

The Working Language of the CJEU: Time for a Change?

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The Working Language of the CJEU: Time for a Change?

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Abstract

It is well known that the working language of the CJEU is French. For many years, the status of French was unquestioned, but this is now changing. This article considers how French came to be chosen as the CJEU's working language; the effect of that choice on the CJEU's judicial method; and the feasibility and desirability of a change in the CJEU's language practices. Has French become an impediment to the CJEU's capacity to communicate effectively with its stakeholders? Should French be replaced or supplemented? If so, by what? Would any potential benefits that might accrue from changing the CJEU's language practices be outweighed by the disruption that would be caused? Or do the political sensitivities in play simply make reform impossible?

Introduction

The Court of Justice of the European Union (“the Court”) is equipped to hear cases in 24 different languages.¹ Its case law is available in 23 of them.² However, its working language has always been French. This means that, whatever the formal

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¹ See Art. 36 of the Court's Rules of Procedure (R.P.).

² A temporary derogation for Irish is laid down by Reg. 2015/2264 extending and phasing out the temporary derogation measures from Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community and Regulation No 1 of 15 April 1958 determining the languages to be used by the European Atomic Energy Community introduced by Regulation (EC) No 920/2005, O.J. 2015 L322/1.

language of a case according to its Rules of Procedure,³ the Court works from a case file of documents in French (either originals or translations produced by the Court's translation service); the Court's deliberations are conducted in French; and its judgments are drawn up in that language.⁴ A curious consequence is that the authentic version of a judgment⁵ in the language of the case concerned (where that language is not French) will in fact be a translation from a French text.⁶

The purpose of this article is to contribute to the growing literature on the linguistic regime of the Court by focusing on its working language. Why was French chosen? What effect, if any, did that choice have on the Court's legal method and the quality of its judgments? Would it be desirable for the Court to change its working language? If so, would such a step be feasible?

Why French?

The dominance of the French language in the Court is connected with the way it was originally designed.⁷ When the Paris conference opened on 21 June 1950 under the chairmanship of Jean Monnet, France proposed that measures taken by the High

³ See Art. 37.

⁴ See S. Wright, "The Language of the Law in Multilingual Contexts – Unpicking the English of the EU Courts' Judgments" (2016) 37 Statute Law Review 156.

⁵ See Art. 41 R.P. That provision uses the term "documents" and does not specifically mention judgments. It has therefore been argued that all language versions of the Court's judgments are equally authentic: see J. Bengoetxea, "Multilingual and Multicultural Legal Reasoning: The European Court of Justice" in A. Kjær and S. Adamo (eds.), *Linguistic Diversity and European Democracy* (Farnham: Ashgate, 2011) 97, pp. 103-104. However, it is the version in the language of the case that is signed by the judges involved and served on the parties or the referring court pursuant to Art. 88(2) R.P.: Wright, n. 4, p. 160. Moreover, it is on the judgment in the language of the case that clerical errors are noted: Arts. 103 (preliminary rulings) and 154 (direct actions) R.P. See R. Plender, "Procedure in the European Courts: Comparisons and Proposals" (1987) 267 *Recueil des Cours* 13, pp. 304-305. In her Opinion in *Farrell v Whitty* (C-413/15) EU:C:2017:492 (n. 55), A.G. Sharpston referred to "the 'authentic' text" of the judgment of the Court in a previous case. It may also be noted that the Court's online search form includes "authentic language" as a search criterion.

⁶ This practice seems to have been followed since the earliest days of the Court: see D. Valentine, *The Court of Justice of the European Coal and Steel Community* (The Hague: Martinus Nijhoff, 1955), p. 148.

⁷ See A. Boerger-De Smedt, "La Cour de Justice dans les Négotiations du Traité de Paris Instituant la CECA" (2008) 14 *Journal of European Integration History* 7; A. Boerger-De Smedt, "Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome" (2012) 21 *Contemporary European History* 339; M. Rasmussen, "Constructing and Deconstructing 'Constitutional' European Law: Some Reflections on How to Study the History of European Law" in H. Koch, K. Hagel-Sørensen, U. Haltern and J. Weiler (eds.), *Europe: The New Legal Realism* (Copenhagen: DJØF Publishing, 2010) 639; D. Tamm, "The History of the Court of Justice of the European Union Since its Origin" in A. Rosas, E. Levits and Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Heidelberg: Springer, 2013), p. 9.

Authority of what was to become the European Coal and Steel Community should be open to review by an arbitral tribunal established on an ad hoc basis. Although wary of a “gouvernement des juges”, Monnet was persuaded by Germany and the Benelux countries that the new community should have a permanent court with the power to review acts of the High Authority. In the autumn of 1950, Monnet appointed Maurice Lagrange, a member of France’s highest court in administrative law matters, the Conseil d’Etat, to help create a court that would resemble an administrative court along French lines with the limited remit of ensuring that the High Authority acted within the limits of its powers. Lagrange played a key role in the drafting of the treaty articles on the Court and in defining its powers.⁸ In performing that task, he took as his blueprint the Conseil d’Etat and French administrative law.

The French influence is evident in the grounds of review set out in Article 33 ECSC (and now Article 263 TFEU), as Lagrange himself, by then an Advocate General in the new court, would recognise in *Assider v High Authority*.⁹ It is evident in the nomination of a judge-rapporteur to shepherd each case through the Court’s procedure and draw up the draft judgment.¹⁰ Perhaps most significantly, it is evident in the institution of the Advocate General, acknowledged by Lagrange on his retirement from the Court in 1964 as “inspired by the example of” the French Conseil d’Etat.¹¹ According to Boerger-De Smedt,¹² Lagrange introduced the Advocates General late in the negotiations after the rejection of the idea of dissenting opinions, well established in common law jurisdictions and the International Court of Justice (ICJ) but little known in continental Europe. As Lagrange explained in his retirement speech, the opinion of the Advocate General was partly intended to compensate for the absence of dissenting judgments in the new court by providing a prism through which the judgment might be analysed and clarified.¹³ The late appearance of the Advocates General explains why, in contrast to the EEC and Euratom Treaties, they

⁸ See Boerger-De Smedt, “La Cour de Justice dans les Négotiations du Traité de Paris Instituant la CECA”, above n. 7, p. 8.

