E pluribus unum? Language diversity, pre-comprehensions and translatability in EU business law.

1. INTRODUCTION

The European Union is not a federal state in a true sense, and yet it has developed an original form of multi-level constitutionalism.\(^1\) The original six members of the Economic Communities, founded in 1951\(^2\) and 1958\(^3\), are grown to 28 members of the European Union as of 2016.\(^4\) Far from being melted into a single and unified legal system, however, Member States still preserve their distinct legal traditions and, most importantly, they have kept the own national languages. As of today, the EU recognises 24 official languages and all EU legislative acts are to be drafted in each of these languages.\(^5\) Additionally, at national level courts and legal scholars make use of their own national languages, even when they interpret EU rules. Such a diversity is not a unique feature of the European Union and other multi-language legal systems exist today, the most important of which is probably India. This situation, however, may have a significant impact on the uniformity of law in the EU. Languages, indeed, are vehicles for cultural traditions, pre-comprehensions and ideologies, so that terms and concepts of EU legal documents may be interpreted differently in different countries, reflecting domestic legal discourses and traditions.

It is to be expected, therefore, that in branches of the law that are more embedded in domestic social relations, such as family law or criminal law, legal discourses and languages would drastically diverge across the European Union. Other areas of law, however, might be loosely embedded into any specific national system, so that it is to be expected that European linguistic harmonisation should be an easy task. At a first glimpse, the set of rules governing intra-corporate relations and capital markets seem to belong to this latter category, so that national idiosyncrasies should be easily overcome. In this paper, it will be shown that this is only partially the case.

In this complex scenario, the only element of simplification is the emergence of English as a lingua franca for the political and legal debate.\(^6\) However, despite its reputation and its flexibility, English is still

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\(^2\) Treaty establishing the European Coal and Steel Community (Treaty of Paris) signed on April 18, 1951 by Belgium, France, Italy, Luxembourg and the German Federal Republic.

\(^3\) Treaty establishing the European Economic Community (Treaty of Rome) signed on 25 March 1957 by the same countries that signed the Treaty of Paris.

\(^4\) Denmark, Ireland and the United Kingdom joined the European Communities in 1973 (OJ 1972 L73); Greece joined the European Communities in 1981 (OJ 1979 L291); Portugal and Spain joined the European Communities in 1986 (OJ 1985 L302); Austria, Finland and Sweden joined the European Communities in 1995 (OJ 1995 C241); Estonia, Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia joined the European Union in 2004 (OJ 23.9.2003); Croatia joined the European Union in 2013 (OJ L112/10).

\(^5\) Regulation 1/58 determining the languages to be used in the EEC, OJ B017, 7.10.1958, 385 – 386. The official languages of the EU are: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish.

\(^6\) English, actually, is the lingua franca not only in legal or political debate, see U Smit, ‘English as lingua franca and its role in integrating content and language in higher education. A longitudinal study on question-initiated exchanges’ 24 Utrecht Studies in Language and Communication (2012) 155.
far from being a widely accepted common language having the same level of legitimacy, at least among scholars and clerics, which Latin had in the middle age, not to speak of its role before the collapse of the old Roman statehood. Additionally, the new legal lingua franca used by scholars and policy makers whose native language is not English (like the author of this work, whose native language is Italian) is often just a simplified version of Shakespeare's idiom and is loosely connected with the common law tradition into which the English legal language is rooted; in some cases, this ‘new English’ even creates neologisms that reproduce concepts deriving from other legal cultures and traditions. Ironically, despite the common use of English in both the European academic and the European political discourse, the United Kingdom, by way of a referendum held on 23 June 2016, has decided to detach its destiny, at least under the institutional standpoint, from the European Union’s. Nevertheless, it is predictable that English will continue being the most commonly used language for international and European legal and political discourse at least in the near future.

This work will test whether company law and financial market law are ‘organic’ to national societies and whether language idiosyncrasies are likely to emerge in these areas. While the next section will address the general issue of legal language and concepts, the following sections will analyse three specific and emblematic questions arising in the fields of company and financial market law. The third section addresses how the concept of ‘merger’ among companies, entailed in two directives on the harmonisation of company law and identical in all languages, is interpreted differently across different languages and cultures; to this aim, we will discuss the arguments put forward in front of the Court of Justice of the European Union in the case Sevic by the German government and by the Advocate General. The third section addresses the concepts of ‘registered office’, ‘statutory seat’ or ‘seat’ of a company, and how these concepts are translated in a sample of European language (Dutch, Italian, English, French, German, Spanish, Romanian, Portuguese). The forth section addresses a case of linguistic discrepancy, namely the concept of ‘inside information’ of the Market Abuse directive (now regulation). The last section tries to draw some conclusions by stressing that even in most advanced economic fields language diversities exist, reflecting the fact that the balance of interests among social actors and classes is predominantly conducted at national level.

2. LAW, LANGUAGES AND SOCIAL RELATIONS

The European Union institutions are based upon written rules embodied in the Treaty on the Functioning of the European Union and the Treaty of the European Union. The EU institution, additionally, have developed a broad body of statutory instruments whose ultimate interpretative body is the Court of Justice of the European Union. Nevertheless, in the daily legal life, these written rules are interpreted and applied by national courts and institutions; additionally, legal scholars and judges also discuss EU law issues in their national languages and national communities of legal scholars continue writing and discussing in their own languages on topics related to the interpretation of EU law. And since language is the sole vehicle for legal concepts, legal scholars might still have the tendency to think according to own national categories and mid-sets, even when they interpret EU law.

A simple solution to avoid such idiosyncrasies, based upon the earlier Wittgenstein’s claim that ‘the borders of my language are the borders of my thought’, could be adopting just one official language (which is likely to be English) for all official languages and using such exclusively such language in legal...

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7 The reason of this narrow selection is simply that the author of this work can understand these definitions in such languages without being helped by a native speaker translator.


