

## SUPERDIVERSITY AND THE RELATIONSHIP BETWEEN LAW, LANGUAGE AND TRANSLATION IN A SUPRANATIONAL LEGAL ORDER

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### **1. Introduction**

The object of this chapter is to demonstrate that multilingualism is not an accidental property of European Union (EU) law. It is in fact a force that has an impact on the very nature of that law. Furthermore, the chapter proposes a new theoretical framework, which may contribute to the further development of the theory of ‘superdiversity’. The chapter focuses on the case law of the Court of Justice of the European Union (ECJ). The multilingual nature of that case law creates a complex system of hierarchical relations between individual legal languages. Additionally, translation creates and controls multilinguistic superdiversity in that case law, which challenges the principle of uniform application of EU law. The chapter forms part of a larger study in which the authors aim, through interdisciplinary research, to introduce a new facet to the current thinking on the development of the European Union legal order.<sup>1</sup>

The European Union is unique among international organisations in its policy of linguistic parity for member states. Currently, the EU has 28 member states and 24 official languages.<sup>2</sup> Furthermore, unlike international organisations such as the United Nations or the Council of Europe, whose resolutions are addressed to governments only, the activity of the EU institutions is such that it creates a whole new ‘EU law’, which is applicable in each member state, to each citizen and legal person. It is therefore necessary for EU legislation to exist in the national languages of the states concerned, i.e. in a language spoken and understood by each citizen to whom it applies. The question of languages is thus at the core of the unique political system of the European Union, whose motto is ‘*unity through diversity*’. Yet the EU’s legal

system is based on the assumption that the law that governs that Union is uniformly understood, interpreted and applied throughout 28 diverse member states (McAuliffe, 2011). There is little doubt that the European Union and its legal order is ‘superdiverse’ by any ordinary interpretation of that term. Superdiversity can be defined as going beyond simple differences understood in terms of binary oppositions. This chapter investigates ‘superdiversity’ in the context of systems theory and information theory, through the lens of the case law produced by the ECJ.

The following section reviews some previous approaches to multilingual communication in the supranational legal system and institutions of the EU, and identifies a gap in current legal studies and anthropology literatures as well as in multilingual communication literature. That gap may be usefully filled by the theoretical framework proposed in section 3, which brings together approaches from applied linguistics and borrows methods from systems and information theory and which is also applicable in the linguistic investigation of superdiversity. That framework is later applied to two case studies from the multilingual case law of the ECJ. Finally, the chapter analyses the relevance of that framework to the study of superdiversity in general and the importance of the findings to the study of EU law.

## **2. Historical Perspectives: Multilingual Communication in the European Union**

For the reasons explained above, the multilingual nature of European Union law, applicable within member states, to citizens and legal persons, sets that Union apart from other international organisations that appear to function smoothly using just a few languages (for example, the UN has 193 member states and 6 official languages and the Council of Europe, with a current membership of 46 uses just two languages). The EU’s multilingualism policy and the multilingual nature of the EU legal order is a perennial topic of both academic and general discourse. The media frequently report on the ‘euro-jargon’ used by EU institutions and on issues of cost and logistical problems associated with translation and interpretation. Academics and legal practitioners have also considered the language question in relation to EU law,

particularly in the context of discrepancies between different language versions of legislation. Indeed, the European Union is frequently likened to a modern-day tower of Babel, a superdiverse organisation in which the diversity does not always lead to unity (Creech, 2005).

With some exceptions (most notably work by the present author – Cf McAuliffe 2009, 2010, 2011, 2013a, 2013b, 2015), studies of multilingual communication within the EU legal order have tended to focus on questions of language policy and regime, interpretation of multilingual legislation and pragmatic or logistical translation concerns. However, multilingual communication within the EU generally and within EU institutions in particular has piqued the interest of scholars in fields such as translation studies, sociology and anthropology. Work by anthropologists such as Bellier and Abélès, based on significant periods of fieldwork research in the services of the European Parliament and Commission, provide a valuable insight into the significance of culture, identity and multilingual communication in the policies, actions and day-to-day life of those institutions (Bellier, 1997; Abélès et al, 1993; Bellier, 2000; Bellier and Wilson, 2000; Abélès, 2004). In spite of the fact that EU institutions are staffed by individuals from member states with diverse social and educational backgrounds, languages and cultures, each institution is, by its very nature “obliged to express itself with a single voice” (Bellier, 2000:137) presupposing that it has resolved any internal conflicts deriving from technical considerations and differing political approaches to similar phenomena. Abélès and Bellier identified that European civil servants work together in the unique hybrid environment of those institutions through ‘cultural compromises’. Those cultural compromises necessarily affect the policies and actions of the institutions in which a ‘culture of compromise’ is visible. The anthropological studies of EU political institutions also note the development of a mixed and hybrid ‘eurolanguage’ within those institutions, which is the linguistic manifestation of the cultural compromise by which the institutions work. Bellier points out that such ‘eurolanguage’ functions perfectly well within the institution but can create problems when the Commission engages in discourse with the outside world (Bellier, 1997).

Those anthropological studies of EU institutions may allude to the superdiverse nature of the EU as a system, but they do not explicitly consider the system in terms of a defined concept of superdiversity. Furthermore, they consider the EU political institutions but not its Court of Justice or the issue of multilingual communication in the EU legal order. With a few notable exceptions (including work by Vauchez (2012, 2014), Davies and Rasmussen (2012, 2014) and the body of work by McAuliffe, mentioned above), there is a dearth of empirical work in this area and theoretical frameworks in the field remain underdeveloped. Using superdiversity as a lens through which to analyse the multilingual case law of the ECJ may be useful in further understanding the impact that multilingualism has on the EU legal order. The theoretical framework developed in this chapter is founded in systems and information theory. That framework, when combined with empirical data analysis, provides a methodologically well-founded approach to the study of linguistic superdiversity in supranational legal systems.

