Performativity and Modal Meanings in the Case Law of the European Court of Justice

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Abstract
This paper discusses performativity, modal meanings and directive speech acts in a small sample of ECJ cases written in Court French and then translated into so-called Bruxellish. Insights from philosophy of law, legal communication and legal linguistics on the one hand, and from recent investigations into the semantics of modality and imperatives on the other, will enable us to take the first steps in reassessing the role of performativity in uttering legal expressions. Pre-theoretical discussion and description of the meaning and linguistic realisations of (priority) deontic modal meanings will follow. As will be seen, the main factors behind drafting and translating performativity and priority modal meanings are: the legitimacy ascribed to law and institution, construed as a collective entity; the ongoing politically-driven effort to create a superordinate but unifying law; the importance of equal effect and uniform intent of the instrument.

Key-words: performativity, dominant EU lingua francas, ECJ cases.

1. Introduction

This paper presents a qualitative investigation into the case law of the European Union. The purpose is to address performativity, modality and speech act realisation in "Court French" (McAuliffe 2011) and "Bruxellish" (Lopez 2010). On the one hand, the paper considers the more linguistically-oriented strand of research on law and language, and briefly addresses the (performative) speech acts of obligation, prohibition, permission and authorisation by adapting selected notions from recent work in semantics, philosophy of law, legal communication and legal linguistics. On the other hand, data are discussed from a small corpus of English and French cases so as to shed light onto the linguistic realisation of the speech acts at hand within two of the EU dominant legal lingua francas.

As the legal lingua francas of, respectively, the EU and of the Court of Justice of the European Union (ECJ), Bruxellish and Court French represent hybrid EU variants of the legal English and legal French of, respectively, English- and French-speaking Member States. Hybridity results from the politically-driven effort to compound and unify national orders, legal systems and traditions into one superimposed, supranational legislation. At the same time, in the multilingual frame of the EU this also poses a problem of translation (Schäffner and Beverly 2001) from and into dominant and/or minor languages. An additional kind of issue is recourse to French as the working language of native and (mostly) non-native judges, drafters and presidents in the Court of Justice.

Patently, hybridity in multilingual, supranational institutions is a feature of terminology creation. If achieving justice is considered as the prime function of EU case law, however, it might be a step forward to move the centre of gravity towards language (in legal documents) as a means (*instrument*) to change legal relationships (Mattila 2013: 41-43) and therefore to performativity, modal meanings and directive speech acts. To this purpose, this paper will proceed as follows. Section 2 discusses hybridity, Court French and Bruxellish in the frame of the ECJ. Section 3 turns to corpus data, method and framework of analysis. Power and expressivity (McAdams 2015) as well as form and publicity (Mattila 2013) are some of the notions that come in handy when tackling the performative dimension of obligation, permission, authorisation and prohibition. From another perspective, recent work on the semantics of modality and imperatives (Portner 2009; Kaufmann 2012) will enable us to provide pre-theoretical descriptions of Preliminary Judgments. At the same time, data analysis draws on Garzone (1996) and references there for a discussion of performatives and speech acts. Using the tools of corpus linguistics (Scott [1997] 2010; Barlow 2009), Section 4 then proceeds to the preliminary qualitative data analysis of a small sample of French and English cases deliberated and authenticated by the ECJ; the direction of translation is from French into English. Section 5 briefly summarises the results.

2. Hybridity, Bruxellish and Court French

The European Union is a superimposed, supranational legal system which strives to unify the legal orders and different traditions of

the Member States. In this frame, methods of interpretation and judgment construction at the ECJ have come to mix traditions originating in various legal cultures (Ballasant-Aebi 2000: 720; Berteloot 2000: 529). This is one sense in which the case law of the EU is a new hybrid. Novelty and hybridity characterise ongoing legal systematisation, doctrine and sources of law, individual institutions and principles, as well as new terminology, recourse to old (mainly French) terms with new conceptual content in EU law (Mattila 2013: 140) and use of generic terms in a specialised sense (Mattila 2013: 154).

