

## The grammatical interpretation in european law

Panos Lazaratos

Professor of Administrative Law

University of Athens

### I. The theoretical problem of multilingualism in european law.

1. Each legal text of the european law (treaties, regulations, directives) needs interpretation, exactly like the legal texts of the internal law. However the grammatical interpretation of european law texts causes a significant problem, which doesn't primarily concern the internal law. It is a problem of the text translation in 25 languages, and the choice of the linguistic version, which is each time the appropriate, according to the judge's opinion.
2. The situation is roughly as follows: According to article 314 ECtreaty all official spoken languages of the 25 countries of European Union are authentic and equivalent. That means **firstly** that each legal text of the Community, even if its original version is in french or english language, has to be translated in 24 other languages, in such a way that all texts obtain the same meaning. It also means, **secondly**, that in case of differentiation of a word's meaning, or the meaning of an expression of primary or secondary community law among the languages of Community member-states, in which the community law is obligatory translated, the judge is not legally eligible to consider that one language precedes the other a priori. Neither the language in which the text was originally written, nor the language of the state court that judges the case, provided that the case is judged by a member-state of the EU and not by the Court of the European Community or the First Instance Court of the European Community.
3. This situation of multilingualism indicates a fundamental linguistic problem which could be expressed in a main question:

In which way should the judge choose between the potential different meanings of several languages in which the European provision is written, and which meaning does he have the duty to interpret accurately according to the other methods of legal interpretation (teleological, systematic).

This question is of major practical interest. **Firstly**, because it is a common knowledge to anybody who has worked with European legal texts, that texts in two different languages rarely have exactly the same meaning. Concerning the case of 25 languages, we can speak almost of the tower of Babel. **Secondly**, because the European Court doesn't abandon at all the grammatical method, when it stands before linguistic contradictions. On the contrary, according to statistics the grammatical approach is the basic method of interpretation in 70% of the decisions of the European Court in Luxembourg.

## II. Strategies of facing the multilingualism problem

4. To confront this linguistic problem, the European Court and the theory of European law have developed criteria and certain strategies, to which following titles could be given:
  - a) criterion of majority
  - b) criterion of interpretation less damaging to the citizen
  - c) criterion of most explicit interpretation
  - d) criterion of common divisor
  - e) orientation to the **original text** and not to its **translations**
  - f) orientation to the way of genesis of the concept (historical interpretation).
  
5. According to the criterion of **majority**, in case of semantic differentiation between several languages, it is chosen that common particular meaning, which results from the **numerically** most linguistic versions of the member-states of EU. The criterion however is coincidental, extremely formal and mechanistic and for that reason has been abandoned.

6. According to the criterion of the **interpretation less damaging to the citizen**, between controversial interpretative versions, it is to choose the one that has the less possible disadvantages for the citizen. However this criterion is unsuccessful too, because usually a group of citizens are favoured and another group incurred by the same community measure. Furthermore, the question which is the most disadvantageous interpretation for the citizen is a matter connected to the teleological and not to the grammatical interpretation of the rule.

7. According to the criterion of the **most explicit interpretation**, between controversial potential interpretations this interpretation should be chosen this interpretation, which leads to the **more explicit meaning**.

However what is explicit and what is more explicit does not result from the language itself, but it needs evaluation. Clarity is always relevant: it is connected with certain recipients of the meaning, at a certain time period, with certain needs, and it is always a partial clarity. According to a sceptical approach, there is a need of a clarity criterion for what is explicit, and this criterion requires a new criterion and all this leads to an interminable chain.

8. **The rule of common divisor** means that if a term of an EC-rule could obtain the meanings a and b in one language, and the meanings b and c in another language, the common for the two languages meaning b has to be chosen.

However, when we have to maintain, in the level of the interpretation, linguistic differentiations there is no "common divisor" between different meanings.

According to the grammatical interpretation of the classical legal methodology we seek for the **whole** meaning of a legal term and not for just a **part** of this meaning on a minimum basis. The rule of common divisor leads to the comprehension of a part only of the meaning of a legal term and not to its entire semantic, degrading thus often legislative will.

9. According to another opinion supported sometimes in theory, the **initial text** prevails in case of conflict, over **the translations**. However this rule infringes Article 314 EC treaty: Equivalence of languages means that the initial text cannot prevail against the translations. Besides most texts of EC law have been drawn up simultaneously in more languages. The original-initial text is not **one** but more.