### **3. Critical Issues and Debates**

Superdiversity as a phenomenon has been defined in diverse ways in various fields, such as the social sciences, medicine and biology (Lougheed et al 1993; Arnold et al 2007; Lamshead and Boucher, 2003; Vertovec, 2007; Blommaert and Rampton, 2012; Arnaut, 2012; Knowles, 2013). There is, however, no universally agreed definition of the term itself. Although there are, of course, differences in the approaches taken in those diverse fields, in essence they address the same issues and are concerned with the study of considerable or extreme variance. While it would be wrong to assume that terms, concepts or methodologies can simply be exchanged between disciplines, differences between fields should not obstruct communication but rather serve as resources for exchange of information. In order to develop a genuinely holistic understanding of superdiversity in relation to law and language studies, a dynamic dialogue between research fields is necessary. This chapter contributes to the study of superdiversity in social science by developing a model that

relies on systems and information theories which have previously been applied in the fields of biology and medical science (Rennolls and Laumonier, 1998). Use of those theories allows the issue of excessive variance in the field of superdiversity studies to be addressed. Moreover, in the context of EU law, and the case law of the ECJ in particular, terms such as ‘multilingualism’ and ‘multiculturalism’ are not always helpful as they are often too general to allow useful analysis of the production of that case law.<sup>3</sup> ‘Superdiversity’, in the sense of going beyond simple differences understood in terms of binary oppositions, may be a more useful concept in which to frame such analysis.

### 3.1 Quantity of Diversity

This chapter approaches diversity as “the variety of life, at all levels of organisation, classified both by evolutionary (phylogenetic) and ecological (functional) criteria” (Colwell, 2009: 257). It follows that the study of diversity is concerned with how variance emerges and the functions of constitutive parts of a system. It has, in linguistic terms, both diachronic and synchronic dimensions since it is concerned with evolution and with the description of variance at one particular point. Two key terms in this definition are *organisation* and *variety*. One of the most solid theoretical foundations for the investigation of those two notions can be found in systems theory and information theory. Thus organization and variety in the context of systems and information theory are considered in turn below. Both theories have strong formal and mathematical bases. Since such formal definitions are not always useful to an interdisciplinary audience, this chapter considers the theories in an in-depth but more descriptive manner, relying mainly on Shannon (1948), Ashby (1956, 1968), Simon (1962), Checkland (1976), Luhmann (1984) and von Foerster (2003).

First, in systems theory, organisation is always organisation of parts that belong to a whole. Describing organisation of parts within a whole involves describing how they are inter-related and how they work together. The result of such endeavour is a description of the system. In other words, wherever there is organisation, there is

system. Rosen (1986) defines systems as aggregates of things. That definition suggests that systems are set-like entities that consist of elements. Therefore, that the study of systems involves cardinality (a term borrowed from Set Theory, referring to the number of elements in a set). The system is both an object and model of study. In fact, it is through a transformation of rough observations into a model that the observed becomes a system. The system model “searches for relations between emergent properties and the wholes of which they are characteristic” (Checkland, 1991: 267). Such relations are complex and it is usually impossible to provide a complete description of a system. Studies typically focus on a limited number of relevant variables. In general, studying a system involves observing the behaviour of elements and attempting to identify patterns/tendencies. In particular, relations, differences, and changes tend to be investigated. In this way, properties of a system and conditions that govern the emergence of these properties can be identified, i.e. the profile of a system.

Systems theory is thus concerned with the description of relations between elements and variance within whole systems. Cardinality in the description of systems allows the distribution of elements within a system to be investigated in a quantitative manner.<sup>4</sup> Measuring variance or the quantity of variety in a system directly is not possible (Ashby, 1956). However, measuring information and entropy (as discussed below) in the context of systems theory allows the level of order and disorder in a system to be observed.

All systems can be described as probability systems, which means that the organisation of a system cannot be described in a deterministic manner. In such systems only tendencies can be observed. A system can be described diachronically, focusing on how distributions of sets of possibilities have changed over time, or synchronically providing a description of how a set of possibilities is distributed at a certain point in time. Because systems are non-deterministic, their future states can never be predicted with certainty. Nonetheless, through a measurement of amount of information the ‘uncertainty degree’ can be measured. The uncertainty degree indicates to what extent the occurrence of an element within a system is surprising or

expected. The more expected an occurrence is, the lower the uncertainty degree. In a system in which the occurrence of all elements is equally probable the uncertainty degree will be very high. Conversely, in a system in which an element is highly probable to occur (in mathematical terms, where the element occurs with the probability one) there will be a low level of surprise and thus a low uncertainty degree. The measurement for uncertainty degree used in the present chapter derives from Shannon's (1948) theory of information. According to this theory, the more uncertainty and surprise there is in a system, the more information it contains. Information is understood here not in terms of its content and meaning but as a transmission of a signal. A measurement of information indicates the predictability of the occurrence of an element is. If a system contains a higher amount of information it will have a higher quantity of variety. The diversity of a system can therefore be described by measuring the quantity of information in that system.

In his theory of information, Shannon introduced a technical term for the measurement of uncertainty or amount of information within a system: *entropy*. The more surprise, uncertainty and information, the higher the entropy will be. The notion of entropy allows the degrees of diversity in a system to be precisely investigated.<sup>5</sup>

### **3.2 The Theoretical Framework**

The theoretical framework set out in this chapter relies on systems and information theories and thus approaches superdiverse entities as systems consisting of aggregated set-like items. Superdiversity studies as understood in the context of this chapter are generally concerned with the investigation of (i) the organisation of elements in systems and (ii) variance within superdiverse systems. As such these systems can be studied quantitatively. With regard to organisation of elements, distribution of those elements and relations between elements within a superdiverse system can be studied both synchronically and diachronically. With regard to variance, the level of diversity in systems can more usefully be investigated in terms of the measurement of entropy as per information theory. Using this new terminology the framework presented in this chapter assumes that superdiverse systems have high entropy and sub-diverse

systems have low entropy. Systems which have a zero-value entropy have no diversity at all and are uniform.