⁹ *Assider v High Authority* (3/54) [1954-56] E.C.R. 63, 75 (Opinion not available in English on the CJEU website).

¹⁰ See M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004), pp. 47-60 (concerning the Cour de Cassation).

¹¹ Address given by Maurice Lagrange (8 October 1964)

https://www.cvce.eu/obj/address_given_by_maurice_lagrange_8_october_1964-en-f2f00c1c-2587-497f-ace0-6890bf0cb85f.html, p. 2 of the pdf [accessed 17 April 2018].

¹² “La Cour de Justice dans les Négotiations du Traité de Paris Instituant la CECA”, above n. 7, p. 21.

¹³ Above n. 11.

were not mentioned in the body of the ECSC Treaty but in the Protocol on the Statute of the Court¹⁴ annexed to that Treaty.¹⁵

So when the Court opened for business in the Villa Vauban in Luxembourg on 4 December 1952, it must have seemed natural for the seven judges¹⁶ and two Advocates General to converse among themselves in French. The ECSC Treaty had been drafted entirely in French and only the French text was authentic, although there were official translations into Dutch, German and Italian.¹⁷ While it was decided that those four languages should be the Court's official languages, the discussions on its language regime were conducted entirely in French,¹⁸ a language spoken in three of the then six Member States. No-one would therefore have been surprised at the emergence of French as the Court's working language from the outset. Lagrange later observed of that language: "one of the Court's official languages was spoken fluently by all its Members. No interpreter was ever needed in the deliberation room. That invaluable asset remains...It may even have acquired the status of a tradition."¹⁹

The term "tradition", emphasising the lack of formal legal basis, was borrowed by Advocate General Kokott in *Italy v Commission* to describe the drafting of judgments in French.²⁰ Cohen²¹ quotes a judge of the Court (whose nationality is not revealed) as saying that the use of French is accepted by the Member States "as a customary constitutional rule", but no justification is given for that view. It seems more likely that the Member States have simply acquiesced in the practice initially adopted by the Court.

The effect of recourse to French within the Court

¹⁴ Art. 11. See M. Lagrange, "The Court of Justice of the European Communities from the Schuman Plan to the European Union" in *Mélanges Fernand Dehousse* (Paris/Brussels, Fernand Nathan/Éditions Labor, Volume 2, 1979), https://www.cvce.eu/content/publication/1999/1/1/30dbbb02-97f2-46ad-898c-49b074cb2ab2/publishable_en.pdf, p. 4 of the pdf [accessed 17 April 2018].

¹⁵ Arts. 32a and 32b making provision for Advocates General were added to the ECSC Treaty by Art. 4(2)(a) of the Convention on Certain Institutions Common to the European Communities signed alongside the EEC and Euratom Treaties.

¹⁶ The purpose of the seventh judge was to prevent the full Court from being evenly divided.

¹⁷ D. Edward and R. Lane, *Edward and Lane on European Union Law* (Edward Elgar, 2013), p. 291; I. Burr, "Article 55 [Languages and Deposit of the Treaty]" in H.-J. Blanke and S. Mangiameli, *The Treaty on European Union (TEU): A Commentary* (Heidelberg: Springer, 2013), p. 1470; Tamm, above n. 7, p. 17.

¹⁸ Valentine, above n. 6, p. 147 (n. 6).

¹⁹ M. Lagrange, *Mélanges Dehousse*, above n. 14, p. 6 of the pdf.

²⁰ *Italy v Commission* (C-566/10 P) EU:C:2012:368, para. 93.

²¹ M. Cohen, "On the Linguistic Design of Multinational Courts: the French Capture" (2016) 14 *International Journal of Constitutional Law* 498, 502.

The decision to adopt French as the working language of the Court was to have far-reaching consequences. As Bobek (currently an Advocate General at the Court) has acknowledged, the *linguistic* domination of French “spills over into *intellectual* domination, which leads to ideas, notions or solutions from outside the Francophone legal family not being genuinely represented within the institution, and not being systematically translated into its cases.”²²

The most obvious effect has been on the Court’s judicial style, which initially resembled that of the Conseil d’Etat and the Cour de Cassation, France’s highest court for civil, commercial, social and criminal law matters. The Opinion of the Advocate General served a function similar to that of the *commissaire du gouvernement* (now *rapporteur public*) in the Conseil d’Etat and the *avocat général* in the Cour de Cassation. The judgments of all three courts were collegiate, without dissenting opinions. According to Mancini and Keeling, throughout the 1950s and early 1960s those of the Court “looked like a carbon copy of the judgments of the great French courts...”²³

Judgments of the Court were initially divided into two parts, one describing the facts and the arguments of the parties, the second giving the ruling of the Court and its supporting reasons. It was this second part that must have seemed very familiar in style to French lawyers: it would typically be very concise and comprise a short number of long sentences punctuated in the French text with the phrase “attendu que”, following the example of the Cour de Cassation.²⁴ Lawyers trained in the common law tradition would have found it striking that the French text of the section of the judgment in *Van Gend en Loos*²⁵ dealing with the direct effect of Article 12 EEC comprised a single sentence covering little more than two sides of the European Court Reports.

²² M. Bobek, “Epilogue: Searching for the European Hercules” in M. Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford: Oxford University Press, 2015), p. 309. See also minutes of the meeting of 11 June 2003 of the Délégation pour l’Union Européenne of the French Assemblée Nationale: the use of the French language at the Court means that “les juges s’appuient sur une tradition de droit continental alors que le recours à l’anglais, la langue de la Common law, conduirait probablement à des évolutions sensibles de la jurisprudence communautaire”.

²³ G.F. Mancini and D. Keeling, “Language, Culture and Politics in the Life of the European Court of Justice” (1995) 1 *Columbia Journal of European Law* 397, 399. Mancini was an Advocate General at the Court from 1982-88 and a judge from 1988-1999.

²⁴ This and the use of the term Advocate General may have represented an acknowledgment of the status of the Cour de Cassation. The Conseil d’Etat uses the phrase “considérant que”.

