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Comparison of all language versions as a method of interpreting EU Tax Law: With some reflections from South Africa

by

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Summary

CILFIT is a landmark case when it comes to language issues in interpreting EU law. But its criteria have raised many practical implications which have hitherto not been sufficiently dealt with. One area that still needs much attention is whether the European Court of Justice (the Court) in *CILFIT* has placed an obligation on national courts to compare all the language versions when interpreting EU tax law. In this regard, the research question addressed by this thesis is: to what extent does the Court in *CILFIT* require national courts to carry out a comparison of all language versions when interpreting EU tax law? This research question is important because it provides clarity on how legal interpretation may be carried out by national courts and addresses the question of uniform application and interpretation of EU law. To create uniformity and to uphold the principle of equality, the Court requires EU law to be interpreted in light of all language versions. An analysis of the cases of the Court shows that the Court is not consistent in using its language comparison requirement. The practical difficulties associated with fulfilling this requirement have led to suggestions of having a few languages as authentic languages to be consulted when interpreting EU law. A major hindrance of settling on one or a few official languages has been mainly political. This is so because any prioritisation of one language over the other implies raising one country in importance, yet the EU is a union of equal nations. However, Brexit may have provided a neutral ground and an opportunity for depoliticising the debate around comparing all language versions when interpreting EU tax law and focusing on the merits and demerits of solutions being provided. In other words, with Brexit, English may be used as a clarifying language version of EU law without it being resisted on political arguments being raised.

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Abbreviation List

Abbreviation text	Explanation
AG	Attorney General
a court	a National Court
the Court	Court of European Justice
ECtHR	European Court of Human Rights
EU	European Union
SA	South Africa
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

SECTION 1: INTRODUCTION

1.1 Background

EU law is drafted in all of its Member States' official languages, and each of these language versions carries equal authority. This practice goes way back to 1958 where the first Regulation of the Council of the European Economic Community (the Regulation) stated that "Regulations and other documents of general application shall be drafted in the four official languages".[1] The Regulation has undergone some amendments to cater for the expansion of Member States in the EU and give authority to the languages of the joining Member States.[2] Currently, article 1 of the Regulation provides for twenty-four official and working languages of the institutions of the EU. This means that EU law exists in a multilingual legal environment. An unavoidable result of this is a development of different legal systems with different legal terminology, concepts and principles which further results in marked differences in legal reasoning, interpretation and application of EU law among the EU Member States.[3] As a way of coping up with and managing the multilingual nature of the EU, the European Court of Justice (the Court) uses a metalinguistic method when it is faced with linguistic divergences in interpreting EU law.[4] Using this method, the Court requires EU law to be interpreted and applied uniformly in light of the versions existing in all the languages of the EU.[5]

There is academic literature that discusses the multilingual nature of the EU, its problems and the interpretation of EU law that involves a comparison of all EU language versions.[6] *CILFIT* is a landmark case when it comes to language issues in the EU, but its criteria have raised many practical implications which have hitherto not been sufficiently dealt with. One area that still

[1] Article 4 of EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community 1958.
[2] For example, the Regulation was amended to give official language status to Danish and English in 1973, Greek in 1981, Portuguese and Spanish in 1986, and Finnish and Swedish in 1995 and in 2007 (with some derogations) to Irish.
[3] S Taylor "The European Union and National Legal Languages: An Awkward Partnership?" https://www.cairn.info/revue-francaise-de-linguistique-appliquee-2011-1-page-105.htm# (accessed 20 March 2020).
[4] LP Aljanati "Multilingual EU Law: A New Way of Thinking" (2018) 10 *European Journal of Legal Studies* 5 at 37.
[5] Case C-283/81 *CILFIT* ECLI:C: 1982:335 para 18 -20 and Case C-296/95 *EMU Tabac* ECLI:C: 1998:152 para 36.
[6] See for example, Aljanati 2018 *European Journal of Legal Studies*, S van der Jeught "Current Practices with Regard to the Interpretation of Multilingual EU Law: How to Deal with Diverging Language Versions?" 2018 (11) *European Journal of Legal Studies* 5 and T Capeta "Multilingual Law and Judicial Interpretation in the EU" http://www.cyelp.com/index.php/cyelp/article/view/88/62 (accessed 22 March 2020).

needs much attention is whether the Court in *CILFIT* has placed an obligation on national courts to compare all the language versions when interpreting EU tax law.

A major hindrance of settling on one or a few official languages has been mainly political.[7] This is so because any prioritisation of one language over the other implies raising one country in importance, yet the EU is a union of equal nations. Thus, the current debates around comparing all language versions are being tainted with the issue of the equal authenticity of all languages and the political reasons behind the idea of equal authenticity. However, with the exodus of Britain (Brexit) from the EU, the time may have come for this question to be properly addressed and solved without raising political arguments. It follows that Brexit may have provided a neutral ground and an opportunity for depoliticising the debate around comparing all language versions when interpreting EU tax law and focusing on the merits and demerits of solutions being provided.[8]

1.2 Research question

According to the Court in the case of *CILFIT*, interpreters of EU law have to consider the special characteristics of EU Law when interpreting a provision of EU law.[9] They especially need to bear in mind that EU law has its terminology and that EU law provision exists in several, equally authentic language versions. According to the Court, an interpretation of a provision of EU law involves a comparison of the different language versions. [10]

The research question addressed by this thesis is: to what extent does the Court in CILFIT require national courts to carry out a comparison of all language versions when interpreting EU tax law?

1.3 Aim

The thesis aims to provide clarity around what the Court in *CILFIT* meant when it said all language versions need to be considered when interpreting EU law. Legal interpretation is part and parcel of the judiciary duties, and the thesis aims at investigating whether the Court through *CILFIT*'s case is placing an obligation on national courts of considering all language versions

[7] L Stevens "Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments: The Regime Linguistique in the Court of Justice of the European Communities" (1967-1968) 62 *Northwestern University Law Review* 701 at 726 and 732.
[8] A Arnull "The Working Language of the CJEU: Time for a Change?" http://epapers.bham.ac.uk/3186/1/IEL_Working_Paper_01-2019-arnull.pdf (accessed 2 April 2020).
[9] *CILFIT* para 18 -20.
[10] *CILFIT* para 18.

when interpreting EU tax law. In other words, the thesis seeks to address one of the many questions that remain unclearly answered in academic literature, which is whether the national courts faced with the twenty-four languages of the EU are required to carry out a comparison of all these languages when interpreting EU tax law.

Other than providing clarity on how legal interpretation may be carried out, the research question addressed by this thesis is of paramount importance for the reason that it addresses the question of uniform application and interpretation of EU law.[11] Furthermore, the research question may be of importance in limiting state liability issues which may arise as a result of a failure by national courts to interpret EU tax law correctly because of the multiple languages.

1.4 Method and material used

Different research techniques were applied to attain the goal of this thesis. The legal dogmatic research methodology was used to conduct the research for this thesis. This method, "concerns researching current positive law as laid down in written and unwritten European or (inter)national rules, principles, concepts, doctrines, case law and annotations in the literature".[12] The thesis analysed cases from the Court and conducted a literature review of related academic writings. Thus, the relevant information for this thesis was extracted from a selection of relevant case law and literature. Although the main focus of this thesis was on tax law, cases which deal with EU law, in general, were also used to put forward arguments. The research was also conducted in the form of an extended argument of the current academic literature, supported by relevant documentary evidence. The thesis's discussion was made using case law from the Court and literature dealing with the literal and multilingual interpretation approach and dealing with multilingual problems in EU law. The discussion of the thesis was mainly centred around the case of *CILFIT*. Reference was also made to the TFEU, which is the legislative basis for the preliminary ruling procedure. Furthermore, a descriptive and analytical writing method was used to put forward and support the arguments presented in this thesis. Lastly, for comparative purposes, the research also briefly discusses how SA, a country with eleven official languages, deals with multilingualism problems in legal

[11] Aljanati 2018 *European Journal of Legal Studies* 44.
[12] J Vranken "Exciting Times for Legal Scholarship" http://www.lawandmethod.nl/tijdschrift/lawandmethod/2012/2/ReM_2212-2508_2012_002_002_004.pdf (accessed 18 February 2020).

interpretation. The comparative method was used to investigate if any lessons may be learnt from SA's multilingual interpretation approach.

1.5 Delimitation

The thesis did not fully discuss the different methods of interpretation, but much focus was given to the literal method of interpretation and multilingual interpretation. The thesis was mainly centred on *CILFIT* case and the language comparison requirement mentioned in *CILFIT*.

1.6 Outline

The thesis is divided into six sections with section one and two of the thesis giving an introduction and background of the thesis. Section three discusses the obligation to compare all languages. Section four of the thesis provides a brief comparative analysis looking at the case study of SA. The answer to the research question is provided in section five discussing national courts' obligation arising from *CILFIT*. Lastly, section six concludes the thesis and provides recommendations.

SECTION 2: CILFIT AND INTERPRETING EU TAX LAW

2.1 Introduction

This section discusses the Court's decision in *CILFIT* as well as its reasoning. Furthermore, the section discusses the uniqueness of EU law terminology, the preliminary process and the literal and multilingual interpretation method.

2.2 *CILFIT* case

The Court in *CILFIT* was asked to explain whether the obligation upon national courts of last instance to refer to the Court any question on the interpretation of EU law is subject to certain restrictions.[13] In response to the question, the Court passed a landmark decision on the conditions governing the interpretation of EU law and the *acte clair* doctrine. *Acte clair* is when the correct application of community law is so obvious, and there is no reasonable doubt as to how the question raised is to be resolved.[14] In such a situation, there is no obligation upon a court to refer the question to the Court. In addition to the *acte clair* the Court also further developed the Da Costa[15] (*acte eclair)* doctrine. The Da Costa doctrine does not require national courts of last instance to refer a question to the Court when the Court has already dealt with the question.[16] However, the Court noted that national courts have the liberty to bring a matter before the Court whenever they consider it appropriate to do so.

The Court acknowledged the *acte clair* doctrine but qualified its use by revealing the difficulties the national courts had to overcome before declaring a matter *acte clair*.[17] The Court stated that before a national court can decide that there is an *acte clair*, it needs to be convinced that the matter is obvious to the courts of the other member states and the Court.[18] The Court went on to explain the particular difficulties and special characteristics of EU law which the national courts have to deal with when interpreting EU law.[19] Firstly, the Court said that it must be borne in mind that EU law is drafted in several languages which are all equally authentic and when interpreting EU law all the different language versions need to be

[13] Para 11-12.
[14] Para 16.
[15] Joined cases C-28 to 30/62 *Da Costa en Schaake NV* ECLI:C: 1963:6.
[16] Para 13-14.
[17] Capeta "Multilingual Law and Judicial Interpretation in the EU".
[18] Para 16.
[19] Para 17.

compared.[20] This means that *prima facie,* the meaning of EU law is derived from a comparison of all the language versions. But one may rightly question how can the 24 languages of EU which carry in them different legal cultures be of equal authenticity.[21] The Court further added that even where the different language versions are entirely in accord with one another, EU law uses peculiar terminology and that legal concepts do not have the same meaning in EU law and in the law of the Member States.[22] Finally, the Court stressed that the interpretation of EU law entails placing every provision of EU law in its context and interpreting it in the light of EU law as a whole while having regard to its objectives and state of evolution.[23]

The criteria laid down above by the Court has not been without criticism. Most of the criticism which the *CILFIT* criteria have given rise to emanate from the "equally obvious" criteria and the language versions comparison criteria.[24] This thesis is concerned with the language versions comparison requirement. Although it has been stated that the Court in *CILFIT* seems to give national courts some discretion in matters dealing with the interpretation of EU law and in deciding not to refer a question to the Court, the language comparison requirement have been argued to be difficult to fulfil in practice.[25] AG Colomer and AG Jacobs have even considered the need for the adjustment of the *CILFIT* criteria.[26] AG Colomer has called the language comparison requirement "unviable at the time it was formulated" and in the current EU with 24 languages, "it seems preposterous".[27] He further argues that the Court should "moderate its terms to adapt them to the demands of the times".[28] The environment that existed at the time the Court laid down its criteria in *CILFIT* is significantly different from the present EU. The Member States have increased, and the official languages have almost doubled.

