Behind the Scenes at the European Court of Justice

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BEHIND THE SCENES AT THE COURT OF JUSTICE: DRAFTING EU LAW STORIES

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Introduction

This paper presents a 'behind the scenes' look at the Court of Justice of the European Union (CJEU) with the aim of uncovering the functioning of that Court in a way that is not often considered in standard EU legal narratives. Providing a better understanding of the inner workings of the environment in which a significant part of EU law is created allows scholars across disciplines to work towards delimiting the inconsistencies that inevitably arise in the multilingual EU legal system.

It is not difficult to see why the CJEU interests scholars across many disciplines. Through its case law it has crafted an innovative constitutional architecture and system of regulation and has been a major driver of the European integration process.[1] Legal and political science scholars, in particular, have written a great deal about the CJEU.[2] Historically, commentators have suggested that the CJEU, left to its own devices and 'tucked away in the fairytale Grand Duchy of Luxembourg',[3] was able to implement its own EU integration agenda, largely flying under the political radar of the Member States. More recently however, a new literature has emerged, which challenges the notion of 'integration by stealth', showing that national governments were not only aware of this integration process, but actually (at least in the case of Germany)[4] were broadly facilitative of it. Those more recent studies, and the contributions in the present volume, do something that the preceding legal and political science literatures haven't tended to do: they look at what is happening behind the scenes of the CJEU's case law. These EU law stories bring a new dimension to our understanding of individual cases and to the narrative of EU law more generally.

Most of the literature on the CJEU focuses on its judgments: on what those judgments say and what impact they may have on EU policy and the EU legal order. Students and commentators alike consider the meaning and implications of the words chosen by the Court in those judgments. Furthermore, political science and legal scholars have generally treated the CJEU as a unitary body.[5] This is in a large part due to necessity since the deliberations of the CJEU are secret and no dissenting opinions are published. As Pollack states:

> "Faced with such a closed court, both legal and political science scholars have made a virtue of necessity, treating the Court as a single body, ignoring the diversity of

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[1] Cf. Harmsen and McAuliffe (2015).
[2] Ibid
[3] Stein (1981).
[4] Davies (2012).
[5] Vauchez, (2012), p. 52.

backgrounds and views of its judges, and imputing preferences to the Court as a whole."[6]

However, while the Court may be obliged to express itself with one voice, it is of course staffed by individuals from Member States with diverse social and educational backgrounds, languages, and cultures. The case law that it produces is not simply drafted by majestic figures in long amaranth robes,[7] alone in their secret deliberations, but is created through a unique multilayered and multilingual process. This paper tells the story of that process and the actors involved in it. By understanding the many stages of and people involved in that process we can develop a more nuanced understanding of the CJEU's jurisprudence, and of EU law more generally.

Methodology

This paper is based on fieldwork research, interviews and participant observation, carried out at the CJEU between 2002 and 2013. The interview sample consisted of 78 interviews in total (56 lawyer-linguists; 5 judges; 3 advocates general and 14 référendaires).[8] Participant observation involved observing the interactions among lawyer-linguists and between those lawyer-linguists and members of the Court and their référendaires,[9] both in professional contexts such as meetings, seminars etc. and more informal contexts such as Court social functions, coffee breaks, lunchtimes etc.; engaging to some extent in those activities; interacting with participants socially, and identifying and developing relationships with key stakeholders and gatekeepers.

Processing a case through the Court of Justice

The limits of most EU law scholars' interest in how the Court of Justice works generally extend to the procedure followed in various direct and indirect actions before that Court.[10] However, there is far more involved in the working of the CJEU than is elaborated in most treatises on that institution. This section sets out how a case is processed from application to final judgment. EU law scholars generally spend little time considering that process, but such an understanding is helpful in developing a fuller understanding of the subsequent 'output' of the CJEU (its case law) and the consequent EU law narrative.

When a case comes before the CJEU it is allocated to a particular chamber[11] and judge rapporteur. The judge rapporteur is responsible for managing the case and, following the chamber's secret deliberations, writing the judgment. Certain cases will also be allocated to

[6] Pollack (2013).
[7] Le Figaro, 1954, as referred to in Cohen (2013), p. 21.
[8] Apart from slight editing (in parentheses), the quotations in this paper are as they were recorded. Interviewees are identified only as far as the group to which they belong.
[9] The personal legal assistants who work for the judges and advocates general at the CJEU.
[10] McAuliffe (2013), p. 862.
[11] There are currently 10 chambers at the Court of Justice and 9 at the General Court. Composition of the chambers is listed on the Court's website: www.curia.europa.eu. Cases are allocated to particular chambers by the President of the Court (or the President of the General Court where relevant).

an advocate general, who will deliver an opinion on how he/she thinks that the Court should rule.[12] The opinion is delivered, in open court, prior to the chamber's deliberations.

A case can be brought before the Court in any one of the 24 official languages of the European Union,[13] and each case will have an official 'language of procedure'. In references for preliminary rulings, the language of procedure is the language of the national court that has made the reference. In direct actions, the language of procedure is chosen by the applicant, unless a defendant is a Member State or a natural or legal person holding the nationality of a Member State, in which case the language of procedure is the official language of that state. Member States are entitled to use their own language in their written statements and observations and their oral submissions when they intervene in a direct action or participate in a preliminary reference procedure. The CJEU declares only the version in the language of procedure the authentic version of a judgment. For practical purposes, however, the Court operates in a single working language: French.[14] The very first step in the process of a case file through the CJEU therefore is translation of the application into French.

