale” and one for “kontrakt”, without either

¹²⁸⁰ The *Store norske leksikon* (Great Norwegian Encyclopaedia) states that, “*Agreement* means the same thing as *contract*.” (Author’s translation of the Norwegian source text: “*Avtale* betyr det samme som *kontrakt*”; see *Store norske leksikon*, ‘*Avtale*’ <<https://snl.no/avtale>> accessed 5 November 2024.) Synonymous usage is also apparent in practice. For example, the Norwegian act on the conclusion of contracts is called “*avtaleloven*” (agreements act), rather than ‘*kontraktsloven*’ (contracts act), and the act refers to both “*avtaler*” (agreements) and “*kontraktsmessig*” (contractual) in a single chapter (see chapter 38b of the act). As noted above, such synonymous usage is also apparent in two official EU languages, Swedish and Danish, as illustrated by the official translations of the title of Directive (EU) 2023/2673 concerning “financial services contracts concluded at a distance”, a phrase which has been translated as “*avtal om finansiella tjänster som ingåtts på distans*” in the Swedish version and as “*aftaler om finansielle tjenesteydelser indgået ved fjernsalg*” in the Danish version, despite the fact that both languages also feature the word *kontrakt*. For Swedish, see *Svenska Akademiens ordlista*, ‘*Kontrakt*’ <<https://svenska.se/saol/?sok=kontrakt&pz=1>> accessed 5 November 2024, and for Danish see *Den Danske Ordbog*, ‘*Kontrakt*’ <https://ordnet.dk/ddo_en/dict?query=kontrakt> accessed 5 November 2024.

choice representing an incorrect translation since the translators have simply used their “freedom of choice between several approximately equivalent possibilities of realizing situationally appropriate meaning”.¹²⁸¹ The mismatch can only be resolved by undertaking additional contextual investigation. In other words, approaches which are dual-source at the *identification* stage become multi-source at the *resolution* stage due to the inclusion of additional data, i.e. sources of information. Such additional data can be obtained by various means, including those discussed below.

3.1.3.1 Back translation

As noted in section 2.3.2 above, the mechanism of back translation is “(a) translation (target text [TT₁]) of the source text (ST), (b) translation (TT₂) of TT₁ back into the source language, and (c) comparison of TT₂ with ST”.¹²⁸² Applying this approach to the above example produces the following results (see Table 4 and Table 5):

Table 4: Example findings, back translation, English-German

Source text (ST)	The purchase conditions are set out in a contract.
Translation (TT ₁)	Die Kaufsbedingungen sind in einem Vertrag festgehalten.
Back translation (TT ₂)	The purchase conditions are set out in a contract.

¹²⁸¹ House, *Translation Quality Assessment* (n 1164) 16.

¹²⁸² Colina and others (n 1240) 267–268.

Comparison of the ST with TT₂ shows that they are identical, i.e. there are no mismatches between them.

Table 5: Example findings, back translation, English-Norwegian

Source text (ST)	The purchase conditions are set out in a contract.
Translation (TT ₁)	Kjøpsbetingelsene fastlegges i en avtale.
Back translation (TT ₂)	The purchase conditions are set out in an agreement.

Comparison of the ST with TT₂ shows that they are not identical, with the final word in the sentence differing. There is therefore a potential mismatch between the ST (final word: 'contract') and TT₂ (final word "avtale"; back translation: 'agreement'). As stated above, there is a clear difference in meaning between the words 'contract' and 'agreement' in English, and the comparison step forces reconciliation of this mismatch, i.e. requires a decision to be made as to whether 'avtale' or 'kontrakt' should be used in the final Norwegian TT.

3.1.3.2 Multiple forward translation

The multiple forward translation approach as discussed above produces the same finding as back translation. Specifically, if multiple translators had been asked to prepare independent translations of the ST into Norwegian, some might have opted for "avtale" and some for "kontrakt" (in line with the previously noted synonymous usage of "avtale" and "kontrakt" in Norwegian). Comparison of the different forward translations would reveal this difference, which would then have to be reconciled when amalgamating the different

Norwegian translations into a single, unified version. As in the back translation scenario, a choice would have to be made between “avtale” and “kontrakt” in the final Norwegian TT.

3.2. Towards horizontal comparison – adapting horizontal TQA

From the above discussion, it is clear that the multi-source approaches of back translation and multiple forward translation offer a potential methodology for identifying and resolving divergences which single-source and dual-source approaches might either fail to identify at all or fail to resolve due to their limited selection of informational sources. Horizontal translation quality assessment recognises that – as discussed above – the comparison of different text versions – whether of the ST (in the case of back translation) or the TT (in the case of forward translation) – facilitates the identification of mismatches. Horizontal TQA has been proposed specifically for the multilingual context, i.e. the situation where an ST is translated into multiple TTs. This may occur not only with EU legal texts, but also in other multilingual legal regimes, such as those of the UN and WTO. Moreover, the potential utility of horizontal TQA extends beyond legal texts alone, to other document types. Fundamentally, any type of document which seeks to achieve harmonised outcomes in different countries or through different language versions could benefit. Relevant document types include, for example, international standards, guidance documents and reports intended for a broader target audience.

In terms of the practical approach to be taken, it would theoretically be possible to prepare a back translation of each TT for comparison with the ST. However, this would involve extensive translation work and is not the mechanism utilised by horizontal TQA. Conceptually, horizontal TQA is closer to the multiple forward translations method – and could perhaps be viewed as an extension of it – in that it envisages comparison not of the ST with alternative versions (i.e. back translations) of the ST, but rather the comparison of different TTs. In horizontal TQA, however – and unlike multiple forward translations – these different TTs are not prepared specifically for comparison purposes. Instead, they already exist as the product of translation into the target languages. Horizontal TQA thus entails comparing TTs which are in different languages but stem from the same ST, to identify potential mismatches between them. In other words, horizontal TQA bypasses the backward and/or forward translation stage by mandating direct comparison of TTs in different languages. Applied to the above example, the approach would entail comparing the German and Norwegian translated sentences to reveal a mismatch between the German term “Vertrag” (contract) and the Norwegian term “avtale” (agreement). Similarly, in the translation of EU legal acts, the horizontal approach would involve comparing language versions with the aim of identifying any differences between them. Thus, for example, as indicated in footnote 1275, comparison of the Swedish and Danish versions of Directive (EU) 2023/2673 with the German version of that directive would reveal a potential mismatch between the phrases “avtal om finansiella tjänster” and “aftaler om finansielle tjenesteydelser” on the one hand and the corresponding German term

“Finanzdienstleistungsverträge” and the English term “financial services contracts” on the other.

The above is just a brief description of how horizontal comparison could be done in theory. Moreover, it is clear that the approach outlined above is purely theoretical, and that significant limitations and objections can be raised, not least with respect to practical implementation. Potential limitations and objections are therefore considered further below, before a concrete proposal to overcome these is presented in the discussion and proposal section at the end of the chapter.

3.2.1 *Limitations and objections*

The preceding section has outlined a potential approach for conducting horizontal TQA. However, a number of immediate limitations and objections are apparent. These are discussed below.

3.2.1.1 Practical constraints

A further objection to conducting horizontal comparison of multilingual translations concerns the related factors of impracticality¹²⁸³ and cost,¹²⁸⁴ particularly with respect to

¹²⁸³ Fernando Prieto Ramos, ‘International and Supranational Law in Translation: From Multilingual Lawmaking to Adjudication’ (2014) 20 *The Translator* 313, 324.

¹²⁸⁴ Czyżewska (n 805) 91.

human resources.¹²⁸⁵ The example referenced above involves translation of an English source text into just two target languages. The number of combinations (or language pairs) involved is therefore quite small: English-German, English-Norwegian and (if a horizontal approach is adopted) German-Norwegian. As previously noted, the number of languages relevant in the context of EU lawmaking is far higher, at 24. It is also clear that the number of language combinations increases exponentially as the scope of horizontal comparison is expanded by including further languages. In the EU context, 552¹²⁸⁶ combinations or language pairs would have to be considered if comprehensive horizontal TQA were to be conducted for all official languages. This presents a number of difficulties. First, it is uncertain whether staff could be found for all language pairs. The official EU languages have widely varying numbers of speakers,¹²⁸⁷ making it likely that while combinations of more widely

¹²⁸⁵ Irène Bellier, 'Spelling out Unity and Living in Diversity: The EU Administrative Culture at a Crossroads' in Magali Gravier and Vassiliki Triga (eds), *Organisational culture in the institutions of the European Union* (European University Institute 2005) 13; see also Condon (n 1091) 216, who notes "a lack of multilingual legal personnel and a multiplicity of very different authentic languages" as an obstacle to horizontal comparison in the case of plurilingual treaties. This is supported by interview findings: "I think there is added value in this approach, but I think that it is totally unrealistic with so many languages." (Interview with Quality Manager (n 265)); "The speed at which we work, the volume of documents that we deal with, it somehow seems a bit of a pipedream, really, to have that level for every document."; "What would be highly desirable on paper, I think, would just be unworkable in reality." (Interview with Legal Language Professional (n 674).)

¹²⁸⁶ See Katsarova (n 298) 1 and van der Jeught (n 282), para. 54, but see also Drugan, Strandvik and Vuorinen (n 937) 42, footnote 7: "Theoretically... there are 552 (i.e. 24 × 23) potential language pairs to deal with. In practice, the number of language combinations is considerably smaller, as English is now the overwhelmingly dominant source-language: In the Commission, in 2016, more than 80% of all documents were translated from English."