It may be argued that making it practically difficult for the national courts to legitimately meet the requirements for not referring questions to the Court was somehow intentional on the part of the Court. It may have been an attempt to promote a dialogue between national courts and the Court and discourage national courts from having the final say on the matters to do with

[20] Para 18.
[21] This question on equal authenticity will be discussed in section 3.1.
[22] Para 19.
[23] Para 20.
[24] Para 16 and 18.
[25] J van Dorp and P Phoa "How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the *CILFIT* Judgment to the Creation of a New European Legal Culture" (2018) 34 *Utrecht Journal of International and European Law* 73 at 78.
[26] Case C-461/03 *Gaston Schul Douane-Expediteur* ECLI:C: 2005:415 para 52 and Case C-338/95 *Wiener* ECLI:C: 1997:352 para 65.
[27] Para 52.
[28] Para 58.

the interpretation of EU law. In line with this argument, the decision of the Court in *CILFIT* has been cited as an example of "institutional power play" and "judicial activism" by which the Court under the pretext of giving discretion to the national courts, it in fact "bolstered" its position of authority and extended its jurisdiction limits at national courts' expense.[29] However, there is also some literature from former judges of the Court and AGs arguing for a refined interpretation of the *CILFIT* criteria and its continual use and significance. For example, Edward, a former judge of the Court, who despite agreeing that the Court's "phraseology is not ideal" nonetheless argues that the words of the Court need not be read and understood with complete "absurd literalism".[30] According to him, the *CILFIT* criteria should not be seen as a strict criterion, but it should be read fairly as a chain of caveats, which are "no more than common sense", to be considered when a national court is deciding whether there is reasonable doubt as to how the question raised is to be resolved.[31] AG Tizzano shares similar positive reading of *CILFIT* and adds that language comparison should be regarded as a standard method of interpretation in any legislation drafted in several languages.[32]

2.3 EU autonomous terminology

The cases of the Court show that the Court has solved the problem of multilingualism in the interpretation and application of EU law by subjecting it to new techniques of construction which emphasise on the peculiarity, complexity and unprecedented nature of EU tax law.[33] This approach is called autonomous interpretation and maybe the theory behind what the Court in *CILIFIT* stated about EU law. It was stated in *CILFIT* that, even when all the language versions are in accord with one another, national courts cannot rely on their understanding of the provision in question since EU law uses terminology which is peculiar to it.[34] This means that EU law uses terminology and legal principles which are *sui generis*, independent from the Member States laws.[35] Thus, every national court, when interpreting and applying EU tax law has to accommodate this autonomous nature of the EU law.

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[29] van Dorp and Phoa 2018 *Utrecht Journal of International and European* 76 and D Edward "*CILFIT* and *Foto-Frost* in their Historical and Procedural Context" https://www.law.du.edu/documents/judge-david-edward-oral-history/2010-the-past-and-future-of-EU-law.pdf (accessed 23 March 2020).
[30] Edward *CILFIT* and *Foto-Frost* in their Historical and Procedural Context".
[31] Edward *CILFIT* and *Foto-Frost* in their Historical and Procedural Context".
[32] Case C-99/00 *Lyckeskog ECLI*:C: 2002:108 para 55-76.
[33] Stevens 1967-1968 *Northwestern University Law Review* 719-720.
[34] Para 19.
[35] Case C- 6/64 *Flaminio Costa* ECLI:C: 1964:66 para 3 and RF van Brederode "Judicial Cooperation and Legal Interpretation in European Union Tax Law" (2009) 1 *Faulkner Law Review* 53 at 53.

This principle of autonomy has been in operation before *CILFIT* case. For example, the Court, as early as the case of *VNO,* said that EU law does not refer to the law of Member States for determining its meaning and scope.[36] Furthermore, it stated that the concept of capital goods is an independent concept of EU law which cannot be left to the discretion of each Member State.[37] The aim behind the autonomous interpretation is to promote a uniform application of EU law across all Member states.[38] This goal of the uniform application was mentioned in cases dealing with VAT exemptions. For example, in *Velvet & Steel* and *TMD,* it was held that VAT exemptions constitute independent concepts of EU law and that the purpose of independent concepts of EU law is to avoid divergences in the application of VAT system between the Member States.[39] The same was also said in cases such as *CCP, Ygeia* and *Taksatoringen*.[40] In *SAFE,* it was held that the concept of supply of goods in the now article 14(1) of the VAT Directive[41] could not be defined according to the procedures prescribed by national law.[42] This was done to promote a uniform definition of taxable transactions across all Member States.

The concept of autonomous EU law serves to show that in interpreting EU law, national courts are required to seek the definition of provisions of EU law in EU law itself and not Member States' laws. This is because EU legal terms are not "constrained by the legal culture of any of the Member States and their domestic case law and jurisprudence".[43] It follows that in using the autonomous interpretation approach, EU law will be interpreted as if it exists in a monolingual legal environment and as if the different linguistic divergences cannot and do not exist.[44] Therefore, despite various language versions, EU law always has a uniform meaning, anywhere it is interpreted and applied.[45]

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[36] Case C- 51/76 *VNO* ECLI:EU: 1977:12 para 10-11.
[37] *Ibid*.
[38] R Barents "Law and Language in the European Union" (1997) 1 *EC Tax Review* 49 at 55. See also Case C-327/82 *EKRO BV* ECLI:C: 1984:11 para 11 where it was stated that principle of equality and the need for a uniform application of EU law requires the terms of EU law to be given an independent and uniform interpretation throughout the EU.
[39] Case C-455/05 *Velvet & Steel* ECLI:C: 2007:232 para 15 and Case C-412/15 *TMD* ECLI:C: 2016:738 para 24.
[40] Case C-349/96 *CPP* ECLI:C: 1999:93 para 15, Joined Cases C-394/04 and C-395/04 *Ygeia* ECLI:C: 2005:734 para 15 and Case C-8/01 *Taksatorringen* ECLI:C: 2003:621 para 37.
[41] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/1 (2006).
[42] C-320/88 *SAFE* ECLI:C: 1990:61 para 7.
[43] SE Pommer "Interpreting Multilingual EU Law: What Role for Legal Translation?" (2012) 5&6 *European Review of Private Law* 1241 at 1249.
[44] Barents 1997 *EC Tax Review* 53.
[45] *Ibid*.

However, the autonomous interpretation approach has not been spared from criticism. Pacho has argued that this type of interpretation assumes that decisions of the courts are exempted from value judgements and individuals' discretion. [46] But, it is submitted that when the Court is talking of autonomous concept of EU law, the emphasis is on how independent EU law is from Member States' laws. By this, the point the Court is hammering on is an interpretation of EU law different and separate from national laws and aimed at creating a uniform interpretation and application of EU law. It is natural that when one is confronted with a provision of the EU law, one seeks its meaning within one's local legal framework, but this is exactly what EU law is not about and what the Court has been cautioning against when it spoke of autonomous EU law terminology.[47] In the words of the Court, "the [EU] legal order does not aim in principle to define its concepts based on one or more national legal systems without express provision to that effect".[48]

It has been argued that given the different legal cultures in the EU, having a single meaning for the EU law is almost certainly impossible.[49] More so, it has been questioned whether there can truly be one law and 24 languages?[50] To this, it has been argued that if there is ever going to be anything like one EU law language it is the "authoritative interpretation" of the Court based mainly on the English and French languages understood by the majority of judges.[51] Thus, multilingualism seems to be destined to continue to pose a threat to the creation of a uniform EU legal environment and its terminology.

2.4 Preliminary process

The preliminary reference procedure laid down is in article 267 of the TFEU.[52] Article 267 provides national courts with discretion or an obligation to refer, and the Court with a jurisdiction to provide an answer, questions on the proper interpretation validity of EU law. According to article 267, a national court has the discretion, while a national court of last instance has an obligation, to refer the question to the Court if it considers that a decision on the question is necessary to enable it to give judgment. The preliminary rulings of the Court on

[46] Aljanati 2018 *European Journal of Legal Studies* 44.
[47] Barents 1997 *EC Tax Review* 55.
[48] Case C-64/81 *Nicolaus Corman* ECLI:C: 1982:5 para 8. See also AG Slynn opinion in Case C-102/86 *Apple and Pear* ECLI:C: 1987:466.
[49] Taylor "The European Union and National Legal Languages: An Awkward Partnership?".
[50] N Urban "One Legal language and the Maintenance of Cultural and Linguistic Diversity?" (2000) 1 *European Review of Private Law* Page 51 at 52.
[51] *Ibid* 57.
[52] Consolidated Version of the Treaty on the Functioning of the European Union C 326/47 of 26.10.2012.

questions referred to it are binding on the interpretation of EU law, but not on the application of this interpretation to the case before the national court.[53]

The preliminary reference procedure is an important procedure upon which the co-operative relationship of the Court and national courts hinges upon.[54] The purpose of the preliminary reference procedure is for the preservation of the character of EU law and to ensure that in all circumstances, this law is the same across the EU.[55] In the cases of *Hoffmann-La Roche, Morson & Jhanjan* and *Aquino* the Court repeated the same idea, albeit in a different wording when it stated that the preliminary procedure aims "to prevent a body of national case law not in accord with the rules of [EU] law from coming into existence in any Member State".[56] Neamt rightly submits that the rationale behind these previously quoted cases is that the EU as a "supra-national legal system" can only fully function as a whole across all the Member States' different legal systems if its legal concepts and principles are interpreted and applied uniformly across all the jurisdictions of the Member states.[57] Thus, the aim behind the preliminary reference procedure is to ensure the correct interpretation and application of EU law across all Member States through the assistance of the Court. The Court, as the final interpreter of EU law, attains this objective by giving a harmonised interpretation of EU law that is applicable across all Member States and not confined to one case or one Member State.[58] However, when it comes to the interpretation of EU law by national courts, it may be questioned whether interpreting *CILFIT* case as a decision which subjects national courts to an obligation to compare all languages when interpreting EU law is necessary to attain a uniform application of EU law.

