

RESEARCH ARTICLE

How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the *CILFIT* Judgment to the Creation of a New European Legal Culture

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The aim of this article is to better understand the conditions outlined in the *CILFIT* judgment and their role in creating a meaningful dialogue about European Union law. For these purposes two distinct views on the relation between language and meaning are utilised, as has been argued for by Ludwig Wittgenstein in his *Philosophical Investigations*. In the *CILFIT* judgment both of these views surface, which imply different challenges to the participants of the EU dialogue. In the conclusion, we suggest how these challenges can be met in order to facilitate a mutually meaningful dialogue about EU law.

Keywords: Court of Justice of the European Union; judicial dialogue; language philosophy

I. Introduction

The cooperation and integration of 28 European states within the 'European project', that is, the legal structure that has grown from the European Economic Communities to the present-day European Union (EU), is increasingly contested. The impending secession of the United Kingdom from the EU (Brexit) that started with the infamous referendum on 23 June 2016, has given momentum to debates dominated by populist and Eurosceptic politicians in various other Member States, about the desirability, the form, and the intensity of transnational cooperation.¹ Furthermore, recent developments relating to the rule of law in certain (Eastern and Central European) Member States, have called into question the premise underlying European integration, namely that Member States have a common conception of certain values, such as respect for the rule of law and for human rights.²

A common theme uniting these recent developments is the threat they pose to the existence of, and belief in, a meaningful European dialogue. The aim of this article is to discuss the conditions for such dialogue about EU law from a philosophy of language perspective. Before continuing to say more about what is meant by conditions for a meaningful dialogue and the perspective of language philosophy, there are three premises underlying this article. First of all, it is taken as a fact that the EU encompasses a diversity of legal cultures, that is, on a macro-level various legal systems (national, EU law and sometimes international law) interact and – at times – overlap.³ On a micro-level, every jurist working with EU law has to accommodate both their own national legal cultural background, and the autonomous, *sui generis* nature of EU law.⁴ Secondly, legal unity in the EU (equated here with the uniform interpretation and application of

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¹ Kate Lyons and Gordon Darroch, 'Frexit, Nexit or Oexit? Who Will Be Next to Leave the EU?' *The Guardian* (27 June 2016) <<https://www.theguardian.com/politics/2016/jun/27/frexit-nexit-or-oexit-who-will-be-next-to-leave-the-eu>> accessed 29 June 2018.

² Peter Müller and Christoph Schult, 'Merkel Risks Deepening EU Rifts' *Spiegelonline* (18 October 2017) <<http://www.spiegel.de/international/europe/rule-of-law-dispute-deepens-rifts-in-european-union-1173184.html>> accessed 13 June 2018.

³ See for instance Allan Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2008) 1 *European Journal of Legal Studies* 121.

⁴ See on this point Geneviève Helleringer and Kai Purnhagen, 'On the Terms, Relevance and Impact of a European Legal Culture' In: Geneviève Helleringer and Kai Purnhagen (eds), *Towards a European Legal Culture* (Beck/Hart Publishing/Nomos 2014) 3–4.

EU law in all Member States, but also with an aspiration of harmony between EU and domestic law) needs to be achieved legitimately, either through positive harmonisation, that is, legislation, which derives its legitimacy through its democratic process, or through negative harmonisation. An example of negative harmonisation is judge-led harmonisation, which derives its legitimacy from being an outcome of judicial dialogue, rather than judicial hegemony/hierarchical monologue. Finally, the relationship between the Court of Justice of the European Union (CJEU) and national courts (and on a macro-level, between the EU and its Member States) can indeed be characterised as one of ‘interaction, dialogue and compromise’.⁵ In this regard, the concept of dialogue used is modelled as closely as possible on a natural conversation between two equal speakers.⁶

This article aspires to show how a judicial dialogue about EU law can function as a model for European legal integration⁷ and cooperation. In order to achieve legal integration and cooperation, the participants (primarily national courts and the CJEU) should be able to continue what is called a mutually meaningful conversation about EU law. This means the participants should be able to work well together across their different national legal cultures and, at the same time, express a shared understanding of EU law. This article focuses on the difficulties that the participants at a micro-level face when they participate in what should be a mutually meaningful conversation about EU law. For this the preliminary reference procedure and one example of this procedure in particular is examined: the *CILFIT* judgment.⁸ This procedure has proven to be a highly valuable procedure for the process of European legal integration and cooperation. Furthermore, it is both a paradigmatic and concrete example of judicial dialogue.

From the later language philosophy of Ludwig Wittgenstein, his *Philosophical Investigations*,⁹ we borrow the idea that ‘meaning’ and ‘language’ are intimately interwoven. This idea is used to critically read a particular section of the *CILFIT* judgment. Thus, this article is not about Wittgenstein’s philosophy, but aims to demonstrate what view on language and meaning underlies the *CILFIT* judgment with help of Wittgenstein’s understanding of language and meaning.¹⁰ The *CILFIT* judgment is a landmark case that is most known for its instructions on when courts of last instance may refrain from making a preliminary reference to the CJEU. In the context of these clarifications, the CJEU drew attention to the ‘particular difficulties’ involved in interpreting EU law. This is set out in paragraphs 13–16 of the judgment. However, paragraphs 18–20 of the judgment are more interesting, for it is here that the CJEU spells out the conditions under which a judicial dialogue about EU law is to be conducted between national courts and the CJEU. By using Wittgenstein’s view on language and meaning we will show what national courts, and jurists working at the CJEU, should do in order to meet the conditions set out in *CILFIT* and how difficult this is for them.

In the next section a brief introduction of the preliminary reference procedure is given. Section 3 zooms in on the *CILFIT* judgment, a part of which will continue to be read closely with use of Wittgenstein’s philosophy in section 4. The final section concludes with a suggestion of what participants of a judicial dialogue on EU law can do to continue a mutually meaningful dialogue about EU law.

⁵ See Anthony Arnall, ‘Judicial Dialogue in the European Union’ In: Julie Dickson and Pavlos Eleftheriadis, *Philosophical Foundations of European Union Law* (OUP 2012) 133. By way of a contrast, in that same edited volume, George Letsas disputed the value of the concept of ‘dialogue’ as a solution to the ‘problem’ of legal pluralism. (George Letsas, ‘Harmonic Law – The Case Against Pluralism’ In: Dickson and Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford Scholarship Online 2012). The core of Letsas’ argument is a ‘de-bunking’ of the myth according to which legal pluralism in the EU presents a problem for mainstream (positivist) legal pluralism. Letsas places positivist legal theory (that he defines as legal theory that sees law as a system of rules with a rule of recognition, or at least a clear hierarchy) in opposition to what he calls non-positivist legal theory, which places political morality at the heart of law. However, we do not subscribe to the limited view of law as a mere system of rules, nor do we view legal pluralism as a theoretical problem that needs to be resolved through a conceptual judicial dialogue. Rather, we see legal pluralism as a fact (much like the plurality, diversity of natural languages on the European continent) that real-life jurists need to deal with in one way or the other.

⁶ See also the second category of judicial dialogue identified by Allan Rosas (n 3) 125–126.

⁷ We refer to the way Karen Alter has described European legal integration: not just ‘the expansion and penetration of European [Union] law into the national legal and political systems’, but also, and ‘more importantly, the acceptance of this jurisprudence within national legal systems and by national politicians’. Karen Alter, ‘Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration’ In: Anne Marie Slaughter, Alec Stone Sweet and Joseph Weiler, *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998) 227.