¹²⁸⁷ For example, while German is spoken by 97,000,000 persons in Europe, and French by 71,500,000 persons, languages like Latvian (1,750,000), Estonian (1,165,400) and Irish (240,000) have far fewer speakers; see Chad Emery, '34 of the Most Spoken Languages in

spoken languages could be covered, less common pairings might be difficult to include. Second, the mere fact that a person speaks two languages is no guarantee of suitability to conduct translation quality assessment, i.e. it is uncertain whether sufficiently qualified persons could be found for all language pairs. Third, given the large volume of documentation which the EU produces and translates annually¹²⁸⁸ and which would potentially have to be assessed, it is uncertain whether sufficient numbers of qualified persons could be found. Finally, even if enough qualified staff could be found, the cost of hiring/contracting and training these individuals would in all likelihood be prohibitive.¹²⁸⁹ While these factors suggest that horizontal TQA cannot be undertaken for all official EU languages using human resources alone, it may be possible to adjust the approach to address at least some of these identified issues, including by limiting the scope of the assessment and/or adopting alternative methods for undertaking the work involved. These possibilities are discussed further below.

Europe: Key Facts and Figures' (15 December 2022) <<https://www.langoly.com/most-spoken-languages-in-europe/>> accessed 5 November 2024.

¹²⁸⁸ For example, the European Commission's Directorate-General of Translation (DGT) produced 2,553,813 pages of translation in 2023; see European Commission, 'Annual Activity Report 2023 - DG Translation' (n 294) 6.

¹²⁸⁹ The experience gained in connection with the accession of new EU member states in 2004 may be relevant in this regard, as EU institutions sought to provide new-language training to staff, and particularly translators, in preparation for enlargement; see Karen McAuliffe, 'Enlargement at the European Court of Justice: Law, Language and Translation' (2008) 14 *European Law Journal* 806, 810.

3.2.1.2 Access to contextual information

One possible objection to the proposed horizontal approach is that existing dual-source TQA approaches are sufficient because dictionaries and other linguistic resources are publicly available, thus giving readers of a TT access to the contextual information they require to resolve any mismatch. This objection appears less relevant in the EU legal context. As indicated in Chapters II and IV, in practice many – if not most – readers of EU legal texts will be members of the public or national courts¹²⁹⁰ seeking information in their preferred language, not language specialists¹²⁹¹ tasked with conducting quality assessment of translated texts. Different groups of readers will have differing capacities to comprehend the content of EU legal texts. Thus, members of the public may not know whether/that they are reading a translation, or even be aware that other language versions exist, whereas legal professionals are more likely to know this. This alone will make it difficult for members of the public to comply with the requirement laid down in the *CILFIT* case regarding “comparison of the different language versions.”¹²⁹² Moreover, even if readers are aware of the language versions and know that these may diverge from one another, for example because they are legal professionals, they may still be unaware of relevant linguistic resources and/or be unable to access them, especially if such resources are subscription-based. In other words,

¹²⁹⁰ See e.g. Prieto Ramos, ‘International and Supranational Law in Translation’ (n 1283) 324.

¹²⁹¹ See e.g. the definition of “revision” at ‘International Standard ISO 17100:2015 Translation Services – Requirements for Translation Services’ (n 239) 2, which mandates “bilingual examination” and thus requires revisers to master both the source and target languages.

¹²⁹² Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (n 90), Decision, para. 18.

many readers – both members of the public and legal professionals – are likely to rely on their existing linguistic knowledge and personal interpretation when reading an EU legal text. Applied to the above example, therefore, it seems likely that most members of the public would interpret the terms “Vertrag” and “avtale”, in German and Norwegian respectively, in line with ordinary usage and/or dictionary definitions. Therefore, while a German reader might conclude that purchase terms must be specified in a contract, a Norwegian reader might conclude that an agreement (but not a formal contract) is required. Such divergences of meaning and interpretation are what horizontal TQA is intended to help eliminate.

3.2.2 *Overcoming limitations and objections*

3.2.2.1 Limiting the scope of assessment

It has been suggested, in the context of multilingual treaty drafting, that “[i]f undertaken on a sensible scale (for example, consultation of two or three language versions) the difficulties of comparison are real but hardly insurmountable”.¹²⁹³ The first potential adjustment is therefore to limit the number of languages included in a horizontal comparison, for example based on resource availability (i.e. limiting the comparison to languages for which sufficient and qualified staff are available) and/or prioritised languages (i.e. limiting the comparison to languages assigned higher importance on the basis of criteria specific to a given

¹²⁹³ Kuner (n 352) 963–964.

institution). A significant drawback of the first approach is that it would be ad hoc in nature due to being strongly shaped by resource availability at any given time. In concentrating primarily or even exclusively on languages for which resources are available, the approach might fail to cover languages which are important (for example in terms of prevalence, institutional usage, etc.) but insufficiently resourced. In addition, certain languages may be poorly resourced due to a shortage of qualified persons.¹²⁹⁴ Overall, it seems likely that this approach would result in the dominance of well-resourced languages, which in practice is likely to mean the most widely spoken or institutionally entrenched languages. Moreover, a resource-based standard for omitting languages from the scope of comparison would be arbitrary, allowing languages to be omitted simply because – for whatever reason – they are under-resourced at the time of selection. This would make it difficult to secure uniformity and predictability in terms of language coverage, and would also raise concerns about discrimination of less well-resourced and/or less widely spoken languages.

The second approach – limiting the assessment to prioritised languages – offers greater scope for uniformity, although the basis for designating languages as ‘prioritised’ would

¹²⁹⁴ Such as Irish, which although it is an official EU language has been exempted from EU translation obligations on the basis that “despite sustained and continuous interinstitutional efforts and considerable progress, the number of qualified translators is still expected to be so limited as regards Irish that, for the foreseeable future, full coverage of that language... cannot be assured for documents other than legal acts of general application”; see European Parliament, ‘Recommendation for a Decision pursuant to Rule 168(4) of the Rules of Procedure extending Rule 168 of Parliament’s Rules of Procedure until the end of the tenth parliamentary term’ (n 267), para. (E). The exemption applies until the end of the European Parliament’s 10th parliamentary term, i.e. until 2029.

have to be determined. There is precedent for such an approach among supranational organisations, including the EU. As noted in Chapter III, the UN has 193 member states but only six official languages, NATO has 32 member states and two official languages, the WTO has 166 member states and three official languages and the Council of Europe has 46 members and two official languages.¹²⁹⁵ Similarly, even though all official EU languages have equal status *de jure* (see Chapter III), certain languages have higher *de facto* status as procedural or working languages in certain contexts,¹²⁹⁶ and there is thus precedent in the EU system for giving certain languages higher priority. Nevertheless, any selection of languages based on status would raise concerns about linguistic discrimination, and presumably be politically unacceptable for that reason. One solution in this regard may be to prioritise languages based on practical considerations, rather than official status. An example of this is provided by the EU itself. In response to the difficulty of finding sufficient numbers of qualified translation staff, a system of so-called pivot, relay or bridge languages has been adopted by EU institutions¹²⁹⁷ to serve as hubs for further translation. For example,

¹²⁹⁵ As at 6 November 2024.

¹²⁹⁶ English, French and German are procedural languages of the European Commission, and thus of the EU institutions.

¹²⁹⁷ The European Economic and Social Committee website identifies the pivot languages as French, English and German; see European Economic and Social Committee, 'The Importance of Translation' <https://www.eesc.europa.eu/sites/default/files/files/eu_speaks_6b-translation.pdf> accessed 5 November 2024. The ECJ, on the other hand, uses the bridge or relay languages French, English, German, Italian and Spanish (and potentially Polish in future); see van der Jeught (n 282), para. 54. Further, personal communications with interview respondents in the period August-October 2024 indicate that the European Commission uses English and French as relay languages, the European Parliament uses English, French and German, and the Council of the European Union makes very limited use of pivot languages.

if a text in language A needs to be translated into language B, it might first be translated into language C (the pivot language) and then from language C into language B (and other languages). As noted earlier, conducting comprehensive horizontal TQA for all official EU languages would involve considering 552 language combinations or pairs, and the pivot system holds potential for reducing the number of potential combinations. In the case of the ECJ, for example, the pivot system reduces the number of possible combinations from 552 to 41,¹²⁹⁸ still a sizable number and a major obstacle to full horizontal comparison. However, it is important to note that the number of possible combinations is not the same as the number of unique language pairs, which drops to 15 when there are no more than six pivot languages. This number appears far more manageable, as it would limit the work involved and require fewer human resources, and would ensure that at least the pivot languages “preserve the unity of the single instrument”¹²⁹⁹ before further translation into the other official languages.

However, it is also important to note that objections can be made to the use of a relay/bridge/pivot language on the basis that the approach involves ‘translation of a translation’, a process also referred to as indirect translation. It has been stated that “[i]ndirect translation is laden with negative connotations”,¹³⁰⁰ including the objections that

¹²⁹⁸ McAuliffe, Muntean and Mattioli (n 114) 170.

¹²⁹⁹ Susan Šarčević, *New Approach to Legal Translation* (Kluwer Law International 1997) 72.

¹³⁰⁰ Hanna Pięta, Rita Bueno Maia and Ester Torres-Simón, *Indirect Translation Explained* (1st edn, Routledge 2022) 10.

indirect translation is a threat to translation quality, a threat to the balance between languages and cultures and a threat to the jobs, rights and ethics of translators.¹³⁰¹ Detailed consideration of such criticisms falls outside the scope of the thesis, and it is sufficient to note that these criticisms may be less applicable to the translation of EU legal texts, given that the latter can be distinguished from literary translation. Accordingly, objections concerning language and cultural balance and the job security, rights and ethics of translators are less relevant in the EU legal context, where translations are commissioned by the EU institutions with linguistic diversity in mind, and translation work is undertaken by employees of those institutions. The objection concerning translation quality is perhaps the most significant in the context of this thesis, given the importance of translation quality with respect to legal certainty for individuals, as previously discussed. Even if the pivot system were to entail an elevated risk of mistranslations or other negative translation quality metrics, it is important to recognise that the system is in fact used by the EU on a daily basis. This implies that the advantages of the pivot system, as discussed previously, are deemed to outweigh the disadvantages in the EU context. One particularly weighty factor in this regard may be the function of the ECJ as the ultimate authority on the meaning of EU legislative texts, and thus as a type of quality assurance mechanism by virtue of its power to remedy deficient translations through its rulings.