Each case study analysed in section 4 below presents a system consisting of aggregated elements. Using this framework, the diversity degree of these systems is measured in terms of the amount of information they contain. Before proceeding to the case studies from the multilingual case law of the ECJ, however, it is important to set out the language regime at that Court in general terms.

### 3.3 Multilingualism at the ECJ

The Court itself highlights the importance of the multilingual aspect of its work. Indeed, the ‘General Presentation’ of that Court, as stated on its own website, consists of only two paragraphs – the first setting out its ‘mission’ and the second stating:

*“As each Member State has its own language and specific legal system, the Court of Justice of the European Union is a multilingual institution. Its language arrangements have no equivalent in any other court in the world, since each of the official languages of the European Union can be the language of a case. The Court is required to observe the principle of multilingualism in full, because of the need to communicate with the parties in the languages of proceedings and to ensure that its case-law is disseminated throughout the Member States”<sup>6</sup>*

Unlike the other EU institutions, the ECJ operates using a single internal working language – French.<sup>7</sup> For every action brought before the Court there is a language of procedure, which can be any one of the 24 official languages.<sup>8</sup> In references for preliminary rulings under Article 267 TFEU, the language of procedure is the language of the national court that has made the reference. In direct actions, the language of procedure is chosen by the applicant, unless a defendant is a Member State or a natural or legal person holding the nationality of a Member State, in which

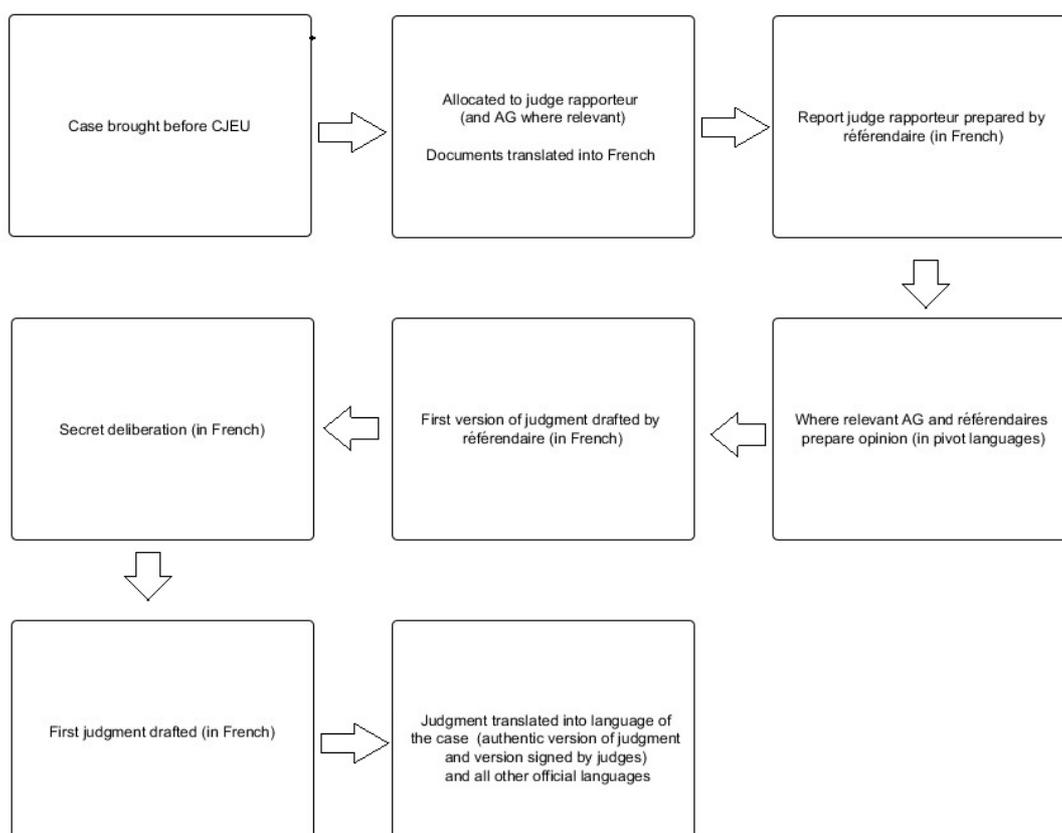
case the language of procedure is the official language of that state. Member States are entitled to use their own language in their written statements and observations and their oral submissions when they intervene in a direct action or participate in a preliminary reference procedure.

Since the ECJ operates in a single working language, applications (and interventions) that come into the Court in official languages other than French are immediately translated into French. Once an application has been translated into French it is allocated to a reporting judge, who is responsible for managing the case file and drafting a preliminary report. The Court will then decide what further steps to take, in particular whether to deal with the case in plenary session or refer it to a Chamber. It will also decide whether or not there should be an oral hearing and an Advocate General's opinion.<sup>9</sup> Advocates General have the same status as judges, but are not involved in deliberations in a case. In their Opinions they can discuss any relevant points of law, taking account of previous case law or academic writing, and offer their opinion how the case in question should be decided.

In cases that include an advocate general's opinion, the judge rapporteur and his/her référendaire(s) (legal assistants) must wait to receive that opinion before beginning to draft the substance of the judgment. In some straightforward cases, where the judge and/or his/her référendaire(s) can read the language of procedure, some of the preparatory work can be done at an earlier stage; but generally the judgment cannot be prepared before receiving the advocate general's opinion. Also, the opinion usually has to be translated into French as, historically, advocates general write their opinion in their own mother tongue.<sup>10</sup> Once the members of the relevant judicial Chamber have deliberated and have come to an agreement on their collegiate judgment (which may take weeks or even months), the final version of that judgment is drafted, in French, by the reporting judge and his/her référendaires.