The hybrid-like creation of new legislation has its counterpart in hybrid-like texts and, importantly, formulae and wordings that are particular to EU institutions. In line with all contexts of international communication, EU institutions have witnessed a steady increase in the use of English as the legal lingua franca, a variant also known as Bruxellish (Lopez 2010: 12). Indeed, English has progressively replaced French as the first language in use, for serial translation across minor languages as well. Nevertheless, French, or better "Court French" (McAuliffe 2011), remains the dominant legal lingua franca and the internal working language of the ECJ (Mattila 2013; 2014). Both lingua franca variants diverge from the legal languages adopted by the Member States.

Court French is the official language of administrative procedures and judicial proceedings in the ECJ. While all EU languages are equal as procedural languages, French is spoken by the Judges; though all the documents lodged in a given proceeding are translated into French and the authentic version of the judgment might be written in another official language, the French version of the case is the one used as the source of interpretation (Mattila 2013: 33-35).

A combination of factors contributes to shaping and reinforcing Court French. First, the drafters are often non-native jurists. They take on temporary positions as legal secretaries ('référendaires') in the President's or Jurists' teams and do not participate in the wording of the deliberations. As a practical matter, translatability problems may involve literal void or misleading translations and lead to non-uniform intent of the multilingual versions of a legal instrument (Pigeon 1982; Šarčević 2000). To overcome these fundamental problems, legal secretaries adhere to written and unwritten guidelines (e.g. EUR-Lex 2013) and to the style and genre conventions of authenticated documents. More importantly still, they construct glossaries based on

the "settled case law of the Court" (McAuliffe 2011: 110) and make systematic recourse to data bases and computer-aided translation tools currently in use at the Court of Justice (the GTI), which are indeed intended to assist and further the translation delivery process with a view to reinforcing the rule of law.

3. Corpus data and framework of analysis

The 'ECJ Corpus' is comprised of cases closed and authenticated by the ECJ in 2008. Three small parallel modules are currently under construction: 'ECJ_IT' for Italian, 'ECJ_FR' for French and 'ECJ_EN' for English. All cases were downloaded from the official portal of the ECJ (http://curia.europa.eu/; http://curia.europa.eu/jcms/jcms/j_6/). Discussion here is confined to a sample of 18 cases written in French (ECJ_FR) and their parallel English translations (ECJ_EN), as shown in Table 1.

TABLE 1
Corpus data

ECJ_FR	*ECJ_EN*
1. Affaire C-3/08: Décision préjudicielle	1. Case C-3/08: Preliminary ruling
2. Affaire C-12/08: Décision préjudicielle	2. Case C-12/08: Preliminary ruling
3. Affaire C-18/08: Décision préjudicielle	3. Case C-18/08: Preliminary ruling
4. Affaire C-59/08: Décision préjudicielle	4. Case C-59/08: Preliminary ruling
5. Affaire C-101/08: Décision préjudicielle	5. Case C-101/08: Preliminary ruling
6. Affaire C-128/08: Décision préjudicielle	6. Case C-128/08: Preliminary ruling
7. Affaire C-141/08 P: Pourvoi	7. Case C-141/08 P: Appeal
8. Affaire C-168/08: Décision préjudicielle	8. Case C-168/08: Preliminary ruling
9. Affaires jointes C-202/08_P et C-208/08_P: Pourvoi	9. Joined cases C-202/08 P and C-208/08 P: Appeal
10. Affaire C-219/08: Manquement d'Etat	10. Case C-219/08: Failure of a Member State to fulfil obligations
11. Affaire C-285/08: Décision préjudicielle	11. Case C-285/08: Preliminary ruling
12. Affaire C-296/08 PPU: Décision préjudicielle	12. Case C-296/08 PPU: Preliminary ruling
13. Affaire C-299/08: Manquement d'Etat	13. Case C-299/08: Failure of a Member State to fulfil obligations
14. Affaire C-301/08: Décision préjudicielle	14. Case C-301/08: Preliminary ruling
15. Affaire C-311/08: Décision préjudicielle	15. Case C-311/08: Preliminary ruling
16. Affaire C-333/08: Manquement d'Etat	16. Case C-333/08: Failure of a Member State to fulfil obligations
17. Affaire C-425/08: Décision préjudicielle	17. Case C-425/08: Preliminary ruling
18. Affaire C-475/08: Manquement d'Etat	18. Case C-475/08: Failure of a Member State to fulfil obligations

