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"The translation of German-language legal terms in the judgments of the European Court of Human Rights and the Court of Justice of the European Union (from German into English): Comparison and analysis in consideration of the *skopos* theory"

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"Yo me atrevo a insinuar esta solución del antiguo problema: *La biblioteca es ilimitada y periódica.* Si un eterno viajero la atravesara en cualquier dirección, comprobaría al cabo de los siglos que los mismos volúmenes se repiten en el mismo desorden (que, repetido, sería un orden: el Orden). Mi soledad se alegra con esa elegante esperanza."

"La Biblioteca de Babel", Jorge Luis Borges

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0. Introduction

The focus of the present thesis is on the strategies that can be observed in the translation[1] of legal terms originating from the legal systems of selected German-speaking countries[2], as found in the judgments of two important and influential European courts – the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Both courts are supranational and are dedicated to the application of what has been defined as international law[3] but they differ considerably from one another in a number of aspects, ranging from Contracting Parties/Member States and competences to official languages and translation workflows. Here, the overarching focus is on specific legal concepts from Austria and Germany; since Switzerland is a Contracting Party to the Convention for the Protection of Human Rights and Fundamental Freedoms (widely known as the European Convention of Human Rights (ECHR)) but not a Member State of the European Union, legal terms from Switzerland are only taken into account with respect to the judgments of the ECtHR, and in order to supplement the analysis of strategies. The targeted focus on analysing approaches in translations from German into English is motivated not only by the position of the English language as a modern *lingua franca,* something which leads and/or could lead to an increased demand on the market for translations into English (and thus has a significant importance to the professional practice of translators), but also by the dominant status of this language in both courts: English is an official language for both (in the ECtHR it is one of only two, in addition to French). Due to their competences, both courts have to address and contend with legal concepts and as a result terminology from legal systems where German is the official language as well as the primary court language, and these terms frequently need to be included in a judgment presented in English. This results in an internal need for

[1] Or non-translation.

[2] It is recognised that these three states are not the only European states where German is a national (or at least, court) language. These include: Liechtenstein as well as parts of Belgium and Luxembourg; moreover, German is a minority language in certain countries, e.g. Italy (South Tyrol). The focus here is on Germany, Austria, and in part, Switzerland, due to the higher number of cases concerning these states' law in both courts.

[3] Concerning this classification, including brief summaries of the (ongoing) debates, see de Witte, Bruno (2017), "EU law: is it international law?", in Barnard, Catherine; Peers, Steve (eds.), *European Union Law.* 2017. Oxford/New York: Oxford University Press, and Wildhaber, Luzius (2007). "The European Convention on Human Rights and International Law", in *The International and Comparative Law Quarterly*, Vol. 56, No. 2, pp. 217-232

translation into English, if not of an entire judgment (i.e. where the judgment was never drafted in a language other than English), then at least of the legal term from the respective legal system.

The contextual embedding of these terms has been selected to consist of judgments, not only because many of them are publicly available and can be searched, and are therefore similar to a parallel corpus, but also because these judgments are frequently translated into (some of) the other official languages of the respective court, and because the institutional settings in which the translations are presented are prestigious as well as influential. As a result of these considerations, these judgments can be an important resource for translators. However, the particular context in which these terms are used is an aspect that needs to be analysed in order to better understand the challenges which an external translator can face when trying to decide on the most appropriate translation strategy for his or her own translation scenario. A descriptive and critical exploration of the context in which the terms appear will be supplemented by a consideration of the internal translation workflow, resources used and terminology management strategies in the two courts, which are important due to the opportunity to compare and contrast them to the possible workflows of an external translator. Since this thesis ultimately undertakes to assess the usefulness of these judgments as terminological resources, the challenges a translator can face when working with them, and the significance that adopting such terms may have for his or her professional standing, it focusses on a number of examples of national legal terms as found in translation in selected judgments.

The thesis begins (chapter 1) by presenting its theoretical foundations, with the first section of that Chapter dealing almost exclusively with the *skopos* theory, as developed by Hans Vermeer and Katharina Reiß, and elaborated by other academics. The *skopos* theory has been selected here as the prism through which to critically consider the applicability of "borrowed" translation strategies in legal translation and as a result legal terminology scenarios primarily due to the theory's pronounced focus on the target text (with all the ethical complexities that this entails), which has also served as the starting point for other theories or approaches. It is precisely due to the ethical dimension that Bourdieu's concept of *champ* ("field") is also introduced here in an attempt to highlight the potential power structures that can influence translators who are active on a globalised translation market.

The second section of Chapter 1 is dedicated to theoretical approaches to legal translation, and it aims to pay particular attention to the tensions and conflicts that have been highlighted in this respect. The third section of that Chapter considers theoretical and practical approaches to (legal) terminology, in direct continuation from previous observations, and finally, a concluding fourth section consolidates the implications resulting from the arguments in all preceding sections in a critical manner.

Chapter 2 and Chapter 3 are dedicated to the ECtHR and CJEU, respectively. Each Chapter begins with a presentation of the specific structure of the respective court, its roles and competences, and significance. It then proceeds to present the respective translation workflows, as determined by the jurisdiction, needs, and resources available to the court. In their final parts, each Chapter introduces a number of German-language legal terms, which have been selected on the basis of particular criteria, and their translation into English in judgments by the two courts.[4] The choices are then considered in detail, whereby the focus is on analysing both the "superficial" (i.e. the term itself, the "label"), and the "deep" (the concept behind a "label", in a manner similar to a comparative law approach), and thus attempting to illustrate the multitude of considerations that a translator has to balance.

The conclusion of the thesis analyses the transferability of the observed strategies to the practice of translators who work outside of the institutional setting of the two courts, and explore potential challenges that they may have to contend with when making a certain choice. Here, the thesis returns to the abovementioned *skopos* theory, as complemented by thoughts on terminology, the situation on the globalised free market, and the position and status of the translator in theory and practice.

It should be noted here that it seems impossible, unnecessary, and, above all, detrimental to the holistic analysis of the present topic to strictly confine the above issues to their own sections or chapters; for this reason, all parts will contain cross-references to other relevant arguments.

The thesis aims to illuminate the strengths and weaknesses of the academic theories under consideration in light of the particular research subject (i.e. the translations of terms in the judgments of the two courts), and to offer some reference points for a translator who is interested in building up or refining his or her research skills for the translation of legal terms, with a special focus on a translator working outside the institutional contexts analysed here. It also briefly tackles approaches, measures, or even attitudes that can help address some of the imbalances which (can) exist in the power relations between translators and the parties with which they interact.

In line with this practical consideration, another goal of this thesis is to help highlight as well as provide an impetus for the narrowing of a more or less pronounced gap in interdisciplinary research on issues of comparative law and translation, as highlighted by Künnecke, who remarks that comparative law publications have previously devoted

[4] The focus here is on analysing a few terms in more detail as opposed to briefly touching upon a huge number of terms.

limited space to legal translation issues, at least in English-language works (see Künnecke, 2013: 244).

1. Chapter 1: Theoretical overview

1.1. The functional approach and the *skopos*

The *skopos* theory, as developed for the first time by Hans J. Vermeer and Katharina Reiß in their seminal work *Grundlegung einer allgemeinen Translationstheorie* of 1984, is interested – as its name suggests - in the *skopos* (a Greek word meaning "purpose", but also "aim", "goal", or "intended function" (see Pym, 2014: 44)) of a translation, and therefore defines translation as an action (*Handeln).* As Vermeer writes: "Translation sei […] das professionelle übersetzerische (oder auch dolmetscherische) Handeln eines Translators […]" (1989: 40). Naturally, this theory is not the only one that grapples with the relationship between a "source" text and a "target" text, nor is it a very recent theory, but it has been and remains an important one. For one, this is because it is frequently considered (albeit not necessarily rightly so (see Pym, 2014: 49)) as a break from the equivalence paradigm, which works towards maintaining a sameness, an equal value between the source text and the target text. Furthermore, as Pym notes, "these theories have been used to modify training curricula" (2014: 57), and in addition, the theory "has a strong pedagogical purpose beneath a thin veil of descriptivism" (2014: 57). As a result, it has had a strong influence on translation training.

The targeted focus on the *skopos* leads to certain consequences, which have been neatly summarised by Prunč as the following (see Prunč, 2007: 143 – 146): the primacy of the purpose (*Zweck*); the "dethroning" of the source text; and the lack of need for functional equivalence between the source text and the target text.

1.1.1. The primacy of the purpose *(Zweck)*

The above definition results in the conclusion that "die Dominante aller Translation" is "deren Zweck" (Reiß and Vermeer 1984: 96), and also that "[d]er Zweck [heiligt] die Mittel" (Reiß and Vermeer 1984: 101). Since human action is "stets intentional", as Prunč writes, this power of the *skopos* makes the translated text (*Translat,* also designated "translatum" in English) "als Handlung und das Produkt dieser Handlung" into a "situations-spezifische[n] kommunikative[n] Handlungselement" (2001: 143).

This definition and its consequences as well as the subsequent adjustment and refinements of the theory by other academic are not immune to criticism[5]. Firstly, one could ask who determines what the purpose of the translation is. Even though Prunč locates this authority with the translator, author or with whomever is commissioning the translation (*Auftraggeber)* (1997: 176), he also cites Vermeer (1984: 54, in Prunč, 2007: 144): "[...] der Zweck ist als empfängerabhängig beschreibbar". In any case, to place the possible decision as to the purpose with the translator can be emancipatory and affords him or her both responsibility and creativity, which are important for accountability and a respected professional role in society. As Amman writes, "[t]raditionellerweise hat die Übersetzungswissenschaft versucht, das Individuelle auszuschalten, [...] durch den Versuch, 'Äquivalenz' herzustellen [...] Mit der modernen Theorie vom translatorischen Handeln und der Skopostheorie wurde diese Rigidität aufgebrochen" (1994: 43). Unlike the various modifications and adjustments found in approaches based on the assumed possibility of equivalence, which mainly focus on the various ways that this "stable" meaning can be carried across languages with the help of various linguistic strategies, and can result in translators being perceived as mere automatons or transcoding "machines", the functional thinking of the *skopos* theory can be seen as a welcome event. On its part, though, in looking beyond linguistic aspects, it adds additional layers to be considered, which can complicate matters: "[y]ou are engaged in applied sociology, marketing, the ethics of communication, and a gamut of theoretical considerations that are only loosely held under the term 'cultural studies'" (Pym, 2014: 49). The multiplicity of possible functions and social actors involved in the translation process can result in translators finding themselves in a highly challenging situation, confronted with unrealistic expectations, due to the fact that professional relations in practice can be frequently marked by asymmetries of power (a point which will be explained in more detail below). In such circumstances, it may become impossible for translators to fulfil the requirement posited by Vermeer, i.e. to inform those commissioning the translation when a *skopos*-adequate translation is impossible (and provide a statement such as: "'Your text may not be suited for the purpose you want the translation for, therefore it would be better not to translate it, as it is, but to write another text instead'" (Vermeer 1994: 100)).

[5] For a concise summary, see Pym, 2014: 55-58, where the critiques directed at the theoretical premises and possible inconsistencies or logical fallacies are summarised; here, the focus is on the ethical consequences arising out of the theory's conceptualisations.

As the *skopos* determines the strategy, equivalence may theoretically remain intact, but only where explicitly required (cases of functional constancy, *Funktionskonstanz)* (see Reiß and Vermeer, 1984: 139). Nevertheless, Vermeer adds:

> "Man muß nur wissen, was man tut, wozu man es tut und welches die Folgen eines solchen Tuns sind, welches z. B. die Wirkung eines derart erzeugten Textes in der Zielkultur ist, inwieweit eine solche Wirkung von der Wirkung des Ausgangstextes in der Ausgangskultur abweicht und ob diese Folgen mit der intendierten Wirkung übereinstimmen." (1990: 83).

Therefore, even in cases where functional constancy is to be attained, the translator retains an autonomous role when assessing the consequences of his or her action.

Here, it should also be noted that other theorists within the same functional line of thinking, e.g. Nord, have occasionally accorded more significance to the source text, by advocating a model source text analysis for the elaboration of translation strategies that is "applicable to all text types and text specimens, and which can be used in any translation task that may arise" (2005: 1). Nord may have considered the purpose and function of the source text and not just of the target text, but she nevertheless states that

> "[i]t is not the source text as such, or its effect on the ST receiver, or the function assigned to it by the author, that operates the translation process, as is postulated by equivalence-based translation theory, but the prospective function or skopos of the target text as determined by the initiator's needs. This point of view corresponds to Vermeer's Skopostheorie [...]." (2005: 10)

As Garre points out (1999: 72), based on the conflicting statements made by Nord, it is unclear whether the source text analysis or the target text analysis is decisive. The significance of this dichotomy, where either source text or target text is seen as dominant and all-powerful, will be discussed in more detail in the subsequent section of this Chapter, and reconciliation between the two radical positions will be sought. It should also be noted that Nord sees the *skopos* as being determined by the needs of either initiator or commissioner but accords the translator some powers, i.e. to "decide whether the translation which the initiator asks for can actually be produced on the basis of the given source text and, if so, how, i.e. by which procedures and techniques, this should best be done" (2005: 10). How this can occur in practice, given the statement above that the source text cannot operate the translation process (yet it can be analysed), is unclear. This view, coupled with that of Prunč outlined earlier, also serves to show the wide range of possible nuances that can be conceptualised as part of the *skopos* theory as developed by Reiß and Vermeer.

As noted earlier, Pym remarks that the *skopos* theory introduces ethics more prominently as a consideration (see Pym, 2014: 49). He refers to the difficulty of taking a number of factors into account when deciding what the *skopos* is, for instance when there are conflicting wishes as to the purpose of the translation (see Pym, 2014: 53). Vermeer's answer as to what should be conveyed is that the intended information should be

transmitted in an "optimal" manner, on which the translator decides himself or herself ("aus der Sicht des Translators") (1990: 68). Prunč locates the responsibility "ob Translation überhaupt stattfindet" primarily with translators (2007: 332), even though he recognises the possibility of asymmetric relations between the actors involved. He writes about the necessity to remain aware of the "vorhersehbaren langfristigen Auswirkungen des Translats auf die Ausgangs- und die Zielkultur im Allgemeinen" and to act in a responsible manner (2007: 332). He refers to Koskinen, who on her part cites Bauman, in the context of whether a translator needs to only be aware of the immediate parties with whom he or she interacts:

> "In his postmodern ethics, Zygmunt Bauman stresses that a moral actor cannot ignore long-term and distant effects, even if they are necessarily covered in uncertainty. […] In translation this would mean that the responsibility has to surpass the immediate participants, and the translator has to reflect on aspects outside the immediate textual reference." (Koskinen 2000: 109)

Here, unexpected and unpredictable effects that go beyond the textual elements or the immediate participants are considered important. While this position may be informed by postmodernism (see Koskinen, 2000: 23), which Koskinen perceives as an aspect that is also present in Pym's approach (see Koskinen, 2000: 9), Pym nevertheless critiques her approach for having little bearing on the practical considerations with which Pym and Venuti are concerned (see Pym, 2007: 39). Yet, his own preoccupation with the ethical consequences of the *skopos* theory leads him to summarise one of the "shortcomings" of that theory in a manner which also resonates with the above concern: "For some decisions, the theorists seem to say, we cannot really help translators, who must ultimately act in their own name in each specific situation. As in basic existentialism, this places huge responsibilities on the shoulders of translators, along with considerable liberties" (2014: 53). In cases where the translation of a text may be used for purposes that can have an effect reaching (indefinitely) into the future (e.g. to be subsequently presented in various legal contexts which could even influence the development of the law), the idea of considering future impact may become especially onerous. The ability of translators to act responsibly and make confident decisions in such an environment would then depend on the information and support that they receive from their partners, i.e. the other social actors that they interact with, as well as on clearly demarcated roles and responsibilities. These, on their part, would need to be established roles as opposed to roles which the translator would have to advocate, convince, or cajole the other parties to assume. When Prunč writes that translators need to make it explicitly known to their clients or commissioners about instances where they follow their own purpose (see Prunč, 2007: 339), this sounds like a logical consequence of the *skopos* theory. However, in a globalised world, and considering the lack of uniform qualification requirements (see Pym et al, 2013: 12), translators can be easily replaceable or perceived

as interchangeable, especially in cases where economic factors lead to an oversupply of translators/translation agencies in a specific country, where anyone can call himself or herself a "translator", or when it is both possible and cheap to commission a translation from a translator who is resident in another country. Quality, while still defined as important, can nevertheless take a backseat to other considerations, such as payment amount and terms, and this can be done to the exclusion of a detailed and targeted discussion of responsibilities and expertise expected.

When translators cannot participate in determining the *skopos* of a translation, a problem may arise, one already highlighted by Kohlmayer with respect to the *skopos* theory as applied to literary translation. He refers to the theory as "das richtige Rezept, wo Literatur als Konsumgut für stabile, homogene Kundenbedürfnisse funktioniert" (1988: 152). This criticism to *skopos* theory is reflected in this remark by Baker:

> "We soon configure something like *skopos* theory as a narrative in our minds: the theory evokes (for me at any rate) an industrialized, affluent society populated by clients and highly professional translators who belong to the same 'world' as their clients, who are focused on professionalism and making a good living, and who are highly trained, confident young men and women. These professional translators and interpreters go about their work in a conflict-free environment and live happily ever after." (see Baker and Chesetrman, 2008: 21 – 22)

These conflict-free environments are hardly imaginable in a globalised world. Even though Prunč acknowledges that the idea of a value-free (*wertfrei)* translation or one that is a mere reflection of the original is an illusion and has to be given up (see Prunč, 1997: 111-112), he nevertheless defends the *skopos* theory against criticisms pertaining to its ethical consequences. He takes note of arguments advanced by Kohlmayer that there have been instances where *skopos* theory has resulted in cooperation with totalitarian regimes. Prunč acknowledges those in a cursory manner, and offers as an argument that translators need only add the principle of loyalty to oneself (see Prunč, 1997: 112) to the loyalty principles with which Nord complements *skopos* theory (i.e. loyalty to the source-text author, to the commissioner/initiator, and to the target text receiver (see Nord, 2005: 32)), in order to resolve ethical issues. This may go beyond other solutions, e.g. that of Morini who refers to Nord's addition of the concept of "loyalty" as a way of finding a solution for the ethical problems, which then becomes "function plus loyalty" (see Morini, 2007: 88-90). Nevertheless, the solution proposed by Prunč may not come across as particularly helpful when one considers a certain field in detail (here, the legal field) from the perspective of Bourdieu's theory of society and capital. For instance, a hypothetical situation may arise where a translation carried out by a translator who is loyal to one's self is forwarded by the client/commissioner to a third party to use as that party deems fit, or is used for a different purpose that the one indicated to the translator, a situation that can be legitimised by an uneven distribution of social capital. This may indeed breach the translator's own expectation that the client/commissioner behaves in a

loyal manner, but if such a situation nevertheless occurs, it remains unclear what a translator can do to address it prospectively when he or she is active in a field marked by power asymmetries.

1.1.1.1. The sociological approach of Pierre Bourdieu

Here, the concepts found in Bourdieu's theory should be presented in more detail. Bourdieu writes of "un champ de forces agissant sur tous ceux qui y entrent, et de manière différentielle selon la position qu'ils y occupent […], en même temps qu'un champ de luttes de concurrence qui tendent à conserver ou à transformer ce champ de forces" (Bourdieu, 1991:4-5). While in this particular instance Bourdieu refers to the literary field, this definition applies to other fields, including the field of law (with the concept of a field being "an area of structured, socially patterned activity or 'practice', in this case disciplinarily and professionally defined" (Terdiman, 1987: 805)), as has been recognised by Bourdieu himself, for whom the law is a constitutive force in modern liberal societies (see Bourdieu, 1986: 4). The particular logic of the legal field (which is the aspect of particular interest here) is seen as determined by "les rapports de force spécifiques qui lui confèrent sa structure et qui orientent les luttes de concurrence ou, plus précisément, les conflits de compétence dont il est le lieu", and by "la logique interne des œuvres juridiques qui délimitent à chaque moment l'espace des possible et, par-là, l'univers des solutions proprement juridiques" (Bourdieu, 1986: 3-4).

Within one field, the actors have different resources which Bourdieu designates with the term "capital", but unlike Marx, he conceives of capital not only as economic capital, but also as social capital and cultural capital, with the former being defined as

> "[...] the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition – or in other words, to membership in a group – which provides each of its members with the backing of the collectivity-owned capital, a "credential" which entitles them to credit, in the various senses of the word." (Bourdieu, 1997: 51)

Cultural capital is characterised by three possible states: embodiment in a person (and as a result, it cannot be transferred), its possibility to be objectified via cultural goods (e.g. arts, books) as well as institutions (e.g. through qualifications) (Bourdieu, 1997: 47-51).

Since Bourdieu's field is conceived of as an *espace de jeu* (a "playing field"), it is thought of as rather dynamic, and in fact, this aspect of the theory, which considers the principles of transformation of the field, is seen by Bourdieu as its distinguishing feature, for instance in comparison with the systems theory of Luhmann (Bourdieu, 1986: 4). This dynamism, however, could also lead to a certain standstill in the behaviour of individual actors, when one takes into account Bourdieu's concept of *habitus* – "die von einem Individuum verinnerlichten Spielregeln eines Feldes" (Prunč, 2007: 312), "learned yet

deep structures of behaviour" (Terdiman, 1987: 807). When rejecting the criticism of Kohlmayer, it would have been auspicious for Prunč to address the possibility of internalised self-censorship. The legal playing field is marked by the unequal division of resources (see Bourdieu, 1986: 8), which on its part can influence work strategies as well as the professional action of translators. On the one hand, the rules of that field can exert an unconscious influence, especially when they are never addressed explicitly. On the other hand, a self-consciousness of translators with respect to their economic powerlessness when faced with clients or employers can lead them to unquestioningly follow the purpose provided by the client or employer, or even to attempt to adjust their own perceptions to fit the instructions they receive (the self-censorship scenario mentioned above). Both scenarios make the principle of loyalty to one's self, as suggested by Prunč, expendable. Following Vermeer, Prunč mentions the refusal to translate as a potential path to self-empowerment and regaining responsibility, e.g. one could refuse to translate due to "professionellen Gründen" when "die Produktionsbedingungen keine funktional adäquate Translation zulassen" (see Prunč, 2007: 334). The likelihood of translators adhering to this strategy in an economically precarious climate (to name just one consideration) aside, a scenario could also arise where the translator considers the production conditions adequate only because the internalised rules of the field at that particular point in time are such that these conditions are considered "normal" and "universal" (not only due to their widespread acceptance in practice but also as a result of the behaviour of actors towards translators which suggests that the translator's particular social or cultural capital is considered inferior or widely available for "purchase"). For instance, a translator being provided with only a limited time to translate a certain text may become the norm due to translators increasingly accepting such commissions, as a result of the perception that otherwise, their particular skills will be easily replaced by someone more willing or capable of working within tight deadlines. In that case, the translator can assume that requesting more time to carry out the translation would result in the client not only rejecting that request but also in the client commissioning future translations with another, more "obliging" or "efficient", translator. What is more, working across borders may compound the difficulties in asserting one's perspective in an effective manner in the legal field of another country, which is also marked by "des ressources juridiques accumulées par les générations successives, c'est-à-dire du corpus de textes canoniques et du mode de pensée, d'expression et d'action, dans lequel il se reproduit et qui le reproduit" (see Bourdieu, 1986: 5) as well as "les traditions nationales" (see Bourdieu, 1986: 6). Thus, having mastered the skills of legal translation and research may not be sufficient in being able to understand the rules in the legal field, which is a prerequisite for making decisions as to how to remain loyal to oneself.

It should also be noted here that assessing the adequacy of production conditions is a purely subjective matter (from both perspectives – that of the translators and of the client), and Prunč does consider responsibility and loyalty to oneself in a subjective manner. Nevertheless, in situations of power asymmetries, the more powerful actors can effectively become the ones determining what is considered reasonable or objectively adequate, in setting terms and controlling the economic resources, thus possibly taking away from the individual translator the chance to work towards a reconciliation of his or her subjective assessment with the conflicting view of the client. Prunč does not identify concrete measures as to how the individual responsibility placed on the translator could lead to emancipation in a manner spanning different fields but only notes that the other partners on the field should change their approach. Why they should do so when they are acting in a field where the conditions can frequently further their own economic position remains unclear.

An additional problem in the legal field (or any specialised field) can be the client's potential wish to solve translation problems by himself or herself or to make translation decisions, for instance because they (rightly or wrongly) consider themselves better versed in legal matters (the social division between lay people and professionals that is noted by Bourdieu can come into play here (see Bourdieu, 1986: 4)), more competent due to being "native" speakers and/or because they want the text to have a specific legal meaning/interpretation/effect. The roles of a specialist in both legal matters and translation may sometimes converge in the person of a single individual, as in the CJEU, where "[t]he lawyer-linguists at the Court of Justice deal with all the classic problems of translation (and legal translation in particular) such as ambiguity, translation of 'untranslatable' legal concepts, the effects of translated legal texts etc." (McAuliffe, 2011: 111). The combination of the two competences, however, is not very common in practice. It is conceivable that lawyers could request from translators that certain terms are translated in a specific manner. This can be legitimate as a client/commissioner may indeed be better equipped to decide on the meaning of a legal term, but an issue may ensue where the influence of one actor leads to a certain crucial part of the text being translated in a manner that directly benefits the client as a result of their explicit instructions. Moreover, a client/commissioner deciding that a term has to be translated in a certain manner, as a direct result of that client being part of a field which is the site of competition for control of legal interpretation, can effectively make the translator an extension of the client's own role in the field, and rob the translator of the capacity of being an autonomous actor, thus negating the importance of the social and cultural capital that the translator has amassed. As Kohlmayer notes: "[d]er Übersetzer wird zum 'Funktionär des Wünschenden'" (1988: 23). He interprets the maxim of Reiß and

Vermeer "Niemand kann zwei Herren zugleich dienen" as "[d]er Kunde ist König" (Kohlmayer, 1988: 152), "marktwirtschaftlich gesehen". Morini observes:

> "Se lo *skopos* è sempre sovraordinato all'equivalenza, le modalità di transcodifica da una lingua all'altra possono dipendere, in certi casi, da progetti ideologici (in senso lato) piuttosto che da principi traduttivi. Per esempio, che cosa succede se il testo d'arrivo è chiamato a svolgere una funzione propagandistica nella cultura di arrivo? Oppure: può il traduttore sentirsi giustificato a produrre sempre e comunque una versione "scorrevole" del testo di partenza (una versione cioè che risponda allo scopo di intrattenere senza fatica il lettore)?" [emphasis in original] (2007: 88-90)

This brings us back to the ethical considerations inherent in the *skopos* theory's conceptualisation of the translation situation, which, coupled with the implications of the possible asymmetrical relations in the legal field, can contribute to a continuously subservient and invisible position of translators as well as put translators in the ethically murky position of being responsible for the content of legal documents that can produce legal effects but not having the practical chance to claim the agency that their role should entail.

1.1.2. The "dethroning" of the source text

Since *skopos* theory is premised on the idea of cultural transfer and is primarily interested in the result, i.e. the translated text (*Translat)*, it is therefore mainly guided, as already mentioned, by its position in the target culture and status in the target context.[6] The recognition of the multidimensionality of the way a text is received, also central to literary reception theory, can be seen in Reiß and Vermeer's claim: "Jede Rezeption realisiert nur Teile aller möglichen Verstehens- und Interpretationsweisen und neutralisiert und konnotiert jeweils andere Merkmale" (Reiß and Vermeer, 1984: 62). In line with the remark by Vermeer referred to earlier, which can be seen as placing responsibility with the translator, he also writes that translations are "Interpretationen des Translators" (Vermeer, 2003: 256), which impacts the very concept of translation, since the translated text is then conceived as an interpretative work of an individual. Tymoczko levels at *skopos* theory the criticism that it is impossible to determine the dominant functions of a text or to establish a hierarchy of functions: "Such concerns suggest that on the level of skopos there are problems of indeterminacy, indeterminacies that can only be resolved by interpretation based on the perspective of the translator" (see 2014: 37).

[6] It should be noted, however, that as a result of the pronounced focus on the purpose of the translated text and the wishes of the client or commissioner, a situation may arise where no transfer occurs.

This interpretive function is not without problems for legal texts. For one, the interpretative scope may be severely limited. As Taylor notes:

> "The overriding consideration in the legal language of any idiom is that it be flawless and therefore not betray the fundamental rights of any person or group. The consequent scrupulous attention paid to making sure that legal text is hermetic and unambiguous is one of the main reasons for its at times seemingly impenetrable, syntactic complex nature, full of apparent redundancy. For translators this is both a blessing and a curse in that they cannot make mistakes, but the guidelines are rigid; there is little or no room for creative interpretation." (1998: 126)

Without this being acknowledged as an absolute truth, it is important to highlight the possibility that actors in the legal field may hold these views. Moreover, the persons deemed "translators" may not always have the professional competence and experience needed for this interpretation, possibly even where they can understand the concepts or have the research skills to look into them in more detail. Nikitin (see Nikitin, 2014, website: "3 reasons to ensure your arbitration doesn't get lost in translation") refers to an arbitration case, *Occidental Petroleum v. Ecuador* (ICSID Case No. ARB/06/11), where one of the members of the Tribunal, Professor Brigitte Stern, commented on the misleading translations from Spanish into English of judgments of the Supreme Court of Ecuador. According to her, had the translations been correct, this would have led to a different decision (Para. 78 of her dissenting opinion) ("the conclusions arrived at by the majority would have been impossible to sustain" (see *Occidental Petroleum Corporation* (2011)). In this type of scenario, the persons who carry out translation tasks may be referred as "translators", simply because they are perceived as such in the specific field in which they operate and are accepted as such by other actors (at the very least by their work product being submitted before a tribunal or court, for instance). Therefore, even where these persons do not possess certain certifications or qualifications as a means of proving competence, they may still be accorded the title of "translators" by other actors, which may have implications on the way other translators are perceived.

Another instance where the professional image of translators may end up being harmed is where translators are perceived as making interpretations, but the interpretative work is being performed by the client/commissioner instead, and as a result the translations are changed without this being explicitly made transparent to the other actors in the field. Where a translated text is criticised as inaccurate or poorly translated, the translator can easily become the scapegoat, especially where he or she is working in a field where more powerful (i.e. possessing more of the capital recognised within that field) actors are in competition amongst themselves. Since the *Translat* is understood as being "kohärent interpretierbar" with the target recipient situation (see Reiß and Vermeer 1984: 101, 113), the question also arises of what would happen if a translation is subsequently (and unbeknownst to the translator) used for other purposes, with the specific situation permitting those new purposes to be perceived as coherent, e.g. where a translation for

the internal informational needs of a law firm is later presented to an opposing party (outside of court) or even in court (depending on the procedural rules of the particular jurisdiction) with the purpose of amending the behaviour of the other actors or even having legal effect.

On the other hand, when the *Translat* is introduced in a new situation where it can no longer be interpreted as coherent, this should lead, according to the logic of the *skopos* theory, to the *Translat* not being considered a *Translat* any longer. Here, one could say that theory is divorced from practical considerations, as, in a real-life scenario, it seems unlikely that a translation previously considered by everyone as such is later regarded as something else simply due to the use to which it is put, unless there is an external authority which can and is willing to compare and contrast the original purpose provided by the client with each later use of the translation. Moreover, in the legal field, the capacity of translators to satisfactorily assess the situation in which they are translating can be severely limited, due to the monopoly which other, more powerful actors, can exercise over the information available to the translator. It stands to reason that a client/commissioner in the legal field may not be able or willing to share all the information about a specific text or legal case, for a number of reasons: the client may consider it unnecessary and therefore dispensable or distracting (and time-consuming) to the translator, or they may not want to share confidential information. In any case, unless the translator has a strategy of obtaining adequate information, the translator will very rarely know with absolute certainty the contextual significance of the purpose provided by a client/commissioner, in order to make an informed decision regarding the possible consequences of his or her own translation behaviour. This has an effect on the translator's behaviour both on the level of actual translation choices and on the level of interacting with the client/commissioner.

1.1.3. Lack of need for functional equivalence between the source text and the target text

As a third consequence from the definition by Reiß and Vermeer, Prunč lists the lack of need for any functional equivalence between the source text and target text. Instead, the production is derived from the *skopos* (see Siever, 2010: 153). Prunč speaks of the resulting "freien Definierbarkeit" of the *skopos,* which also opens the way for translators to the new, modern jobs "der Informationsgesellschaft" (2007: 152). This "freie Definierbarkeit", however, takes us back to the power-related dichotomy of client/commissioner and translator. When a legal text is being commissioned, it is possible, as already noted, for the client/commissioner to define the *skopos* in a particular manner, without leaving much room for the translator, for various reasons. The translator

is then only free in his and her actions in so far as he or she is willing to translate a text in compliance with the purpose provided and to the extent explicitly asked of him or her, and in so far as he or she is ready to bear the consequences associated with complying with the various conventions, i.e. the rules, of the particular field.

Here, without going into detail about the concepts of legal translation and legal translators, which will be addressed in the subsequent section, it is nevertheless important to mention the potential influence that the *skopos* provided by the client can have on legal translators. As Paolucci writes: "In particular, a translator (whether a linguist or a legal practitioner) with the arduous task of translating legal texts is always trying to find a term or concept in the target language that is equivalent or is as equivalent as possible" (2011: 91). While in a specific situation, the search for equivalence may be replaced with the pursuit of a different type of function that the target text is supposed to fulfil in the target culture/situation, there are still some implications to note in that respect. When a translator from a continental European country, where law is codified and often based on Roman law, has to translate from the language of that country into English (a language associated with common law), it is hardly imaginable that he or she would be willing to translate in pursuit of a *skopos* that simply requires adequacy (for instance, for a quickly produced summary of an article) and explicitly rejects equivalence (e.g. for time-saving reasons), unless the translator can be certain that the translation will not be used in a different context later.

This multiplicity of the possible roles and images of the translators and their capacity to translate complex texts for a functionally differing *skopos* can also lead the actors in the field to require ever more increasing expertise from translators, including the type of expertise that would be associated with more specialised qualifications, personal investment in terms of both time and money, and skills which should be remunerated accordingly.

In conclusion, the two main lines of criticisms of the *skopos* theory have been outlined above, which logically also apply to legal translation scenarios. Firstly, the purpose as defined by a client/commissioner can be followed opportunistically and leave little to no room for the agency or input of the translator. Secondly, the fact that a client/commissioner can freely define the *skopos* of a legal translation, coupled with a client's/commissioner's powerful position in the field, could lead to very high expectations from the work of translators, without any corresponding assistance (either from clients or from public bodies). Moreover, these expectations could increase with time by virtue of the less visible position of translators. Vidal Claramonte writes: "Translators and interpreters must clearly understand that legal discourse is […] an authorized discourse intended to be believed and obeyed because its speakers are invested with official authority and because the language they use represents that

authority" (2005: 266). In legal translation scenarios, translators can easily find themselves at a crossroads between their own sense of responsibility to the complications and mutability of the effects of a legal text and the ethics of their professional relationship with the client/commissioner. *Skopos* theory itself is not conflict-proof; in practice, the position of a translator in the legal field of today's globalised world can be even more complex.

1.2. Legal translation

This second section will explore the relevant theoretical approaches which specifically deal with legal translation, with the concept of "legal translation" itself being critically analysed in light of the various academic interpretations and views on the topic.

It should also be noted here that while this section and the next one will primarily focus on presenting the relevant translation theory (including comparative law approaches) as well as on reviewing them in a more critical manner, it will also inevitably contain references to the research subject, i.e. the translation of terminology in the judgments of the ECtHR and CJEU. This is necessary in order to illustrate the links between the more general theories and the particular approaches at the two courts; however, it will be done in a cursory manner, as the primary aim of the Chapter is to delineate perspectives, tease out issues, and offer suggestions. The practical application of the theories is the subject of the third Chapter, which includes specific examples from the judgments of the two courts.

1.2.1. On law and language

The connection between law and language is a close one, with the two frequently perceived as inextricably bound in numerous works. Pound, following Kantorowicz, refers to law (*Rechtswissenschaft*) as a "Wortwissenschaft" (1934: 525). "The law is a profession of words", writes Mellinkoff (1963: vi). "Das Recht lebt durch die Sprache", observes Arntz (2010: 17), and Kjær notes that "legal language is inextricably intertwined with the legal system" (2007: 508). Language is the law's "natural environment, in which all or almost all legal acts are accomplished" (Kozak, 2010: 106, in Łachacz and Mańko, 2013: 75).

In addition to being so universally acknowledged, the particular connection between law and language has led some to claim that this distinguishes law from other disciplines, as Kocbek remarks, since the law fundamentally relies on language (see Kocbek, 2016: 124). This reliance is also important in the context of the possibility of comparing legal

norms, since "knowledge of a foreign language is a prerequisite for most comparative law" (Grossfeld, 1985: 793). This may seem self-evident in a multilingual, globalised society, where the significance of foreign languages for certain legal areas is underlined by the marked necessity of transposing legal norms into other legal contexts. In supranational legal orders such as that of the European Union, however, with its normative requirement for all legislation to be available in all official languages, the knowledge of a foreign language is more than simply a logical consequence; rather, it becomes constitutive of the order itself. As Correia remarks, EU laws are inconceivable without translation (see Correia, 2003: 40). Moreover, as will be seen later, the translation of EU law exists in a very particular setting that does not necessarily preclude the need for comparative law but instead complicates matters by adding further layers.

Not only does language enable the existence of law but the language of law "authoritatively posits legal norms" (Cao, 2007: 14). This normative power makes the language of law a powerful tool, which can be used to direct, influence or modify people's behaviour (see Cao, 2007: 13). Maley observes:

> "In all societies, law is formulated, interpreted and enforced: there are codes, courts and constables (Goody 1986: 132). And the greater part of these different legal processes is realised primarily through language. Language is medium, process and product in the various arenas of the law where legal texts, spoken or written, are generated in the service of regulating social behaviour." (1994: 11)

This once more stresses the importance of the connection between law and language, as the former makes use of the various tools provided by the latter in order to steer, warn, punish, or otherwise direct human action, at the same time as being itself the product of legal discourse.

As a result of this close relationship, law is inevitably the function and product of the language in which it is drafted, including the way that this language has been shaped by its respective history as well as (legal) culture with which it is associated. As noted above, the expression of legal concepts would be unthinkable without linguistic tools. As a result, one can reach not only the perhaps obvious conclusion (above) that knowledge of the laws of a particular legal system is very much dependent on knowledge of the language in which the legal system expresses its norms, but also that the conventions of the particular linguistic usage of a certain country and the specifics of the legal sector in that country can influence both the form and substance of the law. This may initially also appear as a logical conclusion but it stands in tension with two particular philosophies or approaches, the first being the philosophy of natural law (according to which rules may only be conceived of as laws if they can be morally justified, i.e. they need to have a superior justification than the simple fact that they are created by a state (see McLaughlin, 1989: 445), hence language would have a limited significance for this theory), and the second being the approach to comparative law which aims to underscore similarities

rather than differences when looking at different legal systems (this will be addressed in a later subsection).

In making the above observations, then, it should also be noted (without offering a more detailed discussion on this topic) that what this thesis refers to when it speaks of law is premised on the English legal positivist approach (see the works of Jeremy Bentham and H.L.A. Hart), i.e. the validity of the law is dependent on its enactment by an accepted authority and not on its moral justification. The second aspect, i.e. the nuances of the comparative law approach, will be dealt with in more detail later.

1.2.2. What is legal translation?

Before discussing legal translation in more detail and moving on to the particular significance that the conclusions or lessons drawn from that discussion can have for the translation of legal terms found in the judgments of the two courts, the concept of "legal translation" itself as well as the conflicting views that have been advanced in that regard need to be explored and engaged with in a critical manner.

Notably, many definitions of legal translation start with a detailed definition of legal language or of a legal text. Bulcke and Héroguel summarise the types of approaches of classification into: one where the sender has to be the one occupying a legal function (e.g. in the approach of Gémar; Šarčević, discussed in more detail below, may also fall in that category); one where the context is dominant (e.g. in the approach of Mayoral; Cao and Harvey, as will be seen, also fit this category); and one where the discursive situation of the text is considered (i.e. sender, receiver, register, objective) (e.g. in the approach of Hurtado Albir and Borja Albi, but also Kocbek, as will be seen in a later subsection) (see Bulcke and Hérogue, 2011: 212).

One definition of legal translation is proposed by Šarčević, who considers legal language as one used strictly in "special-purpose communication between specialists, thus excluding communication between lawyers and non-lawyers" (1997: 9). Harvey observes that this would exclude texts such as contracts, judgments, correspondence with lawyers and legal authorities (see Harvey, 2002: 178), despite some of those expressly included by Šarčević in her categorisation (see Šarčević, 1997: 11). For instance, in the specific case of judgments, she includes them explicitly as hybrid texts (see Šarčević, 1997:11), but it is arguable whether her definition should not result in them being excluded from this type of categorisation, as judgments are not exclusively directed at specialists. In a later essay, she quotes Kelsen and Van Hoecke to refer to the distinction made in legal communication between direct and indirect receivers, the former being "lawyers who interpret and apply the law, especially judges", and the latter being "the

persons affected by a piece of legislation" (2012: 193). However, she states that legal translation is only "*primarily* communication between specialists" [emphasis added] (see Šarčević, 2012: 193). For instance, the judgments in preliminary reference procedures before the CJEU are by their nature specifically directed at national courts, but it is inarguable that they may be informative and useful to persons who are not legal specialists. As McAuliffe writes with respect to the judgments of the CJEU: "Even those texts which are addressed to Member States only can produce rights for individuals which must be guaranteed within their national legal orders and upheld by national courts" (2012: 201). It is also known that judgments as a general rule are not solely directed at specialists (see Harvey, 2002: 178), and they are often published online. Moreover, a criterion based on the sender would exclude norms without any identifiable senders, e.g. customary law (see de Carvalho, 2011: 26).

In any case, Harvey's statement that "one of the hallmarks of legal discourse is arguably that it is not restricted to specialists, but is (at least in theory) intended for the lay citizen" (2002: 178) maintains the more democratic nature of legal texts, not limiting this type of text to a select few recipients. This should not serve to erase the practical significance of legal texts quite often being drafted in language that is not understandable to persons who are not experienced in legal discourse (something which might have to do with the historical development of the respective legal system, as will be seen later). However, failing to take note of the fact that legal texts should be accessible not only to people who are specialists, ends up in turning a blind eye to the position of the translator who has to resolve the conflicting purposes – one of maintaining the convoluted and abstract language of a text and one of seeking comprehensibility due to a hypothetical broad conceptualisation of the potential addressees (not to mention the ethical conundrums where a client/commissioner prioritises one aspect over the other). Naturally, by widening the group of possible addressees, this also increases the practical significance of legal translation.