As instrumental as the preliminary procedure may have been in driving a judicial dialogue between the Court and national courts, there have been questions on how it can be properly applied. Most of the questions raised concern the extent to which the procedure places an obligation on courts to raise questions with the Court.[59] The extent of this obligation was precisely the question which the Court in *CILFIT* was called upon to answer. This question

[53] Case C-29/68 *Milchkontor* ECLI:C: 1969:27 para 2-3.
[54] van Brederode 2009 *Faulkner Law Review* 53.
[55] Case C-166/73 *Rheinmifhlen-Diisseldorf* ECLI:C: 1974:3 para 2.
[56] Case C-107/76 *Hoffmann-La Roche* ECLI:C: 1977:89 para 5, Joined cases C-35 and C-36/82 *Morson & Jhanjan* ECLI:C: 1982:368 para 8 and Case C-3/16 *Aquino* ECLI:C: 2017:209 para 33.
[57] VP Neamt "The Obligation of National Courts Against Whose Decision there is no Judicial Remedy to Refer Questions to the Court of Justice of the European Union" (2016) 17 *Journal of legal studies* 24 at 25.
[58] Taylor "The European Union and National Legal Languages: An Awkward Partnership?".
[59] Capeta "Multilingual Law and Judicial Interpretation in the EU".

triggered, for the Court, a task of balancing the co-operative nature of the preliminary reference procedure and the duty of the national courts to ask from the Court an authoritative meaning of EU law.[60] Paragraphs 18–20 of the judgment indicate the circumstances within which a judicial dialogue on EU law's interpretation is to occur between the Court and national courts.[61]

Without the preliminary ruling procedure, the uniformity and independence of the EU legal order would be jeopardised. This is because, without the Court's "authoritative guidance, diverging interpretations would exist in the Member States, and the "sense of being part of the same legal jurisdiction would be compromised".[62] The preliminary process has been dubbed as a 'central nervous system' to enforce EU law and coordinate the EU and national legal systems.[63] There is, therefore, no doubt that refraining from referring a case for a preliminary ruling may impede on the objective of article 267 of creating a uniform understanding and application of EU law. With the preliminary procedure being held as a fundamental tool in the development of EU law, it can be argued that the result of a non-referral by national courts may be a total collapse of the EU system.

2.5 Literal method of interpretation

2.5.1 The *claris non fit* interpretation principle

Following the in *claris non fit interpretation* principle, the Court applies the literal interpretation method if the meaning of a text is clear and obvious that no other interpretation exists.[64] An example of where the in *claris non fit interpretation* principle was applied is *Commission v United Kingdom* where the Court held that in the face of the clear and precise wording of a provision, the Court cannot interpret that provision with the intention of correcting it and thereby extending the obligations of the Member States relating to it.[65] Arguing that the literal interpretation of Article 2(1) of the Thirteenth VAT Directive does not allow for refunds to third-country persons carrying out financial and insurance transactions, AG Jaaskinen

[60] Taylor "The European Union and National Legal Languages: An Awkward Partnership?".
[61] van Brederode 2009 *Faulkner Law Review* 60.
[62] P Craig and G de Burca *EU Law: Text, Cases, and Materials* 5 ed (2011) 477.
[63] AS Sweet "The Juridical Coup d'Etat and the Problem of Authority: *CILFIT* and *Foto-Frost*" in LMP Maduro and L Azoulai (eds) *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010) 201.
[64] S O'Brien, "Controlling Controlled English An Analysis of Several Controlled Language Rule Sets Obtaining the Rule Sets" https://www.academia.edu/1160347/Controlling_controlled_english_an_analysis_of_several_controlled_language_rule_sets (accessed 15 April 2020).
[65] Case C-582/08 *Commission v UK* ECLI:C: 2010:429 para 51.

demonstrated what a clear provision might be.[66] According to the AG, if a provision expressly states that it applies to subparagraphs (a) and (b), it cannot be interpreted as applying to subparagraph (c) without departing from the meaning of the language used in that provision.[67]

Having regard to the fact that EU law is drafted in 24 languages, the literal interpretation of a provision may not be synonymous across all the language versions because the literal meaning of a provision may be ambiguous.[68] In explaining the complexities of language in general O'Brien states that "a language is vastly more complex than an automobile engine, and linguistic items, being multi-functional, can be looked at from more than one point of view, and hence given more than one label on different occasions even within the same analytical framework".[69] Terra and Kajus point to the view that a seemingly clear text should be literally applied in view of the different language versions.[70] Therefore using AG Jaaskinen's demonstration above, a provision may still be interpreted as applying to subgraph (c) in other language versions of the provision. However, in interpreting the multilingual EU law, the Court does not apply the literal method to the exclusion of other methods of interpretation such as the teleological and contextual methods. In *Kennemer Golf & Country Club*, in deciding on the meaning of a 'non-profit-making' organisation, the Court had regard to the French version of the now article 133(a) of the VAT Directive in light of the objective of the provision.[71] Thus, the Court does not always follow a strict literal interpretation, and in some cases even when the meaning is *prima facie* clear, unambiguous and persuasive from the text, it will merely use the literal method of interpretation as a starting point of a thorough judicial interpretation process.[72]

2.5.2 Literal interpretation coupled with multilingual interpretation method

A key element of the literal interpretation method introduced by Bengoetxea is a comparison of all languages. [73] Naturally, the literal method is in favour of language comparison. This is because language comparison allows for the extension of the "scope of the textual framework" within which the clarification of an unclear term and a confirmation of a clear term is found

[66] Case C-582/08 *Commission v UK* ECLI:C: 2010:286 para 25.
[67] *Ibid* para 26.
[68] *Ibid* para 27.
[69] O'Brien "Controlling Controlled English An Analysis of Several Controlled Language Rule Sets Obtaining the Rule Sets".
[70] B Terra and J Kajus *Introduction to European VAT IBFD* Digital ed (2020) 6.3.
[71] Case C-174/00 *Kennemer Golf & Country Club* ECLI:C: 2002:200 para 32-33.
[72] Stevens 1967-1968 *Northwestern University Law Review* 727.
[73] J Bengoetxea *The Legal Reasoning of the European Court of Justice* (1993) 234.

before or without, having recourse to external evidence.[74] Accordingly, it may be rightly submitted that the literal interpretation method may be regarded as the ground upon which the multilingual interpretation is built upon. The method of literal interpretation "draws arguments from semantic and syntactical features of legal language, and a comparison of different language versions in which [EU] law is authentic".[75] This is an important element because, as will be discussed in section 3.1, all EU languages are held by the Court to be of equal authenticity, and one way of realising this equal authenticity involves a comparison of all languages when interpreting EU law. [76]

In as much as a close link may be identified between the literal and multilingual interpretation approach, this link is not one that is not without its fallouts. For example, the different languages versions may not always carry the same meaning of an EU law provision. This was the case in the case of *MKG-Kraftfahrzeuge,* where the Court had to decide whether factoring is part of debt collection falling under VAT exemption.[77] The English and Swedish versions placed factoring on the same footing as debt collection, by expressly referring to it, alongside the latter, as a transaction not included in the list of exemptions.[78] However, the other language versions did not contain an express indication to that effect.[79] In such a situation, it will be difficult for the Court to come out with a uniform meaning by solely relying on the literal interpretation and without having recourse to other interpretation methods.

In *MKG-Kraftfahrzeuge*, the Court resorted to resolve the language divergences by interpreting the provision in its context and in the light of its spirit and of the scheme of the Sixth Directive.[80] A similar approach was followed in the cases of *Motor Industry*, *Velvet & Steel Immobilien* and *ERGO*. [81] The Court recalled that all language versions of EU constituted the same legal instrument of EU law when it mentioned that "provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union".[82] The Court went on to invoke the purpose and general scheme interpretation method. It held that where there is a divergence between the various language

[74] Stevens 1967-1968 *Northwestern University Law* 727.
[75] Bengoetxea *Legal Reasoning of the European Court of Justice* 234.
[76] *CILFIT* para 18.
[77] Case C-305/01 *MKG-Kraftfahrzeuge* ECLI:C: 2003:377.
[78] Para 68.
[79] Para 69.
[80] Para 70.
[81] Case C-149/97 *Motor Industry* ECLI:C: 1998:536 para 16, *Velvet & Steel Immobilien* para 20 and Case C- 48/16 *ERGO* EU:C: 2017:377 para 37.
[82] *ERGO* para 37, *Motor Industry* para 16 and *Velvet & Steel Immobilien* para 20.

versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[83] This approach has some similarities with the criteria of the Court in *CILFIT* which requires a court to place the provision in question in its context and to interpret it in light of the EU law as a whole having regard to its objectives and state of evolution at the date on which the provision is to be applied.[84]

AG Jacobs has suggested that the reference to all language versions is a reinforcement to the point that EU law provisions must be interpreted in the light of their context and of their purposes rather than based on the text alone.[85] It follows that when faced with linguistic the Court resorts to a "metalinguistic criteria" of interpretation to try and reconcile the wording of different language versions.[86] This method of interpretation has become the standard formula for the Court when faced with linguistic discrepancies.[87] The metalinguistic method seemingly gives the Court a generous leeway to do a thorough assessment of cases of divergences in pursuance of adequate solutions and uniform interpretation of EU law across all the language versions. [88]

Interpreting law which is drafted in many languages raises linguistic problems for any court. Some of these problems can be as a result of drafting or translating errors. [89] But, the problems often are just unavoidable difficulties which are intrinsic in the very nature of language, "for each language possesses its genius which influences the choice of words and the arrangement of the sentence".[90] In *Tomas Vilkas* the Court indicated the need for an interpreter of EU law to consider the actual intention of the legislature in light of the versions drawn up in all languages.[91] However, a relevant question posed by Solan is "how faithful to the will of the legislative body can decision-makers be in a system that produces legislation in many languages and gives equal status to each version".[92] This goes to show that there are limits for

[83] Para 37.
[84] Para 20.
[85] *Wiener* para 65.
[86] van der Jeught 2018 *European Journal of Legal Studies* 12.
[87] See for example Case C-404/16 *Lombard Ingatlan Lizing* EU:C:201 7:759 para 21 and Case C-74/13 *GSV* EU:C: 2014:243 para27.
[88] van der Jeught 2018 *European Journal of Legal Studies* 12.
[89] CW Baaij "Fifty Years of Multilingual Interpretation in the European Union" in P Tiersma and LM Solan (eds) *The Oxford Handbook of Language and Law* (2012) 229.
[90] Stevens 1967-1968 *Northwestern University Law* 715.
[91] Case C-640/15 *Tomas Vilkas* EU:C: 2017:39 para 47.
[92] LM Solan "The Interpretation of Multilingual Statutes by the European Court of Justice" (2009) 34 *Brooklyn Journal of International Law* 277 at 280.

the literal interpretation as a result of different meanings which may be ascribed to EU law provision across the different languages of the EU.