10 L Wittgenstein, Tractatus Logico-Philosophicus (1933) proposition 5.
debates referred to EU law. Such a solution, however, is far from being realistic. Furthermore, even if all Member States (and their legal communities) would commonly decide to adopt a single language for legal discourse, this – admittedly quite unrealistic – decision would not resolve the fundamental problem. It is worth remembering that Wittgenstein reversed his previous opinions at a late stage of his life, claiming that languages are historically and anthropologically determined and that words are instruments of social practices, not mere logical tools.\(^{11}\) To a certain extent, the ideas of the later Wittgenstein are mirrored in other theories on languages and legal discourses, such as the theory of hermeneutic circle, whereby any interpreter addresses rules and definitions with some pre-existing expectations as to their meaning so that languages are also vehicles of tradition and ‘traditional context’\(^{12}\), or the idea that legal languages are the symbolic tools of given communities.\(^{13}\) By following this idea coherently, we might even conclude the aim of a legal unification in Europe and the creation of a single market are not much more than a dream, as lawyers are unavoidably embedded in a specific language and a culture which would force them into diverging interpretations.\(^{14}\) Whether we accept this conclusion or not, what is clear is that the question of language, and of the interpretation of legal materials, is a political question. This crucial issue is exacerbated by the fact that all versions of EU statutory instruments in any of the 24 official languages of the EU are equally binding and that their translations in different languages might diverge.

The problem of legal languages in the EU is therefore multifaceted. A first layer of problem is given by the fact that a definition or a term of art entailed in the Treaty or in any other legislative instrument may be interpreted differently across Member States, according to domestic traditions and conceptual mind-sets. This first problem reveals quite clearly how national legal traditions, whether consciously or not, may have an impact upon the interpretation and, therefore, upon the content of legal rules.\(^{15}\) A second layer of issues is given by the fact that discrepancies may exist in different language versions of the same legislative instrument.\(^{16}\) Sometimes, certain discrepancies are hidden behind a veil of allegedly identical, or functionally equivalent, words or definitions in different languages, which however reveal deep profound divergences if we look at courts’ and lawyers’ conceptualisations and practices. Nevertheless, the goal of uniform interpretation throughout the EU should be paramount, otherwise lawyers and policy makers would only pay lip service to the goal of creating a single market and harmonising certain areas of the law. Therefore, the European Court of Justice has developed criterions to reach uniform interpretations of EU legislative materials.\(^{17}\) And yet this process of reaching uniform interpretations of EU law is not painless. The reason is that any legal system is product of continuous dialogue within a community sharing the same language and, most importantly, is the product of a political balance of the underlining interests at national level and of the specificities of national


\(^{14}\) See P Legrand, ‘The impossibility of legal transplant’, 4 Maastricht J. Eur. & Comp. L. (1997) 111. A radical application of this idea notoriously dates back to Montesquieu, who was convinced of the inherent embeddedness of law and legal language, so that any attempt of transplanting legal institutions from one jurisdiction to another would be a vain effort: C. L. de Secondat, Baron de Montesquieu, *The Spirit of the law* (1st ed. *L’esprit de Lois*, 1777) chapter 3. The issue of whether legal transplants are possible or not has triggered an intense debate, which can not be addressed in this work. For a different position see A Watson, *Legal Transplants – An approach to comparative law* (1973).

\(^{15}\) Such differences emerge with regard to any jurisdiction, not only between common law and civil law systems. In this regard, with conclusions partially diverging from those of this work, see V G Curran ‘Romantic common law, enlightened civil law: legal uniformity and the homogenization of the European Union’ 7 Col J. Eur. Law (2001) 63 (lawyers implicitly learn the core tenet of the other system through non-legal social experiences which retain the essence of it).


\(^{17}\) An overview in M Lutter ‘Die Auslegung angeglichenen Rechts’ 47 Juristen Zeitung (1992) 593.
economies.\textsuperscript{18} In other words, the law is ‘embedded’ into a given interpretative community and into a given society at large.

In order to analyse the level of ‘embeddedness’ of law into society, Kahn-Freund suggested to classify all branches of the law along a continuum between rules that are entirely organic to a given society, at one extreme, and rules that are completely disembodied from any society and only express technical decisions, at the other.\textsuperscript{19} In Kahn-Freund’s view, the position of a given set of rules along this ‘continuum’ – and hence whether rules can be transplanted or not from one jurisdiction to another – only to a limited extent depends on geographical or cultural factors, while political factors are likely to be much more significant. By relying on the idea that rules can be analysed along a continuum from fully embedded to merely technical ones, the question arises as to whether company and financial law are close to the ‘technical’ side of this spectrum or are organic to the specific national society into which they grow. This question is crucial for the process of harmonisation of company and financial law in the EU: should we conclude that these branches are \textit{per se} embedded into specific societies, any attempt of harmonisation – as well as any legal transplants from one legal system to another – would be useless. Such analysis might offer a solid foundation for the question of whether European company law is ‘trivial’ or not.\textsuperscript{20}

To address this issue, we should introduce into our analysis the dimension of social relations and politics. Any area of the law governs social relations that reflect a certain balance of power among social actors and, in some cases, among social classes. Rules that strike the balance among conflicting social groups and social classes, such as labour law or insolvency proceedings, are organic to specific society and political communities.\textsuperscript{21} Even in an era of intense globalization, and even within the European Union, such equilibria are mostly established at the level of national state.\textsuperscript{22} By contrast, sets of rules that address the interests of just one social group are more likely to be less embedded into any specific society, provided that this social group or class has predominantly trans-national interests.

In this regard, the question arises as to whether company law and financial market law belong to the last category of ‘not embedded’ branches of the law. Company law mainly regulates the intra-corporate relations and the relations among company’s bodies; this area of law, therefore, mainly addresses the relations among shareholders, that is to say relations and conflicts within the same social class. To a certain extent, therefore, company law rules are merely technical and disembodied from a given society. Things, however, seems to be more complicated, since certain company law rules also govern the relations of a company with other stakeholders. For instance, in Germany the ‘codetermination’ mechanism of corporate governance grant to labour a certain share of corporate power; other examples might be the rules aimed at protecting creditors from excessive distributions or the risks arising from risky transactions (for instance capital reductions or mergers). Additionally, even the main underlying

\textsuperscript{18} Some scholars argue that differences among jurisdictions mainly depend on extra-legal economic factors, such as whether a socio-legal system is to be classified as liberal or coordinated market economy (according to the traditional literature on varieties of capitalism); see among other authors: K Pistor ‘Legal Ground Rules in Coordinated and Liberal Market Economies’, in \textit{Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US}, eds. Hopt, Wymeersch, Kanda, Baum (2005) 249. For an overview of socio-legal theories see M. Siems, \textit{Comparative law} (Cambridge: 2014)136 – 140.


