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# Some reflections about the language of EU law and its interpretation

Robert Bray

## Foreword

The present paper reflects the content of the lecture held by Robert Bray, former head of the secretariat of the Committee on Legal Affairs of the European Parliament, on 24 April 2018 at the Law Department of the University of Verona within the PhD Course on International and European Legal Studies. In the context of its academic programme the selected cross-cutting topic has dealt with interpretation and its multifaceted application at different levels and in various sectors. The lecturer was thus invited to provide an insight of the European Union legal framework resulting from his high-qualified experience and knowledge of the law-making process where difficulties in the legislative developments are mainly linked to the different languages and respective different meanings.

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# Some reflections about the language of EU law and its interpretation

Robert Bray*

In the spring of 1980, British trawlers cast their nets in international waters (albeit claimed by the Poles) the lines of which were passed to waiting Polish vessels and their nets trawled, after a time the British trawlers drew up alongside the Polish vessels and the lines are taken on board. The nets were taken on board and 2500 tonnes of cod were discharged into the holds of the British trawlers. In return the British recompensed their Polish partners with mackerel and herring not found in those waters. This, at first sight somewhat bizarre, arrangement had a simple explanation: in 1979/1980 the fishing industry in the Community was in difficulties owing to declining catches, in particular of cod, and overcapacity in terms of fishing vessels. In the absence of an agreement between the EEC and Poland permitting Community vessels to fish in those waters, participation in joint fishing operations with Polish vessels seemed to be the means of enabling Community vessels to gain access to them.

In 1984, the Commission brought an action against the United Kingdom[1] which turned on the interpretation of Article 4 of Council Regulation No 806/68 on the common definition of the origin of goods[2]. That provision reads as follows:

> "Article 4
>
> (1) Goods wholly obtained or produced in one country shall be considered as originating in that country.
>
> (2) The expression "goods wholly obtained or produced in one country" means: …
>
> (e) products of hunting or fishing carried on therein,
>
> (f) products of sea-fishing and other products taken *from the sea* by vessels registered or recorded in that country and flying its flag." (emphasis supplied)

* Former head of the secretariat of the Committee on Legal Affairs of the European Parliament.

[1] Opinion of Advocate General Mancini in *Commission* v *United Kingdom* Case 100/84, ECLI:EU:C:1985:60.

[2] Official Journal, English Special Edition 1968 (I), p. 165.

Whereas the English version of letter (f) refers to the vessel which *takes the fish from the sea*. The French and Italian versions use the verbs "*extraire*" and "*estrarre*" whilst the German more prosaically falls back on "*gefangen*" (caught).

After reporting minutely on the linguistic and philological arguments of the parties, Advocate General Mancini states as follows:

> "Perhaps the Court will allow me to make a modest literary reference: I doubt whether Marguerite Yourcenar or Graham Greene would be prepared to read each morning a piece or two of Community legislation *'pour prendre le ton',* as Stendhal used to read articles of the *Code Civil*. In other words, I admire the wisdom of the Community legislature but not its careless and too often imprecise language. For instance, in the past I have had to interpret a regulation in which the chemical transformation of white or raw sugar into substances other than sugar is termed purely and simply 'disposal'. I am sure that each one of you can recount similar experiences. In those circumstances mobilising all the resources of Romance and Teutonic philology in order to read one meaning or another into the participle '*extrait*' seems to me a slightly absurd exercise: all the more so since, in my view, each of the meanings contended for by the parties ('drawn out' and 'separated from their environment') is legitimate and the secondary arguments — *'gefangen'* in Article 4 (2) (f) as against *'gewonnen'* in Article 4 (2) (h) — are equivalent and cancel each other out like the elements of certain zero-sum operations."

The Advocate General went on by noting that that, in Italy at least, the origins of the use of the term "*estrazione*" in this context went back to the late nineteenth century and stemmed from a dispute between various departments of State as to which of them should be responsible for fisheries. In the end, fishing was determined to be an industry based on a resemblance which someone perceived between fishing and mining.