In explaining the limits and cautioning against the strict use of the literal interpretation method, AG Jacobs stated that the very existence of many language versions is a reason for not adopting an excessively literal approach to the interpretation of EU provisions.[93] But rather it is a reason for putting greater weight on the context and general scheme of the provisions and their object and purpose.[94] This same reasoning was used by the Court in *Velvet & Steel Immobilien* where it was held that, because of the linguistic differences, the scope of the phrase in question cannot be determined based on an exclusively textual interpretation.[95] It follows that when faced with diverging meaning in language versions, no legal consequence can be based on the terminology of a provision. Thus, language becomes of no relevance or less importance in an adequate and uniform meaning of EU law.[96] This has led to some claims that the multilingual nature of EU law "observably leads to reduced importance of the literal interpretation method".[97]

2.5.3 Literal and multilingual interpretation: the benefits

Notwithstanding the conflicts discussed above between the literal interpretation approach and multilingualism interpretation, it is beyond doubt that a literal interpretation which involves multilingual interpretation (a comparison of all languages) has some benefits. For instance, it is a possible way of bringing uniformity across all EU on the meaning and application of EU law. Furthermore, it can be used to provide clarity of a provision of EU law.[98] Solan has concluded that comparing different linguistic versions assists the Court to put into operation and further the intention and goals of the legislature.[99] A case in point which serves to show how a comparison of different language versions can provide clarity and guarantee a uniform application of the EU law is *Sharda Europe BVBA*.[100] In this case, a comparison between different language was able to confirm Sharda's claim that 31 December 2008 constituted the deadline for the submission of an application for re-evaluation under Article 3(2) of Directive 2008/69. More so, a comparison of different language versions showed that the Spanish version

[93] *Wiener* para 65.
[94] *Ibid*.
[95] *Velvet & Steel Immobilien* para 20.
[96] Capeta "Multilingual Law and Judicial Interpretation in the EU".
[97] Pommer 2012 *European Review of Private Law* 1243.
[98] IO Fernandez *Multilingualism and the Meaning of EU Law* (LLD thesis, European University Institute, 2020) 152.
[99] Solan 2009 *Brooklyn Journal of International Law* 278-279.
[100] Case C-293/16 *Sharda Europe BVBA* EU:C:2017: 430.

was not in agreement with other language versions. Furthermore, Language comparison helps to "discover divergences that would otherwise go unnoticed".[101] In *EMU Tabac* and *MKG-Kraftfahrzeuge* language comparison was used to clarify a meaning which a majority of the language versions in those cases did not portray.[102] However, this method as appealing as it may be in creating uniformity in EU, what remains questionable is whether this method of interpretation which involves a comparison of all the 24 languages in EU is something that can be carried out by the national courts.

2.6 Conclusion

The *CILFIT* case provided guidance on the interpretation of EU law and conditions under which a national court is not obliged to refer a question to the Court for a preliminary ruling. The preliminary ruling reference procedure is an instrument used by the Court to in attaining a uniform interpretation and application of EU law across all the Member States. In interpreting EU law, the Court uses the literal interpretation method. As was discussed above, there is a close link between the literal interpretation method and the obligation to compare all language versions. This link, however, is not without problems. It has been shown that the Court, when solving the language conflicts, it rises above not only the strict literal interpretation approach., but it also goes beyond comparing the different languages and takes into account the purpose of the legislation, general scheme and context in which provision in question forms part. The language comparison obligation is part and parcel of a logical result of the Court's idea that each language version of EU contributes to the meaning of EU law and of the equal authenticity principle which is to be discussed in the following section. [103]

[101] Aljanati 2018 *European Journal of Legal Studies* 46.
[102] *EMU Tabac* para 33-36 and *MKG-Kraftfahrzeuge* para 68-74.
[103] Fernandez *Multilingualism and the Meaning of EU Law* 152 and *CILFIT* para 18.

SECTION 3: OBLIGATION TO COMPARE ALL LANGUAGES

3.1 Introduction

This section discusses the principle of equal authenticity, the arguments for and against comparing all language versions.

3.2 Principle of Equal Authenticity

3.2.1 Twenty-four original legislation language

The Court in *CILFIT* stated that all the language versions of EU law are equally authentic.[104] This means that in the EU, all the 24 languages are original language of law and in interpreting EU law courts cannot rely on a single language version or give priority to one language.[105] The principle of equal authenticity has been in existence before the *CILFIT* case. For example, in *Bosch*, AG Lagrange stated that all languages are authentic means that no single one of them is authentic.[106] Again in 1969 the Court in *Staude*r, stated that when a single decision is addressed to all the Member States, the necessity for uniform interpretation and application makes it impossible to consider one version of the text in isolation but requires that it be interpreted, in the light of the versions in all languages.[107] Thus, in tackling the divergences between the different language versions, the Court does not construe EU law meaning from one language version in isolation of the rest versions.

However, there have been some arguments in the literature pointing to the view that the rationale behind the principle of equal authenticity stems from political reasons.[108] By giving equal authenticity to all the language versions, the Court is upholding the principle of equality and sovereignty of each Member State regardless of their population size.[109] Thus, politically, the principle of equal authenticity gives Member States a confirmation of their equal status and sovereignty in the EU, thereby cementing relations between EU institutions and the public.[110] On the other hand, Urban argues that the principle of linguistic remains "a fiction" and is even

[104] Para 18.
[105] Pommer 2012 *European Review of Private Law* 1248.
[106] C-13/61 *Bosch* ECLI: C: 1962:3 para 149.
[107] Case C-29/69 *Stauder* ECLI: C: 1969:57 para 3.
[108] See for example Fernandez *Multilingualism and the Meaning of EU Law* 215, Solan 2009 *Brooklyn Journal of International Law* 279 and Stevens 1967-1968 *Northwestern University Law* 726 and 732.
[109] Solan 2009 *Brooklyn Journal of International Law* 279.
[110] Stevens 1967-1968 *Northwestern University Law* 726 and 732.

"hardly compatible with the necessity of uniform interpretation on which the Court of Justice has always insisted".[111] More so, it has been argued that the principle of linguistic equality together with the many EU languages is a combination not compatible with the minimal requirements of efficiency.[112] But Manko argues that equal authenticity is an important principle in "building the Union's democratic legitimacy towards its citizens…it is not just a matter of transient political will but rests upon solid legal foundations found in the Charter of Fundamental Rights…".[113]

3.2.2 Twenty-four languages, but one EU law meaning

As already stated above, all the twenty-four languages of the EU are regarded as original languages of EU law. For example, article 55 of the TEU all the 24 languages in which the Treaty is drawn up are regarded as the original language.[114] But, what does this mean for any court called upon to interpret EU law, does it mean the law may have 24 different meanings? This question is relevant given the fact that all the language versions of EU law are not always portraying a single meaning of EU law. Taylor cites legal language as one of the impediments to a harmonisation application of EU law.[115]According to Solan "the opportunity for inconsistencies among the various language versions is so profound that it would not be surprising if the entire system collapsed under its own weight".[116] But, having regard to the previously discussed idea in section 2 that the Court strives for uniformity of EU law across all Member States, it can be concluded that although the different language versions present different meanings, they are deemed to be expressing the "same rule of law".[117]

In *CILFIT*, it was held that every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole.[118] In a multilingual context like EU, the context spoken of by the Court in *CILFIT* is made up 24 different language versions. This means that each language version forms part of the context within which the other version

[111] Urban 2000 *European Review of Private Law* 53.
[112] Barents 1997 *EC Tax Review* 51.
[113] R Manko "Legal aspects of EU Multilingualism" https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595914/EPRS_BRI(2017)595914_EN.pdf (accessed 3 March 2020). The author referred to articles 21, 22 and 41 (4) of the Charter of Fundamental Rights which obliges the European Union to respect linguistic diversity, prohibits discrimination on account of language and provides for the citizen's right to communicate with the institutions in any official language of the EU.
[114] Consolidated Version of the Treaty on European Union C 326/15 OF 26.10.2012.
[115] Taylor "The European Union and National Legal Languages: An Awkward Partnership?".
[116] Solan 2009 *Brooklyn Journal of International Law* 278.
[117] Solan 2009 *Brooklyn Journal of International Law* 279.
[118] Para 18.

is to be interpreted, meaning that an interpreter cannot read one version with the expectancy of understanding the multilingual law of EU. [119] It follows that on its own, one version of EU law is not complete, but "by combining the possible expressions in the different languages, the [uniform] meaning may be found". [120] In *EMU Tabac* it was held that the need for a uniform interpretation of EU law requires that it should be interpreted and applied in the light of the versions existing in the other official languages. [121]Accordingly, the content of a provision of EU law theoretically is not contained in one language version but "only in the aggregate of all the authentic language versions". [122] For the readers of EU law, the equal authenticity principle means that they cannot solely depend on their language version. [123] More so, it also means that they are bound by a meaning of EU law in other language versions which they may be not aware of.[124] As will be seen in section 5.1this raises serious concerns from a legal certainty perspective.

3.2.3 Majoritisation prohibition

As previously noted, the principle of equal authenticity requires courts not to rely on one language version when interpreting EU law. Bobek identifies three principles which govern language versions comparison. These principles are (a) majoritisation prohibition (b) the prohibition of reading one version in isolation of the other versions and (c) using other methods of interpretation to overcome language discrepancies.[125] The first two principles flow from the principle of equal authenticity and have been confirmed by the Court in a number of its cases. In *EMU Tabac*, the Court talking of the majoritisation prohibition principle held that to discount two language versions, as suggested by the applicants, would run counter to the need for uniform interpretation of EU law.[126] The Danish and Greek versions were the only versions indicating that for excise duty to be payable in the country of purchase, transportation must be effected personally by the purchaser (not an agent) of the products subject to duty.[127] The applicants were arguing that the two versions not consistent with the other versions needed to be disregarded because at the time when the Directive in question was adopted, the Member

[119] Pommer 2012 *European Review of Private Law* 1247.
[120] Pommer 2012 *European Review of Private Law* 1248.
[121] *EMU Tabac* para 36.
[122] Fernandez *Multilingualism and the Meaning of EU Law* 154.
[123] Capeta "Multilingual Law and Judicial Interpretation in the EU".
[124] Capeta "Multilingual Law and Judicial Interpretation in the EU".
[125] M Bobek "On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't Do as I Say'?" (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 1 at 2-4.
[126] Para 36.
[127] Para 33.

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.[128] Rejecting this argument, the Court concluded that, all the language versions must, in principle, be recognized as having the same weight and thus cannot vary according to the size of the population of the Member States using the language in question.[129]

The decision of the Court in *Emu Tabac* was confirmed in *Motor Industry* where the Court had to decide whether a Motor Industry Institute qualified for VAT exemption under the now Article 132(1)(l) of the VAT Directive. The Court held that it is settled case-law that the wording used in one language version cannot serve as the sole basis for the interpretation EU law, or be made to override the other language versions in that regard.[130] Such an approach was held to be incompatible with the requirement of the uniform application of EU law.[131] The decision in *Motor Industry* was confirmed in *Velvet & Steel Immobilien*.[132] In *MKG-Kraftfahrzeuge* the explicit mentioning of factoring in two languages, Swedish and English, was not found to be conclusive in placing factoring on the same footing with debt collection.[133] But it was used as evidence to corroborate the argument that the other language versions also placed factoring, including true factoring, among the exceptions to the VAT exemptions.[134]

A conclusion to be drawn from the discussion of these cases is that if two language versions have a different expression or are portraying a different meaning than the rest of the other 22 language versions, those two language versions are an indication that all the other 22 language versions carry the same meaning as the two language versions. Likewise, the Court cannot draw conclusions based on a meaning portrayed by a majority of the language versions. It follows that in interpreting EU law "majoritisation is not an option" and a correct interpretation involves a parallel analysis of all the language versions.[135] However, the Court sometimes discards one language version under the simple justification that "one language version of a multilingual text of Community law cannot alone take precedence over all other versions".[136] In support of the Court's view that the number of languages in support of particular

[128] Para 34.
[129] Para 36.
[130] *Motor Industry* para 16.
[131] *Motor Industry* para 16.
[132] *Velvet & Steel Immobilien* para 19.
[133] Para 68-69 and 74.
[134] Para 74.
[135] Pommer 2012 *European Review of Private Law* 1248.
[136] Case C-268/99 *Aldona Malgorzata* ECLI:C: 2001:616 para 47.

interpretation is not of significance when deciding on the meaning of a provision, Bobek submits that linguistic divergences "cannot be solved based on a simple reassertion of how many languages lean in one direction and how many in the other, i.e. by some form of language voting". [137] The language divergences are resolved by resorting to Bobek's the third principle governing language versions comparison which, discussed in section 2.4.[138] But the question that keeps on lingering around all these discussions and arguments is whether national courts, with their limited resources and understanding of other languages, can be expected to carry out this daunting task of comparing all the 24 languages of EU.