²⁵ *Van Gend en Loos* (26/62) EU:C:1963:1.

Initially, when its case law attracted little attention outside a small group of *cognoscenti*, this model enjoyed some success. In seeking to explain the willingness of national courts to engage with the Court through the preliminary rulings procedure, Weiler remarked on “the per se compliance pull of a dialogue conducted between courts in ‘legalese’”.²⁶ Pescatore, a member of a committee of jurists charged with ensuring the legal coherence of the draft EEC Treaty and a judge at the Court from 1967-85, later said of *Van Gend en Loos*: “There has rarely been a legal argumentation as well developed as this one, and presented to individuals and their judges with such elegance and persuasive power.”²⁷ In the *Jacques Vabre* case before the French Cour de Cassation in 1975, Procureur Général Touffait (a Judge at the Court from 1976–82) described the judgment in *Costa v ENEL*²⁸ as based on “so coherent a reasoning that its conclusion appears unavoidable”.²⁹ His conclusions helped to persuade the Cour de Cassation to accept the doctrine of primacy.

In his well-known book on comparative judicial decision-making,³⁰ Lasser says of the decisions of the Cour de Cassation that they “lack any serious description of the facts, almost never refer to past judicial decisions, and contain absolutely nothing that could be described as serious interpretive or policy analysis.” To what extent could that criticism be levelled at the Court?

When the Court’s judgments were divided into two parts, the first part would contain a reasonably full account of the facts and arguments. However, the use of a small number of long sentences in the French text of judgments made it difficult for the Court to engage fully with those arguments. In the late 1970s the practice of long sentences was abandoned. However, the increasing translation burden imposed by the Court’s growing case load meant that by the mid-1990s judgments of the Court had ceased to contain a separate account of the facts and arguments. To compensate for that absence, the Court for a time described them in more detail in the body of its judgments. Nowadays, however, the account of the facts has become less detailed and the Court rarely engages with the arguments in the same way as a

²⁶ J. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), p. 195.

²⁷ P. Pescatore, “*Van Gend en Loos*, 3 February 1963 – A View from Within” in M. Maduro and L. Azoulay (eds), *The Past and Future of EU Law* (Oxford: Hart Publishing, 2010) 3, p. 6.

²⁸ *Costa v ENEL* (6/64) EU:C:1964:66.

²⁹ *Directeur Général des Douanes v Société Vabre* [1975] 2 Common Market Law Reports 336, 363; G. Mancini, “The Making of a Constitution for Europe” (1989) 24 Common Market Law Review 595, 605.

³⁰ Lasser, above n. 10, pp. 30-31.

common law court. Certainly, few would turn to the Court's case law for "serious interpretive or policy analysis".

While the Court could imitate the judicial mannerisms of the highest French courts, it could not emulate their status as institutions of a proud European nation state with a long history. An ambitious new institution, the Court needed to earn the respect of its interlocutors. After the first enlargement of the then Community in 1973, some lawyers from the new Member States were less impressed by what Mancini and Keeling called the Court's "often stunted reasoning and its frequently oracular tone..."³¹ Rasmussen famously said that the Court had "probably pushed its gap-filling activities beyond the proper scope of judicial involvement in society's law and policy making."³² The "persuasive power" of the Court's judgment in *Van Gend en Loos* was lost on Sir Patrick Neill, who saw it as an example of judicial activism on the part of a court which had liberated itself from "the customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning of the language of the relevant provision."³³ He did not comment on the elegance of the judgment. Hartley claimed that the Court sometimes refused to accept the natural meaning of the Treaties "in pursuance of a settled and consistent policy of promoting European federalism..."³⁴ Whatever its merits, this line of thought affected the political climate in the United Kingdom and played a not insignificant part in the result of the 2016 referendum on its continued membership of the EU.³⁵ It also caused friction in the Brexit negotiations.³⁶

Although the style of the Court's judgments has evolved over the years, a number of problems associated with its French heritage have endured. One is that, as Bell explains:³⁷

³¹ Above n. 23, p. 398.

³² H. Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986), p. 28.

³³ P. Neill, "The European Court of Justice: A Case Study in Judicial Activism" (London: European Policy Forum, 1995), p. 47.

³⁴ T. Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union" (1996) 112 *Law Quarterly Review* 95, 95.

³⁵ Michael Gove, the then Lord Chancellor and Secretary of State for Justice and a leading member of the Leave campaign, called it a "rogue" court at a Vote Leave event in Stratford-on-Avon on 6 June 2016: <http://video.pressassociation.com/record/105842> [accessed 17 April 2018].

³⁶ Compare e.g. the respective position papers of the UK and the EU27 on ongoing Union judicial and administrative proceedings, <https://www.gov.uk/government/publications/ongoing-union-judicial-and-administrative-proceedings-position-paper> and https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-ongoing-union-judicial-admin-procedures_en_0.pdf [accessed 17 April 2018].

³⁷ In a review of Lasser: (2005) 30 *European Law Review* 446, 447-448.

“The purpose of the judicial decision of the highest [French] courts is not necessarily to justify a decision taken...Rather it is to communicate a rule and its interpretation to the lower courts. The role of the highest court is to provide such authoritative (albeit not binding) decisions.”

The Court adopted a similar approach to its task, both in preliminary rulings and direct actions. The brevity of the section of the judgment in *Van Gend en Loos* dealing with direct effect is in inverse proportion to its importance and the fact that it involved the rejection of the arguments of three of the then six Member States as well as the advice of Advocate General Roemer. The judgment in *Plaumann*³⁸ on the meaning of individual concern under Article 173 EEC (now Article 263 TFEU) was even more concise, devoting just a single paragraph to the central issue in the case.

The Court was seeking in these and other cases of the period to declare what the law was rather than to persuade a perhaps sceptical reader that this was what the law ought to be. This might have been acceptable, even desirable, in a Community of six Member States with a broadly shared understanding of the role of courts, when the scope of the Treaties was relatively limited and there was little knowledge of Community law among judges and practitioners. However, a number of factors were to put pressure on the form of judgment based on the French model of the time. The arrival of Member States from other legal traditions brought with it judges and practitioners with different expectations. The expanding scope of the Treaties brought them to the attention of a wider constituency, the members of which were increasingly being introduced to Community law in Europe’s law faculties. Many of them began to scrutinise the Court’s judgments with a critical eye. Perhaps the most important factor, however, was the growth in the sheer volume of the case law and the challenge of ensuring consistency.