On his part, Harvey proposes a more inclusive definition of a legal text, adding "documents which are, or may become, part of the judicial process: for instance, contracts, wills, court documents, witness statements and expert reports, which are 'bread and butter' activities for lawyers and legal translators" (2002: 178). This definition looks to the practice of legal translators as being defined by their work on documents which are part of the judicial process, thus focussing on the work product's context and the proximity to the judicial process. Harvey's approach therefore proceeds from the context in which the document is used, but it is notable that he only mentions documents that are generally perceived as producing legal effects, either outside or inside the courtroom. Kocbek refers to a similar type of texts used in the legal process as one of the categories identified by Cao:

> "ordinary texts such as business or personal correspondence, witness statements and expert reports, etc., which are often not written in a legal language by legal professionals but enter the sphere of legal translation due to specific circumstances. These translations are meant to be used by parties in proceedings who do not speak the language used in court or by lawyers and/or court officials who need to access the original documents written in a language different from the one used in court." (Kocbek, 2014: 116)

Here, the context in which the "legal language" is situated determines its nature, in a way similar to the way Harvey approaches what falls under "legal texts". However, other, more general documents, are included (e.g. personal correspondence). Cao distinguishes three types of legal translation on the basis of the communicative purpose in the target culture: translation for normative purposes, translation for informative purposes, and translation for general legal and judicial purposes (i.e. the one quoted above) (see Cao, 2007: 10-12). As Cao remarks with respect to this last type: "This type of legal translation is often left out in the discussion and classification of legal translation" (2007: 12).

In Cao's view, therefore, the focus is on the function of a text in the target situation. Cao's distinction between these three types is informed by her understanding of "legal language" as "the language of and related to law and legal process. This includes language of the law, language about law, and language used in other legal communicative situations [...]" (2007: 9). In fact, Cao expressly states: "Legal texts refer to the texts produced or used for legal purposes in legal settings."

However, it is unclear why "legal purposes" as the function of a text or "legal setting" as the exclusive domain of a legal text, or rather, the defining criteria for what constitutes a "legal text", have not been precisely defined in Cao's approach. Such a definition would be decisive as to the type of text that would fall within the category or not; if a text has to be situated in a specific context from which it derives its "legal" nature, i.e. its very identity, rather than just a binding or authoritative status, this setting would require a more specific definition. In this approach, a text on a complex technical process presented in court will be considered a "legal text", which seems inappropriate. While it is true that many legal texts may include terms from other domains (Mattila lists commerce, technology, social work, land surveying as examples (see Mattila, 2012: 32)), these terms have a place in a wider context consisting of legal terms, or these terms have themselves acquired a legal meaning. This issue could have a significant importance to the translator, as it has a direct bearing on his or her skills, experience, what is expected of him/her (including regarding work quality), and as a result, status in society.

The categories proposed by Hurtado Albir and Borja Albi (see 1999: 154) – prescriptive texts (e.g. constitution, laws, decrees); judicial texts (e.g. summons, pronouncements, search warrants, judgements); case law (compilation of judgments); reference works (dictionaries, encyclopaedias, legal doctrine) (e.g. essays, legal studies, articles); texts applying the law (e.g. authentic or private documents, contracts, wills) – are considered

especially helpful since they take into account the "discursive situation of the text" (Bulcke and Héroguel, 2011: 212). Nevertheless, it should also be noted that certain documents may fit into one of the above categories but nevertheless possess additional characteristics pertinent to another translation area.

De Carvalho proposes for a discourse to be considered legal when it is the vehicle for creating the law (the normative aspect), but also where "it is the result of a law-building process that is recognized by the founding legal discourse", thus deriving its "legal signification" by means of the "constitutive discourse of the law" (2011: 28). Following all these considerations, in the present thesis, a "legal text" is considered to be one with a legal purpose, or a text with a legal purpose and in a legal setting. A "legal purpose" is conceived of as any desire to obtain a legal effect or to provide legal information, and "legal setting" as any interaction where at least one of the parties involved aims to obtain a "legal purpose" as previously defined (i.e. this includes legal textbooks, for instance, as it is unclear how those would fit into some of the categories above, and excludes documents presented in court that have general subject matters, such as some personal correspondence). As a result, (written) "legal translation" is conceived as the translation from a source language into a target language of a legal text (i.e. a text with a legal purpose, or a text with a legal purpose and in a legal setting).

1.2.3. Categories of legal text

In a next step, the categorisation of legal texts needs to be addressed, as this can have significance for both translation strategies and for the way the *skopos* theory interacts with legal translation considerations. Often, legal text categorisation is performed based on an analysis of the source text. Cao refers to a usual classification according to the source language text into: domestic statutes and international treaties; private legal documents; legal scholarly works; case law; and according to the status of the source language text into: enforceable law or non-enforceable law (see Cao, 2007: 8). Šarčević proposes a classification on the basis of the functions of the legal texts: primarily prescriptive (laws, regulations, contracts etc.), i.e. normative texts; hybrid texts which are primarily descriptive but have some prescriptive parts (e.g. judicial decisions, legal instruments, pleadings, briefs, appeals, etc.), and purely descriptive (legal opinions, textbooks, articles) (see Šarčević, 1997: 11-12). A criticism levelled by Cao at this type of classification is the continued exaggerated focus on the source text, and on her part, she proposes the classification of legal translation previously mentioned, which distinguishes between translation for normative purposes, translation for informative purposes, and translation for general legal and judicial purposes (see Cao, 2007: 10-12).

As has been noted, however, this distinction is also based on an insufficiently explained view of the criteria for what constitutes a legal setting or a legal purpose.

1.2.3.1. Judgments

The selection of judgments for the subject of analysis of the present thesis is partly due to their terminological density. Naturally, there are other types of legal texts that could be analysed, or, if one wants to avoid adopting a rigid definition of what constitutes a legal text (as suggested earlier), other types of text containing legal terminology. It is noted that these genres are numerous, and as a result, legal terms can be located in a variety of different types of texts, and often move between them. A summary of a few types of classifications of legal texts is presented here, from which it should become clear that judgments, i.e. the subject of the present thesis, are uncontestably thought of as "legal texts" (in all categorisations).

As has been seen above, judgments would fall under Šarčević's "hybrid" category of primarily descriptive but partly prescriptive texts. However, the structure of judgments in different legal systems may result in the descriptive or prescriptive parts having different lengths or importance, and it is unclear whether they would still fall under that category. Cao refers to a possible distinction between legislative texts, judicial texts, legal scholarly texts, and private legal texts (including texts written by lawyers and non-lawyers but used in litigation or other legal situations) (see Cao, 2007: 9-10). Judgments also fall within Cornu's category of "le discours juridictionnel" (see Cornu, 1990: 335) (with other categories being "le discours législatif", "le discours coutumier (les maximes et adages du droit)", and "l'expression corporelle dans le langage du droit"), a category which encompasses all texts that have as their goal the application of the law (and is thus broader than *judiciaire* (see Mac Aodha, 2014: 215)). Kocbek relies on the functional text typology of Busse of legal genres (see Kocbek, 2014: 117-118): those with normative power (constitution, statutes); those used to interpret texts with normative power (commentaries, legal opinions); those relevant to legal practice (*Textsorten der Rechtsprechung)* (judgments, sentences, judicial decisions); those used in proceedings for finding justice (indictments, pleadings, appeals); those used for asserting/claiming justice (claims, testaments); those for implementing legal provisions and exercising the law (complaints, charges, court and out-of-court settlements, arrest warrants); those of contractual nature (notarial contracts, commercial agreements, Articles of Association, General Terms of Trade); those used for certification, authentication and/or notarisation (notarial deeds, official documents); those pertaining to legal science and legal education (legal textbooks, dictionaries, academic papers). It is notable that this particular categorisation does not include any examples of non-legal texts used in the judicial proceedings.

Where judgments fit into these categorisations can have a bearing on the considerations to be taken into account when determining the *skopos,* as the categories contain implicit assumptions about the status of a judgment in relation to the status of other types of texts. Supranational judgments, such as those of the CJEU and ECtHR, will not always fit neatly into the above categories, as their normative power ensues from their belonging to a supranational legal order (but can be tempered by other considerations in practice). Therefore, a strict categorisation of judgments in general is avoided here, albeit with a preference for the typology of Busse, due to its prototypical character, and its representation of *culturemes* "with a specific extra-textual dimension and a prototypical textual macro- and microstructure" (Kocbek, 2014: 117).

1.2.4. The *cultureme* model

In light of the various theoretical perspectives outlined above and their critical review, Kocbek's proposal of viewing texts as *culturemes* is advanced here as a theoretical framework that can serve to combine the aspects of the functional approach of the *skopos* theory with an analysis of the characteristics of the source text. Based on this framework which builds upon Oksaar's model by applying it to a translation context (see Kocbek, 2014: 112), legal texts are to be viewed as *culturemes*, i.e. culturally bound patterns of communicative behaviour that consist both of extratextual aspects - here, the culture underlying the text, which in the case of a legal text consists of the legal system and the area of law, - and of textual aspects, since established cultural practices mould a text's macro- and microstructure, i.e. they have an impact on the lexical, syntactic, stylistic and pragmatic level. As a result of these multiple perspectives, Kocbek's model combines work from several disciplines - translation studies, terminology, text linguistics, pragmatics, and contrastive discourse analysis as well as comparative law, - and consequently also aims to take into account the differences between legal systems (see Kocbek, 2014: 111). For this reason, too, it is particularly suited to an interdisciplinary subject such as legal translation.

According to Cao, it is important to ascertain the legal status and communicative purpose of both the source text and the target text, as both can have an impact on the translation (see Cao, 2007: 10). In the *cultureme* model, legal texts are seen as highly conventional texts that are shaped by rigid norms and conventions in the source culture (which are passed on from generation to generation of legal experts), so that when the texts are translated, they need to be adapted to the *cultureme* of parallel texts in the target culture (Kocbek, 2014: 128). Kocbek expressly links the model with the *skopos* theory (see Kocbek, 2014: 111); however, this is done solely for the first step of the process, in which the type of translation to be carried out is decided following an analysis of the intended

function of the translation. In a second part of the process, the source text's *cultureme* is considered, beginning with a narrower analysis of terminology, and then moving on to all other textual and extra-textual dimensions, "i.e. the legal system and culture in which the text is embedded" (2014: 111). Since this approach combines aspects from various disciplines, it also means that knowledge of both comparative law and legal linguistics is needed (see Kocbek, 2014: 112).

The relevance of this model for the present thesis is two-fold. Firstly, it can be applied to the judgments of the two courts, by considering both the possible *skopoi* of the translated judgments but without foregoing source text analysis. The final step of the process in the *cultureme* model is described as follows: "Having compared the two *culturemes*, the translator will establish their overlapping (i.e. common features) and divergence on different text levels. Finally, by considering the intended function or prospective use of the target text, s/he will design its final version" (2014: 129). While the intended function of a translated text is indispensable in order to develop the most appropriate strategy possible and Kocbek does concede that there is a need to adapt textual conventions to fit the conventions of the target culture "**to the extent** required by the skopos" [emphasis added], the function does not need to be the sole guideline, and she explicitly envisages the production of a "target text in which features of the source and target *culturemes* are combined to best comply with the *skopos*" (2014: 111).

This is particularly important since, for the judgments of the ECtHR and the CJEU, the source texts are highly dependent on the national law of the respective states and contain specific terms bound by that state's legal system, which are then translated into a new context marked by supranational legal considerations. The model can therefore be used to consider not only the function of the source text or the purposes of the target text, thus balancing the exigencies of the *skopos,* i.e. this retains some of the advantages of the functional model, but focuses on the analyses of the cultures within which both texts are embedded. The importance of this will become clearer in the later discussion of comparative law approaches in academia. Moreover, it can be expanded to include broader viewpoints that allow an analysis of the field as conceived by Bourdieu. For instance, it can accommodate observations about authentication or certification of documents within the respective culture, including attitudes towards the practice, as well as discussions about the prestige and professional status – both of legal and language professionals. Secondly, the model can be applied to gauge the appropriateness of using those translated terms in the context of other translation scenarios, i.e. it has relevance for the consideration of choices made by legal translators working outside of the institutional setting of the two courts.

By weighing up the demands of both the target culture and context and the specifics of the source culture, the *cultureme* approach also takes into account and illustrates the

complexity of the task that a legal translator has to fulfil, the high level of skill and knowledge in different subject matters as well as the (desirability of) unique and tailored solutions. It also has a significance for the practical (and thus marked by ethical considerations) choices of the translator, by freeing the translations from an unrelenting subservience to the *skopos* and permitting the source text to "intrude" even where the *skopos* may otherwise be hostile to this. As has been seen, this is an important adjustment to the consideration of the *skopos*. Most importantly, the analysis of the source text may serve as a "defence" or justification for the translator when he or she is faced with wishes of the client that conflict with the translator's own professional assessment.

For these reasons, the present thesis conceives of legal translation in a second step as the translation of a source legal text into a target legal text, both of which are conceived of as a *culturemes*, in line with Kocbek's model, as well as texts with a legal purpose, or with a legal purpose and in a legal setting, as already noted above.

1.2.5. The legal translator

The definition of "legal translation" and what constitutes a "legal text" is also relevant to the determination of the role and responsibilities of a "legal translator". The translation of legal text can be accompanied by a number of challenges. The integral connection between law and language – as already referred to above – results in the need for attention to the way language is used in the legal text, which can make the work of the translator constitutive of the law itself. For instance, Ajani and Rossi refer to the work of translators in the context of multilingual EU law as one marked by actual shaping of the law: "Se si considera la lingua come ciò che appartiene alla sostanza della produzione legislativa comunitaria, allora l'opera dei traduttori va intesa come formante" (2006a: 134).

Nevertheless, here, too, views differ as to the level of expertise or specialisation that a legal translator possesses, or even the status that a legal translator should be accorded. Cao remarks:

> "It is important to bear in mind that legal translators are not lawyers. Likewise, bilingual lawyers are not automatically translators. The legal translator's job is not to provide legal advice and solve legal problems, but to translate and facilitate communication across linguistic, cultural and legal barriers through the medium of language. The legal translator's skills and tasks are very different from the lawyer's. The legal translator does not read and interpret the law the way a lawyer does. The legal translator does not write the law either. However, the legal translator needs to know how lawyers, including judges and lawmakers, think and write and why they write the way they do, and at the same time, to be sensitive to the intricacy, diversity and creativity of language, as well as its limits and power." (2007: 4)

However, it is arguable whether in practice the distinction between these tasks can be drawn as neatly as Cao attempts to do. Firstly, the contention that a legal translator reads and interprets the law in a manner different from that of the lawyer can only be valid if

these are two distinct individuals with different training: it would not necessarily be true for a lawyer-linguists of the CJEU who also has translation training, for instance. Moreover, in order to make the distinction between the various concepts inherent in a polysemic term, for instance, a translator will be attaching meaning to it (see Mattila, 2012: 30), and thus, willingly or not, interpreting the legal text. Since clients of different levels of sophistication or agencies which serve as intermediaries can be requesting the legal translation, they might not be able to provide conclusive instructions or address the implications of certain translation decisions. Therefore, in situations where a document to be translated contains terminology that is wrong (whether it be a typographical error or a conceptual mistake), the translator, by virtue of his or her experience and knowledge, might be expected to draw attention to this. Such a level of active involvement may impinge on tasks otherwise reserved to a lawyer. It may be true that any translator – legal or not – might be expected to point out an easily corrigible inaccuracy in the source text they are given to translate; however, if legal texts are indeed accorded special status due to the importance flowing out of their legal effects, then in the case of a mistake, the translator's involvement would be of crucial importance, and his or her understanding would need to go beyond the way legal professionals simply "think and write". Here, we can also refer again to the ethical dimension, by introducing a hypothetical situation where a client asks a translator to translate a term in a certain manner, with which the translator may not necessarily agree, but he or she might not be able to understand the legal consequences ensuing from the differences between the two terms in question. The previous discussion of Bourdieu's concept of power asymmetries is especially relevant here. The examples in this paragraph are not meant as an exhaustive exploration of the issues which may arise in practice, but rather to demonstrate that the job, status and expected role of the translator of legal texts can be as fluid as the context and power relations in which he or she may find himself or herself.

This strict division of competences is not drawn in the same manner by all. For instance, Garre observes:

> "When translators translate legal texts, in many ways they will move into the sphere of legal professionals in that they are working with legal texts, in legal systems and are trying to establish the meaning of legal texts in order to be able to translate them. It is a problem if legal translators and legal professionals have completely different methods of interpretation and ways of reading texts as translators often carry out a kind of first reading and interpretation for legal professionals. Legal professionals rely on translators and translations for accurate information and communication, but the problem is whether this fact is sufficiently taken into account in legal translation." (1999: 3-4)

Here, the responsible role of legal translators is recognised due to their (expected) active involvement as well as the need to understand the text they have to translate. This view also acknowledges the possible lack of recognition of this role which translators can assume.

Others see the task of legal translation to be reserved to legal professionals with sufficient theoretical knowledge as well as knowledge of comparative law, as "la traduzione giuridica in senso proprio costituisce un ramo della dottrina" (Sacco, 2000: 733). On the other hand, Cortelazzo remarks (with respect to the field of legal drafting) (see Cortelazzo, 2004: 59-60), with Megale considering this observation applicable to the practice of legal translation (see Megale, 2008: 35), that the linguist and the lawyer need to collaborate in a more dedicated and targeted manner, and this should be the first step before attempting to unify knowledge of both subject matters in one person.

Finally, it is worth noting that these approaches conceive of a "legal translator" as an acquired position, based on certain criteria, but without clarifying how a person becomes one and/or what practical qualifications one needs to have in order to be considered a legal translator, possibly because the pathway may differ greatly from one setting/country to another. A "legal translator" for the purposes of this thesis is therefore defined as any person translating legal texts, either for remuneration or "pro bono" (but not for the purposes of translation training or legal education, i.e. didactic purposes), regardless whether this is directly for clients or for translation agencies as intermediaries. As a result, these are not only individuals with academic or any other relevant training but also any individuals who are able to obtain work on the national or international service market due to their linguistic, legal or other domain-specific knowledge, i.e. persons recognised by other market participants as "translators of legal texts". This definition is motivated by both the state of the globalised translation market, with little to no barriers for individuals to enter (see Williams: 2013: 45) and a lack of internationally required standardised professional qualifications or certifications, and the relative paucity of educational institutions which offer in-depth training in legal translation.

1.2.6. Is legal translation special?

Harvey lists the numerous claims that have been made about legal translation (see Harvey, 2002: 177). It has been dubbed a "category in its own right" (by Weston, Gémar, Garzone; see Harvey, 2002: 177). Mac Aodha supports the view of the "unique character" of legal translation, on the basis of the lack of "common knowledge base" as put forward by Pélage (see Pélage, 2000:127) (such as would exist between other subject matters across borders, e.g. technology), Šarčević's argument (see Šarčević, 1997: 20) that for equally authentic versions, the legal effects of the target text have to be the same as those of the source text, and the multifaceted role of the legal translator, who drafts, carries out comparative law tasks, and produces texts (see, Mac Aodha, 2014: 207). Kjear (see Kjear, in Bajcic and Basaneze, 2016: 2) notes that a legal translator needs to take the

"situation, institution, text, genre, legal actors, and type of legal action performed" into account so that the same legal effects can be achieved when translating legal texts (see Kjear, in Bajcic and Basaneze, 2016: 2). Harvey also cites views according to which legal translation is "the ultimate linguistic challenge", and combines the inventiveness of literary translation with the terminological precision of technical translation (see Cairns and McKeon, Gémar, Pelage, all cited in Harvey, 2002).

There are also those who deny the special status of legal translation, e.g. Harvey, Mills, Mincke. For instance, one of the arguments Harvey puts forward in denying the special status of legal translation is that he considers it a tautology to define the special status as originating from the fact that legal texts have legal effects; this would also result in any other specialised texts having particular effects in their fields (see Harvey, 2002: 179). However, this in itself is also a circular argument: other specialised texts can also have a special status by virtue of other criteria, e.g. a text on astrophysics can have a special status and its translation may require particular skills and knowledge. It may indeed be said that the difficulties faced by legal translators are in line with those experienced by other translators (of other types of text). However, this in itself does not mean that legal translation lacks a special status; it could also mean that all other types of translation have a special status. Here, too, defining concepts is of significant importance. Special status does not need to be thought of as a status determining something to be extraordinary or particularly hard or above other types of translation; neither does it have to be associated with a cynical desire for higher remuneration (as Harvey does; see Harvey, 2002: 2). It can simply be an awareness of the highly specialised and particular skills required, especially due to the varied nature of the texts to be translated[7], and, perhaps most importantly, an effort to make clear the responsibility of legal translators and make their tasks and the challenges they face more visible. In turn, this can result in a more pronounced awareness on the part of other actors on the market regarding workflows, tools and aids that can be developed to ensure better cooperation and a better translation environment and translation product.

[7] It should be noted here that the theory does not differentiate between legal translators specialising in one particular type of legal text, or, more importantly, area of law. Lawyers, on the other hand, are rarely generalists; rather, they focus on one particular area of the law, and frequently work in a specific department.

1.2.7. Legal language

One of the arguments advanced as to why legal translation has a special status is the specificity of its language. In the initial paragraphs of this section, it was already noted that legal language is also seen as a defining component of legal texts. For instance, terminological precision is referred to as a hallmark of legal texts. This terminological precision, however, does not seem as clear-cut when we consider Megale's reference to law as one of the disciplines with "lingue speciale" but with less formalised terminology, closer to ordinary language (unlike, e.g. mathematics, chemistry or statistics, which have a highly standardised or formalised terminology) (see Megale, 2008: 73). It is also observed that terminological precision is by no means absolute, in that it does not carry across languages. As Sacco writes:

> "La parola esprime una nozione. Se un biologo, per parlare dei linfonodi, utilizza quattro lingue diverse, egli trova in tutte le lingue una parola che corrisponde con la precisione desiderata al concetto ch'egli ha bisogno di esprimere. Non avviene sempre così, nell'area del diritto. I concetti creati, elaborati e utilizzati dal legislatore o dai giuristi di un sistema dato non corrispondono necessariamente ai concetti elaborati nell'ambito di un altro sistema." (2000: 725)

This is one opinion which highlights the singularity of the individual legal language of a specific legal system.

Cao presents an overview of the differences of opinion about legal language (see Cao, 2007: 16). According to Caton (1963) as well as Schauer (1987) (see Cao, 2007: 16), legal language is closely related to ordinary language, for different reasons. While Caton (1963) considers the same speech acts as applicable to both technical and ordinary contexts of use, he also acknowledges that the two may differ in vocabulary. According to Schauer (1987), it is the context that makes language work differently in a legal setting as opposed to when it is used in an ordinary setting. Legal terms may thus have meanings which are different from those they bear in non-legal contexts of use, but these are parasitic on ordinary language.

Cao also summarises the opposing view, i.e. that legal language is distinct from ordinary language (see Cao, 2007: 16). One of those proponents is the legal philosopher H.L.A. Hart (1954, 1961/1994), according to whom legal language is "sui generis". This is because it takes as its premise an already existing legal system, from which it derives meaning, both in general and in the particular. Moreover, the distinctive status of the technical terms used in that language seeps into the meaning of the words which are used in connection with those terms. Jackson (1985), another legal philosopher as well as a legal semiotician, considers legal language from a semiotic perspective as a technical language, one which is autonomous from natural language. This can be seen from two perspectives, and highlighting two aspects: firstly, that legal institutions determine which

semiotic objects enter the legal lexicon (see Jackson, 1985: 46); and secondly, the existence of a whole universe of legal meanings, due to the autonomy of the semiotic relations within the system itself ("in ways different from those of the ordinary language" (Jackson, 1985: 47)). Importantly, Jackson notes that legal language may indeed resemble natural language and a layperson may consider himself or herself able to read it, thinking it intelligible, but nevertheless be oblivious to differences that open up the different meanings of words to the lawyer (see Jackson1985: 47). It is "lack of knowledge of the system, rather than lack of knowledge of individual lexical items, which produces this effect" (Jackson, 1985: 48). As a result, even ordinary words, when used in the context of the legal system, may make sense only within that legal system itself. This reinforcement of the legal language's singular and special status makes the role of the legal translator a particularly demanding one. It can result in a very rigorous and high threshold of who is considered knowledgeable enough to translate, and can lead to the conclusion that it may never be realistic for a legal translator, unless they are both a lawyer and a linguist, with special training in translation, to command enough authority to be able to act in this field. While the expectation may be justified, its practical significance needs to be addressed by means of public institutional measures or initiatives that can help adjust or reveal the power asymmetries in the respective field(s), and contribute to a better working environment as well as more realistic expectations and willingness to provide ample support and resources.

Cao herself sees legal language as a "variety of language use of the technical nature", which is not completely identical to ordinary language (2007: 18). In her view, legal language is characterised by a "complex and unique legal vocabulary, found in different legal languages" (2007: 20). Beyond that, it also possesses a complex syntax and a distinct style, with frequent use of conditions, qualifications and exceptions, and there are different pragmatic considerations to take into account, too.

This particular topic, i.e. the singularity and specificity of legal language, especially in relation to terminology, will be a discussed in more detail below, in the section on terminology (section 1.3).

1.2.8. The role of comparative law

It should not be surprising that comparative law is of significant importance for legal translation. Comparative law is defined as "the scholarly search for interrelations between different legal systems" (Brand, 2009: 19). As George Steiner famously wrote, "to understand is to translate" (1992: 29). In particular, he emphasises the importance of knowing and mastering the space and time coordinates to detect in the text the specific

features which differentiate it from those common to other space and time points, in much the same way some legal comparison approaches operate (1992: 27).

Law and legal language are system-bound and reflect the history, evolution and culture of that legal system, as de Groot writes: "the language of the law is very much a system-bound language, i.e. a language related to a specific legal system. Translators of legal terminology are obliged therefore to practice comparative law" (1998: 21). Justice Oliver Wendell Holmes writes (1881/1990, cited from Cao, 2007: 23): "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics". Šarčević stresses that each national or municipal law "constitutes an independent legal system with its own terminological apparatus and underlying conceptual structure, its own rules of classification, sources of law, methodological approaches and socio-economic principles" (1997:13). Therefore, the specific manifestation of legal thought in a particular legal system (or subsystem) needs to be taken into account if one is to translate successfully.

What is similar in legal translation and comparative law, as Künnecke notes, is precisely the element of understanding (of the source text or the law, respectively) and the system building and systematising (see Künnecke, 2013: 247). Crucially, when a comparatist searches for a corresponding legal concept in another legal system, they will divorce it from the purely linguistic designation and seek the concept that fulfils the same function (see Zweigert and Kötz, 1996: 33), something that has been referred to as the functional approach (with functionality as *Funktionalität)*, in much the same way the translator of a term can seek the concept rather than simply a term. It should be noted, however, that comparing the concepts with the help of comparative law can be only the first step in the translator's working process, and that the functional method can stop there, with the translator adopting a different strategy in the actual transposition of the source concept in the target context (e.g. by a neologism).

Here, it should be noted that the approaches towards comparing legal systems are by no means clear-cut, and the functional method is not without its critics. After World War II, the legal comparative studies developed in a manner where the similarities between systems were stressed and underlined (as Brand states, the functional method seeks those similarities, too, and presupposes "that different legal systems face essentially the same problems" (see Brand, 2009: 31)). Subsequently, however, "contemporary law's postmodernist tendencies" resulted in differences being stressed (see Megale, 2008: 20). Grosswald Curran has criticised the functionalist (i.e. similarities-seeking) approach in the following manner:

> "[...] a tautology which may lead to a refusal to probe beneath the surface for underlying, sometimes irreconcilable, differences among legal systems. Even purely functionalist

> objectives, such as harmonizing international laws, drafting effective treaties, and understanding the resolutions to legal issues in other countries, will be undermined by the failure to consider incompatible features of different legal systems. To deny difference is to deny recognition to the particulars that constitute identity itself; in that sense, it is to camouflage and erase identity." (2002: 8)

Curran focusses on difference as ensuing from the act of comparison itself, emerging from "cognition's dependence on comparison" (1998: 48). When comparing, difference always dominates: "By virtue of being 'other', the second [domain] will have only certain properties in common with the first, such that focusing on the second domain as a way of conceptualizing the first will result in suppressing certain properties of the first, as it will mean highlighting others" (1998: 48-49). This approach, influenced by deconstruction, queries the very possibility of finding common ground, and as a result, has a significant impact on the possibility of translation. Further, Brand criticises the functional method for being the reason why language has a limited role to play in "mainstream" comparative law, with "textism" being practiced despite statements to the contrary (see Brand, 2009: 31), and he provides numerous examples of the importance of language aspects in comparative law, such as the dominance of a single language (i.e. the global dominance of English), the prioritisation of a textual approach (as opposed to "law in action"), the importance of style as determined by the particular language and legal system, issues of equivalence in translation, untranslatables, non-translation scenarios, hidden implications, the neglect of etymology, the neglect of actors involved in the shaping of a legal system (see Brand, 2009).

According to Sacco, the dominance of the postmodernist approach has been halted in practice in the 21st century, as evidenced by the practical steps taken "all'unificazione del diritto a tutti i livelli" (2005: 438). Nevertheless, the postmodernist line of thinking does help question the foundations of the functional comparative method, and it can serve to show the deficiencies of that approach, including where translation is concerned. These considerations can also be starting points in addressing the practical challenges of a translator working in an environment which lacks a stable reference point, for instance by contribution to observations such as the one that programmes for legal translators and court interpreters also need to focus on the development of legal competence (Bajčić and Basaneže, 2016: 3). This can also extend to a more theoretical knowledge of the approaches available, including their implications.

This postmodernist position – of defining difference as a constitutive part of identity and underlining the impossibility of reconciling all aspects of legal systems – can also be associated with the discussion of the untranslatability of legal texts that will be a topic of discussion in the next few paragraphs.

1.2.9. The (non-)translatability of law

As with other topics surrounding legal translation, there are dissenting views as to whether legal texts are translatable in the first place. For instance, Didier (see Didier, 1991a: 245-248) and Mincke (see Mincke, 1991: 446-465) are of the view that legal language is inherently untranslatable, a view that can be seen as a staple in certain types of conceptual relativism (see Pierce, cited in Mac Aodha, 2014: 208). If translatability is seen as a pre-requisite for as well as enabling the commensurability of legal traditions in the field of comparative law (see Mac Aodha, 2014: 208), the idea of untranslatability is associated with the impossibility of conveying the meaning of the original in full, and an ensuing loss, as the translation would inevitably modify the original message. The proponents of translatability, on the other hand, focus on the idea of "universal deep surface formal structures", with all languages "based on the same model although not paralleled point for point" (Mac Aodha, 2014: 209-210).

There are also views that are not as radical as those, by the likes of Mounin, Soll, and Mel'čuk (see Didier 1991b: 21). According to such views, translation can never be absolute but it should suffice for the most important parts to be transmitted. Moreover, as Mac Aodha points out (see Mac Aodha, 2014: 211), the legislator themselves can make a decision regarding the possibility of legal translation: "The legal imperative in Canada, for example, to create Common Law en français (CLEF) and Droit Civil en anglais (DCA) means that legal translation is obligatory and therefore per force possible". This approach, however, is only demonstrative of a willingness to consider the possibility of legal translation as dependent on normative legislative will, and is not very useful for the discussion of translation strategies, as it simply states that translation is possible because an external authority has authorised it to be possible, i.e. a positivist view on translation.

According to Sandrini, where a source text that is embedded in a specific source culture is translated into a target culture that possesses a different legal system, the translatability of the text will depend on the extent of the relatedness of the legal systems (see Sandrini, 1999: 17). In this case, a translator will need to identify the legal families of the systems involved and establish the degree to which they are related, i.e. engage in a comparative law analysis. It is, however, hard to decide what the degree of relatedness is, how it affects the individual legal area under consideration, and more importantly, what strategies can be developed to establish that particular degree in each individual case. Mattila observes that the degree of difference between concepts from one legal system to another will depend on the "earlier interaction between the lawyers of the legal cultures in question" (2012: 28). Establishing the effects of such an interaction would necessitate

advanced comparative law skills, the analysis of the historical development of the respective legal system and legal areas, and ample resources.

As has been seen, translators need to be able to move between legal orders and cultures by taking into account the findings of comparative law regarding similarities and differences between legal families and systems (see Zweigert and Kötz, 1996), and by drawing on the perspective of legal linguistics, which deals with impacts of these features on the respective legal languages (see Cao, 2007, and Mattila, 2006). The challenges to translatability can occur at both the level of macrostructure and microstructure. As a result of the different historical developments of legal systems, normative legal texts, such as statutes or judgments, can differ in both their structure and terminology from one legal system to another (see Arntz, 2010: 17). These differences make an analysis of the microstructure and macrostructure of the legal text indispensable. One example of differences on the textual level between legal systems is the formal structure of a judgment, with judgments in Germany beginning with the actual ruling itself, and only then moving on to the facts and the consideration of the relevant law, whereas French judgments first summarise the facts and consider the applicable law, and only then provide the ruling (see Arntz, 2010: 17)[8]. Depending on what needs to be conveyed, whether a particular text or concept is seen as translatable into another language can be very much dependent on the *skopos* of the translation, i.e. its purpose and intended use in the target context.

1.2.10. The interdisciplinarity of legal translation

The connection between law and language, the posited special status of legal translation as well as the need to compare legal systems when translating makes the theory and practice of legal translation interdisciplinary in nature. When considering the translation of a legal text, it is rather difficult to know where thinking about the language of that text – on a syntactical, pragmatic, or terminological level – ends, and where thinking about the legal effect and contemporary significance as well as legal history begins. Rather, these aspects bleed into each other, mutually informing one another. As Arntz stresses, the legal systems of the respective source language and target language can differ greatly from one another in numerous aspects (see Arntz, 2010: 17). It is therefore impossible to even contemplate translating a legal text without comparing the legal concepts of the two

[8] It should be noted that the structure of Austrian judgments is similar to that of German ones, whereas the Swiss courts follow the model where the ruling is only provided at the end of the judgment. The latter is also the model adopted by the judgments of the ECtHR and CJEU.

systems. As Gémar writes: "Si le juriste ne peut éviter les questions sémantiques, le linguiste ne saurait éluder la composante juridique" (2010: 846). The literature contains ample references that a translator needs to compare the legal systems, and that a comparatist has no choice but to translate, like this remark by Kisch: "ein guter Übersetzer [ist] eigentlich ein von außen nach innen gekehrter Komparatist und ein guter Komparatist eigentlich ein von innen nach außen gekehrter Übersetzer" (cited from de Groot, 1999: 11).

Legal translation is therefore a practice that combines a number of competences:

> "The translation of legal texts of any sort, from statute laws to contracts to courtroom testimony, is a practice which stands at the crossroads of three areas of theoretical inquiry: legal theory, language theory (broadly defined, to include the interests not only of linguistics but of rhetorical and textual theory as well), and translation theory." (Joseph, John E., 1995: 14).

The inclusion of additional areas of inquiry demonstrates the complexity of the task, as it adds the prospect of more fields (in the sense of Bourdieu's sociological approach) in which a legal translator is active, and can thus be enmeshed in various different power relations and asymmetries. Joseph also notes that postmodernism has brought to the fore that these practices are ideological in nature, i.e. "guided by political positions and beliefs [...] rather than by a 'real' truth or justice or understanding, since even these terms indicate ideals which are not 'out there', but are themselves ideologically constructed" (1995: 14). The recognition of ideology by the postmodernist approach is valuable in its concurrence with Bourdieu's focus on power structures and rules that apply in a specific field.

1.2.11. The translation of legislation

A few words should be dedicated to one particular type of legal translation that also has significance for the present subject of analysis.

Legal translation considerations have a particular part to play in cases where normative legal texts, such as legislation, are drafted in multiple languages, with each version having a binding, authoritative status. This is the case in countries with more than one official language (e.g. Switzerland, Canada, Belgium) as well as for the EU's legislation. The challenge of translating these texts is that there is no clear division between source language and target language, as each version is considered binding. As Künnecke writes: "the master and servant relationship between source and target language does not provide the parallel texts with a convincing translation strategy" (2013: 246). In the case of EU legislation, nevertheless, the translation of such documents may be considered

slightly easier due to the fact that the target context/situation is not as culture-bound as in the case of national multilingual legislation:

> "The translation of such documents is nevertheless eased by the general orientation of the original document, i.e. by the fact that the sender envisages a general situation of communication, which is applicable in all countries of the Union, and the text is thus less culture-bound than in cases when the sender envisages a communicative context in a particular language and culture." (Bargan, 2011: 3)

Judgments, on their part, are directed at all the states of the European Union, but first and foremost, they are directed at the parties to the proceedings. (The same can be said for the European Convention of Human Rights and the judgments of the ECtHR.) What is more, unlike the case of legislation, not every language version of that judgment is authentic. This complex situation – of the legislation and a version of the judgment having a possibly varying degree of primary addressees - could make the task of the translator more challenging. In addition, when taking into account Kocbek's proposed *cultureme* model, not having a particular embedding in a certain culture can mean that there is no stable reference point with respect to a target culture. The different types of context also raise the critical question of whether translation choices (e.g. translated terms in the judgments and legislation) can apply to all other contexts of translation, and if not, to which ones. As we have seen, this consideration is especially important in light of the ethical challenges with which a translator is faced when active in a globalised market.

The complexity of translating in such settings where equally authentic legislation versions interact with other multilingual sources of law is compounded by the fact that the individual organisations/bodies within the same legal order interact with one other, but this is not always done in a consistent, reflected manner. Pozzo remarks that the use of terminology in the European Commission is characterised by the use of abstract terms which lack a definition (or a precise definition, at least) (see Pozzo, 2006: 19). The success of harmonisation and providing more uniformity in use "may depend, in part, on the ability of legal academics to create European taxonomies and on the glosses provided by the European Court of Justice" (Pozzo, 2006: 19). Such an observation links the importance of the use of language (and therefore, by logical extension, the use of language in translation) in one institution – the CJEU – to the general success of the European project.

Therefore, the translation of legislation with its particular challenges has significance for both the management of terminological strategies and the application of the functional approach when translating. It also has relevance for the purposes of the present thesis, despite the fact that the subject here are the judgments of the ECtHR and the CJEU, which follow their own rules about which language version is considered authentic, and these rules differ from those applicable to multilingual legislation, since they take into

account the particular structure and needs of the respective institution. It should also be noted that the strategies of using and translating terms in both EU legislation and the European Convention of Human Rights as the legal basis of the jurisdiction of ECtHR may differ from that of their respective courts, but that both can have an important impact on the analysis of the judgments. For instance, Gallo (2006: 192) provides the example of the term *fonctionnaire* in the EC Staff Regulations, translated by the other institutions into Italian as *funzionario* but the Court preferring to use *dipendente* ("employee") due to the association of *fonctionnaire* with a public employee in French, whereas *funzionario* is only associated with someone with powers of management or representation. Gallo terms these occasions "curious situations of 'parallel terminologies'" (2006: 192), and these can be a source of confusion for translators looking to find suggestions for translations in the judgments of the Court.

Another issue is that, despite a tendency to use neologisms (i.e. newly-coined words) (see Ajani and Rossi, 2006b: 89), EU legislation also uses terms that are already found in the national legal system of the Member States, but ascribes to them distinct EU meanings, thus contributing to the polysemy of that term, i.e. one term expressing a number of concepts (see Mattila, 2012: 30). This is an aspect that compounds the already existing tendency of legal language to make use of polysemic terms. These observations underscore the complex relationship between the different constituent parts of a supranational legal order, such as that of the EU.

For the purposes of this subsection, it should be sufficient to note that the translation workflow in the two courts is not immediately clear from simply looking at the judgments, and the process by which the authentic version comes into being merits its own discussion, especially due to the lack of clear designation of an "original" source text. This will be seen later (in Chapter 2), where the translation workflow of the courts will be discussed in more detail.

1.2.12. English as a legal language

Since the present thesis deals with the translation of German-language legal terms into English, the peculiarities of the two legal languages will be addressed here in more detail.

Many English legal terms are derivatives from Latin (e.g. "affidavit", "amicus curiaea", "stare decisis", "habeas corpus") as a result of the Norman influence on the British Isles (following the Norman Conquest) (see Kocbek, 2013: 29-30). On the other hand, the various words of French origin (e.g. "agreement", "arrest", "damage", "felony", "bailiff", "bar", "judge", "summons", "verdict", etc.) are the result of the domination of Law French over Latin, beginning towards the end of the 13th century (see Kocbek, 2013: 29).

The English legal language is also marked by imprecise and ambiguous expressions ("fair and reasonable; due process of law; justice; due diligence; reasonable endeavours" (see Cao, 2007: 19)). Kocbek refers to these as "word pairs" ("special case of synonymy or semi-synonymy documenting the specific evolution of legal English – they originate in ancient Anglo-Saxon formulae, consisting of two words with closely related meanings, often alliterative, used in specific legal rituals" (2014: 126); a doubling which in medieval English law often involved pairing an English word with its French equivalent (as with "acknowledge and confess")), and "word strings" ("list of near-synonyms", "a clear manifestation of the striving for all-inclusiveness, a prominent feature of Anglo-American legal *culturemes*, i.e. the need to cover every possible situation, every conceivable event, especially in documents of contractual nature" (2014: 126)). As Kocbek remarks, if the *skopos* requires that the ambiguity resulting from these has to be maintained in the target text, this may prove quite difficult where the target *cultureme* lacks this type of convention or structure (see Kocbek, 2014: 126).

The English legal language also has an abundance of metaphors. Kocbek notes the different type of metaphors, with some being more universal (i.e. existing across languages, albeit with potentially different meanings, e.g. *force majeure* and *höhere Gewalt*) and some existing in one legal system/culture only (e.g. "lifting the corporate veil") (see Kocbek, 2014: 126). A cursory search in the CJEU database for a case with German as the language of the case shows (*Schindler Holding Ltd and Others v European Commission* (*C-501/11 P)*) that "corporate veil" has been used in English in the opinion of the Advocate General Juliane Kokott (originally written in German), highlighting the potential of such metaphors to "infiltrate" other languages.