¹³⁰¹ *ibid* 10–11.

3.2.2.2 Crowdsourcing

As noted in section 2.3.1, crowdsourcing involves the delegation of a task (or parts thereof) to (the members of) a community of contributors, usually through digital channels. Before specific possible applications of crowdsourcing in the context of multilingual EU legislation are discussed, it is worth noting that, in practice, quality assessment of EU multilingual legislation is already *de facto* outsourced (or crowdsourced) to users of such legislation. Specifically, once legislation is published, identification of divergences and other issues occurs primarily when legislation is applied by those subject to it or tasked with supervising or enforcing its provisions. Thus a divergence in regulations concerning farming subsidies might be discovered when an individual applies for a subsidy, when a public authority wishes to grant a subsidy or when a subsidy scheme is scrutinised by a regulatory authority. Moreover, such divergences are not resolved unless and until they are brought before the courts, often in the context of proceedings targeting non-compliance of some kind. In practice, therefore, it can be said that quality assessment of European legislation is outsourced (or crowdsourced) by default.

However, it might also be possible to employ crowdsourcing more deliberately, as a means of operationalising horizontal TQA of EU legislative acts. Two forms of crowdsourcing appear relevant in this context, the first of which is crowdsourcing of horizontal comparison of different language pairs to volunteers, based on the previously noted suggestion that “it is possible to get high quality translations in aggregate by soliciting multiple translations,

redundantly editing them, and then selecting the best of the bunch".¹³⁰² Moreover, crowdsourcing to non-professionals has been found to be a potentially acceptable means of comparing the output of different machine translation engines.¹³⁰³ However, this form of crowdsourcing raises a number of potential problems, including how to recruit sufficient numbers of qualified contributors and the difficulty of securing uniform and adequate coverage of all language pairs. Moreover, it is uncertain that a sufficient volume of contributions could be secured to benefit from the law of averages as indicated above for all languages. Such concerns could be addressed, at least in part, by adopting the second potential form of crowdsourcing: encouraging the general public – i.e. users/readers of relevant texts – to report issues and suggest solutions.¹³⁰⁴ It seems probable (but by no means guaranteed) that the primary users of EU legislative texts have professional reasons for engaging with them, and thus some relevant basis for commenting on issues and proposing solutions. While this approach could in theory alleviate, at least to some degree, the 'unqualified contributors' concern noted above, the 'lack of coverage' concern would remain.

¹³⁰² Zaidan and Callison-Burch (n 1236) 1220–1221.

¹³⁰³ Jiménez-Crespo (n 1168) 87–88.

¹³⁰⁴ It could be concluded that the EU has already adopted crowdsourcing to some degree, given its reliance on external feedback from readers of EU legal texts regarding errors, divergences, etc. as the initiating factor in the corrigendum procedure. (Interview with European Council Head of Unit, 'Interview 3' (29 September 2023).)

A further objection to both outlined forms of crowdsourcing is that feedback would be determined by the arbitrary needs and interests of users, and coverage would thus be ad hoc or piecemeal. In the absence of a systematised approach, including targeted recruitment to ensure full language coverage, user reports would be limited to documents of interest to particular users at a particular point in time, and to cases where a contributor is sufficiently interested or otherwise invested to submit a report. Moreover, the huge volume of legal texts published by the EU (comprising both previously adopted legislation which remains in force and the annual output of new legislation) makes achieving full coverage a herculean task. It seems clear that any solution incorporating crowdsourcing would need to be carefully designed, and competing interests would need to be balanced. For example, asking contributors to register to allow for filtering and weighting by professional background and qualifications could be outweighed by the disadvantage of reducing participation rates through the added administrative effort required of users. While one solution could be to limit the scope of assessment, for example to pivot languages or an expanded selection of languages identified as high-priority, it seems unlikely that crowdsourcing could resolve all of the challenges associated with full horizontal TQA.

3.2.2.3 New technologies

The preceding discussion demonstrates that undertaking horizontal comparison of all language versions of multilingual EU legal texts is essentially impossible by human resources alone. While restricting the scope of comparison by reducing the number of languages

holds some potential, as does crowdsourcing, these measures also have drawbacks. Given the suggestion that machine translation could be used to discover divergences between language versions,¹³⁰⁵ it is logical to consider whether emerging technologies could facilitate horizontal comparison of language versions. While detailed consideration of the possibilities offered by new machine translation and artificial intelligence-based technologies¹³⁰⁶ falls outside the scope of this thesis, it is important to acknowledge both the rapid advances being made and their potential (but as yet unclear) impact on traditional translation processes, including translation quality assessment. Not least, such technologies could potentially be used to compensate for a lack of qualified human assessors and/or replace human assessors entirely. Going further, it could be argued that if automated systems become strong enough to conduct effective comparison of language versions, they will also be strong enough to produce translations of such high quality that comparison becomes unnecessary. However, adopting the terminology used in Chapter II to describe the EU legislative context, this argument presupposes a willingness on the part of both the originating culture (i.e. the EU legislative bodies) and the recipient culture (i.e. the target audience, comprising EU citizens) to rely on fully automated translations and assume their correctness without question. It seems unlikely that any such acceptance will establish itself for many years to come, and that a need to verify translation quality will remain for the foreseeable future. Regardless of potential future developments, however, at this juncture it

¹³⁰⁵ Sobotta (n 985) 10.

¹³⁰⁶ Including particularly so-called large language models (LLMs), exemplified by services such as ChatGPT, Google Gemini and perplexity.ai.

is sufficient to note that new technologies may well offer increased scope and/or support for horizontal comparison in future, even if fully automated comparison appears unlikely to be adopted in the short term.

3.2.2.4 Co-drafting and concordance meetings

The final option for overcoming identified limitations and difficulties is to modify the proposed approach by drawing inspiration from the so-called 'co-drafting' procedure used in certain multilingual jurisdictions. It has been suggested that different approaches to co-drafting share a number of features, namely that "operations of multilingual text production... take place at **several stages in the legislative process**", that "**interdisciplinary discussion** is institutionalized" and that "[t]here is **no strict hierarchy between the texts** produced in the different languages".¹³⁰⁷ In the discussion of examples of co-drafting below, the emphasis is on the latter feature. While the origins of co-drafting are often traced to Canada in the 1970s, it has been suggested that similar procedures are observable much earlier.¹³⁰⁸ As practised in Canada, co-drafting involves "drafting the two versions of a bill together using a team of two drafters",¹³⁰⁹ one working in English and the other in French,

¹³⁰⁷ Valérie Dullion, 'When Was Co-Drafting "Invented"? On History and Concepts in Legal Translation Studies' [2022] Perspectives 1, 2.

¹³⁰⁸ Bernd Mertens, 'Mehrsprachige Gesetzgebung aus historisch-vergleichender Sicht' (2013) 35 Zeitschrift für Neuere Rechtsgeschichte 157.

¹³⁰⁹ Government of Canada, 'Guide to Making Federal Acts and Regulations' (Privy Council Office 2001) 127. However, it has been noted that the practical specifics of the 'co-drafting' procedure have evolved since its introduction, moving away from the ideal of "drafters... working on only one bill at a time and [having] all the time they need to discuss every provision until both are satisfied that they have expressed a rule of law in the clearest,

with the aim of ensuring that “each language version is properly drafted and reflects both the civil and common law systems.”¹³¹⁰ In other words, efforts are made to coordinate and ensure concordance between language versions at the pre-legislative (drafting) stage. A similar model is used in Switzerland, which has four national languages, three of which have full official status,¹³¹¹ namely German, French and Italian. Switzerland has adopted a statutory obligation to pursue “appropriate, clear and comprehensible” language in official publications.¹³¹² Legislative texts are issued in the three official languages, and in the case of legislative texts “[p]ublication is effected simultaneously in the official languages German, French and Italian. In the case of enactments, the three versions are equally binding.”¹³¹³ By virtue of such publication, the language versions are also equally authoritative.¹³¹⁴ This in turn implies, as in the case of EU legislative texts, that “every single version should reliably convey exactly the same content. Each version should be able to be read and used independently.”¹³¹⁵ To avoid the occurrence of divergences between language versions, the “Swiss federal administration has developed procedures for law drafting that aim at

most natural and readable way”; see André Labelle, ‘What Ever Happened to Legislative Translation in Canada?’ (2016) 37 *Statute Law Review* 133, 138–139.

¹³¹⁰ Privy Council Office (n 1309) 127.

¹³¹¹ Andreas Lötscher, ‘Multilingual Law Drafting in Switzerland’ in Günther Grewendorf and Monika Rathert (eds), *Formal Linguistics and Law* (Mouton de Gruyter 2009) 373–374.

¹³¹² Federal Act on the National Languages and Understanding between the Linguistic Communities 2007, Article 7

¹³¹³ Federal Act on the Compilations of Federal Legislation and the Federal Gazette 2004, Article 14

¹³¹⁴ Federal Act on the Compilations of Federal Legislation and the Federal Gazette, Article 15

¹³¹⁵ Lötscher (n 1311) 376.

preventing textual discrepancies".¹³¹⁶ More specifically, in the case of important legal texts¹³¹⁷ these procedures include "an intermediary stage of revision and text control within the administration that has to assure that all texts are coherent, clear and precise and obey the requirements of good legal texts."¹³¹⁸ This procedure, variously referred to as 'co-redaction'/'co-drafting'¹³¹⁹ and 'co-editing',¹³²⁰ involves a committee composed of language specialists and legal experts representing both French and German.¹³²¹ This "Internal Drafting Committee"¹³²² "examines the wording of all drafts of statutes and regulations and makes suggestions as to how they could be formulated in a clearer and more transparent way",¹³²³ and in this context "treats the French and German version as equivalent, irrespective of the language in which the text had been composed originally"¹³²⁴ and, "in case of discrepancies or insufficiencies, it seeks to develop two good versions, corresponding to each other in content, being as close to the other as possible but also as precise, clear and stylistically

¹³¹⁶ *ibid* 384.