However, the final version of a judgment, as deliberated on by the members of the relevant Chamber, is not usually the authentic version of the judgment. As mentioned above, the authentic version of a judgment is the version in the language of procedure

(for a more detailed explanation see McAuliffe, 2012). Therefore, more often than not, the authentic version of an ECJ judgment (the version signed by the judges) is a translation of the version agreed on by the judges in their secret deliberations. That process can perhaps be more clearly represented by the following (simplified) diagram:



**Figure 1: The process of production of CJEU judgments**

This unique method of case law production can have implications for the rule of law within the EU, in particular regarding the uniform application of that law in 24 languages, across 28 different legal orders. A detailed discussion of such issues is beyond the scope of the present chapter, but has been discussed in previous work by McAuliffe (2010, 2011, 2013a, 2013b) and forms the basis of the ERC-funded research project *Law and Language at the European Court of Justice* currently being carried out by the present authors (see note 1 above).

It should be noted that although those drafting the ECJ's case law (judgments) are working in French, they are not necessarily (indeed rarely) of French mother tongue. In addition, those drafting such case law are constrained in their use of language and style of writing (owing to pressures of technology and in order to reinforce the rule of law). These factors have led to the development of a 'Court French', which differs significantly from 'normal' French insofar as it consists of "*almost wholly automatised sub-codes of grammar and syntax*" (Trklja and McAuliffe, forthcoming). ECJ judgments are created in a 'lego-building block' fashion (McAuliffe, 2011a) by multiple authors in a language which for most of them is not their mother tongue. This 'Court French' necessarily shapes the case law produced (McAuliffe 2012, 2013a, 2013b).

That case law also undergoes many permutations of translation into and out of up to 23 different languages. The ECJ has its own translation service, which deals with those various permutations of translation at different stages of the process. The translation service is organised into separate 'translation divisions' for each of the official EU languages. Since French is the internal working language of the Court and thus the language of deliberation and the language in which all internal documents are drafted, it has a special role at the Court. The French language division must translate the application plus all of the procedural documents of the case as well as all opinions not drafted in French. Judgments are never translated into French since that is the language in which they are drafted.

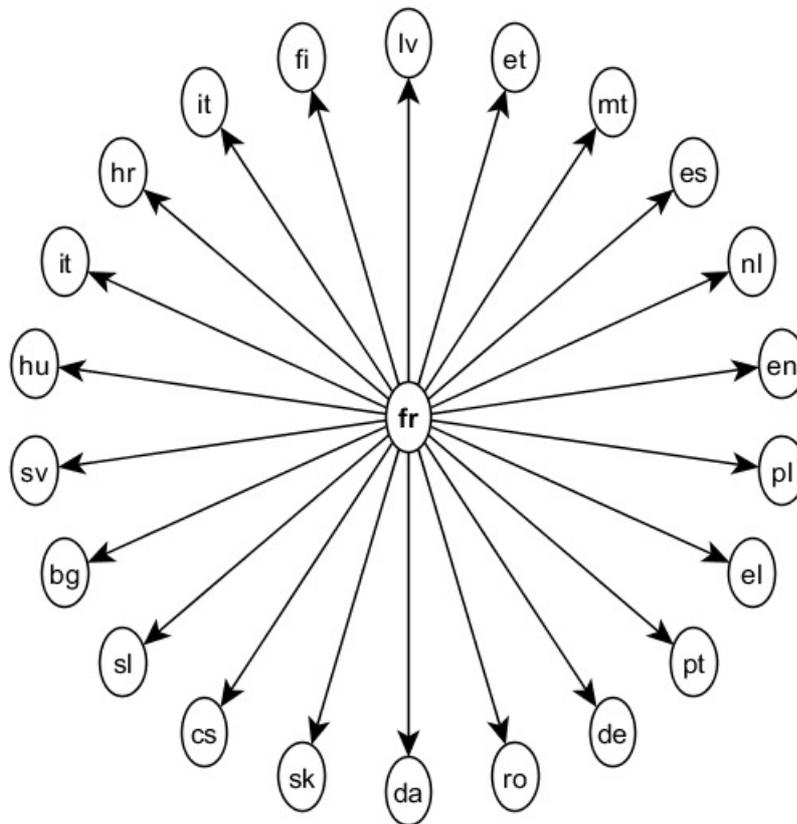
It can be seen that communication at the ECJ takes place through multilingualism and the process of producing judgments at that court involves several steps of translation across languages. Each of those steps contributes to the judgment as the final product of the process. The following section investigates the superdiverse nature of that multilingualism, using the theoretical framework set out above, by focusing on relationships between languages and on translation of ECJ judgments.

## 4. New Debates: Applying the Theoretical Framework

### Case Studies:

#### 4.1 Language Relationships and Complex Organisation in ECJ Case Law

This, first, case study uses the framework set out above and terminology deriving from systems theory to consider complexity relations in linguistically superdiverse ECJ case law. A peculiarity of ECJ case law is that it exists in not one but 23 different linguistic forms (ECJ case law is not currently translated into Irish). Since the ECJ uses French as a working language, those 23 languages create a system with a ‘*flat hierarchy*’ (Simon, 1962: 469). In this type of hierarchy one element is positioned at a higher level than other elements. This element is called the *boss* and the other elements are its *subordinates*. The relation between these two sets of elements is defined as *the span of control*. The term refers to “the number of subordinates who report directly to a single boss” (Simon, 1991: 543). In ECJ case law, the boss is French and all other language versions are subordinates because they are created through the translation from the French original. As can be seen in Figure 2, French holds under its span of control 22 elements. French is placed at the centre of the diagram and arrows show direction and orientation of the flow of the content.