⁸ Case C-283/81 *CILFIT* [1982] ECR 3415.

⁹ Ludwig Wittgenstein (G.E.M. Anscombe (tr)), G.E.M. Anscombe and Richard Rees (eds), *Philosophical Investigations* (Basil Blackwell 1986).

¹⁰ We could also have used a different view on language and meaning, such as the one developed by Hans-Georg Gadamer, *Truth and Method* (3rd edn, Bloomsbury Academic 2004). We could have demonstrated a similar point with use of anthropological research done by Clifford Geertz, *Local Knowledge: Further Essays In Interpretative Anthropology* (Basic Books 1983). For a different, but interesting discussion of (among other things) the difficulty with communicating in law across different languages (cultures) see: Marianne Constable, *Our Word is Our Bond. How Legal Speech Acts* (Stanford University Press 2014).

II. The Preliminary Reference Procedure as Tool for European Legal Integration

One of the main objectives of the CJEU is to achieve uniformity in EU law, that is, it strives for, and facilitates, the uniform interpretation and application of EU law within the Member States.¹¹ The CJEU's most important instrument for this is the so-called preliminary reference procedure, as laid down in Article 267 of the Treaty on the Functioning of the European Union (TFEU).¹² As the Court has made clear, the purpose of Article 267 TFEU is 'to ensure that [Union] law is interpreted and applied in a uniform manner in all Member States' and that 'the particular objective of the third paragraph is to prevent a body of national case law not in accord with the rules of [Union] law from coming into existence in any Member State'.¹³ Article 267 TFEU stipulates that any national court may (and national courts of last instance must) refer preliminary questions to the CJEU in case of doubt about the interpretation of EU law and if the interpretation of EU law is necessary for the resolution of the case. This unique procedure allows the Court and national courts to communicate directly with each other. The national courts enjoy a large discretion to refer questions to the CJEU, and the answers that the Court gives are binding when it comes to the interpretation of European law, but not as to the application of this interpretation to the concrete facts of the case at hand, which remains the exclusive domain of the national judge. The preliminary reference procedure is therefore a special form of judicial dialogue between the CJEU and national courts. While the CJEU has the exclusive competence to rule on the interpretation and validity of EU law,¹⁴ it also acknowledges that national courts and authorities are the ones who actually apply EU law most often. The national courts therefore play an important role in the application of EU law.¹⁵ Sometimes this system is characterised as 'decentralised,' which emphasises the important role of national jurisdictions and suggests that they are not hierarchically 'below' the CJEU.¹⁶ The preliminary reference procedure has been such an important instrument in the development of EU law, that it has been called 'a kind of central nervous system for the enforcement of [EU] law and the co-ordination of the [EU] and national legal orders'.¹⁷

III. *CILFIT* C-283/81

There are several reasons why this article focuses on the *CILFIT* case, which was decided in 1982. First, the Court still regularly refers to its judgment in *CILFIT*.¹⁸ Secondly, although the Court still refers to *CILFIT*, there are inconsistencies in the CJEU's own references to the *CILFIT* criteria. For instance, the CJEU sometimes omits the reference to the comparison of the language versions and just mentions the 'specific characteristics of EU law' and the 'particular difficulties' to which the interpretation of EU law gives rise,¹⁹ but at other times it refers to the language comparison it prescribed in *CILFIT*.²⁰ The existence of these inconsistencies calls for an attempt to clarify the meaning of the *CILFIT* judgment.

Thirdly, the *CILFIT* case is also of continuous interest since, at more or less regular intervals, the matter of revising the *CILFIT* criteria is raised in academic literature and even by Advocates-General of the CJEU.²¹

¹¹ See Case 314/85 *Foto-Frost* [1987] ECR 4199, para 15; Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze* [1981] ECR 1191; Case C-34/10 *Brüstle* [2011] ECR I-9821, para 25; Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817, para 24; Case 327/82 *Ekro* [1984] ECR 107, para 11; Case C-287/98 *Linster* [2000] ECR I-6917, para 43; Case C-170/03 *Feron* [2005] ECR I-2299, para 26 and Case C-316/05 *Nokia* [2006] ECR I-12083, para 21.

¹² The preliminary reference procedure has been described and analysed in a large number of academic publications. It goes beyond the scope and purposes of this article to list them all, but for a good example, see for instance Anthony Arnall, *The European Union and its Court of Justice* (2nd edn, OUP 2006) 95–131, or Martin Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd edn, OUP 2014).

¹³ Case 107/76 *Hoffmann-La Roche* [1977] ECR 957, para 5; Joined cases C-35 and C-36/82, *Morton and Jhanjan* [1982] ECR 3723, para 8; Case C-3/16 *Aquino*, ECLI:EU:C:2017:209, para 33 and the case law cited in footnote 2 above.

¹⁴ Article 19(3)b TEU and Article 267 TFEU.

¹⁵ See for instance Catherine Barnard and Steve Peers, *European Union Law* (2nd edn, OUP 2017) 293–294.

¹⁶ See for instance para 32 in *Aquino* (n 13). See also Hjalte Rasmussen, 'The European Court's Acte Clair Strategy in *CILFIT* – or: Acte Clair, of Course! But What Does It Mean?' (2015) 40(4) *European Law Review* 475–489, 478.

¹⁷ Alec Stone Sweet, 'The Juridical Coup d'Etat and the Problem of Authority: *CILFIT* and *Foto-Frost*' In: Luis Miguel Poiars Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 201.

¹⁸ See for instance Case C-379/15 *Association France Nature Environnement*, nyr, paras 48–50; Case C-207/14 *Hotel Sava Rogaska* ECLI:EU:C:2015:414, paras 25–28. In the Case C-160/14 *Ferreira da Silva* ECLI:EU:C:2015:565, para 39–40, the CJEU refers to Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paras 33–37, which, in turn, refers to the *CILFIT* criteria.

¹⁹ *Association France Nature Environnement* (n 18) paras 48–50 and *Ferreira da Silva* (n 18) paras 39–40.

²⁰ *Hotel Sava Rogaska* (n 18), para 26.

²¹ See for instance Peter J. Wattel, 'Kobler, *CILFIT* and Welthgrove: We Can't Go On Meeting Like This' (2004) 41 *Common Market Law Review* 177; David Edward, 'Reform of the Article 234 Procedure: Limits of The Possible' In: David O'Keefe (ed), *Judicial Review in European Union Law, Liber Amicorum Lord Slynn* (Kluwer Law International 2000) 119; Morten Broberg, 'Acte Clair Revisited: Adapting the Acte Clair Criteria to the Demands of the Times' (2008) 45 *Common Market Law Review* 1383; Hanna Sevenster, 'Good Old

At the same time, academic handbooks about the European Court of Justice and the preliminary reference procedure continue to cite *CILFIT* as a landmark case on the conditions for interpreting EU law and for pronouncing an *acte clair*.²²

Furthermore, in 2003 the CJEU clarified that the failure to refer preliminary questions may lead to Member State liability for breach of EU law.²³ Moreover, as a fifth and final point, there is another recently developed line of case law according to which an insufficiently motivated refusal to refer preliminary questions may constitute a breach of Article 6 of the European Convention on Human Rights.²⁴ Since the *CILFIT* criteria govern the national courts of last instance's legitimate reasons to refrain from referring, these last developments also merit a new and closer look at the *CILFIT* judgment.