Once an application has been translated into French and allocated to a judge rapporteur, the judge rapporteur, in turn, allocates the case to one of his/her personal legal assistants, known as référendaires. That référendaire has the responsibility of managing the case file and drafting a preliminary report. The content and structure of the preliminary report tends to vary from judge to judge. However it usually includes a brief introduction setting out the point of the case, a summary of the legal and factual background and the submissions of the parties and observations and recommendations of the judge rapporteur. The Court will then decide what further steps to take, in particular whether to deal with the case in plenary session or refer it to a Chamber. It will also decide whether or not there should be an oral hearing.[15]

In cases that include an advocate general's opinion, the judge rapporteur and his/her référendaire(s) must wait to receive that opinion before beginning to draft the substance of the judgment. In some straightforward cases, where the judge and/or his/her référendaire(s) can read the language of procedure, some of the preparatory work can be done at an earlier stage; but generally the judgment cannot be prepared before receiving the advocate general's opinion. Also, the opinion usually has to be translated into French as, historically, advocates general write their opinion in their own mother tongue.[16] The judgment is drafted in French.

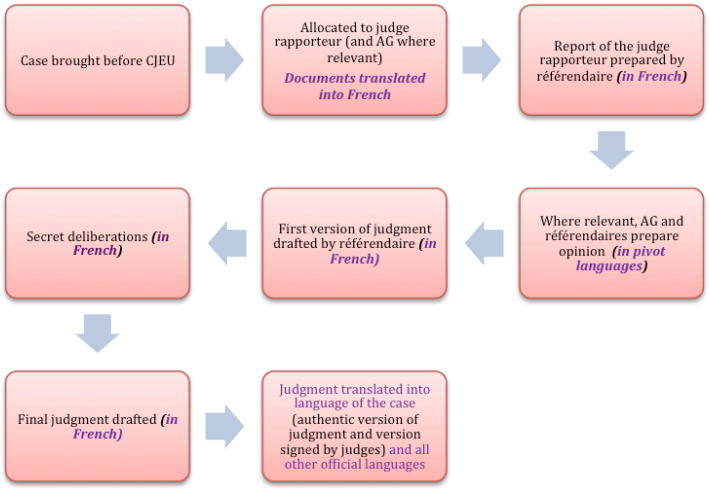
Students of EU law, and indeed many established scholars, are often surprised to learn that the members of a Chamber do not begin their deliberations with a 'blank sheet', but with a more or less fully-drafted judgment. Contrary to what is often imagined, the judgment is

[12] An opinion is not given in every case before the CJEU. Since 2004, if a case raises no new questions of law, then an advocate general's opinion is not necessary.
[13] At the time of going to press there are 24 official EU languages. These are, in English alphabetical order: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.
[14] Article 7 of Council Regulation No 1/58 (JO 34, 29/05/1959) stipulates that the CJEU may develop autonomous rules in respect of language use for proceedings.
[15] Article 76(2) of the Rules of Procedure of the CJEU provides for the Court to dispense with the oral hearing if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling.
[16] Since 2002 that practice has changed and today's advocates general are expected to write their opinions in one or more of the Court's 'pivot languages' (English, French, German, Italian, Spanish – see *infra*). Cf McAuliffe (2008), McAuliffe (2012).

drafted before the members of the Chamber deliberate on it.[17] During the deliberations the judges will make any necessary amendments to the text. Once the members of the Chamber have deliberated and have come to an agreement on their collegiate judgment (which may take weeks or even months), the final version of that judgment is drafted, in French, by the judge rapporteur and his/her référendaires.

However, the final version of a judgment, as deliberated on by the members of the relevant Chamber, is not usually the authentic version of the judgment. As mentioned above, the authentic version of a judgment is the version in the language of procedure.[18] Therefore, more often than not, the authentic version of a CJEU judgment (the version signed by the judges) is a translation of the version agreed on by the judges in their secret deliberations.

That process can perhaps be more clearly represented by the following (simplified) diagram:



A CJEU judgment is thus a collegiate document; the final version is not only completed by a chamber of judges in secret deliberations, but the entire process involves multiple 'authors' working in a language that, for most, is not their mother tongue. That process also includes many layers and permutations of translation between 23 of the 24 official EU languages.[19]

The CJEU has its own translation service, which deals with those various permutations of translation at different stages of the process. The translation service is organized into separate 'translation divisions' for each of the official EU languages.[20] Since French is the internal working language of the Court and thus the language of deliberation and the language in which all internal documents are drafted, it has a special role at the Court. The French language division must translate the application plus all of the procedural documents of the

[17] Of course, the judgment is not drafted in a vacuum: the members of a Chamber, and their référendaires, discuss cases and exchange notes de déliberé throughout the process. Also, in some complicated cases the judge rapporteur may wish to suggest that certain points of the case be discussed in detail by members of the Chamber before the judgment is drafted.
[18] For a more detailed explanation see McAuliffe K (2012).
[19] Although a case may be brought before the CJEU in Irish, at the time of going to press a derogation regarding the Irish language remains in place. Under this derogation the judgments of the CJEU are not required to be translated into Irish. To date no case has been brought before the CJEU in Irish.
[20] With the exception of the Irish language, for which there is a 'Cell' rather than a language division. At the time of going to press there is one person employed in the Irish Cell and Irish has never been used in submissions before the CJEU.

case. The French language division translates all opinions not drafted in French, but never translates judgments, since judgments of the CJEU are always drafted in French.

