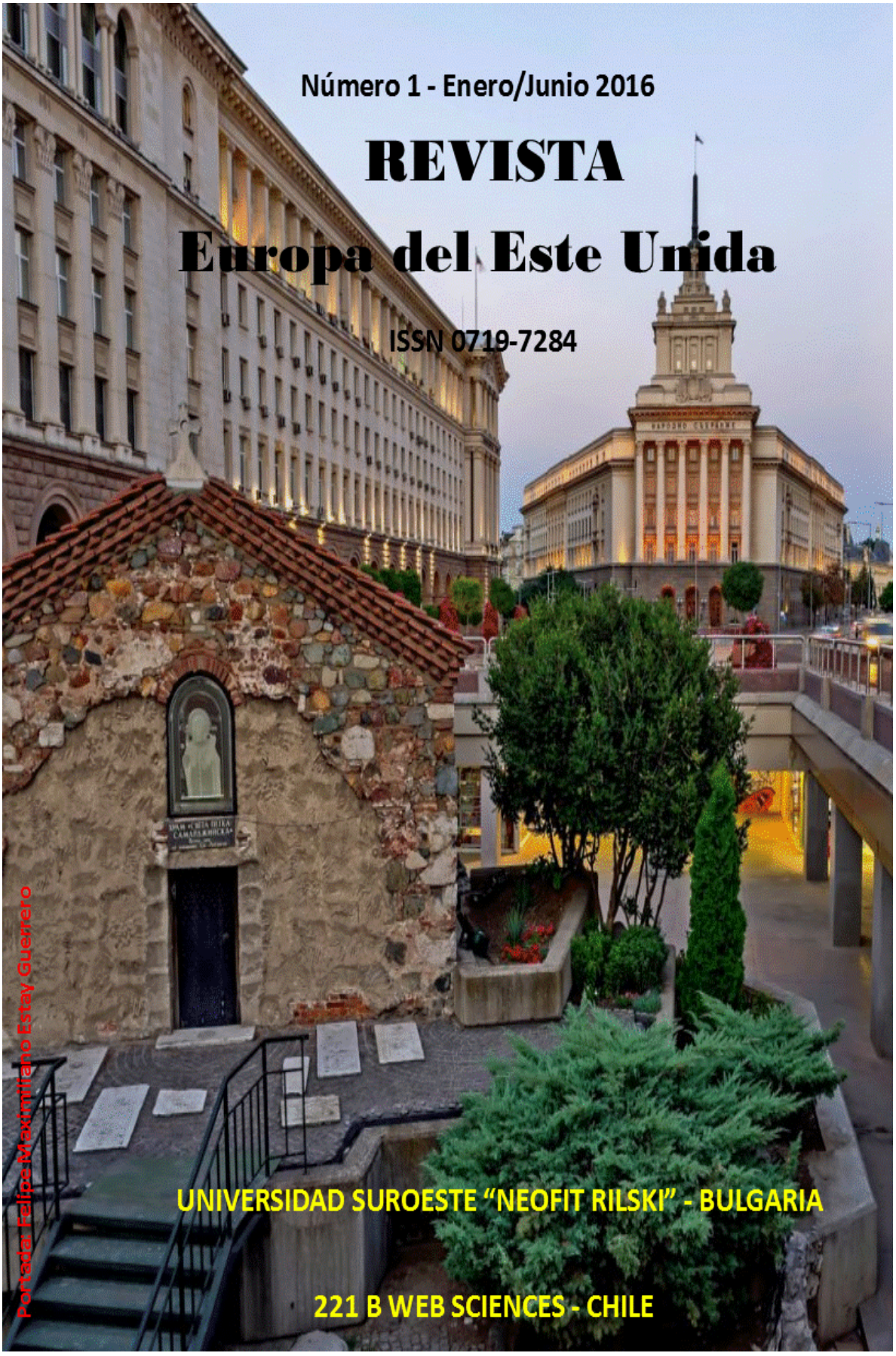

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LANGUAGE BOUNDARIES – MEANING OF TERMS WITHIN THE CONTEXT OF THE CASE-LAW OF CJEU

FRONTERAS LINGÜISTICAS: DENTRO DEL CONTEXTO DE LA JURISPRUDENCIA DE LA CJEU

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Abstract

The article is an attempt at examining the language boundaries among Member States, particularly the interpretation of meaning of terms within the context of the case-law of CJEU. The problems faced by the multilingual court are illustrated through a few cases in which judgments are made by comparing different language versions of the legislation. Despite the language boundaries caused by multilingualism and the obstacles before the CJEU, which needs to interpret and apply legislation, the system works, being constantly oriented towards improvements and new practices.