In this engaging opinion, Mancini even resorts to 19th Century English case law on the law of trespass[3] to conclude that it is common sense that catching and netting amount to the same thing, irrespective of the risk that the net will tear. But, after this exegesis, the Advocate General makes his determination on the basis of the "essential feature" of the rule defining the origin of the fish, that is to say, the nationality of the vessel doing the fishing. "Vessel", he points out, does not signify merely the hull but the hull with all its accessories and appurtenances, including *the nets*.

[3] *Young* v. *Hichens*, 1843,1843, 6 QB 606.

The Court agreed with its Advocate General in a particularly clear judgment. After pointing out that a comparative examination of the various language versions of the regulation did not enable a conclusion to be reached in favour of any of the arguments put forward and so no legal consequences could be based on the terminology used, it stated that in the case of divergence between the language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part[4].

Moving now to 1998, there is the "*Man in Black*" case[5]. Under the relevant Community legislation[6], where cigarettes (subject to certain limits) are acquired by private individuals for their own use and transported by them, excise duty is charged in the Member State in which they are acquired. The Man in Black company offered to act as an agent for individuals in the United Kingdom in buying a maximum of 800 cigarettes for them in Luxembourg, where the excise duty was considerably lower, and transporting them to the United Kingdom in return for a fee.

The Court of Justice rejected the argument that the maxim of Roman law *qui facit per alium facit per se* should be applied in this case even though neither the English version of the directive nor the French, Italian, Spanish, German, Dutch or Portuguese versions excluded the possibility of using an agent.

First, the Court pointed out that the Community legal order did not, in principle, aim to define concepts on the basis of one or more national legal systems unless there was express provision to that effect.[7] Secondly, *qui facit per alium facit per se* derives from civil law and does not necessarily fall to be applied in the sphere of fiscal law, where the objectives are of a quite different nature. Thirdly, where the Community legislature intended the directive to apply in the event of the involvement of a third party it did so by means of an express provision.

As far as the provision of the directive at issue was concerned, none of the language versions expressly provided for such involvement and, on the contrary, the Danish and Greek versions indicated particularly clearly that, for excise duty to be payable in the country of purchase, transportation must be effected personally by the purchaser of the products subject to duty.

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[4] *Regina* v. *Pierre Bouchereau* Case 30/77 ECLI:EU:C:1977:172.

[5] *The Queen* v. *Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham* Case C-296/95 ECLI:EU:C:1998:152.

[6] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124.

[7] *Corman* Case 64/81 ECLI:EU:C:1982:5.

The applicants in the main proceedings submitted, however, that if the Danish and Greek versions were not consistent with the other versions, they were to be disregarded, on the ground that, at the time when the directive was adopted, those two Member States represented in total only 5% of the population of the 12 Member States and their languages were not easily understood by the nationals of the other Member States.

After pointing out that the contradiction between the Danish and Greek versions on the one hand and the other language versions on the other only arose if the argument put forward by the applicants in the main proceedings was accepted, the Court pointed out that to discount two language versions would run counter to the Court's settled case-law to the effect that the need for a uniform interpretation of Community regulations made it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages.[8] All the language versions must, in principle, be recognised as having the same weight. Union "legislation is drafted in several languages and […] the different languages are equally authentic. An interpretation of a provision of [EU] law thus involves a comparison of the different language versions."[9]

Thus, although Danish and Greek are never used to draft Union legislation, recourse to the Danish and Greek versions may be had in order to interpret it. This reflects the principle of linguistic equality, which enjoys a "quasi constitutional" status.[10] It does not mean, however, that the Court of Justice "gives precedence to certain language versions over the others, simply that those versions may serve to strengthen the contextual and/or teleological interpretation upon which the ECJ's reasoning primarily rests".[11]

All the legislation which fell to be interpreted in the judgments discussed above was drawn up before Declaration No 39 on the quality of the drafting of Community legislation, annexed to the final

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[8] *Wörsdorfer, née Koschniske,* v. *Raad van Arbeid* Case 9/79 ECLI:EU:C:1979:201, para. 6.

[9] *Srl CILFIT and Lanificio di Gavardo SpA* v. *Ministry of Health* Case 283/81 ECLI:EU:C:1982:335, para. 18.