3.3 Arguments in case law and literature for the position that not all language versions have to be considered

So far, it is safe to say it is risky for a reader of EU law to draw conclusions of EU law meaning based on one language version. However, some writers argue against comparing all language versions calling for a refinement of the *CILFIT* criteria of comparing all language versions. For example, in the earlier mentioned opinion of AG Jacobs in *Wiener* case dealing with the Tariff classification of nightdresses, the AG called for a refinement of the language comparing requirement. He was of the opinion that *CILFIT* judgment should not be regarded as requiring the national courts to examine any EU law provision in every one of the official EU languages because that would involve in many cases a disproportionate effort on the part of the national courts.[139] Solan, in explaining the challenges faced by EU judges states that language comparison "…appears to create a daunting task for a court that must resolve disputes over a statute's applicability in a particular situation". Terra and Kajus state that proving that a solution adopted for a matter is evident using a linguistic comparison is a challenging task which cannot be placed upon the shoulders of the national courts.[140]

As stated in section 2.4.1, AG Jacobs argues that the language version comparison requirement is just an essential caution against taking too literal approach.[141] The earlier cited former judge of the Court, Edward, called the *CILFIT* criteria "caveats" not to be read with "absurd literalism".[142] It follows that for these writers, the language requirement is one of the caveats

[137] Bobek 2007-2008 *Cambridge Yearbook of European Legal Studies* 2-4.
[138] *Ibid*.
[139] Para 65.
[140] Terra and Kajus *Introduction to European VAT* 6.3.
[141] Para 65.
[142] Edward "*CILFIT* and *Foto-Frost* in their Historical and Procedural Context" 179.

given by the Court which is not to be read as 'literally' as an instruction requiring a comparison of each of the 24 language versions.

3.4 Arguments in case law and literature for the position that all language versions have to be considered

When it comes to language comparison, the Court has made known its position years ago. The Court, as far back as 1967 in *J. H. van der Vecht* has stated that the need for a uniform interpretation of EU law requires that it should be interpreted and applied uniformly in the light of the versions existing in the other official languages.[143] This statement has become, more or less, the Court's standardised response when faced with language divergences in interpreting EU law. The statement was repeated in *CILFIT* case.[144] In *P Ferriere Nord* the Court confirmed its decision in *J. H. van der Vecht* and *CILFIT* cases.[145] The Court held that the need to interpret EU law in the light of the other language versions is unaffected by the fact that one language considered on its own is clear and unambiguous.[146] This decision seems to say that an argument that a provision is clear and unambiguous will only be accepted if all the other language versions have been consulted.[147] The decision in cases of *P Ferriere Nord* and *J. H. van der Vecht* were later confirmed in *Jyske*.[148] A strong lesson for EU lawyers to take away from this is that "however ingenious and convincing a reasoning based on a term in one language may be, it can crumble when this term is compared with those in other language versions".[149] It has been cautioned that one "must keep in mind that apparent clarity is no guarantee of the absence of divergence" and that the only way one can be certain that a provision is clear is when language comparison is carried out.[150] Thus, one should only conclude EU tax law interpretation matters after having done a comparison of all language versions.

In *Velvet & Steel Immobilien*, the Court repeated that EU law must be interpreted in the light of the versions existing in all the languages.[151] The Court used the indicator "all" to show that all the language versions have to be compared. However, the Court acknowledged that if there

[143] Case 19-67 *J. H. van der Vecht* ECLI:C: 1967:49 at 353.
[144] Para 18.
[145] C-219/95 *P Ferriere Nord* ECLI:C: 1997:375 para 15.
[146] Para 15.
[147] LP Aljanati *The Court of Justice of the European Union's Case Law on Linguistic Divergences (2007-2013): Interpretation Criteria and Implications for the Translation of EU Legislation* (Phd thesis, University de Geneve, 2015) 110.
[148] C-280/04 *Jyske* ECLI:C: 2005:753 para 31.
[149] Barents 1997 *EC Tax Review* 55.
[150] Aljanati 2018 *European Journal of Legal Studies* 46.
[151] Para 16.

are language divergences, the scope of text in question cannot be determined solely based on a literal interpretation.[152] In *Commission v Germany* the Court stated that "it is necessary, first, to examine the wording of the provision at issue in all language versions".[153] As previously noted, AG Tizzano holds a comparison of all languages as a standard method of interpretation for any legislation drafted in several languages.[154] Watkin is of the idea that the very fact that language if flexible (differs from nation to nation) should be enough to persuade one that language comparison is an essential step in interpreting multilingual law.[155]

The principle of equal authenticity is a further indication of the impossibility to rely on an interpretation of EU law based on a single language version. As held in the case of *CILFIT*, it must be emphasised that EU legal concepts do not necessarily have the same meaning in the law of the various Member States.[156] Any interpretation of a rule of Community law based on one language version only is insufficient. It follows that a "monolingual interpretation always carries the risk that the uniform character of Community law is distorted".[157] Even when a term seems to be clear in one language, the same term may carry a different meaning in another language of a Member State. This creates the need for language comparison. Furthermore, as already stated, each language version forms part of the context within which the other version is to be interpreted.[158] This means that if the meaning of a provision is to be found in the sum of the EU language versions, "the intention of the author can be ascertained only by consulting and comparing all the authentic texts of the particular instrument regularly".[159]

However, it should be noted that even if language version comparison was done in the cases cited above, still it was not a comparison of all language versions. More so, in the present-day EU set up, it may difficult to reconcile this approach with the current number of languages. At the time the cases which set the judicial precedence for language comparison were decided, the languages were about 4. But now there are 24 languages. Thus, it may have been practical for the Court to do the comparison, but, currently, no matter how much the Court may want to hold

[152] *Ibid*.
[153] Case C-107/84 *Commission v Germany* ECLI:C: 1985:332 para 10.
[154] *Lyckeskog* para 55-76. See section 2.2.
[155] TG Watkin "Bilingual Legislation: Awareness, Ambiguity, and Attitudes" (2016) 37 *Statute Law Review* 116 at 127.
[156] *CILFIT* para 19.
[157] Barents 1997 *EC Tax Review* 55.
[158] See section 3.2.2.
[159] Pommer 2012 *European Review of Private Law* 1252.

on to its practice and judicial precedence it cannot be denied that comparing all languages appeals more on paper or in principle than in practice.

3.5 Conclusion

Under the principle of equal authenticity, the Court does not derive the correct meaning of EU law based on one language version. Likewise, the Court does not conform itself to a meaning being portrayed by the majority of the language versions. The Court sometimes uses a meaning given by a single language version to point out the correct meaning. Language comparison is done by the Court to bring out a meaning which is uniform across all Member States. Despite the benefits of language comparison requirement discussed, there have been critiques of this requirement who argue against the 'literal' reading of the requirement.

SECTION 4: THE CASE OF SOUTH AFRICA (SA)

4.1 Introduction

This section briefly discusses legal interpretation in SA and how language and language comparison play a role in the interpretation of SA law in general. The case may be instructive in our understanding of how other non-EU countries deal with multilingualism. This comparative analysis may help to identify any lessons EU can draw from the way SA deals with multilingualism and legal interpretation.

4.2 The language practice in the SA judicial system

Outside the EU, SA has eleven official languages. According to the South African Constitution (the Constitution), all the elven official languages have equal status.[160] This, like in the EU, is done to cater for the diverse people and cultures living in SA. The Bill of Rights in SA offers general protection to the multilingual nature of SA. It offers, among other language rights, the right to use the language of one's choice provided that the right is exercised in a manner consistent with other provisions of the Bill of rights.[161]

Despite this explicit constitutional recognition and protection of the multilingualism of SA, reality shows that the 11 languages are not treated equally both in the legislative and judicial system of SA.[162] The legislative process is carried out in the English language, and the English version of statutes is the official text which is binding upon anyone in SA.[163] As a "sop" to the Constitution, the English version is translated into the other ten languages.[164] These ten translated versions do not carry an official status. This has raised legal certainty concerns because a person who relies on the translated version is still bound by the English version the translation of which may not be correct.[165] The South African courts have had the opportunity to address the language problems in the country. In *Lourens,* the South African Supreme Court of Appeal was asked to declare as "unfair language discrimination" the practice of the

[160] The Constitution of the Republic of South Africa Act 108, 1996 section 6.
[161] Section 30.
[162] JM Hlophe "Receiving Justice in your own Language the need for Effective Court Interpreting in our Multilingual Society" (2004) 17 *African Journal Archive* 42 at 42.
[163] LTC Harms "Law and Language in a Multilingual Society" (2012) 15 *Potchefstroom Electronic Law Journal* 1 at 7.
[164] A de Vries "Why Using just One Language in South Africa's Courts is a Problem" https://theconversation.com/why-using-just-one-language-in-south-africas-courts-is-a-problem-134911 (accessed 24 April 2020).
[165] *Ibid*.

legislature not to provide and publish translated versions of the national laws in the other languages.[166] The Court was reluctant to make this declaration and instead held that the legislature "has no duty to translate or publish National Legislation in all 11 official languages".[167] However, the Supreme Court stated, as *obiter dictum*, that the legislature and government as a whole "should aspire to translate legislation in all Official Languages".[168] It follows that English is the statutory language of SA.

The South African courts in conducting their judicial services, also "pay lip service" in recognising and promoting the equality of all the official languages.[169] In *Mthethwa* the court refused a request by the accused to have the court's proceeding conducted in isiZulu (one of the indigenous languages).[170] The reason for this was that it was not practical to do so. This judgment has been criticised and referred to as "a low watermark on the question of use and promotion of indigenous languages" and a missed opportunity to promote the right to language enshrined in section 6(2) of the Constitution.[171] However, when it comes to the use of the eleven official languages by the SA government, section 6 (3) of the Constitution acknowledges the need to take into account the practicalities and expenses associated with promoting multilingualism. In the case of *S v Matomela*, the court held that the solution to language problems is to have a single official language for all the courts.[172] According to the court, all the other official languages will have to "enjoy parity of esteem …but for practical reasons and better administration of justice one official language of record will resolve the problem". [173] The one language solution suggested favoured a language understood by all court officials, and the court stated the need for national legislation for this purpose. [174]According to the decree made by SA's Chief Justice, English is the courts' only language of record in SA. [175] According to the Chief Justice, having language as the court's only language of record "will ensure that all judges can follow proceedings and produce judgments that are accessible for all parties on appeal and review".[176]

[166] *Lourens v Speaker of the National Assembly of Parliament and Others* (2016) 2 SA 340 (SCA).
[167] Para 32.
[168] Para 32.
[169] Harms 2012 *Potchefstroom Electronic Law Journal* 7.
[170] *Mthethwa v De Bruyn NO & another* 1998 (1) BCLR 366 (N).
[171] Hlophe *African Journal Archive* 42
[172] S v Matomela 1998 (1) BCLR 339 (Ck) 342.
[173] *Ibid*.
[174] *Ibid*.
[175] de Vries "Why Using just One Language in South Africa's Courts is a Problem".
[176] de Vries "Why Using just One Language in South Africa's Courts is a Problem".