For an overview of which documents are translated into which language(s) in both direct and indirect actions before the CJEU, see Tables 1 and 2.

In the early days of the European Communities the processing of a case through the Court of Justice, although a novel process, was not too difficult to execute. However, the Court established in 1952 to rule on the misuse of powers by the institutions of the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) was a much smaller institution than the Court of Justice we know today. With only six judges cabinets and two cabinets for advocates general, the workload of the original ECSC Court was minimal- only 34 cases were brought before that court between 1952 and 1957, and only 12 judgments were delivered in that time. As the EEC grew in size and became the EU, so too the Court of Justice grew and extended its jurisdiction. Its workload increased exponentially and each enlargement impacted on its working methods.

Enlargements at the CJEU: pressure on the translation service

The main impact of each EU enlargement on the workings of the CJEU was the introduction of new official EU languages from which translations had to be provided. The Court's translation service used a system of direct translation from and into each official language. Four official languages required 12 language combinations for direct translation. That number was increased to 30 combinations in 1973,[21] 56 in 1981,[22] 72 in 1985[23] and 110 combinations in 1995.[24] Before each enlargement a 'mild panic' was felt throughout the Court, and in particular within the translation service.[25] Prior to the accession of Austria, Finland and Sweden to the EU in 1995, it was widely speculated that the Court's translation service would not be able to cope with the addition of a further two new official languages (raising the number of combinations from 72 to 110) and that the Court's language regime would have to change. In fact, the translation service absorbed the new languages with minimal fuss or problems[26] (no doubt aided by the fact that it took almost two years before those new member states brought any cases before the CJEU).

The concern surrounding each of those enlargements was, however, a mere drop in the ocean in comparison with the general panic that was rapidly swelling within the CJEU prior to the 'mega-enlargement' of 2004.[27] Ten new Member States joined the EU in 2004, followed by a

[21] With the accession of Denmark, Ireland and the UK in 1972, Danish and English were added to the list of four original official languages (Dutch, German, French and Italian). Irish (Gaeilge) is the first constitutional language of Ireland. However, since English is the second official language and in fact the vast majority of Irish government and administration is conducted in English, the Irish government agreed in 1973 that Irish would be an official language only where primary legislation (that is, the Treaties) were concerned. That remained the case until June 2005 when Irish was granted full EU official language status – this came into effect on 1 January 2007.
[22] Spain and Portugal joined the EEC in 1981, adding two new official languages.
[23] Greek was added in 1985.
[24] The accession of Austria, Sweden and Finland in 1995 resulted in the addition of two languages to that list of official EU languages: Swedish and Finnish.
[25] Cf McAuliffe (2008).
[26] Ibid.
[27] Cf. Ibid. This sense of panic was reflected in the literature on the Court of Justice – see for example, Mullen (2000).

further two in 2007. The number of official EU languages rose from 11 to 23 and with the accession of Croatia in 2013, the number now stands at 24. A system of direct translation would require 552 language combinations to provide direct translation from and into 24 languages. Continuing with such a system was clearly untenable.

Although the enlargement itself took place in May 2004, preparations for that enlargement were underway from as early as the mid to late 1990s. Publicly, the Court approached its preparation for the May 2004 enlargement within the context of the discussion concerning the future of the EU judicial system, which took place between 1998 and 2004. During that time the Court put forward a number of proposals for reform of the EU judicial system, structure and procedure, culminating in its contribution to the 2003-2004 Intergovernmental Conference. Although many of the proposals for reform submitted by the Court were not motivated by the prospect of an enlarged EU (for example those related to the anticipated increase in caseload as a result of the entry into force of the Treaty of Amsterdam), enlargement certainly was a catalyst for others.[28] With regard to the translation problem, the Court submitted a number of reports and other documents to the Council and Parliament, highlighting the difficulties of translation from the point of view of resources and logistics. Those reports on translation tended to underline the importance of maintaining the EU linguistic regime as a whole, as well as the linguistic regime and translation policy within the Court itself. This point is particularly interesting as, in documents prepared in parallel to such reports on translation (in the course of the debate on the future of the EU judicial system), the Court gave serious consideration to proposals to change that linguistic regime and translation policy. In the end, the linguistic regime at the Court of Justice remained as it always had been (i.e. with French at the working language of the Court), but changes were made to its translation policy. The solution was the introduction of a system of 'pivot translation' alongside the direct translation system.