Keyword

Multilingualism – Court of justice of the European Union – Case-law of CJEU

Resumen

El artículo examina la frontera lingüística entre los estados miembros de la Unión Europea, en particular, la interpretación del significado de los conceptos en el contexto de la jurisprudencia del Tribunal de Justicia Europeo. Los problemas con los que el corte multilingües se enfrenta, están ilustrados por varios casos en que la decisión jurídica está tomada mediante la comparación de diferentes versiones lingüísticas de la legislación. A pesar de la frontera lingüística causada por el multilingüismo y las barreras frente del Tribunal de Justicia de la Unión Europea, dedicándose al interpretar y aplicar la ley, el sistema funciona constantemente y se centra en mejorar e introducir nuevas prácticas.

Palabras Claves

Multilingüismo – Corte de Justicia del Tribunal de la Unión Europea – Práctica Jurídica de la CJEU

The importance language has in legal practices cannot be disregarded. Since the Court of Justice of the European Union (CJEU) in Luxembourg is a multilingual court in its essence, it faces multifarious challenges regarding the acceptance of the Court's case-law in the Member States (MS). It is exactly multilingualism – understood as the use of multiple equally authentic languages within one legal system[1] – that creates new and difficult jobs for legal practices, especially legislation. The translation of documents into all 24 official languages of the European Union (EU) has influence on their quality. What is more, it brings on to issues of interpreting meaning of terms within the realm of the case-law of CJEU. This makes language boundaries among MS even more audible since the reasoning of the CJEU has been the object of constant criticism due to its lack of transparency. As a source of law, the case-law of CJEU appears to be complicated because it adds up to the doubts on the restrictions before the CJEU judgments. However, multilingualism is what makes Europe more democratic and despite all the obstacles before the Court, which needs to interpret and apply legislation, the system works, being constantly oriented towards improvements and new practices.

The problems could not be solved through the use of EU database with shared EU concepts as each MS of the Union uses its own legal system, style and accepted register. There are specific rhetorical, social and cultural requirements and the document should go through a process of adaptation and text processing created by an international organization to the legal and socio-cultural characteristics of different national target users, so that it is a valid document, originating from the EU and effective in the local legislation of new Member States. Yet, lawyers are reluctant to admit that the problem of equivalence in legal texts is insoluble, making translation a myth, and refrain from including linguistics in the discussion. Looking at the bright side, the presence of several authoritative multilingual versions in EU legislation could have a beneficial effect as well.

Multilingual states and courts as well as supranational organizations use the principles of equal authenticity of language versions of legal documents by means of a combination of drawing up and translating in different amounts. Multilingual and multilegal states such as Canada and Switzerland are examples of diverse approaches. They can include parallel drafting of the whole act in two separate languages by two drafters who do not work together, without translating; drafting of alternate of parts of the act, some are drafted in language A while others in language B, then translated into languages B and A; shared drafting of the text separated into two halves, each half drafted in its own language, and afterwards translated into the other language(s); double-entry drafting, which is connected with one bilingual drafter in charge of the two versions and joint drafting, meaning the whole document is drawn up by two drafters in two languages.[2] Drafting and co-drafting bilingual documents without interpretation entirely exclude the concepts of a source and target language text, and avoid tension between the original and the translation.

Within the framework of the case-law of CJEU the role of argumentation for the admissibility of the legal judgment is probably even more important than in domestic law. One of CJEU's tasks is to harmonize the legal meaning anywhere in the EU. However, if the legal society is not convinced in its interpretation, it is hard to achieve a harmonization. As

[1] O. Łachacz, R. Mańko, Multilingualism at the Court of Justice of the European Union: Theoretical and Practical Aspects, Studies in Logic, Grammar and Rhetoric 34 (2013), 75.

[2] A. Doczekalska, Drafting or Translation – Production of Multilingual Legal Texts. In F. Olsen, A. Lorz, and D. Stein (eds), Translation Issues in Language and Law, The International Journal of Speech, Language and the Law (Basingstoke/New York: Palgrave Macmillan, 2009), 165.

the interpretation of the CJEU may be contrary to the wording of individual language versions, or rather, the interpretation is usually associated with words in a national context, the Court should convince the legal society that despite this digression, the judgment made is the most appropriate one.

In *The Queen v Commissioners of Customs & Excise, ex p EMU Tabac*[3], two language versions of a certain clause are more understandable than others. The provision relates to the Directive on excise duties. It involves the conditions under which people, who live in a specific place in a Member State, have to pay there an excise duty on goods obtained for their personal use in another Member State. The issue is whether people might avoid paying excise duties in the country of residence by hiring a third party who might buy the products for them or whether the purchase should be carried out by the person for whom the products are meant. The Court defines that neither of the language versions gives an apparent involvement of a third party and that "the Danish and Greek versions indicate 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."[4] There have been a lot of arguments related to the versions, which is they should be disregarded based on the fact that when the directive in question was adopted, Denmark and Greece represent only five percent of the Union's population and that to a great extent the countries are not understood by the citizens of other Member States. Therefore, it is not surprising that this unpleasant argument is not adopted by the Court, testifying that the Danish and Greek versions do not counter the other language versions. It goes on in paragraph 36. There it is stated that to ignore two language versions, what has been suggested by the applicants in the major proceedings, would oppose the Court's settled case-law, having the general meaning that the necessity for an equable interpretation of Community regulations makes it improbable for the text of a provision to be analysed in isolation. However, it is required that it should be interpreted and applied in the light of the versions that exist in the other official languages. Finally, all language versions have to be recognised as being identical and this cannot vary regarding the size of the population of the Member States using the language under consideration.