¹³¹⁷ Defined as the Federal Constitution, Federal Assembly decisions, statutes and important ordinances; author's translation from German. See Swiss Confederation, 'Koredaktion und Redaktion' (*Bundeskanzlei BK*) <<https://www.bk.admin.ch/bk/de/home/regierungsunterstuetzung/rechtsetzungsbegleitung/gesetzesredaktion/verwaltungsinterne-redaktionskommission.html>> accessed 5 November 2024.

¹³¹⁸ Lötscher (n 1311) 384.

¹³¹⁹ *ibid* 385.

¹³²⁰ Swiss Confederation, 'The Language Services of the Federal Administration' (Federal Chancellery Central Language Services 2012) 15.

¹³²¹ Lötscher (n 1311) 384; Federal Chancellery Central Language Services (n 1320) 15.

¹³²² Federal Chancellery Central Language Services (n 1320) 15.

¹³²³ Höfler (n 226) 231.

¹³²⁴ Lötscher (n 1311) 385.

appropriate as possible.”¹³²⁵ Overall, the aim is to ensure “that both language versions are consistent in terms of content and form.”¹³²⁶ A further example of such coordination can be found in the brief discussion of plurilingual treaty interpretation in Chapter VI, and the suggestion there that mandatory comparison of authentic texts could be good practice in the WTO context. A similar instance is observable in the approach adopted by the United Nations during drafting of the Law of the Sea Convention, where language groups representing the six official UN languages “consulted among themselves in order to reduce textual divergences”.¹³²⁷ Finally, it is interesting to note that the EU formerly practised a similar procedure, referred to as concordance meetings, at which representatives of the (then) 11 official languages met to read through all the language versions, ask questions and discuss any discovered problems.¹³²⁸ The enlargement of the EU in 2004 and the resulting increase in the number of official languages rendered this procedure impracticable, and it was discontinued.¹³²⁹ A further factor is a strong increase in the number of legislative acts without a corresponding increase in the number of available staff.¹³³⁰ It is important to note that the discontinuation of concordance meetings is attributable to practical reasons, rather than the meetings as such being deemed unhelpful or inexpedient. The value of securing

¹³²⁵ *ibid.*

¹³²⁶ Federal Chancellery Central Language Services (n 1320) 15.

¹³²⁷ Kuner (n 352) 959.

¹³²⁸ Interview with Quality Manager (n 265); Interview with European Council Head of Unit equivalent, ‘Interview 8’ (24 November 2023); Interview with European Commission Legal Reviser, ‘Interview 9’ (27 November 2023).

¹³²⁹ Interview with Quality Manager (n 265); Interview with Head of Unit equivalent (n 1328); Interview with Legal Reviser (n 1328).

¹³³⁰ Interview with Legal Reviser (n 1328).

feedback and input from the perspective of the different official languages is still recognised today, as exemplified by so-called collation meetings and expert meetings at which the parties involved in a particular matter seek to build the best possible base for translation into the official languages¹³³¹ by discussing common problems¹³³² and building a shared understanding of the source text.¹³³³

Discussion

In Chapter V above, two dimensions of failure were noted with respect to protection of the rule of law by a state, namely failure in the *accuracy of recognised rights* and failure in the *fairness of enforcement*. It was noted that *accuracy* concerns arise where the state grants citizens rights against itself which it then fails to safeguard due to official mistake, for example when divergences between language versions mean that some EU citizens cannot assert rights granted to them, or that previously granted rights are withdrawn due to official mistake. Specifically, divergences between language versions can be regarded as inaccuracies in EU legal texts, and can be described as official mistakes on the basis that they are (normally) unintentional (not least because they increase the likelihood of non-harmonised application of EU law). Moreover, the withdrawal of previously granted rights due to official mistake is illustrated by the case of *Marianne Worsdorfer, née Koschniske, v*

¹³³¹ Interview with Head of Unit equivalent (n 1328) 8.

¹³³² Interview with Quality Coordinator, 'Interview 4' (n 1151).

¹³³³ Interview with Quality Coordinator, 'Interview 6' (n 675).

Raad van Arbeid,¹³³⁴ as discussed previously, where social security benefits were stopped based on an interpretation of the Dutch language version which sought to align it with other language versions.

Similarly, *fairness* concerns arise when citizens who rely on a single language version are disadvantaged, for example in comparison to other citizens who speak multiple languages and thus have access to a greater range of language versions (and thus legal information), or indeed in comparison to citizens who are legal persons with far greater resources at their disposal. As noted in Chapter III, individuals engaging with EU legal texts may include both natural and legal persons, and Chapter II stated that both natural and legal persons subject to EU law should have the opportunity to familiarise themselves with their rights and obligations under EU legislation. Chapter VI discussed the ECJ's position that the interpretation of EU legal acts – and thus logically also familiarisation with the content and meaning of such instruments – requires examination of all language versions,¹³³⁵ and discussed criticisms levelled at this requirement based on the lack of legal certainty it creates because citizens have “no way of ascertaining what the law says by reading it in an official language that they can understand.”¹³³⁶ It was also noted that while the ECJ's ruling in the *Conorzio*¹³³⁷ case modified the obligation to compare all language versions somewhat, it

¹³³⁴ Case 9/79 *Marianne Worsdorfer, née Koschniske, v Raad van Arbeid* (n 776).

¹³³⁵ Case C-451/08, para. 38.

¹³³⁶ *Leung* (n 79) 205.

¹³³⁷ Case C-561/19, *Conorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* (n 90).

also increased the onus on litigants to point out divergences in their submissions to the adjudicating court. However, as indicated above, not all litigants are equal in terms of their capacity to identify and point out potential divergences between language versions. The position of natural persons in this regard can be illustrated by reference to the previously discussed case of *Criminal proceedings against Dirk Endendijk*,¹³³⁸ where a farmer was held criminally liable for tethering calves in contravention of an EU prohibition despite the fact that his use of rope was compliant with the wording of the relevant national legislation, which only referred to chains being prohibited. The fact that other language versions referred to tethering or attachment more generally, regardless of the means used – and thus that his practice might be unlawful – would not have been apparent to the farmer unless he had consulted more than one language version. Legal persons, on the other hand, may have greater ‘investigative capacity’ than natural persons. This is exemplified by the practice of so-called ‘forum shopping’, whereby litigants (often legal persons) select a legal venue based on their expectations as to which jurisdiction will be most favourable to them.¹³³⁹ Fundamentally, forum shopping exploits a lack of uniformity among legal systems.¹³⁴⁰ A decision to prefer one jurisdiction over another may be motivated by practical considerations, such as the anticipated speed of proceedings and related legal costs, or the more strategic question of which jurisdiction offers the greatest chances of success. In

¹³³⁸ Case C-187/07 *Criminal proceedings against Dirk Endendijk* (n 442).

¹³³⁹ Tamar Mskhvilidze, ‘The Legal Nature of Forum Shopping in International Civil Procedure Law’ (2023) 9 *International Journal of Law: Law and World* 93, 93.

¹³⁴⁰ Robert Thomas Currie Telfer, ‘Forum Shopping and the Private Enforcement of EU Competition Law: Is Forum Shopping a Dead Letter?’ (University of Glasgow 2016) 23.

assessing the latter, the focus is often on exploitable differences between national legislative, regulatory or enforcement regimes. Such exploitable differences may be the product of, for example, the exercise of national discretion in legislative or policy implementation,¹³⁴¹ or indeed of differences between language versions of EU legislation. An example of the latter is provided by a series of cases heard by the UK Competition Appeal Tribunal, commonly referred to as the replica sports kit cases,¹³⁴² in which a number of companies sought to capitalise on a difference between two language versions of a judgment issued by the CJEU General Court in a case which defined the term ‘concerted practice’ under EU law.¹³⁴³ Whereas the French-language version of the judgment implied that a concerted practice could exist when two competitors met and one indicated its likely course of action, the English-language version of the judgment indicated that one of the competitors had to indicate what action the other party should take in the market.¹³⁴⁴ Although the companies were unsuccessful with their argument, the key point in the present context is that the

¹³⁴¹ For example, EU member states have discretion in the implementation of directives, which set out goals to be achieved but leave detailed regulation to the individual member states, thus creating potential for differing national regimes. Regarding policymaking, see e.g. Eva Thomann, *Customized Implementation of European Union Food Safety Policy: United in Diversity?* (Palgrave Macmillan 2019) 3–4.

¹³⁴² Cases 1019-1022/1/03 *Umbro Holdings Ltd v Office of Fair Trading; Manchester United PLC v Office of Fair Trading; Allsports Ltd v Office of Fair Trading; JJB Sports PLC v Office of Fair Trading* [2005] CAT 22.

¹³⁴³ *Cimenteries CBR and Others v Commission* [2000] European Court of Justice Case T-25/95.

¹³⁴⁴ Karen McAuliffe, ‘Behind the Scenes at the European Court of Justice: Drafting EU Law Stories’ in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, vol 3 (Cambridge University Press 2017) 50 <<https://www.cambridge.org/core/product/identifier/9781316340479/type/book>> accessed 1 November 2024.

companies were only able to make this argument because they had the resources to examine more than one language version of the judgment and discover the difference between the French and English versions. In other words, they had greater investigative capacity than is likely to be available to most natural persons. In light of the above examples, it can be questioned whether it is fair to apply the same 'investigative standard' to natural and legal persons with respect to familiarisation with the content and meaning of EU legal texts, given the clear differences between the capacities of such persons to comply with the requirement to review different language versions.