**Figure 2: The flat hierarchy of relations between languages used at the ECJ**

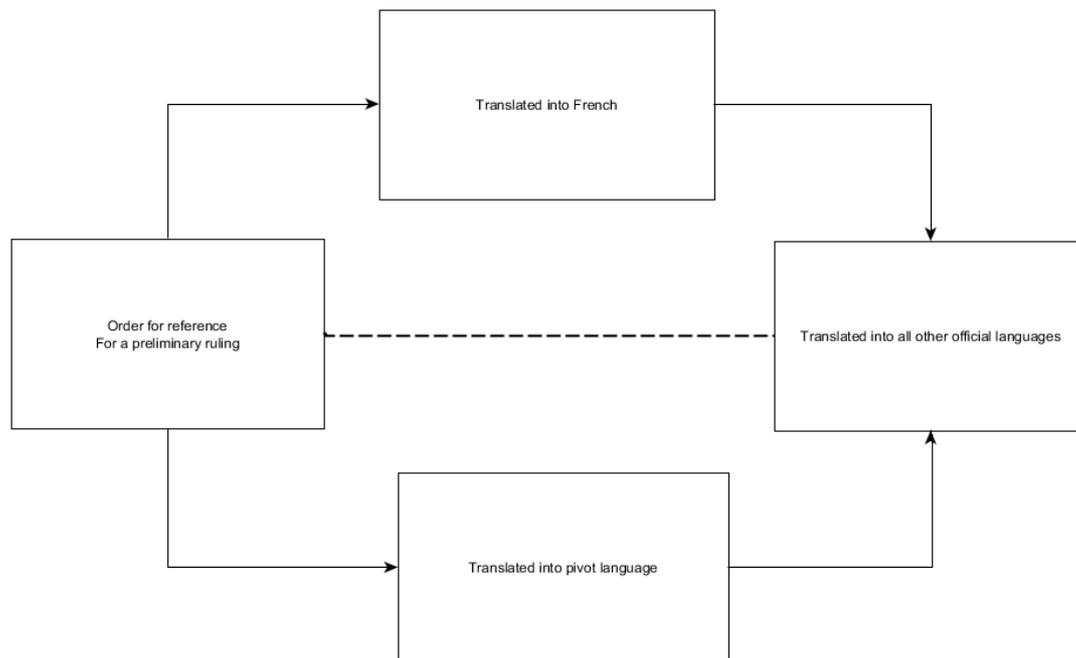
This flat hierarchy describes the basic organisation of ECJ case law as a multilingual system. However, some additional relations and systems can also be observed, demonstrating that the increase in numbers of language versions increases the complexity of the system.

First, in addition to the basic flat hierarchy described here, there is a second, *flexible* or *rotational flat hierarchy* based on the language of procedure in each case (which is the authentic language version of the judgment in question). Each time a language is chosen as a language of procedure it becomes a boss and the other languages subordinates. The boss position in this flexible flat hierarchy can, in theory, be taken by any one of the EU official languages.<sup>11</sup>

Secondly, the translation system in use at the Court since May 2004, is actually a mixed translation system – while direct translation is used whenever possible, given the Court’s ever-increasing workload (Harmsen and McAuliffe, 2015), translation through a ‘pivot language’ is the norm. Documents in certain languages (the post-2004 languages) are translated into a particular ‘pivot language’ and then into the other EU official languages, and *vice-versa*. There are five pivot languages: French, English, German, Spanish and Italian. Because French is the working language of the Court, the French translation division provides translations from all of the ‘post-2004’ EU official languages when necessary.<sup>12</sup> Each of the other four pivot language divisions are ‘partnered’ with a number of other official languages.<sup>13</sup> This reduces the number of language combinations for translation from a potential 552 to a more manageable 39, which saves significantly on labour.

Since French is the working language of the Court, the French language division must provide translations of all documents originating externally not drafted in French. The only external documents that go through the pivot translation system are orders for reference for a preliminary ruling, Member State observations, and applications to intervene in direct actions.

The following diagrams represent how the pivot translation system works:



**Figure 3: The pivot translation system at the ECJ**

For example, an order for reference for a preliminary ruling submitted to the ECJ from a Czech court, in Czech, will be translated into French and German, and worked on within the Court in French. The judgment will be drafted in French and then translated into German and from German/French into the other official EU languages. The authentic version of that judgment will be the (translated) Czech version.

The hierarchy of this system (*pivot translation hierarchy*) has a more complex organisation from the basic flat hierarchy because it consists of five boss elements (the pivot languages) and other subordinates (the remaining official languages).

Finally, the influence of individual languages on ECJ case law has not been equal over the past six decades because individual states did not join the EU at the same time. Since the foundation of the European Economic Community there have been seven enlargements, raising the number of member states from six to 28 and official languages from four to 24. Those languages that have been in use in the EU legal order for a longer period of time have necessarily had a stronger impact on the form

and content of judgments than those languages added subsequently. The addition of more languages increased the complexity of relations between languages and documents, which in turn contributed to the increasing complexity of ECJ judgments themselves (*temporal linguistic hierarchy*). This phenomenon is illustrated below in terms of translation correspondences. The span of control expanded from a relationship between one boss and three subordinates to that of one boss and 22 subordinates. Consequently, the potential influence of translation on EU case law also increased. Finally, the introduction of the pivot translation system was a consequence of the increased linguistic diversity.

The systems observed above indicate that, due to the EU's multilingual language policy, ECJ case law has several layers of hierarchical organisation. Those layers indicate a multitude of interactions between languages, which contribute to the complexity of EU case law. Vertovec (2007) argues that superdiversity is reflected in a 'growing diverse composition'. Following that argument, the increased level of complexity of EU case law due to multilingualism is a signal of superdiversity. According to Jørgensen and Juffermans (2011), superdiversity is also reflected through the increased range of resources, such as the increase in the number of languages at the ECJ since its establishment. The organisational level relationships between languages create a complex structure unlike that in any other international superdiverse institution. Multilingualism thus has an impact on the nature and complexity of EU case law. It follows, therefore, that the relationships and information flow between languages should be considered.

#### **4.2 Translation and Linguistic Superdiversity in ECJ Judgments**

Studies on EU language policy tend to claim that translation creates diversity because of the high number of language combinations in EU institutions. Direct translation with the current 24 official languages results in 552 language combinations (506 at the ECJ if Irish is discounted since ECJ case law is not currently translated into Irish). However, as mentioned above, not all documents at the Court are translated directly across languages. Consequently, those studies do not provide insights into how

linguistic diversity is actually created through translation. The case study presented here explores how translation generates diversity by focusing on ECJ judgments. A corpus linguistic approach is used to identify and describe translation correspondences and the results are interpreted in the context of the framework set out above.