\textsuperscript{20} See L. Enriques’ seminal paper ‘EC company law directives and regulations: how trivial are they?’ 27 \textit{U Pa J Int Law} (2006) 1

\textsuperscript{21} On discourse idiosyncrasies in labour tribunal practices see W Bromwich ‘Discourse practices and divergences in legal cultures in employment tribunals’ (2010); on the politics of insolvency law see FM Mucciarelli ‘Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension’ \textit{European Business Organization Law Review} (2013) 175.

social group governed by company law rules (the shareholder as a class) might be still organic to their specific national state. Therefore, company law rules are likely to be still partially embedded into national jurisdictions and societies. Eventually, financial regulation, which governs relations among individual investors in financial markets, seems to be more prone to globalising tendencies, due to the global activities of its main actors (asset managers and institutional investors), so that a bottom-up request for uniformity is likely to emerge.

The relation of legal language with the underlining social interests (the relations of production), however, is not mechanical. Languages reflect traditions and conceptions of the world, which are based upon the standpoints and the ideologies of relevant social groups, in most cases upon the needs of the dominant class. In other words, linguistic idiosyncrasies will only disappear when the relevant social groups will show a sufficient degree of uniformity throughout the EU disembedded from any national states (a sort of ‘European bourgeoisie’) and will have the cultural power to shape domestic practices and languages. Alternatively, this outcome might be produced by compromises among dominant social groups that retain their national character, so that national legal languages and concepts will be made fully translatable across different languages. Additionally, languages are mediated by intellectual groups, that is to say by their ideologies and role they play in a given society\(^{23}\); in our case, legal language is mediated by the social group of academically trained lawyers (both academics and practitioners). Therefore, the less a national class of lawyers is self-confident and proud of its independency, the more national legal language risk to be porous to foreign influences without any mediation or filter.\(^{24}\) In this light, diverging interpretation of EU terminology and different language versions of a legislative instrument are not to be considered as parochialisms (although this might sometimes be the case), but represents the struggles of linguistic communities representing local interests to keep the original balance of interests and counter-react to uniformity tendency.\(^{25}\) This does not mean that the harmonisation of law in the EU and of legal concepts mediated by national languages is an always impossible task; what I would like to stress is just that such outcome will ultimately depend on both economic (the scale of interests of the dominant classes) and ideological (the resilience of national lawyers) factors. In the next pages, three cases of linguistic divergences and idiosyncrasies in the fields of company law and financial regulations will be analysed. These areas of law, are more likely than other areas to show uniformity tendencies, hence they might reveal at which pace the process of harmonisation of European legal systems (beyond the harmonization of specific areas of the law) is proceeding.\(^{26}\)

3. **What is a ‘merger’?**

In legal and financial discourse, a ‘merger’ among companies is commonly defined as a combination of two or more companies into a new or an existing legal entity.\(^{27}\) This operation is accepted and regulated in nearly all jurisdictions, as it reflects the need of restructuring company arrangements without

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24 See Grossfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n.) 76.


27 For instance, see: Hillier Ross Westerfield Jaffre Jordan, Corporate Finance (McGraw-Hill: 2010), 784; FT lexicon [http://lexicon.ft.com/Term?term=merger](http://lexicon.ft.com/Term?term=merger). In certain studies, the concept of a ‘merger’ refers to both a combination of two or more entities and the acquisition of an entity by another; see for instance: Brealey Myers Allen, Principles of Corporate Finance (McGraw-Hill: 2008) 882 – 885. Only the former of these situations reflects the legal concept of a ‘merger’. \[\text{885.} \]
liquidating pre-existing companies. Its essential elements are that (a) the resulting company assumes all duties, rights and liabilities of the merging companies, and (b) shareholders of the merging companies become shareholders of the new companies in a percentage that normally reflect the relative value of the undertakings involved. In the European Union, the Third Company Law Directive addresses mergers among companies incorporated in the same Member State, while the Cross-Border Merger Directive allows and regulate mergers between two or more companies governed by the law of different jurisdictions. In these legislative instruments a merger by acquisition is the operation whereby two or more companies ‘are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company […]’ and a merger by formation of a new company is the operation ‘whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company’. According to commonly accepted criteria developed by the European Court of Justice, these definitions should be interpreted autonomously, and, since these definitions do not seem to diverge across language, it is to be expected that in all jurisdictions legal communities interpret these concepts similarly. Most importantly, we should expect that that this concept is constructed similarly in all legal communities since it defines a business operation that is, in its essence, identical throughout jurisdictions. Nevertheless, the definition of ‘mergers’ have triggered a quite complex constructive and semantic problem.

If we take these definitions literally, a ‘merger’ is the combination of two elements: (a) dissolution of pre-existing companies without a liquidation proceeding; (b) transfer of all assets and memberships of these companies to another company (a pre-existing company or a newly established entity). Underneath the surface of this apparently clear language, however, several conceptual ambiguities lurk, as is clearly shown the decision rendered by the Court of Justice in the case Sevic, where different interpretations of the concept of merger were used to support different solutions as to the scope of freedom of establishment. The case discussed by the Court was related to a Luxembourg company (Security Vision Concept S.A.) that sought to merger into a German company (Sevic System AG). In the classification of the cross-border merger directive, this was a ‘merger by acquisition’. At the time when the decision to merge was taken and the case was submitted to the European Court of Justice, however, the cross-border merger directive had not yet been approved. Before the enactment of this directive, the German statute on companies’ transformations regulated only mergers between two or more companies having their ‘Sitz’ (seat) in Germany, which was interpreted as an implicit prohibition of cross-border merges. Curiously, such prohibition also applied when the resulting company was incorporated in Germany, such as in the Sevic case. As a consequence, the local court of Neuwied refused to register the deed of merger. This refusal was challenged in front of the regional appeal court (Landgericht) of Koblenz, which submitted to the European Court of Justice a preliminary question on whether the German prohibition of cross-border mergers was compatible with the EU freedom of establishment. What is relevant for the purpose of this study is analyzing the arguments put forward, on the one hand, by the German government and, on the other hand, by the Advocat General Tizzano.