Data collection required a triangulation of manual searches of the wordlists of words and lemmatizations in either language, and handling and selection of mono- and multilingual concordances (Scott 2010; Barlow 2009). As a follow up to Cacchiani and Preite (2014), the paper provides some initial reflections on the relationship between social context and legal order, and on performativity, (priority) modal meanings and directive speech acts.

3.1. Framework of analysis: about performativity

In Marmor's (2014) words, two types of 'dialogue' are in place when deliberating: a dialogue between judges and legislature, which comprises interpretation; and, importantly, a dialogue between judges and the subjects of the specific deliberation. The court would thus come out with a joint opinion and deliberate as a collective institution, an "[imperative] without imperator" (Marmor 2014: 74); this is also an 'internal speech act', as it were (50), collectively addressed to the subjects of the deliberation.

"The language of the law is […] an *instrument* of speech acts" (Mattila 2013: 42, emphasis added), i.e. language is the means to achieve legal order. This, of course, is reminiscent of the simple and common sense view that the enactment of law is a performative (Austin 1962; Searle and Vandervecken 1985) speech act: what the law is (and does) is what the law says – that is, the assertion (deliberation and publicity) of legislation, statutes and judgments in conventionalised form.

Turning to the macrostructure of the ECJ's judgments, these comprise the Heading, followed by three main sections: a Report that contains a statement of facts, the legal background and a summary of the arguments; the Reasoning of the Judgment, or the grounds for the decision; and the performative Ruling (Hartley 2014).

3.2. Expressivity and modal meanings

Very broadly, a case holds the 'expressive power' to inform, change beliefs and, based on the required conduct, coordinate (social) behaviour and relationships, including those with institutions (adapted from McAdams 2015). If the legal expression has moral credibility, it can stand a fair chance of achieving publicity (i.e.

the judgment is part of the parties' common beliefs/ground) and uniqueness (i.e. the judgment stands out against conflicting expressions). 'Felicitous', successful speech acts amount to the subject's compliance with the legal expressions. One important step or condition, however, is that the hearer (subjects at large or parties to the specific action) ascribe legitimacy to the ECJ as a supranational social and legal order: subjects recognise the claims and intentions of the law as motivating (Marmor 2014) and genuinely (that is, sincerely) communicating the required conduct based on factual knowledge (Rodriguez-Blanco 2013: 80) of what is moral (that is, socially good). This involves variously framing the law as authority, social obligation and moral imperative, as well as social mechanism, strategic tool and social identity (Winter 2013: 123-126). In short, recognising the intention of the institution secures recognition of the speech act and paves the way to felicitous compliance on the part of the legal subject (Marmor 2014).

When uttering the legal expression, what is true in the speech act is the intention of the ECJ to motivate conduct on the part of the legal subject, not the propositional expression. The emphasis in this paper lies on the linguistic realisations of performativity *strictu sensu* (that is in the Ruling), as well as on modal meanings as realised in the Ruling and in other sections of the case: the 'obligatory' (legal commands and requirements) and its contradictory, the 'omissible' (authorisations not to *p*), the 'impermissible' (prohibitions, or negative commands and requirements, as well as negative permissions and authorisations), the 'permissible' (permissions) and the 'optional' as a subaltern of both the obligatory and the permissible (which permits both *p* and its negation) (Ray [1924] 1994, adapted with reference to Šarčević's 2000 discussion of speech acts). Another modal meaning is the 'anankastic' (von Wright [1963] 1989).