At the textual level it is assumed that ECJ judgments in all 23 linguistic versions have the same content. Since it is impossible to assess this assumption quantitatively by investigating whole texts, smaller units of analysis need to be identified. These units range from individual words to sentences and paragraphs. The analysis here is restricted to multi-word lexical items which can be investigated by means of corpus tools. For the present chapter, three languages were selected (English, German and Italian) and 30 French expressions were randomly selected. All expressions have been identified in a translation corpus of ECJ judgments compiled for the ERC-funded research project 'Law and Language at the ECJ'.<sup>14</sup> The corpus contains 1143 judgments in French, English, German and Italian which make up the *acquis communautaire*<sup>15</sup> judgments. Each sub-corpus consists of about 7 million words. The judgments have been aligned at the sentence level for the language pair French-English, French-German and French-Italian. Corresponding items have been identified in the corpus by means of ParaConc (Barlow, 2002) and then further filtered with the help of Shell scripts created specifically for this analysis.

That linguistic analysis indicates that for every multi-word item in French there is more than one translation correspondence in other languages. On average, every French linguistic unit from the sample corresponds to seven lexical items from other languages. Applying Shannon's basic formula of entropy (see note 5 below) it can be concluded that diversity of translation correspondences tend to be 2.8 bits of information for each language ( $\log_2$  of 5 = 2.8). This figure would, at first glance, indicate a maximum level of diversity. However, correspondences do not occur with equal probabilities. Trklja (2013) observed that Zipf's rule of distribution (Zipf, 1938) can apply to translation correspondences, and this observation is true here. This means that in the list of all translation correspondences there will be a few correspondences that occur with high frequency and many which occur infrequently. The average

values for the distribution of the usual seven correspondences in the corpus studied here are: 0.36, 0.25, 0.18, 0.08, 0.06, 0.04. Thus Shannon's basic formula for entropy is not appropriate. Applying his formula for entropy in non-equiprobable systems, the entropy value calculated for this distribution is in fact 2.62. This means that translators typically have a set of options from which to choose and some of them will be selected more often than others. In linguistics, this tendency to prefer or avoid certain options by language users is called lexical priming (Hoey, 2005). If translation correspondences are considered to constitute a system then repetition and lexical priming play an important role shaping the internal organisation of this system. Without repetition, each time a translator needs to translate a lexical unit from a source into a target language he/she would need to insert a new term. Without lexical priming the system would have maximum entropy because all options would occur with equal probability. It is actually through repetition and lexical priming that a system itself emerges by arising into order from noise (von Foerster, 2003). This is important because it indicates that translation is a force which simultaneously introduces linguistic diversity in EU case law and controls this diversity from devolving into chaos and disintegration.

This point can be illustrated with an example. Within the corpus eight German translation correspondences of the French expression *conditions de transport* can be found. The following table displays the frequency of these translation correspondences and their spread over time. The occurrence of items is displayed in terms of relative frequency and spread or dispersion in decades. In order to represent data in a comparable manner the results are provided in terms of their log-values (a mathematical function allowing variables from different sets to be compared).

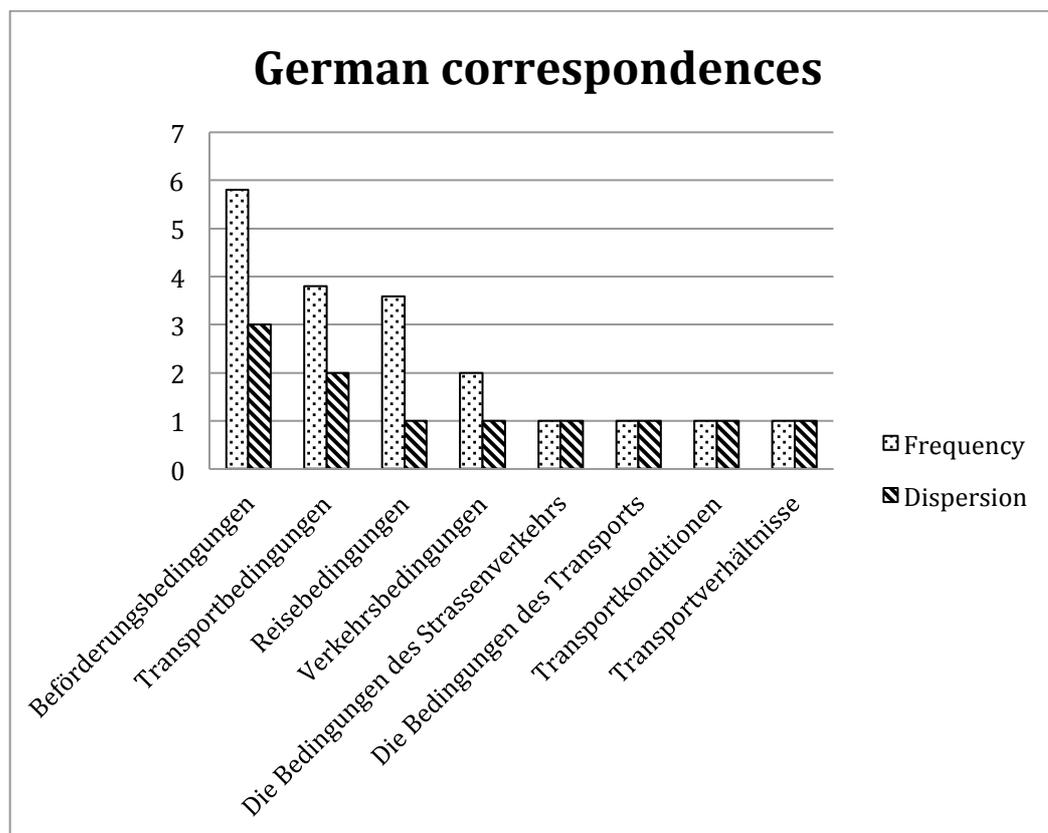


Table 1: Frequency and dispersion of German correspondences of *conditions de transport*

As can be seen, the expressions do not have the same distribution. The entropy value is 1.87 instead of 3 which would have been the case had the all the items been equally probable. The first three items occur with a relative frequency higher than 0.1 and comprise 88% of all German correspondences. The expression *Beförderungsbedingungen* alone makes up 60% of all options here. The original French expression and its German correspondences occur in judgments published in the period between 1958 and 1960 and between 1970 and 2010. The frequency and dispersion values in the above table are strongly correlated;  $r=0.87$  using Spearman's rank correlation coefficient (Oakes, 1998). Thus, the most frequent German correspondence has the highest dispersion because it occurs across three decades (in judgments published between 1970 and 2010), and the second most frequent item is found in judgments published in two decades (1958-1960 and 1990-2000). All other items can be observed only in one decade. The item *Reisebedingungen* is interesting because it was introduced in the final decade and occurs as the third most frequent

item in the data, but occurs in only one decade in three different judgments. In fact, it occurs as a part of a lengthy citation of the first of three judgments in total.