To show that German law did not violate freedom of establishment, the German government maintained that the Luxembourg company, by merging into a German company, ‘loses its legal personality’. According to this argument, therefore, a merger implies the dissolution of pre-existing companies and a universal transfer of all their assets and liabilities into another company, similarly to a universal succession among natural persons. A consequence of this construction is that ‘a dissolved

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29 Directive 78/855/CEE, art. 3 and art. 4.
company cannot [...] be ‘established’ either as a primary or secondary place of business in another Member State’. Consequently, the German Government argued that the EU freedom of establishment did not apply to that specific case and that, therefore, a prohibition of cross-border mergers was not violating EU law.\(^{32}\)

The Advocat General Tizzano, by contrast, opposed this conceptualization by stressing that the German Government ‘follows an inverted logic in the sense that it concludes that a consequence of the merger, namely the dissolution of the incorporated company, is the reason why that company is unable (even before it is dissolved!) to carry out the merger and therefore the justification for the prohibition on registration which precisely precludes this operation.’\(^{33}\) The Advocat General, therefore, moves from the idea that between merging companies and the resulting entity there is full continuity and that the dissolution of the merging companies is a mere consequence of the merger itself, not an element of its very definition.

What is interesting to note is that the German Government deduces from a construction of the concept of ‘merger’ that freedom of establishment was not infringed, while the Advocat General reached the opposite conclusion from a different construction. Curiously, both constructions were based upon the same wordings of the third directive. The arguments put forward by the German Government and the Advocat General can be properly understood only if we consider the debate on the concept of ‘merger’ in Germany and Italy.

German legal scholars and courts maintain that a ‘merger’ (Verschmelzung) is a winding up of pre-existing companies, without liquidation, combined with a universal succession of the new company regarding assets and liabilities of pre-existing companies, whose outcome is that shareholders of all merging companies receive shares in the company resulting from the merger.\(^{34}\) Such interpretation is based upon §2(1) of the German Transformation Act (Umwandlungsrecht), which maintains that legal entities can merge ‘by dissolving without a liquidation proceeding’.\(^{35}\) Such legal construction is not without practical consequences. Since the resulting company does not continue the legal personality of pre-existing companies, any specific license or authorization received by public bodies with regard to activities undertaken by a merging company is likely to expire. Additionally, real estates located owned by a merging company are deemed to be conveyed to the resulting company, and this transaction obviously triggers property taxation.\(^{36}\)

Symmetrically, the arguments put forward by the Advocat General Tizzano reflects debates and conclusions developed by Italian legal scholars and courts over the last decades. To understand such development we should look back to the Italian Commerce Code of 1882, which expressly mentioned...
the decision to merge among the causes for a company’s winding-up. Most legal scholars maintained that mergers were akin to hereditary successions, and yet this interpretation was not unanimous even when the Commercial Code 1882 was in force. The Civil Code 1942, which included all matters previously regulated by the Commercial Code, does not mention mergers among the causes for a company’s winding-up. This shift of language convinced Italian legal scholars and courts that a ‘merger’ is rather a modification of pre-existing companies, while the winding-up of previous entities is just a consequence of this operation. A consequence of this construction is that shareholdings and all activities continue in the new entity.

The German Government and the Advocat General, therefore, based their arguments on different interpretations of the term ‘merger’. Far from being just intellectual speculations, these constructions would lead to different practical outcomes. Such legal constructions were rooted in their national traditions and in the debates among their national community of legal scholars. In other words, the German Government ‘thinks in German’, while the Italian Advocat General Tizzano looks at the legal categories under the standpoint of Italian legal culture. These different interpretations show different pre-comprehensions of the concept of ‘merger’, which the interpreters consciously employ for deciphering the directive.

It interesting to note that the Court of Justice, to resolve the Sevic case, did not discuss the arguments put forward by the German Government and by Advocat General Tizzano, nor tried to assess what the true interpretation of the concept of ‘merger’ should for the purpose of freedom of establishment. The Court of Justice rather based its conclusion upon a functional and teleological interpretation, disregarding any conceptualization of the term ‘merger’. The Court of Justice simply stressed that ‘German law establishes a difference in treatment between companies according to the internal or cross-border nature of the merger’ and that such discrimination between national and cross-border merger is per se a restriction to the exercise of freedom of establishment. Such ‘teleological’ approach is not new in CJEU’s case law related to linguistic discrepancies. What is interesting to note for the purposes of this work is that the Court seems to believe that conceptual discrepancies rooted in national legal traditions can not be bridged and that common solutions can only be based on the ground of the policy purposes of the Treaty. In other words, since fundamental discrepancies among legal cultures can not be erased, what the European Court of Justice can do is only issuing a top-down decision that settles a specific controversy and that might eventually end up in a transformation of national legal cultures. In our case, however, German lawyers do not seem to have changed so far their interpretation of the general concept of a ‘merger’.