Where one version is irrelevant compared to the others, the Court would not allow it to excel above the rest. For instance, *Denkavit Internationaal and Others v Bundesamt für Finanzen*[5]*,* where the Court attaches importance to the use of present tense in all language versions except the Danish of an indent in a Directive. According to the CJEU, "the interpretation is not invalidated by the fact that the Danish version uses a past tense"[6], although the Court seeks confirmation for its point of view in the Directive's objective as it is explained in particular in its Preamble.

There are certain cases in which the comparison of various language versions makes it clear that the text is not convincing. In *Regina v Bouchereau*[7] United Kingdom's Government relies on the usage of one and the same term in an English text of particular provisions of the Community Directive. The Court observes that[8], a comparison of the

[3] Case C-296/95 [1998] ECR I-1605 and Case C-321/96, Mecklenburg v Kreis Pinneberg – Der Landrat [1998] ECR I-3809.
[4] Para. 33.
[5] Cases C-283/94, C-291/94 and C-292/94 [1996] ECR I-5063.
[6] Para. 25.
[7] Case 30/77 [1977] ECR 1999, Para. 13.
[8] Case 30/77 [1977] ECR 1999, Para. 13. See also Case 29/69 Stauder v Ulm [1969] ECR 419; Case 9/79 Koschniske v Raad van Arbeid [1979] ECR 2717.

different language versions of the provisions under discussion makes it evident that with the exclusion of the Italian text all the other versions use different terms in each of the two articles. As a result, no legal consequences can be based on the terminology that is used. A similar issue can be found in *Givane and Others*[9], which concerns the interpretation of Regulation (EEC) 1251/70. It is about the right of workers to stay in the territory of a Member State after having been employed in that State[10]. According to Art. 3(2), if a worker dies during his working life and before having obtained the right to remain in the territory of the State concerned, members of his family shall be entitled to stay there permanently. This shall happen on the condition that on the date of his decease the worker had lived continuously in the territory of that Member State for a period of at least two years. The problem that is arising is if it is needed a period of two years of continuous residence to be set up in the period right before a worker's death. Another issue is if it could be set up by a period of continuous residence which happens earlier in the worker's life? The Court started scrutinizing the wording of Art. 3(2). What appears is that the wording of the first indent of this article of Regulation No 1251/70 in French, German and Italian (being the majority of the present language versions till the date the document was adopted) implies the two-year period lasts until the time of the worker's death. But the wording in the other provision's versions is not so clear. The Spanish, Danish, Greek, English, Dutch, Portuguese, Finnish and Swedish versions look more neutral regarding the chronological relation between the two-year continuous residence and date of the worker's death. Since according to the settled case-law, the various language versions of a provision of Community law need to be identically interpreted, the Court concludes that a literal interpretation of Article 3(2) does not give an "unequivocal answer" to the question discussed[11].

When there are cases like these, the Court takes into account and should take into account the aim of the provision and its legal context as significant. In *Givane* the Court accepts that it is necessary to place the expression "for at least two years" in the first indent of Article 3(2) of Regulation No 1251/70 in its context and to interpret it in relation to the spirit of the provision in question"[12]. The main scheme of Art. 3, interpreted in relation with another provision of the Regulation, maintains the view that the two years should immediately go before the worker's death. This view is also compatible with the objectives of Art. 48 (later 39) of the EEC Treaty and the Regulation in general. This condition accepted in Art. 3(2) is meant to make an important connection between that Member State and that worker and his family, and to ensure a particular level of their integration in the society of that State.[13] Such a relation cannot be endorsed if it is sufficient for the worker to live for at least two years in that State at a stage of his life, even in the distant past.[14]

In a contrary way, the Court might search for support in different language versions for an interpretation it has encountered through a teleological approach[15]. In *Henke v Gemeinde Schierke and Verwaltungsgemeinschaft "Brocken"*[16]*,* for instance, the issue is if