Commands and requirements, prohibitions, etc. are directive speech acts, with a word-to-world direction of fit and future orientation (Searle and Vandervecken 1985). With recent studies on the semantics of modality (Portner 2009) and imperatives (Kaufmann 2012), it is possible to posit a sequence of contexts around the cases at hand, from pre-context through intermediate or actual utterance context, to post-context. In principle, uttering legal expressions in the intermediate context and under the pre-context conditions

mentioned above (shared presupposition, contextual constellation and circumstantial base) secures an update of the beliefs (Kaufmann 2012: common ground) of the legal subjects in the post-context. The small corpus under investigation is mostly comprised of Preliminary rulings, or Rulings on the interpretation or validity of the EU law made at the request (in the pre-context) of the court of an EU Member State (EUR-Lex 2014). Though, in principle, these are non-binding, in practice they are generally felt to be binding by national courts. Along with common legal consciousness and shared legal convictions across EU Member States, institutional context and presupposition of the ECJ's expert factual knowledge in the pre-context account for requests of clarification in the pre-context, and will thus determine the update of the national court's belief and conduct in the post-context, which results in the uptake of the ECJ's Preliminary ruling.

Under the obligatory, commands and requests are public, rule-based speech acts with a priority modal meaning (Portner 2009: 135). They verify in the post-context the possible future course of events described and restricted by uttering the legal expression in the intermediate context. They constrain the development of future situations. Deontic modals belong here. As Šar evi (2000) points out, legal commands are mandatory, while requirements are either mandatory or directory. 'Prohibitions' (the impermissible) represent the illocutionary denegation of the propositional content of commands. They are legal speech acts with the illocutionary force of forbidding, but they can be also used to withdraw a permission or authorisation (Šarčević 2000).

'Permit'- and 'authorise'-expressions open up further possibilities for the development of the situation, liberalising the subject's commitment: there is court-subject mutual joint belief that the legal subject is now entitled to do the action that is part of the propositional content in the pre-context. Optionals open up two possible courses of events (permissible and omissible). Because the subject can update his to-do-list performing either action, there is a clear shift from deontic to bouletic modal flavours within the priority set (Portner 2009). This would differentiate 'permissions' and 'authorisations'.

Lastly, 'anankastic' expressions do not express any order, command or obligation. They are (deontic) *necessary* expressions,

or "a statement to the effect that something is (or is not) a necessary condition" (von Wright [1963] 1989: 10) for the validity of an act, state of affairs, etc.

4. Data analysis

Though making valid generalisations would require thorough quantitative data analysis of words and multi-word expressions (e.g. adapting Goźdź-Roszkowski 2011 or Biel 2015, Chapter 5), the purpose of this analysis is much more limited. At this point, the linguistic expression of performativity, modal meanings and speech acts under scrutiny will be analysed by comparing selected items in parallel texts.

4.1. Performativity

If performativity is presupposed throughout the instrument and the performative meaning is secondary but still present in the underlying act, then performative prefixes (Levinson 1983) in complex clauses might actually be taken to be redundant. In any case, however, the Ruling takes on the performative prefix. Given the relevant institutional context, the Dispositif or Ruling is not only performative *strictu sensu*, it is also a thetic (Conte 1985) or constitutive act (Carcaterra [1990] 1994). See example (1) or, from a Preliminary ruling, example (2).

(1) Par ces motifs, la Cour (deuxième chambre) *déclare et arrête :* / 1. Le recours *est rejeté*. / 2. La Commission des Communautés européennes et le Royaume de Belgique *supportent* chacun leurs propres dépens.[1] (Affaire C-219/08)
On those grounds, the Court (Second Chamber) *hereby:* / 1. *Dismisses* the action; / 2. *Orders* the Commission of the European Communities and the Kingdom of Belgium each to bear its own costs. (Case C-219/08)

(2) Par ces motifs, la Cour (quatrième chambre) *dit pour droit:* / 1. L'article 6 de la directive 98/59/CE du Conseil, du 20 juillet 1998, concernant le rapprochement des législations des

[1] In all examples emphasis is added.