4. REGISTERED OFFICE, STATUTORY SEAT OR JUST SEAT?

EU freedom of establishment also applies to companies and other legal entities; additionally, several EU regulations and directive, in order to establish which jurisdiction should have law-making powers,

37 Article 189, No 7 Italian Commercial Code 1882.
39 See G Ferri, La fusione delle società commerciali (Roma 1936).
41 See J Esser, Vorverständnus und Methodenwahl in der Rechtsfindung, Rationalitätsgrundlagen richterlicher Entscheidungspraxis (Kronsberg: 1970) 133.
42 Sevic at 22
44 See the authors quoted above nt 34.
entail a specific criterion for establishing the proper connection between a company and a Member State. The English version of this commonly used criterion is ‘registered office’, but we shall see hereunder that different language versions of the same legislative instruments, including article 54 of the Treaty on the Functioning of the European Union, make use of different conceptualisations. In the next pages, these linguistic fluctuations will be assessed with regard to a sample of legislative instruments (the Treaty, the Insolvency Regulation, the Prospectus Directive, the Takeover Directive and the Regulation on the European Company) and a sample of languages (Dutch, Italian, English, French, German, Portuguese, Romanian, Spanish).

a) The most important example of a statutory rule referring to a company’s ‘registered office’ is article 54 TFUE, which extends freedom of establishment to companies. The English text reads: Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. In the language versions considered in this work, the English wording ‘registered office’ is rendered in the following ways: (a) Dutch: statutaire zetel; (b) French siège statutaire; (c) German: satzungsmäßigen Sitz; (d) Italian: sede sociale; (e) Portuguese: sede social; (f) Romanian: sediu social; (g) Spanish sede social. The Dutch, French and German wordings can be translated in English as ‘statutory seat’. The Italian, Portuguese, Romanian and Spanish versions can be translated as ‘company’s seat’, which is a more ambiguous terminology.

b) A further significant example of spatial criterion is to be found in the Insolvency Regulation. The main choice-of-law and choice-of-forum criterion for ‘main’ insolvency proceedings with universal effects is the place where the centre of main interests of an insolvent debtor (‘COMI’) is situated. This is a fact-based criterion, which does not refer to any formal element such as a clause in the articles of association or the place of registration. This article, however, clarifies that a company’s COMI is presumed to be in the member state of its ‘registered office’. In the other languages considered in this work, this term is rendered as follows: (a) Dutch: statutaire zetel; (b) French siège statutaire; (c) German Satzungssitz; (d) Italian: sede statutaria; (d) Portuguese: sede estatutária; (e) Romanian: sediu statutar; (f) Spanish: domicilio social. Most of these expressions can be translated in English as ‘statutory seat’ (this is the case for Dutch, French, German, Italian and Portuguese), whereas the versions in Romanian and Spanish seem to be more ambiguous (the Romanian expression may be translated as ‘company’s seat’, and the Spanish expression may be translated in English as ‘company’s domicile’).

c) According to the Prospectus Directive, issuers of securities should draft a prospectus, which should be approved by the authority based in the ‘home Member State’. The definition of ‘home Member State’ is quite articulated, but the common denominator, in the English version, is the ‘registered office’ of an issuer. Other language versions refer to the following terms: (a) Dutch: statutaire zetel; (b) French: siège statutaire; (c) German: Sitz; (d) Italian: sede sociale; (e) Portuguese: sede estatutária; (f) Romanian: sediu social; (g) Spanish domicilio social. Once again, most of these language versions adopt terms that can be translated in English as ‘statutory seat’ (Dutch, French, Portuguese), whereas the Italian, Romanian and Spanish wording at first sight seem more ambiguous. In this scenario, however, it is the German version that clearly depart from other languages versions by referring to the vague concept of ‘seat’ (‘Sitz’ in German).

d) According to the English version of the Takeover Directive\[^{47}\], the competent supervisory authority and the applicable law are those of the country where a company’s registered office is situated. When the target company is listed in a regulated market based in a Member State different than the state of its registered office, the state of the market only governs procedural issues, while the state of the registered office.


Office regulates company law matters. The language considered in this study uses the following expressions: (a) Dutch: *statutaire zetel*; (b) French: *siege social*; (c) German: *Sitz*; (d) Italian: *sede legale*; (e) Portuguese: *sede social da sociedade*; (f) Romanian: *sediul social societatea*; (g) Spanish: *domicilio social*. In this case, only the Dutch version is to be clearly translated in English as ‘statutory seat’, whereas all other versions use expressions that at first sight seem to be more ambiguous; similarly, to the Prospectus Directive, the German version clearly departs from other versions since it employs the term ‘seat’ (‘Sitz’).

e) According to the Regulation on the European Company, a company’s ‘registered office’ is to be located in the same Member State where its head office is also situated; additionally, its provisions should be supplemented by the rules on public companies of the Member States on whose territory a European Company’s ‘registered office’ is located.48 In other languages, the English wording ‘registered office’ is rendered in this way: (a) Dutch: *statutaire zetel*; (b) French: *siege statutaire*; (c) German: *Sitz*; (d) Italian: *sede sociale*; (e) Portuguese: *sede*; (f) Romanian: *sediul social*; (g) Spanish: *domicilio social*. The English translation of these terminologies follows a pattern similar to what we have seen regarding other directives and regulations: some versions are to be translated in English as ‘statutory seat’ (Dutch and French), whereas other versions use less clear expressions and the German version (in this case together with the Portuguese one) refers to the vague concept of ‘seat’ (‘Sitz and *sede* respectively). The following table summarises the results of this comparison.

Table 1

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<td>Registered office</td>
<td>Registered office</td>
<td>Registered office</td>
</tr>
<tr>
<td>Italian</td>
<td>Sede sociale</td>
<td>Sede statutaría</td>
<td>Sede sociale</td>
<td>Sede legale</td>
<td>Sede sociale</td>
</tr>
<tr>
<td>French</td>
<td>Siège statutaire</td>
<td>Siège statutaire</td>
<td>Siège social</td>
<td>Siège social</td>
<td>Siège statutaire</td>
</tr>
<tr>
<td>German</td>
<td>satzungsmäßiger Sitz</td>
<td>Satzungssitz</td>
<td>Sitz</td>
<td>Sitz</td>
<td>Sitz</td>
</tr>
<tr>
<td>Portuguese</td>
<td>Sede social</td>
<td>Sede estatutária</td>
<td>Sede estàtutaria</td>
<td>Sede social da sociedade</td>
<td>Sede</td>
</tr>
<tr>
<td>Romanian</td>
<td>Sediul social</td>
<td>Sediul social</td>
<td>Sediul social</td>
<td>Sediul social societate</td>
<td>Sediul social</td>
</tr>
<tr>
<td>Spanish</td>
<td>Sede social</td>
<td>Domicilio social</td>
<td>Domicilio social</td>
<td>Domicilio social</td>
<td>Domicilio social</td>
</tr>
</tbody>
</table>

The wording used by the Dutch, English and Romanian texts is uniform in all EU materials that we have considered: the Dutch versions univocally refer to the *Statutaire zetel*, the English versions refer to the registered office, while the Romanian versions employ the wording *sediul social*. Other languages (Italian, French, German, Portuguese and Spanish), by contrast, reveal some fluctuations and the question arises as to whether these fluctuations reflect different meanings or not.