Pivot Translation at the CJEU

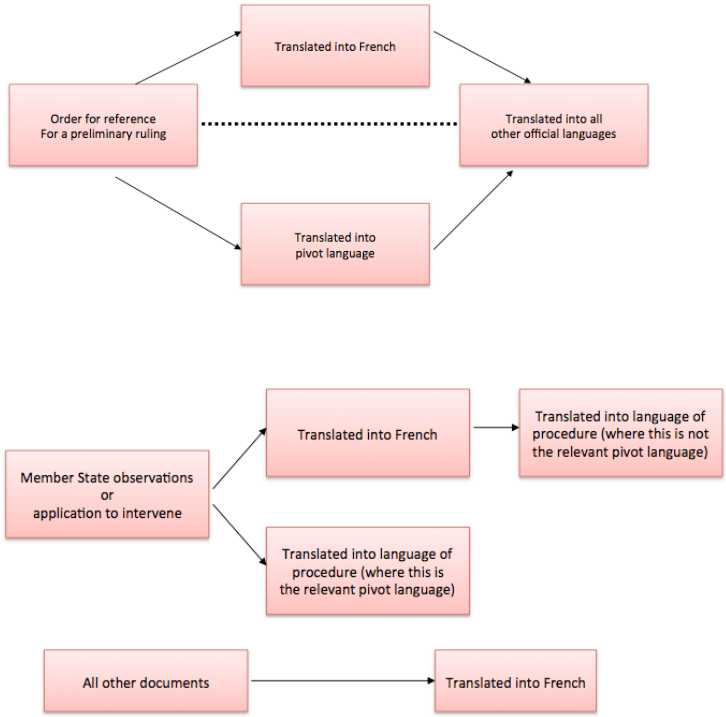
The translation system, which has been in use at the Court since May 2004, is, on paper at least, actually a mixed translation system – direct translation is used whenever possible, rather than translation through a 'pivot language'. However, given the Court's ever-increasing workload,[29] pivot translation is the norm. Documents in certain languages (the post-2004 languages) are translated into a particular 'pivot language' and then from that pivot language into the other EU official languages, and *vice-versa*. This reduces the number of language combinations for translation from a potential 552 to a more manageable 134, which saves significantly on labor. There are five pivot languages: French, English, German, Spanish and Italian. Because French is the working language of the Court, the French translation division provides translations from all of the 'post-2004' EU official languages when necessary.[30] Each of the other four pivot language divisions are 'partnered' with two or three 'new' official languages.[31]

[28] Cf McAuliffe (2008).
[29] Cf. Harmsen and McAuliffe (2015).
[30] With the exception of Maltese and Irish. See infra, note 31.
[31] The German language division provides translations from Bulgarian, Estonian and Polish; the English language division from Czech and Lithuanian; the Spanish division from Croatian, Hungarian and Latvian; and the Italian language division from Romanian, Slovakian and Slovenian. Neither Maltese nor Irish have been assigned to a pivot language division. Since English is the second official language of both Malta and Ireland, it is assumed that

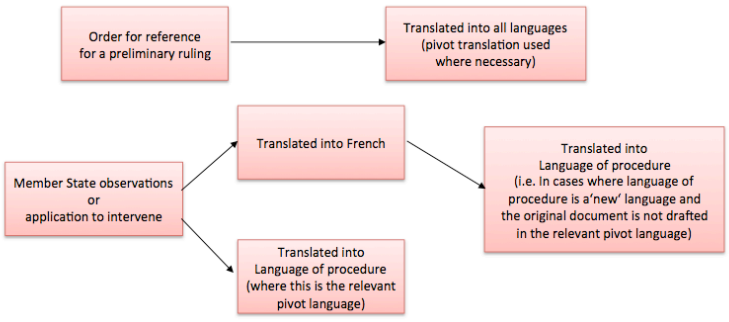
Since French is the working language of the Court, the French language division must provide translations of all documents originating externally and drafted in any of the 'post-2004' languages. However, the only external documents that go through the pivot translation system are orders for reference for a preliminary ruling, Member State observations, and applications to intervene in direct actions (i.e. those documents which are subsequently notified to all Member States and which therefore must be available in all official EU languages).

The following diagrams perhaps more clearly represent how the pivot translation system works:

(a) Documents drafted in post-2004 official languages



(b) Documents drafted in pre-2004 official languages



the Maltese and Irish lawyer-linguists are able to provide English translations of documents in Maltese and Irish where necessary.

It is clear, from the above, that while the task of the CJEU's translation service may seem relatively straightforward (translating documents 'coming in' into French and those 'going out' into all of the official EU languages), the process behind such a task is more complicated than it may seem.

The People behind the Process

The second part of this EU law story focuses on the individuals involved in producing the CJEU's jurisprudence, in particular those involved in drafting and translating judgments and opinions. There are 28 judges at the CJEU (and 28 at the General Court),[32] one from each Member State. There are currently nine advocates general.[33] It is relatively easy to find out just who those judges and advocates general are, where they are from and what their motivations may be- the Court's own website lists a biography and short CV for each current and former member of the Court.[34] However, as we have seen, the CJEU's judgments are not only collegiate documents, but involve multiple 'authors'. This section considers the role of those 'authors' at various points in the production process: that of the référendaires who are involved in the drafting of judgments and of the lawyer-linguists who translate those documents.

Référendaires

Each judge and advocate general employs three or four référendaires – discovering who those référendaires are and how they work is not so easy. This is where methodologies borrowed from disciplines outside of law, such as participant observation, can be useful in helping us understand more of what happens behind the scenes.

As already mentioned, référendaires work exclusively for the judge or advocate general to whose cabinet they are attached. They are recruited by the member him/herself and as such are not permanent staff of the CJEU. Ideally, provided that he/she was compatible on a professional and personal level with that judge or advocate general, a référendaire would remain working in a cabinet for the full term of his/her employer. Increasingly, however, référendaires tend to remain in that post for a much shorter time than was the norm in the past. Nowadays it is common for the staff of a cabinet to change completely over the course of three or four years. There are many reasons for this high turnover rate: more and more young lawyers who are at the start of their careers are being recruited as référendaires, such lawyers will invariably move on to other positions as practicing lawyers, academics or even to other posts within the EU institutions; as mentioned above, the nature of the post of référendaire is temporary – offers of permanent employment will always be tempting; many référendaires (in particular those from Ireland and the UK) view the job as a type of

[32] At the time of going to press the CJEU is in discussions with the European Parliament concerning the appointment of a further 28 judges at the General Court.
[33] There are six permanent advocates general, one from each of the 'big' Member States (France, Germany, Italy, UK, Spain and Poland). The three remaining posts are rotated between the remaining 22 member states.
[34] www.curia.europa.eu (last accessed 6th November 2014).

secondment or career break and, after a few years at the Court, return to their permanent jobs in their own Member States; many others are actually officially on secondment from their own permanent jobs. It is rare (although not unprecedented and becoming more common in recent years) for a post of référendaire to be advertised, and there has never been any formal open competition for their recruitment. Often judges and advocates general recruit people with whom they have worked in the past or who have been recommended to them.