Frequently, legal English has been seen as a language that is used in a formal and ritualistic manner, even to the exclusion of all other participants: something harking back to Šarčević's definition of legal language as the exclusive communication between experts. Mellinkoff uses the term "argot" for the language/jargon used between legal professionals when communicating between one another (see Mellinkoff, 1963: 17). Danet (1985) has pointed to features of this type of special use being: common words with uncommon meanings, doublets, archaic words, unusual prepositions, the frequent use of *any*. Tiersma refers to over-precision that also characterises English as a legal language (Tiersma, 1999: 95).

English as a target language in particular is an interesting case, mostly due to its association with the common law of England and Wales (including in its spread to the countries of the Commonwealth) and the United States of America. In particular, the legal system of England and Wales developed in a very different historical manner from that of continental legal systems such as that of France or Germany, with only a limited influence from Roman law and a lack of systematisation or codification drive as it existed

on the continent (see Zweigert and Kötz, 1996: 177 - 201). This can have a significance for the translation of legal terminology, as will be seen later.

Since here the focus is on using the judgments as resources which can offer solutions that could be implemented in other translation scenarios, a translator is presumed to begin with an analysis of these available terms in order to assess their suitability. Finally, when deciding on the conclusive English translation, a translator would necessarily need to engage in a comparison with English legal terms as used in the United Kingdom, the United States or other common law systems. This would be especially relevant where the *skopos* requires a text that can be used in those states, and the translator will consequently have to take that requirement into consideration, while balancing the other textual and extratextual considerations.

One complicated situation mentioned by Kocbek is where the target language is one that is unrelated to the source and target legal systems (which, on their parts, are somewhat related, for instance by belonging to the same continental legal tradition) (see Kocbek, 2009: 53-54). Here, the reference is specifically to English being used as a language to translate a text that is used in a setting which usually has another working language (Kocbek 2009: 53-54)). This is an instructive example here, since English, being one of the official languages of both the ECtHR and the CJEU, is used to translate a text originating from a continental legal system, which differs to a significant extent from the English legal system, and into a target "legal system" that is supranational yet connected to the source legal system by virtue of its historical, political and legal relationship to it. The lack of a clear-cut, culture-bound target legal system means that English is used to convey concepts from a legal system that is foreign to the legal system typically associated with it, and into a cultural "void", or rather, a cultural "multiplicity", in much the same way as when it is used as a third language between related legal systems.

As a *lingua franca*, English can also be divorced from the legal system(s) with which it is associated. Legal translation has been seen as more difficult where the language used in drafting the legislation is as neutral as possible, foregoing any terminology associated with national legislation. With respect to the Principles of European Contract Law, an independent initiative led by academics, Ioriatti Ferrari notes that the neutrality of the language used (in that case, English) which is not connected to a specific legal system can result in considerable facilitation on the operative legal level, but that this also deprives the translator from an important reference point (see Ioriatti Ferrari, 2005: 1558-1559). The ensuing language is "una lingua 'orfana'" (Ioriatti Ferrari, 2005: 1558-1559), something that makes the translation task more difficult.

The results of the Brexit referendum of 2016 and the planned exit of the United Kingdom in March 2019 will not result in English being removed from being an official language

of the EU but it will throw up questions about the use of English-language terms, in particular about the relationship of these terms with the terms as used in the UK laws (in the past and in the future) and with the Court's past case law. This can add an additional level of complexity for a translator working into English.

1.2.13. German as a legal language

German as a legal language is characterised by highly abstract terminology which is explained by the historical development of German law (see Zweigert and Kötz, 1996: 130-141), and by high frequency of noun use (see Smith, 1995, cited in Cao, 2007: 21).

The different varieties of legal German (depending on the country in which they are used) merit a more detailed examination, not least because the countries under consideration here are Member States/High Contracting Parties to either or both the European Union and the Council of Europe (in the case of the ECtHR). When comparing the variations of legal German across selected European German-speaking countries (i.e. Germany, Austria, and Switzerland), Kocbek remarks that many terms of foreign origin (mostly Latin) are still used in Austria and Switzerland but not in Germany (any longer) (2013: 31). The initial influence of Latin on the German legal language can be traced back to the fall of the Roman Empire when many Latin terms entered the laws of the German tribes, to be then translated into German; the second wave came at the end of the Middle Ages, dubbed "the period of the Reception of Roman law" by Kocbek (see Kocbek, 2016: 138). However, during the Enlightenment, a period marked by the idea that law should be understandable and accessible to people, the Latin terms were replaced with German equivalents and were then systematically germanised (*Eindeutschung*), which resulted in the creation of "new pure German legal terms" (Kocbek, 2013: 30). As a result:

> "Nowadays, German terminology [*i.e. terminology as used in Germany: comment added*] is characterized by its lexical richness, the ease of creating terms in the form of sometimes extremely complex compound words, the often highly condensed meaning and the high level of abstractness of its terms and structures, which might be a source of problems in translation." (Kocbek, 2013: 31)

The *Bürgerliches Gesetzbuch* (BGB) – the German Civil Code - "verzichtet bewußt auf Allgemeinverständlichkeit" and adopts abstract conceptual knowledge that a layperson and a foreign lawyer would find largely "unverständlich", but trained legal experts cannot help but admire for "ihre Präzision und gedankliche Disziplin" (Zweigert and Kötz, 1996: 143). This is the result of the learning of the German Historical School of Law (*Historische Rechtsschule)* (headed by Savigny, and focussed on customary law and the historical development of the law) and the German Pandectist School (with its intense and exclusive focus on Roman law, and deference to accuracy, clarity, completeness and complex syntax (see de Cruz 1999: 88)). To provide a continental comparison point, the

Code Civil of France was specifically drafted to be comprehensible to a layperson, and stated "relatively broad principles" in a manageable number of articles (2,000 as opposed to the 17,000 articles of the 1794 Prussian *Landrecht)* (see Tiersma, 2012: 17).

The development of the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) as well as that of the Swiss *Zivilgesetzbuch* (ZGB) did not consist of a direct borrowing process from the German *BGB* (in fact, the *ABGB* was codified much earlier, in 1811, and the *BGB* only in 1900), but rather had a life of their own. Despite some exchanges of approaches – mostly the Pandectist Approach – between the countries, there remain some differences of language use. For instance, both Austrian law and Swiss law use many more terms of foreign origin than German law does (see Lohaus, 2000, for a more detailed comparison of German and Austrian terminology). Kocbek notes that these observations can be helpful as a way of allocating belonging to a text (to a specific legal system) (2013: 31). In order to be able to do so, however, a translator will need to locate the definitions of the relevant terms in the respective legal systems.

It should also briefly be noted here that between countries with the same language, there will inevitably be polysemy of terminology, but this particular topic will be the focus of discussion in the section on terminology as well as in analysis of the specific choice of terms in Chapters 2 and 3.

Traditionally, common law has been referred to as a law relying on precedent, one that can be quite difficult to understand, with a tangled web of case law and statutory provisions. On the other hand, continental law – to take German law as an example – is frequently thought of as codified law. However, as Zweigert and Kötz note, the division between the two is not as neat any longer, due to on the one hand, the proliferation of judicial glosses for the statutes in Germany, and the increased passing of statutes in England in the 20th century:

> "Aus alledem ergibt sich, daß die einst so gängige Unterscheidung zwischen dem Common Law als einem richterlichen Fallrecht und dem Civil Law als einem Gesetzesrecht heute viel von der Überzeugungskraft verloren hat [...] Daß die englischen Gerichte ihre beherrschende Stellung als Rechtsschöpfungsorgane heute namentlich in den modernen sozialrechtlichen Materien weithin an das Parlament und an die zum Erlaß von Verordnungen befugte Exekutive verloren haben, ist evident; umgekehrt wissen wir, daß die Rechtsprechung auf dem Kontinent sich oft nur noch in einem höchst formalen Sinne an den Wortlaut der alternden Kodifikationen anlehnt und daß der Gesetzgeber, wo er *neue* Vorschriften erläßt, gern durch bewußt weiträumig formulierte Regeln die Bürde der eigentlichen Rechtsschöpfung auf den Richter ablädt." [emphasis in original] (1996: 198).

To this, one can add the observation that the harmonisation drive inherent in EU law has had an effect on both common law and civil law jurisdictions in Europe:

> "Significantly, the emerging legal order of the European Union effectively amounts to a process of penetration and assimilation of the national legal orders of its member states. Indirectly at least, this phenomenon of 'communitarisation' of national law, along with the

> mixed membership of the European Union, diminishes the traditional divide between the legal families of civil law and common law." (Vranken, 1999: 17-18)

How this will progress following Brexit remains to be seen but it does not change the fact that, in the current state of affairs, when dealing with legal systems with different traditions but somewhat similar aspects, a legal translator will most almost always have to look at both legislation and case law in order to build up his or her understanding of the concept in question, as well as consult up-to-date literature on the matter. The following section on terminology undertakes to show how this hodgepodge of sources makes the finding of (accurate and stable) definitions and demarcating domains significantly harder.

1.3. Terminology

This section is dedicated to a discussion of the theories behind terminology work and of the practical role and importance of terms in legal texts in particular, with terms serving as both indicators of the source text genre and its possible context, and as "labels" for concepts, along with their cultural "baggage", which need to be conveyed in the target text.

It should we stressed that the focus in the subsequent two Chapters will not be on the way the two courts interpret the individual national statutes or case law in question, but on the manner in which the terminology from these national legal systems is presented (in translation) in the judgment of the respective court. However, the two may sometimes be inseparable, not least because these terms may frequently appear in both the parts on the facts of the case and the legal reasoning. One may also have to take into account the significance of a court's interpretation in considering the definition of a concept. It will shortly become clear why that is the case.

Two perspectives will be of primary importance. One is the viewpoint of a hypothetical legal translator using the judgments as a resource for terminology, and the other is that of the persons engaged in the translation workflow within the courts themselves. The aim of the thesis is to unite these two perspectives, in order to gauge the (conditions of) usefulness of the translated terms for external legal translators as well as to outline the advantages or pitfalls of adopting these translations, in view of their implications for the status of legal translators working in a globalised market. Prior to embarking on a more detailed exploration of particular terms from selected judgment, it is therefore necessary to present at least some of the nuances in the approaches to legal terminology.

1.3.1. Approaches to terminology and definitions of concepts

First, the troublesome task of clarifying what "term" and "concept" are needs to be tackled, and approaches to terminology work should be outlined.

Terminologielehre, or General Theory of Translation, developed in the course of the 20th century, with its origin in specialised fields, and gradually took on the role of an independent science (see Sandrini, 1996b: 3). Sandrini summarises what was new in this theory in the following manner: "Sie unterscheidet sich von der eher sprachwissenschaftlichen Betrachtung der Fachsprachenforschung dadurch, daß ihr Forschungsgegenstand nicht die Sprache als solche ist, sondern der Terminus [...]" (Sandrini, 1996b: 3). This theoretical approach was initially developed by the Austrian Wüster (Sandrini dubs him "der Begründer der allgemeinen Terminologielehre" (Sandrini, 1996b: 3)), an engineer "with a strong interest in information science" who was primarily focussed on technical languages and their standardisation (see Cabré Castellví, 2003: 165).

Despite the designation *General Theory of Terminology,* the theory itself is not uniform and clear, with different researchers adopting different stances towards Wüster's work and its continuation (for a review of the various strands, see Cabré Castellví, 2003). The very concept of "concept" is equivocal. Since the binary conceptualisation of *signifié* (signified, i.e. the concept) and *signifiant* (signifier, i.e. the sound-image) of de Saussure (see de Saussure, 1991/1916), the relationship between the concept and the linguistic sign has undergone numerous different conceptualisations. A semiotic triangle was "developed" and adopted by numerous academics (e.g. Gomperz, Dittrich, Ogden and Richards, and Wüster). The (initial) semiotic triangle of Wüster consists of an object (*Gegenstand)*, concept (*Wortinhalt)* and symbol (*Lautkörper)* (see Wüster: 1959/60: 188), later adapted for the purposes of the *General Theory of Terminology* (see Drewer and Schmitz, 2017: 3) into a triangle of *Gegenstand, Begriff,* and *Benennung*, respectively.

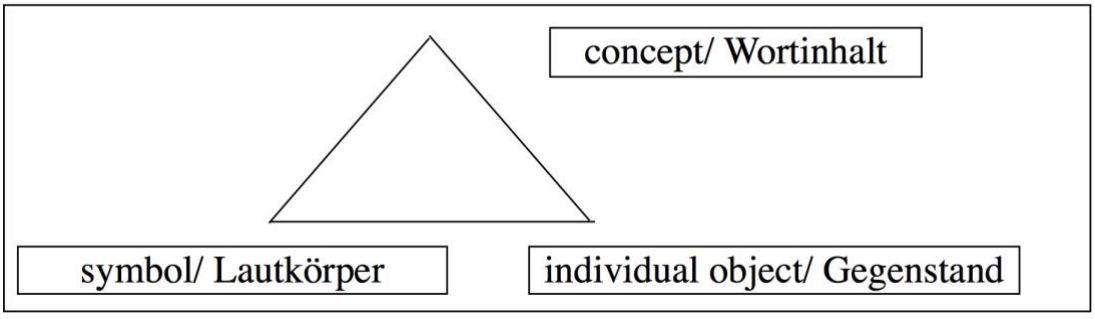

Figure 1: Wüster's three-part model (taken from Temmerman, 1997:52)

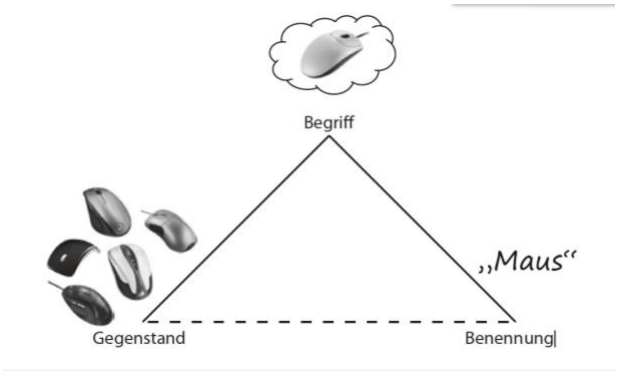

Figure 2: "Semiotisches Dreieck" (taken from Drewer and Schmitz, 2017: 3)

According to Cabré Castellví, Wüster's idea of "concepts" is of "clusters of internationally unified features which are expressed by means of equivalent signs of different linguistic and non-linguistic systems" (see Cabré Castellví, 2003: 167). Mattila notes that "concepts" are "abstract figures created by the human mind, that is entities formed by features which are peculiar to a matter or thing", whereas a "term" "designates the names of concepts, their external expressions", i.e. it is the "linguistic expression of a concept belonging to the notional system of a specialized language" (2012: 27). The latest ISO 1087 (see ISO 1087-1:2000) provides the following definitions: "concept" as "unit of knowledge created by a unique combination of characteristics" (i.e. *Begriff*), "term" as "verbal designation of a general concept in a specific subject field" (i.e. *Benennung*), "designation" as "representation of a concept by a sign which denotes it" (i.e. *Bezeichnung*), and "definition" as "representation of a concept by a descriptive statement which serves to differentiate it from related concepts"(i.e. *Definition*). While some see concepts as either units of thought or units of knowledge, Budin et al. (see Budin et al, 1993: 484) refer to both units of thought (*Denkeinheiten)* and of knowledge *(Wissenseinheiten)*, with the structuring of concepts (which are based on abstraction) into concept systems (see Simonnæs, 2007: 121). According to Simonnæs, there is good reason to see "concepts" not as units of thought "since thinking is a subjective matter and necessarily produces variable conclusions" but as units of

> "intersubjective knowledge (in a certain field/discipline) that is available at any given time. This definition allows a concept to be seen as dynamic, since concepts change based on new discoveries in their relevant fields more quickly than the corresponding means for expressing them." (2007: 120)

It should also be noted that the terms used for the various different elements of the theory are also by no means uniform. For instance, *Terminus* has been conceived of as "Einheit aus einem Begriff und seiner Benennung" (see Sandrini, 1996b: 3), whereas other models do not differentiate between"'Fachwort' (Terminus) und 'Benennung'. Insbesondere

kennt die englische Fachsprachenterminologie nur das 'Fachwort' = 'term'" (KÜDES, 2002: 14, fn 3)[9].

The reference to the "Einheit" of a concept and its term brings attention to another aspect of the theory where viewpoints differ. Cabré Castellví (see 2003: 186) writes of two different approaches to terminology: one semantic, with its object of knowledge being the concept, which "is independent and precedes its designation", and one linguistic, where the object of knowledge consists of the terminological units, "conceived as indivisible combinations of form and content" (2003: 186). The focus on the concept in the *General Theory of Terminology* should be seen in the context of that theory's (initial) hallmarks:

> "**a. regarding language**
>
> the priority of the concept;
>
> the precision of concepts (monosemy);
>
> the univocity of the term (absence of synonymy);
>
> the semiotic conception of designations;
>
> the exclusive interest in the lexicon, leaving aside all other linguistics levels; the synchronic treatment of terms;
>
> the priority of written registers;
>
> **b. regarding assumptions about its evolution**
>
> the conscious control of evolution (planning, unifying, standardising); the priority given to international forms of designations;
>
> the concern with the written language only;
>
> **c. regarding working methods**
>
> the exclusive use of the onomasiological approach (in contrast with the semasiological approach of lexicography) and hence a preference for systematic ordering." [emphases in original] (Cabré Castellví (2003: 166)

The working approach when it comes to terminology has frequently been divided into a punctual approach ("punktueller Ansatz", see KÜDES, 2002: 49), which focuses on processing individual terms, often as the result of a particular translation problem, and frequently undertaken under time pressure, and a systematic approach, dealing with an

[9] On their part, "[F]achwörter sind in einem allgemeineren Sinn spezialisierte Bezeichnungen, die eindeutig bestimmbare, konkrete oder abstrakte Gegenstände (Nockenwelle; Strafverfahren) bezeichnen" (see KÜDES, 2002: 14).

entire *Fachgebiet*. With respect to methodology, the basic distinction – hinted at above - is between an onomasiological and semasiological (or lexicological) method, with the former proceeding from the concept and the latter from the term itself (see Rondeau, 1984: 69). Sandrini notes the following:

> "So werden bei Arntz/Picht, Felber und Rondeau als erste Schritte jeder Terminologiearbeit die thematische Abgrenzung des Fachgebiets und die systematische begriffliche Erarbeitung genannt. Erst danach wird die begriffliche Äquivalenz auf Grund eines Vergleichs der Begriffssysteme festgestellt." (Sandrini, 1996b: 171)

The approach proceeding from the concept, as has been noted earlier, appears similar to the functional comparative law method. Sandrini nevertheless remarks that this approach is not without its difficulties when it comes to legal terminology but that the semasiological approach does not present an appropriate alternative:

> "Es sei hier festgehalten, daß in Fachgebieten, in denen die streng onomasiologische Vorgangsweise nicht ohne größere Schwierigkeiten einsetzbar ist - Recht zählt ohne Zweifel dazu - die Alternative keineswegs in einem semasiologischen Ansatz zu suchen ist." (Sandrini, 1996b: 172)

This thesis proceeds from the concepts of "concept", "term" and "designation" as conceived by Wüster (in the triangular representation), but does not adopt all the principles outlined above, in particular the necessity to always proceed from an onomasiological approach, and it does attempt to take some important criticisms/adjustments into account. In particular, it considers the sociocognitive aspect (as evident from the focus on Kocbek's approach), the communicative element (as necessary for the discussion of the practical and ethical dimensions of the *skopos* theory), and the conceptualisation of Cabré Castellví of terms as "units of knowledge, units of language and units of communication", thus necessarily covering "a cognitive component, a linguistic component and a socio-communicative component" (2003: 183). This latter aspect, in particular, is motivated by the orientation of this thesis towards the practice of translators.

1.3.2. Terms as memes

In the *cultureme* model that was previously advanced as a middle ground between more radical approaches prioritising either the source text or the target text, differences on the extra-textual level between systems were seen to result in "considerable divergences in the textual microstructure"; these relate to the syntactic, pragmatic, stylistic, and, naturally, terminological aspect (see Kocbek, 2014: 121). Kocbek approaches terms (simple terms, multiple elements terms as well as phraseology) in light of the sociocognitive approach in terminology not as "concepts" in their traditional definition (concepts that can be clearly delimited from others; for all aspects of differentiation, see

Temmerman 2000, xiv, 223-224) but as "*units of understanding* based on cognitive frames" [emphasis in original](Kocbek, 2014: 113). Crucially, this approach advances the studying of terms as a starting point:

> "Traditional Terminology theoretically stipulates that a specialist can describe the concept before giving any attention to the term. The concept is considered to exist in an abstract way, without acknowledging the role language plays in categorisation and communication. This position equals the one taken by specialists on standardisation committees. It reflects just one aspect of how special language vocabulary can be handled in communication. Artificially, the fact that terms already exist to communicate about the knowledge in the specialised domain under consideration is conveniently overlooked. With the aim of arriving at unambiguous communication the artificial model insists on first clearly delineating a concept and then naming it in order to obtain mononymy and monosemy.
>
> As terminology can only be studied in discourse it is better to accept that it is the **term** which is the starting point in terminological description rather than what was traditionally called the *concept*. What is named by the same term in different texts can be shown to have different referents. More often than not a category cannot be clearly delineated. It is like a *chunk of knowledge* which has a core and a structure but which exists in a process of continuing reformulation and is therefore in constant transition." (Temmerman, 2000: 224) [emphases in original]

This is important here since a translator faced with assessing the appropriateness of a term found in the judgments of the two courts, and having to navigate the complex network of national and supranational legal provisions, cannot always be expected to be able to systematise the terminology in advance.

Kocbek also perceives terms as memes (following Dawkins and Chesterman) (see Kocbek, 2014: 112). Memes serve the function of signposts or landmarks indicating the genre in question (and thus allow differentiation between terms which one can come across in different legal areas, e.g. "privity of contract"/"privity of possession"), "the tip of the iceberg" directing to relevant law, to then finally point to the legal system and wider legal culture (see Kocbek, 2014: 117). They can help a translator find his or her bearing in the cultural environment of the source text, and as a result, help him or her to better understand the surrounding implications. Here, conventions play a great role in having an effect on the genre in the source and target culture, with traditional texts especially steeped in pronounced and culturally-marked conventions (see also Prunč, 2005: 72-74). An example of memes would be "estoppel" in English, "Tort Law" and "Law of Obligations", or "cause" (see Kocbek, 2014:114), all of which point to a more or less pronounced difference between legal systems and could as such pose particular problems to a translator.

This thesis proceeds from the assumption that a translator working with the translated terms in the judgments of the two courts has do so on both a semasiological and onomasiological level, and as a result, the *cultureme* model is especially relevant. It allows for the practical situation where a translator searches for a term in the judgments as a means of finding an authoritative translation, with the terms being the first point of

analysis (especially in cases of polysemy) and the analysis of concepts following from there (to provide an example, a search result providing translations of the term *Gebühr* in a different manner for Austria and Germany), and it also considers the realities of searching large databases to obtain translation suggestions, including an analysis of their authoritative status. Due to its focus on the cultural setting, the model also permits the consideration as well as facilitates the transfer of translation strategies for national legal concepts, as found in judgments, to the translator's work in different settings with different *culturemes*. Moreover, as remarked in Drewer and Schmitz:

> "DIN 2342 (2011, S. 5) führt weiter aus, dass Begriffe nicht an bestimmte Sprachen, wohl aber an Kulturen oder Gesellschaften gebunden sind. Der kulturelle und gesellschaftliche Hintergrund der Menschen, die die Begriffe benutzen, und das Umfeld, in dem diese Menschen leben und in dem die Gegenstände vorhanden sind, beeinflussen die Ausprägung von Begriffen – und nicht etwa die Sprache, die in diesen kulturellen Gemeinschaften gesprochen wird." (2017: 4)

Finally, to limit the settings under consideration to only those which are expressly legal and to disregard the significance of terminology for the status and visibility of the legal translator's work and expertise in general (i.e. when working outside of a legal setting) would be to draw a hard line where, as Cao acknowledges, with respect to legal text, the prototypology of Snell-Hornby, with prototypes having a hard core and blurred edges, is "particularly constructive" (Snell-Hornby 1988: 27), a "spectrum that admits blends and overlapping, a question of quality and intensity, not one of fundamental difference" (Cao, 2007: 8).

1.3.3. Legal terms

As Sandrini notes, the legal term serves not only for communication, but also for the application of the law, the regulation of certain life situations, and legal certainty (see Sandrini, 1996b: 25). Megale considers special languages characterised by a denotative and monosemic "vocation" (see Megale, 2008: 75). Denotative refers to the objective *significato* as opposed to a connotative, i.e. non-objective, one (the example Megale provides is that of "Orient", with its objective *significato* being the direction, and the connotative *significato* - "luogo di una civiltà diversa" (2008: 75)). The monosemic aspect serves to show that not only does every *significante* have only one *significato* but also each *significato* is represented by only one *significante*, which is the result of the undesirability of ambiguity. However, as Megale acknowledges, this in itself is impossible in living languages; "soltanto nelle lingue artificiali ogni termine ha una definizione concettuale univoca e acontestuata all'interno di una tassonomia gerarchica stabile […]" (2008: 75).

With respect to legal terminology,

> "[...] il faut signaler que la terminologie juridique présente encore d'autres spécificités qui ne simplifient pas le travail du traducteur [...], notamment l'absence de délimitation claire avec la langue courante, l'importance de la polysémie, et un flou parfois voulu (c'est le cas dans les contextes diplomatiques)." (Dullion, 2015: 93)

According to Felber, "[t]erms should: be accurate, be concise, be easily spelt *(sic)* and pronounced, allow easily the formation of derivatives, be linguistically correct" (1984: 83). However, this task becomes impossible in practice. With respect to this, Sandrini remarks: "Die Benennung des Rechtsbegriffs besitzt ja allzuoft dieselbe Form wie das allgemeinsprachliche Wort, nichts weist auf eine spezifische Bedeutung hin. Zur Erkennung des dahinterliegenden Begriffes bedarf es juristischen Fachwissens" (1996b: 130).

Here, it is important to mention an observation Sandrini makes by drawing a line from *Begriff*, i.e. "concept" to the legal *Tatbestand* (the elements of the particular basis of a legal term): according to him, "[j]eder Rechtsbegriff muß auf Grund juristischer Kriterien definiert werden, semantisch-sprachliche Faktoren spielen, wenn überhaupt, eine untergeordnete Rolle" (1996b: 29), in much the same way that, in the semantic approach to terminology, the "concept" precedes its linguistic representation:

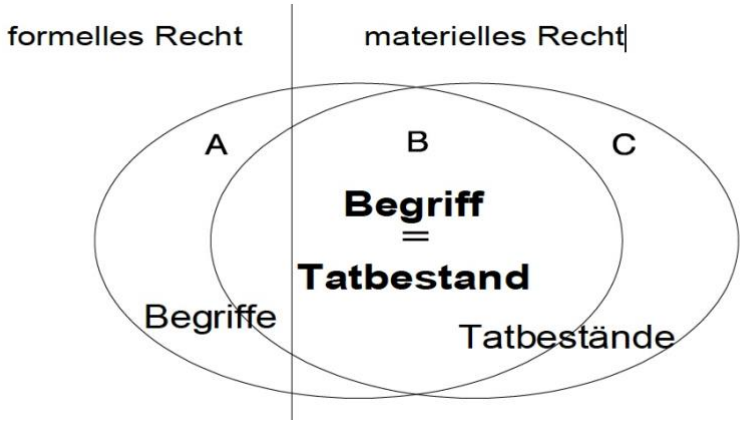

Figure 3: Venn diagram "Begriff/Tatbestand" (taken from Sandrini, 1996b: 29)

He cites Dubischar: "Begriff und Tatbestand gleichen sich darin, daß auch der Tatbestand nichts anderes ist als der gesetzgeberische Versuch, die Begriffe des Diebstahls oder des Mordes zu umschreiben, manchmal wortreich, manchmal nur mit einem einzigen, kennzeichnenden Wort" (Dubischar, cited in Krawietz 1976: 419). The line drawn in the above Venn diagram, separating material and formal law refers to, with respect to the former, the totality of all legal provisions of a legal system (independent from their implementation) (see *Deutsches Rechtslexikon G-N*, 2001: 2821), and, with respect to the latter, the implementation of material law (i.e. procedural law) (see *Deutsches Rechtslexikon A-F*, 2001: 1673). Terms from subject matters concerning material law

frequently correspond to a particular *Tatbestand*; nevertheless, such a term is not necessarily expressed by a single concept, "sondern kann auch durch mehrere Begriffe in Form eines Satzes, eines Absatzes bzw. Paragraphen beschrieben werden" (this is set C on the diagram) (Sandrini, 1996b: 30). When it comes to terms from formal sources of law (e.g. terms designating persons, documents, or organs), these concepts are not equal to a *Tatbestand*, hence their positioning in set A. As a result of these considerations, with respect to material law, Sandrini adapts the semiotic triangle in the following manner (replacing *Begriff*/concept with *Tatbestand*):

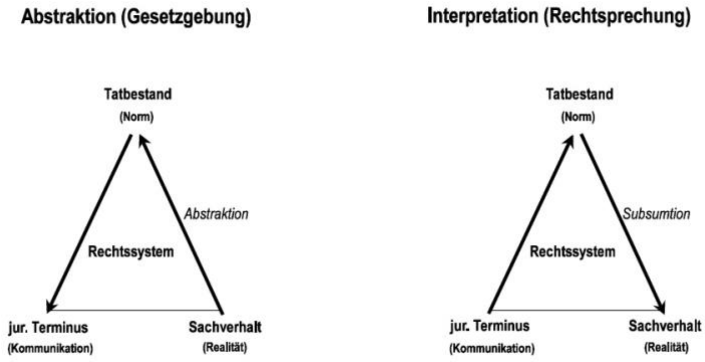

Figure 4: Der Begriff als Tatbestand (taken from Sandrini, 1996b: 31)

The two different triangles represent the different approaches of the legislature and the judiciary when dealing with concepts, with the legislature proceeding from potential scenarios that can arise, from which a generally applicable norm is derived via abstraction, and the concept can then be (hopefully) defined (see Sandrini, 1996b: 31-32). (Even where legal literature or case law is accorded the power of defining or determining legal concepts, Sandrini considers this from the teleological perspective: "Beide sind aber an die Aussage bzw. den Zweck des Gesetzgebers gebunden" (1996b: 31). Sandrini sees the role of the *Rechtssprechung* in mostly specifying "die Norm und damit auch die Rechtsbegriffe gemäß den aktuellen Erfordernissen [...]" (1996b: 31).) On the other hand, judges proceed by *Subsumption*, i.e. divide the *Tatbestand* into individual constituent concepts, which can then be applied to the *Sachverhalt* at hand (1996b: 31).

As to types of legal terms, Cornu differentiates between terms with respect to their meaning: there are those that are exclusively legal in nature, which are limited in number; and a second group consists of legal terms which have both a legal and general meaning ("double appartenance"), with terminologically-oriented work not being interested in the general meaning (see Cornu, 1990: 62). De Groot differentiates legal terms on the basis of context: there are terms used by the legislator; terms used in case law

(*Rechtsprechung);* terms used by practitioners; terms used in literature; and terms used in the media (see de Groot, 1999: 31). In a similar vein, Sandrini (see 1999b: 26), referring to Wank, differentiates between "Rechtssatz- oder Legalbegriffe", provided by the legislator, and "Rechtsinhaltsbegriffe"/"Dogmatikbegriffe"/"rechtswissenschaftliche Begriffe". It should already become clear from these few select classifications that the authors and the context in which legal terms can be used can vary greatly, and that this may have an impact on the authoritativeness of the term and the way it is dealt with by the actors involved (for instance, Sandrini suggests that terms in legal academic works which advocate for the legal language to be changed (i.e. prescriptive terms) be avoided in terminology work (see Sandrini, 1999b: 26)).

1.3.4. The problem with definitions

Sandrini refers to a definition as "Begriffsbeschreibung", which

> "soll den einzelnen Begriff durch Angabe seines Begriffsinhaltes bzw. Begriffsumfanges von anderen Begriffen abgrenzen und dadurch ein reibungsloses Verstehen des definierten Begriffes innerhalb der Kommunikation eines bestimmten Fachgebietes gewährleisten." (1996b: 49)

He also remarks that the concept of definition itself is not universally agreed upon. As we have seen, a definition as defined in ISO 1087 is a "representation of a concept by a descriptive statement which serves to differentiate it from related concepts". This conceives of a definition as an "Umfangsdefinition", which presents a concept by its sub-concepts, or an object by its parts, and helps delimit it in comparison with adjacent concepts (see KÜDES, 2002: 31). According to Sandrini, this is a wide conception, and he compares it a more narrow concept, as presented by Felber and Budin ("Eine Definition ist die Festlegung eines Begriffes durch Angabe der Merkmale des Begriffsinhalts, die auf ein Begriffssystem bezogen sind" (Felber and Budin, 1989: 96)). In KÜDES, this latter definition is deemed an "Inhaltsdefinition", providing the traits which characterise the concept (see KÜDES, 2002: 30). In his consideration of definitions, Sandrini proceeds from both the narrow and wider concept (see Sandrini, 1996b: 50), and the same approach is adopted for the present thesis, i.e. the definition serves the important purpose of delimiting the concept as well as locating its place in the particular concept system. In addition, Arntz writes that definitions help determine the equivalence of terms (see Arntz, 1987: 73), which is particularly important for translation purposes.

In the legal field, primary definitions can be located in statutes (*Legaldefinitionen)*, in case law *(Rechtssprechung),* and in legal literature (*Rechtswissenschaft)* (see Sandrini, 1996b: 90-92).

1.3.4.1. Legaldefinitionen

With respect to definitions found in statutes, Cao juxtaposes common law and civil law statutes (see Cao, 2007: 111). She remarks that common law statutes include both exhaustive and non-exhaustive definitions but lack general principle provisions; they contain "detailed enumeration and specific descriptions, with precise and deliberate choice of words"; and are considered necessary "because words in a particular statute are used with specifically assigned meanings in order to give certainty to the law and its implementation" (2007: 111). She adds that "[d]efinitions are also used to maintain consistency in the law, so that the same words throughout an act have the same consistent meaning" (2007: 111). Sandrini observes that the common law legislator feels it necessary (even feels "gezwungen") to provide as many statutory definitions as possible, "da die Gerichte zu einer allzu wörtlichen Auslegung neigen und damit den Regelungszweck verfälschen könnten" (1996b: 89). On the other hand, Cao notes that civil law statutes normally lack a definition section, but usually include general principle provisions (see Cao, 2007: 112). The reasons for these differences in the statutory provision of definitions can once again be explored via comparative law methods, in particular by looking at the different historical development of the two legal families. English statutes were enacted by Parliament in a more sporadic manner and were perceived as having less authority than common law:

> "Insbesondere wurde der Gedanke entwickelt, daß jedes Gesetz, soweit es vom ungeschriebenen Common Law abweicht, gleichsam Ausnahmecharakter habe, deshalb eng auszulegen und nur auf solche Sachverhalte anzuwenden sei, die durch seinen Wortlaut unzweifelhaft gedeckt werden." (Zweigert and Kötz, 1996: 260)

Teleological interpretation was hardly practiced (see Zweigert and Kötz, 1996: 260). This touches upon the difference in judicial interpretation of statutes, with civil law jurisdictions focussing on legislative intent (see Tetley, 2000: 704), and common law jurisdictions being more restrictive, with statutes construed "according to a host of rules developed by the courts such as the literal rule, the golden rule, the mischief rule, and other statutory rules of interpretation" (Cao, 2007: 113). The drafting of statutes in English law can be explained with these "restrictive techniques of construction" (Cao, 2007: 113), and is is thus contingent on its historical development.

Whereas synonymy may be eliminated within the same statute by the consistent use of the same term, an aspect to take into account when it comes to legislation is the possibility of polysemy (i.e. numerous meanings for the same term). For instance, the use of terms from European national legal systems in the legislation of the EU may cause confusion due to the existence of the term in different contexts, i.e. in the national legislation and in the EU legislation. Rossi remarks:

> "È innegabile che il diritto comunitario, quando impiega termini giuridici degli ordinamenti nazionali, tende a risemantizzarli [...] Non si può tuttavia generalizzare questo fenomeno, né imputare ad esso problemi che risiedono altrove. È possibile che stessi termini si riferiscano a concetti parzialmente differenti: è sufficiente che gli interpreti nazionali ne siano consapevoli. Questo presuppone che, nel caso di dubbi sull'identificazione dei termini espressi in più lingue, alcuni soggetti possano risolvere le controversie interpretative, decidendo in forza di principi interpretative certi, nazionali o comunitari. Il multilinguismo osservato da questa angolazione rimanda all'assetto istituzionale dell'Unione." (Rossi, 2008: 41)

This highlights the need for awareness of the fact that the European Union represents a separate, supranational order enjoying a different legal status; this is also true for the order created by the Council of Europe and the European Convention of Human Rights. As a result, definitions may be contained in multiple sources, and they can pertain to different legal areas. (An example is the definition of *Kreditinstitut* in EU law and Austrian law.)

In his discussion of the matter, de Groot also remarks that sometimes, even within the same legal system, a term may not always have the same meaning, for a number of reasons. One of those reasons is that the law is not worded in a careful manner, for instance different statutes use different types of definitions, e.g. the *Legaldefinition* referred to above, or an indirect definition (de Groot, 1999: 14-15). In this respect, Sandrini speaks of a "kaschierte Legaldefinition" (explicit definitions, on the other hand, are "reale Definitionen"), with the term "Rücktritt vom Versuch" (§ 16 StGB) provided as an example (see Sandrini, 1996b: 91). This type of definition will be especially relevant later when we consider some of the terms selected for analysis in the context of the judgments of ECtHR.

Moreover, one needs to be aware that the concepts from one national legal system can be complemented by those in the same language in other legal systems (resulting in a practical complexity which can be compounded by the fact that some terms may not be available in both systems, or that there may be different designations for similar (or comparable) institutions) (see de Groot, 1999: 15-16). Lawyers working in one legal system may also require an explanation as to what these concepts from the other legal system (designated by the same term) mean. In particular, this can happen in similar legal systems, since, as de Groot argues, there are no "undurchdringbaren Trennwände" between them, because the respective legislators would usually be aware of the meaning of the concept in the *Umgangssprache*; lawyers from both systems are likely to be interested and informed about laws and legal literature from the other system; and as a result, there would be a "gewisse Osmose der Rechtsterminologie" (albeit small differences would persist) (see de Groot, 1999: 17), with the terminologies of the respective countries influencing one another.

Nevertheless, it is important to remember that legal terms are not fixed in stone, defined once for and all, but undergo changes. In the case of legal systems that have common origins, e.g. continental systems historically based on Roman law, changes in the legal system could lead to terminological similarities but lack of correspondence between the substance, i.e. the definition of a term. Arntz refers to an example from Italian and German criminal law, both based on Roman law and influenced by 19th century French law, where an initial division of *Straftat/reato* (*infraction* in French) (as an umbrella concept) existed into *Verbrechen*/*crimine* (*crime* in French), *Vergehen/delitto* (*délit* in French), and *Übertretung*/*contravvenzione* (*contravention* in French) (see Arntz, 2010: 18). The direct comparability of the distinction was later made superfluous due to changes in the laws of Germany and Italy, resulting in no equivalence as to contents between the terms, in particular due to the change of criteria applied in the classification (see Arntz, 2010: 18).

De Groot also adds a category in between, consisting of terms which are implicitly provided with a meaning by the legislator, and are consistently used in a certain manner in statutes, but lack an explicit definition and their meaning cannot be deduced from the text of the law (see de Groot, (de Groot, 1999: 15). As a subcategory of those, one could include terms from other specialised fields which statutes use without defining, such as financial terms, which, however, have a particular meaning in their respective domains. We will observe this phenomenon in more detail in the later discussion of *Steuer, Gebühr,* and *Beitrag.*

1.3.4.2. Definitions by the *Rechtsprechung*

Sandrini considers the definitions provided by judges in continental systems limited in their effect, and he specifically refers to the Austrian *Allgemeines bürgerliches Gesetzbuch* § 12 ABGB ("Die in einzelnen Fällen ergangenen Verfügungen und die von Richterstühlen in besonderen Rechtsstreitigkeiten gefällten Urtheile haben nie die Kraft eines Gesetzes, sie können auf andere Fälle oder auf andere Personen nicht ausgedehnet werden") to claim that these definitions lack binding force, in which way he implicitly accords more importance to definitions of the legislator (see Sandrini, 1996b: 91). De Groot also considers this aspect in the context of searching for definitions since, sometimes, the meaning of the term will be developed by the legal literature (see de Groot, 1999: 15).

In this respect, Sandrini makes another important observation, by considering the widening of a concept by analogy, in both continental law and in common law (see Sandrini, 1996b: 73). Analogy is understood as "die sinngemäße Anwendung eines oder mehrerer Rechtssätze auf einen nichtgeregelten, aber rechtsähnlichen Sachverhalt, indem

für diesen ein neuer Rechtssatz mit ähnlichen Tatbestandsmerkmalen gebildet wird" (Sandrini, 1996b: 73). In continental law, such a *Begriffserweiterung* is considered to only apply to the specific case under consideration, whereas for common law, once it has occurred, it would have the power of a binding precedent: "Damit liegt ein weiterer Grund vor, warum Rechtsbegriffe nicht ein für allemal exakt genau definiert werden können bzw. warum die Definition eines Rechtsbegriffes relativiert und immer im Rahmen der Norm gesehen werden muß" (Sandrini, 1996b: 74).

1.3.4.3. Definitions by the *Rechtswissenschaft*

As to terms from legal literature, as has been seen above, Sandrini considers them as lacking in binding force (1996b: 91), and cites Wank: "erst durch Rezeption durch die Gerichte wird aus der zunächst nur festsetzenden oder regulierenden Definition eine feststellende Definition über das geltende Recht" (1985: 71). However, legal literature may provide a systematic overview of the subject matter, consolidating the way statute law has been interpreted in the case law, and as a result provide the translator with an overview of the stakes involved in the use of a certain term.