Since this paper is drafted in English, it seems acceptable trying to translate these terms into some roughly equivalent English expressions. In this regard, it is worth warning that one of the most common mistakes that comparatists risk to make is being deceived by words’ similarity across different languages.49 Translating, in other words also implies an action of understanding the legal meaning of the

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49 O Kahn-Freund, ‘Comparative Law as an Academic Subject’, 82 Quart Lr. (1966) 40, 52, who stressed that ‘The teacher of comparative law must spend much of his time to impress students […] that “domicile” [English] is anything but “domicile” [French]”; S Sarcevic ‘Challenges to the legal translator’ Oxford Handbook of Language and Law (nt 43) 187, 194.
words that are being translated, and comparing this meaning with the concept used in the language into which the former is translated (in this paper: English). The exercise of translation, hence, sheds light on the conceptualisations of the own legal system, in that case upon the concept of registered office in English law (and in any legal system based upon the English model in this regard). The term of comparison, hence, should be the concept based upon the legal system in which the language of this paper is rooted. More exactly, in English company law, ‘registered office’ indicates the address filed with the companies’ house, where several documents are to be kept for inspections, and which does not have to have any physical connection with the company’s activities or administration.

The question, hence, arises as to whether the concepts used in legal systems other than the English one are similar or identical to the concept of ‘registered office’. A first, albeit approximate, answer is in the negative. The concept of ‘registered office’ indicates an address, which may also be a mere letterbox, which was filed by the founding shareholders with the companies’ house. By contrast, most of other languages refer to a ‘seat’, which seems to indicate a physically existing place, which is mentioned in a company’s articles of association. The noun ‘seat’ is often (yet not always) accompanied by an adjective; if we take French as an example, most legislative materials use the expression Siège statutaire, while the expression Siège social is employed in just one case. The former may be translated in English as ‘statutory seat’ and the latter as ‘company’s seat’. French can be easily compared with other Romance languages, which often employ similar words. In the Portuguese versions, we can find variants similar to those employed in French (sede estatutária and sede social), and yet the Portuguese version of the SE Regulation employs the word sede (just ‘seat’). Italian law adds to the two basic alternatives (sede statutaria and sede sociale) a third option, namely sede legale (‘legal seat’). Romanian law, by contrast, does not fluctuate and consistently uses the word sediu social. The only Romance language departing from this model is Spanish, which employs the word domicilio social, with the sole exception of the TFU that uses the word sede.

In order to understand whether these wordings they refer to the same concept and whether these concepts are comparable with the English ‘registered office’, we should analyse the legal conceptualisation developed in each of these countries. Such analysis reveal that in all these jurisdictions, despite some language fluctuation (such as in Italy) these definitions are interpreted as the place (‘seat’) that is indicated in a company’s articles of association and should geographically coincide with one of the register’s local offices should be in the domestic territory.

By moving our attention to the two ‘Germanic’ languages of this sample (Dutch and German), we notice that the Dutch expression Statuutaire zetel can be translated as ‘Statutory seat’, and its meaning is quite similar to the idea already met regarding Romance languages (a place indicated in the article of association that should be filed with the register). German law, however, departs from this pattern, as its versions of the Prospectus Directive, the Takeover Directive and the SE Regulation employ the ambiguous term Sitz (‘seat’). The following table summarises these results, by using English as the reference language.

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51 Companies Act 2006 s. 9(2)(b), s. 1136 and s. 1139(1).

52 In French, the wording Siège social used in the takeover directive is commonly understood as statutory seat. In the Italian legal language, the terms sede sociale and sede legale are used interchangeably as synonyms; see: article 2437 Italian Civil Code or article 101-bis(1) Unified Decree on Finance. In Portuguese legal language, the term ‘ sede’ is used for a company’s ‘statutory seat’. See article 12 Portuguese Código das Sociedades Comerciais: The Spanish companies act uses the term ‘domicile’ to refer to the statutory seat.… For Romania, see Legel 31/1990 […]

Table 2

<table>
<thead>
<tr>
<th></th>
<th>Registered office</th>
<th>Expressions translatable in English as 'statutory seat' or 'seat of the company'</th>
<th>Seat</th>
</tr>
</thead>
<tbody>
<tr>
<td>TFUE</td>
<td>English</td>
<td>All languages except English</td>
<td>-</td>
</tr>
<tr>
<td>Insolvency Regulation</td>
<td>English</td>
<td>All languages except English</td>
<td>-</td>
</tr>
<tr>
<td>Prospectus Directive</td>
<td>English</td>
<td>All languages except English and German</td>
<td>German</td>
</tr>
<tr>
<td>Takeover Directive</td>
<td>English</td>
<td>All languages except English and German</td>
<td>German</td>
</tr>
<tr>
<td>SE Regulation</td>
<td>English</td>
<td>All languages except English, German and Portuguese</td>
<td>German and Portuguese</td>
</tr>
</tbody>
</table>