With regard to the question of the relevance of *CILFIT*, two main strands of arguments in legal literature are identified. On the one hand, the CJEU's argumentation in *CILFIT* has been received with criticism: although it seemed as if the CJEU gave national courts more leeway in deciding when to refrain from referring a question, the conditions for an *acte clair* were so hard to fulfil, particularly the language comparison,²⁵ that many authors observed that it was hardly realistic to expect anyone to be able to perform such a comparison.²⁶ Accordingly, it would be hard for national courts to legitimately refrain from referring a question to the CJEU. According to certain authors, therefore, the CJEU's decision in *CILFIT* was a form of institutional power play: under the guise of giving leeway to national courts, it actually bolstered the CJEU's position of authority.²⁷

There are also authors, notably (former) magistrates of the CJEU, who argue for a nuanced reading of *CILFIT*, and for its continued relevance. For instance, while former CJEU Judge David Edward conceded that 'the Court's phraseology is not ideal', he argued that paragraphs 18–20 of *CILFIT* must not be read with 'absurd literalism'. In his opinion, *CILFIT* paragraphs 18–20 must not even be read as a confirmation of an *acte clair* doctrine, but rather as a series of caveats, that are 'no more than common sense', for when a court may consider whether there is 'scope for any reasonable doubt as to the manner in which the question raised is to be resolved'.²⁸ It is argued in section IV that there is more to say about the paragraphs 18–20 than Edward suggests.

The Case

In *CILFIT* the so-called *Da Costa* doctrine is further developed. That is, the doctrine according to which national courts of last instance do not have the obligation to refer preliminary questions in those cases in which the question raised is materially identical with a question that the CJEU has already answered.²⁹

CILFIT – pleidooi voor een 'make-over' In: Tristan Baume et al. (eds), *Today's Multilayered Legal Order: Current Issues and Perspectives* (Uitgeverij Paris 2011) 297–305; Valentin Paul Neamt, 'The Obligation of National Courts Against Whose Decision There is No Judicial Remedy to Refer Questions to the Court of Justice of the European Union' (2016) 17 *Journal of Legal Studies* 24. Ricardo García and Estela Ferreiro Serret, 'Hardening the Preliminary Reference Procedure in a Union in Crisis: Kernkraftwerke Lippe-Ems' (2016) 53 *Common Market Law Review* 819. See also Case C-338/95 *Wiener v Hauptzollamt Emmerich* [1997] ECR I-6495, Opinion of AG Jacobs; Case C-461/03 *Gaston Schul Douane-Expéditeur* [2005] I-10513, Opinion of AG Ruiz-Jarabo Colomer. See for a confirmation of *CILFIT* as valid law Case C-99/00 *Lyckeskog* [2002] ECR I-4839 and Case C-99/00 *Lyckeskog* [2002] ECR I-4839, Opinion of AG Tizzano, paras 55–76.

²² Arnulf (n 12) Chapter 4 and Chapter 16; Broberg and Fenger (n 12) 230–256; Rüdiger Stotz, 'Case Law of the CJEU' In: Karl Riesenhuber (ed) *European Legal Methodology* (Intersentia 2017) 557–558. Stotz notes that the calls for a revision of *CILFIT* have not been taken up. Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of AG Mazák, paras 79–100.

²³ Case C-224/01 *Gerhard Kobler v Austria* [2003] ECR I-10239 and Case C-173/03 *Traghetti del Mediterraneo SpA v Italy* [2006] ECR I-5177; see also *Ferreira da Silva* (n 18).

²⁴ *Ullens de Schooten and Rezaabek v Belgium* no 3989/07 and 38353/07 (ECtHR, 20 September 2011); *ECtHR Dhahbi vs Italy* no 17120/09 (ECtHR, 8 April 2014); *Schipani v. Italy*, no 38369/09 (ECtHR, 21 July 2015); indirectly also: *Arlewin vs Sweden* no 22302/10 (ECtHR, 1 March 2016).

²⁵ Note that at the time of the judgment in *CILFIT*, there were only 7 languages, the comparison of which was already deemed too difficult, whereas now, anno 2018, there are 24 official languages in the EU, making a comparison even more difficult.

²⁶ See *Wiener v Hauptzollamt Emmerich* See (n 21), Opinion of AG Jacobs; also *Gaston Schul Douane-expéditeur* (n 21), Opinion of AG Ruiz-Jarabo Colomer, para 53, who called the *CILFIT* requirements 'unviable' already at the time it was adopted, but at present – in an expanded EU – 'preposterous'. See also Palu Craig, 'The Classics of EU Law Revisited: *CILFIT* and Foto-Frost' In: Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 188.

²⁷ See, for instance, Rasmussen (n 16) 242; Federico Mancini and David Keeling, 'From *CILFIT* to ERT: The Constitutional Challenge Facing the European Court' (1991) 11 *Yearbook of European Law*, 1. See also Daniel Sarmiento 'CILFIT and Foto-Frost: Constructing and Deconstructing Judicial Authority in Europe' In: Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 195.

²⁸ *CILFIT* (n 8) par 16, see David Edward, 'CILFIT and Foto-Frost in their Historical and Procedural Context' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 178–179. See for a similar positive reading of *CILFIT* *Lyckeskog* (n 21) Opinion of AG Tizzano, paras 55–76.

²⁹ Joined cases 28–30/62, *De Costa en Schaake et al v. Nederlandse belastingadministratie* [1963] ECR 31.

However, the *Da Costa* doctrine was subsequently applied rather liberally by the national courts, leading to such a wide interpretation of existing case law of the Court of Justice that it even resulted in non-compliance.³⁰ The *CILFIT* case presented an opportunity for the Court of Justice to pronounce itself on the application of the preliminary reference procedure, and – arguably – to regain some control over the national courts' practice in referring questions.

The case concerned a preliminary reference from the Italian Supreme Court of Cassation in a procedure between *CILFIT* Srl and 54 other textile firms, and the Italian Ministry of Health. *CILFIT* and the others were levied contributions towards the carrying out of health inspections for the import of wool under the Italian law. These companies challenged parts of the levy, arguing that the levy violated EU law. Specifically, the companies argued that a specific Regulation on the common organisation of the market in, among others, 'animal products' as mentioned in an Annex to the EEC Treaty was violated. However, the Ministry of Health's counterargument was that 'wool' was not mentioned in that Annex, and therefore it did not fall within the scope of application of the Regulation. Moreover, the Ministry argued that the wording of the Annex was so unequivocal, that there was no need to refer a preliminary question to the CJEU.

The Italian Supreme Court of Cassation referred a question on this meta-issue, namely how Article 177 EEC Treaty (now: Article 267 TFEU), which laid down the preliminary reference procedure, should be interpreted. More particularly, the Supreme Court of Cassation wanted to know whether (emphases ours):

The third paragraph of Article 177 of the EEC Treaty, which provides that where any question of the same kind as those listed in the first paragraph of that article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law that court or tribunal must bring the matter before the Court of Justice, **lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?**³¹

The next section includes an overview of the central facts and question of the *CILFIT* case. Then, section IV turns to the core of this article and explores the conditions for a meaningful judicial dialogue.