However, bearing in mind the earlier remark by Zweigert and Kötz that the sources of law in the continental legal tradition are not as radically different from those of the common law any longer, i.e. that the continental legislator often leaves gaps in the provisions, leaving it to the courts to "fill" those in, it appears that a legal translator may nevertheless need to look at both statute law and case law, and possibly clarify the current interpretative status with reference to the legal literature, in order to find or collate the most suitable definition. Context, i.e. the *skopos* of the translation (as conceived of in Kocbek's model), would be particularly relevant here. For instance, a translation of a judgment where the particular concepts from the legislation are discussed and clarified (i.e. where the very significance of the concept is central) would require a different translation strategy than the translation of a text where the target document is simply meant to summarise a legal update (where the concept could be assumed to have a certain, more or less stable, or at least generally accepted, meaning). Perhaps most importantly, a translator may need to be aware of the general extra-textual context in which his or her choices are made, in order to be able to understand the implications of the specific translation choice.

Moreover, the translation, as determined by the *skopos,* may be influenced by different already translated terms, e.g. translations found in both legislative texts and legal literature (which, on their part, are also guided by a consideration of their addressees). Schulze notes (2006, cited in Megale, 2008:98):

> "The expression *fair/unfair,* which is characterized by strong cultural features of the common law, is replaced by different words in the German legal language, which better correspond to the German legal tradition in the relevant areas (*billig/unbillig, lauter/unlauter, missbräuchlich*). This applies in particular to normative texts, whereas the legal literature contains more references to the original concepts." [emphases in Megale]

The observation that a concept needs to be taken only as it appears in context of the particular legislation (as seen in a statement by Sandrini above) therefore appears unrealistic. Albeit with other concerns in mind, Ajani argues that on the EU level, one needs to move beyond the reading of terms in their particular contexts, with a movement away from the teleological approach of the EU Court:

> "Al fine di contribuire al consolidamento di una culture giuridica comune, tale metodo deve favorire una lettura decontestualizzata dei testi normativi, alla ricerca delle nozioni costituenti che consentono un ragionamento giuridico coerente fra livello comunitario e livelli nazionali. Muovendo dal primo livello, l'analisi dovrà condurre alla comparazione con il sistema delle nozioni, proprie ai sistemi giuridici nazionali, tramite una estesa descrizione dei diversi usi dei termini giuridici che rappresentano i concetti." (2006: 128-131)

As to translation, in certain cases, it may suffice for the analysis of concepts from the source text to be conducted on the basis of the specific legal norm (possibly taking into account its judicial interpretation), but when it comes to finding an appropriate translation for the target text, a translator may have to conduct an analysis of additional norms, terms and concepts, including their relationship to one another, in particular when it comes to the choice of a target language term (in English, for instance, an analysis of the terms and concepts as they appear in English law and American law may be indispensable).

1.3.5. The issue of equivalence

One of the biggest issues in legal translation is the conundrum of equivalence. Equivalence can be broadly defined as the assumption that values across languages (on the level of form, function, or anything in between) can be the same (see Pym, 2014: 6). Numerous authors have pointed out that there is basic lack of equivalence between languages (see Gauton, 2008: 108), something that Zgusta terms the "anisomorphism of language" (i.e. lack of equivalence) (1971: 296). According to him, only a limited number of words with no polysemy have precisely the same meaning in both source and target language, and these are usually scientific terms (1971: 296).

On his part, Sandrini addresses equivalence as to terms, with a particular focus on legal terms, in the following manner (1996a: 1):

> "In our first assumption we define equivalence, in line with Wüster, as a relation between concepts having the same characteristics (intensional identity) [...] There is no equivalence on the level of terms. In systematic terminography, the characteristics, i.e. the intensions of concepts have to be analysed regardless of their linguistic representation. The linguistic form of the terms is only of secondary importance [...]. Conceptual equivalence is the basis on

> which a translator proceeds to reach his ultimate goal of textual equivalence [...]. The relations between concepts of different legal systems do not imply immediate interchangeability or intensional identity, but rather represent a sort of window onto another legal reality. Such an approach should enable the user to see what concepts and terms are employed by another legal system to control the same matter."

Not unlike Kocbek's approach, this view, focussing on a comparison of the concepts, uses terms as signposts to direct, but here the approach is in line with the more traditional methods of the *General Theory of Translation*, and has a functionalist flavour, as it tries to find how the other legal system "control[s] the same matter".

It should be noted, though, that the above approach is also informed by Sandrini's arguments that a legal translator should

> "abandon the concept of equivalence in favour of a more flexible comparative approach. The difference lies in the presupposition that legal concepts as part of a national system of laws are fundamentally different across legal systems and that only a comparative approach is possible; the establishing of equivalence relations is not." (1996a: 5)

This approach can be seen to be in the line of thinking, or trend, described by Megale and referred to earlier, of seeking to find differences between the legal systems as opposed to similarities. (Here, it should be noted that simply because an approach prioritises one over the other, this should not mean it is less comparative.) It results in a conclusion that equivalence, when it comes to legal terms, is impossible.

As we have already seen, legal language is system-bound, i.e. the terminology used in a particular legal system is specific to that legal system, even where it makes use of a language that is also used in other legal systems (de Groot, 1999: 12). Dealing with such issues is a very real concern in practice, as can be seen, for instance, in Austria's caution before joining the EU, resulting from the possibility that terms already used in the German language versions of the Directives and Regulations would have a different meaning in Austria's national legislation (de Groot, 1999: 14). The system-bound nature of legal language leads de Groot to argue that the common conception of translation as being from one language into another is inaccurate, and it should be regarded as being from one system-bound terminology into the legal terminology of the target language (i.e. "Zielrechtsordnung") (where that language is used in more than one state, this would be the terminology of the specific country in question) (see de Groot, 1999: 17-18). The target legal system is decided with reference to the intended recipient of that text ("intendierter Rezipient") (1999: 17-18); this actively includes the *skopos* of the translation as part of the considerations.

With respect to equivalence in legal translation, Šarčević presents specific diagrams to illustrate various degrees of equivalence (see Šarčević, 1997: 237-239). These degrees are: near equivalence; partial equivalence; and non-equivalence, with each including both intersection and inclusion. The easy classification of types of equivalence and the use of

degrees, with a more or less neat enumeration of essential and accidental characteristics, may create the illusion that conceptual analysis is not so hard after all, which Šarčević concedes is "false" (see Šarčević, 1997: 239). David and Brierley remark:

> "The absence of an exact correspondence between legal concepts and categories in different legal systems is one of the greatest difficulties encountered in comparative legal analysis. It is of course to be expected that one will meet rules with different content; but it may be disconcerting to discover that in some foreign law there is not even that system for classifying the rules with which we are familiar. But the reality must be faced that legal science has developed independently within each legal family, and that those categories and concepts which appear so elementary, so much a part of the natural order of things, to a jurist of one family may be wholly strange to another." (1985: 15)

De Groot argues that complete equivalence is possible only if the source and target language refer to the same legal system (e.g. as in the cases of Belgium, Finland, Switzerland, and Canada), which would be a rare occasion; where there is partial uniformisation of the relevant legal areas (*Rechtsgebiete*); or where one concept has been taken over in the past and remains unchanged (e.g. adopted law, such as in the cases of Indonesia and the Netherlands; Turkey and Switzerland; Japan and Germany; and Taiwan and Germany) (see de Groot, 1999: 20).

1.3.6. Is translation possible at all?

One cannot help but wonder whether the system-bound nature of legal language and the difficulties encountered in trying to establish equivalence between legal terms in different languages precludes the meaningfulness of any attempt to translate them. After analysing potential strategies for translating particular terms, Ajani concludes:

> "[…] la traduzione è (quasi sempre) possibile, se si abbandona l'illusione della corrispondenza letterale fra i termini e si sostiene con la comparazione il confronto fra i testi; analogamente a quanto si afferma in relazione all'interpretazione, non è agevole trovare quale sia la traduzione "vera"; l'opera di traduzione resta comunque praticabile anche perché, come rileva la filosofia del linguaggio (Eco, Penco), le diverse possibili traduzioni sono soggette comunque a restrizioni pragmatiche di sensatezza e credibilità." (2005: 26-27).

As a result, the possibility of legal translation is affirmed due to pragmatic considerations, in much the same way Mac Aodha does when he writes about translation being possible as it is mandated by the normative actions of the legislator (see above).

Accepting the translatability of terms is a pre-condition for the transfer of a concept from one language into another. In the same vein as Kisch's example of *Ehe* (below), Sacco writes that terms which do not have the same contents (i.e. have no equivalence as to contents) can be nevertheless translated (e.g. "contract" – "contratto" – "contrat", where these terms clearly refer to a document that is governed by the specific provisions of contract law within the legal system where they are "resident") (see Sacco, 2000: 727-728). He writes that the these terms should be thought of in a more abstract or theoretical

manner, as "una nozione metapositiva", a conceptual genotype from which the empirical manifestations ensue, which can then be studied for each country, including by the comparatist (see Sacco, 2000: 727-728). The interpretation here is once more based not on the two terms in the two languages but rather on the contents or concepts designated by these words. However, the transferability can also be precluded – or rather, hampered – by an insufficient knowledge of the target context. Where that context is not known and cannot become known, the translator is essentially faced with an impossible task: to translate into a void, without knowing what is relevant (e.g. whether the theoretical or empirical elements are of significant importance), and, more importantly for the ethical considerations outlined in the first section, what could become relevant in a different context.

1.3.7. What about functional equivalence?

Functional equivalence is an offshoot of the idea of equivalence, and has links to both the pragmatic considerations when deciding on the possibility of translation and to the functional method in comparative law. Weston defines functional equivalence in the following manner: "using a term or expression in the target language (TL) which embodies the nearest situationally equivalent concept" (1988: 683).

Functional equivalence is best illustrated with the example provided by Kisch (see Kisch, 1973: 407) of *Ehe*, later taken up by Mincke (see Mincke, 1991: 458) (and similar in premise to the observation of Sacco about "contract" presented above but with an increased focus on the equivalence). The question here is whether the terms *Ehe*, *marriage, mariage* are equivalent, as the conditions for entry into this institution and its legal consequences may differ significantly from country to country. According to Kisch, if the possibility of translation were to be denied, this would result in exaggerated perfectionism, and the term can and should be translated into other languages since the terms are equivalent "quant à la substance", despite their different embedding (1973: 407). However, de Groot brings up an example of what he considers a potentially different context that could result in non-translatability: when marriage for same-sex couples was introduced in the Netherlands, a Dutch colleague of de Groot had pronounced his intentions to divorce his wife in the Netherlands, in order to get remarried to her in Germany (by virtue of the institution of marriage in Germany not permitting same-sex couples to get married at the time; thus, this particular person considered the differences so stark so as to result in entirely different concepts) (see de Groot, 1999: 22). This example also shows the political nature of the use of terms, an aspect that has great significance for the position of the translator in the market.

With respect to functional equivalence, Orücü refers to two distinct types of functionalism when seeking equivalence, with one being a functional-institutional approach (seeking the institution in the other legal system that performs the equivalent function in the first legal system), and the other the problem-solving approach (seeking the way a specific social problem is dealt with in both systems) (see Orücü, 2006: 443-445). Both methods seek comparable concepts that fulfil the same functions in two legal systems, but these systems need to be at least a little similar, according to Orücü. Šarčević (1997: 235-236) offers the examples of "hypothèque" and "mortgage" as such functional equivalents.

However, functional equivalence is not considered the be-all and end-all by everyone. According to Šarčević,

> "[t]he difference between these two systems [i.e. the two systems being compared; comment added] are sometimes so great that a functional equivalent may be similar to the source concept only as far as its general function or usage is concerned, whereas the legal concept it denotes in the restricted sense is different." (1990: 156)

De Groot considers the context and purpose (see de Groot, 1999: 22) of the translation of great importance, which determines whether certain differences between the source text term and the potential target text term are of such relevance that the target text term cannot be used (a negative correlation) (see his example of same-sex marriage above). In the same way he reasons about equivalence in general, here, too, he considers a "systematisch-strukturelle Einbettung" as necessary for functional equivalence to exist (1999: 24). Such relativity leads to the decision always being ad hoc (see de Groot, 1999: 23). As a result, the *skopos*, in considering the target context, has practical consequences for the equivalence decision.

1.3.8. What is lost

The notion of "calcolo delle perdite" of Gambaro (see Gambaro, 2004) (also present in the work of Eco) is introduced with respect to what the translator working in the context of the *skopos* theory has to take into account: "Quando il livello di astrazione è assai elevato, e le parole utilizzate sono pregne di rimandi culturali, occorre procedere al calcolo delle perdite. I contesti discorsivi sono dunque decisive ai fini di una traduzione" (Gambaro, 2004: 291). From this observation, it should become immediately clear how this "calculation" can be incorporated into an approach based on the *skopos* theory. Megale (2008: 92-93) provides an overview of the academic discussion in this respect, by referring to de Groot (2000: 139-140) and his observation that this type of calculation is a pragmatic operation, since the level of "acceptability" and "non-acceptability" will

vary according to the context and the *skopos* (and will thus change from case to case). Megale observes:

> "Da tutte le considerazioni sopra riportate appare che la "mobilità" del confine fra perdita 'accettabile' e 'inaccettabile', sulla base della *situazione pragmatica* (contesto e scopo della traduzione) di volta in volta esistente, è una conclusione pacifica e condivisa degli studi sulla traduzione giuridica sia sul versante dei giuristi che su quello dei linguisti." [emphasis in original] (2008: 93)

A translator therefore has to find a degree of loss that is acceptable for the particular addressees of the translation. The observation that the calculation can only be done on a case-by-case basis is extremely important, because it effectively makes any scenario where a translation is subsequently used for any other purpose open to the "accusation" that its degree of "loss" is inappropriate. If one considers an observation such as that of Schroth (1986: 48), "[...] most of the time, a good translator can arrange to make what is lost the part that doesn't matter to the particular audience", this can effectively result in the translator being considered the opposite of a "good translator". As a result, the concept of "loss", while being very flexible and allowing the translator agency and freedom, can in practice leave the reputation of that translator vulnerable, unless he or she takes precautions or adopts certain strategies to prevent this.

1.3.9. Term translation strategies

This subsection will outline various different strategies that have been proposed for the translation of terms, in order to showcase the variety of options available to the legal translator.

1.3.9.1. Literal translation

A literal translation can be conceivable, when, as Ajani notes, "sia la corrispondenza semantica sia quella concettuale sono sicure […]" (2005: 26). The examples provided are *assegno, cheque,* and *check* (see Ajani, 2005: 26). Literal translation is likely be limited to very few cases for a legal translator.

1.3.9.2. Functional translation

Ajani also observes:

> "Analogamente, si svolgerà a livello letterale quando, pur essendovi diversità semantiche di rilievo, si abbia la consapevolezza che esse non invalidano la precisione del discorso. Così, è evidente che *Prime Minister* e Primo ministro sono termini che indicano posizioni giuridiche non omologhe, ma proprio la diffusa consapevolezza di ciò consente di utilizzare il termine Primo ministro anche per far riferimento alla istituzione di diritto britannico." (2005: 26-27)

Even though he dubs this literal translation, it has a functional approach. This is the same strategy observed above for "contract" (in the example from Sacco) and *Ehe* (in the example from Kisch). In order to assess the possibility of employing a functional equivalent, a translator would need to be able to decide how this affects the accuracy of the target text, which can be a complicated task.

1.3.9.3. Paraphrase

Another possibility is to paraphrase (i.e. explain the concept) ("Umschreibung", or a descriptive paraphrase, according to Šarčević, see 1999: 252; see also de Groot's equivalent of many words, in de Groot, 1999: 29). This may be a viable strategy, but it may be rather complicated to implement. It would effectively solve one issue of equivalence, i.e. it would guarantee equivalence by rendering a definition in the target language ("if the paraphrase in the target language is a virtually perfect definition of the source language concept" (de Groot, 2006: 425)). Caponi remarks in this respect: "È difficilmente praticabile l'idea di spiegare il significato giuridico del termine direttamente nel testo della traduzione, attraverso una perifrasi che non snaturi quest'ultima e non la trasformi in un commentario di diritto comparato" (2006: 138). This latter potentiality may be especially problematic, as it may impinge on the interpretive and authoritative role of a legal professional, in particular of the judge. Cesana, for instance, advocates for no paraphrases as this would cause *Begriffsverschiebungen* (distorting the meaning of the source concept) (Cesana, 1910, cited in Šarčević, 1997: 38). According to his view, a translator who paraphrases is "assuming the difficult task of interpretation [...], which is reserved strictly for judges" (Šarčević, 1997: 38). It is arguable whether it is possible at all for a legal translator to not interpret, either of his or her own volition or as a result of the client's/commissioner's wishes, as any strategy adopted will be a choice, may lead to a different degree of "loss" (as discussed above), and thus contribute to a specific reception for the target text readers. Moreover, legal terms are not always subject to unanimous interpretation, and may have many academic opinions written or even judicial pronouncements made on the particular implications of a certain interpretation of one term. By choosing a specific term as opposed to a paraphrase, then, a translator could also be engaging in interpretation.

1.3.9.4. Loan/foreignising

Others (see, e.g. Megale, 2008: 106) are of the opinion that sometimes, it may be better to use the original, "foreign" term, i.e. a loan, in order to maintain the strangeness and underline the difference of the concept, which refers to a distinction that goes back in time as far as Schleiermacher (1813/1963) with his dichotomy of either bringing the

reader to the source text or the source text to the reader. Šarčević refers to this strategy as "borrowing", i.e. of the original term (1997: 256). Schroth writes, with respect to the target text containing such a term: "If you want to understand, you will have to learn a new word (and a great deal about the way that word is used)" (Schroth, 1986: 57-58). This could be taken to the logical conclusion that if you want to understand, you will have to learn a new legal system. According to Ajani, however, this is the stage "quando la diversità semantica incide sulla affidabilità della traduzione" (2005: 26-27). According to de Groot (1999: 28), this approach is not acceptable, as it negates the very objective of translating, especially where the languages are etymologically different from one another, or where the reader cannot be expected to understand the source term. This strategy may also not be entirely workable in the context of the judgments of the two courts considered here, as one of their goals is to work towards an approximation of laws (or at least the uniform application of supranational law), and as a result to be applicable across legal systems, and translation of at least of some of the terms might have to be provided.

1.3.9.5. Neologism

Another strategy is to use a neologism, which is usually seen as a term that is not available in the target language (the wider definition), but de Groot defines more narrowly as any term that does not belong in the "Zielrechtsorndung" (see de Groot, 1999: 31). Ajani considers neologism a strategy to be adopted where the introduction of a foreign word would impede the comprehensibility of the translation, and provides an example with *Rechtsgeschäft* and *negozio giuridico*, the latter not being a term used in Italian law (see Ajani, 2005: 26-27).

1.3.9.6. Providing the source language term in brackets

Finally, it should be noted that Bulcke (cited in de Groot, 1999: 25) recommends that sometimes, it is "sinnvoll" to also provide the original term, both in cases of functional equivalence as well as where an "Umschreibung" or neologism is employed, especially when it comes to judicial instances, as this would help with the traceability of the terms.

1.3.10. Resources for the translation of legal terms

Being able to translate legal terminology is largely dependent upon having access to a number of resources. In order to understand and delimit legal terms, one needs clear and authoritative definitions. As we have seen, these can be located in statutes; however, finding definitions with clear and succinct wording (e.g. in the case of "kaschierte

Legaldefinitionen" (see Sandrini, 1996b: 91)) can be very laborious. With respect to target language concepts, it might be necessary to first find an indication of the possible terms that correspond to all potentially appropriate concepts, so that their definitions can then be checked for correspondence with the definition of the source language term.

An additional difficulty can be that it may be unclear how to "fence off" the contents of a potential definition, i.e. decide what is important and what is not, since the significance of a particular aspect can only become clear following a more thorough comparison of the legal concepts in the two legal systems. This would require detailed knowledge of the legal systems, often encompassing an overview of their respective historical development as well as possible points of contact, convergence, and divergence throughout time, including the connections between the particular legal area and its adjacent ones in both systems. As has been noted earlier, the task of the legal translator and the comparatist are very similar, and legal comparative studies are akin to terminology research. Örücü writes:

> "As a blueprint, it can be suggested that the following steps be followed in most comparative law research. Having decided on the scope of the comparison, the first step is the choosing of the concepts and identifying them. In essence these are the units of inquiry and the containers of data. Concepts, which are to be the units of comparison, should be identified and defined. There should be extensive information sufficiently precise to be meaningfully compared. Here there may be problems such as concept construction and definition; level of abstraction and classification; languages of comparison and measurement; and problems of translation and cross-cultural terminology." (2006: 447)

The terminological approach, as has been seen, is very similar to this workflow. When commenting on the importance and usefulness of the comparative method in the EU, Künnecke notes: "This does not necessarily entail detailed academic research but an efficient analysis of terminology" (2013: 260). She does acknowledge, however, that a significant chunk of terminological resources are not available to translators outside the Directorate-General for Translation (even though the academic method is indeed featuring more prominently, as evidenced by the existence of multilingual comparative material) (see Künnecke, 2013: 260). As a result, it may prove impossible for external translators to forego an academic analysis, in particular if they need to research the historical development of a certain term.

Mattila considers the "key source for exact definitions of legal terms" to be legal dictionaries (2012: 37), often "encyclopedic in nature", albeit he notes that their quantity and quality vary greatly. Their designations may vary according to locale (e.g. a pure term dictionary in Germany is called *Rechtswörterbuch* or *juristisches Wörterbuch,* and an encyclopedic dictionary – *Rechtslexikon)*. Mattila refers to *Black's Law Dictionary* as the most important source of legal terms in the English language legal field (however, this dictionary focusses on American law), with Creifeld's *Rechtswörterbuch* being worthy of mention for the German language (see Mattila, 2012: 37). It is notable that

these are all monolingual dictionaries. With respect to bilingual dictionaries, Mattila considers them "useful not only for legal translation in the proper sense of the word, but also as a means of gaining a better understanding of the similarities and differences between corresponding terms in various languages" (2012: 38), but he does refer to a point also made by de Groot and Laer (see de Groot and Laer, 2008) that, since the quality varies greatly, it may be risky to rely on them. For the purposes of the present thesis, both monolingual and bilingual dictionaries will be consulted.

In his analysis of a specific judgment of the ECtHR, Mac Aodha discusses the French term *escroquerie*, and notes that, when faced with numerous possible translations in a number of bilingual dictionaries (as in his analysis), one should always consult a monolingual legal dictionary (see Mac Aodha, 2014: 217). He does finally settle for one translation choice ("fraud"), after having reviewed the definition in a monolingual dictionary, but does not really offer any detailed explanation as to why he considers the English term "fraud" to be the most appropriate one. He also does not address the possibility of consulting more than one monolingual dictionary (and therefore does not deal with the possibility of definitions being different), nor does he mention potentially consulting a monolingual dictionary in the target language, in order to understand the significance of the target term. Since the context of the terms are judgments, it is striking that there is no analysis of the functional role of the judgment in the legal environment and multilingual context in which it appears. Somewhat inconsistently, in further examples, for instance that of *détention provisoire*, the target culture aspect does indeed come into play, with the English legal situation taken into consideration.

The example provided by Mac Aodha of *juge d'instruction* is especially interesting, because one of the consulted and cited works (Weston) contains a preference for an option which is considered more appropriate with regard to comparative law, taking into account the differences between a *juge d'instruction* and an "examining magistrate". However, Weston also acknowledges that "examining magistrate" – the term provided by all dictionaries in the sample – "is so firmly entrenched that it cannot be ignored" (see Mac Aodha, 2013: 218). In a similar manner, where established neologisms are used by other translators, and it is likely that the reader of the translation is familiar with them as well as used to them, de Groot recommends using those neologisms (see de Groot, 1999: 35). Therefore, in some cases, consistent use of terms in an established manner can be seen as just as important as equivalence. Thus, if a term is translated in a particular manner in the judgments of the courts, this translation may merit adoption even where other resources provide definitions or suggested translation which differ. In particular, if the recipients of the translation are professionals who may be familiar with a specific use of the term by the courts, they might expect for it to be reproduced.

In this way, resources may sometimes provide additional confusion instead of clarity. For instance, the examples provided by Mac Aodha (see 2014: 218) show an absence of consistent suggestions amongst the various published versions of dictionaries consulted, with *mandate de dépôt* variously translated as "committal order" or "warrant for committal". Translations of legislation which are available in a printed version or online, especially where it has been carried out on the initiative or with the support of official bodies from the respective country, can also compete with one another and with the various other resources available. Here, the authoritativeness of the publications may play an important part. However, translation which is carried out or provided by a certain person or an institution that may enjoy a particularly prestigious or "official status" may still benefit from a more critical analysis of the terms and their translations for the purposes of the current *skopos*. For instance, the strategies adopted, the qualifications of the persons who carried out the translation, proofreading procedure, glossary work, and the internal consistency of the terms used can all be reviewed (or spot-checked). This will be an important consideration in the following chapters, where translations of the German-language legislation provided by official or semi-official bodies or institutions within the respective countries can be seen as competing with the translations of terms as found in the judgments of the two courts.

Mac Aodha concludes that the mismatch between terms in the legal field can be overcome "by judicious use of lexicographic and doctrinal resources" (2014: 219). However, it may not seem clear just where the judicious ends and the inefficient beings, and how a translator should decide which resource takes precedence over another. Here, the power relations between actors in a certain field or across fields can play an important part when it comes to the provision of information with respect to the *skopos* or the consequences if instructions are not observed, e.g. with one or more actors explicitly or implicitly attributing more value on one resource over another. Mac Aodha does acknowledge, though, that "[i]t is to be hoped that such resources in the future will better reflect the needs of translators" (2012: 219). However, if the needs of translators change depending on context, it seems that the resources can only be truly useful if they are assisted by a targeted development of additional, transferrable skills.

Online resources, including terminological databases and electronic dictionaries, are also an important resource for translators (see Mattila, 2012: 38). The IATE (Inter-Active Terminology for Europe) database of the European Union will be discussed in more detail below; however, it should be noted here that it, too, can represent an authoritative competing source for the legal translator.

1.3.11. The didactic perspective

Finally, the topic of teaching/learning legal translation should be addressed, or rather, the kind of exercises which can be used to develop one's skill. In particular, Dullion's observations on this are illuminating (see Dullion, 2015). Following a discussion about the necessity of reading legal literature, in particular comparative law literature, Dullion warns against the uncritical adoption of the terminological choices found there, remarking that the communicative (or rather, intercultural) situation is something that the comparatist does not need to take into account, whereas a translator has to (see Dullion, 2015: 101). Here, therefore, the comparative law approach and the translation approach differ in their practical implementation and potential addressees (albeit not necessarily in their comparative methodology).

Dullion proposes a number of exercises, which have the aim of:

> "illustrer les aspects multiples de l'interaction entre traduction juridique et droit comparé; faire ressortir la distinction entre les étapes de documentation et de comparaison (en amont) et l'étape de traduction proprement dite; souligner l'importance de la dimension textuelle et des paramètres pragmatiques." (2015: 103)

These exercises can be useful not only in learning how to approach the translation of legal texts in theory or in the classroom, but also in becoming more and more aware of the different type of strategies employed by comparatists as well as of the difficulties that could arise in certain situations, and as a result adapt to new challenges. These can also help a translator explain his or her choices if they are queried by a client/commissioner, or he or she can assist the client/commissioner in assessing the particular translation choice suggested by the client/commissioner, and as a result succeed in reaching a decision that ensures loyalty to one's self.

1.4. The *skopos* theory revisited

Following all the above consideration of legal translation with its various aspects, with a particular focus on legal terminology, it is now necessary to revisit the *skopos* theory.

As has been seen above, in the various approaches to terminology and legal translation, often, the process of translating is almost exclusively thought of in a theoretical manner, without consideration of the diversity of possible power constellations in practice. The actual position of a translator in the context of a real translation scenario is not taken into account – either as a potential aspect to consider in the theories or as a concrete scenario. Terminological problems are frequently viewed from the perspective of an independent and autonomous person, capable of making any choice that he or she wants or feels comfortable with. There is also no analysis of the consequences which a specific choice

may have for the standing of the translator amongst his or her peers or clients, the feedback from the client/commissioner (who may or not be a sophisticated party) or from an intermediary (i.e. from parties on which the translator is financially dependent). Instead, usually, academic discussions of legal translation implicitly accord unlimited freedom to the translator. This latitude, however, cannot be thought of as given or absolute in practice. The approaches of Arntz and Megale can be seen to showcase two differing perspectives. According to Arntz, for instance, the scope allowed for creativity and subjectivity depends on the type of text ("Textsorte") (see Arntz, 2010: 29), and there is no consideration of any external factors which could influence the translation. In his book, Megale (see Megale, 2008) does address the practice of legal translation but does not make an attempt to systematise it into a coherent criticism of any particular theory (see Gémar, 2010, for a review of Megale's book).

The functional approach of Reiß and Vermeer as outlined in the first section considers the target culture as decisive, including where the translation of specialised texts is concerned. This can stand in tension with the importance of the legal contents of the source text, since, as we have seen, the comparative approach involves juxtaposing concepts from different legal systems but does so as part of a clearly discernible analysis of both source and target legal concept. On the other hand, the translation of legal texts and terminology is not confined to only one possible context. According to Arntz, there is nothing to preclude the co-existence of accuracy as to contents and an orientation towards the target culture (see Arntz, 2010: 22). As has been seen, however, some authors, such as Šarčević, consider legal translation to be a type of translation which has a special status, something that is not sufficiently taken into account by the functional approach: according to her, the legal system which serves as foundation and background of the translated text (i.e. the source legal system) should be decisive (see Šarčević 1997: 19). For instance, she refers to the need to consider the governing law when translating a contract, and not only the target-language formulae (see Šarčević 1997: 19). Künnecke writes of legal translation as a "special type of cultural transfer insofar as the legal contents of one legal order and cultural community are being transferred into another legal order" (2013: 245) (concentrating on the cultural perspective, referring to Habermas' concept of "life world" and the idea of a "legal life world" built upon that concept), and therefore, this approach can also be seen as focussing on the (cultural conditioning of) source text. The necessity of solving the issue about what takes precedence is rendered more critical by the argument that unlike the translation of other specialised texts, e.g. in the field of technology, legal translation does not have a uniform subject matter, i.e. one that does not differ from country to country (see Arntz, 2010: 29). Lauzière writes:

> "Il n'existe pas de vocabulaire scientifique commun à tous les systèmes juridiques du monde entier […]. Contrairement aux sciences exactes qui se rapportent à des procédés ou à des principes absolus et reconnus universellement, le droit se fonde sur relations très nuancées. Le vocabulaire juridique possède une valeur variable et relative au système juridique qui l'élabore." (1979: 11)

The treatment of terminology may depend on what one considers to have higher priority: the source or the target legal context.

The solution to this conundrum for the adherents of the *skopos* theory can be found precisely in the flexibility of the approach, i.e. the different strategies adopted in the respective situation (depending on the client's/commissioner's wishes or the translator's decision), precluding the need for one-size-fits-all conceptualisation and making the theory especially valuable due to the fact that it highlights that something is lost in translation. Kisch's consideration of equivalence "quant à la substance" has already been noted, and, according to De Groot, the context and purpose of the translation are fundamental when determining this:

> "It is possible that in a particular context certain words are acceptable equivalents, where they are not in a different context. Relevant also is whether a translation needs to be prepared to give persons who are not proficient in the source language a summary impression of the contents of the text, or whether the translation will receive the status of authentic text in addition to the source text [...] In the latter case, it is important that the terms in the target text are not narrower or broader than those in the source text. Looking from this angle, we may already establish that the conclusion that terms are acceptable equivalents is not absolute. Acceptable equivalence depends on the above factors." (2012: 540)

However, it is the interplay between the inherent flexibility of the approach and the authority and legal nature of the source text that is problematic. Arntz does acknowledge that in certain situations, the room for adopting one's own strategies – "Raum für Subjektivität und Kreativität" - is extremely limited, and can even be non-existent in certain situations - due to the nature of texts and their importance (however, he does not think this precludes the application of the functional approach) (see Arntz, 2010: 29).

There are other problems, however. For instance, the functional approach does not take into account the ethical repercussions of translating for an isolated single "target culture", according to which a translator is supposed to set his or her "compass", given the translation market of today's globalised world, where documents can be passed on in seconds. The matter is further complicated when adding the aspect of professional relationships and the image of translators who are faced with the authoritative status of (possibly conflicting) translated texts on an international and national level, e.g. translated legislation or judgments, including the websites of official bodies.

The functional approach also falters when it comes to the translation of multilingual legislation. As a result of the different language versions being equally binding, the way the functional approach considers the orientation towards the target culture is faced with

considerable difficulties, i.e. it needs to conceive of texts as source and target texts, which may be impossible in that situation. When discussing the situation in Switzerland, for instance, Arntz states that the Swiss legal system is very similar to the German and Austrian legal systems, and that there are considerable (but not widespread) similarities on the terminological level (see Arntz, 2010: 23). When translating these terms into French and Italian, for the equally binding versions of the legislation, it is therefore important to both find a fitting word to parallel the German text, and for it to be similar (but not too similar) to the legal terminology of France and Italy (see Arntz, 2010: 23). In light of this complicated interplay between languages, a (non-binding) translation into English (where it is a non-official language) would possibly need to balance all these considerations and adopt a strategy that is tailored to both the particular "needs" of the target context and the source text particulars (at the very least, the translator should be aware of the latter). The translations of the judgments of the two courts can also be viewed in light of the issues particular to multilingual legislation translation, since in that case, too, there is a lack a clear division between what is the source and what is the target text.

When referring to translations of normative texts for information purposes, Šarčević (2012: 191) writes of "the increasing use of foreign law as evidence in cross-border litigation and international commercial arbitration", where a judge from one jurisdiction would have to apply foreign law and would therefore require translations of that law, which can be provided by an "accredited translator". It is beyond the point here to discuss whether that translator would always need (i.e. be required) to be "accredited" in practice, but Šarčević makes an important observation:

> "In the latter situation, it would be clear that the requested translation is to be used for judicial purposes; however, this is frequently not the case. As a precautionary measure, publishers of non-authoritative translations of laws sometimes include a disclaimer freeing them from liability for possible translation errors." (2012: 191)

Freelance translators would not necessarily be able to provide such disclaimers, yet their translations may still be used in different contexts, where mistakes may have a big impact. With respect to the risks contained in legal translation, which stem from the performative nature of legal language, i.e. the fact that utterances in legal texts have an impact on reality, Sandrini provides (1999b: 39) the following: "Als allgemeine Leitprinzipien für jede Übersetzung im Recht gelten die Wahrung der Rechtssicherheit für den Zieltext und die Transparenz bzw. Nachvollziehbarkeit der translatorischen Entscheidungen" (1999: 39). Kocbek interprets this statement as a suggested method of reducing the risk of the possible consequences of the translation decisions (see Kocbek, 2014: 130). This is a viable approach but there might still be problems where the *skopos* is insufficiently clear, or where the role of the translator is one accompanied by increased

responsibility, with him or her making translation decisions without adequate support or opportunities to communicate with the client.

The *skopos* theory, as a part of the functional approach, would therefore require of the translator who is loyal to one's self to gather as much information as possible to evaluate the communicative situation for which the translation is needed. Examples of such possible use cases are numerous: there are different types of potential recipients with various levels of knowledge and linguistic expertise as well as homogenous/heterogenous groups.

Due to the importance of the information provided when defining the translation *skopos*, the translation brief can play a significant part (see Nord, 1997: 137). A brief is meant to provide the translator with explicit and implicit information about the intended target text functions, addressees, the time, place, and motive of production and reception; and possibly the legal system, too. However, this translation brief would need to be quite detailed in cases of legal translation, in order to take into account the specific nature of legal translation and the ethical considerations, or, alternatively, the client should be willing to provide additional information when requested (which would be the second best option, due to the fact that the translator may not know what there is to request). A translator will always need to know the detailed *skopos*, even if a third-party recipient of the translated document will be kept in the dark as to its exact specification (i.e. will not have access to a translation brief). This way, the translator could provide the recipient or any other interested party with the relevant information, if requested at a later point in time, or if it proves relevant.

The functional approach also raises another interesting question. As Garre observes with respect to international law, the legal status of existing (non-official, non-binding) translations of a binding source text results in these versions having different functions despite similar form and content (1999: 74). For instance, in the case of a translation of the ECHR into German, with this not being an official language of the Council of Europe, it is not clear how this translation should be treated by other translators. This also raises the question whether, where the text function of two texts is different, a different translation strategy needs to be adopted (e.g. making the translated texts different from one another), or whether there are any alternative options that the translator can adopt (Garre, 1999: 75). To extend this consideration to the authentic versions of judgments, one could ask whether the translation of an authentic English-language judgment of the ECtHR should be translated differently into German than its non-authentic French-language version, and whether the French-language version should be checked as a possible reference in making translation choices.

In conclusion to this Chapter, it can be summarised that the *skopos* theory's main strength is that it allows room for flexibility on the part of translators, and that it enables the consideration of the translator's ethics. Nevertheless, it is not to be welcomed or adopted without questioning its foundations and implications. In particular, in such cases, a translator would benefit from active support and initiatives meant to encourage more information on the part of official bodies or professional associations (on a global level), whose work should reach not only translators but also be easily accessible (as a first step) and known (as a second step) to potential clients/commissioners.

2. Chapter 2: Translation of German-language legal terminology in the judgments of the ECtHR

This Chapter focusses on the judgments of the European Court of Human Rights (ECtHR). Firstly, the history and role of this court are presented and its competences are explained, since, in order to understand the choice of terms in an institutional setting, "[t]he first step towards understanding why institutional translations are the way they are is to define not only what they are like but also how they came into being that way. One therefore needs to analyse not only the end product but also the process behind it" (Koskinen, 2014: 5). This is followed by an explanation of the language policies of the court, its official languages and the translation workflow. Finally, selected examples from the judgments are presented and analysed.

2.1. Competences and role of the ECtHR

The European Court of Human Rights was established in 1959 in Strasbourg (see Christoffersen and Madsen, 2013: 3). Institutionally, it belongs to the Council of Europe, an international organisation which was founded in 1949 by ten Western European states, conceived of as "an association of democratic European states committed to basic common values, human rights and the rule of law" (Garre, 1999: 18), with the goal of promoting increased cooperation on the political level between its Member States. The main responsibility of the Court is to ensure oversight over the application of the Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention of Human Rights, or ECHR for short), a legal instrument which was adopted by the Council of Europe in 1950 and which entered into force in 1953 (when ten states ratified it) (see Bates, 2010: 1-108). The ECHR is also the legal basis for the Court's jurisdiction. Germany signed the Convention in 1950 and ratified it in 1952, and Austria signed it in 1957 and ratified it in 1958 (see Council of Europe website, "Chart of signatures and ratifications of Treaty 005"). There were initial doubts in both countries with regard to the potential effect this would have on national law, in particular as to whether the Convention would have a constitutional status (see Welan, 2002: 7; and BVerfG, 26.03.1987 - 2 BvR 589/79, 2 BvR 750/81, 2 BvR 284/85). It was not until 1974 that Switzerland ratified the Convention (having signed it in 1972; see Council of Europe website, "Chart of signatures and ratifications of Treaty 005"). The formal legal position of the ECHR in each relevant state is as follows: it enjoys the status of a federal statute in Germany, "enjoying in principle the same weight as other federal statutes"; in Austria, the Convention has the rank of formal constitutional law; and in Switzerland it is part of substantive constitutional law (see Hoffmeister, 2006: 727).

Garre summarises the significance of the ECHR in the following manner:

> "The European Convention of Human Rights is unique in many ways. First of all, it guarantees a number of fundamental civil and political rights; secondly, it explicitly establishes a Commission and a Court of Human Rights; thirdly, it allows citizens of the member states as well as member states themselves to file complaints with the Commission and to bring cases before the Court; and finally, the Court's decisions are final and legally binding on the member states." (1999: 19)

Christoffersen and Madsen divide the development of the Court since its foundation into phases (see Christoffersen and Madsen, 2013: 3). The first phase, starting in 1959 (with the Court's "inauguration"), is the time when the Court tried to incrementally develop its institutional autonomy and case law (this phase was also marked by great uncertainty about the future of the Convention). The second phase – beginning in the mid to late 1970s – was marked by the development of more progressive case law. After the end of the Cold War (marking the start of the third phase), the Court's influence in Eastern Europe increased. Christoffersen and Madsen also postulate a fourth phase to have started around 2004 (see Christoffersen and Madsen, 2013: 3). This phase can be seen once again as marked by uncertainty, this time regarding the enforceability of the decisions of the ECtHR in certain countries. These issues of efficacy contrast greatly with the original idea behind the Convention of creating a legal foundation similar to a constitution: "to produce a common conscience for all of (Western) Europe" (Christoffersen and Madsen, 2013: 1). In comparison to the ambitious initiative of the 1950s, the increasing lack of cooperation on the part of some states when implementing the Convention is a significant problem that makes the work of the ECtHR both more difficult and lengthy (on non-compliance, see, e.g. Anagnostou and Mingiu-Pippidi, 2014). Another aspect that can be seen as contributing to the problem is that there are no analyses on how the Court influences European integration (especially in contrast to the numerous analyses with respect to the CJEU) (see Christoffersen and Madsen, 2013: 3). The lack of visibility of this role of the Court could be interpreted as one of the aspects contributing to the concerns over the effectiveness of its decisions, in particular in light of non-compliance (see Keller and Marti, 2016). The role of the Court and its judgments, however, remains considerable in light of its competences. As Brannan writes, "elle conduit les États à modifier leur législation et constitue une référence pour les juridictions internes" (2009: 24).

The categories of individual petitioners (or applicants) who can appear before the Court includes "physical persons", "legal persons" (but only "non-governmental organisations"), and "any group of individuals" (see Council of Europe website, 2017, "Practical Guide on Admissibility Criteria": 9-10). (While Article 33 of the Convention allows "inter-State applications", these are very rare (see Council of Europe website, 2017, "Practical Guide on Admissibility Criteria": 9-8), and ignored for the purposes of

this thesis). Whether a case is subject to the jurisdiction of the ECtHR depends on whether the Member State (of the Council of Europe) against which the case is being conducted is a signatory to and has ratified the Convention (it has to be a High Contracting Party; see Rule 47 § 1d of the Rules of Court). Moreover, an applicant must have exhausted all domestic remedies and comply with a six-month deadline following a final decision of the domestic court (see Article 35 of the ECHR). The application, which needs to have as its subject a violation of one of the rights explicitly accorded by the Convention and should be made via the form provided by the Court's Registry, is sent directly to the ECtHR (see Rule 47 of the Rules of Court). Representation by a lawyer is possible, i.e. not mandatory (see Rule 36 of the Rules of Court). After the application has been submitted, the following scenarios are possible: if the case is clearly inadmissible, it is decided by a single judge; if the case is one where the facts of an earlier case are repeated, with the Court having ruled on these facts multiple times, a committee of three judges decides (see Council of Europe website, "Your Application to the ECHR": 6). The Chamber consisting of seven judges also deals with repetitive cases (see Council of Europe website, "Your Application to the ECHR": 6). Applications cannot be sent directly to the Grand Chamber but are rather "relinquished" to it during proceedings before the Chamber; the Grand Chamber is reserved for those cases "where the case raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous decision of the Court"; alternatively, a case may be referred to the Grand Chamber if a party to the proceedings requests it within three months of the delivery of a judgment by the Chamber but this is only rarely accepted (see Council of Europe website, "Your Application to the ECHR": 7). Prior to the proceedings being initiated, "[t]he court will first communicate the application to the Government concerned, to inform them of the existence of the complaint and allow them to submit observations on the matter in dispute" (Council of Europe website, "Your Application to the ECHR": 6).