These factors might have led the Court to reappraise fundamentally the form of its judgments, but no such reappraisal appears to have taken place. Examples of striking developments in the more recent case law include what is sometimes called the principle of incidental effect³⁹ and the conferral of direct effect on general

³⁸ *Plaumann v Commission* (25/62) EU:C:1963:17.

³⁹ *CIA Security* (C-194/94) EU:C:1996:172; *Unilever* (C-443/98) EU:C:2000:496.

principles of law,⁴⁰ momentous steps which received only meagre justification from the Court. This perhaps stems from the Court's failure to develop a robust technique for dealing with its previous case law. Even though the Court does not (and as a supreme court could not) apply a doctrine of binding precedent, the requirements of legal certainty make it essential that some degree of consistency in its case law should be preserved. Mancini and Keeling acknowledge⁴¹ that the case law of the 1960s and early 1970s was characterised by

“a typically continental preference for vague allusions to the ‘settled case law of the Court’ and for disguised quotations from previous judgments...[D]uring that period, it would have been considered positively indecent to expressly overrule a precedent or to acknowledge the existence of a conflict in the case law.”

The accession of the United Kingdom and Ireland in 1973 may have made the Court more “precedent-conscious” (as Mancini and Keeling put it),⁴² but it was not until 1990 that the Court expressly (if obliquely) overruled one of its own previous decisions.⁴³ Its inability to conduct a serious analysis of its case law was laid bare in *Keck and Mithouard* in 1993,⁴⁴ an attempt to clarify the law on the free movement of goods. In that case, the Court memorably declared⁴⁵ that, “contrary to what has previously been decided”, a certain type of national provision was not such as to hinder trade between Member States as long as certain conditions were met. The case provided a stark illustration of the problem: the Court failed to identify precisely what it was overruling or to explain why provisions of the type in question (those relating to “certain selling arrangements”)⁴⁶ were no longer to be considered restrictions on trade. Similarly, the case law on incidental effect made little attempt to reconcile that principle with the case law holding that directives may not impose obligations on individuals.⁴⁷ Mancini and Keeling went so far as to concede that “the

⁴⁰ *Mangold* (C-144/04) EU:C:2005:709.

⁴¹ Above n. 23, p. 402.

⁴² *Ibid.*

⁴³ *CNL Socal v HAG GF* (C-10/89) EU:C:1990:359.

⁴⁴ (C-267/91 and C-268/91) EU:C:1993:905.

⁴⁵ Para. 16 of the judgment.

⁴⁶ *Ibid.*

⁴⁷ *Marshall v Southampton and South-West Hampshire Area Health Authority* (152/84) EU:C:1986:84; *Faccini Dori v Recreb* (C-91/92) EU:C:1994:292.

collegiate nature of the [Court's] judgments...does not lend itself to the sort of rigorous case law technique practised by common law judges."⁴⁸

The concern here is not with the substance of these cases, but with what they tell us about the Court's judicial method. It is obviously not the case that all its decisions are poorly reasoned, but this is true of enough of them for it to be a matter of concern. The problem, it is suggested, is partly attributable to the historical influence on the Court of French legal method. In accordance with what may now be an outdated view of the French model,⁴⁹ the form of the judgment remains a syllogistic one in which the conclusion is made to appear the inevitable consequence of the premises which precede it. The depersonalised form of the judgment allows the exercise to be presented as a mechanical one in which there is no room for personal opinions. It is true that the Advocate General has always injected a personal perspective and revealed the possibility that a case might have several plausible solutions. Moreover, the Court's judgments have become somewhat more discursive than they used to be. However, they end by declaring what the law is. They do not engage with the Advocate General's Opinion or make any serious attempt to persuade the reader of the rightness of the conclusion reached. It is the law because that is what the Court has decided. As Judge Prechal has admitted, "as judges we do not really have debates with the outside world."⁵⁰

This approach to judging is unsustainable in 21st century Europe, where citizens expect to be engaged in a process of dialogue by the institutions of government, including the courts. In the EU legal order, the Court must also maintain a full and frank dialogue with the national courts if it is to retain their confidence. As Weiler puts it: "The style of [the Court's] judicial decisions is outmoded, does not reflect the dialogical nature of European Constitutionalism, and is not a basis for confidence-building European relations between the European Court and its national constitutional counterparts."⁵¹ Although the legal homogeneity of the EU was an advantage in the Community of six Member States, the Court has not succeeded in adapting the style of its judgments to the modern world, a world in which its own legitimacy and that of the EU itself is increasingly questioned. As Weiler therefore

⁴⁸ Above n. 23, p. 402.

⁴⁹ See Lasser, above n. 10, p. 34.

⁵⁰ See <http://europeanlawblog.eu/?p=2115> [accessed 17 April 2018].

⁵¹ J. Weiler, "Epilogue: The Judicial Après Nice" in G de Búrca and J Weiler (eds), *The European Court of Justice* (Oxford: Oxford University Press, 2001) 215, p. 219.

argues, “the Court should abandon the cryptic, Cartesian style which still characterizes many of its decisions and move to the more discursive, analytic, and conversational style associated with the common law world...”⁵²

Should the Court review its working language?

It is not essential for the Court to change its working language in order to rectify the problems with the form of its judgments identified above. It would be possible for it to modernise the style of its judgments while retaining French as its working language. It may, however, be doubted whether this would be the optimum solution. In any event, it seems unlikely to materialise.