The minimum requirement to become a référendaire at the CJEU is to be a qualified lawyer with a good knowledge of EU law and with at least a reasonable knowledge of French. In spite of the fact that (judges') référendaires are required to work wholly in French, they are not required to have a 'perfect' command of that language.[35] Almost without exception, référendaires come from backgrounds of 'practicing' lawyers – be they members of the bar of their own Member States, lawyers in large European law firms, or, as is the case for many from civil law jurisdictions, law clerks for member state courts or government agencies/organizations. When new judges or advocates general come to the Court they generally bring their own staff with them, although they sometimes keep the staff of the cabinet of the departing member and they do frequently try to recruit at least one référendaire from the institution itself as "it is useful to have at least one member of the cabinet who knows and understands how the institution works".

It is common for the référendaire to be of the same nationality as the judge or advocate general for whom they work, however this is by no means invariably the case – in fact, many judges attempt to have at least one francophone référendaire in their cabinet.

The role of the référendaire is principally to assist the judge or advocate general in drafting documents such as reports, judgments, opinions, and, in the case of the Presidents of the CJEU and General Court, orders. Those référendaires work extremely closely with the individual judge or advocate general by whom they have been employed. The roles of judges' and advocates general's référendaires differ considerably, since the role of the advocate general and the style of the opinion differ significantly from that of a judge and judgment respectively. Since the focus of this paper is the production of CJEU judgments, this section considers in more detail the role of judges' référendaires.[36]

While officially it is the judge rapporteur who is responsible for drafting the judgment according to what is agreed on by the chamber in deliberations, in reality it is his/her référendaire who drafts, at least the first version, of the text. Because of the heavy workload of the CJEU, it is not always (or even often) possible to allocate cases to cabinets or to particular référendaires within a cabinet on the basis of expertise. For this reason référendaires claim that they have to be "generalists" who are "knowledgeable about every area of EU law". Not only that, they also have to be able to understand and use their knowledge in French – a language that in most cases is not their mother tongue. As has been demonstrated in a number of studies by the present author, working in French has a clear impact on the linguistic development of the CJEU's case law.[37] Although few of the

[35] If a référendaire is not sufficiently competent in the French language, however, it can cause problems for the judge for whom he/she works. Cf. McAuliffe (2013).
[36] Owing to space constraints it is not possible to discuss the role of the advocates general or their référendaires in more detail. For a more detailed discussion of this role see McAuliffe (2013).
[37] Cf. McAuliffe (2013); McAuliffe (2013a); McAuliffe (2011).

référendaires interviewed complained of difficulties in drafting in French,[38] "*since legal concepts are intimately connected with intellectual reasoning processes*", they are nonetheless 'reined in' by their own legal language and the legal reasoning embedded therein.[39] Having said that, many of the référendaires interviewed insisted that having to work in French led them to conclusions which may have been different to those they would have reached had they been writing in their own language:

> "it can be difficult to find terms in a foreign language that meet your exact thinking, [but] working in a foreign language can also help you to find answers to legal problems that you wouldn't have found in your own language."

Although many référendaires interviewed felt that way, it is in fact more likely that they reach a similar solution through slightly different reasoning:

> "It is often difficult to say exactly what you want to say in a judgment […] often the Court will want to say X but in the very rigid French of the Court that is used in the judgments you have to get around to X by saying that it is not Y!"[40]

Owing to the CJEU's many rules and conventions regarding language use, référendaires feel constrained as to the style of writing that they must employ. They are then further constrained because of the collegiate nature of the Court's judgments, the final version of which is decided by a chamber of judges in secret deliberations. Moreover, there is a perceived pressure to cite previous judgments 'word-for-word' or even 'paragraph-for-paragraph'.[41] However, many see these linguistic constraints and the very formulaic language used in CJEU judgments as useful and as a type of safety net: since référendaires are by their own admission 'generalists' rather than experts in the various areas of EU law in which they work:

> "In your own language you have a huge choice of words and phrases and so there is more risk of making a mistake where you are drafting a judgment concerning an area of EU law that you may not be expert in".[42]

All of these factors lead to an environment where repetition is the norm:

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[38] In fact, the only référendaires who expressed any problems/difficulties with drafting in French were francophones, who feel that the formulaic style of CJEU judgments and the ensuing 'Court French' are almost as alien to the 'real' French language as English or German would be! Cf. McAuliffe (2011).

[39] Cf Pozzo (2006), p. 9.

[40] However, that in itself is enough to have an impact on the reasoning of the CJEU and subsequently the development of its case law. Cf McAuliffe (2015).