The Judgment of the CJEU

In response to the question raised by the Italian Supreme Court of Cassation, the CJEU's judgment seems to provide a quite comprehensive answer. As mentioned, the question concerned the conditions under which national highest courts may refrain from raising a question on the interpretation of EU law.³² These conditions are spelled out in paragraphs 13 through 16 of the judgment. According to the Court in paragraph 13, national courts are under no obligation to raise a question that concerns a matter already answered by the Court in a similar case: 'the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case'.³³ The Court thereby confirmed its earlier judgment in *Da Costa*.

In paragraph 14, the Court stated that there is also no such obligation for national courts if the Court has 'already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical'.³⁴ This has been dubbed the *acte éclairé* doctrine. Before the Court concluded with its final condition in paragraph 16, paragraph 15 reminds the reader that national courts and other relevant EU institutions are always allowed to raise questions on the interpretation of EU law whenever they find it necessary. But national courts are under no obligation if there is no 'reasonable doubt' about the correct interpretation, that is, the so-called *acte clair* doctrine.³⁵ This final condition requires national courts to convince themselves that their interpretation is equally obvious to other national courts and to the CJEU.³⁶

³⁰ On this point see Rasmussen (n 16) 475.

³¹ *CILFIT* (n 8) para I "Facts and Procedure".

³² *ibid.* para 12.

³³ *ibid.* para 13.

³⁴ *ibid.* para 14.

³⁵ *ibid.* para 16.

³⁶ *ibid.* para 16.

These paragraphs of the *CILFIT* judgment have received the most attention since its publication.³⁷ Based on paragraphs 13–16 it can be seen that the Court has made an effort to indeed answer the preliminary question. The Court's answer leaves some discretion to the national courts in the matter of EU law interpretation, and hereby the Court sides with the positions of the Italian government, Denmark and the Commission, and opposes the position of the plaintiffs.

However, there is more to say about this judgment and this is of fundamental importance to the way in which, according to the CJEU, a dialogue on EU law is to be conducted. Where the preliminary question raised in *CILFIT* concerned the room for discretion by national courts, the CJEU also spelled out the 'particular difficulties' that national courts have to deal with when interpreting EU law, that is, when they can conclude that there is an *acte clair*. In paragraph 17 the Court says: 'However, the existence of such a possibility [i.e., whether there is a reasonable doubt in the interpretation of EU law] must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise'. These difficulties are formulated in paragraphs 18–20 to which we will now turn.

Rather than all too easily dismissing the wording of *CILFIT*, like David Edward who called these paragraphs mere caveats,³⁸ it is – despite the obvious practical unfeasibility of conducting a linguistic comparison of 24 languages – valuable to take the Court's wording seriously, and 'unpack' what is said.

Moreover, if Edward's qualification is accepted, that *CILFIT* merely contains caveats which warn national judges that they should not think too lightly about declaring the meaning of an EU law term 'beyond a reasonable doubt', then the question remains: how should the meaning of EU law terms be determined? This question must be answered given the peculiarity of EU law – which EU jurists need to navigate – that it is not merely the sum, average or common denominator of the legal systems of its Member States, rather, it is 'autonomous'.³⁹ However, at the same time, EU law is supposed to be building upon, and be respectful of, the national legal cultures and constitutional traditions of its Member States of which it is, due to the doctrines of primacy and direct effect of EU law, an important part. This complicates legal 'meaning-making' in EU law. Moreover, the jurist who determines this meaning is necessarily someone who comes from one of the Member States and has originally received their legal education in a national setting. Just as there is no common language that is detached from all other EU languages, there is no breed of pure EU jurists, untainted by the influence of any domestic culture or legal system.

IV. Reading the *CILFIT* Judgment Paragraphs 18–20

The particular difficulties mentioned in paragraph 17 indicate what we call the conditions for conducting a meaningful dialogue about EU law.⁴⁰ These conditions are spelled out in paragraphs 18–20 of the judgment. To get a better understanding of these conditions this article makes use of Wittgenstein's later philosophy of language.⁴¹ For the purpose of this article, a thorough understanding of Wittgenstein philosophy is not necessary.⁴² It is not about Wittgenstein's language philosophy but about the conditions for a meaningful judicial dialogue as is set out by the CJEU in the *CILFIT* judgment. For a better understanding of these conditions two different views on the relation between language and meaning are used. These views can be illustrated with reference to the work of Wittgenstein, but could also be illustrated in a different way, for instance with reference to a different language philosopher (for example, Hans-Georg Gadamer) or

³⁷ See for instance Gerhard Bebr, 'The Rambling Ghost of "Cohn-Bendit": *Acte Clair* and the Court of Justice' (1983) 20 Common Market Law Review 439 and Mancini and Keeling (n 27) 2–13; Sevenster (n 21) 305.

³⁸ Edward (n 28) 179.

³⁹ See for instance CJEU Opinion 2/13 on the Draft agreement for the accession of the EU to the ECHR ECLI:EU:C:2014:2454, para 170; see also case C-284/16 Achmea, ECLI:EU:C:2018:158, para 59. See generally René Barents, *The Autonomy of Community Law* (Kluwer Law International 2004) 45.

⁴⁰ In this section we borrow from: Jacobien van Dorp, *On the Nature of Legal Understanding and the Quality of Transnational Communication in Law* (Cadmus 2015).

⁴¹ That is after 1929. See: P.M.S. Hacker, *Wittgenstein's Place in Twentieth-Century Analytic Philosophy* (Blackwell Publishers 1996) 1, 97–136.

⁴² For a good understanding of Wittgenstein's philosophy see: Paul Horwich, *Wittgenstein's Metaphilosophy* (Clarendon Press 2012) See for further reading: Gordon P. Baker & P.M.S. Hacker, *Wittgenstein: Meaning and Understanding: Essays on the Philosophical Investigation, Volume 1–2* (Wiley 1991); Gordon P. Baker and P.M.S. Hacker, *Wittgenstein: Rules, Grammar and Necessity* (Wiley 2009); Meredith Williams, *Blind Obedience: Paradox and Learning in the later Wittgenstein* (Routledge 2010); Meredith Williams, 'Rules, Community and the Individual' In: Meredith Williams, *Wittgenstein, Mind and Meaning – Towards a Social Conception of the Mind* (Routledge 1999) 157–187; William Child, *Wittgenstein* (Taylor & Francis 2011).

philosopher (for example, Stanley Cavell) or with reference to the work of James Boyd White which combines insights from literary studies with legal knowledge.⁴³

The reason why Wittgenstein's *Philosophical Investigations* is so illuminating for these purposes is that by reading the first sections we are introduced to two different views on language and meaning: one superficial view of language as a set of words and grammar, which is separated from meaning; and one complex view on language as a cultural practice, which is intimately interwoven with particular meaning. The latter view is the one that Wittgenstein further develops in terms of 'rule-following' and 'form of life,' but we will not go into this here. The point here is to illustrate the difference between language as something superficial and disconnected from our understanding of the world, and language as something complex, a social practice or culture, that is closely related to how we understand our world.

What is more, a close reading of these first sections of the *Investigations* is itself exemplary of the way in which we will read the paragraphs 18–20 of the *CILFIT* judgment. That is, by reading these paragraphs we will ask ourselves what relation between (legal) language and (legal) meaning is suggested by the CJEU. This is what is meant when we say, as we did in the introduction, that we make use of the perspective of language philosophy.