[9] Case C-257/00 [2003] ECR I-345. See also Cases C-267/95 and C-268/95 Merck and Others v Primecrown and Others and Beecham and Europharm [1996] ECR I-6285.
[10] OJ Eng Sp Ed 1970 (II) 402.
[11] Case C-257/00 [2003] ECR I-345, Para. 38.
[12] Para. 38. See Merck v Primecrown, Para. 22.
[13] Case C-257/00 [2003] ECR I-345, Para. 46.
[14] Para. 47.
[15] An interpretation which takes account of the objectives and functions that the legislator seeks to give a legal text.
[16] Case C-298/94 [1996] ECR I-4989. Cf Case C-84/95 Bosphorus v Minister for Transport, Energy and Communications, Ireland and Attorney General [1996] ECR I-3953.

a directive on ensuring employees' rights if there should be transfers of undertakings of a business or parts of businesses[17] will be applicable to a transfer of administrative functions from a municipality to a grouping composed by municipalities to support their administration. The Court observed that, since it is obvious from the preamble to the Directive, it arranges to guard workers against the possibly adverse outcome for them of alterations in the undertakings resulting from economic tendencies at a national and Community level, via, inter alia, transfers of undertakings, businesses or parts of businesses to other employers as a result of transfers or mergers.[18] Thus, the reorganization of the public administration's structure or the transfer of administrative functions among the municipal authorities does not constitute "transfer of undertakings" within the meaning of the Directive[19]. According to the Court, this interpretation

> "is borne out by the terms used in most of the language versions of the Directive in order to designate the subject of the transfer … [then the Court cites a number of them] … or the beneficiary of the transfer… [again the Court cites several language versions] … and is not contradicted by any of the other language versions of the text"[20].

Interpreting has been suitably depicted as 'an imperfect process in an imperfect world'[21], which to a great extent is applicable to translation, too. The discrepancies between the legal systems are among the main difficulties translators come across and can be due to a lack of equivalents to differences in communicating. In view of this, the publication of the interdisciplinary volume *Translation Issues in Language and Law*, edited by Frances Olsen, Alexander Lorz and Dieter Stein, is more than timely[22]. Its writers are mainly lawyers and researchers in the area of law. Together with linguists and translators they explore the issues which emerge during the written and spoken multilingual communication in various cultural and linguistic legal settings. Almost every chapter notes the facts that are familiar to linguists on account of different histories and traditions. The legal systems have drawn up different procedures, documents and thus various concepts and terms. Taking this into consideration, the diverse linguistic and legal communication is acknowledged. Whatever form it takes, it is anything but transparent. The translation is a structural part of their discussions. European lawyers are usually forced to utilize a foreign language, particularly English, in numerous international business agreements. This could cause problems in understanding the concepts and transformation of common legal concepts in civil law systems and the opposite. Lawyers in Europe that decide to interchange thoughts in English, do so in its own damage. This means that they fail to express themselves appropriately in a language that is not their own. This in turn means that they are not clear enough and convincing. This argument is typical of Europe when it is compared to the practical American one.

Working with bilingual contracts and multilingual documents of international organizations pose a number of questions to lawyers. After EU's enlargement in 2004, and after the accession of Bulgaria, Romania and Croatia, the Union and the CJEU regularly

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[17] Dir 77/187, OJ 1977 L 61/26.
[18] Case C-298/94 [1996] ECR I-4989, Para. 13.
[19] A. Arnull, The European Union and its Court of Justice. Oxford European Community Law Library, Second Edition, 608-611.
[20] Case C-298/94 [1996] ECR I-4989, Para. 15.
[21] F. Olsen, A. Lorz, and D. Stein (eds), Translation Issues in Language and Law, The International Journal of Speech, Language and the Law (Basingstoke/New York: Palgrave Macmillan, 2009), 256pp + xi, Reviewed by Ludmila Stern, 161.
[22] F. Olsen, A. Lorz, and D. Stein (eds) (2009), Translation Issues in Language and Law… 161.

make 24 multilingual versions of legal documents. This work is done by drafters and interpreters. All versions have the same status and should not be treated as translations of one original version. These versions have been produced by means of translation. Achieving equivalence has been one of the challenges[23] the Union is faced with. The lawyer-linguists working with these documents, have run into the abovementioned problems, such as a lack of adequate understanding of the document in a foreign language, misunderstanding the true meaning of legal lexical terms in different languages and reliance on misleading similar words to identify the meaning.

It can be inferred that a multilingual document that originated through drafting rather than translation seems to stop being the object of translation studies. It requires that its creator be recognised as an author or co-author rather than translator.[24] These new practices lead to redefining qualifications, role and professional identity of the writers of multilingual documents. Furthermore, they lead to defining whether they are interpreters that specialise in law, lawyers, linguists, lawyer-linguists or professionals with an even more complicated expertise as drafters, interpreters or lawyers. All of these considerations call for a more interdisciplinary approach to legal texts within the realm of the case-law of CJEU, with lawyers turning to linguists' for advice, and seeing the future of comparative law in the efforts of an interdisciplinary team.

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