[41] There are a number of factors contributing to this 'pressure'. First, référendaires are, for the most part, working in a language that is not their mother tongue and so since the early days of the CJEU there has always been a tendency to use the same expressions over and again. Second, référendaires are encouraged to use the same terminology and to cite phrases from previous cases in their entirety in order to speed up the translation process. Third, some argue that since the CJEU is building a rule of law in a developing legal system, it is necessary to repeat the same expressions over and again to help embed that legal system. Finally, it is often necessary to refer to provisions of relevant EU legislation. In those cases référendaires are obliged to use the same specific wording used in the provision in question.

[42] However, according to some lawyer-linguists (see infra) such mistakes are even more likely where the référendaire does not fully understand the implications of the translation of their choice of wording or terminology in French. Cf. McAuliffe (2013).

> "Because we are writing in a foreign language there is a tendency to do a lot of 'cutting and pasting' and so the style [in which the CJEU's judgments are written] reproduces itself."
>
> "If something along the lines of what I want to say has been said before by the Court, then I will just use that same expression – I'll 'cut and paste' it."

That, in turn, leads to the development of a type of (linguistic) precedent in CJEU judgments, in spite of the fact that no such rule actually exists within the EU court system.[43]

Lawyer-Linguists

The second group to be considered in this EU law story is the CJEU's translation service, and more specifically the lawyer-linguists. The Court's translation service is that institution's largest department, making up almost half of its total staff.[44] Those responsible for translating documents into the working language of the Court and subsequently into all of the official EU languages are known as lawyer-linguists. This job is an extremely important one since not only does the Court rely on translations of applications, submissions and pleadings into French in order to reason and deliberate on a case, but in most cases the authentic version of a judgment will also be a translation.

The criteria to become a lawyer-linguist at the CJEU are not set in stone. However, prospective lawyer-linguists are typically required to possess a perfect command of their mother tongue and an in-depth knowledge of at least two other official EU languages. They are also usually required to hold a law degree awarded in an EU Member State and generally to have two years of professional experience. Lawyer-linguists are recruited through the European Personnel Selection Office (EPSO) and frequent 'competitions' are held to recruit lawyer-linguists for specific languages.[45]

The role of a lawyer-linguist is a difficult one. In order to be able to translate legal concepts from one language to another, lawyer-linguists need a comprehensive knowledge not only of their own legal systems but also the legal systems of other Member States, as well as a thorough understanding of EU law and the CJEU's jurisprudence. In a supranational legal order founded on a principle of uniformity of law throughout 28 Member States, the CJEU's lawyer-linguists must ensure that the Court's case law remains consistent across 23 language versions. This involves understanding how CJEU judges intend concepts to be understood (not always easy since the deliberations are secret) and how the legal language that they use in translation is likely to be interpreted in the relevant Member State(s). Thus lawyer-linguists are responsible for legal issues that may arise because of linguistic ambiguities in texts. As has been demonstrated in previous studies by the present author, the CJEU's lawyer-linguists appear to be trying to balance a dual professional identity – that of lawyer and linguist.[46] The necessary compromise resulting from the struggle to reconcile the notions

[43] Cf. McAuliffe (2013a).
[44] In 2014 the Court's linguistic service employed 1008 staff (47% of the Court's total staff), 630 of whom were lawyer-linguists. Source www.curia.europa.eu (last accessed April 2015).
[45] These competitions, which are nowadays centralized through EPSO, usually involve a series of: computer-based testing of a candidate's verbal, numerical and abstract reasoning; participation in 'assessment centres' involving group exercises and oral presentations; translation tests and a formal interview.
[46] Cf. McAuliffe (2013); McAuliffe (2011); McAuliffe (2010).

of 'law' and 'translation' is reflected in the process of 'filtering out' the CJEU's case law to the wider EU through translation.[47] This notion of a linguistic cultural compromise at the CJEU is put forward by the present author in a series of publications on law and language at that Court.[48]

Case Studies

Thus far, this chapter has discussed the process behind the production of the CJEU's case law and the people involved in producing it. The question to now consider is whether that process actually has any real impact on the case law itself. Studies in disciplines outside of law demonstrate that process has a clear impact on the output of an institution.[49] According to all of the lawyer-linguists and the majority of référendaires interviewed for the purposes of this chapter, the process of producing case law at the CJEU can potentially lead to problems of a legal nature. This section highlights some such problems in two separate case studies. The first demonstrates problems that can arise at the member state level due to mistranslation, and the second discusses potential legal issues that arise in the Court's own case law due to the unique process of producing collegiate judgments.

The first case study concerns a series of cases that arose before the Competition Appeal Tribunal in the UK in the early 2000s (the replica sports kit cases),[50] which involved "concerted practices" (price-fixing agreements) between the parties in relation to the sale of replica football kits. The definition of a concerted practice in EU law is set out in a judgment of the CJEU's General Court in Case T-25/95[51]. Paragraph 1852 of the English language version of that judgment states:

> "*In order to prove that there has been a concerted practice…[i]t is sufficient that by its statement of intention the competitor should have eliminated, or at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market*" (my emphasis).