Reading Wittgenstein

The first section of the *Investigations* begins with an excerpt of Augustine's *Confessions*:

When they (my elders) named some object, and accordingly moved towards something, I saw this and I grasped that the thing was called by the sound they uttered when they meant to point it out. (...) Thus, as I heard words repeatedly used in their proper places in various sentences, I gradually learnt to understand what objects they signified; and after I had trained my mouth to form these signs, I used them to express my own desires.⁴⁴

This excerpt describes how a child learns a language from his parents. Language acquisition involves the repeated utterance of words by the parents in combination with their pointing to particular objects and, in response to this, the efforts of the child to copy his parents' behaviour, including the attempts to (correctly) pronounce words. The result of this is, supposedly, that the child has not only learned to speak a language ('I have trained my mouth to form these signs'), the child has also learned to understand the world ('I used them to express my own desires').

Wittgenstein uses this description of language learning to identify a particular underlying view on language and meaning:⁴⁵

These words [i.e. in Augustine's excerpt], it seems to me [Wittgenstein], give us a particular picture of the essence of human language. It is this: the individual words in language name objects – sentences are combinations of such names. – In this picture of language we find the roots of the following idea: *Every word has a meaning. This meaning is correlated with the word. It is the object for which the word stands.*

The crucial point in this description of language is the relation between language and meaning. This description suggests that language (words and sentences) functions as a mere *tool* to express or communicate meaning. Words do not themselves constitute meaning. Wittgenstein writes that there is a correlation between meaning and words but the relation is no stricter than that. This is because the source of meaning is the object *outside* of language. The objects that should be thought of here are tables and chairs, but also people, actions, properties and law. The source of meaning of objects is either the mental picture we have of it in our minds or something in reality, depending on what philosophical stance we take: an anti-realist or a realist position. It is too complex to go into detail about this philosophical discussion here.⁴⁶

The first view of language and meaning turns out to be a rather primitive one: it does not fully capture what we do and mean when we use our language. This failure becomes visible when we continue reading

⁴³ See James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press 2001); James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Brown 1973); James Boyd White, *The Edge of Meaning* (University of Chicago Press 2003); James Boyd White, 'How Should We Talk About Religion? Inwardness, Particularity, and Translation' (2001) *Erasmus Institute Papers* 1.

⁴⁴ Wittgenstein (n 9) section 1.

⁴⁵ *ibid.* section 1 (emphasis added).

⁴⁶ See for example: Michael Dummett, 'Realism' In: Michael Dummett, *Truth and Other Enigmas* (Harvard University Press 1978).

the first section of *Philosophical Investigations*. Here a story designed by Wittgenstein is provided on the basis of the just outlined description of language:⁴⁷

I send someone shopping. I give him a slip marked 'five red apples'. He takes the slip to the shopkeeper, who opens the drawer marked 'apples'; then he looks up the word 'red' in a table and finds a colour sample opposite it; then he says the series of cardinal numbers – I assume that he knows them by heart – up to the word 'five' and for each number he takes an apple of the same colour as the sample out of the drawer.

It follows from the above description of language and meaning that the words 'five red apples' stand for a particular amount (five) of a particular object (red apples). Knowing these three words and what they stand for should enable the shopkeeper to understand what is on the shop list and hence, be able to respond to the buyer accordingly. However, we see that the shopkeeper needs to know and do *more* than what is captured in the three words and the object (red apples). We see that the shopkeeper needs to open a drawer with apples (not with pears) and pick the red ones (not the green) and then count to five (not four or six) in order to deliver what is on the shopping list.

Wittgenstein's simple story of the shopkeeper brings out the idea that the first description of language and its relationship with meaning is too simplistic to account for what we do with language. This story not only suggests a second, more comprehensive account of language and meaning, but also the core of what can be called Wittgenstein's philosophy of language. In section five he writes:

If one looks at the example in section 1, one can perhaps get an idea of how much the general concept of the meaning of a word surrounds the working of language with a haze which makes clear vision impossible. – It disperses the fog if we study the phenomena of language in primitive kinds of use in which one can clearly survey the purpose and functioning of words.⁴⁸

This section describes what, according to Wittgenstein, is problematic about the first primitive description of language and meaning. Namely, this description makes it hard to see how our language really works because it 'disperses the fog' or 'surrounds the working of language with a haze'. Wittgenstein's philosophical message is that we should get rid of this primitive description of language and meaning. Elsewhere he writes, '[p]hilosophy is a struggle against the bewitchment of our understanding by the resources of our [primitive] language'.⁴⁹

Following this philosophy, the too simplistic idea that words represent the meaning of objects should be ignored, not because it is complete nonsense (which it is not) but because it prevents us from seeing the *intimate* relationship between our use of language and our understanding of the world. In Wittgenstein's terms 'the *speaking* of language is part of an activity, or of a form of life'.⁵⁰ This sentence captures Wittgenstein's own view on language and meaning.

With this new view, we can return to the story about the shopkeeper. It could be said that going shopping with a shopping list is part of a form of life and thus enables the shopkeeper, who is part of this form of life, to deliver the requested number of red apples. The words ('three red apples) or the objects (the actual red apples) are not sufficient, rather it is the cultural practice in which the shopkeeper and the buyer are embedded which allows for meaningful interaction (i.e., in this case: buying and selling fruits).

Thus, it is concluded that the second more intelligible view on language and meaning is that language is more than a set of words and grammar. Language is a culturally embedded practice, which includes the use of words (of course) but also particular (inter)actions. For instance, when we were to sell fruits we would know what to say to our customers, where to look for the fruits, how to count and deliver them correctly, and so on. This complex idea of language is directly related to a relatively complex idea of meaning (understanding). When we use our culturally embedded practice of language we, thereby, exhibit what Wittgenstein calls 'a form of life' or in our term 'cultural practice'.

The following example illustrates the difference between the two above outlined views on language and meaning. Imagine someone tells you about the Dutch national feast called King's Day (*Koningsdag*). He tells

⁴⁷ Wittgenstein (n 9) section 1.

⁴⁸ *ibid.* section 5.

⁴⁹ *ibid.* section 109.

⁵⁰ *ibid.* section 23.

you that on King's Day Dutch people dress in orange clothes and there are parties with music everywhere. Following the first simplistic view on language and meaning, the previous sentence stands for something like the following image: people wearing orange clothes while music is played. The second view on language and meaning would imply a cultural practice underlying this image. And, of course, for a Dutch person King's Day means usually much more than the image of people dressed in orange and music suggests. However, to communicate *this* complex cultural practice requires more than words alone can describe.

To understand King's Day, as the Dutch do, requires, besides proficient competency in language in the simplistic sense (i.e., knowledge of words and grammar), a competency in the Dutch cultural practice of King's Day. This means knowledge of what Dutch people usually do on this day, how they interact and with whom, and where they go and when, and so on. It means knowledge, for instance, of how Dutch people, young and old, celebrate the birthday of the King, which is certainly not the same as celebrating an ordinary Dutch birthday (with family, coffee, and cake). King's Day is the public birthday of the King but there is no need to bring the King a gift, for instance, or to congratulate him in person. Rather, one could go out early in the morning to look for cheap housewares in one of the many flea markets. One could go also with friends to one of the many live music events or dance parties, some of them starting the night before King's Day and continuing until the following afternoon.

The Dutch participate in a wide variety of activities on King's Day. But, how one should behave and interact, what is expected of you to say and do (and what not), is part of the Dutch culturally embedded language practice that constitutes our particular understanding of King's Day. This understanding cannot fully be described here, not because we do not know the words, but because it is too complex to describe in words. This complexity is characteristic of the second view on language and meaning identified here, that is, language as a cultural practice, the use of which is intimately related to the expression of particular meaning or a particular understanding of the world.