If the Court reaches the conclusion that there has been a violation of the Convention, the Member State that has been held to have violated the Convention must ensure that such violations do not occur any longer (which may sometimes necessitate an amendment of the national legislation) (see Council of Europe website, 2008, "The execution of judgments of the European Court of Human Rights" on the execution and effects of judgments of the ECtHR), and "[i]f it does find a violation, it may award you compensation" (Council of Europe website, "Your Application to the ECHR": 9). The Council of Europe watches over the implementation of the judgments: "When a judgment pending a violation becomes final, the Court forwards the file to the Committee of Ministers of the Council of Europe, which is responsible for monitoring the execution of the Court's judgments. That brings the proceedings before the Court to an end" (Council

of Europe website, "Your Application to the ECHR": 9; see Article 46 ECHR). As already mentioned above, the execution of judgments is sometimes accompanied by problems as some of the Member States delay or do not amend the laws in questions (see le Borgn, 2017).

As a result, the addressees of the judgments can be postulated to be all parties whose human rights have been or may be violated in future by a High Contracting Party to the ECHR, the members of the national legislatures and judicial bodies of each Member State as well as members of the legal profession (who may offer advice or support on matters before the Court). A Council of Europe publication (see Council of Europe website, 2017, "Practical Guide on Admissibility Criteria") notes:

> "The pool of potential applicants is therefore vast: in addition to the eight hundred million inhabitants of greater Europe and the nationals of third countries living there or in transit, there are millions of associations, foundations, political parties, companies and so forth (not to mention those persons who, as a result of extraterritorial acts committed by the States Parties to the Convention outside their respective territories, fall within their jurisdiction)." (2017:7)

As a result, the workload of the Court is challenging, with 79,700 applications as of 31 December 2016 (with around 95% of those being rejected for non-satisfaction of one of the admissibility criteria) (see Council of Europe website, 2017, "Practical Guide on Admissibility Criteria": 7). Nevertheless, this does not necessarily ease the burden:

> "This situation is frustrating on two counts. Firstly, as the Court is required to respond to each application, it is prevented from dealing within reasonable time-limits with those cases which warrant examination on the merits, without the public deriving any real benefit. Secondly, tens of thousands of applicants inevitably have their claims rejected." (Council of Europe website, 2017, "Practical Guide on Admissibility Criteria": 7)

Many judgments are freely accessible online, although the universal accessibility (or at the very least, accessibility in the Member States) is significantly restricted due to the limited number of available languages, as will be seen below.

The practical significance of languages and translation at the ECtHR is illustrated neatly by Garre who refers to the case of *Jersild*, where relevant parts of the Danish Penal Code were translated into English in one manner when presented to the European Commission of Human Rights, and in a different manner when presented to the European Court of Human Rights, with nothing indicating as to why these were translated differently (see Garre, 1999: 40-41). Moreover, Garre observes that both the decision and the judgment use the term "aiding and abetting" in English, which she maintains was not submitted as a translation in the documents provided to the Commission and the Court. Garre then points to the problem of using a term that has an established meaning in English which can "give rise to different references and case law", and raises the (unanswered) question of whether the use of the term was a conscious consideration (see Garre, 1999: 44). (The French term used in the ECtHR judgment is "complicité".) In conclusion, Garre remarks:

> "It is impossible to prove whether these differences in the translation have influenced the case and its decision, but it clearly illustrates that the Danish perspective of international human rights law is not only concerned with the way in which Danes understand international human rights instruments, but also relates to how foreigners understand Danish law in the context of international human rights." (1999: 44)

As a result, issues of translation could have an effect on the understanding of national legislation in an international context.

An important aspect that underscores the multilingualism of these judgments is the fact that in cases before the (Grand) Chamber, a "national judge" is also present. National judges are representatives of the states against which the proceedings are conducted. Criticism of the institution of the national judge focusses on the potential partiality of these judges and the possibility of them being politically influenced. On the other hand, these are parties that are familiar with the laws of the country in question:

> "The most common argument maintains that any panel of judges must include an expert on the defendant state's legal system in order to preclude any misunderstanding of the mandates and circumstances of that state's laws, given the plurality and diversity of the legal systems that may be represented, which in many cases includes common law systems, civil law systems, Scandinavian traditions and other legal traditions." (Guerra, 2017: 554)

If one takes into account that the lawyers of the Registry are already responsible for the accurate representation of the national legislation, and can be assisted by translators and other linguists (as will be seen below), and that the "national judge" does not need to sit in each and every case, this role appears dispensable. Nevertheless, the presence of a judge from the respective Member State is another important indicator for the sensibility of the Court with respect to the challenges and requirements of multilingualism.

Another point to be noted briefly is the possibility that the European Union accedes to the Convention; this, however, is considered unlikely at the time of writing. The Treaty of Lisbon (effective as of 1 December 2009) provided for the obligation that the EU accede to the Convention but the CJEU has ruled that the terms of the negotiated agreement have not been sufficiently tailored to the legal arrangement of the EU and the role and competences of the Court (see *Opinion 2/13, Accession of the European Union to the European Convention of Human Rights*). Nevertheless, this possibility is mentioned here as it might have an implication for legal translators in the future.

2.2. The translation workflow

The only official languages of the ECtHR are English and French (see Rule 34 of the Rules of Court). Until 1998 (the year the Court became permanent), all judgments were published in both languages; this, however, was also related to the smaller number of cases before the Court (see Brannan 2009: 25). Currently, Rule 76 § 1 of the Rules of

Court of the ECtHR provides the following: "Unless the Court decides that a judgment shall be given in both official languages, all judgments shall be given either in French or English". Brannan notes that judgments have to be drafted in one of the two languages, and that translation into the other official language is usually dependent on whether the case is a significant one (see Brannan, 2013: 910). A decision that a judgment shall be given in both official languages is thus considered an exception and usually occurs for: Grand Chamber cases; cases which have been selected for publication in the official reports (see Rule 76 § 2 Rules of Court); and certain specific cases of increased media interest (see Brannan, 2009: 25). With the exception of Grand Chamber cases, the texts for the published reports are translated after the judgment has already been provided in one official language, and these translations are published on HUDOC as soon as they are ready, i.e. prior to publication in the official (printed) reports (see Brannan, 2009: 30). (The existence of the official reports is explained in the following manner by Brannan: "A l'ère de l'Internet il est même légitime de se demander s'il est toujours nécessaire de publier un recueil, mais la Cour y tient jusqu'à présent, notamment pour des raisons de prestige; toutes les juridictions internationales ont une telle publication" (2009: 30)).

Garre considers the fact that the ECtHR has only two official languages as an advantage, as it reduces the need for extensive translation (and interpretation), and as a result helps save both time and money (see Garre, 1999: 36). In addition, despite the fact that the Court is multilingual and deals with proceedings that are conducted in a number of different languages in their home jurisdictions, Brannan notes the danger of having too many languages as this can undermine the authority of a court (in fact, he refers to this being one of the reasons invoked in the 1920s with respect to the UN and the International Court of Justice) (see Brannan, 2009: 25-26). However, having only two official languages can also be seen from a more negative perspective, as the universal access to the judgments is restricted, which can be especially critical for persons who are affected by them (e.g. nationals of the state against which the judgment is made (see Garre 1999: 37; see also Terris et al, 2007)).

As a result of the above considerations regarding the language policies of the Court, the translation of judgments can be divided into two stages: the first one being prior to and during the drafting of the judgment, and the second following the drafting of the judgment and its publication in one official language.

Before proceeding to look at these two stages of translation, it is important to mention the way a ECtHR judgment is structured. It begins with a brief outline of the case, including the Court's composition for the hearing (Chamber, section, judges presiding) and outline of the procedural development of the case (in the domestic courts). This is followed by a section containing the facts. This section consists of the circumstances of

the case (background, the dispute), where the proceedings in the respective Member State and the applicable law ("domestic law") of that Member State are presented. This part contains both factual assertions (which can be of a more general nature) and representations of the particular legal context, and therefore usually contains numerous institutions, court names, and legal concepts. It is the part that the lawyers in Registry (whose role will be outlined shortly) prepare. Brannan explains:

> "The case may concern any of the 47 member States of the Council of Europe, so the French or English terms (depending on the drafting language), especially in the 'facts' and 'domestic law' parts of the judgment, are often already based on a summary translation from a non-official language, usually carried out in the initial drafting process by a lawyer from the country concerned, subject to editing by linguists if necessary." (2013: 910)

Subsequently, the part titled "The Law" contains the considerations of the Court with respect to the presented facts and domestic law. This is followed by a conclusion (i.e. the actual ruling), under the heading "For these reasons, the Court, unanimously...". Where there are dissenting opinions, they follow the final part of the judgment, and the "unanimously" is omitted from the previous heading.

As has been noted, in this first stage, once an application is being considered before the ECtHR, it is the lawyers from Registry who are in charge of the submitted documents, beginning "à rédiger l'exposé des faits, en français ou en anglais, généralement sans l'assistance d'un traducteur" (Brannan, 2009: 24; see also 28). Since the focus of the present thesis is on the translations of German-language terms from national laws of Germany, Austria, and, at least for the ECtHR, Switzerland, into English, this stage of receipt of documents from such jurisdictions represents an important phase. It is permitted that these documents are submitted in German, pursuant to Rule 34 § 2 of the Rules of Court:

> "In connection with applications lodged under Article 34 of the Convention, and for as long as no Contracting Party has been given notice of such an application in accordance with these Rules, all communications with and oral and written submissions by applicants or their representatives, if not in one of the Court's official languages, shall be in one of the official languages of the Contracting Parties. If a Contracting Party is informed or given notice of an application in accordance with these Rules, the application and any accompanying documents shall be communicated to that State in the language in which they were lodged with the Registry by the applicant."

This, as Brannan notes, is part of the considerations in the post-1998 Court with respect to the access to justice for potential applicants: "La langue ne doit pas constituer un obstacle à l'accès effectif à la justice" (Brannan, 2009: 27). It would be quite expensive and complicated to require an applicant to have his or her documents translated in advance, just so that they are allowed to present them before the Court. However, in the context of a hearing, or "after notice of an application has been given to a Contracting Party", the communication submitted by the applicants must be in English or French, although there is a possible exemption: "unless the President of the Chamber grants leave

for the continued use of the official language of a Contracting Party" (Rule 34 § 3(a) of the Rules of Court), in which case:

> "[..] the Registrar shall make the necessary arrangements for the interpretation and translation into English or French of the applicant's oral and written submissions respectively, in full or in part, where the President of the Chamber considers it to be in the interests of the proper conduct of the proceedings." (Rule 34 § 3(b))

In an email responding to a query from the author of this thesis, a senior translator from the ECtHR[10] writes:

> "We don't put pleadings (known as parties' observations) in the memory [*Logiterm, see below (added comment)*]. The issue here is that pleadings are translated outside in GC [*Grand Chamber, (added comment)*] cases and usually not at all in Chamber cases. Even in GC cases, the Government file pleadings in an official language and the applicant usually does too, but can be exempted under the Rules – the latter is the only situation where we outsource translation from a non-official into an official language. The document then of course has to be translated into the other official language, in the GC procedure, but this is usually outsourced too (as are the Government's observations into the other language). In any event, none of this work is included in the memory although we discussed the issue relatively recently in connection with pre-translation, i.e. what are the most useful documents to include for that purpose. One issue is that not all the outside translations are revised; another is that the source document is often provided in pdf format." (See Appendix 3 for the full chain of emails).

Therefore, pleadings will not always be translated, and where they are, they are usually outsourced (including in cases where they should exist in the two official languages, i.e. for Grand Chamber cases).

On the other hand, the High Contracting Parties (i.e. the Member States who have signed and ratified the Convention) must use the official languages of the Court (see Rule 34 § 4 of the Rules of Court), although here, too, leave to use one of the Contracting Parties' official languages may be granted (however, in such cases the Contracting Party must make its own translation arrangements). In cases where those parties make their own translation arrangements, therefore, those documents are also not likely to be prepared in accordance with the procedure existent in the Court.

As mentioned, documents presented by the parties, in whatever language they are submitted, serve as the basis of the documents prepared by the lawyers in the Registry. The task of the Registry is described in the following manner:

> "The principal function of the Registry is to process and prepare for adjudication applications lodged by individuals with the Court. The Registry's lawyers are divided into 33 case-processing divisions, each of which is assisted by an administrative team. The lawyers

[10] The views presented here (and in subsequent quotes) do not necessarily represent those of the European Court of Human Rights.

> prepare files and analytical notes for the Judges. They also correspond with the parties on procedural matters. They do not themselves decide cases, however.
>
> Cases are assigned to the different divisions on the basis of knowledge of the language and legal system concerned, as applicants can address the Court, at the beginning of the proceedings, in any official language of the States Parties to the Convention. On the other hand, the documents prepared by the Registry for the Court are all drafted in one of its two official languages (English and French)." (see Council of Europe website, "ECHR Registry": 1-2)

The assistant lawyers' scheme eligibility requirements specifically state that "[a]pplicants must hold a university degree in law, obtained in a Council of Europe member State" (see Council of Europe website, "The Assistant Lawyers' Scheme at the European Court of Human Rights": 4). Arold summarises the clerks' tasks in the following manner: "The clerk writes a memo on the case and presents the factual and legal issues to senior clerks and the judges. The clerks further write draft judgments presented for deliberation, and after deliberation they write the final judgment" (Arold, 2007:44). In an email responding to a query from the author of this thesis, a senior translator from the ECtHR notes that "[...] any German to English translation will be done by the lawyers themselves in drafting the case" (see Appendix 3 for full chain of emails).

The summary of the documents presented by the parties is therefore written by a legal professional. Although assistance from a translator is not required or needed in each and every case, situations may arise where this does occur (see Brannan 2009: 28). Especially since these preparatory documents are drafted in English or French, and the documents do not have to be submitted by the applicants in an official language, the legal professionals could be writing in a language that is not their main working language (they must know either one of the official languages, but it does not need to be their "native language"). A "garde-fou" of sorts exists:

> "le contrôle linguistique (*language checking*) par un locuteur natif. Il s'agit d'un service (devenu quasi obligatoire pour les décisions et arrêts les plus importants) qui est mis à la disposition des juristes depuis quelques années, assuré à la fois par des traducteurs et par une équipe de correcteurs linguistiques." [emphasis in original] (Brannan 2009: 28)

This cooperation also exists between the language professionals and judges who are not "francophones ou anglophones" (Brannan 2009: 28), and can be complemented by suggestions to change the source text where necessary, including on the basis of a list of frequent mistakes. This work "donne lieu à un échange entre le linguiste et le juriste qui est enrichissant pour les deux parties" (Brannan, 2009: 28). In comparison with the system of the CJEU, there are no highly specialised lawyer-linguists who can cover the majority of possible language combinations (however, the CJEU cannot provide for such absolute comprehensiveness, either, and makes use of so-called "pivot languages" (see

McAuliffe, 2012: 210-211)), and this cooperation helps ensure the quality of the documents on both the legal and linguistic level.

Translators can be involved to a greater extent than the one described above in the case of important judgments, defined by Brannan as those cases before the Grand Chamber (composed of 17 judges as opposed to the Chamber which only has 7 judges) (see Brannan, 2009: 29). In those cases, the pleadings of the case ("observations des parties, textes législatifs, décisions des juridictions internes, etc.") are frequently outsourced to external translators (as already observed earlier), whereas the Court's own translators translate the confidential documents destined for the judges; these contain "la note du rapporteur, les questions aux parties et parfois un rapport du service de recherche du greffe"; unlike the CJEU, the translators also assist during the deliberations of the judge (Brannan, 2009: 29).

In summary, translation of German terms into English will initially happen by the lawyers at the Registry, with potential consultation from the translators, but this consultation will be done with a focus on the English text. It is also possible that the German-language terms will only be translated into French and not translated further into English (e.g. where a Chamber judgment is published in French only). Another option is that, in the case of Grand Chamber judgments, they will be translated into both English and French, with the translation into the respective other official language being carried out prior to publication and the translator being involved to a greater extent and at an early stage, and where both the source version and the translation are considered binding and "authoritative" in both language versions (see Brannan, 2013: 910).

As already noted, the official language used is either English or French which also means that a Chamber judgment is always published online or at least drafted in one of the two languages. The translation of already published judgments from English into French or from French into English is "purely for publication on the on-line HUDOC database and more rarely in printed reports" (Brannan, 2013: 910), and "[l]a vaste majorité des textes du recueil est donc traduite après que l'arrêt ou la décision ont été rendus, sauf pour les affaires de Grande Chambre" (Brannan, 2009: 30). These translations are performed within the translation department at the Registry (see Brannan, 2009: 29). Here, it should be taken into account that the translation from one official language into another can be based on a "source text" which in itself is a translation but drafted by lawyers in the particular manner explained above (see Brannan, 2009: 28). However, in preparing the translation, a translator also has the opportunity to "consulter le dossier de l'affaire et interroger le juriste compétent, même si l'affaire n'est plus en cours" (2009: 30), something that an external translator clearly cannot do. Moreover, an external translator may have trouble obtaining such information from his or her client/commissioner.

The translations of judgments into any other languages are left to external third parties and the Court does not assume any responsibility for their quality (see European Court of Human Rights website, "Language Versions").

As mentioned above in the discussion about the structure of the judgment, terminology plays an important role in the sections with the facts and the domestic law of the respective Member State. These judgments are later meant to be implemented by national courts, but since judges are familiar with the concepts of the domestic law, they can be expected to understand what is meant by certain terms. The same would apply for lawyers who would be representing the parties, despite Arold's observation that there does not seem to be any class of lawyers specialising in representation before the ECtHR (see Arold, 2007: 61). However, the judgments could be an especially useful resource for the translator either beginning to specialise in legal translation or looking for authoritative translation suggestions.

According to Brannan, there is no dedicated terminology service at the Court, and this role is taken over by translators: "La tâche d'organiser des réunions de terminologie, plusieurs fois par an, est confiée à un traducteur de chaque division linguistique, qui prépare une liste aux fins de la discussion, à laquelle participent parfois des juristes du greffe" (2009: 9). After initial thoughts of building up a terminology database with Trados' Multiterm, there has been a switch to Logiterm. In an reply to an email query by the author of this thesis, a senior translator at the ECtHR states:

> "Logiterm also has a glossary function and there is still an intention to use it to build up a terminology database. It's certainly been slow to get off the ground, but it may materialise in the coming months. It will be some time though before it contains enough entries and I doubt that it will be made available to other staff in the Registry, because of the cost of licences. So we still basically use the concordance function of that software or the Court's own case-law database, Hudoc, which is not particularly easy to use for translation purposes." (see Appendix 3 for full chain of emails)

Logiterm is also used for the pre-translation of judgments and decisions, after an auditor's report from 2017 called on translators to use that function more, and contains a number of documents to that effect (see Appendix 3 for full chain of emails and a list of these documents).

In its translation memory, the software contains the following information:

> "The Logiterm memory includes documents from earlier stages in GC cases, but probably only the rapporteur's note and research reports, together with any earlier decisions (in particular a Chamber judgment in the event of referral) and press releases. We don't put pleadings (known as parties' observations) in the memory. [...]
>
> Certainly no translations are included other than English/French and French/English. Miscellaneous documents in Logiterm include annual reports and glossaries, whether monolingual or bilingual, and other international instruments." (see Appendix 3 for full chain of emails)

As a result, the Logiterm database does not contain documents in German. The input of translators when it comes to translation from German into English would therefore be limited to those instances where they discuss the best possible translation option, and this will always be in consultation with the lawyers at the Registry.

The terminology workflow for translators at the Court is as follows:

> "In addition to a style manual, we have an internal drafting guide containing sections for each country and the official-language terminology that has been agreed for domestic institutions and so on. This is mainly used by the language checkers, and some of the content is the result of terminology meetings and internal discussions. Those two documents obviously seek to ensure consistency are available to all staff – drafting lawyers are expected to use the style manual in particular.
>
> Language checkers and translators usually ascertain how a term has been used/translated before, using Hudoc or Logiterm, but the problem of course is that there may be a number of variants – as the case-law has developed, key passages have been edited and improved, amended deliberately, complemented or reduced, adapted to a different context, back-translated to something different from the original, etc. It is sometimes difficult to trace back the origin of particular usage. And of course it's important to retain the linguistic precedent as far as possible, but it's not always easy to establish the best variant where there are several possibilities.
>
> In case of doubt, the language checkers ask their team manager while the translators usually decide autonomously. There's always a possibility that the case lawyer may then disagree and this leads to discussion. For some countries we've had in-depth discussions with the country lawyer to iron out terms of criminal procedure, for example. In the example I gave of the oberlandesgericht, the case lawyer objected to the previous translation as Court of Appeal, on the ground that it hears some cases, such as terrorism cases, at first instance. This issue was then discussed by e-mail. This illustrates the fact that preferences can change over time, often as older staff retire and their successors have different ideas (whether translators, lawyers or proofreaders in the publications department) – apart from the fact that people just disagree.
>
> Consistency within the same text is ensured, but we are aware that usage has not always been consistent in the past, for the above reasons. It is therefore quite important to find the most recent examples of translation or usage (one reason why I personally prefer to rely on Hudoc, using the "most recent first" filter). Another point is that, at least in the law part and especially the general principles, the relevant case reference is often given in brackets – so you have text which comes from a previous case but with no inverted commas (a "hidden quote") – in that situation it is usually best to look up that case on Hudoc. The exact wording may still not be found, however, if the lawyer has paraphrased or even referred to the wrong case or paragraph, or of course if the reference is a monolingual Chamber case, or if there are several references and it's not clear which one contains the closest wording. Sometimes instead of looking for a precise case, it's better to enter a particular sentence. Another advantage of Hudoc is that you can see the whole judgment for the context." (See Appendix 3 for full email chain).

This statement recognises the lack of consistency in past judgments but also showcases the flexible and evolving attitude towards solving terminological problems, including consistency issues, in an institutional context and, perhaps most importantly, the need for discussion and cooperation when deciding on the use of a term, not only with regard to the most appropriate term to use for a certain concept in another language but also in

light of previous usage in specific contexts. Moreover, the statement highlights the need to be aware of specific techniques when searching the database, which represents an important tool for translators. For instance, Brannan refers to HUDOC in the following manner: "La base Hudoc constitue ainsi un outil pour les traducteurs extérieurs, et pas seulement ceux qui travaillent en anglais et en français, car on retrouve souvent des termes provenant de langues tierces, laissés entre parenthèses, et des passages entiers de droit interne traduits directement ou indirectement des langues non officielles" (2009: 32). In order to be able to use these suggestions in an optimal and responsible manner, however, an external translator will be advised to critically evaluate these suggestions, and check the previous translations of the same terms, so that he or she can make an informed decision, explain his or her choice to a client/commissioner, or possibly query the term suggested by that client/commissioner.

Here, it should also be mentioned briefly that there are "autonomous" terms, i.e. terms which are used in a manner that is particular to the Convention. Garre divides the references found in the case law into those which refer directly to the relevant legislative text (here, the ECHR) and discussions of that particular text, and those which involve facts and laws from the domestic legal systems (see Garre, 1991: 51). For the latter, she observes that "translation can no longer be seen only in an international law context, but must be considered as translation between two different legal systems without the intervention or special setting of international law" (1999: 51). For the former, the translations provided by the Court can be even more useful, and in fact, can be seen as authoritative and binding; but as these are not specific to the national legislation of the Member States, which is the focus of the present analysis, they are beyond the scope here. It should be noted, though, that for a translator, it is still important to be able to distinguish these and similar (procedural) terms from certain other national legal terms, e.g. *Beschwerde* for "application" (to the ECtHR) and not the complaint found in the German legal system.

2.3. Examples from judgments

2.3.1. *Untersuchungshaftgründe*

The examples analysed in this section concern *Untersuchungshaftgründe* (which can be explained in English as grounds for detaining suspects pending trial, or pre-trial detention in the US, and custody in the UK) in Austria (as provided by § 173 of the Austrian *Strafprozeßordnung,* referred to below as öStPO*)*, Germany (as provided by § 112 of the German *Strafprozeßordnung,* referred to below as dStPO), and Switzerland (as provided

by Art. 221 of the Swiss *Strafprozessordnung,* referred to below as sStPO). However, the guiding terms are those for Austria (i.e. not all grounds in Germany will be dealt with).

2.3.2. Criteria for selection

These specific legal concepts have been selected for the present analysis for numerous reasons. Criminal law (including criminal procedure) is one of the legal areas where the law in the individual states can differ greatly, if not necessarily in the terms for the concepts, then in their contents (e.g. as in the example of "police", referred to by Pakes (see Pakes, 2014:1)). In this particular case, as will be seen later, the grounds do not differ greatly between the countries when it comes to concepts, but there is an inconsistency in the terms used in the individual states as well as synonymy, both of which can be confusing.

Moreover, with respect to this topic, certain matters clearly fall within the competences of the ECtHR. For instance, Article 5 (right to liberty and security; in particular Article 5 § 1 concerning deprivation of liberty), Article 6 (right to a fair trial), and Article 7 (no punishment without law) of the ECHR could be violated in cases involving *Untersuchungshaft*[11], with Article 5 being the most relevant.

The statistics of the Court offer an opportunity to review the annual number of cases where violations of the respective Article have been held. This example is for 2017 only (see Council of Europe website, 2018: "Violations by Article and by State"). (A more detailed breakdown by country – for all applications, i.e. concerning all Articles - can be found in the published "Analysis of statistics"; see Council of Europe, 2017, "Analysis of statistics".)

Article	**Year**	**Austria**	**Germany**	**Switzerland**
Article 5	2016	2	2	0
Article 6	2016	15	0	1
Article 7	2016	0	1	0

[11] The German term is used throughout, in order to avoid attributing to the concept features from common law concepts.

Therefore, in recent years, these violations do not represent a significant number; however, searching the HUDOC database, which contains published ECtHR case-law from 1960 onwards, results in the following numbers (filtered by English as language of the judgment, since the HUDOC search does not de-duplicate results, and provides the same judgment in a different language version as a separate result):

Article	**Years**	**Austria**	**Germany**	**Switzerland**
Article 5	1960 - 2018	9	33	18
Article 6	1960 - 2018	154	88	39
Article 7	1960 - 2018	0	9	0

These numbers show that there are quite a few cases available on HUDOC; at least some of these are likely to contain references to grounds for *Untersuchungshaft.*

2.3.3. Analysis of translations

The grounds for *Untersuchungshaft* presented in § 173 öStPO can be classified as follows: *Fluchtgefahr* (see § 173 Abs. 2 Z. 1); *Verdunkelung- (Verabredungs-)Gefahr* (see § 173 Abs. 2. Z. 2); *Tatbegehungsgefahr* (see §173 Abs. 2 Z. 3); *Tatausführungsgefahr* (§ 173 Abs. 2 Z. 4). These terms do not appear in the actual section of the law but are regularly referred to in this manner (see Help.gv.at website, "Verhängung und Dauer der Untersuchungshaft"), and can therefore be regarded as "kaschierte Legaldefinitionen", as defined by Sandrini (see 1996b: 91).

The grounds for *Untersuchungshaft* for Germany can be found in § 112 dStPO. Morgenstern writes: "Das deutsche Haftrecht nennt in §§ 112, 112a StPO *vier Haftgründe,* die einzeln oder nebeneinander einen Haftbefehl begründen können: Flucht und Fluchtgefahr; Verdunkelungsgefahr; die Schwere der Tat und die Wiederholungsgefahr" (2018: 647). Here, *Fluchtgefahr*, *Verdunkelungsgefahr*, and *Wiederholungsgefahr* are designated as terms, and it should be stressed that the present analysis proceeds from the Austrian terms, i.e. that the grounds of seriousness of the offence will not be dealt with in detail here.

The grounds for *Untersuchungshaft* (as well as for the *Sicherheitshaft)* in Switzerland are found in Art. 221 of the sStPO, and these are also similar to those in Austria and Germany. As in the case of Austria, the statutory provisions do not explicitly refer to

these terms. They are, however, commonly referred to in that manner, as can be seen from this excerpt of the website of the *Staatsanwaltschaft* of the St. Gallen Canton:

> "Besondere Haftgründe sind: Fluchtgefahr, Wiederholungsgefahr, Ausführungsgefahr (wenn ernsthaft zu befürchten ist, eine Person werde ihre Drohung, ein schweres Verbrechen auszuführen, wahrmachen) oder Kollusionsgefahr (wenn ernsthaft zu befürchten ist, die dringend verdächtige Person könnte Personen beeinflussen oder auf Beweismittel einwirken, um so die Wahrheitsfindung zu beeinträchtigen)." (see Kanton St. Gallen Staatsanwaltschaft website, "Die Untersuchungshaft")

The HUDOC database was searched for these terms, and monolingual dictionaries and legal reference works were consulted, in order to obtain a better understanding of their significance in the respective legal system. The database was searched by first entering the respective term in German, then limiting the search results to Austria, Germany, or Switzerland, respectively, and subsequently reviewing either any English-language judgments containing the German term, or the English versions of any judgments available in German only (in unofficial translation). The initial results were then used to refine the search, and combinations of English-language terms were then entered. The judgments were also checked for relevance and subject matter. (A table of all the results, including a description of the methodology, can be found in Appendix 1).

2.3.3.1. *Fluchtgefahr*

2.3.3.1.1. Austria

The Österreichisches Rechtswörterbuch defines *Fluchtgefahr* in the following manner:

> "Grund für Verhängung der *Untersuchungshaft*, wenn die Gefahr besteht, dass ein Beschuldigter wegen der Höhe der ihm voraussichtlich bevorstehender Strafe oder aus anderen Gründen flüchten oder sich verborgen halten wird [...]." [emphasis in original] (2014: 59)

§ 173 Abs. 2 Z. 1 StPO describes *Fluchtgefahr* as a ground for *Untersuchungshaft* in the following manner:

> "(2) Ein Haftgrund liegt vor, wenn auf Grund bestimmter Tatsachen die Gefahr besteht, der Beschuldigte werde auf freiem Fuß
>
> 1. wegen Art und Ausmaß der ihm voraussichtlich bevorstehenden Strafe oder aus anderen Gründen flüchten oder sich verborgen halten, […]."

Searching for *Fluchtgefahr* on HUDOC with an English language filter showed results where the judgment is in English but the term also appeared in German: in those instances, the original term always followed the translated term, and was provided in brackets. (See Appendix 1, subsection A-a, for a step-by-step description of the searches

conducted.) There were 8 cases for Austria, with 4 for "danger of absconding", 3 for "risk of absconding", and 1 for "danger of flight"[12].

Due to the possibility that in some cases, the German-language terms have not been indicated at all (and that only a translation into English is provided), the database had to be searched for those terms and term combinations in English (see Appendix 1, subsection A-a for more information about the steps and combinations), with the cases reviewed for relevance (e.g. instances where "flight" occurred in the meaning of "flight with an airplane" were ignored), but cases of legal polysemy were noted and will be discussed where relevant. While this methodology cannot guarantee exhaustiveness, it can showcase possible translation strategies; and more importantly, it parallels the approach an external translator might adopt when searching the database.

The review of the results showed that "danger of absconding" is by far the more popular choice (15 cases), with "risk of absconding" appearing in 9 cases, and only 4 cases mentioning "danger of flight" (which were all from cases between 1968 and 1974). What also became evident was that there is a significant overlap of use of a term in individual cases, i.e. that consistency has not been maintained throughout the decision. For instance, the most recent decision found, *Elsner (no. 1)* from 2011 contains the following sentences: "The Investigating Judge based the warrant of arrest on the **risk of the applicant absconding** under section 175 §1 (2) of the Code of Criminal Procedure" [emphasis added], and "The assumption that there was a **danger of absconding** as a ground for detention had to be based on certain facts establishing a risk that the accused could escape or hide" [emphasis added]. While there is no significant difference between the two ("danger" and "risk") and they can be regarded as synonymous, the inconsistency in the judgments is notable. This does not detract from the comprehensibility of the judgments, since they provide additional context such as facts, but it may lead an external translator to consider the terms interchangeable and adopt the same strategy, e.g. in order to add more variety to the text – an approach that may not be advisable in every single instance.

Another aspect that was already noticeable when reviewing the initial results (i.e. reviewing the translations which included the term in German) was that it is not advisable to search for English term combinations by enclosing them in quotation marks, i.e. attempt to isolate a particular phrase, since the German noun is frequently transformed

[12] These numbers only refer to (at least) a single instance of use of the term (or a variation thereof) in the respective judgment. The number of times the term occurs in each judgment (and consequently, across judgments) has not been documented.

into a multiple-word term in English, and the way it is used within the grammatical structure of a sentence can vary greatly, e.g. "risk of his absconding", "risk that he might abscond", "danger of the applicant absconding". While making the search more challenging, this feature can also be a useful resource to a translator, who can see how the terms are used in practice as well as notice possible patterns, and transfer them to his or her own translation.

As noted, the results presented here cannot be exhaustive due to the difficulties in predicting all possible terms used in the translations. However, a few incidental discoveries could be made which can also throw light on issues an external translator may face when analysing them. When searching for combinations such as "risk" and "flight", or "danger" and "flight", "flight" was found to have been used to indicate "escape" as in "preparations for flight" but without this being adopted in a term for *Fluchtgefahr*, such as "danger of flight" or "risk of flight". (The same observation was made for "fleeing", e.g. in *Neumeister* (1968) and *Elsner (No. 1)* (2011)). Moreover, both "flight" and "fleeing" were found to be used in contexts concerning asylum seekers (e.g. *I.K.* (2013), *Bajsultanov* (2012)), i.e. in an entirely different factual situation (and therefore have not been included in the Appendix results). Finally, "fleeing" was also found in the context of a direct citation of Article 5 § 1 of the ECHR, which deals with deprivation of liberty (e.g. *Herczegfalvy* (1992), *Reinprecht* (2005)).

Competing sources

There is no freely accessible online translation of the öStPO. There is also no published translation at the time of writing (the öStGB – the Austrian Criminal Code – exists in translation (see Schloenhardt/Höpfel, 2016), but it is does not mention *Fluchtgefahr*). The publication "The Austrian Judicial System" of the Austrian Federal Ministry of Justice translates *Fluchtgefahr* as "risk of absconding" (see Federal Ministry of Justice of the Republic of Austria, 2014: 16). The European e-Justice Portal also indicates "risk of absconding" (e-Justice Portal website, 2018, "Austria".).

2.3.3.1.2. Germany

The dStPO defines *Fluchtgefahr* in the following manner:

> "(2) Ein Haftgrund besteht, wenn auf Grund bestimmter Tatsachen
>
> [...]
>
> 2. Bei Würdigung der Umstände des Einzelfalles die Gefahr besteht, daß der Beschuldigte sich dem Strafverfahren entziehen werde (Fluchtgefahr) [...]" (§ 112 Abs. 2 Z. 2)

Creifelds Rechtswörterbuch provides the following information for *Fluchtgefahr* (under the entry for *Haftbefehl)*: *"Fluchtgefahr* muss unter Würdigung aller Umstände

gerechtfertigt sein, die im Einzelfall abzuwägen sind (Bindung an Arbeitsplatz und Familie; anderseits Fluchtvorbereitungen" [emphasis in original] (2017: 632). According to Ostendorf, in Germany, around 90% of detentions have *Fluchtgefahr* as grounds, e.g. due to "auffällige Wohnungs- oder Arbeitsplatzwechsel, Verwendung falscher Namen und Papiere oder Flucht in einem früheren Verfahren, sowie Beziehungen ins Ausland" (2012: 141).

Searching HUDOC for *Fluchtgefahr* in cases against Germany (by using the filters described above) only showed results of unofficial translations of judgments into German by the German Federal Ministry of Justice (i.e. no English-language filter was available). Therefore, one can make the conclusion that the German term *Fluchtgefahr* has not been used in brackets in any of the English-language decisions.

Following review, the results were found to once again provide "danger of absconding" (7 cases), "risk of absconding" (12 cases), and "danger of flight" (2 cases), with "danger of flight" being used in more recent cases than was the case for Austria. Subsequently, various combinations of English terms were searched for (see Appendix 1, subsection A-b), with the following results: "danger of absconding" (13 cases), "risk of absconding" (19 cases), and "danger of flight" (3 cases). Once more, "risk of absconding" had the most results, and here, too, use was found to be inconsistent, with "risk of absconding" and "danger of absconding" being used interchangeably within the same judgment. One of the more interesting instances is the case of *K.-F.* (1997), which provides a translation of § 112 dStPO, the relevant part of which reads "there is a risk, in the circumstances of the case, that the suspect will evade the criminal process **(danger of absconding)**" [emphasis added], and elsewhere it refers to: "In a report drawn up at 11.30 p.m. the police stated that they strongly suspected Mr and Mrs K.-F. of rent fraud (*Einmietbetrug*) and that there was a **risk that they would abscond**" [emphasis added]. Here, the inconsistent use was more striking as the term adopted in the translation of the statutory provision was not maintained throughout the rest of the judgment.

As with the results for Austria, here, too, there was varied use with respect to the grammatical structure of a sentence. "Fleeing" and "flight" were also found in contexts which are unrelated to *Untersuchungshaft* (including Article 5 ECHR citations and asylum contexts, as above).

Another noteworthy example is the case of *Bergmann* (2016), where "absconding" was found in a translation of § 66 of the dStGB, where it is used in a different context: that of preventive detention (*Sicherungsverwahrung)*.

Morgenstern writes that in ECtHR decisions, "[d]ie Begriffe der Fluchtgefahr als *danger of absconding* und die Gefahr, der Beschuldigte werde sich dem Verfahren entziehen (*will fail to appear for trial*)" are used synonymously (2018: 177). However, performing

a cursory search for "fail to appear", "failed to appear", and "failing to appear" with a filter for Germany only came up with very few results. As has been seen, "risk of absconding" seems to be a more popular choice.

Competing sources

The translation of the dStPO by Duffett and Ebinger that is available online on the website *Gesetze im Internet* of the *Bundesministerium der Justiz und Verbraucherschutz*, and is not authoritative (but can be de facto authoritative) (see Duffett and Ebinger, website, "The German Code of Criminal Procedure"), provides the following: "considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (**risk of flight**)" [emphasis added]. The e-Justice Portal refers to "efforts to abscond" and "the danger that you might abscond" (see e-Justice Portal website, 2018, "Germany").

2.3.3.1.3. Switzerland

The *Schweizerisches juristisches Wörterbuch* provides the following definition (under the entry for *Untersuchungshaft)*:

> "Liegt vor, wenn sich der Beschuldigte durch heimlichen Ortswechsel der Strafverfolgung entzieht oder wenn ein solches Verhalten als wahrscheinlich erscheint. Die in den kantonalen Strafprozessordnungen genannten Voraussetzungen sind heute zum Teil überholt; der Entscheid ist in jedem einzelnen Fall unter Würdigung der Umstände zu fallen." (1996: 610)

Fluchtgefahr is explained as follows in Art. 221 Abs. 1 lit a sStPO:

> "1. Untersuchungs- und Sicherheitshaft sind nur zulässig, wenn die beschuldigte Person eines Verbrechens oder Vergehens dringend verdächtig ist und ernsthaft zu befürchten ist, dass sie [...]
>
> a. sich durch Flucht dem Strafverfahren oder der zu erwartenden Sanktion entzieht [...]"

There were no results for *Fluchtgefahr* (in German) for Switzerland. Searching for various term combinations, based on the ones adopted for Austria and Germany (see Appendix 1, subsection A-c), resulted in 3 cases for "danger of absconding", 2 cases for "risk of absconding", 2 cases for "risk of flight", and 1 case for "danger of flight"; here, too, there was inconsistency of use in individual judgments.

Competing sources

There is an English translation of the Swiss *Strafprozessordnung* on the website of the Swiss Government (albeit with a disclaimer that it is for information purposes only, and has no legal force) (see Swiss Government website, "Swiss Criminal Procedure Code"), which includes the following translation of the paragraph: "will evade criminal proceedings or the anticipated sanction by **absconding**" [emphasis added]. Switzerland is not featured on the e-Justice Portal.

2.3.3.1.4. Analysis

It is notable that the translations are not consistent but that there are only minor differences between the terms used most frequently, and this would not necessarily create any problems in understanding. The occasional provision of the term in the original language offers clues on how to further research the term, in order to find, e.g. more recent instances of use. This could present a difficulty, though, if a translator were to search for the term in the Swiss context first, where there are no results available.

Still, the inconsistency in use can be confusing, especially when a translator is faced with the low number of results for "risk of flight" but is also aware of the "stamp of approval" given to this option by the online translation of the dStPO (coupled with the prevalence of "risk of absconding" and not "risk/danger of flight" in the ECtHR judgments).

Here, it should also be noted that it is important to ascertain the context of the case, e.g. as in the asylum cases. As has been seen, certain cases contain the term "absconding" in the context of asylum. Moreover, the term "risk of absconding" appears in EU law, in particular in the Dublin III Regulation (see Regulation (EU) No 604/2013, Article 2(n) in both the English and German version), where it is used in the context of a "third party national or a stateless person", and is referred to in the German version of the Regulation as *Fluchtgefahr*. The European Migration Network (EMN) Glossary provides the following definition of "risk of absconding": "existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is subject to return procedures may abscond" (see European Migration Network (EMN) website, "Glossary: Risk of Absconding"), thus specifically referring to third-country nationals. The relevant national StPO *Untersuchungshaft* provisions, however, apply to both nationals and third-country nationals. Therefore, the polysemic term *Fluchtgefahr* could be used in cases that deal with all categories of nationals. It should also be noted that there is no clear definition of the term in EU law/international law (see European Council on Refugees and Exiles (ECRE) website, 2017: "CJEU"). This term already helps illustrate the necessity for a translator to work with various types of norms and to compare and contrast them, in order to be able to make an informed decision and present reasons for one's final choice.