The status of French as the working language of the Court permeates the entire institution. It puts members of the Court who do not have a native or near-native command of the language at a disadvantage in deliberations⁵³ and other collective gatherings of the Court. It means that the translation service is organised to ensure that all the papers in the case file for every case, if not already written in French, may be translated into that language. Draft judgments are checked by Francophone *lecteurs d'arrêts* and proof-readers to ensure that they are “expressed in correct legal French, consistent with the language and conventions of the Court’s case-law.”⁵⁴ This means that, if the formation of judgment would prefer to deal with a case in an official language of the Court other than French,⁵⁵ it cannot do so because the necessary support structures are lacking. The system tends to perpetuate itself, in that applicants for posts at the Court may be screened for their knowledge of French, knowledge often acquired through the study of French law or the law of an analogous legal system.⁵⁶

The problem is exacerbated by the way the Court’s judgments are produced. Initial drafts are drawn up by *référéndaires* working in the chambers of the judges. As McAuliffe has explained,⁵⁷ many *référéndaires* who are not native French speakers

⁵² *Ibid*, 225.

⁵³ Mancini and Keeling, above n. 23, p. 398.

⁵⁴ Wright, above n. 4, p. 158.

⁵⁵ e.g. if none of the members of the formation is francophone. It is understood that this has sometimes been attempted. Cf. Bengoetxea, above n. 5, p. 107; D. Anderson and M. Demetriou, *References to the European Court* (London: Sweet & Maxwell, 2nd edition, 2002), p. 307.

⁵⁶ Cohen, above n. 21, pp. 508-511; Bobek, above n. 22, p. 309.

⁵⁷ K. McAuliffe, “Language and Law in the European Union: The Multilingual Jurisprudence of the Court” in L. Solan and P. Tiersma, *The Oxford Handbook of Language and Law* (Oxford: Oxford

think in their own first language before drafting in French. Interviews she conducted revealed a tendency among *référéndaires* to resort to a “cut and paste” approach, with the same expressions being used repeatedly. She reports complaints from lawyer-linguists working in the Court’s translation service of excessive reliance by *référéndaires* “on stock phrases, frequently causing the meaning of texts to be obscured.”⁵⁸ McAuliffe also notes that *référéndaires* feel that they are under pressure to cite verbatim from previous judgments. Moreover, because the deliberations of the Court are conducted in secret,⁵⁹ *référéndaires* may not be able to identify compromises underlying amendments made to the original draft. This makes it safer to leave awkward or badly worded phrases untouched. The result is often formulaic judgments expressed in a “Court French” that is only a distant cousin of the language of Montesquieu. The process is inherently conservative, keeping original drafting to a minimum and concerning itself more with linguistic consistency than clarity and legibility. Such a process is unlikely to lead to a radical change in the form of the judgment.

The Court should therefore follow the example of the French Conseil d’Etat⁶⁰ and the Italian Ministry of Justice⁶¹ by launching a review of the way in which its judgments are drafted. It should consider how they might be made easier for the public to understand through the use of a style which is simpler and more transparent. But a mere review might not be enough to achieve a departure from ingrained habits. In order to encourage reform, the review should explicitly involve consideration of a change in the Court’s working language to English.

Notwithstanding the claim by the President of the European Commission, Jean-Claude Juncker, on 5 May 2017 that English was “losing importance in Europe”,⁶² it is now widely used in the Union’s political institutions.⁶³ As Baaij

University Press, 2012) 201; K McAuliffe, “Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union” (2011) 24 *International Journal for the Semiotics of Law* 97.

⁵⁸ “Language and Law in the European Union”, above n. 57, p. 213.

⁵⁹ Statute, Art. 35. Tamm observes: “until now nothing substantial to illuminate what actually happens behind closed doors when the Court is deliberating has come out”: above n. 7, p. 11 (n. 8).

⁶⁰ See the address by Jean-Marc Sauvé, Vice-President of the Conseil d’Etat, to the new cohort of administrative judges, 27 June 2016.

⁶¹ See

http://www.dirittoegiustizia.it/news/16/0000077545/Sinteticita_degli_atti_processuali_per_una_giustizi_a_efficiente_al_via_gruppo_di_lavoro.html [accessed 17 April 2018].

⁶² State of the Union conference, 4-6 May 2017, European University Institute, Florence, Italy <https://stateoftheunion.eui.eu/2017/> [accessed 17 April 2018].

⁶³ See e.g. Bobek, above n. 22, p. 309 (n. 87).

explains, “English has begun to function as the predominant language of the EU Institutions, specifically in the legislative procedures.”⁶⁴ It is “the language of choice for procedural matters in the Commission”, the language in which legislative documents are usually drafted and the one generally employed by the European Parliament.⁶⁵ Moreover, “English is the primary pivot [or relay] language used for the purpose of translating from and into” the official languages of the central and eastern European states who acceded to the Union in 2004 and 2007. In addition,

“participants in the legislative process primarily communicate in English in informal interactions. The significance of the French language has diminished over the years...with respect to the overall language use in the EU legislative institutions, German is used only marginally. In sum...English is the *de facto lingua franca* of the EU legislative bodies.”⁶⁶

An indication of the status of English in the legislative process was provided by *Slovak Republic and Hungary v Council*, which concerned the validity of a Council decision. Advocate General Bot pointed out that “the texts representing the successive amendments to the Commission’s initial proposal, including the text of the contested decision as finally adopted by the Council, were distributed to the delegations of the Member States only in English.”⁶⁷ This was despite the fact that the contested decision was not applicable to the United Kingdom and Ireland (or Denmark) due to opt-outs they enjoyed from the relevant part of the Treaty.

Within the Court, English is one of five “pivot” languages now used for translation purposes. (The others are French, German, Italian and Spanish.) The introduction of pivot languages has had a particular effect on Advocates General whose native language is not one of the chosen five. Instead of drafting their Opinions in their native language, as was formerly the case, they often now do so in one of the pivot languages (frequently English). The version in the native language of

⁶⁴ C.J.W Baaij, *Legal Integration and Language Diversity: Rethinking Translation in EU Lawmaking* (Oxford: Oxford University Press, 2018), p. 63.

⁶⁵ *Ibid.*, pp. 63-64.

⁶⁶ *Ibid.*, pp. 65-66.