Reading Paragraphs 18–20 of the CILFIT Judgment

We now turn to the paragraphs 18–20 in order to see which of the above outlined views on language and meaning is underlying the conditions for a meaningful dialogue about EU law. We start by reading paragraph 18 (emphases added):

To begin with, it must be borne in mind that community legislation [i.e., EU law] is **drafted in several languages** and that **the different language versions are all equally authentic**. An interpretation of a provision of community law thus involves **a comparison of the different language versions**.

Paragraph 18 begins with a reminder by the Court that all languages used by Member States of the European Union allow for equally authentic versions of EU law. This means there are (currently) 24 different official languages versions of EU law. The second and final sentence of this paragraph tells us that the meaning of EU law follows from comparing these language versions with each other.

Our question is which view on the relationship between language and meaning is underlying paragraph 18. To say that different languages (French, German, Polish, Dutch, and so on) allow for an equally authentic interpretation of EU law seems to imply two things. First, language (in 'language versions') is seen as a *tool* rather than a culturally embedded practice or form of life. Apparently, there are different languages, different sets of words and grammar, which (presumably) express the same meaning of EU law. This suggests there is no real intimate relationship between the language that is used and the particular meaning that is hereby manifested, as would follow from the second more complex view on this relation. Were there such an intimate relationship, the use of, for instance, German legal language would show the German legal culture rather than a European legal culture. But how could different language versions of EU law be equally authentic if there was one that resembles the German legal culture, and one that resembles the Dutch legal culture, and so on? The presumption underlying the 'equal authenticity' of the different language versions of EU law is that these versions, although different in terms of words and grammar, stand for something that is more or less the same. Hence, there seems to be no intimate connection between the national languages in which EU law is interpreted and the meaning of EU law.

Second, the separation of language and meaning suggests that the meaning of EU law is relatively superficial. As we demonstrated above, the complexity of a culturally embedded practice cannot be captured in words alone. If the national languages function as mere tools for the interpretation of EU law then this interpretation will be rather poor: it would lack social embeddedness or cultural practice. We will come back to this point.

Thus, at first sight, a simplistic view on the relationship between language and meaning seems to underlie the conditions for a European judicial dialogue set out in paragraph 18 of the *CILFIT* judgment, and this implies a relatively superficial understanding of EU law.

The second sentence of paragraph 18 is less clear from a language philosophical perspective. The sentence states that a *comparison* of language versions is needed for the interpretation of EU law. The question is at what level should this comparison take place. Is it a comparison at the level of words and legal terms? For example, where the French word for 'contract' is used in the French version of EU law, the Spanish word for 'contract' should be used in the Spanish version, and so on. Or should we think of a comparison at the level of language as a culturally embedded practice? This would mean that, for instance, the Dutch culturally embedded legal language practice would be compared with the German culturally embedded legal language practice, and so on.

For the moment, let's assume we are to compare at the level of words or legal terms only. Then the question is at what level of meaning can be compared as such? As mentioned, words alone cannot fully capture the complexity embedded in language as cultural practice. This suggests that the comparison of words allows for a relatively superficial comparison of meaning. The following example illustrates this. The example stems from a draft legal dictionary that provides for the translation and hence, comparison, of a particular legal term 'good faith', that is, a translation from English legal language into the Czech legal language:⁵¹

Good faith 1 *common law* the quality or state of mind of a person subsisting in honesty, sincerity, decency, fairness and reasonableness without intent to cheat or defraud or take unfair advantage of another (*BLD*) (subjektivní) dobrá víra subjektivní přesvědčení osoby, že jedná v souladu s právem a že svým jednáním nikomu nepůsobí újmy (*TOM*); **mutual duties of** ≈ vzájemná povinnost jednat v dobré víře; **to donate st. in** ≈ darovat v dobré víře; **to make a** ≈ **determination** učinit rozhodnutí v dobré víře; ...

This dictionary excerpt shows a rather detailed comparison of the meaning of 'good faith', as it is (supposedly) used in the English common law language and in the Czech civil law language. It does not show, however, that the term 'good faith' originally stems from German civil law (*Treu und Glauben*). For example, Article 242 of the German Civil Code provides: '*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Trau und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*'.

Moreover, Jaakko Husa has argued that the German concept *Treu und Glauben* is not compatible with how the English common law system functions.⁵² If Husa is right, the dictionary leaves us with a rather poor comparison of legal meaning. It suggests falsely that 'good faith' is an English common law term. Hence, it would be a risky business if national courts were to compare at the level of words or legal terms only with use of a legal dictionary.⁵³

Turning to legal practice for a moment, it is interesting to note that the CJEU does use lawyer-linguists to translate between the different national languages of Member States. These translators are lawyers by training and proficient in several European languages. They are called upon to use their own cultural and legal knowledge to reach an optimal translation.⁵⁴ However, the Court also relies to an increasing extent on translation software in the initial stages of translation.⁵⁵ This software resembles the function of a legal dictionary and misses the culturally embedded legal knowledge that lawyer-linguists have.

Returning to our analysis, we could alternatively think that the CJEU wants national courts to compare languages at the more complex level of language practice. This implies, however, comparing meaning at a complex level too. Think of comparing something like the Dutch King's Day with the French celebration of Bastille Day. Besides the fact that both are national holidays there are many differences between them.

⁵¹ Marta Chromá, 'A Dictionary for Legal Translation' In: Cornelis J.W. Baaij (ed), *The Role of Legal Translation in Legal Harmonization* (Kluwer Law International 2012) 136.

⁵² Jaakko Husa, 'Understanding Legal Languages: Linguistic Concerns of the Comparative Lawyer' In: Cornelis J.W. Baaij, *The Role of Legal Translation in Legal Harmonization* (Kluwer Law International 2012) 161–181.

⁵³ See also Barbara Pozzo, who points at the subtle differences between the meanings of 'Eigentum', 'propriete', 'property' and 'proprieta'. Barbara Pozzo, 'Multilingualism, Legal Terminology and the Problems of Harmonising European Private Law' In: Barbara Pozzo and Valentina Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Kluwer Law International 2006) 7–8.

⁵⁴ Court of Justice of the European Union, 'Brochure Working as an English-language lawyer linguist at the Court of Justice of the European Union' <https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-03/brochure_en.pdf> accessed 19 July 2018.

⁵⁵ See Antoine Vauchez, *Brokering Europe* (CUP 2015) 187. See also, more extensively, Karen McAuliffe, 'Precedent at the ECJ: The Linguistic Aspect' (2013) 15 *Current Legal Issues* 483–493.

Husa's research suggests we can expect a similar conclusion when comparing different culturally embedded legal language practices with each other.

To conclude the reading of this paragraph, we find that the CJEU is not clear about what the comparison of language versions should lead to: the identification of differences or similarities, and what to do when we find differences rather than similarities? Which difference is to determine *the* meaning of EU law? Is, for instance, the French legal cultural practice to dominate the interpretation of EU law?

Turning to paragraph 19 (emphases ours):

It must also be born in mind, even where **the different language versions are entirely in accord with one another**, that **Community law uses terminology which is peculiar to it**. Furthermore, it must be emphasized that **legal concepts do not necessarily have the same meaning in Community law and the law of the various Member States**.