Also in Chapter IV, three contexts were described in which legal certainty is required: *lawmaking*, *law finding* and *law applying*. Lawmaking was linked to careful drafting to ensure that legal rules can give guidance to readers. Law finding was linked to accessibility, on the basis that rules can only guide individual members of society if they are accessible to them. It was also noted that legal certainty is not served if different readers of a legal text can form differing views of its contents, as is the case if different language versions state (or can be understood to state) different things. Finally, with respect to law applying, it was noted that members of the public expect to be able to self-apply legal texts syllogistically, i.e. that the meaning of legal texts can be ascertained by deductive reasoning based on their content. In other words, any proposed new approach to translation quality assessment in the EU legal context needs to achieve several purposes: it needs to improve accuracy, promote fairness, and have benefits in the areas of lawmaking, law finding and law applying. Interview

responses suggest that respondents in the present study saw value in horizontal comparison of language versions, with responses including the following: “I think there is added value in this approach”;¹³⁴⁵ “Yes, yes, most definitely. If [one] could pinpoint... all the potential discrepancies... that would help”;¹³⁴⁶ “I think that... this kind of comparison... would be a great idea to do in order to ensure quality but also legal certainty”;¹³⁴⁷ “There would be some added value to that”;¹³⁴⁸ and “It is valuable as a source of inspiration, to draw from languages other than the original.”¹³⁴⁹ In addition, the interviewees related that some forms of horizontal comparison are already done, mainly in the form of translation tools which allow translators to review translations prepared by other translators.¹³⁵⁰ For example, a translator working in Italian could review the solution adopted by the translation units for related languages such as Spanish and Portuguese to gain helpful insights for their own work. As one respondent stated, “The way it was translated seems fine, but then when you compare it to especially the other Romance languages... you realise that in the other Romance languages things were translated differently.”¹³⁵¹ It was also stated that such horizontal comparison could be very helpful to translators in two respects: resolving lack of clarity in the original; and providing inspiration on how to translate into their own language.¹³⁵² As

¹³⁴⁵ Interview with Quality Manager (n 265).

¹³⁴⁶ Interview with Quality Coordinator, ‘Interview 4’ (n 1151).

¹³⁴⁷ Interview with European Parliament Quality Coordinator, ‘Interview 5’ (10 October 2023).

¹³⁴⁸ Interview with Legal Language Professional (n 674).

¹³⁴⁹ Interview with Head of Unit equivalent (n 1328).

¹³⁵⁰ Interview with Quality Coordinator, ‘Interview 4’ (n 1151); Interview with Quality Coordinator, ‘Interview 6’ (n 675).

¹³⁵¹ Interview with Quality Coordinator, ‘Interview 4’ (n 1151).

¹³⁵² *ibid.*

one respondent put it, "If [something] isn't clear, I will look at whatever text I can get my hands on."¹³⁵³ However, while referring to other language versions by currently available means is standard practice, it is not done systematically. Rather, such comparison occurs on an *ad hoc* basis¹³⁵⁴ in accordance with the language skills of each individual translator.¹³⁵⁵

Proposal

Based on the preceding discussion, a new (or rather revived and supplemented) approach suggests itself as a potential means of reducing the number of divergences between language versions, and thereby improving legal certainty for EU citizens. This approach entails leveraging the pivot language system to ensure greater coordination of language versions. In practical terms, this would involve reviewing and comparing the five or six pivot-language versions to ensure that they do not contain (undesirable) divergences which could result in differing legal outcomes in different EU member states. This review and comparison could comprise two measures: reviving concordance meetings and supplementing these meetings with horizontal comparison of pivot-language versions. Regarding the first of these measures, insights can be drawn from three sources. Firstly, the fact that such meetings could be useful is illustrated by the fact that the EU itself used to hold them. The reason for stopping these was not a lack of utility, but rather the increase in the number of official languages following the 2004 enlargement, which so expanded the amount of work

¹³⁵³ Interview with Legal Language Professional (n 674).

¹³⁵⁴ *ibid.*

¹³⁵⁵ Interview with Quality Coordinator, 'Interview 6' (n 675).

involved that it became impossible to continue. Reducing the number of languages to be considered to the five or six pivot languages would address this issue and could thus facilitate a return of concordance meetings. Secondly, the Swiss model as discussed above illustrates the value of a review/coordination stage. As noted above, for important legal texts the Swiss legislative drafting process includes review by a committee comprising language specialists and legal experts representing both French and German in pursuit of the aim to ensure “that both language versions are consistent in terms of content and form.”¹³⁵⁶ Thirdly, it was noted above that a key feature of the multiple forward translation method (and variants thereof) is “the use of bilingual translators or judges who check for errors in meaning in the two or more versions of the [text by comparing] the source and translated versions of each [text] and decid[ing] whether any differences between translations could result in non-equivalence of meaning”.¹³⁵⁷ This reflects the fundamental assumption that comparing translation output can provide insights which help improve final translation(s) into target language(s). Moreover, it was noted that this ‘improvement effect’ is not necessarily limited to two languages, thus permitting its application to multiple target texts. It is important to note that all three of these approaches entail manual comparison of language versions by relevant legal and linguistic experts. Above, it was stated that new technologies may offer increased scope and/or support for horizontal comparison in future, although fully automated comparison remains unlikely at present. However, horizontal comparison is not

¹³⁵⁶ Federal Chancellery Central Language Services (n 1320) 15.

¹³⁵⁷ Hambleton (n 1256) 16.

necessarily a question of all or nothing. Specifically, full automation is not a prerequisite for horizontal comparison to be of any use. Accordingly, consideration should be given to whether present technology allows some degree of automation which could reduce the work involved in conducting horizontal comparison or facilitate progress towards the goal of such comparison. One possibility might be to use automated back translation to provide an indication of potential divergences.

Overall, it appears that implementing concordance meetings focused on pivot languages could be a useful instrument for discovering and addressing divergences between language versions. Moreover, this approach would address two problems identified with the pivot system, namely that “errors are transmitted from one document to another. Such errors are not always easy to pick up and subsequently follow through to every language version”,¹³⁵⁸ and that “it is not always possible to consult the original version of a document being translated through a pivot language, since one may not have the relevant linguistic expertise”.¹³⁵⁹ Ensuring that the pivot-language versions are coordinated would logically limit the scope for the occurrence of divergences to the final stage of translation, i.e. translation from each pivot language into its target languages. As noted in the context of treaty drafting, “the closer the language versions are brought together during that process [i.e. at the drafting stage], the greater the basis for assuming that they are indeed identical

¹³⁵⁸ McAuliffe, Muntean and Mattioli (n 114) 170.

¹³⁵⁹ *ibid.*

in meaning.”¹³⁶⁰ Thus errors would no longer be transmitted from pivot-language versions to their target languages, and the pivot-language versions would become originals in their own right, thereby eliminating the identified linguistic expertise problem. Overall, this would greatly reduce, or even eliminate, the scope for carryover of mistakes from pivot-language versions into all their related translations. At the same time, a committee-based approach would allow political considerations to be respected, including any intentional lack of clarity, vagueness and other political priorities as discussed in Chapter V. There are several further potential advantages to reviving concordance meetings and supplementing them with (fully or partially automated) horizontal comparison of pivot-language versions. The purpose of the comparison component would simply be to identify potential divergences between language versions. Any decision as to the desirability or otherwise of identified divergences, and any decision on whether they should be eliminated or remain, would rest with the committee. However, comparison would provide additional information allowing an informed decision to be made. Moreover, clearly documented committee deliberations would constitute valuable information for the ECJ when asked to interpret EU law, i.e. supplementary means of interpretation¹³⁶¹ analogous to *travaux préparatoires* in the context of treaty negotiations and national statutes (called preparatory documents in the EU

¹³⁶⁰ Kuner (n 352) 959.

¹³⁶¹ See, for example, Article 32 of the Vienna Convention on the Law of Treaties, which states that, “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

context¹³⁶²). In other words, if documentation is available which shows that a given ambiguity (or even divergence) was noted, considered and approved during the legislative drafting process, and if reasons are given for this decision, the ECJ will have a much better indication of the legislature's position, and a stronger basis for determining and upholding its intentions. This would assist the ECJ in its task of interpreting EU law, securing greater clarity and thus greater legal certainty for EU citizens. This can be illustrated by reference to the previously discussed *Worsdorfer* case,¹³⁶³ in which the Dutch language version of a piece of European legislation referred to an "echtgenote" (wife), whereas other language versions made reference to both partners to a marriage by employing terms like "Ehegatte" (German) and "spouse" (English). It was noted that this divergence between language versions represented both a semantic and a conceptual divergence between the Dutch and other language versions, and that this divergence could only be discovered by comparing the language versions. If the proposed approach outlined above had been adopted during production of the legislation central to the *Worsdorfer* case, the semantic and conceptual divergence could have been discovered and resolved at a far earlier stage, thus providing Ms Worsdorfer with certainty as to her rights and obligations under the relevant legislation and eliminating the need for legal proceedings in the Netherlands and the request for a preliminary ruling by the ECJ. Specifically, the horizontal comparison element of the approach would have revealed the divergence between the Dutch and other language

¹³⁶² European Union, 'Preparatory Documents' (*EUR-Lex*) <<https://eur-lex.europa.eu/collection/eu-law/pre-acts.html>> accessed 5 November 2024.

¹³⁶³ Case 9/79 *Marianne Worsdorfer, née Koschniske, v Raad van Arbeid* (n 776).

versions at the drafting stage, and the concordance meeting element would have provided a forum for discussing and, ultimately, resolving it.