When it comes to judicial interpretation, South African courts also use the literal interpretation method as one of their method of interpretation. The primary rule of legal interpretation in SA is that "if the meaning of the word is clear, it should be put into effect; it must be equated with the legislator's intention".[177] The court in *Union Government v Mack* held that the intention of the legislature should be deduced from the words used in the legislation.[178] Having regard to the already stated views that legislation is passed in English and that English is the only language of record of South African courts, one can conclude any literal interpretation done by the judiciary in SA is based on the English text.[179]

4.3 Conclusion

The South African Constitution gives equal official status to the eleven languages of the country. However, reality shows that the practice of the court and the legislature pay lip service to the recognition of the equality of these languages. As it stands, English is the statutory language of SA. More so, English is held as the language of record of the court. The meaning of SA law is decided upon based on the English language version, which is the official legislation text. The research carried out did not provide any evidence in the courts' cases of the court comparing the English language version with the other translated language versions to determine the meaning of a provision.[180] Thus, any linguistic problems in provisions of SA law are contained in and solved using the English language text.

[177] CJ Botha *Statutory Interpretation- An Introduction for Students* 5 ed (2012) 91-92.
[178] *Union Government v Mack* 1917 AD 731.
[179] CJA Lourens "Ideology Versus Multilingualism in South Africa: Should National Legislation Be Published in All Official Languages?" http://www.hrpub.org/download/20161130/LLS2-19307443.pdf (accessed 23 April 2020).
[180] *Ibid*.

SECTION 5: NATIONAL COURTS' OBLIGATION FROM *CILFIT*

5.1 Introduction

This section discusses the legal certainty principle and the compatibility between the obligation to compare all languages and the principle of legal certainty. This section also discusses the limits of multilingual interpretation with regard to the concept of legal certainty. Furthermore, the section provides an analysis of the Court's practises in comparing all languages. Finally, the section provides an answer to the question of whether or not there is an obligation on the courts to compare all language versions.

5.2 Legal certainty in a multilingual legal environment and the obligation to compare all languages

The principle of legal certainty has been held by the Court to be one of the fundamental principles of EU law.[181] EU law creates rights and obligations for its addressees, and in return, the principle of legal certainty requires it to be clear, precise, predictable and foreseeable in its application.[182] In the context of human rights, the ECtHR settled in its case law that the "requirement of foreseeability is fulfilled when a law is formulated with sufficient precision to enable any individual to regulate his or her conduct".[183] To meet the foreseeability requirement, the ECtHR held that "a provision in national legislation should be phrased in clear terms, avoiding open and vague notions that may give the State authorities unfettered power and leave room for arbitrary interferences". [184] It follows that other than protecting the legitimate expectations of individuals, the principle of legal certainty is also aimed at protecting individuals against arbitrary decisions by public authorities.

The relationship between the principle of legal certainty and the multilingual nature of the EU is not without some paradoxes. A question which may rightly be raised in this regard is whether multilingualism and legal certainty can co-exist without conflicts or whether one has to prevail at the expense of the other? The Court has given a hint on the possibility of incompatibility

[181] Case C-201/08 *Plantanol* EU:C: 2009:539 para 46.
[182] Case C-409/04 *Teleos* EU:C: 2007:548 para 48.
[183] For example, Joined cases Olivieira and Landvreugd App no 33129/96 & App no 37331/97 (ECtHR, 4 June 2002) para 52.
[184] *Ibid* 21.

between the principle of legal certainty and the multilingual nature of the EU taken together with the need for a uniform interpretation promoted by the Court. The hint was given when the Court stated that legal certainty might be violated since "one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words".[185]

On the one hand, multilingualism guarantees legal certainty.[186] This is because multilingualism allows EU citizens to access EU laws, which create rights and obligation for them, in their languages.[187] But on the other hand, legal certainty requires the law to be clear and its interpretation, application and effect to be foreseeable.[188] In light of the views previously discussed, (a) that all languages carry equal authority and (b) the impossibility of relying on a single language version, it may be argued that multilingualism to some extent undermines the foreseeability of law and contributes to the uncertainty of EU law among its subjects. This is because if EU law is published in all the EU languages which have equal authority, people are bound to a meaning in a language version which they may not know or understand.

From a democratic perspective, it has been questioned whether it is reasonable to expect addressees of EU law to make efforts in comparing their language version with other language versions.[189] For any person, carrying out a systematic language comparison of all the twenty-four languages is not easy. As a result, it has been argued that "the impossibility to rely on a single language version is detrimental to legal certainty".[190] This is even made worse by the Court's utterances in *CILFIT* that even when all the languages seem to be in accord with one another, EU law uses terminology which is peculiar to it.[191] Thus, even if it possible for an interpreter to consult all the language versions and establish a clear understanding of the meaning of a provision across all the languages, it is still possible for the Court to pronounce a different meaning. The "multilingual paradox" where on the one hand, one cannot fully trust or solely rely on his or her language version, while on the other hand, one has a right to his or her language version remains unresolved.[192]

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[185] Case C-80-76 *North Kerry Milk Products* EU:C: 977:39 para 11.
[186] Aljanati 2018 *European Journal of Legal Studies* 30.
[187] Aljanati, *The Court of Justice of the European Union's Case Law on Linguistic Divergences (2007-2013): Interpretation Criteria and Implications for the Translation of EU Legislation* 104.
[188] *Ibid*.
[189] van der Jeught 2018 *European Journal of Legal Studies* 31.
[190] Aljanati 2018 *European Journal of Legal Studies* 30.
[191] Para 19.
[192] van der Jeught 2018 *European Journal of Legal Studies* 37-38.

It has been aptly submitted that "legal certainty should operate mainly for the benefit of the individual and not for the powers that be, namely the EU".[193] However, it is noteworthy that in most of the cases the Court has carried out a language comparison, it has been held that the language version upon which a litigant relied to support arguments presented was incorrect.[194] For example, in *Direct Cosmetics* it turned out that the English language version together with the Greek and Dutch versions relied upon by the appellants were wrong in that they referred to tax evasion instead of tax avoidance as referred to by most language versions.[195] In *Commission v Germany* the Court concluded, contrary to Germany and French versions relied upon by the Germany government, that "the exemption for the supply of services by the public postal services is not meant to apply to postal services, but to services rendered by (and not to) public postal service providers".[196] Again, in *Commission v Italy*, it was held that the exemption applied to care by medical and paramedical professions excludes services provided by veterinary surgeons.[197] This was because, in all the other language versions except the English and Italian versions, there was a specific limit of the exemption to care administered to persons.[198] These decisions might suggest that there is little consideration for the principle of legal certainty by the Court. The limits placed on multilingual interpretation in light of the principle of legal certainty need to be defined. The Court should do more to offer better protection to the "right of individuals to place trust in their language version" than what it is currently offering.[199]

Legal certainty has been raised before the Court as a defence against an interpretation that is contrary to the meaning portrayed by a local language. In *Kraaijeveld* it was raised against an interpretation not consistent with the local Dutch language in the Netherlands.[200] However, the question was not fully addressed; the Court merely referred to its *CILIFIT* decision and held that "uniform interpretation cannot be determined by one particular language. The various language versions are equally authentic".[201] More so, the Court in *North Kerry Milk Products* created the impression that legal certainty is something that may suffer in the Court's attempts

[193] J van Meerbeeck "The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust" (2016) 41 *European Law Review* 275 at 276.
[194] Terra and Kajus *Introduction to European VAT* 6.3.
[195] Joined Cases C-138 and C-139/86 *Direct Cosmetics* ECLI:C: 1988:383 para 31.
[196] Para 12.
[197] Case C-122/87 *Commission v Italy* ECLI:EU:C: 1988:256 para 9.
[198] Para 9.
[199]van der Jeught 2018 *European Journal of Legal Studies* 38.
[200] Case C-72/95 *Kraaijeveld* ECLI:C: 1996:404 para 25.
[201] Para 25.

to create uniform law across EU and solve any divergences between the many equal languages versions of EU law.[202] This impression comes from the Court's statement that the elimination of linguistic discrepancies by way of interpretation may, in certain circumstances, run counter to the concern for legal certainty.[203] As Capeta rightly argues, although the Court "sends the message that meaning is not in the text, it still does not address properly the fact that a party relies on a certain meaning given by the words chosen in the text in one language".[204] It follows that in light of the principle of legal certainty, it may not be proper to require courts to make a comparison of all language versions, some of which the parties to the matter may not even be aware of or understand. Furthermore, since the Court has the authority to give a final and uniform interpretation of EU law, it may be argued that legal certainty is not fully guaranteed until the Court has approved an interpretation which may have been given by a national court.

5.3 The practice of the Court

As Sankari rightly states, the Court has the final interpretation of EU law, and that interpretation is up for review only by the Court itself.[205] This means that in applying interpretations of the law of EU and its terminology, the only point of reference and legal precedence to go with are the Court's judgements.[206] Therefore it is befitting that before one discusses or answers the question of whether national courts should compare all language versions when interpreting EU law, it is necessary to investigate if the Court does the multilingual comparison itself. Thus, before answering the research question, it would seem plausible to ask the extent to which the Court, as the highest Court of EU law interpretation, uses multilingual comparison as a method interpretation. To answer this question requires one to establish whether there is a systematic use of the multilingual comparison as a method of interpretation from the Court cases. Additionally, the answer to the research question also requires one to establish whether the Court does a total or partial comparison.

The case-law of the Court discussed in the previous sections above show that an interpreter of EU law must conduct a comparative analysis of all the EU law language versions. From the way the Court emphasises on interpreting EU law in light of all language versions, one would expect that language comparison is the order of the day in the Court's interpretation of EU law.

[202] Para 11.
[203] *Ibid*.
[204] Capeta "Multilingual Law and Judicial Interpretation in the EU".
[205] S Sankari *European Court of Justice Legal Reasoning in Context* (2013) 8.
[206] *Ibid*.