10. Finally, as a further strategy of facing the multilingualism problem is proposed the orientation to the historical interpretation and the way of genesis of the interpreted term. This approach has its origins in the conception that the European law is in a major degree **a diplomatic law**, in the meaning that at least its basic texts are results of time-consuming and accurate negotiations, which offer interesting material for the grammatical interpretation. However, this approach of the thematic of multilingualism and translation in European law, appears to create special problems for the following particular reasons:

- a) Because there is no historical-genetic material for a lot of community law texts, or this material is vague or multilingual.
- b) Because the historical-genetic method is an autonomous interpretation method which is not allowed to substitute the grammatical interpretation.
- c) Because, finally, the substitution of grammatical with the genetic interpretation would neglect the dynamic character of European law. The law applier would be obliged to decide on the basis of a criterion of a past time period, without taking into consideration new developments and changes.
- d) No interpretation, neither legal nor literal, can be based only on the so-called **intentio auctoris**. It must always be taken into consideration the **intentio operis** as well as the **intentio lectoris**: the intention and the comprehensive horizon of the reader.

11. Based on the preceding thoughts, somebody could come to the intermediate conclusion that none of the strategies that have been proposed for the confrontation of the problem of equivalence of community languages can be used as exclusive method for the choice of meaning between differentiated linguistic alternatives of the same legal term. Nevertheless all these strategies and criteria can be used as explanatory tools in order that the judge makes a first grammatical choice.

### **III. An example**

12. To make the difficulties of this subject more comprehensive, a characteristic example is taken from the case "Commission against United Kingdom" which was judged by the European Court in 1985.

In the beginning of year 1980, british fishing vessels hauled fishing nets without supervision close to polish coasts, in the Northern Sea. These fishing nets were taken up (together with the fishes) by polish fishing vessels, which however, never carried them on board or even took them in polish territorial sea. Some moment the british fishing vessels came alongside the polish ones and raised the nets up to their own deck. After that they carried the "fishes" to United Kingdom.

The question that occupied the European Court was if England should pay fees, because the fish was transferred from Poland to England, or not, as the fish was firstly caught by English vessels. The whole matter became ultimately a linguistic problem of interpretation of article 4 of Regulation 802/68. According to this provision, products that were obtained or produced in a country are considered to derive from this country. Products like these are (according to art.4 par.1) the fish caught in this country or the fish caught by vessels which are registered in the particular country and have its flag.

The term "catch fish" turned out to be linguistically critical. If from one side, the fish "were caught" the minute they were imprisoned in the nets, then they "were caught" by polish

vessels and after that they were transferred to England: conclusion: fee should be paid. If on the contrary, the fish "were caught" the minute they were pulled out of the water and placed on the ship deck, then they "were caught" by English vessels and as a result of that, fee should not be paid. And that because products were not "imported" but were produced in the territory of a member state of the EU (At that time Poland wasn't a member of the EC).

In this case the dutch and english linguistic versions appeared to favour the aspect of the United Kingdom, that the fish were caught by the english and not the polish vessels. The dutch version regarding the expression "fishes caught", was (fishes) "ut the zee gewonnen", while the similar English version was "taken from the sea". Both versions, in opposition to the at least ambiguous and multiseantik greek "ῥιόστηκαν" and german "gefangen" appear to be rather explicit. The fish are taken from the sea not at the moment that are imprisoned in a net but from the moment that the possession is ensured with its "retrieval out of the sea" and its placement on the ship deck or on land.

On the contrary the french and italian version appeared to lead to a different direction. According to the Court's decision, the french version "extrait de la mer" and the italian "estratti de la mar" declare that the fish "are caught" when they are isolated, separated from their natural environment. This happens from the moment they are imprisoned in nets and not necessarily from the moment they are transferred from the sea to land (or on a ship deck).

In this linguistic confrontation (certain details and variants of which will be mentioned in other points of the study) among expressions like "taken from the sea", "ut de zee gewonnen", "ῥιόστηκαν", "gefangen", "extrait de la mer" and "estratti de la mar", the European Court adopted the stricter and not the more equitable interpretation for the United Kingdom after supporting it with teleological and systematic arguments.