[10] See D. Hanf and E. Muir, "Le droit de l'Union européeen et le multilinguisme", in D. Hanf, E. Muir and K. Malacek (eds), *Langue et construction européenne* (Cahiers du Collège d'Europe, Bruxelles, 2010 at 23), cited in K. Lenaerts and J. A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, EUI Working Paper AEL 2013/9, Academy of European Law Distinguished Lectures of the Academy, http://hdl.handle.net/1814/28339. See in particular, section 2. Textualism and Multilingualism, at 8.

[11] K. Lenaerts and J. A. Gutiérrez-Fons, n. 10, at 10, citing *Henke* v. *Gemeinde Schierke and Verwaltungsgemeinschaft Brocken* Case C-298/94 ECLI:EU:C:1996:382, para.15: [t]his interpretation, moreover, is borne out by the terms used in most of the language versions of the Directive […] and *is not contradicted by any of the other language versions of the text*" (emphasis supplied).

act of the Amsterdam Treaty[12], which followed on from the 1992 Edinburgh European Council Conclusions[13] and the common guidelines for the quality of drafting of Community legislation adopted by the European Parliament, the Council and the Commission in 1998[14]. In 2000 the Legal Services of those three institutions published the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation[15] pursuant to that agreement in order to develop the content and explain the implications of those guidelines, by commenting on each guideline individually and illustrating them with examples. It was intended to be used by everyone who was involved in the drafting of the most common types of Community acts.

Indeed, the three institutions have long employed lawyer-linguists, persons who have both a legal and a linguistic qualification, to carry out legal-linguistic revision of legal texts. The experts from the Council and the European Parliament vet all legislation adopted under the ordinary legislative procedure. Representatives of the Parliament's lawyer-linguistics attend committee meetings and trilogues[16] with a view to dealing with any legal or linguistic problems that might arise in the course of the adoption of legislation. There are, however, one or two shortcomings which are worth mentioning.

First, the Commission's lawyer-linguists verify only Commission acts, for instance decisions in competition cases, and not legislative proposals. This has sometimes given rise to difficulties as Union legislation is drawn up in a *langue de base* (English or French, but most often now English[17]) often by non-native speakers, the various language versions are not cross-checked against each other and sometimes translations are not updated to take account of changes made in the basic version following the inter-service consultation which takes place prior to the adoption of the proposal by the College of Commissioners.[18]

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[12] OJ C 340, 10.11.1997, p. 139.

[13] https://www.consilium.europa.eu/media/20492/1992_december_-_edinburgh__eng_.pdf.

[14] Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17.3.1999, p. 1. This had been preceded by Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, OJ C 166, 17.6.1993, p. 1, and the Commission's general guidelines for legislative policy of 18 January 1996, document SEC(1995) 2255/7.

[15] The latest version of 18 July 2016 is available here: https://publications.europa.eu/en/publication-detail/-/publication/3879747d-7a3c-411b-a3a0-55c14e2ba732/language-en.

[16] The meetings held between the European Parliament, the Council and the Commission with a view to reaching first- or second-reading agreements on proposals for legislation. See R. Bray, *Better Legislation and the Ordinary Legislative Procedure, with Particular Regard to First-Reading Agreements*, The Theory and Practice of Legislation, Vol. 2, 2014 – Issue 3, 283-291.

[17] In all likelihood, English will continue to be an official language of the European Union after the United Kingdom has left if only because Regulation No 1 determining the languages to be used by the European Economic Community (OJ English special edition: Series I Volume 1952-1958 p. 59), as amended, can be amended only by a unanimous vote (Article 217 EEC, now Article 342 TFEU).

[18] This gave rise to difficulties in particular in the case of the proposal which give rise to Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107. This text

Secondly, the verification of the final text takes place after the vote in the parliamentary committee but before the vote in the plenary session and in the Council. If this is not possible, the revised text becomes the subject of a corrigendum adopted by the legislating institutions. In this context, it is worth bearing in mind the "*laying hens*" judgment[19] in which a directive was annulled because the General Secretariat of the Council had made amendments to the statement of reasons of the instrument after the Council had voted which went beyond "simple corrections of spelling and grammar".