But as will be seen below, there is evidence to the contrary. Even though the Court still refers to the *CILFIT* criteria, there are still irregularities in the Court's reference and application of the language versions comparison requirement.[207] For example, the Court sometimes does not mention the language versions comparison requirement, and in other cases, it merely mentions this requirement.[208] More so, in some cases where it does mention the requirement, it does not carry a comparison of all the language versions but looks only at a few language versions.[209]

A study done by Baaij on the cases decided by the Court between 1960 and 2010, revealed that in practice the Court rarely conducts language versions comparative analysis and, in those cases, where it did the comparison it considered a limited number of language versions.[210] According to Baaij, between 1960 and 2010, the Court decided 8716 cases and of these only 246 were found to reference and conduct language version comparison explicitly. In terms of percentages, it was found that only 2.8% of the cases studied were "language cases".[211] Furthermore, Baaij notes that in those cases where there was explicit language versions comparison, the Court, in most cases, did not compare all language versions.[212] Worse still, in some of the cases, the Court merely referred to language versions comparison without actually going on to carry out the comparison. Allegedly, in only 1.4% of its cases between 1960 and 2010 did the Court compare all language versions.[213] This quantitative assessment done by Baaij goes to show the absence of consistency in the Court's use of the language comparison requirement. However, Pacho submits that language comparative analysis is often used by the Court as a method of interpretation. She submits that from the Court's cases she analysed, 31% revealed language comparative analyses albeit not of all language versions.[214]

Van der Jeught agrees with Baaij's assessment and notes that the practice of the Court is to conduct a "limited linguistic" comparative analysis through which the language version of the provision in question is compared with several other well-known language versions.[215] In some

[207] For example Case C-379/15 *Association France Nature Environnement* ECLI:C: 2016:603 para 48–50, Case C-207/14 *Hotel Sava Rogaska* ECLI:C: 2015:414 para 25–28 and Case C-160/14 *Ferreira da Silva* ECLI:C: 2015:565 para 39–40 (the Court referred to Case C-495/03 *Intermodal Transports* ECLI:C: 2005:552 para 33–37 which referred to the *CILFIT* criteria).
[208] *Association France Nature Environnement* para 48-50 and *Ferreira da Silva* para 39-40.
[209] *Hotel Sava Rogaska* para 25–28.
[210] CJW Baaij *Legal Integration and Language Diversity: The Case for Source-Oriented EU Translation* (Phd thesis, University of Amsterdam, 2015) at 55-57. See also Baaij *The Oxford Handbook of Language and Law* 219.
[211] *Ibid* 55.
[212] *Ibid*.
[213] *Ibid* 57.
[214] Aljanati *The Court of Justice of the European Union's Case Law on Linguistic Divergences (2007-2013): Interpretation Criteria and Implications for the Translation of EU Legislation* 234.
[215] van der Jeught 2018 *European Journal of Legal Studies* 13.

cases, the Court implicitly refers to the language versions comparison. For example, in *Motor Industry*, the Court used the words "several languages", but it went on to mention two languages.[216] Additionally, in *Kennemer Golf*, the Court referred to one language version.[217] From the above studies, one can safely conclude that the interpretation of the Court remains largely a partial comparison than a total comparison. Furthermore, it can be said that the Court is failing to live up to its own rules of interpretation as far as language versions comparison is concerned. It can be questioned whether, to the national courts, the Court is sending a message of 'do as I say and not as I do'.

In SA, practical and financial difficulties were the impediments to the equal treatment of all languages. Similarly, in the EU, practical or financial difficulties have been cited by Baaij as possible reasons behind the Court's inconsistency in applying the language version comparison requirement. [218]Aljanati considers that the Court, "as the guarantor of uniform application and interpretation of EU legislation, has the capacity and duty to become a real multilingual court".[219] Even though one might expect the Court to be better equipped than national courts in conducting a linguistic comparative analysis, the truth of the matter is that practically twenty-four language versions are too many to compare. As a result, in interpreting EU law, the Court appears to hold it sufficient to compare several but not all language versions. [220]

In those cases where the Court does a comparison of all languages, it has been argued that in most cases, it does not do so on its own initiative. [221] It does so when parties to the matter, other interested actors or the referring national court have pointed it out, but it has also been noted that in some cases it just ignores the issue when it is raised. [222] It follows that, if the linguistic divergences are not brought to the attention of the Court, the Court is not likely to compare other language versions. In such cases, the divergence will likely go unnoticed. This inconsistency is an indication of a mismatch between, on the one hand, the "Court's self-declared goals for the EU legal system of equal authenticity" and uniformity and, on the other hand, its actual multilingual interpretation method.[223] This inconsistency generates difficulties

[216] *Motor Industry* para 15.
[217] para 32-33.
[218] Baaij *Legal integration and language diversity: The case for source-oriented EU translation* 58.
[219] Aljanati 2018 *European Journal of Legal Studies* 46.
[220] Baaij *Legal Integration and Language Diversity: The Case for Source-Oriented EU Translation* 58.
[221] van der Jeught 2018 *European Journal of Legal Studies* 12-13.
[222] *Ibid*.
[223] Fernandez *Multilingualism and the Meaning of EU Law* 224.

"not only in studying and predicting the Court's reasoning", but also with the principle of legal certainty which requires law (including how it is interpreted) to be clear and its effect to be foreseeable.[224]

The discussion above has shown that language comparison is not regularly conducted by the Court. The practice of the Court may lead one to rightly question whether multilingualism, in an EU environment made up of twenty-four languages, is an affordable, feasible or viable option? No matter how beneficial language comparison may be, the effectiveness of the judicial process taken together with the costs associated with carrying out language comparison, do not allow the comparison of all language versions to be conducted in practice. [225] The language versions comparison appears more to be a burden than an instrument to help in the interpretation and creation of uniformity in the EU. If there is a big gap between the Court's standard language comparison requirement and the practice of the Court, is it plausible to expect national courts to conduct a comparison of all language versions?

5.4 National courts: to compare or not to compare all language versions

The studies discussed in the previous section show how impractical it is not only for national courts but also for the Court to compare all twenty-four language versions when interpreting EU law. Comparing all twenty-four language versions places a huge strain on any court in terms of resources and time. This impracticability has been acknowledged by AG Jacobs who has stated that the requirement to compare all languages "involves a disproportionate effort and puts a practically intolerable burden on the national courts".[226] Contrary to the statement of the Court that all languages need to be consulted when interpreting EU law, it has been shown that language comparison is not the standard routine of the Court.[227] This raises the question that if the Court itself is not consulting all language versions, how can *CILFT* case be interpreted to mean that there is an obligation on national courts to compare all the languages. If the Court decision in *CILFIT* is interpreted to mean that national need to compare all language versions, the result is a clear double standard on issues to do with the interpretation of EU law.

[224] *Ibid*.
[225] Capeta "Multilingual Law and Judicial Interpretation in the EU".
[226] *Wiener* para 65.
[227] Fernandez *Multilingualism and the Meaning of EU Law* 154.

The impracticality of comparing all languages may be seen from the way some of the national courts have been dealing with multilingual interpretation. The studies done by Derlen and Bobek serve to show the trend of a limited linguistic comparative analysis in some national courts.[228] In a survey of Denmark, England and Germany cases, Derlen, could not find even one case where the national judges compared all language versions. However, from Derlen's study, 75% of the cases showed the English and French versions as the mainly consulted versions.[229] The approach by these judges may be reasonable given the fact that English and French are commonly used in the legislative and judicial process of EU, and the remaining languages are essentially translations.[230] Again, Bobek notes that in Czech and Slovak Republics, Poland and Hungary, the English and German language versions were mainly consulted to solve any linguistic divergences.[231] An unavoidable consequence of the practice by national courts is that of interpretations which are not consistent with the meanings portrayed in those versions in languages uncommonly known or understood. Thus, language divergences with the uncommonly known languages are likely to go unnoticed. Baaij, in his previously discussed study, submits that the reason behind a limited number of the Court cases dealing with language comparison could be because most of the cases which had language divergences went unnoticed in national courts and never made their way to the Court.[232] This possibility makes the idea of interpreting *CILFIT* as a strong warning against non-referral for a preliminary ruling even more plausible. However, it has been argued that "the same risk exists to some extent" at an EU level especially given the fact that the Court also conducts a limited linguistic comparative analysis[233] But it cannot be denied that the risk is greater in national courts procedures which are monolingual than at the Court and conducted by judges who do not possess the full set of language skills to conduct multilingual analyses.[234]

The Court in *CILFIT* warned that the existence of the possibility of a non-referral must be assessed based on the characteristic features of EU law and the particular difficulties to which its interpretation gives rise.[235] From this statement, it is submitted that the context within which

[228] M Derlen *Multilingual Interpretation of European Union Law* (2009) 288 and M Bobek "The Multilingualism of the European Union Law in the National Courts: Beyond the Textbooks" in AL Kjaer and S Adamo (eds) *Linguistic Diversity and European Democracy* (2011) 138.
[229] Derlen *Multilingual Interpretation of European Union Law* 288.
[230] Capeta "Multilingual Law and Judicial Interpretation in the EU".
[231] Bobek *Linguistic Diversity and European Democracy* 138.
[232] Baaij *Legal Integration and Language Diversity: The Case for Source-Oriented EU Translation* 58.
[233] van der Jeught 2018 *European Journal of Legal Studies* 21.
[234] *Ibid* 16-17 and 21.
[235] Para 17.

the Court in *CILFIT* said all language versions need to be compared, was a context within which the Court was explaining the difficulties in interpreting EU law and trying to promote the referral of cases by national courts to the Court for a preliminary ruling. One of the reasons that makes this explanation plausible is the practice that was developing in national courts after the *Da Costa* doctrine discussed in section 2.1. After the doctrine was passed, national courts began to interpret and apply it more liberally, and such a broad approach to the doctrine resulted in non-compliance with the Court's ruling.[236] More so, national courts of last instance were also developing a trend of not referring cases to the Court claiming the *act eclair* doctrine.[237]

When the *CILFIT* case came before the Court, it was an opportunity for the Court to "pronounce itself on the application of the preliminary reference procedure, and, arguably, to regain some control over the national courts' practice in referring questions".[238] The Court gave its landmark ruling and provided a clear interpretation of article 267 of TFEU. According to the Court, except the interpretation of the provision a national court has to interpret has been given by the Court or its correct application is obvious, the national court should refer the matter to the Court. [239] It is submitted that the fact that the Court went on to point out the many EU law languages and its unique terminology was a signal to the national courts that EU law is not clear, consequentially there is no *acte clair*. It follows that even if the interpretation and application of an EU law provision may seem obvious to a national court, the characteristics of EU law provided by the Court coupled together with the "warning tone"[240] used by the Court make it clear that the Court was trying to discourage national courts from choosing the non-referral option. The Court was indicating that a provision may not be as clear as it may look before the national court.

Following from the above submissions, it may be rightly argued that the Court in *CILFIT* sought to limit the discretion of national courts of last instance when it comes to deciding whether the interpretation and application of an EU law provision is so obvious beyond doubt.[241] Arguably, "reasonable doubt about the correct interpretation and application of EU

[236] Unknown author "Application of the *Cilfit* Case-Law by National Courts or Tribunals Against whose Decisions there is no Judicial Remedy under National Law" https://curia.europa.eu/jcms/jcms/p1_2795511/en/ accessed 24 March 2020 and Capeta "Multilingual Law and Judicial Interpretation in the EU".
[237] *Ibid*.
[238] van Dorp and Phoa 2018 *Utrecht Journal of International and European* 76-77.
[239] Urban 2000 *European Review of Private Law* 55.
[240] A Limante "Recent Developments in the *Acte Clair* Case Law of the EU Court of Justice: Towards a more Flexible Approach" (2016) 54 *Journal of Common Market Studies* 1384 at 1387.
[241] *CILFIT* para 16.

law" is bound to exist in multilingual law in "particular at the conceptual level".[242] Accordingly, interpretation issues as a general rule must be referred to the Court. A result for the national courts of the multilinguistic nature of the EU together with the metalinguistic method applied by the Court when it is dealing with diverging language meanings was accurately captured by Rasmussen. He submits that the Court in *CILFT* "spilled much ink explaining that only in rare cases should national judges feel confident that they were in command of all the insights necessary to decipher the correct meaning of any provision of Community law, including those that at first glance look plain and unambiguous".[243] This submission may be seen as logically flowing from the previously discussed aim of the Court to create a uniform meaning of EU law across all Member States despite the presence of twenty-four different languages.