"Absconding" is defined in *A Dictionary of Law* as "[t]he failure of a person to surrender to the custody of a court in order to avoid legal proceedings" (2015, accessed online), and in *Black's Law Dictionary* "abscond" is "to depart secretly or suddenly, esp. to avoid arrest, prosecution, or service of process" (2009: 7). It should be noted that in English, the term is used in discussions of bail, such as in this instance: "In taking instructions for the bail application, bear in mind the commonest grounds for objection to bail, i.e.: a) fear of absconding; b) fear of further offences; c) fear of interference with witnesses"

(Sprack, 2004: 2). *A Dictionary of Law* also mentions "absconding" in the context of its definition of bail: "Normally an accused is granted bail unless it is likely that he will abscond, or interfere with witnesses, or unless he is accused of murder, attempted murder, manslaughter, rape, or attempted rape and has a previous conviction for such an offence. [...]" (2015, accessed online). As a result, when deciding how to translate *Fluchtgefahr,* a translator may have to take the conditions of bail in the UK and/or US as a consideration, and explore the umbrella term and related terms, e.g. "remand" (see *A Dictionary of Law* (2015)), "custody" (see *A Dictionary of Law* (2015)), "pretrial detention" (see *Black's Dictionary of Law,* 2009: 1307), and "Kaution" (see *Schweizerisches juristisches Wörterbuch*, 1996: 318), in order to assess the comparability of the concepts for the particular target text context.

2.3.3.2. *Verdunkelungsgefahr/Verabredungsgefahr/ Kollusionsgefahr*

The *Österreichisches Rechtswörterbuch* defines *Verdunkelungsgefahr* in the following manner: "Gefahr, dass ein *Beschuldigter* beabsichtigt, die Spuren seiner Tat zu vernichten, oder *Zeugen, Sachverständige* oder Mitbeschuldigte zu beeinflussen; die Verdunkelungsgefahr ist Grund für die Verwahrungshaft und die *Untersuchungshaft* [...]" [emphases in original] (2014: 194). However, it also has an entry for *Verabredungsgefahr:* "Alte Bezeichnung für eine zu erwartende Beeinflussung von *Zeugen, Sachverständigen* oder Mitbeschuldigten durch den *Beschuldigten* selbst" (2014: 192). Nevertheless, consulting the *Wörterbuch rechtsterminologischer Unterschiede Österreich-Deutschland* (2015) shows both *Verdunkelungsgefahr* and *Verabredungs- oder Verdunkelungsgefahr* to be terms used in Austria, and that they are synonymous with the term used in Germany (which is only *Verdunkelungsgefahr*). The entry notes the following: "Der Terminus 'Verabredungsgefahr' wird im dt. Recht nicht verwendet. 'Verdunkelungsgefahr' ist gleichsam ein Überbegriff und schließt die Verabredungsgefahr mit ein" (2015: 594). As will be seen below, the term *Kollusionsgefahr* is used in Switzerland (see also Meier, 2011)

2.3.3.2.1. Austria

§ 173 Abs. 2 Z. 2 of the öStPO explains *Verdunkelungs-(Verabredungs-)Gefahr* in the following manner:

> "(2) Ein Haftgrund liegt vor, wenn auf Grund bestimmter Tatsachen die Gefahr besteht, der Beschuldigte werde auf freiem Fuß […]
>
> 2. Zeugen, Sachverständige oder Mitbeschuldigte zu beeinflussen, Spuren der Tat zu beseitigen oder sonst die Ermittlung der Wahrheit zu erschweren versuchen […]."

For the reasons mentioned earlier, i.e. the differing terms, *Verdunkelungsgefahr* and *Verabredungsgefahr* were searched for separately. The results (see Appendix 1, subsection B-a) showed that, in cases where the German term is provided in brackets, *Verdunkelungsgefahr* has been translated as "danger of suppression of evidence" (3 cases, latest one from 1985), "possibility of collusion" (1 case) and "risk of collusion" (1 case), and *Verabredungsgefahr* as "risk of collusion" (1 case) and "danger of 'suppression of evidence'" (1 case); the latter, however, includes the term in the longer phrase *Verdunkelungs- und Verabredungsgefahr*. The combination *Verabredungs- und Verdunkelungsgefahr* is translated as "danger of collusion or suppression of evidence" in 1 case (from 1971).

This particular term can be very confusing for a translator since the translation of the longer phrase could indicate that "danger of collusion" refers to *Verabredungsgefahr* and suppression of evidence to *Verdunkelungsgefahr*, or that each term (especially since the connector is "or", not "and") separately captures the meaning of what is a two-term concept in German.

Adding more terms to an English-language search revealed a preference, especially in more recent cases, for "collusion" rather than "suppression of evidence", with "danger of collusion" and "risk of collusion" both appearing in the results (see Appendix 1, subsection B-a). Here, too, there were a number of instances of inconsistency in individual judgments, with "danger" and "risk" used interchangeably.

Competing sources

The publication "The Austrian Judicial System" of the Austrian Federal Ministry of Justice translates *Verdunkelungsgefahr* (*Verabredungsgefahr* is not provided in the German version) as "risk of collusion" (see Federal Ministry of Justice of the Republic of Austria, 2014: 16), and the European e-Justice Portal provides "risk of evidence being destroyed" (see e-Justice Portal website, 2018, "Austria"), thus focussing on one aspect of this concept.

The *Wörterbuch rechtsterminologischer Unterschiede Österreich-Deutschland* provides the following translation suggestion into English (for both terms, as they are considered synonymous): "danger of collusion or suppression of evidence" (2014: 594).

The *Wörterbuch Recht*, albeit seemingly more focussed on German law, has entries for both *Verdunkelungsgefahr* and *Verabredungsgefahr*, and offers "danger of collusion, danger of suppression of evidence, danger of tampering with evidence" for the former and "danger of conspiracy" for the latter (*Wörterbuch Recht*, 2008: 255 and 251).

2.3.3.2.2. Germany

Creifelds Rechtswörterbuch provides the following information for *Verdunkelungs-gefahr* (under the entry for *Haftbefehl)*:

> "*Verdunkelungsgefahr* ist nur begründet, wenn bestimmte Tatsachen die Absicht des Beschuldigten erkennen lassen, Beweismittel zu beseitigen oder zu fälschen (Tatspuren, belastende Schriftstücke) oder *in unlauterer Weise* auf Mitbeschuldigte, Zeugen oder Sachverständige, wenn auch mittelbar, einzuwirken (Versuch, Belastungszeugen zu anderen Aussagen – nicht nur zur Zeugnisverweigerung – zu bewegen), und wenn dadurch die Wahrheitsermittlung erschwert wird." [emphases in original] (2017: 632)

The relevant section of the dStPO provides the following:

> "Ein Haftgrund besteht, wenn auf Grund bestimmter Tatsachen
>
> [...]
>
> 3. das Verhalten des Beschuldigten den dringenden Verdacht begründet, er werde
>
> a) Beweismittel vernichten, verändern, beiseite schaffen, unterdrücken oder fälschen oder
>
> b) auf Mitbeschuldigte, Zeugen oder Sachverständige in unlauterer Weise einwirken oder
>
> c) andere zu solchem Verhalten veranlassen,
>
> und wenn deshalb die Gefahr droht, daß die Ermittlung der Wahrheit erschwert werde (Verdunkelungsgefahr)." (§ 112 Abs. 2 Z. 3)

The term *Verabredungsgefahr* was also searched for, for the sake of completeness, but showed no results. *Verdunkelungsgefahr* had the following results for cases where the term was provided in German, too: "danger of collusion" (2 cases), "risk of collusion" (1 case), and "danger of suppression of evidence" (1 case, albeit from 1961).

Once the search was expanded with the list of English-language terms provided in Appendix 1, subsection B-b, "risk of collusion" (6 cases) and "danger of collusion" (4 cases) took the lead.

An example of polysemy here can be found in *Hentschel* (2017), where "suppression of evidence" is associated with *Beweismittelunterdrückung*, which is not related to the grounds for *Untersuchungshaft*. In that particular case, the German term was indicated in brackets, but where this might not be the case, the translator will be advised to review the context very carefully (especially since a case may still deal with a criminal matter, and discuss only one of the various different types of detention of an offender).

Competing sources

The online English translation of the dStPO translates this grounds as "risk of tampering with evidence" (see Duffett, Brian; Ebinger, Monica, website: "The German Code of Criminal Procedure: StPO"). A cursory search of HUDOC for "tampering with evidence"

and "tamper with evidence" shows two cases where this is used as grounds for *Untersuchungshaft* (*Eckle* (2017), *Ereren* (2014)). The e-Justice portal provides a long description: "the danger that you might impede investigation of the offence, for instance by destroying evidence or influencing witnesses" (see e-Justice Portal website, 2018, "Germany"). The *Langenscheidt Fachwörterbuch Kompakt: Recht: Englisch* provides "danger of suppression of evidence" (*Langenscheidt*, 2009: 649).

2.3.3.2.3. Switzerland

The *Schweizerisches juristisches Wörterbuch* lists *Verdunkelungs- oder Kollusionsgefahr* under the entry for *Untersuchungshaft*, where it refers to the entry for *Kollusion*. *Kollusion* is defined as:

> "'das Zusammenspielen'. Geheime, betrügerische Verabredungen; im Strafrecht die Verschleierung oder Verdunkelung, insbes. durch Absprachen des Angeschuldigten mit Zeugen, Auskunftspersonen, Sachverständigen oder Mitbeschuldigten bzw. durch das Beseitigen oder Entstellen sachlicher Beweismittel, um die Erforschung der Wahrheit zu behindern." (1996: 610)

Art. 221 Abs. 2 lit b of the sStPO describes these grounds in the following manner:

> "1. Untersuchungs- und Sicherheitshaft sind nur zulässig, wenn die beschuldigte Person eines Verbrechens oder Vergehens dringend verdächtig ist und ernsthaft zu befürchten ist, dass sie:
> [...]
> b. Personen beeinflusst oder auf Beweismittel einwirkt, um so die Wahrheitsfindung zu beeinträchtigen."

Searching for the terms *Kollusionsgefahr, Verabredungsgefahr,* and *Verdunkelungsgefahr* did not come up with any results. However, searching for the combination of English-language terms provided in Appendix 1, subsection B-c (based on the prior results for Austria and Germany) showed a clear preference for "danger of collusion" (8 cases), with "risk of collusion" appearing in 4 cases, but again, with some overlap, i.e. inconsistency of use in an individual judgment. There were no results for "suppression of evidence" (either "risk of" or "danger of"), perhaps unsurprisingly, given the term in German (i.e. *Kollusionsgefahr*) is etymologically similar to "collusion" in English.

As a result of coming across the phrase "possibility evidence may be tampered with" in conducting the English-language search (e.g. in *Huber* (1990) and *Bédat* (2016)), additional searches were conducted for a combination of those terms but with limited success (see Appendix 1, subsection B-c).

Competing sources

The English translation of the sStPO provides the following: "will **influence people or tamper with evidence** in order to compromise efforts to establish the truth" [emphasis

added], with no reference to "collusion" or "colluding" (see Swiss Government website, "Swiss Criminal Procedure Code"). This translation may help explain the existence of the phrase "evidence being tampered with or destroyed" noted above.

2.3.3.2.4. Analysis

Here, too, there was inconsistency found in the terms used within individual judgments.

"Collusion" in the *A Dictionary of Law* (2015, accessed online) is defined as "[a]ny comparing of evidence between witnesses that intentionally or accidentally results in the evidence being tainted". The dictionary has an entry for "suppression of documents" but not for "suppression of evidence". "Collusion" therefore does not seem to capture the hiding or destruction of evidence, i.e. that element of the grounds which is not related to the influence of a witness. On its part, "suppression of evidence" in *Black's Law Dictionary* is defined as "[t]he destruction of evidence or the refusal to give evidence at a criminal proceeding" (2009: 1578), and does not capture the element of influencing witnesses. As a result, it appears that for the sake of comprehensiveness, a term may have to capture both aspects.

Moreover, reviewing the results for Switzerland showed the possibility for a particular term to exist and be used in the judgments, without external translators being aware of it, and more importantly, without them having a way of locating every instance of it. Moreover, such a term may also be used in Austrian and German cases. The previous searches for Austria and Germany, however, were not expanded with these additional keywords, since this thesis is concerned with showing approaches and lessons learned, not an exhaustive list of cases.

The term *Verdunkelungsgefahr* and the translation strategies seen above demonstrate the difficulties a translator may have in deciding which translation is the most appropriate for a particular context. The present analysis does not encompass a review of the facts of each case in detail, but for a translator, it will be necessary to ascertain the specific context, i.e. whether the case involved the "suppression of evidence"/"tampering with evidence" or "influencing people"/"collusion", in order to also be able to decide which term is the most appropriate one to use, and whether the use of the original German was accurate (since it seems possible that a case may sometimes use only one of the two available terms from the Austrian context but potentially mean the other one). When a translator chooses one term over another (e.g. "tampering with evidence" over "collusion"), he or she may have to provide the relevant supporting sources, and be aware of competing ones, in order to be able to justify his or her choice. Moreover, he or she may be advised to keep a record not only of the terms and their translations (with sources, etc.) in the form of a glossary but also to document his or her past translation choices

and, where appropriate, clearly communicate these choices and their reasons to the client/commissioner, with sources where necessary, to ensure traceability.

2.3.3.3. *Tatbegehungsgefahr/Wiederholungsgefahr*

2.3.3.3.1. Austria

Tatbegehungsgefahr is defined in the *Österreichisches Rechtswörterbuch* in the following manner, with reference to §§ 170 and 173 öStPO: "Strafrecht: Gefahr, dass ein *Täter* ungeachtet des gegen ihn geführten Strafverfahrens bestimmte strafbare Handlungen gegen dasselbe Rechtsgut begehen werde" [emphasis in original] (2015: 179). The dictionary also contains an entry for *Wiederholungsgefahr,* which is listed with respect to the same legal provision (i.e. § 173 Abs. 2 öStPO) and reads as follows: "Gefahr, dass ein Beschuldigter eine weitere, gegen dasselbe Rechtsgut gerichtete strafbare Handlung, wie die ihm angelastete, begehen oder die ihm angelastete versuchte oder angedrohte Tat ausführen werde [...]" [emphasis in original] (2015: 216). It is notable that the second part of this definition seems to capture what is otherwise referred to as *Tatausführungsgefahr* (see Help.gv.at website, "Verhängung und Dauer der Untersuchungshaft"), for which there is no separate entry (see next subsection on *Tatausführungsgefahr*).

These grounds are also explained in § 173 Abs. 2 Z. 3 lit a-c öStPO as follows:

> "(2) Ein Haftgrund liegt vor, wenn auf Grund bestimmter Tatsachen die Gefahr besteht, der Beschuldigte werde auf freiem Fuß
>
> […]
>
> 3. ungeachtet des wegen einer mit mehr als sechs Monaten Freiheitsstrafe bedrohten Straftat gegen ihn geführten Strafverfahrens
>
> a. eine strafbare Handlung mit schweren Folgen begehen, die gegen dasselbe Rechtsgut gerichtet ist wie die ihm angelastete Straftat mit schweren Folgen,
>
> b. eine strafbare Handlung mit nicht bloß leichten Folgen begehen, die gegen dasselbe Rechtsgut gerichtet ist wie die ihm angelastete strafbare Handlung, wenn er entweder wegen einer solchen Straftat bereits verurteilt worden ist oder wenn ihm nunmehr wiederholte oder fortgesetzte Handlungen angelastet werden,
>
> c. eine strafbare Handlung mit einer Strafdrohung von mehr als sechsmonatiger Freiheitsstrafe begehen, die ebenso wie die ihm angelastete strafbare Handlung gegen dasselbe Rechtsgut gerichtet ist wie die Straftaten, derentwegen er bereits zweimal verurteilt worden ist, […]"

Tatbegehungsgefahr appears in only two cases and is translated as follows: „commit further offences of the same kind" (1 case: *Hesse* (2007)) und „commit another offence similar to the one of which he was suspected" (1 case: *Reinprecht* (2006)). These two

options are so similar to one another that they can be described as different executions of the same strategy.

Wiederholungsgefahr was also searched for, which revealed more possible terms in translation: "danger of recurrence" (1 case), "danger of repetition of offences" (3 cases), "risk of repetition of offences" (1 case), and "danger of committing further offences" (1 case). After expanding the search with English-language combinations, a few more cases could be found (see Appendix 1, subsection C-a).

"Risk of reoffending" (including variations thereof) was also searched for due to its presence in some of the judgments reviewed earlier, and these searches showed additional results (see Appendix 1, subsection C-a).

Finally, "recidivism" was searched for and the results were reviewed, showing no relevant cases.

Competing sources

The publication "The Austrian Judicial System" of the Austrian Federal Ministry of Justice translates the phrase *Tatbegehungs- bzw. Tatausführungsgefahr* as "risk of committing and/or perpetrating an offence" (see Federal Ministry of Justice of the Republic of Austria, 2014: 16), thus seemingly equating *Tatbegehung* with commission and *Tatausführung* with perpetration ("commit" and "perpetrate" are synonyms, see *Dictionary of Law,* 2004: 221, entry for "perpetrate"). Consulting the published translation of the Austrian Criminal Code (*Strafgesetzbuch (StGB)*) shows that, for instance, in §70 StGB and § 166 StGB, *Begehung* is translated as "commission" (the context being "commercial commission" and "commission of an offence in the family", respectively) (see Schloenhardt/Höpfel, 2016: 108 and 222), and § 69 (*öffentliche Begehung*) is translated as "commission in public" (see Schloenhardt/Höpfel, 2016: 107).

The e-Justice Portal only provides *Wiederholungsgefahr* in its German version (e-Justice Portal website, 2018, "Austria"), translating it as "risk of committing an offence".

2.3.3.3.2. Germany

Creifelds Rechtwörterbuch does not have an entry for *Tatbegehungsgefahr,* but it does have one for *Wiederholungsgefahr,* which is defined as follows for the context of *Untersuchungshaft*:

> "[...] ist Haftgrund nur bei bestimmten Sexualstraftaten (§§ 174, 174a, 176-178 StGB) und Nachstellung gem. § 238 II, III StGB; ferner in schweren Fällen bestimmter, wiederholt oder fortgesetzt begangener Delikte, wenn mehr als 1 Jahr Freiheitsstrafe zu erwarten ist: Vorbereitung einer schweren staatsgefährdenden Gewalttat (§ 89 a StGB, Rechtsstaatsgefährdung), Terrorismusfinanzierung, besonders schwerer Fall des Landfriedensbruchs, Körperverletzung, Diebstahl, Raub, Erpressung, Hehlerei, Betrug, Brandstiftung, Autostraßenraub, Betäubungsmittelstraftaten (§ 112a StPO)." (2017: 632)

In § 112a dStPO, these grounds are designated as *Wiederholungsgefahr* and its definition is omitted here due to its length, but this relevant part is included - "bestimmte Tatsachen die Gefahr begründen, daß er vor rechtskräftiger Aburteilung weitere erhebliche Straftaten gleicher Art begehen oder die Straftat fortsetzen werde". From the above excerpt it also becomes clear that these grounds are only applicable to certain types of cases (here, there is no criteria for an offence to be committed against the same *Rechtsgut*). Moreover, this represents subsidiary grounds (see Müller-Dietz, 1998: 204), and most importantly, as can be seen from § 112a Abs. 1, the suspect has to have been convicted in the past five years of a similar crime. As Müller-Dietz states, this is "eine Art präventivpolizeilicher Sicherungshaft" and "paßt [...] nicht in das System der Verfahrens- und Vollstreckungssicherung" (1998: 203). As a result, it is not directly comparable to *Tatbegehungsgefahr/Wiederholungsgefahr* as used in Austria, primarily due to the aspect of reoffending that is present here.

There were no results on HUDOC for *Tatbegehungsgefahr,* and only one for *Wiederholungsgefahr,* where the term is translated as "danger of recidivism" (*Kaya* (2007). However, this case refers to the expulsion of a third-party national with previous criminal convictions, i.e. it is not related to *Untersuchungshaft.* Where the results available in German were reviewed in their English translations, only one case contained "risk of reoffending" as a translation (explicitly referring to § 112a), with the other results not being relevant to *Untersuchungshaft.*

Subsequently, searching for a number of English-language combinations (see Appendix 1, subsection C-b) resulted in cases where the release of a convicted person was discussed (e.g. *Bergmann* (1997), § 67d StGB) but not in the context of *Untersuchungshaft.* In other instances, (see *M.* (2009)), also not related to *Untersuchungshaft,* "reoffending" was the translation provided for *Rückfallgefahr,* which, in its meaning of "Wiederholung eines früher begangenen Vergehens" (*Deutsches Rechtswörterbuch,* accessed online) is only partially equivalent, as it seems to encompass *Wiederholungsgefahr* but is wider than *Wiederholungsgefahr*. Moreover, in the same case (see *M.* (2009)), *Rückfallgefahr* is also conveyed in English as "recidivism".

Competing Sources

The English translation of § 112a dStPO does not translate *Wiederholungsgefahr* but instead provides "further grounds for arrest" (potentially underlining the above-mentioned subsidiarity of the provision), and "bestimmte Tatsachen die Gefahr begründen, daß er vor rechtskräftiger Aburteilung weitere erhebliche Straftaten gleicher Art begehen oder die Straftat fortsetzen werde" is translated as "risk that prior to final conviction he will commit further serious criminal offences of the same nature or will continue the criminal offence" (see Duffett, Brian; Ebinger, Monica, website: "The

German Code Of Criminal Procedure: StPO"). Finally, the e-Justice portal provides "the danger of a repeat offence" (see e-Justice Portal website, 2018, "Germany").

2.3.3.3.3. Switzerland

The *Schweizerisches juristisches Wörterbuch* includes the following under its entry for *Untersuchungshaft*:

> "c) Fortsetzungs- oder Wiederholungsgefahr: es ist mit hoher Wahrscheinlichkeit zu befürchten, dass der Beschuldigte mit den strafbaren Handlungen, die zur Eröffnung der Untersuchung führten, fortfährt oder dass er eine angedrohte Handlung ausführt. In solchen Fällen wird eine Präventivhaft angeordnet." (1996: 610).

This definition also subsumes the provision of Art. 221 Abs. 2, which will be reviewed below, into this entry.

In Art. 221 of the sStPO, the grounds are defined as:

> "1. Untersuchungs- und Sicherheitshaft sind nur zulässig, wenn die beschuldigte Person eines Verbrechens oder Vergehens dringend verdächtig ist und ernsthaft zu befürchten ist, dass sie:
>
> [...]
> c. durch schwere Verbrechen oder Vergehen die Sicherheit anderer erheblich gefährdet, nachdem sie bereits früher gleichartige Straftaten verübt hat."

This definition, too, refers to past offending.

There were no English-language results when searching for the term *Wiederholungsgefahr* in German (either with the term appearing directly in the English-language judgment, and there was only one case where the term was found in a German-language decision, which was not translated into English). Searching for certain English-language combinations did not prove very fruitful, either, with the only results being "risk of repetition of offences" and "risk of committing further offences" (both found in the same case).

Competing Sources

The English translation of the sStPO provides the following translation: "will pose a considerable risk to the safety of others by committing serious felonies or misdemeanours as he or she has already committed similar offences" (see Swiss Government website, "Swiss Criminal Procedure Code").

2.3.3.3.4. Analysis

In this particular situation, a translator will have to make a decision based on the contents of the concepts and decide how much information it is necessary to provide. For instance, the Austrian context specifically refers to the possible commission of an offence against

the same *Rechtsgut*, and appears to consider prospective reoffending (i.e. unlike the German or Swiss provisions, which refer to past offences; yet they also both speak of a *Wiederholungsgefahr*). It is also possible that in practice, the grounds in Austria are applied in practice in a manner similar to that in Germany. As a result, while there is similarity between the concepts, they cannot be considered completely identical. Nevertheless, common translation strategies could be observed, e.g. "risk of reoffending" between Austria and Germany, and "risk of committing further offences" between Austria and Switzerland. To complicate matters further, the *Wörterbuch rechtsterminologischer Unterschiede Österreich-Deutschland* considers *Wiederholungsgefahr* and *Tatbegehungsgefahr* synonymous (and proposes the translation of "danger of recidivism" (2015: 554)). However, "recidivism", as defined by *A Dictionary of Law* (2015, accessed online), is "[a]n offender's relapse into crime after serving a sentence, especially when this proves habitual", and does not seem appropriate for the Austrian use of *Wiederholungsgefahr*.

The translator will have to decide how to distinguish the concepts from one another, where that is necessary, and may have to specifically reject some of these translation. Once more, this approach will benefit from making a record of one's choices and being able to present one's decisions to a potential client/commissioner, including drawing attention to inconsistent use where needed.

2.3.3.4. *Tatausführungsgefahr*

2.3.3.4.1. Austria

Tatausführungsgefahr does not have its own entry in the *Österreichisches Rechtswörterbuch* (2015), which does not even list this as grounds under its entry for *Untersuchungshaft.*

It is described in § 173 Abs. 2 Z. 4 lit d in the following manner:

> "(2) Ein Haftgrund liegt vor, wenn auf Grund bestimmter Tatsachen die Gefahr besteht, der Beschuldigte werde auf freiem Fuß
>
> […]
>
> d. die ihm angelastete versuchte oder angedrohte Tat (§ 74 Abs. 1 Z 5 StGB) ausführen."

There were no results for *Tatausführungsgefahr* on HUDOC for Austria.

Competing sources

As has been seen, the publication "The Austrian Judicial System" of the Austrian Federal Ministry of Justice translates the combination *Tatbegehungs- bzw. Tatausführungsgefahr* as "risk of committing and/or perpetrating an offence" (see Federal Ministry of Justice

of the Republic of Austria, 2014: 16), thus seemingly equating *Tatbegehung* with commission and *Tatausführung* with perpetration ("commit" and "perpetrate" are synonyms; see *Dictionary of Law,* 2004: 221, entry for "perpetrate"). However, in the published translation of the Austrian Criminal Code (*Strafgesetzbuch (StGB*)), in § 12 StGB *Ausführung* is translated as "commission" (the context relating to *Täter*) and in § 15 Abs. 2, as "completion" (the context is *Strafbarkeit des Versuches*) (see Schloenhardt/Höpfel, 2016: 27 - 29).

The e-Justice Portal does not refer to these grounds.

2.3.3.4.2. Germany

The dStPO describes these grounds in § 112a in the manner already seen above (in the subsection on *Tatbegehungsgefahr/Wiederholungsgefahr*). *Creifelds Rechtswörterbuch* does not have an entry for *Tatausführungsgefahr.*

There were no results for *Tatausführungsgefahr* found on HUDOC, possibly because it is subsumed within *Wiederholungsgefahr* ("oder die Straftat fortsetzen werde"). There are only four results for *Tatausführung*, where *Tatausführung* has been translated as e.g. "execution of the crime" (see *Gäfgen* (2010)), but not in the context of *Untersuchungshaft*.

Competing sources

As has been seen, the relevant part of the provision has been translated as "risk that prior to final conviction he will commit further serious criminal offences of the same nature or **will continue the criminal offence**" [emphasis added] (see Duffett, Brian; Ebinger, Monica, website: "The German Code of Criminal Procedure: StPO").

2.3.3.4.3. Switzerland

The sStPO in Art. 221 Abs. 2 provides: "Haft ist auch zulässig, wenn ernsthaft zu befürchten ist, eine Person werde ihre Drohung, ein schweres Verbrechen auszuführen, wahrmachen." As has been seen, the *Schweizerisches juristisches Rechtswörterbuch* refers to these grounds as a *Fortsetzungsgefahr* (1996: 610).

However, there were no results found on HUDOC for either *Fortsetzungsgefahr* or *Tatausführungsgefahr.*

Competing sources

The relevant Art. 221 Abs. 2 is translated as follows in the online version of the sStPO: "Detention is also permitted if there is serious concern that a person will carry out a threat

to commit a serious felony" (see Swiss Government website, "Swiss Criminal Procedure Code").

2.3.3.4.4. Analysis

This particular example shows that not all terms can be located in HUDOC by simply entering the German language term. The fact that there is no indication of any possible translation of the term into English (and with that, the possibility that there might not be any cases that contain this term) would make any further searches time-consuming. In such cases, a translator may have to check other sources. Nevertheless, he or she will still benefit from taking into account the strategies used for the translation of neighbouring terms (all the while keeping in mind their definitions in monolingual dictionaries, and descriptions/definitions in legal provisions), such as in the case of *Tatbegehungsgefahr* here (see section on *Wiederholungsgefahr*), in order to delimit the concept and find suggestions that can be used to adjust or refine the translations found online (which may not always be accurate despite their authoritativeness, such as when "commit" and "perpetrate" are used for two different concepts, as has been seen above).

3. Chapter 3: Translation of German-language legal terminology in the judgments of the CJEU

In the present Chapter, the judgments of the Court of Justice of the European Union (CJEU) will be analysed. As in the analysis of the judgments of the ECtHR, firstly, the role of the Court and its competences are presented. This is followed by a review of its language policies and examples from selected judgments.

3.1. Competences and role of the CJEU

The Court of Justice of the European Union is, as the name suggests, the court of the European Union, which ensures the consistent and uniform application of EU law (see Article 19(1) TEU (Treaty on European Union)). As such, it has existed since 1952, founded by the precursor organisation of the EU, the European Coal and Steel Community, at a time when it had considerably fewer Member States and competences than today (see Barnard and Peers, 2017: 14). At the start, the core competences were almost exclusively focused on the so-called four freedoms: "the free movement of goods, persons, capital, and services", as well as competition law and state aid regulations (see Barnard and Peers, 2017: 2). The focus on those aspects served primarily to support and encourage the basic idea behind the Union and its goal of preventing devastating wars (as Europe had experienced in the years prior to its foundation) by means of a closer economic link between the Member States (see Barnard and Peers, 2017: 12). Since the EU's conception, however, the scope of EU law has increasingly extended to social and political aspects and environmental issues, corresponding to the "spillover" effect expected by Jean Monnet, one of the EU's founding fathers (Barnard and Peers, 2017: 3). As Weiler notes with respect to the development of the Court over the years, it is

> "(n)ot a limited jurisdiction over some technical areas but a complex polity with jurisdiction ranging from human rights to monetary policy to difficult aspects of immigration and even citizenship... And then the Court itself: no longer an instance for dispute settlement, but a judicial giant which has successfully positioned itself at the constitutional centre of Europe, a Europe in which national legal orders suddenly feel under threat." (2001: 217-218)

As a result, the Court has become more than just a guardian of the implementation of the law, but also an agent ultimately responsible for active integration: "Constitutionalization not only positioned the courts as primary arenas for negative integration; it made them supervisory of positive integration, and creators of a growing corpus of rights which the Court found in the Treaty itself" (Sweet, 2004: 238-239).

Therefore, this development demonstrates the increasing importance of the CJEU for European integration, and this effect can be seen as necessary for the further harmonisation of the EU. Craig and de Búrca also point out the important role the Court

has played over the years, especially in developing principles of a constitutional nature as well as other principles that have been crucial to EU law (e.g. direct effect, supremacy, state liability in damages) and facilitating the creation of the internal market (see Craig and de Búrca, 2015: 63). As such, the Court is an active actor, and not just a passive institution (i.e. it is an "activist" court); for instance, there are cases where it has been influenced by non-legal arguments made by a party, such as the financial impact of a provision (e.g. *Kalanke v Freie Hansestadt Bremen (C-450/93)*) (see Craig and de Búrca, 2015: 63).

Nevertheless, this development is also one of the reasons for some of the criticism directed at the EU and the Court. One need only look at comments like the one by a former judge of the German Constitutional Court (*Bundesverfassungsgericht*), Udo Steiner ("Längst regieren europäische Richter die Deutschen" (see Steiner, website, 2003, Nürnberger Zeitung (NZ)), the study of Sir Patrick Neill on "judicial activism" (see Neill, 1995), or the discussions of the threat to Parliamentary sovereignty that the EU presents/presented to the UK (especially in the context of the results of the Brexit referendum) (see Gee, Graham, and Trybus, 2016), in order to understand the full scope of displeasure – justified or not – with the invasiveness of EU law. Due to the influence that EU law has had on the national legislation and case law of its Member States, there are even debates whether it is to be classified as international law or rather as a law sui generis (Barnard and Peers, 2017: 4), and Advocate General Jacobs has acknowledged a "constitutional" role on the part of the Court (see Jacobs, 1992: 25, 32).

Firstly, the structure of the Court should be clarified. Section 5 of Chapter 1 of the TFEU (Treaty on the Functioning of the European Union) refers to "Court of Justice of the European Union". This includes not only the Court of Justice but also the General Court (see Article 254 TFEU). The Court's jurisdiction is governed by Article 19 TEU and Articles 251-281 TFEU. It is a court of last instance, i.e. there is no appeal against its decisions (see Craig and de Búrca, 2016: 62), even though there are certain exceptions to this (see, e.g. Statute of the Court of Justice of the European Union, Article 56).

Prior to the Nice Treaty of 2001, the General Court, which used to be called Court of First Instance (CFI), was not thought of as a component part of the Court but only as "attached" to it (see Craig and de Búrca, 2015: 58-59), and its existence was motivated by the desire to ease the burden of the Court's workload. The competences of this General Court are provided in Article 256 TFEU. Pursuant to Article 256(3) TFEU, the General Court has jurisdiction not only over most direct actions but also over certain preliminary reference rulings (which was not the case prior to the Nice Treaty, with these being solely limited to the Court of Justice). Its decisions can be appealed to the Court of Justice but on questions of law only. The judgments of the General Court are also available on Curia, the Court's website and database. Specialised courts are also possible (see Article 257

TFEU) but are not of interest to the present thesis due to their exceptionality: "The only specialised court to have been created so far is the Civil Service Tribunal. Between 2005 and 2016, this court dealt with cases involving the EU institutions and its employees. In 2016, this court was dissolved and its competences transferred back to the General Court as part of the reform of the judicial architecture of the EU" (see EUR-LEX website, "Specialised courts").

As the above paragraph has hinted, there are two possibilities for a case to be heard before the CJEU: direct actions or references for a preliminary ruling (see Articles 258 - 260 TFEU). There are five types of direct actions: the infringement proceedings (initiated by a Member State or the European Commission against a Member State) (Articles 258 - 260 TFEU), action for annulment (Article 263 - 264, TFEU), action for failure to act (Articles 265 - 266 TFEU), action for damages resulting from an institution's unlawful act (Article 268-360 TFEU), and the request for an advisory opinion from the CJEU (Article 118(11) TFEU) (see Cuyvers, 2017: 264). The first three have the goal of obtaining a declaration from the Court that a Member State or an EU institution has breached EU law, whereas the action for damages is aimed at obtaining compensation for the harmful effects of an EU action (see Barnard and Peers, 2017: 268). An applicant may only use these grounds if he or she has standing (*locus standi*) (see Article 263 TFEU). As noted by Cuyvers, "[t]he limited availability of direct actions further emphasizes the point already made [...], namely the crucial role played by national courts in the interpretation and application of EU law. It also helps to explain the central importance of the preliminary reference procedure [...]" (2017: 254). This only pertains to the standing of individuals; there are groups of "privileged" applicants, such as Member States, the European Parliament, the European Council, the Council, the Commission which do not have to prove *locus standi* (see Article 263, TFEU) (see also Eliantonio et al., 2012: 27).

The reference for a preliminary ruling, on the other hand, is in the hands of the national courts, and individuals themselves cannot appeal to the Court (Craig and de Búrca, 2015: 464). The obligation to refer arises out of the duty of the national courts to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Article 19 TEU). Pursuant to Article 267(3) TFEU, Member States are under a duty to refer cases to the CJEU where a question on the application of EU law or national law in connection with EU law is unclear and the respective case has reached its last instance ("against whose decisions there is no judicial remedy under national law"; this does not mean that the highest court in the respective state needs to have made a ruling, but rather that all possible instances have been exhausted, much in the same way that a case may be deemed admissible before the ECtHR). However, the Court has stated its opposition to limiting this use of preliminary rulings in past (e.g. "Report by the Working

Party on the Future of the European Communities' Court System", 2000: 12), and, according to Craig and de Búrca, in practice, it is common for cases to come from lower-level courts (see Craig and de Búrca, 2015: 503). In its judgments, the CJEU deals with the points of law referred to it, without adjudicating on the facts.

The judgments which interpret and explain EU law are binding for the domestic court which has made the reference as well as for the other national courts of the EU Member States (see EUR-LEX website, "Preliminary ruling proceedings – recommendations to national courts").

The CJEU consists of 28 judges (one judge per EU Member State), appointed for a term of six years (with reappointment possible), and 11 Advocates-Generals, who prepare impartial and independent opinions (called "reasoned submissions" in Article 252 TFEU) for those cases where new legal issues arise (see Statute of the Court of Justice of the European Union, Article 20) (see Craig and de Búrca, 2015: 61). These opinions, which are essentially recommendations about what the Court's decision should be, are not binding but influential (see Craig and de Búrca, 2015: 61). The judgments are usually handed down in a Chamber of three to five judges, even though it is possible that the Court sits as a so-called "full Court", where a case is "regarded as exceptionally important, or where the subject matter so warrants [...]", or in the Grand Chamber where one of the parties to the proceedings is a Member State or an institution as well as in "particularly complex or important cases" (Craig and de Búrca, 2015: 58). The General Court consists of "at least" one judge per Member State (Article 19(2) TEU), i.e. it has more judges than the CJEU, appointed for a term of six years, and who can also be reappointed. Currently, it has 47 judges (to be increased to 56 in 2019, i.e. 2 judges from each country (see European Union website, "Court of Justice of the European Union (CJEU)") and has no separate Advocate-Generals. The General Court

> "sits in Chambers of three and five judges, or sometimes as a single judge, and approximately 75 per cent of cases are heard by Chambers of three judges. It may also sit as a Grand Chamber or full Court when the complexity or importance of the case demands it." (Craig and de Búrca, 2015: 59)

The proceedings before the Court are conducted in two stages: a written one, where all relevant documents are being provided to the parties to the proceedings, and an oral one, where a designated judge-rapporteur presents the facts of the case ("the report of the hearing") as well as the parties' arguments to the Court (see Craig and de Búrca, 2015: 62). At this stage, the legal counsel of the parties may "make oral submissions to the Court, which can question them" (see Craig and de Búrca, 2015: 62).

As a result of the above considerations, the addressees of the judgments can be postulated to be the national courts of the EU's Member States, nationals of the EU Member States, and the members of the legal professions.

Similarly to the judgments of the ECtHR, the judgments of the CJEU begin with a summary of the legal framework of the case in question. This is followed by a presentation of the national law relevant to the case, a presentation of the initial dispute and the facts of the case in question, and finally, an analysis of the case, including the ruling with respect to the costs. By virtue of their very nature, these judgments are a consideration of the laws of a Member State in the context of the relevant EU law.

Craig and de Búrca explain that the style of the judgments (of both the CJEU and the General Court) can be confusing as the judges work in a collegiate manner, and as a result, only a single, often ambiguous, judgment is prepared and published, without any dissenting or concurring opinions. A lawyer-linguist quoted in Künnecke observes that the judgment is kept

> "at a sufficiently high level of abstraction to enable it to justify its decision without giving any hostages to fortune. There are several aspects to this. The language of the Court is surprisingly restricted in vocabulary. The fewer variables, the fewer the misunderstandings. Judgments are built by small steps so that the lawyer linguist following the argument, and supported by revisers, is less likely to be led astray. There are protocols to establish communications between the 'lead' translating Unit (English when English is the language of the case, for instance) and particular Chambers, usually those which share that language. Thus, if on translating or revising a judgment drafted by the UK or Irish Chambers, in French, an EN lawyer-linguist detects a difficulty, such as an ambiguity or an expression which, on translation, is going to have to cease being ambiguous, say, then consultation with the Chambers might give one of several solutions: clarification of the point intended ('what I had in mind in EN when I drafted this in FR was…'), in which case that is what then appears in EN; explanation as above ('what I had in mind in EN when I drafted this in FR was…'), which might prompt the lawyer-linguist to suggest that the FR is not appropriate to convey the meaning or bear the translation, in which case the FR original might be adjusted to take account of the infelicity; or something else." (Künnecke, 2013: 252)

This process of cooperation and adjustment to both texts in order to find the best possible solution in all languages is crucial, and has already been observed in the workflow of the ECtHR. (One should remember, however, that the ECtHR deals with considerably more cases per year, and only publishes a small number of the total amount.)

The opinions of the Advocate General, on the other hand, do not have to contend with the same issues. As a lawyer-linguist explains in Künnecke:

> "The Advocate General is traditionally able to draft in his or her own language. Also, the task of the Advocate General is to explore all the aspects of the case and to propose a form of decision to the Court. The form and style is thus very different and, from a linguistic point of view raises many more challenges for the lawyer-linguist." (Künnecke, 2013: 252)

The fact that Advocates General are free to draft their opinions in their own language also means that there are no "vanishing sources" (see Künnecke, 2013: 248, and Kjær, 1999: 63-79) here, i.e. instances of no clear demarcation of source and target text, and where no text takes precedence over the other.

Craig and de Búrca note that the multilingualism of the Court can cause difficulties, in particular due to the large number of languages used in the Court (2015: 62). However, this is not the only issue when trying to capture all the elements involved in an analysis of the judgments. As Künnecke observes: "It soon becomes evident that the analysis of the legal translation experience in the EU is spread across different disciplines: comparative law, European Union law and Translation Studies" (2013: 244).

3.2. The translation workflow

Before directly addressing the translation process at the CJEU, it should first be mentioned how multilingualism in the EU functions in practice. The EU currently has 24 official languages since each official language of a Member State is considered an official language of the EU (see European Parliament, "Multilingualism in the European Parliament"). In the last 20 years, the number of official languages of the EU has increased considerably as a result of its enlargement. As a consequence, not all EU documents, and in any case not all judgments are translated into every official language (see Court of Justice of the European Union website, "Role of legal translation"). As mentioned earlier, Garre considers the translation of judgments into all languages of the Member States an important advantage to the approach of the EU, in particular in comparison to that of the ECtHR (1999: 37), but this translation is not executed in practice.