⁶⁷ *Slovak Republic and Hungary v Council* (C-643/15 and C-647/15) EU:C:2017:618, para. 209. The contested act was Council Decision 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, O.J. 2015 L248/80.

the Advocate General concerned is then produced by the translation service (normally in consultation with its author).⁶⁸

When the Court compares different language versions of legal acts, the English text is one of those to which it refers most frequently. Moreover,

“...in almost all cases in which the Court’s comparison includes the English version, the Court interprets the provision in hand in agreement with the meaning that it attributes to the English language version. It does this in relation to the English language version more often than in relation to the other six [most cited language versions]. Hence, not only is the English version one of the two most-cited language versions [after German], it is also the cited version the content of which the Court most often prefers.”⁶⁹

The adoption of English, an official language of Ireland and Malta,⁷⁰ may well be facilitated by the United Kingdom’s withdrawal from the Union. This may help to depoliticise the issue and focus attention on the merits (and demerits) of the idea. It should be emphasised that the aim would not be to replace French legal method with English legal method, but to enable the Court to work in a language that would permit greater account to be taken of the full range of legal traditions represented within the institution.

According to Baaij, English is currently the foreign language most frequently spoken by EU citizens. The number of English speakers in the EU is expected to rise over the coming years, “as surveys demonstrate that children are increasingly learning English as their first foreign language at school.”⁷¹ English has “simply turned out to be the language that most Europeans share...”⁷² If the Court changed

⁶⁸ Wright, above n. 4, pp. 157 and 162; Baaij, above n. 64, p. 83; F.G. Jacobs, “Recent and Ongoing Measures to Improve the Efficiency of the European Court of Justice” (2004) 29 *European Law Review* 823, pp. 827-828.

⁶⁹ Baaij, above n. 64, p. 84. National courts also refer frequently to the English text of EU acts: *ibid.*, p. 86.

⁷⁰ Constitution of Ireland, Art. 8(2); Constitution of Malta, Art. 5(2) and (3). These constitutions accord English a status subordinate to that of Irish and Maltese respectively. However, in Ireland, Irish is not widely spoken: see *This is Ireland: Highlights from Census 2011, Part 1* (Dublin, Central Statistics Office, 2012) 40. In Malta, Maltese is widely spoken but English is preferred for certain technical issues. Changes to the rules governing the languages of the political institutions are made by regulation of the Council, acting unanimously: Art. 342 TFEU. Any Member State could therefore block a change removing English as an official language. See Baaij, above n. 64, p. 102.

⁷¹ Above n. 64, p. 98.

⁷² *Ibid.*, p. 102.

its working language to English, it would therefore enlarge the pool from which it was able to recruit. At the level of the judges, the number able to articulate their ideas fluently would rise. This would break the intellectual domination of French legal thinking lamented by Bobek and make it possible for a wider range of approaches to be considered. They would include that of the common law, represented after the departure of the United Kingdom by Ireland, Cyprus and Malta (which has a mixed legal system). The common law is a legal tradition in which judges seek to persuade their readers rather than dictate to them and which has over the centuries developed sophisticated techniques of case law analysis.

The Court would also be able to draw on the model of the European Court of Human Rights, the EFTA Court,⁷³ the ICJ and even the Bundesverfassungsgericht, whose styles are more discursive.⁷⁴ It is noteworthy that Member States showed a degree of pragmatism in the language regimes governing the EU Intellectual Property Office⁷⁵ and the unitary patent⁷⁶ and were supported in both instances by the Court.⁷⁷

One working language or more?

If English were to become a working language of the Court, it might be asked whether it should supplant French entirely or simply be added to French. Consideration might even be given to the addition of other new working languages.

In 2017, the European Court of Auditors published a report on case management at the Court in which it commented on its language practices.⁷⁸ The report noted that, “between 2014 and 2016 a significant share of cases referred to the CJEU, and particularly to the General Court, had English (28%) or German (20%) as procedural language, as compared to those in French (13%).” This

⁷³ English is the language of the EFTA Court even though it is not an official language of any of the EFTA States. See Art. 25 of the Rules of Procedure of the EFTA Court.

⁷⁴ Cf. Weiler in de Búrca and Weiler, above n. 51, p. 225.

⁷⁵ Reg. 40/94 on the Community trade mark, O.J. 1994 L11/1.

⁷⁶ Reg. 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, O.J. 2012 L361/1; Reg. 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, O.J. 2012 L361/89; Agreement on a Unified Patent Court, O.J. 2013 C175/1.

⁷⁷ *Kik v OHIM* (C-361/01 P) EU:C:2003:434 (trade marks); *Spain and Italy v Council* (C-274/11 and C-295/11) EU:C:2013:240 (patents).

⁷⁸ “Performance review of case management at the Court of Justice of the European Union” (Special Report no. 14/2017).

suggested that “consideration could be given to extending the languages of deliberation of the CJEU, in particular the General Court, to languages other than French.”⁷⁹ This would mean that many documents could be drafted directly in those languages and would not need to be translated into French.

The simultaneous use of two languages does not seem to work entirely smoothly at other international courts. In the European Court of Human Rights, Cohen observes that some sections work predominantly in one language, others predominantly in the other, even though in principle either language may be used during deliberations.⁸⁰ As for the ICJ, Cohen explains that it “drafts its judgments and conducts its deliberations simultaneously in two languages. Judges debate both language versions of their judgments, which are published side by side... This requires the constant assistance of translators and interpreters...”⁸¹ In both courts, Cohen claims that the generalised use of English is impeded by francophone judges who are unwilling or unable to operate in English.

If English were to be added to French as an additional working language of the Court, members of the Court would need at least an active command of either English or French and a passive command of the other. Where this could not be assured, interpretation would be required. The presence of interpreters during deliberations has customarily been seen as a threat to their secrecy and for that reason as prohibited by Article 32(1) of the Rules of Procedure.⁸² When drafted in a third language, pleadings and other documents submitted to the Court would need to be translated into both French and English, adding considerably to the workload of the translation service. There would also be a risk that particular formations of the Court would routinely use only one or other of the two languages, undermining the potential benefits of working in both and threatening the overall coherence of the case law. These problems would be multiplied if a third working language were to be added.