At the beginning of this discussion section, it was stated that any new approach must improve accuracy, promote fairness, and have benefits in the areas of lawmaking, law finding and law applying. The proposed two-fold approach of reviving concordance meetings and supplementing such meetings with horizontal comparison of pivot-language versions holds the potential to achieve these aims. Specifically, *accuracy* will be improved through a reduction in the scope for mistakes in the form of unintentional divergences between language versions of EU legal texts. As indicated previously, a reduction in the number of divergences will have a positive impact on the target audiences of such legal texts, and reduce the number of cases in which the ECJ is required to issue an interpretative ruling. Accordingly, there will be fewer cases such as those discussed previously where individuals suffer negative consequences – whether in the form of financial losses, penalties or even criminal liability – as a result of relying on a particular language version. Moreover, *fairness* of enforcement will be promoted by the suggested approach because EU citizens who speak only one official language will no longer be disadvantaged, in terms of their access to information about applicable rights and obligations, compared to citizens who speak more than one official language. As regards the benefits of the proposed approach with respect to *lawmaking*, the guidance function of EU legal texts will be greatly improved if the scope for and number of divergences between language versions is reduced, as there

will be less scope for different readers to form divergent views of the content of a given legal text. Moreover, *law finding* will become easier for citizens, for two reasons. Firstly, the meaning and content of legal rules will become more accessible as a reduced number of divergences translates into fewer legal rules remaining indeterminate pending interpretation by the ECJ. Secondly, financial hurdles will be reduced as the need shrinks for EU citizens to engage multilingual legal assistance to determine the content and/or meaning of EU legal rules. Finally, as regards *law applying*, the suggested approach will reduce the risk of EU citizens in different member states reaching divergent conclusions in their self-application of EU legal rules, because closer alignment of language versions should logically result in greater alignment of citizens' deductive reasoning based on those language versions.

VIII. Conclusion

1. Insights and findings

1.1 Conceptual insights

Chapter II describes the conceptual and empirical approaches used in the study. The conceptual work done generated several key insights, starting with the observation that certainty is of fundamental value and importance with respect to the mutual rights and obligations which arise in any relationship between a governing entity and those subject to its rules. When considering the European Union and individuals subject to its governance, it is therefore relevant to ask whether the EU's multilingual legal regime affords EU citizens with certainty in the sense of enabling them to know their rights and obligations fully and to act in accordance with a correct understanding of these. The stated objective of the thesis was to test the proposition that this is not always the case, i.e. that the EU legal regime fails to afford EU citizens legal certainty when there are differences or divergences between the published language versions of EU legal texts. This proposition was explored on the basis of several conceptual insights, including that the multilingual EU legal regime can be viewed as a system which serves specific purposes whose achievement can be assessed based on system outcomes or impacts, and that all parts of the multilingual EU legal regime should work together with some degree of internal consistency to achieve the intended purpose/functions of the system. Based on the insight that EU lawmaking can be evaluated by examining its output, the thesis has traced the asserted lack of legal certainty for EU

citizens resulting from divergences between language versions of EU legislative texts back to how such texts are produced. Logically, therefore, the conceptual analysis suggests potential for taking measures at the production stage to eliminate divergences and thus improve individual legal certainty.

Further conceptual insights relate to the legal framework governing relations between the EU and its citizens, including the potential relevance of social contract theory as a basis for viewing such relations as a system of mutual rights and obligations whose functioning can be evaluated by reference to principles such as the rule of law, access to justice and legal certainty. These principles in turn raise the question of whether the EU provides its citizens with an intelligible and viable legal framework for their lives. A further conceptual observation is relevant in this regard, namely a perceived conflict between collective and individual interests, where an important distinction can be made between systemic and individual legal certainty and EU institutions paradoxically appear to attach greater importance to systemic considerations despite the Union's strong emphasis on individual rights and freedoms. However, regardless of whether systemic or individual interests are emphasised in the legal framework applicable to EU citizens, divergences between language versions represent a potential challenge to legal certainty.

An additional notable conceptual insight is that translation quality assessment approaches can be classified based on the number of informational sources they incorporate, as single-

source, dual-source or multi-source, and that the category of multi-source approaches offer scope for expansion. This classification provides the backdrop to the main conceptual insight in the thesis, namely the potential for a new approach, entailing so-called 'horizontal' comparison of different target texts stemming from the same source text, as a means of identifying and addressing differences (divergences) between them.

1.2 Empirical findings

The empirical part of the study fulfilled two functions: it supplemented the literature review and the conceptual insights gained through it, and it informed the final proposal presented in Chapter VII. For example, interview findings confirmed that the range of factors with a potential influence on the quality of translation output is broader than merely the resources, tools and technologies provided, and also encompasses the working conditions of translators and other persons involved in the process of document production. Thus the interviews provided insights into how and why divergences between language versions of EU legislative texts may arise, with several interview respondents reporting that translators working for the European Parliament operate in an environment that is, at least at times, subject to short deadlines and resulting time pressure, as illustrated by statements like, "[I]n Parliament it's crazy... so much legislation is being produced, so many documents, so many texts for the citizens are being produced..."¹³⁶⁴ and, "[T]here is so much going on and it has

¹³⁶⁴ Interview with Quality Coordinator, 'Interview 4' (n 1151).

to be quicker than quick.”¹³⁶⁵ In addition, another respondent stated – also in relation to work within the European Parliament – that, “It’s a very dynamic and quite stressful environment... especially in pre-session and session weeks.”¹³⁶⁶

The interviews also revealed an assumption that ensuring high quality of source texts is sufficient to ensure high quality of target texts. As a result, revision appears not to be done as frequently as might be assumed based on official literature. This was illustrated by an interviewee from the Commission, who stated that “[t]he bulk of our work goes into ensuring the quality of the originals, and that translates into good quality of translations”.¹³⁶⁷ The interviewee also stated that little time is available for concrete comparison of target texts with the source text, and revisions is therefore only done in a small fraction of cases.¹³⁶⁸ At the same time, it is questionable whether the underlying assumption that high source-text quality equates to high target-text quality holds true when factors unrelated to source-text quality are at play, such as working conditions, availability of staff with the requisite knowledge and skills in target languages, etc. In this regard, it is interesting to note the interview finding that results quality monitoring appears to have been superseded by greater reliance on the corrigendum procedure.¹³⁶⁹ In practice, this means less (or no)

¹³⁶⁵ *ibid.*

¹³⁶⁶ Interview with Head of Unit (n 70).

¹³⁶⁷ Interview with European Commission Legal Reviser, ‘Interview 9’ (27 November 2023).

¹³⁶⁸ *ibid.*

¹³⁶⁹ Interview with European Council Head of Unit, ‘Interview 3’ (29 September 2023); European Council Head of Unit, email, ‘PhD Research’ (3 October 2023).

random sampling¹³⁷⁰ and reliance, instead, on input from the language teams responsible for dealing with corrigendum requests. Such input may include the types of corrections requested and whether errors are inadvertent or require a focus on specific issues. Interview findings suggest that this approach is considered more objective because it is external, i.e. stemming from the target audience.¹³⁷¹

A further significant interview finding is that when the European Commission proposes legislation under the ordinary legislative procedure, the European Parliament and the Council of the European Union function as a safety net by virtue of their work on the Commission draft.¹³⁷² However, this is not the case with the numerous delegated acts and implementing acts which the Commission adopts, which are not subject to any further controls after work within the Commission's Directorate-General for Translation has been completed. That these delegated and implementing acts represent a substantial corpus of legislation containing potential divergences was confirmed by the interviewee statement that the ordinary legislative procedure "in fact only constitutes a fraction of all legal acts that are adopted in the European Union".¹³⁷³

¹³⁷⁰ Due to workload and resulting capacity shortages. (Interview with Head of Unit (n 1304).)

¹³⁷¹ *ibid.*

¹³⁷² Interview with European Commission Quality Manager, 'Interview 7' (12 October 2023).

¹³⁷³ Interview with Legal Reviser (n 1328).

The conducted interviews revealed awareness among translators and quality managers within the EU system of the potential for divergences between official language versions, i.e. failure of the system to provide clear legislative texts across the official languages. This indicates a mismatch between the EU institutions' assumptions regarding textual quality and the view of textual quality taken by individuals working for those institutions, as well as a further mismatch between such quality assumptions and the individual experiences of persons governed by EU legislative texts, as illustrated by the cases discussed in Chapter V. This finding underlines the relevance of social contract theory due to the latter's focus on the mutual rights and obligations of governing entities and the governed, and the basis it provides for evaluating the fairness of such a system of governance.

Another notable empirical finding is that horizontal comparison, although not referred to as such, is not an entirely new idea, as elements of it can be recognised in various contexts identified during the conducted interviews. These contexts include not only the practice of EU translators referring to other language versions for help in overcoming translation challenges, but also the legislative drafting process used in Switzerland (so-called 'co-redaction' or 'co-editing') and – particularly – the concordance meetings previously used by the EU to align language versions of legislative instruments. The interview finding that horizontal comparison has been used in relevant institutional contexts confirmed the potential utility of the envisaged approach, and the previous use of concordance meetings was incorporated into the final proposal.

Overall, the empirical part of the study provided the key insights that a range of factors influence the final form of official language versions, that translators are subject to time and capacity constraints, that there is an institutional assumption that source-text quality equates to target-text quality, that there are few proactive post-publication quality controls, including particularly of the EU's many delegated acts and implementing acts, that social contract theory is relevant for evaluating the functioning of the multilingual EU legislative regime, and that the idea of horizontal comparison across language versions is not unknown in the EU context.