However, the French language version (i.e. the version in which the judgment was drafted and deliberated on by the judges) states:

> "*Il suffit que, à travers sa declaration d'intention, le concurrent ait éliminé ou à tout le moins substantiellement réduit l'incertitude quant au comportement à attendre de sa part sur le marché*" (my emphasis) [it is sufficient that by its statement of intention the competitor should have eliminated, or at the very least, substantially reduced uncertainty as to its own expected conduct on the market (my translation)]

It seems that, according to the requirements imposed in the French language version of the judgment, for a concerted practice to exist, it is sufficient that two competitors meet and that

[47] McAuliffe (2015).
[48] McAuliffe (2010), (2011), (2013), (2013a), (2015).
[49] Some interesting studies of the European Commission and Parliament investigate the notion of process and output in those multilingual, multicultural institutions. Cf Bellier (2000), Abélès (2004).
[50] Case numbers 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.
[51] *Cimenteries CBR and Others v Commission* [2000] ECR II-491.

one indicates what it *itself* is likely to do; whereas, according to the English language version, a concerted practice requires that one competitor has to indicate what conduct *the other* should follow on the market. It was that English-language version on which the applicants in the Replica Sports Kit Cases attempted to rely.

The *Cimenteries* case was relatively unusual in that there were nine languages of the case and therefore nine equally authentic language versions of the judgment. The UK Competition Appeal Tribunal compared four of those language versions (French, German, Italian and Spanish) and concluded that each of them was in accord with the French language version and thus the French language version should be considered correct. The question to consider, however, is whether the ruling of the UK Competition Appeal Tribunal would have been any different had the English language version of the *Cimenteries* case been the only authentic version of that judgment. Although the CJEU has set out a requirement for national courts to compare language versions when interpreting EU legislation (all of which are considered 'equally authentic'),[52] how realistic is it to expect Member State courts and tribunals to compare up to 23 different language versions of a CJEU judgment before interpreting that judgment, in particular where that Court officially declares only one of those language versions 'authentic'?[53] The procedure for reference for a preliminary ruling requires Member State courts or tribunals in some instances to refer to the CJEU questions of interpretation of EU law.[54] However, under the '*Acte Clair*' doctrine, those courts are not required to make such a reference where the EU rule in question seems clear and unambiguous.[55] If an EU rule seems clear and unambiguous in a Member State court's own language, how realistic is it to expect that court to then check up to 23 other language versions of that rule to be sure?[56]

The second example involves a 2004 order of the CJEU concerning waste management.[57] In Council Directive 75/442/EEC,[58] the word "*réemploi*" is used in French, and "*reuse*" is used in English. That term is defined in various waste-related legislation and papers on the EU waste management hierarchy as referring to a substance or object that is used again *for the same purpose* as that for which it was originally used. The primary meaning of the term 're-use', as found in the EU waste hierarchy, is the repeated use of non-hazardous wastes, in their original form. Waste can also be 're-used as part of a recovery operation, such as operation R1 in Annex II B of the Directive – "*use principally as a fuel or other means to generate energy*". Case C-235/02 centered on the so-called "*réutilisation*", as fuel, of petroleum refining by-products, which are classified as hazardous waste and therefore cannot be "*re-used*" (except as part of a recovery operation).[59] It seems that the industries in question in that case were burning those by-products and using the energy produced from burning them as fuel – claiming, therefore, that it was a "*recovery action*".

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[52] Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, paragraphs 18-20.
[53] For an excellent examination of the *CILFIT* criteria from the perspective of legal linguistics see Kjaer (2010).
[54] Article 267 of the Treaty on the Functioning of the European Union.
[55] Owing to space constraints it is not possible here to enter into a discussion of the Acte Clair doctrine. Cf Kjaer (2010).
[56] For an excellent analysis of multilingual comparisons of EU rules by national courts, see Derlén (2009).
[57] Order of the Court (Third Chamber) of 15 Jan 2004 in Case C-235/02 *Criminal proceedings against Marco Antonio Saetti and Andrea Frediani* [2004] ECR I-1005.
[58] Council Directive 75/442/EEC of 15 July 1975 on waste (OJ L 194, p. 39-41) as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ L 78, p. 32-37).
[59] See Council Directive 75/442/EEC (note: such hazardous waste must be disposed of under very specific, strict conditions).

The référendaire responsible for drafting the order in question (in French) was not an expert in the EU rules on waste management.[60] That référendaire chose to use the French term '*réutilisation*' to describe the use in question. Since *réutilisation* is a different word from *réemploi*, as used in the French language version of Directive 75/442, in the opinion of the référendaire, there shouldn't have been any problem with the order. However, while the word "*réutilisation*" can be translated into English as "*recuperation*" or "*recovery*", the far more usual translation would be "*reuse*", and therein lies the problem (in particular since the *authentic* language version of most cases before the CJEU concerning waste management is English). The "*réutilisation*" of the toxic waste referred to in the order is not in fact "*reuse*" meaning a product being used again for its original purpose: rather, if it is considered a waste, it would be re-used as part of a recovery operation. However, if the Court were to use the word "*reuse*" with reference to certain toxic substances that would normally be considered hazardous, one might reasonably assume that the substances in question are not to be considered hazardous (and can therefore be disposed of or dealt with without having to conform to any special criteria).

In the order in question, "*réutilisation*" was, in fact, rendered in English as "*further use*".[61] However, that particular translation resulted from the fact that the lawyer-linguist responsible for translating the order into English was an expert in waste management! That lawyer-linguist deliberately avoided using the term "*reuse*" because of what she regarded as the potential consequences of such use:

> "*If a référendaire who…doesn't understand the technicalities of waste issues, drafts an order or judgment* [in French] *using words which have a very specific technical meaning, without understanding the nuances of those words; and the judgment is then translated… by a lawyer-linguist who also has no technical knowledge of the subject, toxic waste, which cannot under any circumstances be 're-used' but which must be subject to either a disposal or a recovery operation, might wind up described as being 're-used'. That, in turn, would create a feedback loop whereby hazardous wastes – by virtue of being capable of re-use – are no longer hazardous but are merely waste.*"

All of the lawyer-linguists interviewed for this paper felt that it was "*extremely likely*" that "*réutilisation*" in French would "*usually be translated as reuse*" in English. One lawyer-linguist commented that:

> "*…the use of that one little word could completely change the hierarchy of waste management in the European Union: industries could potentially bring an action claiming that the substances in question in those cases cannot be hazardous because they are being 'reused' within the meaning of* [Council Directive 75/442/EEC]".