Lastly, although there has been a certain amount of case law on impact assessments,[20] none of it has dealt with regulatory impact assessments as an aid to the interpretation of specific pieces of legislation, namely as part of the *travaux préparatoires*. As Lenaerts and Gutiérrez-Fons point out "Externally, contextual interpretation examines the (legislative) decision-making process that led to the adoption of the EU law provision in question. Thus, it makes use, in particular, of *travaux préparatoires*."[21]

Ever since the first Interinstitutional Agreement on Better Law-Making,[22] the legislative institutions have considered that more frequent use of impact assessments (both ex ante and ex post) will help towards the objective of securing good quality legislation. The 2016 Interinstitutional Agreement on Better Law-Making[23] stipulates that

> "the Commission will carry out impact assessments of its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts. The initiatives included in the Commission Work Programme or in the joint declaration will, as a general rule, be accompanied by an impact assessment. …. The final results of the impact assessments will be made available to the European Parliament, the Council and national Parliaments, and will be made public along with the opinion(s) of the Regulatory Scrutiny Board at the time of adoption of the Commission initiative."
>
> The European Parliament and the Council are to "take full account of the Commission's impact assessments. To that end, impact assessments shall be presented in such a way as to facilitate the consideration by the European Parliament and the Council of the choices made by the Commission."

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contained difficult legal concepts which were hard to translate and there were discrepancies between the various language versions of the original Commission proposal. With a view to dealing with potential drafting/translation problems, it should be noted that two of Parliament's lawyer-linguists attended every meeting of the negotiating team and had even taken part in the earlier informal meetings (see R. Bray, n. 16).

[19] *United Kingdom* v. *Council* Case 131/86 ECLI:EU:C:1988:86, para. 31 et seq.

[20] *BASF Agro BV and Others* v. *Commission* Case T-584/13 ECLI:EU:T:2018:279; *Afton Chemical Limited* v. *Secretary of State for Transport* Case C-343/09 ECLI:EU:C:2010:419; *Poland* v. *Parliament and Council* Case C-5/16 ECLI:EU:C:2018:483.

[21] K. Lenaerts and J. A. Gutiérrez-Fons, n. 10, at 13.

[22] Interinstitutional agreement on better law-making, OJ C 321, 31.12.2003, p. 1.

[23] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1

The Interinstitutional Agreement goes on to provide that the European Parliament and the Council may carry out impact assessments in relation to their substantial amendments to the Commission's proposal. In addition, the Commission may, on its own initiative or upon invitation by the European Parliament or the Council, complement its own impact assessment or undertake other analytical work it considers necessary and the co-legislators are to take full account of any additional elements provided by the Commission in that context.

It is noteworthy in this connection that ever since the establishment of the European Parliament's Directorate-General for Parliamentary Research Services (EPRS, the acronym standing for "European Parliamentary Research Service") [24] on 1 November 2013 [25] it has provided the legislative select committees systematically with appraisals of the Commission's impact assessments. On request, it will produce more detailed appraisals. These documents are presented in committee and made available to the public on-line.

This would suggest that impact assessments have the potential to become a useful tool for the interpretation of Union legislation. As Lenaerts and Gutiérrez-Fons observe:

> "the more public access to *travaux préparatoires* is granted, the more the ECJ will take them into account. This may explain why at the beginning of the European integration project, *travaux préparatoires* did not play a major role when the ECJ was called upon to interpret secondary EU law, as they were not generally published in the Official Journal. As Kutscher noted when he was the President of the Court, the interpretation of EU law cannot be based on documents which are not accessible to the public.[26]"

[24] The Directorate General consists of the Directorate for the Library, the Directorate for Impact Assessment and European Added Value and the new Members' Research Service, which provides briefing and research services for individual MEP publishes a range of synoptic publications. The Directorate for Impact Assessment and European Added Value consists of four units, for (i) ex-ante impact assessment, (ii) ex-post impact assessment, (iii) European added value and (iv) science and technology options assessment (STOA).

[25] See Preparing for Complexity – European Parliament in 2025 – Final report by the Secretary-General, http://www.europarl.europa.eu/the-secretary-general/en/activities/documents/docs-2013/docs-2013-april/documents-2013-april-2.html and the EPRS webpage http://www.europarl.europa.eu/the-secretary-general/en/organisation/directorate-general-for-parliamentary-research-services.

[26] H. Kutscher, 'Methods of Interpretation as Seen by a Judge at the Court of Justice' in *Reports of a Judicial and Academic Conference held in Luxemburg on 27-28 September 1976*, at 1-21.