#### **IV. Stages of interpretation work in the linguistic level of member states: First grammatical choice**

13. Trying to indicate, after the description of the above mentioned problem, the necessary stages of the work of a judge who applies European law, somebody could proceed to the following presentation.

a) The judge will read the Community regulation in his native language (**Stage of reading**)

b) The judge will read the regulation in other languages too, and he will try to translate it into his native language (**Stage of translation**)

c) The judge will group the differentiated interpretations, detect the differences and will thus trace the linguistic limits of grammatical interpretation in the level of comparative interpretation of languages of member-states (**Stage of tracing the grammatical limits**)

d) He will possibly use some of the preceding strategies, as indications of a first grammatical choice (**Stage of first grammatical choice**).

14. Regarding the stage of reading, it must be taken into consideration that the first language of reading is not necessarily the native language of the judge. It could be for example the language of state with the legal culture of which the judge is familiarised, or the language in which the judge knows that the text was firstly drawn up, or the language of the state where the dispute was born, or simply the language which the judge considers suitable. In any case this stage of first comprehension of the text will inevitably influence the whole interpretative project

15. The **translation stage** as described includes an utopic task. It is certain that the judge will not be familiar with many of the community languages. It is impossible to use all these languages, even if he has found and read all relative dictionaries.

The limited capabilities of a dictionary appear mostly in the translation field. The dictionary offers conceptual variants but not a true meaning. Translation does not mean familiarisation with a foreign linguistic system from the translator's linguistic view, but the translator's transfer to a new horizon of meaning. Here however the capabilities of each interpreter of law will be deficient. The judge's comprehension of all semantic horizons of languages of the Community member-states is exceptionally difficult, up to impossible, because such a comprehension requires deep knowledge of the linguistic and legal culture of 25 states.

Translation is not comparison of words, but comparison of meanings, especially when translation refers to legal interpretation. Finding of meanings parallelism means familiarisation with another experience and another way of thinking. This is a deep truth mostly in the language of law.

16. In any case the judge owes to make the humanely possible in the third stage. After his working with the help of a dictionary mainly with the languages he knows best, and taking into consideration, as far as he can, the rest ones **firstly** he will group the common linguistic versions. **Afterwards** he will indicate the differences. During this mental process he will try to simplify, to comprehend and finally to present several linguistic possibilities.
17. Finally at the last stage, and using the help of the preceding strategies, the judge will make a first grammatical choice.

Dictionaries, translation, comparison, judge's personal comprehension, old grammatical interpretations of the European Court, principle of majority, principle of common divisor, the criterion of the interpretation less damaging to the citizen, the choice on the basis of principle of more explicit interpretation, but also an orientation to the initial text (provided that such a text exists), all these elements have to be evaluated in order that the judge results to a first grammatical choice. In this choice

teleological and systematic elements of interpretation are going to play inevitably a significant role.

**V. To a Community directed search of meaning: Correction of first grammatical choice.**

18. When however the judge of the Community law works with legal terms, as "public administration", "administrative contract", "public works", "public safety", terms which somebody can find in the treaties, in regulations or in directives, he concludes that the comparative grammatical interpretation through the languages and the legal cultures of member-states does not help him to give a final grammatical meaning to the community law term.

19. If the interpretation is directed to the national state's legal system, directed in other words, to the grammatical interpretation of the term as this occurs in the national state law, which the case concerns in the particular case, then the community regulation would change content depending on the change of the term's meaning in the state that the considered case concerns.

That would have as a further result the creation of so many interpretations of community regulations as the number of the member states of EU. So community law would not be equally applied in the member-states.

20. Thus the European Court had many times the opportunity to stress out that the principle of **uniform application** of Community law in combination with the general principle of **equality**, impose to give finally to the terms of community law an autonomous and uniform meaning, which is determined in the frame of the system where the regulation is included.

21. This "autonomy" and "uniformity" of final interpretation is nevertheless a **partial autonomy** for following reasons:

- a) Because the judge takes necessarily into consideration the interpretation that he made in the level of the languages of member-states.
- b) Because the comparative grammatical interpretation has placed the limits of the autonomous community interpretation.
- c) Because the judge seeks a final meaning considering not only the system of european law but also the acceptability of his interpretation in the member states.

22. In any case the judge facing one language or many, he works necessarily circularly and dialectically.

When he translates he also considers the aim of regulation, as he conceives it, as well as the system in which he will include his interpretation. He also gets often rapidly from teleological to systematic interpretation and from there to grammatical and reversely.

Under this sense of circular and dialectic stochastic process, in an uncertain field the interpretation of law and the interpretation generally as a **creative mental work** is not far from **art**.