2. Main arguments

The theoretical framework developed in the thesis starts with recognition of the fact that the European Union (EU) operates a legal system in which the EU itself and EU citizens are participants. Moreover, this legal system features a unique level of multilingualism, in that EU legal texts are published in 24 official languages, all of which are equally authentic and binding. At the same time, the coherence and effectiveness of the EU legal regime can be undermined by uncertainty about the meaning or content of applicable EU laws. Moreover, the EU legal order can be viewed systemically, i.e. as a sub-system of the larger, overall political and institutional system of the EU, and as a parent system of further sub-systems such as the EU legislative process. Viewing the EU legislative process as a series of interlinked

operations leading from objective to implementation to outcome implies that the effectiveness of the process, and potential improvements to it, can be evaluated by reference to the outcomes produced by the process.

There are two recurring themes in the thesis, specifically a distinction between theory and practice – i.e. between circumstances as described in relevant literature and circumstances observed in reality – and a conflict between collective and individual interests. The first theme is observable in a variety of contexts, for example the fact that while the ECJ is not a precedent-setting body in theory, its rulings carry precedential weight, implying that a *de jure–de facto* distinction can be made not only with regard to EU multilingualism as a whole, but also with respect to the more specific question of the precedential significance of ECJ rulings. Further observations include both that divergences between language versions of EU legal texts necessarily entail divergence between the expressed or claimed status of EU legal texts and the reality of operating in the multilingual EU legal regime, and that authentication through the principle of equal authenticity entails a dichotomy between the claimed state of affairs and the actual situation (where the actual situation may feature differences and divergences between language versions which the claimed status denies). Further, a distinction can be made between *de jure* statehood and *de facto* statehood, where *de jure* statehood equates to fulfilment of formal statehood requirements under international law and *de facto* statehood concerns the actual, real, everyday impact of a state-like entity on persons within its territory. It can be argued that, regardless of whether

or not the EU has *de jure* statehood, it exercises *de facto* statehood, i.e. that it functions as a state *in fact*, if not *in law*. Finally, even though all official EU languages have equal status *de jure*, certain languages have higher *de facto* status as procedural or working languages in certain contexts.

Regarding the second theme – the conflict between collective and individual interests – it is possible to distinguish between systemic and individual legal certainty, or analogously between formalistic and effective access to justice (or fairness of process and fairness of outcome), where individual legal certainty may have to be – or is in fact – sacrificed in practice in order to secure systemic legal certainty. ECJ case law suggests that the court is likely to favour the objective of EU multilingualism (i.e. systemic or collective interests) over individual interests in the form of individual legal certainty. Given the EU's heavy emphasis on individual rights and freedoms, it can seem paradoxical that systemic considerations appear to weigh most heavily in the ECJ's preferred approach to resolving divergences between language versions. A similar tension can be seen within the category of 'individuals', i.e. between the greatest possible collective certainty or the greatest possible individual certainty.

The question of EU statehood is a precursor to applying social contract theory as a lens through which to examine relations between the EU and EU citizens. To challenge the prevailing conclusion that the EU is not a state, the thesis considers arguments for and

against EU statehood. As indicated above, an evaluation by reference to the statehood criteria outlined in the Montevideo Convention on the Rights and Duties of States, the factor of EU citizenship and the rights granted to EU citizens suggests that a distinction can be made between *de facto* statehood and *de jure* statehood, and that the EU can be treated as a state for analysis purposes, regardless of its statehood status in law. Building on this conclusion, three grounds can be cited in support of social contract theory's relevance to the thesis topic: (i) that the EU fulfils formal criteria for recognition as a state irrespective of its asserted legal status, (ii) that even if the EU is not a state in law, it functions as a state in fact, and (iii) that the scope of social contract theory can and must be expanded to include state-like actors like the EU. The conclusion that the EU can be treated as a state for the purpose of analysing its relationship with its citizens allows EU-citizen relations to be viewed from the perspective of mutual rights and obligations, where the functioning of the relationship can be critically examined on the basis of such principles as the rule of law and access to justice.

It is also relevant to consider principles of EU law, and the protection of fundamental rights in particular. The fundamental rights recognised under EU law include legal certainty, and detailed requirements for securing legal certainty can be identified, such as publication, clarity, stability, non-retroactivity and legitimate expectations. At the same time, individual legal certainty may sometimes have to be sacrificed in order to secure systemic legal certainty. The ECJ's stated requirement that all language versions must be referred to when

seeking to resolve divergences can be viewed in two entirely opposite ways, respectively representing the systemic and individual perspectives. The first view argues that legal certainty is guaranteed by ensuring uniform application of the law in all member states, while the second view argues that legal certainty is only achieved if individuals can rely on their particular language version. Ultimately, the conclusion that divergences between language versions undermine legal certainty at both the systemic and the individual levels necessitates consideration of what further efforts could be made to prevent the occurrence of divergences.

Overall, the thesis argues that a system for comparing different language versions of EU legal texts, implemented at the pre-legislative stage (i.e. during document production), could help identify potential divergences and provide a basis for addressing these. The potential limitations of such a system can be remedied, including by reducing the amount of work and costs involved through restriction of the comparison exercise to pivot languages and the use of concordance meetings to coordinate the pivot-language versions prior to translation.

3. Impact

The multilingual and lawmaking nature of the European Union necessitates the issuance of multilingual EU legal texts, which in turn involves extensive translation activity to produce different language versions of EU legal texts, all of which are attributed equal authenticity

and validity. These legal texts effect legal regulation of interactions between the EU and its citizens. In this regard, the EU can be regarded as functioning like a state, and thus to have obligations to its citizens analogous to those of any nation state. Viewing relations between the EU and its citizens as a relationship built on mutual rights and obligations facilitates analysis of the individual outcomes produced by the EU legal regime by reference to the standards which the EU seeks to uphold, including the rule of law, access to justice, fundamental rights and legal certainty. Both individual and collective or systemic considerations arise in this regard, not least with regard to what form of legal certainty is to be achieved, and which stakeholders' legal certainty is most important. This thesis does not argue for a policy shift away from uniform interpretation across the EU member states, i.e. for a reprioritisation of individual legal certainty over collective legal certainty. Rather, it proposes practical adjustments which could be made to improve individual legal certainty within the existing legal and policy framework. Moreover, it is clear that differences or divergences between language versions undermine legal certainty regardless of whether a collective or individual perspective is adopted. Drawing on a variety of existing approaches, this thesis concludes that such approaches can be adapted and extended to create a new approach for reducing the scope for divergences between language versions of EU legislative texts. If properly designed, this approach could secure a number of benefits: greatly reducing or even eliminating entirely the potential carryover of inaccuracies from pivot-language versions into related translations; safeguarding political considerations related to negotiated texts, including any intentional lack of clarity, vagueness and other

political priorities; providing additional information to drafters and translators to facilitate informed decisions on the final form of translated language versions; and the provision of valuable background information for the ECJ when interpreting EU law. First and foremost, however, the proposed approach would support the alignment of language versions of EU legal texts and thereby improve legal certainty both at the systemic level and for individual EU citizens.

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Interviews

Interview with European Parliament Head of Unit, 'Interview 1' (28 September 2023)

Interview with European Parliament Legal Language Professional, 'Interview 2' (29 September 2023)

Interview with European Council Head of Unit, 'Interview 3' (29 September 2023)

Interview with European Parliament Quality Coordinator, 'Interview 4' (5 October 2023)

Interview with European Parliament Quality Coordinator, 'Interview 5' (10 October 2023)

Interview with European Parliament Quality Coordinator, 'Interview 6' (10 October 2023)

Interview with European Commission Quality Manager, 'Interview 7' (12 October 2023)

Interview with European Council Head of Unit equivalent, 'Interview 8' (24 November 2023)

Interview with European Commission Legal Reviser, 'Interview 9' (27 November 2023)

Correspondence

European Council Head of Unit, email, 'PhD Research' (3 October 2023)

Annex 1: Invitation to participate and consent form



UNIVERSITY OF
BIRMINGHAM

Birmingham Law School
University of Birmingham
Edgbaston
Birmingham
B15 2TT

Invitation to participate in PhD research project

Project title: Using translation quality assessment to improve legal certainty

Project details

This doctoral project aims to investigate whether translation quality assessment may be useful in improving legal certainty in multilingual legal orders. The EU is unique in producing a multilingual body of legislation in 24 official languages. Although all these languages have equal status and authenticity, the Court of Justice of the European Union (CJEU) is regularly asked to resolve differences or divergences between official language versions in the form of references for preliminary rulings under Article 267 of the Treaty on the Functioning of the European Union (TFEU). While existing literature describes the multilingual EU legislative process and identifies possible causes of divergences, there is little scholarship which focuses on efforts made, during the drafting process, to prevent divergences in order to improve the quality of official language versions and thereby reduce the need for preliminary rulings by the CJEU.

To achieve the aim of the project, it is important to understand current translation quality assessment processes in use in EU institutions (i.e. the translation and revision processes). Further, an understanding of the situational factors of, and compromises involved in, the production of EU legislative texts is important (i.e. focusing on the actors at the heart of the production process – such as translators, drafters and lawyer-linguists – as well as technology used to improve the quality of resulting texts).

The research is being carried out by Michael Krallmann, a PhD researcher at the University of Birmingham (UK) and a former UK solicitor and active translator, and is supervised by [Professor Karen McAuliffe](#) and [Dr Sofia Malamatidou](#).

In order to fully understand the process behind the production of EU legislative texts, Michael will be conducting interviews with relevant individuals in the period summer 2023-spring 2024.

Interviews

The interview will last around 1-1½ hours and will be very informal. Michael will be interested to hear about your role in the legislative process, how you tackle that role and your own perception of your role. Michael will take notes during the interview. If you agree, Michael will record the interview to complement and ensure the accuracy of his notes.

College of Arts and Law University of Birmingham Edgbaston Birmingham
B15 2TT United Kingdom

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The interview will be held under the Chatham House Rule:

"When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed".