The following graph shows how the number of correspondences has increased in relation to the number of documents over four decades.

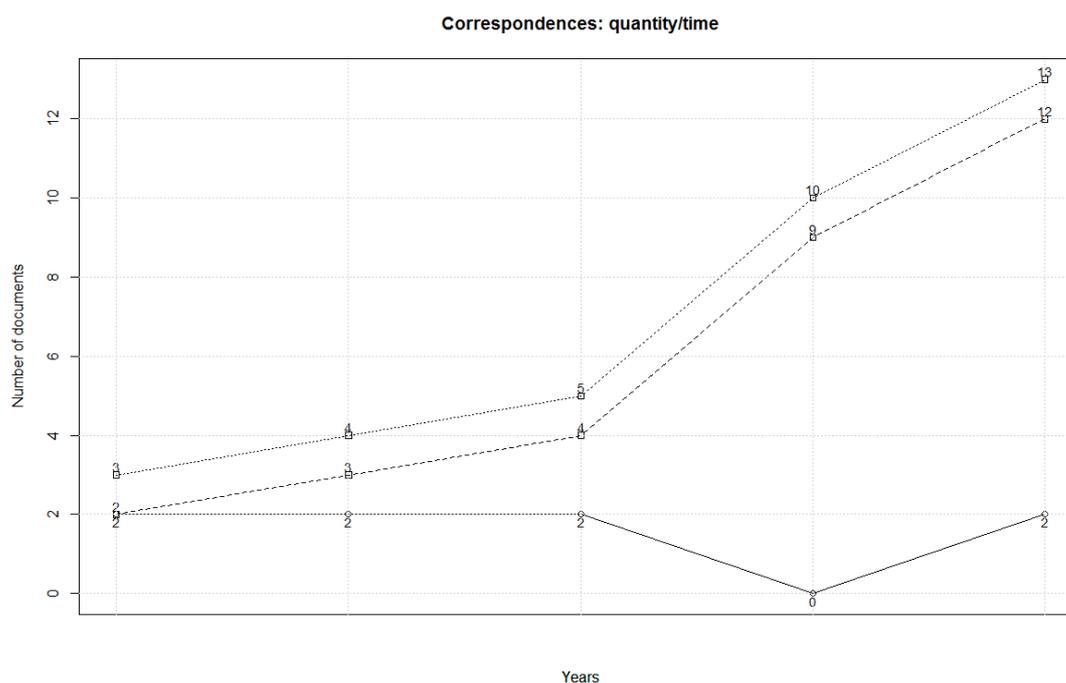


Figure 4: Number of correspondences and judgments over years

Here, the X and Y-axes show the years and the number of documents, respectively. The actual data are displayed in terms of log-values and are indicated with unbroken and dotted lines. The unbroken line denotes how the number of correspondences increased over time and the dotted line displays the growth in the number of documents. It can be observed that the number of documents has increased dramatically, whereas the number of correspondences experienced a comparatively steady growth. The dashed line shows what the number of correspondences would be had they continued to grow at the same rate as the number of documents. For example, instead of eight there would be 36 correspondences in German. This example illustrates how repetition reduces entropy and creates constancy. In fact,

without repetition and lexical priming each time a document is translated a new correspondence would be added (until no relevant translation correspondences remained) which would increase entropy.

In order to obtain a more general picture about what superdiversity in this context really means, it should be noted that this analysis investigated only one of a total 23 languages in which judgments are produced. Assuming that similar findings would also be found in other languages, it follows that the whole system associated with the French term *conditions de transport* would consist of 184 lexical items. In contrast, in a monolingual legal order there would be only one, or, assuming that synonyms could be used, at best half-a-dozen of items associated with this meaning.

Thus it can be seen that translation is not only a source of superdiversity in ECJ case law but also a force that controls this superdiversity. These two findings indicate that communication through multilingualism at the ECJ represents a self-organizing system (Luhmann, 1984).

## **5. Summary**

The ECJ and the way in which it works can be seen as a microcosm of how a multilingual, multicultural supranationalisation process and legal order can be constructed – the Court is a microcosm of the EU as a whole and particular of the supranational EU legal order. This chapter addresses the issue of linguistic superdiversity in ECJ case law in relation to relations between languages and to translation. The approach combines systems and information theories on the one hand with sociolinguistics and corpus linguistics on the other.

The justification for using systems and information theories lies in the notion that superdiversity includes a quantitative aspect and as such the framework developed here can contribute to a methodologically more rigorous theory of superdiversity. For

this study, these two theories were considered descriptively. However, due to their close relation to mathematics further developments of superdiversity theory should also involve more formal applications.

The first part of the analysis demonstrated that ECJ case law constitutes a multilingual system with a complex internal organisation. This organisation is described in terms of four types of hierarchical relations between EU official languages: (i) flat hierarchy, (ii) flexible/rotational hierarchy, (iii) pivot translation hierarchy, (iv) temporal linguistic hierarchy. The second part of the analysis demonstrated that translation simultaneously creates linguistic diversity in ECJ case law and controls the system, preventing disintegration. Owing to these two separate forces of translation, multilingualism at the ECJ constitutes a self-organising system. The controlling mechanism relies on repetition of options created through previous translations. Repetition therefore keeps the degree of superdiversity under control. The EU case law system is a system in development and is ever-evolving. Without repetition this superdiversity would turn into chaos.