The first linguistic question that arises is whether expressions that can be roughly translated in English as ‘statutory seat’ or ‘company’s seat’, can be considered equivalent to the concept of ‘registered office’, which appears in the English version of these legislative instruments. These concepts are commonly held as synonyms, but a closer look at national regimes has revealed some differences: while the registered office under English company law is just a place filed with the companies’ house where a company can receive communications, a ‘statutory seat’ in most jurisdictions of our sample is the place indicated in the articles of association, which should coincide with the branch of the commercial register in which the company is registered; most importantly, all these languages refer to a company’s ‘seat’, which prompts the idea of a physical presence, such an establishment or the head office, in that place, although the function and meaning of this legal concept may vary across jurisdictions.\(^{54}\) In English company law, by contrast, ‘registered office’ indicates the address filed with the companies’ house, where several documents are to be kept for inspections.\(^{55}\)

In most jurisdictions that employ concepts translatable as ‘statutory seat’, companies should be registered in the local office of the commercial register. As a consequence, no practical difference is visible between ‘statutory seat’ and ‘registered office’. Nevertheless, the interpreter should be aware of the underlying conceptual difference between these terms, which may trigger different outcomes in extreme circumstances. In particular, the concept of statutory seat is logically independent from the place of registration, with the consequence that, at least in theory, domestic rules might allow companies to dissociate their statutory seats from the registration.\(^{56}\)

Furthermore, the question arises of how the ambivalent concept of ‘seat’ (‘Sitz’) is interpreted by Austrian and German scholars.\(^{57}\) To understand this point it is necessary to remember that German and Austrian private international law regimes for companies follow the ‘real seat’ theory, whereby companies are governed by the law of the State where a company’s ‘administrative seat’ is situated or where a company is managed on a day-by-day basis, regardless of the country of actual incorporation. Therefore, it does not come as a surprise that versions in German of some significant legislative

\(^{54}\) MV Benedettelli ‘Sul trasferimento della sede sociale all’estero’ Rivista delle società (2010) 1251

\(^{55}\) Companies Act 2006 s. 9(2)(b), s. 1136 and s. 1139(1).

\(^{56}\) In this respect, for instance, certain Italian local offices of the commercial register (notably the Milan branch) allow companies to relocate their statutory seat to another EU Member State while they continue being registered in Italy.

\(^{57}\) The consequence of any form of a ‘real seat theory’ is that ‘pseudo foreign companies’ (ie foreign companies that are exclusively active on the domestic territory). CJEU’s case law has, in practice, banned the most controversial applications of the ‘real seat theory’ form the landscape of the EU. Nevertheless, several Member States’ private international laws are still based upon this theory, at least regarding non- EU companies.
instruments employ the ambiguous word Sitz, which might be easily interpreted as a company’s ‘real seat’. Therefore, the question arises of whether Austrian and German scholars and courts have interpreted the term of art Sitz in the Prospectus Directive, the Takeover Directive and the SE Directive as ‘real seat’ of a company. With regard to the SE Regulation such an interpretation is implausible, since this regulation explicitly distinguishes the company ‘head office’ (Hauptverwaltung in German) from its registered office or from its Sitz in the German version. Things are more uncertain regarding the Prospectus Directive and the Takeover Directive. In this regard, in both countries there was an intense debate on whether the word Sitz was to be interpreted as ‘real seat’ or as ‘statutory seat’ / ‘registered office’. In Austria this issue is still debated, whereby most scholars interpret the term Sitz in the takeover directive as a company’s real seat, coherently with Austrian private international law general criterion, while other scholars maintain that this term should mean a company’s registered office. In Germany, the same ambiguous wording has sparked a certain debate, but the dominant view is that the term Sitz is to be interpreted as registered office, regardless of German general private international law criterion, on the basis of the duty to interpret uniformly EU law definitions.

5. What is ‘inside information’?

The Market Abuse Regulation prohibits ‘insiders’ to use inside information for ‘acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates’. Furthermore, insiders can not disclose inside information to third parties, unless such disclosure falls ‘in the normal exercise of an employment, a profession or duties’. In this context, the definition of ‘inside information’ is crucial for applying these prohibitions. In particular, a piece of information is qualified ‘inside information’ when it (a) is of a precise nature, (b) has not been made public, (c) is related to one or more issuers of financial instruments or to one or more financial instruments and (d) is ‘price sensitive’. One of the most debated issues related to the notion of inside information is how intermediate steps of a decisional process are to be considered when the final decision will be classified as ‘inside information’. In this respect, the new market Abuse Regulation clarifies that any intermediate steps that is sufficiently ‘precise’ and is to be classified as inside information when they fit into the four elements of the general definition. This definition codifies a previous decision of the European Court of Justice, which dealt with a quite intriguing issue.

60 See e.g. P Huber and K Alscher in P Huber (ed.) Übernahmegesetz Kommentar (Vienna: LexisNexis Verlag ARD Orac 2007) § 2 at n 7.
62 See: M Lehmann in FJ Säcker, R Rixecker and H Oetker (eds), Münchener Kommentar zum BGB (Munich: Beck, 6th edn 2015), Internationales Finanzmarktrecht, paras 420-422.
64 Regulation 2014/596/UE (hereinafter the ‘Market Abuse regulation’), article 8.
65 Market Abuse Regulation article 10.
66 Market Abuse regulation article 7.
67 See Market Abuse Regulation article 7(3): ‘An intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article.’
related to different language versions of a directive that provides for the definition of precise information.68

Mr Geltl, chairman of Daimler’s board of directors, decided to resign from his office and, after a few days, he duly communicated this decision to the board and to the market. Despite this disclosure, the question arose as to whether Mr Geltl’s resignation had gained ‘precise nature’ before it was disclosed to the board of director, since such decision was already mature in Mr Geltl’s private sphere. In this regard, the second level directive 2003/124 specifies the notion of ‘inside information’ by clarifying what information is of ‘precise nature’. The English version of this directive maintains that ‘an information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so’.69 It is interesting to note that the same definition is now entailed in the Market Abuse Regulation, with the consequence that this definition is now directly applicable in all Member States.70 The problem, however, is that the definitions of ‘precise information’ in different language versions of these legislative instruments are not identical and these differences could lead to diverging conclusions regarding the case discussed by the court. Such linguistic discrepancies were addressed by the Court of Justice in the Geltl decision.