This case study is particularly interesting as it was precisely because the lawyer-linguist in question was an expert in the area that the issue was highlighted. However, there is no guarantee that all orders or judgments will be translated by lawyer-linguists who are technical

[60] See the discussion, *supra*, on référendaires as 'generalists'.
[61] In the case in question, however, the Court decided that, in fact, the waste by-product should not be considered a waste at all but rather an integral part of the production process, because it was to be used again, and fully, without further processing.

experts in the relevant specific fields of EU law. Thus, it seems that even in instances where there may be no obvious linguistic divergences in case law, there is, albeit in a minority of cases, a risk of that case law being legally inconsistent.[62] The CJEU would of course deal with such inconsistencies using its teleological method of interpretation.[63] However, in order for it to do so, such inconsistencies would have to first be brought before it for interpretation – which again raises the question of how realistic it is to expect Member State courts to compare up to 23 language versions, particularly when the version in a court's own language may seem perfectly clear.

Conclusion

This EU law story, a look behind the scenes at the process of producing the CJEU's multilingual jurisprudence, is, of itself, interesting. Not only are there, as this volume highlights, fascinating stories behind particular cases, but there is yet another layer behind those stories. In addition to its inherent interest, a fuller understanding of the inner workings of the Court can provide a fuller understanding of how its case law has evolved. This type of behind-the-scenes narrative thus inevitably leads to a more nuanced understanding of EU law. Furthermore, developing a better understanding of the inner workings of the environment in which a significant part of EU law is created allows us to work towards delimiting the inconsistencies that inevitably arise in this evolving multilingual system.

The CJEU is often seen as a type of platonic institution, handing down collegiate judgments written in a formulaic language because its judgments are collegiate in nature with no dissenting opinions produced by individual judges. Scholars remain preoccupied with the CJEU's 'output,' however, in fields outside of law, it is widely accepted that process necessarily affects output. It is therefore reasonable to presume that the process behind the production of the CJEU's multilingual jurisprudence could have implications for its development. In spite of that, the literature on the CJEU largely ignores the process through which the actors at that institution produce its decisions. With the exception of previous work by the present author, none of the literature on the CJEU problematizes it in terms of its operating in a multilingual, multicultural setting. Recently, however, a number of excellent studies have sought to go beyond the standard EU law narrative and this volume forms part of that new scholarship.[64] This paper contributes to that developing field by urging the reader to think of the CJEU, not simply in a platonic and rather abstract way, but as a multilingual, multicultural institution. The CJEU's case law is not created and translated by machines but by individuals of many mother tongues, from many different legal cultures, and is necessarily shaped by the dynamics of that institution. In addition to being a collegiate document, a CJEU judgment is multi-layered and multi-'authored'. The various factors and stages of the production process have an impact on the development of the jurisprudence and, by extension, could also impact the development of EU law. Understanding the situational factors of, and compromises involved in, the production of those decisions can therefore aid our understanding of EU law and can illustrate the limitations of a multilingual legal system.

[62] The present author is currently conducting a large scale study on law and language at the CJEU, funded by the European Research Council (ERC), which considers, among other issues, the levels of linguistic and legal divergences in that Court's case law. For further information on this project see www.karenmcauliffe.com, or contact the author directly.
[63] Cf McAuliffe (2011), McAuliffe (2013).
[64] See, for example: Vauchez and de Witte (2013); Davies and Rasmussen (2012); Davies (2012).

Appendices

Table 1: Documents to be translated in direct actions
(Note: not all of the documents will be relevant for every case)

	Translation into:		
	Language of Procedure	Internal working language (i.e. French)	The other languages
Application/Appeal		✓	
OJ Notification of the action		Drafted in French	✓
Defence/Response (to Appeal)		✓	
Reply		✓	
Rejoinder		✓	
Member State Observations	✓	✓	
Application to Intervene	✓	✓	
Statement in intervention		✓	
Documents lodged during the oral procedure		✓	
Report of the judge rapporteur		Internal document drafted in French	
Advocate general's opinion	✓	✓	✓
Judgment	✓	Internal document drafted in French	✓
Summary	✓	Internal document drafted in French	✓
OJ notification of judgment	✓	Drafted in French	✓

Table 2: Documents to be translated in references for a preliminary ruling
(Note: not all of the documents will be relevant for every case)

	Translation into:		
	Language of Procedure	Internal working language (i.e. French)	The other languages
Order for Reference		✓	
OJ Notification of the order for reference		Drafted in French	✓
Observations of the parties to the main proceedings		✓	✓
Member State observations	✓	✓	
Documents lodged during the oral procedure		✓	
Report of the judge rapporteur		Internal document drafted in French	
Advocate General's opinion	✓	✓	✓
Judgment	✓	Internal document drafted in French	✓
Summary	✓	Internal document drafted in French	✓
OJ notification of the judgment	✓	Internal document drafted in French	✓

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