⁷⁹ *Ibid.*, para. 87. The Court of Auditors went on to encourage the CJEU to complete a cost benefit analysis of the impact of the effect on the General Court of working in languages other than French: see paras. 96 and 98(E). In a set of replies reproduced at the end of the report, the CJEU responded: “The choice of the language used for deliberation depends on a number of factors and is determined by considerations of efficiency. The Courts will continue their discussions on this subject in the context of their judicial autonomy, taking into account the observations made by the Court of Auditors.”

⁸⁰ Cohen, above n. 21, p. 504; Jacobs, above n. 68, p.827.

⁸¹ *Ibid.*, 507.

⁸² Art. 32(1) provides: “The deliberations of the Court shall be and shall remain secret.” See also Statute, Art. 2.

The report of the Court of Auditors acknowledged certain advantages cited by the Court of continuing to use French as its working language. It referred in particular to “the avoidance of possible divergences between the legal concepts used in each of the languages chosen as language of deliberation, and the consistency by reference to prior EU case-law.” The best way of balancing those advantages against the disadvantages of the continued use of French would be simply to replace that language with a single language – English - as the working language. The change should apply not just to the Court of Justice but also to the General Court. It would be impractical for the two courts to use different working languages. Moreover, assembling case files in English instead of French would be of particular benefit in large competition cases commenced before the General Court, where the language of procedure is often English.⁸³ The report of the Court of Auditors reveals that, in February 2016, the President of the General Court even asked the Registrar of the Court to carry out an impact assessment of a change to the working language. That assessment had yet to be finalised, ostensibly due to the ongoing Brexit process.⁸⁴

Switching entirely to English would send a clear message to those working in the Court and its outside interlocutors of its resolve to reform the style of its judgments. Since the use of French has no formal legal basis, such a change could be effected without (legal) difficulty, although any financial implications might require provision for them to be made in the Union budget. It is often said⁸⁵ that vacancies for lawyer-linguists whose first language is English attract fewer applications than similar vacancies for those whose first language is another official language of the Court. This problem should not be allowed to frustrate a reform that is otherwise considered desirable. It should be addressed by making sure that vacancies are widely advertised, recruitment agencies used where appropriate, potential candidates offered attractive conditions and the process concluded speedily.

For the majority of judges, the use of English in deliberations would enhance their ability to contribute fully and robustly to the discussion. It could therefore help the Court to produce judgments reflecting not just one legal tradition but all those represented among its members. The draft judgment would be produced in English

⁸³ e.g. *Microsoft v Commission* (T-201/04) EU:T:2007:289; *MasterCard v Commission* (T-111/08) EU:T:2012:260; *Fresh Del Monte Produce v Commission* (T-587/08) EU:T:2013:129.

⁸⁴ Above n. 78, para. 89.

⁸⁵ e.g. Cohen, above n. 21, p. 516 (n. 89).

and proofread for consistency and correctness in the usual way by an anglophone lawyer.

Knock-on consequences

Changing the working language of the Court might prompt a reappraisal of other aspects of the way it functions. Four in particular merit brief consideration here: the single collegiate judgment; the absence of provision for dissenting opinions; the length of the term for which judges are appointed; and the role of the Advocate General.

The single judgment

The single judgment is typical of France and other Member States belonging to the civilian tradition. In the common law tradition, it is usual for each judge involved in a case to deliver a separate judgment. The victor is the party in whose favour a majority of the judges has pronounced. Should the Court adopt that method?

The common law approach has two drawbacks. One is the length of judgments, which is often substantial. The other is that individual judges may give different reasons for reaching the same conclusion. In the multilingual and multicultural context in which the Court operates, it is important that its reasoning should be as clear as possible. That imperative is particularly pressing in references for preliminary rulings. It is therefore suggested that the Court should maintain its current practice of delivering a single collegiate judgment. That practice is followed by the European Court of Human Rights, the ICJ and the EFTA Court.

Dissenting opinions and term of office

Whether Court judges should be permitted to give dissenting opinions has been much discussed.⁸⁶ There are two main arguments against that idea, one pragmatic, one principled. The pragmatic argument is this. Judges are appointed on the basis of nominations by the Member States for the relatively short term of six years.

⁸⁶ See A. Arnall, *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2nd ed, 2006), pp. 9-14.

However, that term is renewable. If a judge's voting record were available for inspection, those who wished to serve more than one term might be tempted to act in a manner calculated to appeal to his or her government. The institution of the single judgment may also have helped the Court to build its authority in the early days of its existence. The principled argument is that dissenting opinions would diminish the range of national perspectives reflected in the Court's judgments, thereby undermining their legitimacy and persuasiveness.⁸⁷

The argument in favour of allowing dissenting opinions is that they would allow the judgment of the majority to be expressed with greater clarity and coherence. The absence of dissents, so the argument runs, leads the majority to offer concessions to judges in the minority which often have the effect of complicating and obscuring the judgment. Calls for dissenting opinions to be permitted are sometimes accompanied by the suggestion that the term for which judges are appointed should be extended and made non-renewable.

The objections of purists (including the present writer) to dissenting judgments were often based on experience of a Union of 15 Member States. They seem less compelling in a Union of its current size. The vast majority of cases before the Court are now decided by three- and five-judge chambers,⁸⁸ while the quorum for the Grand Chamber is 11 and the full Court 17.⁸⁹ So even without dissenting opinions, a large number of national perspectives are absent from the deliberations when most cases are decided. The threat to the Court's authority, legitimacy and persuasiveness now comes, not from the idea that a judge might occasionally disagree publicly with his or her colleagues, but from the routine marginalisation of non-francophone voices. Dissenting opinions are permitted by the ICJ and the European Court of Human Rights and will also be permitted in the Unified Patent

⁸⁷ F.G. Jacobs, "Approaches to Interpretation in a Plurilingual Legal System" in M. Hoskins and W. Robinson (eds.), *A True European: Essays for Judge David Edward* (Oxford: Hart Publishing, 2003) 297, p. 297.

⁸⁸ In 2017, 51.27% of the cases brought before the Court of Justice were heard by a five-judge chamber and 40.76% were heard by a three-judge chamber. Just 7.32% were heard by the Grand Chamber and 0.16% by the Full Court. 0.48% were heard by the Vice President. See "Statistics Concerning the Judicial Activity of the Court of Justice,"

https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ ra_2017_en.pdf

[accessed 17 April 2018].