> États membres relatives aux licenciements collectifs, lu en combinaison avec l'article 2 de celle-ci, *doit être interprété* en ce sens qu'il *ne s'oppose pas* à une réglementation nationale […]. / 2. […] / 3. L'article 2 de la directive 98/59 *doit être interprété* en ce sens qu'il *s'oppose* à une réglementation nationale […]. En appliquant le droit interne, la juridiction nationale *doit* […] *prendre en considération* l'ensemble des règles de celui-ci et l'interpréter, dans toute la mesure du possible, à la lumière du texte et de la finalité de la directive 98/59 […]. *Il lui appartient* par conséquent *d'assurer*, dans le cadre de sa compétence, que les obligations pesant sur un tel employeur ne soient pas réduites par rapport à celles énoncées à l'article 2 de ladite directive. *Il lui appartient* par conséquent *d'assurer* […] *que* les obligations pesant sur un tel employeur *ne soient pas réduites* par rapport à celles énoncées à l'article 2 de ladite directive. (Affaire C-12/08)
>
> On those grounds, the Court (Fourth Chamber) *hereby rules*: / 1. Article 6 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, read in conjunction with Article 2 thereof, *is to be interpreted as not precluding* national rules which […]. / 2. […] / 3. Article 2 of Directive 98/59 *must be interpreted as precluding* national rules which […]. *The national court is required*, […] *to consider* all the rules of national law *and to interpret them*, so far as possible, in the light of the wording and purpose of Directive 98/59 […]. Consequently, it *must ensure*, within the limits of its jurisdiction, *that* the obligations binding such an employer *are not reduced* below those laid down in Article 2 of that directive. (Case C-12/08)

The examples illustrate the case of performativity that extends from beyond the explicit performative prefix (Levinson 1983) to unite with modals and directives in the embedded clauses (Garzone 1996: *dictum*). Fixed formulae (single underlining in the excerpts) vary across case subtype and language. Compare (1) "Par ces motifs, la Cour (deuxième chambre) déclare et arrête", from a Failure of a Member State to Fulfil Obligations, and (2) "Par ces motifs, la Cour (quatrième chambre) dit pour droit:", from a Preliminary ruling, with their English counterparts, (1) "On those grounds, the

Court (Second Chamber) hereby:" and (2) "On those grounds, the Court (Fourth Chamber) hereby rules:". As is apparent, there are (partial) part-of-speech mismatches that are reminiscent of the corresponding formulae in legal French and legal English, e.g. "déclare et arrête" vs. "hereby" from (1), where "Dismisses" and "Orders" move right into the embedded clauses. Another example is (2): whereas "hereby" introduces a performative meaning by foregrounding the utterance context, in a slightly different manner "pour droit" in "dit pour droit" (2) brings out one of the reasons for ascribing legitimacy to the institution and the law, viz. authority – part of the pre-context.

Interestingly, there is at least one general similarity among the various forms used to express performativity and modal meanings across French and English: all parallel documents make systematic recourse to the third person, or the non-person (objectivising passives and impersonal locutions) to guide the subject's conduct (in the post-context) with respect, and pursuant to, the ECJ's recognition of community legislation. Doing away with the first person is fully legitimate: subjectivity is warranted by the names of the Judges and Judge-Rapporteur in the heading and by the final signature (see Garzone 1996: 32, 68-70, expanding on Benveniste [1966] 1990). In the special case of the ECJ, there are good reasons for avoiding the first-person perspective: the type of effort on the part of the judges is a collective one: the ECJ (a plurality of judges) jointly deliberates and coordinates (McAdams 2015) citizens' behaviour and relationships (adapted from Marmor 2014). As Kähler (2013: 542) understands it, the 'impersonal' style of the court would account for the ongoing work of the court as an institution that exists over time and during all decisions. Conversely, the deictic, 'personal' style (first-person singular and first-person plural pronouns) would bring about the opinions of a plurality of particular judges in office for limited periods of time[2].

[2] A sentence like "[a]s we decided 20 years ago", Kähler (2013) argues, would be artificial – for the purposes of this paper, not true – because the judges that took part in the decision are long gone. Another reason for dropping the first person would be that, in the absence of academic debate, there is no need for the first-person perspective.