At the level of legislation, all language versions of European laws are equally authentic (see Künnecke, 2013: 248). The Court's approach to interpretation in general is one focussed primarily on the purpose that the specific law seeks to achieve, as interpreted by the Court (albeit very rarely with a focus on the *travaux préparatoires*), i.e. it has a purposive/teleological approach (see Craig and de Búrca, 64). Kocbek, relying on a description provided by Derlén, even equates this practice with the clear definition of the *skopos* in the functional approach in translation (see Kocbek, 2014: 130). The interpretation of the legislation in cases of discrepancy between the terms used in the different language versions is well-researched, not least because the Court has explicitly referred to these issues of interpretation and their legal significance. In *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (C-283/81*) (1982), the Court stated the following:

> "To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. [...]
>
> Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives

> thereof and to the state of evolution at the date on which the provision in question is to be applied." (paras. 18 and 20)

This thesis does not focus on the details and nuances of the translation of EU legislation. However, a few related points should be addressed. Firstly, the above statement from *CILFIT* has put a burden on national judges to compare the language versions of the EU legislation as part of the process of determining whether a provision is sufficiently clear or whether it needs to be referred to the CJEU. This is a well-researched topic (e.g. see Derlén, 2009); suffice it to say that the translation of terminology is carried out in the context of a complex web of relationships where language and law are enmeshed. Here, it should also be noted that the Commission and the Council of the EU have trained translators (unlike the Court, which has lawyer-linguists) who deal with the special status of EU terminology at the legislative level, and that European legislation has a normative status. In the judgments of the CJEU, on the other hand, it is not only EU legislation that is mentioned, but also national legal concepts from individual Member States. This co-existence of both terminological "domains" could lead to problems for the external translator due to the potential need to differentiate between them (see McAuliffe, 2012: 212).

The language of the proceedings before the CJEU is decided individually for each action (see Court of Justice of the European Union website, "Language arrangements"). In direct action cases, the claimant can choose one of the official languages of the EU. For references for a preliminary ruling, a different principle applies:

> "In preliminary ruling cases, the language of the case is always the language used in the respective national proceedings in which the language has been determined according to national provisions. The language of the case is used throughout the proceedings, and as for the judgement, only the version written in the language of the case is authentic." (Liiri, "Legal translation at the Court of Justice of the European Communities")

This means that almost all documents pertaining to judgments dealing with references regarding Austrian or German law are originally presented in German before the Court, and that all English versions – and not only the terms contained therein, but also the complete judgments – are translations. Many of those English translations contain a reference to being a "provisional text". The language of the proceedings is indicated in a footnote: e.g. "Language of the case: German". The opinions of the Advocates-General, on the other hand, contain references such as "Originally in: Spanish".

The phrase "language of the case", however, does not indicate the language in which the deliberations of the judge have been formulated. Thus, the judgment of a case where German is the language of the case, i.e. where the documents of the case are also very likely to be in German, does not need to have been drafted in German. Unlike the European Commission, where English is becoming more dominant in the initial drafting of legislation (being used in 81% of the cases, with French in 4.2%, and German, in 2%)

(see European Commission and Directorate-General for Translation, 2014: 7), for the Court's internal language, French has remained dominant (see Cohen, 2016: 502; Oddone, 2006: 199). Cohen has spoken with judges at the CJEU and cites the following statement: "everything is in French, it's the internal language and all member states accept it as a customary constitutional rule" (translation by Cohen) (2016: 502). This development can be explained by the history of the EU (with France, Belgium, and Luxembourg as founding states) and the status of the French language as a *lingua franca*. Cohen also offers an overview of the political reasons for French dominating over German and English: with the problem for German being image issues following World War II, and for English the relatively late entry of the United Kingdom and Ireland, including the lack of influence of the common law (2016: 513).

According to Megale (2008: 26), the principle of confidentiality during the deliberations of the Court (see also Article 32 of the Rules of Procedure of the Court) does not permit for translators to be present during the last phase of deliberations. This means that in cases where German is the language of the proceedings, the documents are initially presented in German, then translated internally into French, and those become the basis for the judgment. The judgment is then (according to Megale, always (2008: 26)) initially (i.e. as a first version) drafted in French (but in what has been called "Court French" (see McAuliffe, 2012: 203), with the drafters often being non-native speakers, and the language used deliberately in a manner that facilitates the translation process), and then finally translated into German (this is then the authentic version). Therefore, a judgment is first drafted in French, with the "authentic" version actually being a translation. Künnecke provides a quote from a lawyer-linguist, according to whom, in the translation process from French into the other language, in this case German:

> "[...] the DE Unit [*in this case, the language of the case is German, and thus the German version would be the authentic version; comment added*], will translate early and with particular attention to the intention of the Chambers involved in the case and which drafted the judgment, checking with them and in particular with German-speaking Chambers [*those Chambers whose Members are the German-speaking members of the Court; comment added*] if necessary should there be any difficulties in the way such as: ambiguities, difficulty of conveying concepts, and danger of misconstruing the intention of judges." (2013: 251)

This judgment is thus finally checked by a judge of the Court from the Member State where this language is spoken (see Megale, 2008: 26; Künnecke, 2013: 251), something which also serves as a safety net for translators who are working into other languages and who may need assistance when translating into those other languages. The French version is simultaneously translated into other official languages (with feedback from the "authentic version" lawyer-linguists), one of which could be English. It is not clear whether the "authentic" version can sometimes serve as the basis for translation into other languages, or whether it is always the French version that is translated into all other versions, including the "authentic" one, with the translation into the "language of the

case" simply being a little earlier than the others (perhaps this could be the case in pivot language scenarios). What is clear, though, is that in the majority of cases, there is no direct translation from German into English but that German legal terms are nevertheless translated with the possible assistance of German-speaking lawyer-linguists.

The translations are internally prepared in the department Directorate-General for Translation by "lawyer-linguists" (see Cohen, 2016: 511). These are lawyers who have a degree in law in the Member State in the language into which they are translating; moreover, they must know at least two other official EU languages (see Court of Justice of the European Union website, "How to become a lawyer-linguist at the Court of Justice?"). Further recruitment documents explain that English-speaking lawyer-linguists must also know French, which, in light of the above observations about the internal language of the Court, does not appear surprising (see Court of Justice of the European Union website, "Working as an English-language lawyer-linguist"). Künnecke quotes a statement by a former lawyer-linguist at the CJEU who outlines the training of EU translators in the following manner:

> "*Training in the EU for translators and lawyer-linguists is carried out on the basis of employing someone who can 'hit the ground running', subject to 9 months' probation and the constant feedback via revision from senior colleagues. The modern approach to structured training in the Court concentrates on updating on subject-matter (tax, VAT, CAP, changes in legal terminology or new principles) rather than on any tutored guidance on translation proper.*" [emphasis in original] (2013: 249)

McAuliffe presents the statement of a different interviewee, who remarks that lawyer-linguists are

> "lawyers who are more interested in the *theoretical* aspect of law than in the practice of law. Those who practice law actually deal less with concepts of law and more with business and administration – in applying the rules - and rarely deal with any *real* [conceptual] legal problems [interviewee's emphasis]." (2012: 212)

What follows is a discussion of issues that can arise in connection with English as a target language. In theory, a translation into any language could be influenced to a large extent by legal systems which are historically associated or closely linked to that language. Here, the relevant legal system would be the common law of the Anglo-American legal system. As Robertson writes, EU English is "essentially a new genre" with a "civil law foundation" and certain elements of the common law tradition (with a focus on precedents and the obiter dicta of the Advocates-General) (see Robertson, 2012: 1237). This also means that a term that is translated into English may have a certain significance in the common law tradition, but this would not be the case as a rule, and therefore, an analysis of the circumstances and context on a case-by-case basis would be necessary. On the other hand, Craig and de Búrca refer to the Court in the following manner: "while generally building on its case law, [the CJEU] does not consider itself bound by a strict

system of precedent"; where it deviates from previously decided cases, it may not always refer to those particular cases in an explicit manner (2015: 62).

Here, there is a need to briefly return to the topic of EU legislation, but from the perspective of the work of the lawyer-linguists. Naturally, the lawyer-linguists have to be aware of terms as they used in the EU legislation, especially with regard to those terms which are already used in national legal systems (see Künnecke, 2013: 257). In particular, those cases where semantic expansion or restriction has been employed, i.e. the meaning of an already existing term in the source language has been expanded or restricted, respectively, are of particular interest. An example would be a term such as "consumer", which is a lot narrower in the Consumer Sales Directive 99/44 than in national law (see Künnecke, 2013: 256, and Directive 1999/44/EC), or *Kreditinstitut* which is a lot narrower in EU law (see *Regulation (EU) No 575/2013 (Capital Requirements Regulation),* Article 4(1)) than in the Austrian *Bankwesengesetz* (see § 1 *Bankwesengesetz*). An external translator looking to "borrow" the translation strategies of those terms which exist in the legal system of their source language text should at least be aware of the difference of scope prior to adopting the exact same translation (or risk adding a dimension that is not there in the original). This is especially problematic where there is no standardised or established translation of the national legal term, or where the recipients of the translation service may not be aware of the nuances in context, and as a result, perceive a term on the basis of its linguistic designation and not its conceptual meaning, and end up locating an inappropriate definition or legal norm.

There is the need to at least consider the fact that functional and not formal equivalence may have been sought for when translating the terms in the judgments. Künnecke refers to the following information provided by a lawyer-linguist: "Sometimes the best tenet of legal translation to bear in mind is that the requirement in such cases is for functional rather than formal equivalence: simple lawyer-like language to express the concept rather than to look for a direct counterpart" (2013: 253-254). This is in line with the earlier observation that lawyer-linguists' training appears to focus on legal matters rather than translation strategies, and seems to prioritise an approach which is more influenced by comparative law considerations. However, the approach outlined is still marked by a translational consideration. As a result of the functional equivalence approach, a translator would not look for a directly similar institution in the target culture but search fro a designation to convey the functions of the institution (which actually differs from the previous definitions of functional equivalence provided in Chapter 1, and is more reminiscent of functional equivalence via detailed description (*Umschreibung)*). Nevertheless, it appears that the strategies in finding appropriate solutions are not entirely streamlined in the Court's translation service and that ad hoc solutions may be adopted.

Unlike (elements of the) ECtHR procedure, the documents presented before the Court, due to confidentiality, remain either in-house, translated by lawyer-linguists, or are outsourced to freelancers (see Court of Justice of the European Union website, "Free-lancers"), but are not entrusted to the parties.

> "The European Union institutions are involved in various capacities in proceedings before the Court of Justice, in such cases the General Court or the Civil Service Tribunal and the translation of the parties' pleadings can under no circumstances be entrusted to one of the parties, if the courts' obligation of confidentiality is not to be jeopardised and the fundamental principle of equality of the parties is not to be infringed." (see Court of Justice of the European Union, 2010, Annex: 2)

With respect to resources, internally, lawyer-linguists makes use of CuriaTerm, an

> "internal terminological database for lawyer-linguists in the Court which assists in the management, sharing and collaboration of terminology. It stores the results of research carried out in the Court in the translation processes. The database aims to encourage the sharing of solutions and the harmonization of terminology, and is updated daily. CuriaTerm currently contains 34,700 terminological records and 111,362 terms, and covers the 23 official languages of the European Union. The majority of entries are national legal concepts." (Künnecke, 2013: 259)

Since ca. 2016, some of these terms have also been available on the EU terminology database IATE (Inter-Active Terminology for Europe), which "was created by fusing the earlier term banks of key institutions of the EU into a single entity" (Mattila, 2012: 38). However, there does not seem to be a way to search IATE (e.g. via a particular filter in its search function) for CuriaTerm terms only. As to other sources, the comparative multilingual legal vocabulary (VJM, or *Vocabulaire Juridique multilingue comparé*) collection (a collection of terminological records compiled by lawyer-linguists at the CJEU on the basis of comparative law research) (see Terminology Coordination Unit website, "Comparative multilingual legal vocabulary (VJM)") is also available on IATE, covering the topics of immigration and family law. The VJM has two lists of terms available (in a pdf format), and, at least where the family law domain is concerned, it appears that this list contains many of the terms that appear on IATE as originating from CuriaTerm. However, it is clear that the VJM does not contain all CuriaTerm entries (the family law list contains some 404 concepts, the immigration law – 243 concepts, while CuriaTerm, as noted by Künnecke, exceeded 34,000 terminological records and 111,000 terms in 2013 only (2013: 259)). Therefore, external translators who do not have access to CuriaTerm can only search for terms in the judgments of the Court on Curia. It should also be noted that the terminological entries in IATE can be quite confusing, with some languages having more fields and therefore information than others, and include unsubstantiated remarks (e.g. "Origin of the reference: Term commonly used in CZ" in entry for "anonymní porod" (see IATE website, "Anonymní porod"), without the provision of any authoritative sources or sources that can be reviewed. Mattila notes in this respect that "[m]any terms are still lacking in certain professional sectors,

particularly in minor languages. Furthermore, the quality of equivalents and explanation varies. Therefore, use of the term bank requires common sense and critical thinking" (2012: 38).

3.3. Examples from judgments

As an illustration of some possible translation strategies, this section will focus on the German-language terms *Steuer, Gebühr,* and *Beitrag* (with a particular focus on the last two) into English in selected judgments of the CJEU. The findings are not exhaustive but they illuminate aspects that an external translator will have to address when reviewing these judgments for suggestions for the translation of specific terms as well as when he or she adopts them in a translation in a different context.

3.3.1. Criteria for the selection

It would be informing to analyse criminal law (procedure) terms here, too, in order to provide a direct comparison with the ECtHR cases. However, since the extension of the EU's competences to such matters has only occurred relatively recently (see Era website, "Understanding the role of the European Court of Justice in criminal matters"), and the original core competences were directed towards facilitating economic exchange between Member States, tax law has been selected as the specific legal area for examination with respect to the CJEU. This focus is also supported by the statistics of the Court: for instance, new actions on taxation were 71 in 2016 (68 references for a preliminary ruling, and 3 direct actions) (see Court of Justice of the European Union Annual Report, 2016: 89), and 49 in 2015 (see Court of Justice of the European Union Annual Report, 2015: 77). Moreover, the number of taxation cases completed by judgments, by opinions or by orders involving a judicial determination for 2012, 2013, 2014, 2015, and 2016 are 64, 74, 52, 55, and 41, respectively (see Court of Justice of the European Union Annual Report, 2016: 96). In some years, taxation matters represent the highest number of all subject matter subdivisions (e.g. 2015; see Court of Justice of the European Union Annual Report 2015: 84).

The selection is also motivated by the fact that in finance, there is a differentiation between the terms *Steuern*, *Gebühren,* and *Beiträge*. The *Wörterbuch terminologischer Unterschiede Österreich-Deutschland* (2015: 16) provides the following note in the definition of *Abgabenhinterziehung*, applicable to both Austria and Germany: "In der Finanzwissenschaft wird 'Abgaben' als Oberbegriff verwendet und innerhalb der Abgaben zwischen 'Steuern', 'Beiträgen' und 'Gebühren' unterschieden." Here, it should be noted that Austrian tax law is derived from the German, and was kept with

small amendments in Austria following World War II (a so-called *Austrifizierung* of German law) (see Doralt, 2017: 1), and therefore, it is expected for these concepts to be very similar in these legal systems.

A major difficulty during the running of the search was that the search form/function of Curia (the Court's website) did not index all results (or sometimes, any), and, as a result, searches had to be carried out via the Google search engine, and by limiting the results by website and by adding the phrase "Verfahrenssprache: Deutsch" in quotation marks. It is acknowledged that the addition of this phrase limits the results to judgments and excludes opinions of the Advocate General (since the latter ones would provide a reference to the original language in which they have been drafted, and not to a "language of the proceedings").

In the following subsections, firstly, definitions of the terms from monolingual reference works from both legal systems are introduced in order to allow for any translation issues that could arise to crystallise. These definitions are followed by comments inspired by cursory searches of Curia, which permit an analysis of some observed translation options, and finally, there is a more detailed discussion of searches conducted for two particular terms: *Gebührengesetz* (for Austria) and *Rundfunkbeitrag/Rundfunkgebühr* (for Germany). These latter terms have been selected after a detailed analysis of the definitions of *Gebühr* and *Beitrag*.

3.3.2. *Steuer*

In all definitions of *Steuer* from monolingual works which have been reviewed for the present purposes, this concept is conceived of as a payment to the fiscal authorities for which no reciprocal services are provided.

For instance, the following definitions from Austrian publications were noted:

> "Steuern stehen keine unmittelbaren Gegenleistungen gegenüber, sie dienen generell der Finanzierung staatlicher Leistungen." (UnternehmensservicePortal website, "Steuern und Abgaben – Allgemeines")

> "Geldleistungen an Gebietskörperschaften, denen eine unmittelbare Gegenleistung nicht gegenübersteht [...] Die Steuerpflicht entsteht somit **unabhängig von der Nutzung** öffentlicher Leistungen aufgrund der Verwirklichung des Steuerbestandes." [emphasis in original] (Tumpel, 2016: 14)

The following definitions from German publications also highlight the lack of reciprocity:

> "S[.][teuer] ist die einmalige oder laufende Geldleistung, die nicht eine Gegenleistung für eine besondere Leistung darstellt und die von einem öffentlich-rechtlichen Gemeinwesen zur Erzielung von Einnahmen allen auferlegt wird, bei denen der Tatbestand zutrifft, an den das Gesetz die Leistungspflicht knüpft." (*Creifelds Rechtswörterbuch*, 2017: 1240)

> "[...] allen Steuerbürgern nach Maßgabe des Steuertatbestandes auferlegte Abgaben, die nicht eine Gegenleistung für eine besondere staatliche Leistung darstellen. [...] sie [...] bedarf neben dem Ziel der Staatsfinanzierung grundsätzlich keiner besonderen Belastungslegitimation." (Kirchhof, 1991: 6-7)

A first, cursory search resulted in a large number of cases (which, due to their sheer volume, have not been recorded in Appendix 2), with the ones reviewed mostly providing "tax" as a translation of *Steuer*. *Steuer* is translated as "tax" in the *Wörterbuch Recht* (2008: 218), and as "tax; levy; duty" in the *Langenscheidt Fachwörterbuch Kompakt: Recht* (2009: 624). The IBFD (International Bureau of Fiscal Documentation) definition of tax in English is provided here:

> "There is no single definition of a tax and definitions tend to vary according to the context. In general a tax may be defined as a government levy that is not in return for a specific benefit and is not imposed by way of a fine or penalty (e.g. for non-compliance with the law), except in some cases where it corresponds to tax-related offences. The OECD working definition of a tax is a "compulsory unrequited payment to the government". It is unrequited in the sense that benefits provided by government to taxpayers are not normally in proportion to their tax payments. Taxes may be contrasted with user charges or fees in that the latter payments, while compulsory, are generally requited, in the sense that there is a link between the amount paid and the benefit provided." (IBFD International Tax Glossary)[13]

This definition highlights the lack of a stable definition but also allows for equivalence with the concept of *Steuer* to be established. It also provides helpful indications for possible equivalents of some of the related terms (i.e. "user charge" or "fee").

A cursory search for the phrase *Steuern, Gebühren und Beiträge* and its variations was also performed, in an attempt to find translations that help ascertain the relationship of the term *Steuer* to the terms *Gebühr* and *Beitrag* in English. Here, too, due to the sheer volume of results, only a number of reviewed cases are presented.

In an early case, *Waldemar Deutschmann v Federal Republic of Germany (C-10/65)*, the differentiation in German law between *Steuern, Gebühren* and *Beiträge* is explicitly referred to and these terms are provided in the English-language judgment as "taxes in the strict sense ('Steuern') [...], charges ('Gebühren') and dues 'Beiträge'" (see *Waldermar:* 471). It is also notable that, while parts of the case specifically refer to the difficulty in distinguishing between *Gebühr* and *Steuer* ("In German case-law, the distinction between a charge and a tax is not clear", see *Waldemar:* 471), the Court proceeded to decide the case with no comment on the terminology issues.

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In a number of cases (see, e.g. *Finanzamt Eisleben v Feuerbestattungsverein Halle eV (C-430/04), Finanzamt Oschatz v Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien (C-442/05)*), there is a reference to Article 4(5) of the Sixth VAT Directive (see Sixth Council Directive 77/388/EEC of 17 May 1977, in force until 2006), which specifically refers to "dues, fees, contributions", which in German is provided as "Zölle, Gebühren, Beiträge", i.e. what in the case referred to above was translated as a "due" is translated as "fee" in this Directive. The wording of the Directive is reproduced, in direct quotation, in both language versions of the judgments (in English and German, respectively). These cases also demonstrate how multilingual EU legislation interacts with the translation of the judgments. It also raises the possibility that on occasion, EU legislation might be referred to without a direct quote being provided, in which case the external translator would have to check the relevant norm.

The translation of *Steuer* as "tax" is considered unproblematic, and will therefore be addressed only in respect to the findings regarding the translations of *Gebühr* and *Beitrag*.

3.3.3. *Gebühr*

The definitions from monolingual reference works which have been reviewed show that *Gebühr* is conceived as a money payment provided for specific public services which are actually used.

The definitions from Austrian publications provide the following:

> "Als Gebühren gelten Entgelte, die von Gebietskörperschaften für bestimmte Leistungen eingehoben werden (z.B. Gebühren für den Anschluss an das öffentliche Wasser- und Abwassernetz, für die Müllabfuhr)." (UnternehmensservicePortal Website, "Steuern und Abgaben – Allgemeines")

> "[...] öffentlich-rechtliche Entgelte für eine besondere, vom Bürger unmittelbar in Anspruch genommene Leistung einer Gebietskörperschaft [...] (zB Wasser-, Kanal- oder Müllabfuhrgebühren). Gebühren fallen somit bei tatsächlicher Nutzung öffentlicher Leistungen an. Dagegen sind Gebühren nach dem Gebührengesetz 1957 Steuern, weil diese ohne unmittelbare Gegenleistung der Gebietskörperschaft entrichtet werden müssen, auch wenn Stempelgebühren (zB Ausstellung von Reisepässen) im Zusammenhang mit der Inanspruchnahme von Verwaltungsbehörden erhoben werden." (Tumpel, 2016: 14)

The definitions from German publications also refer to an actual use of the service by the person paying:

> "Obwohl Gebühren in der Verfassung zweimal erwähnt werden, sind sie verfassungsrechtlich nicht abschließend definiert. Sie weisen Merkmale auf, die sie – verfassungsrechtlich notwendig – von der Steuer trennen: sie werden nur geschuldet, wenn der Staat dem Bürger eine individuell zurechenbare Leistung erbracht hat. Sie gehören, weil sie nicht von jedermann, sondern nur von einem Teil der leistungsfähigen Steuerbürger zu zahlen sind (Sonderlasten), zu denjenigen Abgaben, die einen besonderen Belastungsgrund

> vorweisen müssen und für eine staatliche Leistung gezahlt werden (Vorzugslasten). Weitere Merkmale, die sie von anderen Abgabentypen als der Steuer trennen würden, weisen sie nach Verfassungsrecht nicht auf. Die anderen Abgabentypen erwähnt das Grundgesetz überhaupt nicht." (Kirchhof, 1991: 7)

> "Gebühren sind gesetzlich geregelte Entgelte für die besondere Inanspruchnahme von Justiz und Verwaltung. Traditionell werden auch die Vergütungen der Rechtsanwälte und Steuerberater als G. bezeichnet, obwohl diese privatrechtlicher Natur sind." (*Creifelds Rechswörterbuch*, 2017: 523)

A cursory search of Curia and a review of the cases shows *Gebühr* to have been variously translated as "fee" (see *Commission of the European Communities v Federal Republic of Germany (C-389/00)),* including in the designation of authorities, e.g. *Finanzamt für Gebühren und Verkehrsteuern* ("tax office for fees and transaction tax, hereinafter the Finanzamt" (see *Develop Baudurchführungs- und Stadtentwicklungs GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland, C-71/00*). In *Erna Pelzl and Others v Steiermärkische Landesregierung (C-338/97), Wiener Städtische Allgemeine Versicherungs AG and Others v Tiroler Landesregierung (C-344/97) and STUAG Bau-Aktiengesellschaft v Kärntner Landesregierung (C-390/97)*, "Steuern, Abgaben und Gebühren" are translated as "taxes, duties or charges", i.e. *Gebühren* are "charges". Interestingly, this translation is found in a quotation from the Sixth VAT Directive (Article 33), where *Gebühren* are translated as "charges", despite (as has been seen) their translation as "fees" in another part of the Directive.

Consulting bilingual dictionaries did not provide any clarification, either. For instance, *Gebühr* is translated as "fee, charge" in the *Wörterbuch Recht* (2008: 91), and in the exact same manner (i.e. "fee; charge") in the *Langenscheidt Fachwörterbuch Kompakt* (2009: 518). *Elsevier's Legal Dictionary* provides "tax (fiscal); fee; charge" in its entry 13761 (2001: 946).

In order to ascertain whether these translations offer conceptually appropriate terms, their definitions need to be reviewed. The definition of "fee" is as follows:

> "Fees charged by central or local government authorities may seem to share many of the same characteristics as a tax, but they can be distinguished from taxes insofar as they are charged as payments for the supply of particular services by the authorities. In this respect they may be compared with a user charge." (*International Tax Glossary*, IBFD, accessed online)[14]

The IBFD entry for "charge" refers to "user charge", which is defined as follows:

> "Broadly speaking, user charges represent a payment for a specific service. The distinction between a user charge and a tax is not always clear, but generally a user charge is identifiable

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> because the individual users derive a specific benefit or service from the charge, and because the revenue is earmarked for a specific application – this application is often reflected in the name of the charge. It may be argued that, where a charge greatly exceeds the cost of providing the relevant benefit, this should more properly be described as a tax." (*International Tax Glossary*, IBFD, accessed online)[15]

Both definitions hinge on the actual use of a service, with "fee" focussing more on the provision of that service by a public authority, which appears to correspond better to the German-language definitions of *Gebühr* provided earlier. Nevertheless, both "fee" and "charge" seem to be possible choices for *Gebühr*, depending on the context. The inconsistency of use within the same text, however, can be a source of confusion for its readers.

3.3.4. *Beitrag*

According to the definitions from monolingual reference works reviewed, *Beitrag* is a payment for the maintenance of a service in the public interest, where use by the person paying does not have to be actual but potential.

The following definitions from Austrian publications are presented:

> "Beiträge sind Geld- oder Sachleistungen, die von Personen geleistet werden, die ein besonderes Interesse an der Errichtung oder Erhaltung öffentlicher Einrichtungen haben (z.B. Kammerbeiträge)." (UnternehmensservicePortal Website, "Steuern und Abgaben – Allgemeines")

> "Geldleistungen, die demjenigen auferlegt werden, der an der Errichtung oder Erhaltung einer öffentlichen Einrichtung ein besonderes Interesse hat (zB Anliegerbeiträge für die Straßenerrichtung). Davon zu unterscheiden sind Beiträge an andere öffentlich-rechtliche Körperschaften (zB Sozialversicherungsbeiträge). Beiträge werden erhoben, wenn die **Möglichkeit zur Nutzung** öffentlicher Leistungen besteht." [emphasis in original] (Tumpel, 2016: 14)

The German publications also focus on the same features:

> "Unterart der öffentlichen [...] Abgaben. Man versteht darunter Geldleistungen, die dem einzelnen im Hinblick auf eine besondere Gegenleistung des Beitragsberechtigten auferlegt werden, nämlich dafür, dass ihm die Möglichkeit der Benutzung besonderer Vorteile zur Verfügung gestellt wird (Vorzugslasten). Voraussetzung ist deshalb die Nutzungsmöglichkeit; entsprechend dieser sind daher ggf. die Beitragssätze zu staffeln. Ob der Beitragspflichtige von der Nutzungsmöglichkeit Gebrauch macht, ist unerheblich." (*Creifelds Rechtswörterbuch*, 2017: 173)

> "Der finanzrechtliche Beitrag zählt ebenfalls zu den Vorzugslasten. Auch er ist kein festes bundeseinheitliches Rechtsinstitut, sondern nur ein von Einzelgesetzen und Rechtspraxis

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> geformter Typ. Er wird bereits dafür gezahlt, daß der Staat dem Bürger einen individuellen Vorteil anbietet; unerheblich ist, ob er diesen auch tatsächlich in Anspruch nimmt." (Kirchhof, 1991: 9)

Earlier, the option "contribution" was found in translation (based on the Sixth VAT Directive), and "contribution" is defined in the IBFD *International Tax Glossary* in the following manner which appears equivalent to the concept of *Beitrag*:

> "Method of raising revenue that is different from taxation in that taxes are levied on the basis of legal regulations and the proceeds are used to finance "general social needs" (e.g. the armed forces, government administrative branches, the judiciary, etc.), whereas funds to finance "collective needs" (e.g. education, science, culture, health care, retirement and disability insurance, child care, sports, etc.) are obtained by way of contributions." (*International Tax Glossary*, IBFD, accessed online)[16]

3.3.5. Specific terms and analysis

With respect to the two last terms, i.e. *Gebühr* and *Beitrag*, two specific terminological problems have been isolated on the basis of the information encountered in the reference works consulted, and these will be the subject of the next subsections. In the case of Austria, this term is *Gebührengesetz,* as this example shows the significance of the same term used to denote different concepts (albeit only partially and dependent on context), and in the case of Germany, the term is *Rundfunkbeitrag* coupled with *Rundfunkgebühr,* which showcases the importance of terminological precision and conceptual analysis.

3.3.5.1. *Gebührengesetz* (Austria)

Similarly to the statement by Tumpel referred to earlier ("Dagegen sind Gebühren nach dem Gebührengesetz 1975 Steuern, weil diese ohne unmittelbare Gegenleistung der Gebietskörperschaft entrichtet werden müssen" (2016: 14)), Doralt writes: "Der Gesetzgeber folgt nicht immer dieser Terminologie, zB sind die Gebühren nach dem Gebührengesetz finanzwissenschaftlich den Steuern zuzuordnen" (2017: 4). As a result, the term *Gebühr,* when used within a certain context, may have the actual significance of the term *Steuer*.

In order to examine how this issue was approached in the translations of the judgments of the CJEU; Curia was searched for *Gebührengesetz*, with the word "Gebührengesetz" and the phrase "Verfahrenssprache: Deutsch" in quotation marks. All results have been

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recorded in Appendix 2 (subsection 1), which includes a list of the original sentences, their translations, and the relevant terms in bold.

Gebührengesetz has been translated as "the Gebührengesetz (Law on fees)" in *Palais am Stadtpark Hotelbetriebsgesellschaft mbH & Co. KG v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (C-508/99)*, and as "Gebührengesetz (Law on the collection of fees)" in *Copernicus-Trademarks Ltd v European Union Intellectual Property Office (T-82/14)*. In both these instances, the original German title of the law is provided, with an English translation in brackets (albeit inconsistently translated between the two judgments). However, inconsistency can also be observed within a single judgment. In *Palais am Stadtpark Hotelbetriebsgesellschaft mbH*, a case relating to tax on companies with respect to the raising of the capital, *Gebühr* has been repeatedly translated as "duty" (paras. 23, 27) (i.e. without consistency with the title used in English for the law) and the phrase *Gebühr oder Steuer* has first been provided as "duty or charge" and then as "levy or tax" (i.e. also inconsistently). It also does not become clear whether *Gebühr* is to be conceived of as a "fee" or a "tax", from the financial perspective. In *Copernicus-Trademarks Ltd*, a case relating to a EU trademark application, *Gebühren* (including *Schriftengebühren*) have been consistently translated as "fees" (with the latter as "documentary fees", albeit there is one instance where *Gebühren* are translated as "registration fees"). In that case, there is a reciprocal service provided, and as Tumpel writes, in the context of the Austrian *Gebührengesetz*, "Stempelgebühren (zB Ausstellung von Reisepässen) [werden] im Zusammenhang mit der Inanspruchnahme von Verwaltungsbehörden erhoben" (2016: 14). In this present case, therefore, "fee" appears to be an appropriate translation with respect to the significance of the financial concept.

However, as Doralt notes: "Die Gebühren nach dem Gebührengesetz sind keine Gebühren im finanzwirtschaftlichen Sinn für die Inanspruchnahme öffentlicher Einrichtungen […], sondern Steuern (ohne Gegenleistung) [...]" (2017: 202), referring to the some of *Gebühren* in that law. Here, the question arises whether the fact that the Austrian legislator (inaccurately) uses the term *Gebühren* for payments which are conceptually *Steuern*, i.e. taxes as seen from the finance perspective, should result in a translation of the term in English as "taxes" and not as "fees". It is unlikely that tax law experts would be confused by such a distinction, not only due to their formal legal education but also because they will be able to assess the practical significance of using different terms. Translators without any tax law experience, however, should be particularly careful when making translation decisions in this respect, especially where they find conflicting terminology in such authoritative sources. They need to build up skills which allow a critical consideration of inconsistent terminological choices, most

importantly in order to be able to provide the foundational grounding of their decisions if this are queried.

Another factor to take into account is IATE, the EU terminology database, which offers "fee" for *Gebühr* (in the domain of environmental law), with definitions from the Oxford English Dictionary from 1933 and *A Dictionary of Law* from 1999: "1.money paid for work carried out by a professional person (such as an accountant or a doctor or a lawyer).;2.A charge fixed by law for services of public officers or for use of a privilege under control of government" (see IATE website, "Fee"). However, another entry lists "charge", "fee" and "dues"; the domain of the terms is provided as "statistics, finance", and the source for all three is indicated as "statistisches Bundesamt" (see IATE website, "Gebühr"). However, there are other definitions that compete with the above, e.g. "concession tax", "registry charge" or "duty". The search function allows the limiting of results by domain but when "2446 – Taxation" is selected, all but one of the results have the European Parliament as their source, and these definitions may not be appropriate for all contexts. These results show that the IATE term suggestions are not to be adopted without further critical assessment.

3.3.5.2. *Rundfunkbeitrag* (Germany)

The present subsection focusses on the term *Rundfunkbeitrag*, a payment which was previously designated *Rundfunkgebühr* and collected by the *Gebühreneinzugszentrale*. The definitions of the two terms from *Creifelds Rechtswörterbuch* are provided here (which were initially consulted in order to review the practical significance of the terms *Gebühr* and *Beitrag*), in order to showcase the changes in the legal situation.

> "Rundfunkgebühr: Die öffentlich-rechtlichen Rundfunkanstalten finanzierten sich bis Ende 2012 überwiegend durch R. Die R. bestand aus Grundgebühr und Fernsehgebühr und betrug im Jahre 2012 insgesamt 17.98 EUR. Rechtsgrundlage für ihre Erhebung war der Rundfunkgebührenstaatsvertrag. Schuldner der R. war jeder Rundfunkteilnehmer für jedes privat und gewerblich genutzte Rundfunkempfangsgerät. Die Anzahl der zu zahlenden R. war damit unabhängig von der Anzahl der Rundfunkempfangsgeräte. Der Einzug erfolgte durch die Gebühreneinzugszentrale (GEZ). An die Stelle der R. ist seit dem 1.1.2013 der geräteunabhängige Rundfunkbeitrag getreten." (*Creifelds Rechtswörterbuch*, 2017: 1125)

> "Rundfunkbeitrag: Die öffentlich-rechtlichen Rundfunkanstalten finanzieren sich überwiegend durch R., § 13 RStV idF des am 1.1.2013 in Kraft getretenen 15. Rundfunkänderungsstaatsvertrages, nicht dagegen die privaten Rundfunkanbieter, s. Rundfunk, Pay-TV. Der R. ersetzt seit diesem Datum die Rundfunkgebühr. [...]
> Rechtsgrundlage für die Erhebung des R. ist der Rundfunkbeitragsstaatsvertrag, der Teil des 15. Rundfunkänderungsstaatsvertrages ist (Rundfunkrecht). Im privaten Bereich sind von jedem Wohnungsinhaber ein R. (§ 2), im nicht privaten Bereich von jedem Inhaber einer Betriebsstätte je nach Anzahl der Beschäftigten ein oder mehrere R. (§ 5) zu entrichten (Beitragsschuldner). Der R. ist damit, anders als die Rundfunkgebühr, unabhängig von der tatsächlichen Anzahl der vorhandenen Rundfunkempfangsgeräte (geräteunabhängiger R.). Beitragsgläubiger ist die örtliche Landesrundfunkanstalt (§ 10). Der Einzug erfolgt durch die Verwaltungsgemeinschaft ARD ZDF Deutschlandradio Beitragsservice. Natürliche

> Personen können auf Antrag aus sozialen Gründen vom R. befreit werden (§ 4).” (*Creifelds Rechtswörterbuch*, 2017: 1125)

These definitions neatly summarise the change in legal status that accompanied the terminological change from *Gebühr* to *Beitrag,* and showcases the significance of analysing the conceptual contents of a term, in order to ensure that translation choices do not have an adverse effect on the legal consequences stemming from a particular text.

Searching Curia for *Rundfunkgebühr* and *Rundfunkbeitrag* only resulted in one case (see Appendix 2, subsection 2) for each tearm (with one of them still in progress, i.e. with no judgment available), but these two texts are helpful in illustrating the potential issues that can arise if the terminology used in the judgments is adopted uncritically. In *Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH (C-337/06)*, *Rundfunkgebühren* have been consistently translated as “fees”*,* including in the “Staatsvertrag über die Regelung des Rundfunkgebührenwesens” (which is provided as “State Treaty on the regulation of the broadcasting fee (Staatsvertrag über die Regelung des Rundfunkgebührenwesens)”) and “Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten (im Folgenden: GEZ)” (translated as “a central agency for the collection of fees, the Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten (‘the GEZ’)”. The one exception is the translation of *Gebührenbescheid,* which is conveyed as “notice of liability to the charge”. On the other hand, the English-language application in *Rittinger and Others (C-492/17)*, which is a request for a preliminary reference and is still in progress at the time of writing (i.e. there is no judgment yet), refers to *Rundfunkbeitrag* consistently as a “contribution fee”. Moreover, this is a case where the term itself is of significant importance, as the case focusses on the financing of broadcasting. However, a term “contribution fee” does not exist in that form (e.g. there is no entry for it on IBFD *International Tax Glossary*), and instead combines two terms used to denote concepts that can be interpreted as being different from one another. For a translator to adopt “contribution fee” for *Beitrag* in a different context could result in a client/commissioner who is an expert in finance to query that choice and consider the translator inexperienced or incompetent. Where a client/commissioner is not such an expert, translating the term in this manner may still have a negative impact as it may change the legal effect of the translated text. Where a translator adopts a different term (e.g. the more appropriate “contribution”), the client/commissioner could refer to that case and ask why “contribution fee” has not been adopted, especially as it originates from an authoritative source. A client may also be interested in advocating one interpretation over another, and suggest “tax”, “fee”, or “contribution”, respectively.

Therefore, these two examples show that, in a similar manner to the ECtHR scenarios, an external translator should not adopt a term that has been ranslated in a certain manner

in the judgments in an uncritical manner, but instead should query the choice further and undertake an individual analysis. Translators also need to ensure that they understand the factual and legal background of the case, so that they can assess for themselves how the term fits in the overall framework of the specific judgment as well as be capable of explaining to a client why they have selected a certain term and what its function in the source and target text is. For that reason, it is also important to refer to the respective legal system which provides the term with its conceptual framework, in order to assess the appropriateness of a translated term for the particular *skopos*. The CJEU's strategy to frequently refer to a term in its original language can be seen as a way of indicating the embedding of the concept, or simply as a reference to the original designation, meant to ensure that the source norm can be located by those who can speak the language or would like to compare their understanding of the term. Either way, this strategy underlines the "foreignness" of the concept. Arguably, this would not always be necessary in order to stress the fact that the term is resident in a different legal system: after all, the term is already located in a text that explicitly addresses the legal situation in another legal system. The fact that such terms are nevertheless provided in the original language should serve to demonstrate to a translator a general desirability of this practice.

Since the CJEU is a supranational court, the medium and the context of the judgment already make it likely that the addressees of these legal texts are aware of their multilingualism and would readily adopt the model of referencing the original term. In practice, however, in translations destined for actors active in the services market, these references may not be appropriate or may be unwanted by the client/commissioner. It is therefore indispensable to balance the wishes of the client and one's own translation decisions, expertise, ethics, and concerns about one's professional status. This can only be achieved via effective communication and willingness on the part of all parties to take the legal effects of the translated text (and their extension into the future) seriously. As with the ECtHR, it is advised that the translator make notes of his or her decisions and communicate those to the client/commissioner, thus allowing the client to consider them, and ask further questions (where necessary). It would also provide the translator with a chance to refer to this communication at a later stage (where necessary), as evidence of his or her proactive communication with the client, demonstrating professionalism and ethical awareness.

4. Conclusion: Critical consideration of the findings in light of the *skopos* theory

As has been seen in Chapter 1, according to the *skopos* theory, equivalence is considered possible only when both texts – the source text and target text – fulfil the same communicative function (a functional constancy). For the translated judgments of the two courts which are not authentic (i.e. the ones which are not in the language of the proceedings or initial drafting, and which therefore do not have the normative authority that multilingual EU legislation has, for instance), one could say that they at least aim to fulfil the same communicative functions as the respective "original". However, they also have a quasi-normative function, resulting from their status of legal sources that originate from an authoritative institution. They also do not fit neatly into Cao's classification of legal text depending on the function it serves in the target culture. In the case of the ECtHR, the judgment is authentic in what is effectively a translation (or rather, a rewriting) of the submitted documents, and in the case of the CJEU, it is only the judgment in the language of the case that is authentic (but that judgment itself is translated from an original draft in French); therefore, these can be seen as having a normative function; the other language versions, however, cannot be considered purely informative. The judgments serve as the basis for the interpretation of laws and even changes to the legal system of the Member State in question, but are also relevant to other Member States which can use them as guidance and reference. Some of the typical approaches for different types of legal translation can be observed in the judgments. Kocbek notes that translations for informative purposes may often preserve the original term where it is culturally-bound (see Kocbek, 2014: 116), and the English translations of both courts have been found to occasionally contain such original-language terms (also in brackets); however, she also states that the terminological level of the source text can be preserved in cases of translation for normative function (see Kocbek, 2014: 115). At other times, terms in the judgments are translated without the original-language term being provided, and only consulting the parallel text(s) can assist in finding what the "original" is. In the case of the ECtHR, parallel texts in languages other than English or French are rarely available; where they are, these are translations prepared by external parties and therefore not considered authentic.

As has been noted, in some terminological approaches, it is considered best practice to proceed from an analysis and systematisation of the concept (the onomasiological approach), rather than from the linguistic designation. In encouraging the review and analysis of the definitions of the term in one language and legal system, the onomasiological approach offered great assistance, but its usefulness for punctual (ad hoc) terminology work was found to be lacking. The search results offered specific

suggestions with respect to possibly appropriate terms (as well as limited information about the frequency of use), and it was these term suggestions that could then be checked for suitability. As a result, the various translation strategies found in the courts' judgments could be assessed and considered in their respective context. It should also be stressed that since French plays a crucial role in the translation process in both courts, an analysis of the terms used in the French-language judgments would add an additional layer of complexity but could also offer new perspectives. This, however, was beyond the scope of this thesis.