Here, according to the CJEU, there are occasions in which different language versions 'are in accord with one another'. Again, it is unclear which view on language and meaning is underlying here. We have seen that a specialised legal dictionary could provide for an accordance at the superficial level of language, an accordance of legal terms, but this is problematic when it comes to legal meaning. Comparing legal terms, even in detail, may lead to a poor comparison of legal meaning. For example, although 'good faith' is a valid English term, there is no common law practice that supports all of the particularities that would follow from the culturally embedded language practice of its origin in German civil law.

Alternatively, we could take the Court to mean there is or can be 'an accord' at the level of culturally embedded language practices. For instance, we could try to imagine the English understanding of contract law being in accordance with the French understanding of contract law. Although it is hard to imagine this,⁵⁶ it does not rule out the possibility of accordance between the 28 Member States on some legal issue, at the level of their national cultural language practices.

As we continue reading the first sentence of paragraph 19 we can clearly see that the CJEU holds a simplistic view on the relationship between language and meaning. The Court tells us that there is 'terminology which is peculiar to it [i.e., EU law].' This means the Court *adds* terminology to the languages that are to be used for the interpretation of EU law. The suggestion that follows from this is that with the introduction of particular terminology or words, the meaning of EU law is better expressed than without this terminology.

National courts, thus, are to use their own national languages, which presumably work as a tool to express EU law and not as a culturally embedded national legal language practice (as pointed out above), and where these languages run short, national courts should make use of particular terminology that is specifically designed to *fit* the meaning of EU law. In other words, the idea seems to be that judges understand EU law best when they use the right *terms* and not their culturally embedded national legal language practices.

So far, the impression is that the CJEU ignores the intimate relationship between the use of national languages and the particular culturally embedded understanding of law that is tied to this use. The presumption is that national courts are not overly hindered by their own culturally embedded legal language practices when they interpret EU law. We conclude that a superficial understanding of language as a system of words (or terms) and a related simplistic understanding of the relationship between language and meaning seems to be prevalent, although this is not entirely clear. It could be that the Court thinks that comparison of legal languages at the deep cultural level is possible and that at this same level an alignment exists between the Member States. The CJEU's introduction of terminology particular to EU law seems, however, to support our conclusion.

In the second half of paragraph 19 the CJEU takes a remarkable turn. Here the Court states that the legal terms used by national courts can, at times, mean something different within the European legal context than within a national legal context. This affirms our belief that the underlying view on the relationship between language and meaning is a relatively simplistic one. According to the Court, national courts should (and can) *ignore* their own particular national legal understanding, which is contained within their culturally embedded legal language practices, when they interpret EU law. What is more, national courts should (and can) use their own languages to express something that is particularly European. This raises the question: How can national courts give a European meaning to EU law when using their own national languages as mere tools? We find a beginning of an answer in paragraph 20 (emphases added):

⁵⁶ See for an example of the cultural differences between the French legal practice and the English legal practice: Barry Nicholas, *The French Law of Contract* (Clarendon Press 1992).

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 **its state of evolution** at the date on which the provision in question is to be applied.

This is perhaps the most important paragraph. In paragraph 20 the Court seems to allude to something bigger than merely the words in which EU law is phrased. First of all, there is, or should be, a particular *context* in which EU law is interpreted, that is, in the context of the European Union and thus not of one or more Member State(s). This context gives particular meaning to the provisions of EU law, that is, these provisions do not just mean whatever the words at a superficial level mean (dictionary meaning) but these words must be interpreted within the context of the European Union. Second, EU law provisions do not and should not be taken to stand by themselves. They are embedded within a *framework* of EU legislation. Third, there are certain *objectives* of the European Union that should be brought out with use of EU law. This framework and objectives allow for a more complex and particular understanding of EU law than would follow from the language of the provisions alone. Finally, to this understanding a perspective of *evolution* is added, namely the evolution of the European Union.

With the acknowledgment of a particular European context, legal framework, objectives, and perspective, the Court outlines the contours of what we could call a European form of life. This gives the provisions of EU law their rich and complex understanding; contrary to our earlier suggestion that EU law remains superficial. Compare this with the understanding of the shopkeeper of the words ‘three red apples’. These words derive their particular meaning not just from what these words stand for but from the context in which they are used (the shop). The meaning is further developed with the aim of achieving a particular objective, buying and selling fruits. Hence, taking paragraphs 18–20 together, we conclude that ultimately the CJEU holds a complex and intimate relationship between language and legal meaning. Where national courts must ignore their culturally embedded knowledge of national law, they must use their national languages to *create* a European legal culture, that is, they must interpret EU provisions in the light of a European legal context with acknowledgment of a framework of provisions, the objectives of the European Union, and its current state and evolution. This article has focussed so far on the requirements for national courts but these conditions apply to all participants of the European judicial dialogue. The CJEU, for instance, needs to use French language, not to express (instances of) the French legal culture, but to constitute a European one.

V. How to Create a European Legal Culture Out of Different Language Practices?

We used language philosophy for a close reading of paragraphs 18–20 of the *CILFIT* judgment. Our conclusion is that under the reasoning of the Court in these paragraphs lies a simplistic idea of language that functions as a mere vehicle that allows for relatively superficial legal meaning only. The participants of the European judicial dialogue are to use their respective national languages as transparent tools; they have to suppress their culturally embedded knowledge of national law when they interpret EU law. As observed, paragraph 20 has the potential to counter our ‘verdict’ of the Court’s language philosophy as too simplistic, since it ties the superficial use of national languages to a European ‘context’ and to the ‘objectives’ of the system of EU law and to its ‘state of evolution.’ Paragraph 20 introduced the contours of what we can call a European legal practice.

So, if paragraphs 18–20 in *CILFIT* are to be taken seriously, what the CJEU seems to require of national courts is that they adopt a simplistic view of their own national legal language and culture, but a rich, complex understanding of European law. This requirement seems inconsistent in light of the idea of a European judicial dialogue that is supposedly characterised by equal conversation partners who trust and respect each other. The requirements allow for little respect of national legal cultures and imply something like a European legal cultural hegemony.

From a language philosophical perspective, the requirement of the Court is inconsistent and, more importantly, highly problematic. It is inconsistent because the Court deploys in paragraphs 18–20 two different views on language and meaning at the same time. And it is problematic because the requirement of national courts to ignore their embedded understanding of national law makes no sense. This embedded understanding constitutes their legal form of life, which means it constitutes *how* they understand law, not just what law is or what a legal term stands for. In other words, this embedded understanding shines through everything judges say and do in law, that is, in national law but *also* in EU law. This means it is impossible to meet the conditions spelled out in paragraphs 18–19, which require judges to leave out their embedded national legal understanding. Furthermore, the requirement in paragraph 20 that says that national courts are to

create a European legal culture with use of national languages – as transparent tools – raises the question how this can be done.

If, nevertheless, the *CILFIT* conditions should be continued to be taken seriously, there must be a new way forward. More particularly, if paragraphs 18–20 of *CILFIT* are read not just as instructions to national courts of last instance, but what is called in the introduction a ‘micro-level’, that is, as a job-description for jurists working at the CJEU, the matter of how to go on acquires new depth. As noted, these jurists all come from one of the Member States, where they have usually also enjoyed their primary legal education. In their work at the CJEU, for instance when they draft judgments in preliminary reference procedures, they will have to perform this ‘particularity’ of EU law: working in French while they may not be a French native speaker, reasoning about the correct interpretation of EU law, and all the while coming to terms with, – and, if necessary, keeping a distance from – their national legal cultural background.