4.2. Modal meanings

4.2.1. The obligatory and the anankastic

The data suggests that the obligatory realised by deontic modal 'must + Inf Pass' tends to render 'devoir + Inf Pass' (3) and modal locutions such as 'il appartient à', 'il incombe à', 'y avoir lieu', 'il convient de', 'X est tenu à', 'il est force de'. Together with "be required to" (2) and the highly infrequent "be to" (3), it is the most frequent auxiliary used in the Ruling as the operative part of the final decision.

(3) 95 [...] la réglementation nationale *doit* être ciblée et clairement justifiée à l'égard des dites catégories et ne doit pas viser tous les AT [...]. (Affaire C-333/08)
95. […] the national legislation *must* be targeted and clearly justified in relation to those categories and must not envisage all processing aids or all foodstuffs […] (Case C-333/08)

In general, 'be required to' is an alternative to 'must' when translating 'devoir' and tends to override 'must' when rendering formal equivalents such as 'être tenu de' (also → 'be bound to'). It is also found as an alternative to 'be obliged to', the literal translation of 'être obligé de'. When used in the active voice of the present indicative, 3Sg/Pl 'require' renders 3Sg/Pl performatives 'exiger'/'obliger'/'imposer' and 'il est prévu que', all relating to the interpretation of the norm.

Apparently, in French the normative indicative takes on a quantificational/universal reading by pointing to "stereotypical" (Portner 2009) circumstances or to exhaustive possibility for a future course of events, and a modal-performative reading against the relevant contextual constellation and presuppositions in the shared common ground. The expression of the necessary clearly relates to exhaustivity. For instance, this appears to be the case of (ii), from (i) above, and, given the appropriate context, might also apply to (2i):

(ii) 95 [...] la réglementation nationale *doit* être ciblée et clairement justifiée à l'égard desdites catégories et ne doit pas viser tous les AT [...]. (Affaire C-333/08)

95. […] the national legislation *must be targeted and clearly justified* in relation to those categories and must not envisage all processing aids or all foodstuffs […] (Case C-333/08)

(2i) En appliquant le droit interne, la juridiction nationale *doit* […] *prendre* en considération l'ensemble (Affaire C-12/08)
The national court *is required* […] *to consider* all the rules of national law and to interpret them (Case C-12/08)

One final word is needed concerning the Report and Reasoning of the Judgment. In line with EU style guides, 'shall' translates the present indicative (Šarčević 2000), as in (4), from the Summary of the Judgment, or (5), possibly an anankastic, from the Relevant Provisions. Hence, recourse to 'shall' is made where intertextuality is in place and voices from other texts and genres are quoted either directly or indirectly. However, it would be a dispreferred choice for rendering modals, which motivates recourse to the same device in (6), from the Relevant Provisions, and (2ii), from the Ruling in (2).

(4) Sous réserve des articles 14 quater et 14 septies, […] Cette législation *est déterminée* conformément aux dispositions du présent titre […]. (Affaire C-285/08)
Subject to Articles 14c and 14f, […] That legislation *shall be determined* in accordance with the provisions of this Title […]. (Case C-285/08)

(5) Selon l'article 4 de cette directive, « [l]a victime *est obligée de* prouver le dommage, le défaut et le lien de causalité entre le défaut et le dommage ». (Affaire C-285/08)
Article 4 of that directive states that 'the injured person *shall be required to* prove the damage, the defect and the causal relationship between defect and damage'. (Case C-285/08)

(6) L'article 6 de la directive 98/59/CE du Conseil, du 20 juillet 1998, […] *doit être interprété* en ce sens qu'il *ne s'oppose pas* à une réglementation nationale (Affaire C-12/08)

(2ii) 1. L'article 6 de la directive 98/59/CE du Conseil, du 20 juillet 1998, concernant le rapprochement des législations des États membres relatives aux licenciements collectifs, lu en combinaison avec l'article 2 de celle-ci, *doit être interprété* en ce sens qu'il *ne s'oppose pas* à une réglementation nationale […].(Affaire C-12/08)
1. Article 6 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, read in conjunction with Article 2 thereof, *is to be interpreted as not precluding* national rules which […].(Case C-12/08)