Michael will not record any names or addresses in his notes. If you agree to an audio recording, this will be transcribed with any names removed and the recording will then be deleted. No individual will be identified in the final thesis or any other publication which uses the interview results. If/when quotes from interviews are used, they will be referenced based on the role of the interviewee, i.e. 'drafter', 'translator', 'lawyer-linguist', etc.

Participation in the interview is entirely voluntary and you may withdraw, without explanation, from all or part of the research at any time.

Confidentiality

All interview recordings and transcripts will be kept confidential, and will be stored on the University of Birmingham's secure servers. Only the researcher and project supervisors will have access to the data. Data will not be used for other purposes than described above, and third parties will not be allowed access to them (except if required by law). Your interview data will be held indefinitely on an anonymous basis in accordance with the UK Data Protection Act.

Anonymity

All data will be held and used on an anonymous basis, with no mention of your name. Any references to your interview data will be based on your role, i.e. 'drafter', 'translator', 'lawyer-linguist', etc.

Contact details

For further information about the research or your interview data, please contact:

PhD researcher:

Michael Krallmann

School of Law, University of Birmingham, Edgbaston, Birmingham, B15 2TT, UK

Email: [REDACTED]

If you have concerns/questions about the research you would like to discuss with someone else at the University, please contact:

Lead supervisor:

Professor Karen McAuliffe

School of Law, University of Birmingham, Edgbaston, Birmingham, B15 2TT, UK

Email: [REDACTED]

Second supervisor:

Dr Sofia Malamatidou

Department of Modern Languages, University of Birmingham, Edgbaston, Birmingham, B15 2TT, UK

Email: [REDACTED]

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[REDACTED] w:www.law.bham.ac.uk

Consent

I voluntarily agree to participate and to the use of my data for the purposes specified above.
I can withdraw consent at any time by contacting the interviewers.

TICK HERE: DATE202.....

Note: Your contact details are kept separately from your interview data

Name of participant:

Signature:

Email/ tel.:

Signature of researcher:

Two copies to be signed by both participant and researcher, one copy to be kept by each.

Annex 2: Interview guide

Topic	Open question	More specific questions	Comments
	<p>(a) Thank you for taking the time to meet and tell me about your work. The purpose of the interview is to support my thesis research, which is not least focusing on the legislative process and translation during that process. The aim today is to have a conversation, not for me to present a list of questions. I'm interested to learn about your role and your involvement or knowledge of the legislative process and its translation components.</p> <p>(b) Have you had a chance to read through the consent form and to sign it?</p> <p>(c) Perhaps we could start with you taking me through your role?</p>		<p>(A) <u>Q</u>: Why am I doing this research if I'm at a UK university.</p> <p>(B) <u>A</u>: Just doing research, not teaching EU law or anything. Also, I'm a German citizen, so it's relevant to me.</p> <p>(C) "That's really interesting, tell me more."</p>
EU legislative process			
	<p>(a) I'm particularly interested in the EU legislative process. Could you describe the process as you experience or know about it?</p>		<p>Eliminate leading comments from the notes so that don't feed the respondents with them.</p> <p>Keep it open and allow them to go in the direction they want to go in</p>
Different language versions			
	<p>(a) EU legislation is published in all the official languages. How do these come into being?</p> <p>(b) When/at what stages does translation occur?</p> <p>(c) Who does the translation work?</p> <p>(d) What is the process like for those tasked with translating?</p>	<p>(a) Is translation always done by 'professionals'?</p> <p>i. Do others, like e.g. MEPs, do their own translations and insisting on keeping them?</p> <p>(b) Does the translation process feature:</p> <p>i. Time pressures?</p> <p>ii. Other pressures?</p> <p>(c) What authority do translators have to insist on their version?</p> <p>i. Who has the final say?</p> <p>ii. GIGO?</p>	<p>If they ask for advice: Happy to learn from you today.</p> <p>Happy to send you a copy of the thesis once it's done. Too early to reach any conclusions.</p>

(e) How is the final version arrived at? Does someone have the final say on what a translation should be? If so, who?		
(a) I've looked into how the legislative process works and have a schematic overview here which I'd like to get your opinion on.	(a) Does the overview match your experience? If not, what are the differences? (b) Is the legislative process as clear-cut as shown in the schematic overview? (with different readings/rounds of review?) i. Are there unclear boundaries? ii. How else is the process 'messy'?	
Quality of language versions		
(a) Is work done to assure the quality of different language versions? (b) Do you consider quality assurance part of your role? (c) Tell me about any quality assurance you do. (d) What quality assurance do others do?	(a) What measures/steps are taken to assure quality?	
Divergences		
(a) Are all of the language versions the same?	(a) Is it an aim that the different language versions should be the same? i. 'The same' by what measure (content, form, effect, others)? ii. Can differences arise?	
(a) Do differences sometimes arise between language versions?	(a) How can divergences arise (causes)? (b) How often do divergences arise? Are they commonplace? (c) Are divergences considered a problem? i. Are some divergences more problematic than others? (Some an issue, some not?) ii. Are divergences classified in some way (error typology)?	

	<p>(d) Is there a hierarchy of divergences (not serious, less serious, serious)?</p> <ol style="list-style-type: none"> i. Is anything done to avoid/eliminate divergences? ii. If so, at what stage of the legislative process are steps taken? <ol style="list-style-type: none"> a. Pre-drafting b. Post-drafting c. Pre-publication d. Post-publication <p>(e) Others steps taken?</p>	
Revision		
(a) Tell about the revision process	(a) How is revision done?	
<p>(b) In my reading, I saw a reference to legal-linguistic revision possibly including a “legal consistency check of a target text with other language versions”. Are you familiar with this?</p> <p>(c) Another source refers to lawyer-linguists checking “the legal and linguistic consistency of legislative texts (already translated and revised) in the language of the competition with other language versions of the texts.”</p>	<p>(a) What sources of information are used referred to?</p> <ol style="list-style-type: none"> i. Does revision involve just a target text and a source text, or also other sources? <p>(b) Does the reviser refer to other language versions/compare with them (check of all language versions for consistency)?</p> <p>(c) Is there a set procedure for revision/does everyone do the same thing?</p>	
Horizontal comparison of language versions		
<p>(a) In my reading, I saw a reference to “an online system enabling translators to compare translations”. Are you familiar with this system?</p> <p>(b) The source I mentioned before about legal consistency checks also mentions “an occasional check of all language versions for consistency”. Are you familiar with such checks?</p> <p>(c) What are your thoughts on comparing different language versions with one another?</p>	<p>(a) Does the system allow for comparison of e.g. old and new German draft, or e.g. comparison of German with French?</p> <p>(b) Could comparing different language versions with one another be useful?</p> <ol style="list-style-type: none"> i. How/why/to whom would it be useful? ii. How could it be done? <p>(c) Are you aware of any technological advances or projects in this area?</p>	
Miscellaneous		
(a) In my reading, I came across a reference to the term ‘classical mistranslation’. What would you consider this to be?		

(b) In a dream scenario, what would your ideal way of working and/or works situation be?	
(c) And how does this compare to your reality?	

Annex 3: Confirmation of ethics approval



UNIVERSITY OF
BIRMINGHAM

Dear Karen McAuliffe, Sofia Malamatidou ,

RE: Phd Law and Language research

Application for Ethical Review: ERN_0903 -Mar 2023

Your project has been considered in line with the University of Birmingham's research ethics processes and on the basis of the information you have provided, it is understood that while your project does involve human participants, the project raises no substantial research ethics issues and therefore no further ethics review is required

Any adverse events occurring during the study should be promptly brought to the Committee's attention by the Principal Investigator and may necessitate further ethical review.

Please ensure that the relevant requirements within the University's Code of Practice for Research and the information and guidance provided on the University's ethics webpages (available at <https://intranet.birmingham.ac.uk/finance/accounting/Research-Support-Group/Research-Ethics/Links-and-Resources.aspx>) are adhered to.

Please be aware that whilst Health and Safety (H&S) issues may be considered during the ethical review process, you are still required to follow the University's guidance on H&S and to ensure that H&S risk assessments have been carried out as appropriate. For further information about this, please contact your School H&S representative or the University's H&S Unit at healthandsafety@contacts.bham.ac.uk.

Kind regards,

The Co-Chairs of the Humanities and Social Sciences Committee

E-mail: ethics-queries@contacts.bham.ac.uk

Annex 4: Nodes created and used in NVivo 12

06/11/2024 15:38

Code Structure
 PhD interviews
 06/11/2024 15:38

Hierarchical Name	Nickname	Aggregate	User Assigned Color
Node			
Nodes			
Nodes\Divergences		No	None
Nodes\Divergences - causes		No	None
Nodes\Divergences - frequency		No	None
Nodes\Interviewee role, title		No	None
Nodes\IT tools, AI		No	None
Nodes\Language versions - coordination		No	None
Nodes\Language versions - creation		No	None
Nodes\Lawyer-linguists		No	None
Nodes\Legal-linguistic revision		No	None
Nodes\Noun clusters example		No	None
Nodes\Ordinary legislative procedure		No	None
Nodes\Pivot languages		No	None
Nodes\QA - efforts made		No	None
Nodes\QA - horizontal comparison		No	None
Nodes\QA - horizontal comparison in practice - collation, concordance, coordination meetings		No	None
Nodes\QA - sampling of finished texts		No	None
Nodes\Quotes		No	None
Nodes\Regexfunction in SDLTrados		No	None
Nodes\Swiss system		No	None
Nodes\Use of English		No	None
Nodes\Wishlist of improvements		No	None
Nodes\Working conditions - time pressure		No	None

Annex 5: List of figures and tables

Figures

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Table 4: Example findings, back translation, English-German (page 333)

Table 5: Example findings, back translation, English-Norwegian (page 334)