Two options come up. First, the option that national courts (or CJEU jurists, for that matter) abandon their national legal cultures altogether in favour of an isolated European legal culture. This option must be rejected immediately because it is not possible from a language philosophical perspective and it is also not desirable in light of the ideals of the European Union, for example, integration and cooperation between Member States. The second option is that one Member State provides for a dominant interpretation of European law. This means that the courts of the other Member States should learn this first Member States’ national legal culture. Although it is perhaps more or less possible to adopt a new legal culture, besides one’s own, this option is in tension with the idea of a dialogue between equal conversation partners – and with the idea of the autonomy of EU law – and must, therefore, also be rejected.

Following the language philosophical insights, the best way forward begins with the recognition that when we use our languages meaningfully as a culturally embedded practice, this is intimately related to the particular way we do things in life. For example, when most Dutch people celebrate King’s Day and when we interpret and apply law. Then, contrary to what was read in paragraphs 18–19, national courts should be allowed to rely upon their respective legal forms of life when they use their national legal languages in interpreting EU law. As mentioned, it makes no sense to ignore one’s embeddedness in legal culture entirely. The acknowledgement of national legal cultures is, thus, necessary from a language philosophical point of view but it is also a first step in making the European judicial dialogue really meaningful to national courts.

With this altered reading of paragraphs 18–19 we can return to the final condition for a meaningful European judicial dialogue as outlined in paragraph 20 and rephrase it as follows: a European legal culture should be created on the basis of different national legal cultures or embedded language practices (and not on languages in a superficial sense). The question is how this can be done.

This question formulates *the* challenge that national courts, the CJEU and other EU institutions face when interpreting EU law following the reformulated conditions for a meaningful judicial dialogue. The answer is, however, not to have all participants of a European judicial dialogue use the same language in a simplistic sense, for instance something called ‘Esperanto’.

The challenge is to continue a judicial dialogue meaningfully across different national legal cultures with use of different national languages (for example, following the altered conditions in paragraphs 18–19). This requires a solution at the complex level of language practices, not at the superficial level of languages as transparent tools. The real challenge is to respond well to the embedded legal cultural differences.

In natural conversations, outside of law, there are many ways in which one can carry on, for instance by asking to learn more or changing the subject if it all becomes too complicated. It is different when it comes to European law. The judicial dialogue in a procedure – like the preliminary reference procedure – has a strict order and there is little room for further questions.

The participants of this dialogue should, first of all, *recognise* their respective embedded understanding of law as is manifested in their respective national legal language practices. This is perhaps not the most difficult step since as argued, following philosophy of language, that it is almost impossible to deny one’s cultural embeddedness in language. However, it is not just important to recognise but also to be *aware* of one’s particular embeddedness or understanding. This is not always easy.

This last observation is important. In the actual conversation or exchange of arguments one’s particular understanding is brought out or becomes visible. It is therefore important that there is an actual exchange of arguments and the final judgment should adequately reflect this exchange. What is more, an actual exchange of thoughts between judges of national courts, the parties from various Member States and EU institutions, has the double function of helping them understand what is particular about their legal cultures, but also teaching them what is particular, and therefore different about the legal culture of the other(s). It is important to make this process visible, to disclose it, for this is where a real meaningful, as opposed to superficial,

dialogue can begin. In this regard, a recent change has been observed in the Court's work process that is problematic. At the time of the judgment in *CILFIT*, the CJEU still had the practice of documenting a quite extensive summary of the arguments of the various parties in the judgment. However, since over a decade has passed,⁵⁷ and more particularly since the amendment of the Court's Rules of Procedure in 2012, it has more or less stopped doing so.⁵⁸ This is significant, and problematic, since a valuable part of adjudication, that is, formalising an actual dialogue between the various parties and engaging with their arguments, is rendered invisible. Therefore, the amendment of the Rules of Procedure undermines the potential meaningfulness of a European judicial dialogue.

The two steps outlined above – namely an awareness of one's own culturally embedded understanding of law, and the expression of this particular understanding in visible, transparent arguments – could be considered a more detailed understanding of what is required by the enhanced understanding of paragraphs 18–19. But so far nothing new is created, whereas, as observed through the close reading of paragraph 20 in section 4 above, the CJEU requires the *creation* of a European legal culture, mindful of the context, legal system, objectives, and evolution of the EU as a whole. This requires not just the realisation and awareness of national courts' own particular understanding of law combined with at least some understanding of different national courts' embeddedness. What is required to fulfil the condition of paragraph 20 is that a serious attempt must be made by the participants of a judicial dialogue to *respond* to the different embedded understandings, and to the particular exigencies of EU law. It is in this response that something meaningful is created. A proper response is therefore *new*: judges of national courts should go beyond their own and each other's culturally embedded understanding of law. A European legal culture is created *in* a dialogue that is responsive to its participants' particular understanding of law and in this dialogue a new 'European' legal understanding is created.

Together these three steps form our solution to the challenge of participants of a European judicial dialogue, that is, they form the *beginning* of a meaningful dialogue at the level of different embedded legal language practices. The *continuation* of such dialogue requires the continuous responsiveness in the dialogue and thereby the creation of something new out of one's own and each other's particular understanding of law.

Our inspiration for this 'model' of meaningful conversation comes from the way White talks about 'translation' in his book *Justice as Translation*. He argues that a meaningful conversation requires the continuous translation of meaning and ourselves. The following citation illustrates his thoughts on translation:

... two things to make out of them a third, new whole, with a meaning of its own. In this process the elements combined do not lose their identities but retain them, often in clarified form; yet each comes to mean something different as well, when it is seen in relation to the other. In this sense each element is transformed, as it becomes part of something else, an entity existing at a new level of complexity. At the same time we ourselves are transformed as well, both as makers of the new object in the world and as those who engage with it.⁵⁹

Participants of a European judicial dialogue: judges of national courts of the CJEU and members of EU institutions need to learn to talk differently with each other. This means they should create a new European language practice together *in* a judicial dialogue, in which a deep recognition of different culturally embedded understandings of law is recognised as vital, thereby creating a particular European legal culture.

Competing Interests

PP was member of the editorial board of *UJIEL*, on a voluntary basis, from June to November 2017.

⁵⁷ Arnulf (n 12) 9–10.

⁵⁸ Before the amendment of the Court's Rules of Procedure in 2012, the law clerks of the Court always summarised the arguments of the parties for a formal preparatory document called the Report for the Hearing. The summary of the arguments of the parties was thus already made, and subsequently copy-pasted into the judgment under a separate heading. However, as of 1 November 2012, the Court does not prepare a Report for the Hearing anymore, and as a consequence, summarising the arguments of the parties is now rare. As M.-A. Guadissart and S. van der Jeught note, there has been a heated debate about the disappearance of the Report for the Hearing and the summary. Various Member States had argued before the Council of Minister's Working Group on the Court's Rules of Procedure that the Report for the Hearing was valuable for a better understanding of the case and for a greater transparency. However, the Court itself wished to abandon the Report, given the burden it presented for its workload. See Marc-André Gaudissart and Stefaan van der Jeught, 'Het nieuwe reglement voor de procesvoering van het Hof van Justitie. Een overzicht van de belangrijkste wijzigingen' (2013) 4 *SEW* 159, 165–166.

⁵⁹ James B. White, *Justice as Translation – An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990) 4.

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