The findings of the present study support previous studies on superdiversity insofar as they indicate that it is necessary to find new ways of understanding legal orders based on multilingual communication. Multilingualism does not simply refer to the use of many languages but in itself creates new issues that cannot be sufficiently well-explained using existing theoretical toolkits created for the description of orders which are less diverse. Understanding such linguistic superdiversity in the EU legal order is important for questions of legal certainty. As has been demonstrated, levels of interpretation potentially increase as levels of diversity increase. Thus, linguistic superdiversity creates a type of semantic diversity, which leaves more room for interpretation of legal texts in superdiverse systems than in non-superdiverse contexts. Multilingualism and translation of law create new challenges for legal theorists dealing with EU law since they bring more uncertainty and unpredictability to the concept of 'the law'. These new challenges need to be addressed to reveal and clarify the instances of such uncertainty.

Most concepts of legal certainty consist of a formal element of predictability (implying that the law is static and pre-established so that its interpretation may be framed as predictable) and a substantive element of acceptability (referring to reflexivity, fluidity and context sensitivity of adjudication) (Paunio, 2013: 193). Multilingualism, however, adds another layer of uncertainty to both the concept of legal certainty and uniform application of EU law. ECJ judgments are not only constructed through a ‘multilingual’ process, but are subsequently interpreted and applied ‘multilingually’ in 24 languages throughout 28 different legal orders. It may seem, therefore, that the multilingual nature of EU law severely undermines any claim to legal certainty within EU law. That is not, in fact, the case, however a certain reconceptualization of legal certainty is necessary in such a multilingual context. Paunio points out that although multilingualism adds a layer of complexity to legal communication, and may lead to increased uncertainty as to the meaning of legal texts, it does not in itself form an obstacle to assuring legal certainty since a continuous dialogue between the ECJ, national courts and other legal actors secures legal certainty on a different level – discursive legal certainty (Paunio, 2013: 196-7). As submitted here and by others (see note 13 above), however, multilingualism is not always a useful lens through which to analyse such issues. The term ‘multilingualism’ merely suggests that several languages have been in use in a certain communication situation. What it does not imply are features such as the hierarchic relations between languages and relations between correspondences, which show what impact the use of several languages can actually have. A term that covers these features more appropriately is multilinguistic superdiversity.<sup>16</sup> Translation creates a new linguistically superdiverse legal order. The framework developed here, based on interdisciplinary analysis of the process of production of ECJ case law, may not only be useful in terms of contributing to the theory of superdiversity itself, but can also be applied to enhance the understanding of the construction of the EU legal order and as a lens through which issues of legal certainty within that legal order can be analysed.

The analysis carried out here also opens a new research agenda, namely the exploration, definition and quantification of the level of superdiversity in EU law generally and ECJ case law more specifically (Trklja, forthcoming 2017). Comparing

levels of superdiversity in the application of EU law across its 28 member states would allow the principle of uniform application of EU law to be systematically studied and could have far-reaching impact on the EU constitutional narrative.

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## Endnotes

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<sup>2</sup> These are: Bulgarian; Croatian; Czech; Danish; Dutch; English; Estonian; Finnish; French; German; Greek; Hungarian; Italian; Irish; Latvian; Lithuanian; Maltese; Polish; Portuguese; Romanian; Slovakian; Slovenian; Spanish and Swedish.

<sup>3</sup> Elina Paunio has recently suggested abandoning the term multilingualism in the context of the ECJ’s case law in favour of the term ‘plurilingualism’. See Paunio (2015).

<sup>4</sup> Following systems theory research (von Foerster, Luhmann) the unit measurement used here to investigate quantity measures the amount of information.

<sup>5</sup> Shannon’s basic formula for entropy is  $H = \text{Log}_2(\text{number of distinct elements})$ . He subsequently developed that formula for entropy in non-equiprobable systems:  $H(X) = - \sum_{i=1}^n p(x_i) \log_b p(x_i)$  (Shannon, 1948). Units of information are measured in bits.

<sup>6</sup> [http://curia.europa.eu/jcms/jcms/Jo2\\_6999/](http://curia.europa.eu/jcms/jcms/Jo2_6999/) (as at 12/12/15).

<sup>7</sup> In reality the other EU institutions tend nowadays to work mainly in English but the Court of Justice is the only institution to formally adopt a single working language.

<sup>8</sup> Note: at the time of going to press Irish has never been used as the language of procedure in a case, and judgments are not routinely translated into Irish.

<sup>9</sup> Article 76(2) of the Rules of Procedure of the ECJ provides for the Court to dispense with the oral hearing if it considers that it has sufficient information to give a ruling.

<sup>10</sup> Since 2002 that practice has changed and today's Advocates General are expected to write their opinions in one or more of the Court's 'pivot languages' (English, French, German, Italian, Spanish – see *infra*). Cf McAuliffe, 2012.

<sup>11</sup> It could be argued that languages occurring more often in this boss position may have a significant impact on the development of the case law – cf McAuliffe 2015.

<sup>12</sup> With the exception of Maltese and Irish.

<sup>13</sup> The German language division provides translations from Polish, Estonian, Finnish, Dutch, Bulgarian and Czech; the English language division from Lithuanian, Swedish and Danish; the Spanish division from Hungarian, Latvian, Portuguese and Croatian; the Italian division from Slovak, Slovenian, Greek and Romanian.

<sup>14</sup> See note 1 above.

<sup>15</sup> The *acquis communautaire* consists of all of the most important law of the EU, which must be translated and implemented by accession states before joining the EU. The judgments in this corpus consist of the *acquis communautaire* judgments as at the time of the most recent accession to the EU by Croatia in 2013.

<sup>16</sup> Although slightly awkward, *multi-linguistic* is preferred to *linguistic* because the latter may cover superdiversity that involves not only several languages but also different varieties of one language, whereas the former is associated only with multilingualism.