Furthermore, the argument raised above by Rasmussen seems to suggest that, because of the unique characteristics and 'particular difficulties to which its interpretation gives rise', the question for the national courts is much more sophisticated than just asking 'whether the matter is equally obvious to the courts of the other member states and the court of justice'.[244] According to former judge Edward, the real question the national court should consider is whether there is "scope for any reasonable doubt as to how the question raised is to be resolved [and] it is in this context that the national court should take account of the *CILFIT* criteria".[245] Reading the *CILFIT* criteria in that context, he further argues that the language requirement is part of a chain of caveats and should not be read literally.[246] However, Dorp and Phoa argue that if it is to be accepted that *CILFIT* criteria "merely contains caveats" warning national courts not to lightly declare the meaning an EU provision so obvious and "beyond a reasonable doubt", the question which remains unanswered is how the meaning of EU law provisions is to be established by national courts.[247] This question seems important because EU law uses terminology unique to it and in interpreting it, national court judges are not to construe its meaning form their national law or their linguistic cultures.

[242] van der Jeught 2018 *European Journal of Legal Studies* 24.
[243] JH Rasmussen "Towards a Normative Theory of Interpretation of Community Law" 1992 *University of Chicago Legal Forum* 135 at 148.
[244] *CILFIT* Para 21.
[245] Edward *CILFIT* and *Foto-Frost* in their Historical and Procedural Context".
[246] *Ibid*.
[247] van Dorp and Phoa 2018 *Utrecht Journal of International and European* 78.

5.5 A burden on the preliminary procedure

In this thesis, the aim is not to introduce a simplified ruling procedure for the national courts. Rather, the aim is to have national courts become aware of the peculiarity and complexity of EU legal terminology and promote a system of dialogue between the Court and national courts to create a uniform EU legal environment. It is within this context that it is argued that CILFIT does not place an obligation on national courts to compare all the twenty-four languages. But the judgment stands as a forewarning that when interpreting EU law, national courts must not treat or approach EU law as they do their national laws. They need to be aware of the EU law's existence in other languages and its potential of having a different meaning in these other Member States.

Having said all of the above, it should be noted that by encouraging national courts to refer cases to the Court and not to do a comparison of all the languages, this thesis is not advocating for the burdening of the preliminary ruling procedure. A few years ago, a working group established by the Association of Councils[248] to consider the problem of the long duration of the preliminary ruling procedure offered a solution that seems to help in less burdening the preliminary ruling procedure. The working group argued that the *CILFIT* criteria should be understood with common sense.[249] The reason was that it is in the interests of all interested parties, not burden the preliminary ruling procedure with matters of less importance to the "unity, coherence and development of EU law".[250] Given this important interest, the opinion of the working group was that, before referring a question to the Court, a national court must consider whether the question it seeks to refer is worth burdening the Court with a request for a preliminary ruling.[251] A common-sense interpretation, as noted by the working group, means that the Court should not be burdened by less serious problems which the court may, at first sight, be able to solve using their knowledge and understanding of EU law.[252] Thus, the less serious the problem is, the less the need to refer the case, and the more the national court may assume its capability to solve the problem satisfactorily and acceptably.[253]

[248] The Councils of State and Supreme Administrative Jurisdictions of the European Union.
[249] K Mortelmans "The Contribution of the EU's Supreme Administrative Courts to Improving the Preliminary Ruling Procedure: Conclusions of the Hague Working Group" http://www.aca-europe.eu/seminars/Santander2008/Mortelmans.pdf accessed on 2 April 2020.
[250] *Ibid*.
[251] *Ibid*.
[252] *Ibid*.
[253] *Ibid*.

A national court of last instance confident enough of its interpretation of EU law to the extent of willing to take the responsibility and the blame for deciding an issue of EU law without the help of the Court must be legally authorized to do so.[254] But, as the AG Wahl rightly warned, "in such a situation, there is a fly in the ointment". [255] The fly is the possibility of legal proceedings being instituted against the Member State where the court of last instance is located for failing to refer and or incorrectly applying EU law and "that is a risk which that court must assume alone." [256] It follows that whether or not a question is serious enough to warrant the help of the Court is a decision for the national court to make. However, that decision comes bearing an automatic acceptance of the risk for state liability for harm caused by choosing a non-referral option.

In general, the working group suggestions above appear to help in giving some discretion to national courts when it comes to deciding whether or not to refer a case to the Court. However, the nature and boundaries of this discretion still need to be understood within the context of the characteristics of EU law stated above by the Court in *CILFIT*. A critique that may be raised against the working group's opinions is difficulties in practically defining what is serious.

5.6 Conclusion

The existence of many languages presents a challenge for guaranteeing a common understanding, application, clarity, coherence and accessibility of the EU law across all Member States. [257] An analysis of the cases of the Court done revealed that though the Court emphasizes comparing all languages, in practice, the comparison of all language versions is not conducted by the Court. A conclusion to be drawn from the Court's practice is that national courts are not obliged to compare all language versions when interpreting EU tax law.

[254] Joined Cases C-72/14 and C-197/14 *X and T.A. van Dijk* ECLI:C: 2015:319 para 69.
[255] *Ibid*.
[256] *Ibid*.
[257] Pommer 2012 *European Review of Private Law* 1242.

Section 6: CONCLUSION AND RECOMMENDATION

Multilingualism remains a problem in achieving uniformity in the EU, and an adequate solution is yet to be provided by the Court. In *CILFIT*, the Court gave guidance on how national courts ought to interpret EU law and when they need to seek a preliminary ruling from the Court. The Court in *CILFIT* acknowledged the *acte clair* doctrine. It, however, qualified its use by warning of the difficulties the national courts of last instance have to overcome before declaring a matter *acte clair*. One of these difficulties is a comparison of all language versions of EU law. One would expect the Court itself to be more equipped than national courts to carry out a comparison of all language versions. But studies discussed in the thesis have shown that language comparison is not the default starting position of the Court and that there is no consistency in the line of cases of the Court in using linguistic comparison as a method of interpretation. In most cases, the Court has been limiting itself to just mentioning the need for comparing all the language versions when interpreting EU law without actually comparing all language versions. In cases were linguistic comparison is conducted, not all language versions are consulted by the Court. Practical and financial reasons have been cited as some of the reasons for the Court's lack of consistency in applying the language comparison requirement.

Given the lack of consistency of the Court in using the language comparison requirement, the reference to the language comparison requirement in *CILFIT* cannot be read literally as requiring a national court to consult all twenty-four language versions when interpreting EU law. But it should be seen as a warning to national courts of the complexity of interpreting EU law and promotion by the Court of the preliminary ruling procedure.[258] Thus, when faced with linguistic interpretive problems, national courts need to refer the case to the Court, which has the final interpretive authority on EU law. However, national courts, before referring a question to the Court, they must consider whether the question is worthy burdening the Court by asking for a preliminary ruling.

From the South African comparative discussion done, it seems that SA, just as the EU, is still in a state of a dilemma concerning the issue of multilingualism and law given that it has eleven

[258] Oppion of AG Tizzano in *Lyckeskog* para 75 supports this view. The AG states that CILFIT language comparison requirement is a matter of "emphasising that the national court must exercise particular caution before deciding that there is no reasonable doubt. In my view, the Court is insisting not that the national court should always compare the various language versions of a provision but that it should bear in mind that the provision in question produces the same legal effects in all those versions so that, before assuming that an interpretation is correct, it must be sure that it is not doing so merely for reasons associated with the wording of the provision".

official languages. But what is clear is that the official language version of South African legislation is English. The main challenge that SA, unlike the EU, is facing boils down to which language to use when a judicial interpretation of the laws legislated in English is being done. This problem mainly arises when parties to a case do not understand English, which is the main language used in South African courts. Just like in the EU, the choice of one official language in SA has been politicised since it has been seen as a move that privileges a minority of the population.[259] For this reason, the state had to employ many language interpreters.

Schilling has suggested having one or two languages as authentic languages to be consulted when interpreting EU law.[260] However, arguments have been raised against this suggestion, especially in light of the principle of equal authenticity.[261] Moreso, Sobotta [262] argues that it is against the principle of legal certainty, to require people to comply with mandatory rules, laid down in a foreign language. Furthermore, Sabotta invokes the principle of non-discrimination based on language rights to support his view.[263] However, the current practice of the Court, in its effort to create uniform interpretation and application of EU law, shows that legal certainty is a principle that may suffer in the Court's attempts to solve any divergences between the many equal language versions. So, whether or not one or two languages are adopted as the main language versions of EU one cannot deny the idea that legal certainty is seemingly not a priority of the Court when it is faced with linguistic divergences.

Recalling that political reasons maybe a force behind the principle of equal authenticity,[264] political reasons could be argued to be the strongest reasons weighing against academic literature advocating for a few authentic languages. These political reasons, if not properly addressed, may hinder the proper functioning of the EU. However, one may argue that with developments such as Brexit, the time may have come to depoliticise the idea of adopting one language which serves as an authentic language version of EU law. It is submitted that Brexit may be a blessing in disguise to the EU as it may provide a neutral and practical solution to the

[259] Lourens "Ideology Versus Multilingualism in South Africa: Should National Legislation Be Published in All Official Languages?".
[260] T Schilling "Beyond Multilingualism: on Different Approaches to the Handling of Diverging Language Versions of a Community Law" (2010) 16 *European Law Journal* 47 at 64-66.
[261] van der Jeught 2018 *European Journal of Legal Studies* 22.
[262] C Sobotta "Die Mehrsprachigkeit als Herausforderung und Chance bei der Auslegung des Unionsrechts" http://www.zerl.uni-koeln.de/rubriken/forschung/sobotta-die-mehrsprachigkeit-als-herausforderung-und-chance-bei-der-auslegung-des-unionsrechts accessed 16 April 2020.
[263] Language rights explicitly enshrined in article 21(1) of the Charter of Fundamental Rights of the European Union 2000/C 364/01.
[264] See section 3.2.1

language problems faced by the EU. With Britain exiting the EU, English, may now be adopted and solidified as the main language version of EU law, which may be consulted to solve language divergences when interpreting EU law. In other words, with Brexit, English may be used as a clarifying language version of EU law without it being resisted on political arguments being raised. However, as the case of SA suggests, this will not be easy to achieve democratically since some countries may object.

Recently, Arnull, in his 2019 working paper, raised the issue of adopting English as a working language of the Court.[265] In support of his argument, he states that "adoption of English… may well be facilitated by the United Kingdom's withdrawal from the Union".[266] Concerning EU tax law legislation and its interpretation, it may also be argued that Brexit has provided a neutral ground for discussing the possibility of having English as the neutral language version of EU law to be consulted when faced with linguistic divergences. According to Arnull, currently, English is frequently used by the Court in its language comparisons. [267] The aim behind adopting English "would be to enable the Court to work in a language that would permit a greater account to be taken of the full range of legal traditions represented within the institution".[268] It follows that, other than having English as the main working language of the Court, English may also be adopted as the main language version of EU law and any differences in terminology get to be solved based on the English text. This may help to promote harmonisation in the interpretation and application of EU tax laws.

The Court has warned national courts of the risk of state liability for failure to refer questions to the Court.[269] In this respect, adopting the English language version as the authentic version may help create a common frame of reference for EU tax law. This may help in developing consistent general definitions to EU tax law concepts which can be used uniformly across all the Member States. This solution may help minimise language inconsistencies posing a threat to full harmonisation and minimise state liability cases for the Member States.

[265] Arnull "The Working Language of the CJEU: Time for a Change?".
[266] *Ibid*.
[267] *Ibid*.
[268] *Ibid*.
[269] Case C-224/01 *Kobler* ECLI:C: 2003:513 para 53-56 and Case C-173/03 *Traghetti del Mediterraneo* ECLI:C: 2006:391 para 43 and 45.

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