⁸⁹ Statute, Art. 17.

Court.⁹⁰ The Court and the General Court should follow suit and their members be appointed for non-renewable terms of at least nine years.⁹¹

The role of the Advocate General

It might be suggested that permitting dissenting opinions to be published by judges of the Court would have implications for the institution of Advocate General. This is because of the link between the two highlighted by Advocate General Lagrange in his retirement speech referred to above. As he said of the Opinion of the Advocate General,⁹²

“There is no doubt that the public exposition by a member of the court of an argument which is then compared with the judgment can make a useful contribution to the exchanges of ideas and the doctrinal discussions generally prompted by the publication of a dissenting opinion. Secondly, whether the conclusions are consistent with or contrary to the decision adopted, that decision is clarified and even reinforced, either by analogy or by opposition.”

At the time Lagrange was speaking, an Advocate General delivered an Opinion in every case brought before the Court.⁹³ That remains the default position. Since what is now Article 252 TFEU was amended at Nice, however, the Statute has provided for a case to be determined without an Opinion where the Court considers that it “raises no new point of law”.⁹⁴ It is becoming not infrequent for this to be done because of the time and effort it saves.⁹⁵

It is none the less widely recognised that the Advocates General have made a major contribution to elucidating the case law by examining the facts and issues in

⁹⁰ Agreement on a Unified Patent Court, above n. 76, Art. 78(2); Statute, Art. 36.

⁹¹ Judges of the European Court of Human Rights serve for non-renewable terms of nine years: Art. 23(1) ECHR.

⁹² Above n. 11, p. 2 of the pdf.

⁹³ J.-P. Warner, the first British Advocate General who served from 1973-81, is said to have caused consternation among interpreters when he began to deliver opinions *ex tempore* immediately at the end of hearings of the Court. He was persuaded to abandon the practice.

⁹⁴ Statute, Art. 20

⁹⁵ The percentage of judgments delivered without an Opinion has varied from 30% in 2004 (the year after the entry into force of the Nice Treaty) to 53% in 2012. In 2017, the percentage was less than 33%. See the annual reports on the judicial activity of the Court, available on its web site: <https://curia.europa.eu>

more depth than the Court has been able to do within the confines of the collegiate judgment, sometimes suggesting useful changes in the direction of the case law.⁹⁶ It seems unlikely that this function of holding up a mirror to the Court and where necessary drawing attention to its blemishes could be performed by a dissenting judge. The Advocate General is not a judge and does not attend the Court's deliberations. He or she is required by Article 252 TFEU to act "with complete impartiality and independence". This does not just mean independent of the parties or political, financial or personal interests but independent of the Court too. A dissenting judge, in all likelihood working simultaneously on other cases in which he or she is happy to go along with the majority view, would find it difficult to attain the same level of independence as an Advocate General. This may be part of the reason why the General Court, where there are no permanent Advocates General, has hardly ever invoked the power conferred on it by its Rules of Procedure⁹⁷ to call upon a judge to perform the function of Advocate General.

In any event, the function of judges is to decide cases. Those that belong to collegiate courts must accept that there has to be an element of flexibility if agreement is to be reached. Their regular workload will militate against dissenting except in exceptional cases. Even when such a case arises, a judge who dissents may do so on only one or a limited number of the issues raised. It is therefore clear that the possibility that there might occasionally be one or more dissenting judgments could not be a substitute for the detailed, independent analysis of all the issues arising in a case provided by the Advocate General. It would be paradoxical if that institution were to be a casualty of a reform designed to improve further the clarity of the Court's case law.

Dissenting opinions would have a different purpose to that of the Opinion of the Advocate General: to provide their authors with a voice and liberate them from the shackles of the majority, leaving it free to express itself more clearly. Dissenting opinions do not, however, offer a complete solution to the problems considered in this article. Their effect on the legal culture of the Court would likely be limited. They would leave untouched the capacity of non-francophone judges to participate fully in deliberations.

⁹⁶ See generally N. Burrows and R. Greaves, *The Advocate General and EC Law* (Oxford: Oxford University Press, 2007); L. Clément-Wilz, *La Fonction de l'Avocat Général près la Cour de Justice* (Brussels: Bruylant, 2011).

⁹⁷ See Art. 30.

Conclusion

As we have seen, altering the Court's working language requires no change to the Treaties, the Statute or the Rules of Procedure. The introduction of dissenting judgments would require an amendment to the Statute⁹⁸ and the Rules of Procedure.⁹⁹ The relevant provisions of the Statute may be amended by ordinary legislative procedure at the request of the Court and after consulting the Commission or on a proposal from the Commission and after consulting the Court. The Rules of Procedure may be changed by the Court with the approval of the Council¹⁰⁰ acting by qualified majority.¹⁰¹ The only change that would require the Treaties to be altered is extending the terms of judges of the Court and the General Court. This would entail amendments to Articles 253 and 254 TFEU respectively. An opportunity to make such amendments may arise when the Treaties are changed to take account of the withdrawal of the United Kingdom.

It is readily acknowledged that changing the Court's working language and permitting judges to give dissenting opinions would not be a panacea. Even in mono-lingual legal systems, lawyers argue about what judgments mean. In a multi-lingual system in which judgments are often drafted by people who are not working in their native language, there will inevitably be a tendency to reproduce language used in previous judgments. However, adopting English as the Court's working language would offer the potential to enrich its deliberations and cast off the constraints imposed by the current form of the judgment. It would enable the perspectives of non-francophone judges to be better reflected in the judgments of the Court and avoid the need for interpreters to be allowed into the deliberation room.

The jurisdiction of the Court is now much broader than it was when it was founded. It has a major influence on governments, businesses and citizens throughout the Union. It is imperative that it should comprise the best jurists willing to serve on it. Given the practical advantages of a single working language, that language should be the one most likely to be spoken by potential candidates for membership. That language is English.

⁹⁸ See Arts. 36 and 37.

⁹⁹ See Art. 87.

¹⁰⁰ Art. 253 TFEU.

¹⁰¹ Art. 16(3) TEU.