As a result of the analysis of the translations of various terms, it is maintained that the judgments of the two courts represent an important terminological source for translators, especially where the translators do not have a formal legal education, as they can offer suggestions which can then be researched further. It is precisely in these cases, though, that translators need to have a pronounced awareness of the specific challenges inherent in legal translation, since anticipating frequent issues can help in preparing strategies for addressing them. The judgments can also serve as an important reference point for those translators who have a legal education but do not possess a lot of knowledge in comparative law. They are also a good didactical tool which can serve to illustrate some of the arguments familiar from the theoretical terminological approaches, such as: discussions on the translatability of legal terms; the abstract nature of legal relationships, which can make difficult "eine klare Trennung zwischen der Begriffs- und der Benennungsebene im Recht" (Arntz, 2001: 206); the complexities which can persevere within the same legal system (as became clear from the example of *Gebühr*) and in two legal systems which have the same language and similar legal history (such as Germany and Austria, at least in some respects); the difficulties in locating a suitable definition due to the differentiation of terms into those that are purely legal and those of a general nature, and as a result used in everyday life (Arntz, 2001: 209).

One of the great challenges of legal translation lies in being able to strike a balance between the desire for precision, which is important due to the significance that a legal text has for the persons concerned as well as for the greater public, and the unattainability of perfect equivalence. As Arntz notes, "[d]ie Vorstellung von einer präzisen, systematischen Rechtsprache, die sich durch eine genormte und damit 'verfahrensfeste' Terminologie auszeichne, muß erheblich relativiert bzw. modifiziert werden" (2001: 212). The problem with the judgments analysed here begins with the fluid character of the source language and the lack of a stable source text to serve for a reference (it is often unavailable or not a "source text" in the true sense), which precludes easy traceability and therefore hinders the transferability of these solutions. For this reason, these concepts need to always be considered with reference to their relationship to neighbouring concepts in the respective legal system, as legal concepts can be very hard to delimit and

define: “Bei genauer Betrachtung muss man nämlich feststellen, daß absolut bestimmte Begriffe innerhalb der Rechtssprache sehr selten sind – vermutlich kommen hier nur Zahlbegriffe in Verbindung mit Maß-, Zeit- und Geldbegriffen in Betracht” (Arntz: 212).

Consequently, it is important to remain aware of the context in which a translation is carried out. As has already been seen in Chapter 1, the consequences of a conception of translating as an action are three-fold. Firstly, the *skopos* becomes all-powerful and makes the translated text “als Handlung und das Produkt dieser Handlung” into a “situations-spezifisch[es] kommunikativ[es] Handlungselement” (Prunč, 2001: 143). This focus on the purpose of the translation then dethrones the source text, which is not unproblematic when one considers that the purpose could be defined in any manner possible. Finally, there is no necessity for the source text and target text to be functionally equivalent. As already mentioned, there is (even though it is only conditional) functional equivalence between the judgments of the CJEU and the ECtHR (ensuing from their legal nature). On the translation services market, such functional equivalence would only exist in rare cases (e.g. when translating within the same country, from an official language into another official language, e.g. in Switzerland, and even then only in very specific situations). This is one of the most important aspects that should be taken into account when contemplating whether to adopt a term from the judgments: whether this “borrowed” translated term makes sense in the new context (which, e.g. may be more informative than normative, or vice versa). In this light, the *skopos* theory is seen as especially useful, as its theoretical premises would encourage an active analysis of the appropriateness of received translation options.

The significance of the context is also clear when looking at the legal translation services market. There can be numerous actors who may require a legal translation: lawyers (and law firms), institutions and public bodies (including courts), individuals (as direct clients), translation agencies (to re-sell those services to their direct clients). The possible power relations constellations as well as applicable ideas about expected quality standards can vary greatly. Here, Bourdieu’s approach provides additional perspectives (see Chapter 1). A *skopos* provided by a client would require an individual, tailored execution by the translator but this might not always correspond to the quality assessment criteria adopted by the client. Perceptions and expectations of quality can differ greatly, e.g. due to the different degree of legal expertise of clients or their opinion regarding what is “right” and “wrong”, based on previous experience. It is therefore important that translators aim to clarify the translation strategy with the client/commissioner in advance. However, it is just as important for the complicated nature of legal translation and its dependence on a specific context to become more visible across the legal and translation services field, so that the recipients of legal translation services can also become more

proactive and aware of the need to provide information (for both ethical and practical reasons).

Another conclusion that can be drawn from the analysis of these terms is the great value of monolingual reference works, such as glossaries, dictionaries, and legal academic books, especially in light of the relative inconsistency or unhelpful information found in bilingual dictionaries, including online databases such as IATE. Published translations and online bilingual websites can also provide conflicting suggestions, especially where they have not been prepared by a team of lawyers, translators, and terminologists. The external translator should be aware of the degree of usefulness of the different types of reference works, not least because they can provide a quick "window" to the bigger picture of a certain domain, and offer a chance to extract and document "evidence" for one's translation choices.

In conclusion, it is once again stressed that the judgments of the ECtHR and the CJEU are without doubt valuable resources of already translated legal terms originating from the German-language national laws of Member States. However, the terms are to be conceived of as component parts or building blocks of the specific judgment in question, conditioned by the respective legal and institutional context. In order for these translated terms to be adopted elsewhere, a more detailed assessment of the concept, the case and the applicable law is needed. Sometimes, the judgments can even make the task of the translator more difficult, for example where they offer inconsistent solutions (from one judgment to another or within the same one). The analysed strategies illustrate the importance for the translator to be flexible and develop transferable skills, such as the capacity to consider various aspects of the target text and source text, implement strategies on an ad hoc basis, research concepts in appropriate reference works, and query and supplement the wishes of the client. These methods can be built up only on the basis of ongoing critical assessment and work with legal texts. The judgments of the two courts can provide a challenging but instructive starting point, including for learning in an academic and/or practical context.

Moreover, while the ethical issues presented by the free determinability of the *skopos* can be very serious, and as a result an individual translator will always benefit from developing individual strategies of addresssing potential problems on an ad hoc basis, the thesis' research results also highlight the need for more visibility of the structural problems that can result from potential power asymmetries. These issues can be advocated for and addressed by public bodies or institutions - both those interested in maintaining the professional standards of translators as well as those working to ensure legal certainty and access to justice.

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6. Appendix 1: ECtHR[17]

The HUDOC User Manual (see Council of Europe website, 2017, "HUDOC User Manual") has been consulted for the purposes of these searches. It should be noted that certain filters and functions have deliberately not been used to limit the results (e.g. the importance and keyword filters), since the subject of *Untersuchungshaft* can be mentioned in different types of cases. The "OR" Boolean operator has been used to refine certain steps of the searches.

A) Fluchtgefahr

a) Austria

Step 1: Search for *Fluchtgefahr* in German. Results then limited via HUDOC filter to Austria. Only 1 result in German (which exists in English, too). Results then limited via HUDOC filter to judgments in English (i.e. resulting for instances where term is provided in German in an English-language judgment).

Cases where original German-language term is provided in brackets after its translation:

Translation	**Case(s)**	**Total number[18]**
danger of absconding (inlcuding variations, e.g. danger of their absconding)	*Matznetter* (1969), *Stögmüller* (1969), *Ringeisen* (1971), *Can* (1985)	4
risk of absconding (including variations, e.g. risk of his absconding)	*B.* (1990), *Toth* (1991), *Hesse* (2007)	3
danger of flight	*Neumeister* (1968)	1

[17] All cases have been reviewed for relevance to grounds for *Untersuchungshaft*.

[18] These numbers only refer to (at least) a single instance of use of the term (or a variation thereof) in the respective judgment. The number of times the term occurs in each judgment (and consequently, across judgments) has not been documented.

Step 2: Search for the following combinations, based on results above (new results indicated in **bold**):

danger OR risk + absconding OR abscond OR flight OR fleeing

Translation	**Case(s)**	**Total number**
danger of absconding (including variations, e.g. danger of their absconding)	*Matznetter* (1969), ***Neumeister* (1968),** *Stögmüller* (1969), *Ringeisen (Merits)* (1971), ***Neumeister (Article 50)* (1974)**, *Can* (1985), ***B.* (1990), *Toth* (1991), *Herczegfalvy* (1992), *Pfeifer and Plankl* (1992), *Prager and Oberschlich* (1995) *Riepan* (2000)**, ***Lanz* (2002), *Elsner (No. 1)* (2011)**	(4 + **10**) 14
risk of absconding (including variations, e.g. risk of his absconding)	***Neumeister (Article 50)* (1974),** *B.* (1990), *Toth* (1991), ***Herczegfalvy* (1992), *Fey* (1993)**, ***Bulut* (1996), *Lanz* (2002),** *Hesse* (2007), ***Elsner (No. 1)* (2011)**	(3 + **6**) 9
danger of flight	*Neumeister* (1968), ***Matznetter* (1969), *Ringeisen* (1971), *Neumeister (Article 50)* (1974)**	(1 + **3**) 4

b) Germany

Step 1: Search for *Fluchtgefahr* in German. Results then limited via HUDOC filter to Germany. Results only in German, i.e. there are no instances where term is provided in German in English-language judgments. English-language version of these German-language judgments then cross-checked for term translation.

Translation	**Case(s)**	**Total number**
danger of absconding (including variations, e.g. danger of the applicant and other suspects absconding)	*Schöps* (2001), *Čevizović* (2004), *Chraidi* (2006), *Mooren* (2007), *Mooren* (2009), *Ereren* (2014), *El Khoury* (2015)	7
risk of absconding (including variations, e.g. risk of his absconding)	*Schöps* (2001), *Lietzow* (2001), *Garcia Alva* (2001), *Čevizović* (2004), *Chraidi* (2006), *Mooren* (2007), *Mooren* (2009), *Schatschaschwili* (2014), *Ereren* (2014), *El Khoury* (2015), *Erol* (2017), *Stollenwerk* (2017)	12
danger of flight	*Čevizović* (2004), *Chraidi* (2006)	2

(One of the cases available in German contains only abstracts in its English version, and does not make reference to the relevant parts of the StPO: see *Erdem* (2001)).

Step 2: Search for the following combinations, based on results above (new results indicated in **bold**):

danger OR risk + absconding OR abscond OR flight OR fleeing

Translation	**Case(s)**	**Total number**
danger of absconding (including variations, e.g. danger of the applicant and other suspects absconding)	***Wemhoff* (1968), *Klaas* (1993), *K.-F.* (1997),** *Schöps* (2001), *Čevizović* (2004), ***Dzelili* (2005),** *Chraidi* (2006), *Mooren* (2007), *Mooren* (2009), *Ereren* (2014), ***Schatschaschwili* (2014),** *El Khoury* (2015), ***Lecomte* (2015)**	(7 + **6**) 13
risk of absconding (including variations, e.g. risk of his absconding)	***Wemhoff* (1968), *Eckle* (1982), *K.-F.* (1997),** *Schöps* (2001), *Lietzow* (2001), *Garcia Alva* (2001), *Čevizović* (2004),	(12 + **8**) 20

	***Dzelili* (2005),** *Chraidi* (2006), *Mooren* (2007), *Mooren* (2009), ***Rangelov* (2012),** *Schatschaschwili* (2014), *Ereren* (2014), *El Khoury* (2015), ***Lecomte* (2015),** *Erol* (2017), *Stollenwerk* (2017), ***Wetjen and Others* (2018), *Patalakh* (2018)**	
danger of flight	***Wemhoff* (1968),** *Čevizović* (2004), *Chraidi* (2006)	(2 + **1**) 3

c) Switzerland

Step 1: Search for *Fluchtgefahr* in German. Results then limited via HUDOC filter to Switzerland.

No results in English or German.

Step 2: Search for the following combinations, based on terms for Austria and Germany above (all result in **bold**):

danger OR risk + absconding OR abscond OR flight OR fleeing

Translation	**Case(s)**	**Total number**
danger of absconding (including variations, e.g. "danger of collusion and absconding")	***W.* (1993), *G.B.* (2000), *M.B.* (2000)**	3
risk of absconding (including variations such as "risk of his absconding")	***Sanchez-Reisse* (1986), *W.* (1993)**	2
danger of flight	***S.* (1991)**	1
risk of flight	***S.* (1991), *Lüdi* (1992)**	2

B) Verdunkelung- und Verabredungsgefahr

a) **Austria**

Step 1: Search for *Verdunkelungsgefahr* in German. Results then limited via HUDOC filter to Austria. All results in English (i.e. instances where term is provided in German in English-language judgment).

Translation	**Case(s)**	**Total number**
danger of suppression of evidence	*Stögmüller* (1969), *Ringeisen (Merits)* (1971)[19], *Can* (1985)	3
possibility of collusion	*B.* (1990)	1
risk of collusion	*Hesse* (2007)	1

Step 2: Search for *Verabredungsgefahr* in German. Results then limited via HUDOC filter to Austria. All results in English (i.e. instances where term is provided in German in English-language judgment).

Translation	**Case(s)**	**Total number**
risk of collusion	*Toth* (1991)	1
danger of "suppression of evidence"	*Matznetter* (1969)[20]	1

Step 3: Search for *Verabredungs- und Verdunkelungsgefahr* in German. Results then limited via HUDOC filter to Austria. All results in English (i.e. instances where term is provided in German in English-language judgment).

[19] Includes one instance of Verabredungs- und Verdunkelungsgefahr.

[20] However, it appears as part of the phrase *Verdunkelungs- und Verabredungsgefahr*.

Translation	Case(s)	Total number
danger of collusion or suppression of evidence	*Ringeisen (Merits)* (1971)	1

Step 4: Search for *Verdunkelungs- und Verabredungsgefahr* in German. Results then limited via HUDOC filter to Austria. All results in English (i.e. instances where term is provided in German in English-language judgment).

Translation	Case(s)	Total number
danger of "suppression of evidence"	*Matznetter* (1969)	1

Step 5: Search for the following combinations, based on results above (results that did not appear in any of the previous steps indicated **in bold**):

danger OR risk OR possibility + suppression OR suppress OR collusion

Translation	Case(s)	Total number
danger of suppression of evidence (including variations, e.g. danger of "suppression of evidence")	*Stögmüller* (1969), *Matznetter* (1969), *Ringeisen (Merits)* (1971), *Can* (1985)	4
risk of suppressing evidence	-	0
possibility of collusion	*B.* (1990)	1
risk of collusion	*B.* (1990), *Toth* (1991), ***Pfeifer and Plankl*** (1992), ***Ribitsch*** **(1995),** ***Lanz*** **(2002),** ***Hesse*** **(2007)**	6
danger of collusion	*Ringeisen (Merits)* (1971), *Toth* (1991), ***Herczegfalvy***	5

	(1992), *Lanz* (2002), *Hesse* (2007)	
possibility of absconding	*Ringeisen (Merits)* (1971)	1

b) Germany

Step 1: Search for *Verdunkelungsgefahr* in German. Results then limited via HUDOC filter to Germany, with 8 results in German and 4 in English. Results then limited via HUDOC filter to judgments in English (i.e. searching for instances where term is provided in German in English-language judgment).

Translation	**Case(s)**	**Total number**
danger of collusion	*Mooren* (2007), *Mooren* (2009)	2
risk of collusion	*Lietzow* (2001)	1
danger of suppression of evidence	*Wemhoff* (1961)	1

Step 2: Search for *Verabredungsgefahr* in German.

No results.

Step 3: Search for the following combinations, based on results above (new results indicated in **bold**):

danger OR risk OR possibility + suppression OR suppress OR collusion

Translation	**Case(s)**	**Total number**
danger of collusion	***Lietzow* (2001), *Schöps* (2001)**, *Mooren* (2007), *Mooren* (2009), ***Ereren* (2014)**	(2 + **3**) 5
risk of collusion	***Garcia Alva* (2001),** *Lietzow* (2001), ***Schöps* (2001), *Mooren* (2009), *Ereren* (2014), *Patalakh* (2018)**	(1 + **5**) 6

danger of suppression of evidence	*Wemhoff* (1961)	1
risk of suppression of evidence	***K.-F.* (1997)**	1

c) Switzerland

Step 1: Search for *Verdunkelungsgefahr* in German.

No results.

Step 2: Search for *Verabredungsgefahr* in German.

No results.

Step 3: Search for *Kollusionsgefahr* in German.

No results.

Step 4: Search for the following combinations, based on terms for Austria and Germany above (all result in **bold**):

danger OR risk OR possibility + suppression OR suppress OR collusion

Translation	**Case(s)**	**Total number**
danger of collusion	***Schönenberger and Durmaz* (1988), *Huber* (1990), *S.* (1991), *W.* (1993), *G.B.* (2000), *M.B.* (2000), *H.B.* (2001), *Bédat* (2016)**	8
risk of collusion	***S.* (1991), *Lüdi* (1992), *W.* (1993), *A.B.* (2014)**	4
danger of suppression of evidence	-	0
risk of suppression of evidence	-	0

Step 5: Search for the following combinations, based on findings from step 4:

danger OR risk OR possibility + evidence + tampered OR tamper OR tampering OR destroy OR destroyed OR destroying

Translation	Case(s)	Total number
danger of evidence being tampered with or destroyed	*A.B.* (2014), *Bédat* (2016)	2
possibility that evidence might be tampered with	*Huber* (1990)	1

S. (1991) contains a paraphrase, and has not been included in the results: "On application by the Winterthur District Attorney's Office the President of the Indictments Division of the Zürich Court of Appeal extended the applicant's detention on remand until 12 September 1986, **in order to prevent him colluding with his co-accused, who had meanwhile been released, and tampering with evidence**."

C) Tatbegehungsgefahr

a) Austria

Step 1: Search for *Tatbegehungsgefahr* in German. Results then limited via HUDOC filter to Austria. No results in German. Results then limited via HUDOC filter to judgments in English (i.e. searching for instances where term is provided in German in English-language judgment).

Translation	Case(s)	Total number
commit further offences of the same kind	*Hesse* (2007)	1
commit another offence similar to the one of which he was suspected	*Reinprecht* (2006)	1

Step 2: Search for *Wiederholungsgefahr* in German (due to term having been observed in *Toth* (1991)).

Translation	**Case(s)**	**Total number**
risk of repetition of the offences	*Toth* (1991)	1
danger of recurrence	*Vereinigung Bildender Künstler* (2007)	1
danger of repetition of offences (including danger of "repetition of offences")	*Matznetter* (1969), *Stögmüller* (1969), *B.* (1990)	3
danger of committing further offences	*Ringeisen (Merits)* (1971)	1

Step 3: Search for the following combinations, based on findings from steps 2 and 3 (new results indicated in **bold)**:

risk OR danger OR possibility + repetition OR repeat OR repeating OR recurrence OR "commit further" OR "committing further" OR "committing more"

Translation	**Case(s)**	**Total number**
commit further offences of the same kind	*Hesse* (2007)	1
commit another offence similar to the one of which he was suspected	*Reinprecht* (2006)	1
risk of repetition of the offences	***B.* (1991),** *Toth* (1991), **Herczegfalvy (1992)**	(1 + **2**) 3
danger of recurrence	*Vereinigung Bildender Künstler* (2007)	1
danger of repetition of offences	*Matznetter* (1969), *Stögmüller* (1969),	(3 + **4**) 7

(including danger of "repetition of offences")	***Ringeisen (Merits)* (1971), *B.* (1990), *Toth* (1991), *Herczegfalvy* (1992), *Pfeifer and Plankl* (1992)**	
danger of committing further offences	*Ringeisen (Merits)* (1971), ***B.* (1990), *Toth* (1991), *Lanz* (2002)**	(1 + **3**) 4
risk of committing further offences	***Lanz* (2002)**	

Step 4: Search for the following combinations:

risk OR danger + reoffend OR reoffending

recidivism

Translation	**Case(s)**	**Total number**
risk of reoffending (including variations, e.g. risk that he or she will abscond or reoffend)	***Hesse* (2007), *Elsner (No. 1)* (2011), *Lorenz* (2017)**	3
danger of reoffending	***Elsner (No. 1)* (2011)**	

Step 5: Search for "recidivism".

No relevant results.

b) Germany

Step 1: Search for *Tatbegehungsgefahr* in German.

No results.

Step 2: Search for *Wiederholungsgefahr* in German. 1 result in English and 5 in German (English judgment exists in German). Results then limited via HUDOC filter to English.

No relevant results.

Results in German reviewed.

Translation	Case(s)	Total number
risk of reoffending	*Erol* (2017)	1

Step 3: Search for the following combinations:

risk OR danger OR possibility + repetition OR repeat OR repeating OR recurrence OR "commit further" OR "committing further" OR "committing more"

No relevant additional results.

c) Switzerland

Step 1: Search for *Wiederholungsgefahr* in German. Results then limited via HUDOC filter to Switzerland. No relevant results.

Step 2: Search for a combination of terms:

risk OR danger OR possibility + repetition OR repeat OR repeating OR recurrence OR "commit further" OR "committing further" OR "committing more"

recidivism

Translation	Case(s)	Total number
risk of repetition of offences	*W.* (1993)	1
risk of committing further offences	*W.* (1993)	1

D) Tatausführungsgefahr

a) Austria

Step 1: Search for *Tatausführungsgefahr* in German.

No results.

b) Germany

Step 1: Search for *Tatausführungsgefahr* in German.

No results.

Step 2: Search for *Tatausführung* in German.

No relevant results.

c) Switzerland

Step 1: Search for *Tatausführungsgefahr* in German.

No results.

Step 2: Search for *Fortsetzungsgefahr* in German.

No results.

7. Appendix 2: CJEU

1) Gebührengesetz (Austria)

Search for *Gebührengesetz* performed via the Google Search function, limiting the results by website: curia.europa.eu, and including "Verfahrenssprache: Deutsch" in quotation marks.

(Same results obtained via the Curia search form).

Case reference and country	**German**	**Translation**	**Subject matter**	**Relevance**
C-195/90 R Order of the President of the Court of 28 June 1990 *Commission of the European Communities v Federal Republic of Germany* (Germany)			Money payable for using German roads (by heavy goods vehicles)	Indirect: different statute
	(*Keywords*) "Verkehr – Straßenbenutzungsgebühren"	(*Keywords*) "Transport – Road tax"		
	(header) "Gesetz über Gebühren für die Benutzung von Bundesfernstraßen mit schweren Lastfahrzeugen"	*(header)* "Gesetz ueber Gebuehren fuer die Benutzung von Bundesfernstrassen mit schweren Lastfahrzeugen (Law on **charges** for the use of Federal roads and motorways by heavy goods vehicles)"		

	(paras. 4, 14, 20) "Straßenbenutzungsgebühren gesetz"	(paras. 4, 14, 20) the "Gesetz ueber Gebuerhen"		
	(para. 5) "neue **Gebühr** für die Benutzung von Bundesautobahnen und Bundesstraßen"	(para. 5) "a new road **tax** (" Straçenbenutzungsgebu ehr ") (*sic*) "		
	(para. 10) "und daß die geplante Senkung des Satzes dieser **Steuer** praktisch dem Betrag der geplanten **Straßenbenutzungsgebühr** entspreche. Die Einführung dieser **Gebühr** belaste somit nicht die deutschen Verkehrsunternehmen, sondern ausschließlich die Verkehrsunternehmen der anderen Mitgliedstaaten, die diese **Gebühr** entrichten müßten, ohne in den Genuß der Senkung der **Kraftfahrzeugsteuer** zu kommen."	(para. 10) "and the proposed reduction in the rate of the **tax** would be practically equivalent to the amount of the **road tax** contemplated. The introduction of the latter **tax** would thus in fact not constitute a burden upon German carriers but solely on carriers of other Member States who would be required to pay the **road tax** without having the benefit of a reduction in the **motor vehicle tax**."		
	(paras. 13, 14, 15, 16, 20) "**Straßenbenutzungsgebühr**	(paras. 13, 14, 15, 16, 20) "**road tax**"		
C-508/99 Judgment of the Court (Second Chamber) of 16 May 2002 *Palais am Stadtpark Hotelbetriebsgesellschaft mbH & Co. KG v Finanzlandesdirektion für Wien,*			Tax on companies in relation to the raising of the capital	Yes

Niederösterreich und Burgenland (Austria)				
	(para. 17) "§ 33 Tarifpost (im Folgenden: TP) 16 Absatz 1 Ziffer 1 lit. b **des Gebührengesetzes (BGBl 1957/267, im Folgenden: GebG)** sah vor, dass sich die **Abgabe**, die auf Gesellschaftsverträge, ausgenommen solche über Kapitalgesellschaften im Sinne des **Kapitalverkehrsteuergesetzes** in seiner bis zum 31. Dezember 1994 geltenden Fassung, wodurch sich zwei oder mehrere Personen zur Verfolgung eines Erwerbszweckes verbinden, zu erheben war, bei Widmung von Vermögenswerten vom Wert der bedungenen Vermögenseinlage oder ihrer Erhöhung auf 2 v.H., mindestens jedoch 800 ATS, belaufen musste."	(para. 17) "Paragraph 33, item 16(1), point 1(b), of **the Gebührengesetz (Law on fees, BGBl. 267/1957, hereinafter the GebG)** provided that the **duty** to be levied on constituent instruments, other than those which relate to capital companies within the meaning of the **Kapitalverkehrsteuergesetz** in the version applicable until 31 December 1994, by which two or more persons agree to combine in order to operate for profit, was, in the case of a contribution of assets, to be 2% of the value of the capital contribution or increase in it but not less than ATS 800."		
	(para. 23) "Nachdem die Abgabenbehörde die Berufung als unbegründet abgewiesen hatte, brachte Palais am Stadtpark den Rechtsstreit vor die Abgabenbehörde zweiter Instanz, die die Berufung ebenfalls mit der Begründung abwies, dass das Gesellschaftskapital von	(para. 23) "The tax authority rejected the appeal as unfounded. Palais then appealed to the second-instance tax authority, which also dismissed the appeal on the ground, in particular, that **capital duty** had been charged only once on the capital		

	Palais am Stadtpark nur ein einziges Mal der **Gesellschaftsteuer** unterworfen worden sei, da die **Gebühr, die gemäß § 33 TP 16 Absatz 1 Ziffer 1 lit. b GebG** erhoben werde, nicht der **Gesellschaftsteuer** gleichgestellt werden könne und jedenfalls vor dem Inkrafttreten der Richtlinie 69/335 für die Republik Österreich erhoben worden sei."	of Palais: the **duty levied under Paragraph 33, item 16(1), point 1(b), of the GebG** could not be deemed to be **capital duty** and was in any event levied before the entry into force of Directive 69/335 in the Republic of Austria."		
	(para. 24) "**Gebührengesetz**"	(para. 24) "**the Gebührengesetz**"		
	(para. 27) "Mithin fallen die **Gebühren und sonstigen Abgaben**, die die Mitgliedstaaten auf Einlagen in andere Gesellschaften als die durch die Richtlinie 69/335 erfassten, nicht in den Anwendungsbereich dieser Richtlinie."	(para. 27) "Accordingly, **duties and charges** levied by the Member States on contributions to companies and firms other than those referred to in Directive 69/335 do not fall within the scope of application of that directive. "		
	(para. 28) "Daraus folgt, dass das in Artikel 10 der Richtlinie 69/335 aufgestellte Verbot, **keinerlei Steuern oder Abgaben** mit denselben Merkmalen wie die Gesellschaftsteuer zu erheben, nicht auf eine **Gebühr oder Steuer** anwendbar ist, [...] auch wenn die Einlagen, die ihr vor ihrer Umwandlung zugeflossen sind, bereits einer **Gebühr oder Steuer**	(para. 28) "It follows that the prohibition in Article 10 of Directive 69/335 on the charging of **any tax** with the same characteristics as capital duty cannot apply to a **duty or charge** [...] even where the contributions to it before its conversion have already been subject to a **levy or tax** with the same		

	mit denselben Merkmalen wie die **Gesellschaftsteuer** unterworfen wurde."	characteristics as **capital duty**."		
	(para. 32) "die nach § 33 TP 16 Absatz 1 Ziffer 1 lit. b GebG erhobene **Gebühr**"	(para. 32) "the **duty** levied under Paragraph 33, item 16(1), point 1(b), of the GebG"		
Case T-315/13 Order of the General Court *Kompas mejni turistični servis d.d. (Kompas MTS d.d.) v European Parliament and Others*		Not available in English		
Case T-82/14 Judgment of the General Court *Copernicus-Trademarks Ltd v European Union Intellectual Property Office* (Germany; but refers to Austrian legal provisions)			EU trade marks	Yes
	(para. 124) "**Gebührengesetzes** von 1957 in der Fassung vom 11. November 2011 (BGBl. 267/1957)"	(para. 124) the "**Gebührengesetz (Law on the collection of fees)** of 1957, in the version of 11 November 2011 (BGBl. 267/1957)"		
	(para. 117) "In Österreich seien mit der Einreichung der Markenanmeldung unabhängig davon, ob die Marke später eingetragen	(para. 117) "**Documentary fees** were payable in Austria at the time the application for		

	worden sei oder nicht, **Schriftengebühren** angefallen. Insgesamt habe Herr A. bei den verschiedenen Markenämtern für Markeneintragungen, aber auch für Marken, bei denen das Verfahren nicht bis zur Eintragung weiterverfolgt worden sei, **Gebühren** in sechsstelliger Höhe entrichtet."	registration of the trade mark was filed, regardless of whether, in the end, the mark was registered. In total, Mr A. paid **fees** of a six-figure amount to different trade mark offices in respect to the registration of trade marks, but also for marks in respect of which the procedure had not been pursued until registration."		
	(paras. 120, 121, 123, 139) "**Gebühren**"	(paras. 120, 121, 123, 139*) "**fees**" (*para. 139): "registration fees"		

2) Rundfunkbeitrag/Rundfunkgebühr (Germany)

Search for *Rundfunkbeitrag* performed via the Google Search function, limiting the results by website: curia.europa.eu, and including "Verfahrenssprache: Deutsch" in quotation marks.

Search for *Rundfunkgebühr* performed via the Google Search function, limiting the results by website: curia.europa.eu, and including "Verfahrenssprache: Deutsch" in quotation marks.

Case reference and country	**German**	**Translation**	**Subject matter**	**Relevance**
Case C-492/17 *Rittinger and Others* Request for a preliminary ruling (Case in progress) (Germany)			Broadcasting financing	Yes
	"Sind Art. 107/108 AEUV so auszulegen, dass das Gesetz betreffend den **Rundfunkbeitrag** der Zustimmung der Kommission bedurft hätte und mangels Zustimmung unwirksam ist?"	"Are Articles 107 and 108 TFEU to be interpreted as meaning that the law on the **broadcasting contribution fee** should have been approved by the Commission and is invalid without that approval? "		
	"Ist das nationale **baden-württembergische Gesetz vom 18.10.2011 zur Geltung des**	"Is the national **Baden-Württembergisches Gesetz vom 18.10.2011 zur Geltung des**		

	Rundfunkbeitragsstaatsvertrags (RdFunkBeitrStVBW) vom 17. Dezember 2010, zuletzt geändert durch Artikel 4 des **Neunzehnten Rundfunkänderungsstaatsvertrages vom 3. Dezember 2015 (Gesetz vom 23. Februar 2016 – GBl. S. 126, 129**) mit Unionsrecht unvereinbar, weil der dort grundsätzlich seit 1.1.2013 von jedem im deutschen Bundesland Baden-Württemberg wohnenden Erwachsenen voraussetzungslos zugunsten der Sendeanstalten SWR und ZDF erhobene Beitrag eine gegen Unionsrecht verstoßende bevorzugende Beihilfe zugunsten ausschließlich dieser öffentlich-rechtlicher Rundfunkanstalten gegenüber privaten Rundfunkanstalten darstellt?"	**Rundfunkbeitragsstaatsvertrags (Baden-Württemberg law of 18 October 2011 on the application of the interstate treaty on the broadcasting contribution fee, 'RdFunkBeitrStVtrBW')** of 17 December 2010, last amended by Article 4 of **the Neunzehnter Rundfunkänderungsstaatsvertrag vom 3. Dezember 2015 (nineteenth treaty amending the interstate broadcasting treaty of 3 December 2015) (Law of 23 February 2016 — GBl. pp. 126, 129)** incompatible with EU law because the contribution fee unconditionally levied since 1 January 2013 in principle from every adult living in the German Land of Baden-Württemberg to finance the public service broadcasters SWR (Südwestrundfunk) and ZDF (Zweites Deutsches Fernsehen) represents preferential aid that infringes EU law for the exclusive benefit of these public service broadcasting bodies compared to private broadcasting organisations?"		
C-337/06 Judgment of the Court (Fourth Chamber) of			Broadcasting financing	Yes

13 December 2007 *Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH*				
	(paras. 17, 18, 19, 20, 44) "**Rundfunkgebühren**"	(paras. 17, 18, 19, 20, 44) "**Fees**"		
	(Para. 18) "**Staatsvertrag über die Regelung des Rundfunkgebührenwesens vom 31. August 1991**"	(para. 18) "**State Treaty on the regulation of the broadcasting fee (Staatsvertrag über die Regelung des Rundfunkgebührenwesens) of 31 August 1991**"		
	(para. 20) "Die öffentlich-rechtlichen Rundfunkanstalten haben im Wege einer Verwaltungsvereinbarung die **Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten (im Folgenden: GEZ)** gegründet."	(para. 20) "The public broadcasting bodies have established, by means of an administrative agreement, **a central agency for the collection of fees, the Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten ('the GEZ').**"		
	(Para. 20) "Die **Gebühren** werden von ihr beim Bürger per **Gebührenbescheid**, also im Wege hoheitlichen Handelns, eingezogen."	(Para. 20) "the GEZ issues a **notice of liability to the charge**, which is to say it acts as an official authority."		
	(Paras. 20, 44) "**Rundfunkgebührenstaatsvertrag**"	(Paras. 20, 44) "**the State Treaty on the broadcasting fee**"		

8. Appendix 3

Email correspondence with senior translator at the ECtHR[21] (July - August 2018)

1) Dear [...]

I am writing to you with an academic query. I am currently writing my MA thesis (in Translation) at the University of Vienna on the topic of translation of legal terminology (German into English) in the judgments of the European Court of Human Rights and the Court of Justice of the European Union and its significance for legal translators in general.

[…] I have not been able to locate any [...] information about [...] the use of Multiterm (or any other terminology resources) at the ECtHR and was wondering whether you would be so kind as to offer some assistance on this topic [...].

[...]

2) [...]

In fact we never pursued the Multiterm project, in particular as we switched shortly afterwards from Trados to new software called Logiterm.

Logiterm also has a glossary function and there is still an intention to use it to build up a terminology database. It's certainly been slow to get off the ground, but it may materialise in the coming months. It will be some time though before it contains enough entries and I doubt that it will be made available to other staff in the Registry, because of the cost of licences. So we still basically use the concordance function of that software or the Court's own case-law database, Hudoc, which is not particularly easy to use for translation purposes.

Of course any German to English translation will be done by the lawyers themselves in drafting the case. We do, however, discuss solutions with them when checking their drafts – we recently had a discussion on the best translation of oberlandesgericht for example.

[...]

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[21] The views expressed here do not necessarily represent the views of the European Court of Human Rights.

3) [...]

I have a few follow-up questions about the internal workflow with regard to terminology:

1. You mentioned that translators use Hudoc or the concordance function of Logiterm. What would the difference between the two resources be? Does one contain more/different documents in comparison to the other?

2. Following on from the first question: Is the concordance search in Logiterm performed on published judgments and summaries only or does the translation memory also include documents from the earlier stages of the case (e.g. pleadings)? If yes, does this include documents in languages other than English and French?

3. Are there any particular efforts made to ensure consistency of terminology in cases where translators get involved at an early stage (e.g. when assisting the lawyers/judges as part of the "language checking" service, or during the translation of the confidential documents for the Court in cases before the Grand Chamber)? (You referred to this in your reply but I was wondering if it is also done with reference to past translations of a term and how these would be searched for).

4. Would the planned terminology/glossary function in Logiterm be intended solely for translations in the official language pair English-French, or are there plans to include terms from other languages?

[...]

4) [...]

I should also have mentioned that Logiterm is occasionally used for the pre-translation of judgments and decisions. An auditor's report from last year actually called for us to use this facility more, to save time, although not all translators like the idea for various reasons (mainly the idea that it's not very reliable). A new assistant has just been appointed to work on this.

1. Our assistants enter existing translations (by alignment) into Logiterm as soon as possible, so the concordance function searches in all bi-texts which are usually up to date (filters for GC/Chamber, country ...). Hudoc is the database of decisions, judgments, press releases (a separate base), case summaries – it has more material in the sense that it includes monolingual (French or English) decisions and judgments, often a good way of checking whether an expression has been used before. It is also marginally more reliable in terms of being up to date (if the assistants haven't yet put the most recent documents into Logiterm). And yes, Logiterm does contain other documents ...

2. The Logiterm memory includes documents from earlier stages in GC cases, but probably only the rapporteur's note and research reports, together with any earlier decisions (in particular a Chamber judgment in the event of referral) and press releases. We don't put pleadings (known as parties' observations) in the memory. The issue here is that pleadings are translated outside in GC cases and usually not at all in Chamber cases. Even in GC cases, the Government file pleadings in an official language and the applicant usually does too, but can be exempted under the Rules – the latter is the only situation where we outsource translation from a non-official into an official language. The document then of course has to be translated into the other official language, in the GC procedure, but this is usually outsourced too (as are the Government's observations into the other language). In any event, none of this work is included in the memory although we discussed the issue relatively recently in connection with pre-translation, i.e. what are the most useful documents to include for that purpose. One issue is that not all the outside translations are revised; another is that the source document is often provided in pdf format.

Certainly no translations are included other than English/French and French/English. Miscellaneous documents in Logiterm include annual reports and glossaries, whether monolingual or bilingual, and other international instruments.

3. In addition to a style manual, we have an internal drafting guide containing sections for each country and the official-language terminology that has been agreed for domestic institutions and so on. This is mainly used by the language checkers, and some of the content is the result of terminology meetings and internal discussions. Those two documents obviously seek to ensure consistency are available to all staff – drafting lawyers are expected to use the style manual in particular.

Language checkers and translators usually ascertain how a term has been used/translated before, using Hudoc or Logiterm, but the problem of course is that there may be a number of variants – as the case-law has developed, key passages have been edited and improved, amended deliberately, complemented or reduced, adapted to a different context, back-translated to something different from the original, etc. It is sometimes difficult to trace back the origin of particular usage. And of course it's important to retain the linguistic precedent as far as possible, but it's not always easy to establish the best variant where there are several possibilities.

In case of doubt, the language checkers ask their team manager while the translators usually decide autonomously. There's always a possibility that the case lawyer may then disagree and this leads to discussion. For some countries we've had in-depth discussions with the country lawyer to iron out terms of criminal procedure, for example. In the example I gave of the oberlandesgericht, the case lawyer objected to the previous

translation as Court of Appeal, on the ground that it hears some cases, such as terrorism cases, at first instance. This issue was then discussed by e-mail. This illustrates the fact that preferences can change over time, often as older staff retire and their successors have different ideas (whether translators, lawyers or proofreaders in the publications department) – apart from the fact that people just disagree.

Consistency within the same text is ensured, but we are aware that usage has not always been consistent in the past, for the above reasons. It is therefore quite important to find the most recent examples of translation or usage (one reason why I personally prefer to rely on Hudoc, using the "most recent first" filter). Another point is that, at least in the law part and especially the general principles, the relevant case reference is often given in brackets – so you have text which comes from a previous case but with no inverted commas (a "hidden quote") – in that situation it is usually best to look up that case on Hudoc. The exact wording may still not be found, however, if the lawyer has paraphrased or even referred to the wrong case or paragraph, or of course if the reference is a monolingual Chamber case, or if there are several references and it's not clear which one contains the closest wording. Sometimes instead of looking for a precise case, it's better to enter a particular sentence. Another advantage of Hudoc is that you can see the whole judgment for the context.

4. In the previous Multiterm project there was an intention to include other languages within each entry but I don't think that will be the case for Logiterm. We still haven't decided on the final product, but I can let you know in due course.

[...]

5) [...]

[...] was wondering whether there have been any updates/progress since your last email with respect to the Logiterm database.

[...]

6) [...]

In terms of the documents that are placed in Logiterm to help with pretranslation etc., I now have a full list of what is aligned:

- GC judgments/decisions

- judgments/decisions selected for the list of key cases

- judgments/decisions selected for the "B list"

- administrative documents (minutes of meetings etc.)

- CLIN summaries
- press releases
- case-law updates
- case-law guides
- Council of Europe conventions/explanatory reports
- Rules of Court

[...]

9. Abstract

9.1. Abstract in English

The present thesis focusses on the judgments of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) and seeks to assess their usefulness as resources of already translated German-language legal terms for translators working outside of the setting of the two courts. In particular, it considers the adoption of these terms from the perspective of the *skopos* theory, engages in a critical discussion of legal translation theory and terminology theory, and compares and contrasts the translation workflow at the courts. The theory is complemented by a targeted conceptual analysis of specific Austrian, German and Swiss legal terms from the judgments of each court; this analysis helps illustrate the considerations a translator needs to take into account when adopting the same translation strategies, and the possible implications of such action in light of the *skopos* theory.

9.2. Abstract auf Deutsch

Die vorliegende Masterarbeit fokussiert auf die Urteile des Europäischen Gerichtshof für Menschenrechte (EGMR) und des Europäischen Gerichtshof (EuGH) und befasst sich mit ihrem potentiellen Nutzen als Referenzquelle für Übersetzungen von Rechtsbegriffen aus dem Deutschen ins Englische. Unter Zuhilfenahme der Werkzeuge der Skopostheorie, der Terminologielehre und der Theorie(n) des Rechtsübersetzens wird analysiert, inwiefern Übersetzungen von Rechtsbegriffen aus den Urteilen als autoritativ übernommen werden können und was von ÜbersetzerInnen, die mit diesen Quellen arbeiten, besonders beachtet werden muss. Anhand der Analyse der Arbeitsabläufe an den Gerichtshöfen sowie am Beispiel und Vergleich einiger ausgewählter Urteile bzw. Rechtsbegriffe aus österreichischem, deutschen und schweizerischem Recht, werden die besonderen Herausforderungen für ÜbersetzerInnen von Rechtstexten verdeutlicht und unter dem Blickwinkel der Skopostheorie untersucht.