A first group of language versions (French, Italian and Dutch) refer the concept of ‘precise information’ to events that have already occurred or ‘may reasonably be thought to occur’. In other versions, including the English one, precise information is ‘an event which has occurred or may reasonably be expected to do so’. The Spanish and Portuguese versions refer to a set of circumstances ‘which may reasonably exist’ or a ‘reasonably foreseeable set of circumstances’. Hence, despite these wordings slightly depart from each other, these versions of the directive 2003/124 referred to circumstances that are reasonably to be expected to occur. This is in the CJEU’s view a subjective criterion drawn from common experience. The German version, by contrast, depart from this common pattern, since it refers to circumstances that will occur with a sufficient degree of probability.71 In other words, the definition of information of precise nature in German relies upon objective probability that a certain fact will occur.72

The CJEU, therefore, had to choose between either a subjective or an objective concept of probability. The Court based its solution upon the widely accepted idea that concepts of EU law are to be interpreted uniformly in the whole European Union, despite linguistic divergences.73 The Court of Justice undertook a cross language comparison of all versions of the same directive and noticed that the only idiosyncrasy is the German version: while all other versions employ the term ‘reasonably’ and imply a subjective standard in order to foresee whether an event is likely to happen or not, the German version seems imply an objective assessment of likelihood. The Court, therefore, excluded the ‘German variant’ from the acceptable interpretations and focussed exclusively on how the adverb ‘reasonably’, used in all other languages, should be properly interpreted. This method for resolving language divergences throughout EU legislative materials is not new, as the European Court of Justice had already clarified that concepts included in EU statutory instruments should have autonomous meanings and be interpreted in a uniform way, independently from national legislation, even when the text varies across different languages.74 Similarly to the Sević case, the Court of Justice has settled a linguistic

68 C-19/11, 28 June 2012, Marcus Geltl v Daimler AG (ECLI:EU:C:2012:397).
69 Directive 2003/124, article 1(1).
70 Market Abuse regulation, article 7(2).
71 The German version reads: ‘[…] ein Ereignis, das bereits eingetreten ist oder mit hinreichender Wahrscheinlichkeit in Zukunft eintreten wird […]’ (‘…a circumstance that has already occurred or that will occur in the future with sufficient probability …’).
72 Geltl, at 42.
73 Geltl, at 46.
discrepancy: while in the Sevic case a discrepancy of interpretation across different countries had emerged, in the Geltl case a discrepancy of legal materials existed.

6. PROVISIONAL CONCLUSIONS

Before trying to draw some, albeit provisional, conclusions, it seems useful briefly summarising the cases addressed so far. The first case was the definition of ‘merger’ in the third company law directive. All versions of this directive in national languages provide for identical definitions, and yet in the Sevic case what emerged was that German and Italian interpret the same wording differently according to own domestic legal traditions. It is irrelevant for the purpose of this paper to discuss which interpretation is the ‘right’ one: within their national legal systems both interpretations were right, as they were commonly accepted within the national community of lawyers. This are typical cases of ‘pre-comprehensions’ of specific legal terms or definitions, which are primarily language-specific and, as a consequence, cultural and historic-specific.

The second and third cases analysed in this paper, by contrast, addressed diverging versions of the same statutory instrument in different languages. It is important to underline that such diverging versions of the same EU statutory instruments in different languages might be intentional as they are necessary for reaching a political compromise among Member States. First, we have addressed the crucial question of the criterion establishing which Member State should regulate ‘company law issues’, and we have noted fluctuations across languages, whereby these definitions can be clustered along two main concepts: on the one hand the concept of registered office (rooted in common law tradition), on the other hand a concept that can be roughly translated in English as ‘statutory seat’. These criteria refer to different concepts, which could lead to diverging practical outcomes, although in practice this is rarely the case.

The final case was related to the concept of ‘inside information’ of the Market Abuse Directive (now the Market Abuse Regulation): the definition of ‘precise information’ is different in various language versions of Directive 2004/124. In the Geltl v Daimler decision, the CJEU undertakes a cross-language comparison of these definitions in different versions of the directive, and one of the results was that the German version, based upon objective foreseeability of a final event, is an exception and that the correct interpretation of this definition can not rely upon it.

What we have seen, therefore, is that national languages and national legal traditions still influence EU law even in company law and financial law which are heavily globalised. Such influence could occur either in the guise of diverging interpretation of the same definition across member states, according to domestic legal traditions, or in the guise of different language versions of the same directive or regulation. The interpretative outcome of these different situations is not predictable, and the limited number of examples collected in this study does not allow any statically significant inference. The three cases selected, however, represent three possible situations existing in reality. Most importantly, they refer to areas of law (company law and financial regulation) in which the globalisation tendencies and the need for uniformity is likely to be stronger than in other fields. All these cases reveal the tension between national traditions and EU-wide centralization of law. In this struggle, the CJEU plays a relevant role of dragging the whole system in the direction of uniformity; to this aim, the CJEU apply functional interpretation techniques that ignore national legal conceptualisations.

Nevertheless, below the surface of the duty of uniform interpretations of EU concepts, a much more complex and multiform reality is still seething. Such linguistic divergence are produced by an intrinsic tension between, on the one hand, national cultures and groups of interests and, on the other hand, the unification tendency of the single market. The final outcome is barely predictable, as it does not only depend on policy purposes pursued by the Court of Justice, but upon political and economic factors. National courts and scholars, intentionally or spontaneously, are likely to continue applying well-established concepts and mindsets developed in their national interpretative tradition, mostly so by interpreting definitions in own national language that are worded differently than in other languages. If we accept the idea that the law and the legal culture is expression of balance of interests at national level, we should conclude that the action of the CJEU is, at most, just one among other factors that can
shape the development of a legal system, and probably not the most important one. National legal cultures and idiosyncrasies are likely to continue to exist even in most economically advanced areas of the law, such as company law and financial regulation. Such discrepancies will only disappear when a request for truly uniform law throughout the EU will be expressed by dominant social groups at the European level and provided that such a request will be accepted as an own goal by lawyers, both academic and practitioners, of all Member States.