4.2.2. The 'permissible', the 'omissible' and the 'optional'

The 'permissible', the 'omissible' and the 'optional' are realised by the following indicators:
a. permissible: 'il appartient a X de' Imp (i.e., Impersonal) → 'it is for X to'; 'être autorisé' → 'to be authorised'; 'être mis en mesure de' → 'to be given the opportunity to'; 'être susceptible de' Imp/3Sg/3Pl → 'to be capable of', 'to be liable of'; 'avoir droit à' → 'to be entitled to'; 'être admis à' → 'to be granted leave to';
b. omissible: 'ne pas devoir ' → 'not to be obliged to'; 'ne pas être tenu de' → 'not to be required to'; 'ne pas être nécessaire de' → 'not to be necessary to'; 'ne pas être pas obligatoire de' Imp → 'not to be obligatory to' Imp; 'ne pas y avoir lieu de' → 'there be no need to'; 'ne pas être admis que' Imp → 'to be permissible only that' non-p; 'dispenser de' → 'to exempt from';
c. optional: 'permettre de' → 'to enable to'; 'prévoir la possibilité de' → 'to enable to'; 'donner la faculté de' → 'to allow to'; 'justifier de' → 'to authorise to'; 'autoriser à' → 'to provide the possibility to'.

These indicators are primarily rendered by French 'pouvoir', which translates into English 'may' and 'can'. 'Permit' translates 'permettre' and is found in the Summary of the Judgment (8). Turning to locutions, they appear to translate literally, as recourse is systematically made to dictionary equivalents. Among fixed expressions, 'it is for X to' Inf, which renders 'il appartient a X de' Inf (9). These are found in the operative part of the Summary of the Judgment and, more often, in the Ruling.

(7) En prévoyant l'imposition d'un avantage anormal ou bénévole dans le chef de la société résidente ayant consenti cet avantage à une société établie dans un autre État membre, la réglementation *permet* à l'État concerné *d'exercer* sa compétence fiscale en relation avec les activités réalisées sur son territoire. (Affaire C-311/08)
By providing that the resident company is to be taxed in respect of an unusual or gratuitous advantage which it has granted to a company established in another Member State, the legislation in question *permits* the Member State concerned *to exercise* its tax jurisdiction in relation to activities carried out in its territory. (Case C-311/08)

(8) L'article 43 CE, lu en combinaison avec l'article 48 CE, doit être interprété en ce sens qu'il ne s'oppose pas en principe à une

> réglementation d'un État membre […]. *Il appartient cependant à la juridiction de renvoi de vérifier que* la réglementation en cause au principal ne va pas au-delà de ce qui est nécessaire pour atteindre les objectifs poursuivis par celle-ci, pris ensemble. (Affaire C-311/08)
> Article 43 EC, read in conjunction with Article 48 EC, must be interpreted as not precluding, in principle, legislation of a Member State […]. However, *it is for the referring court to verify* whether the legislation at issue in the main proceedings goes beyond what is necessary to attain the objectives pursued by the legislation, taken together. (Case C-311/08)

4.2.3. The 'impermissible' and the 'anankastic' (negative)

To conclude, prohibitions are grouped under the 'impermissible'. Examples here are:
a. contrary or illocutionary denegation of 'to command' and 'to require': 'ne pas devoir Imp/3Sg/3Pl → 'must not', 'not to be obliged to'; 'should not' Imp/Inf Pass.; 'interdire de' → 'to prohibit to', 'to preclude from'; 'prohiber' → 'to prohibit to';
b. contradictories or illocutionary denegation of 'to permit' and 'to authorise': 'ne pas pouvoir' 3Sg/3Pl → 'cannot', also 'may not', 'not to be entitled to', 'not to be able to'; 'ne pas y avoir de possibilité de' Imp → 'not to be permissible to'; 'ne pas être autorisé à' → 'not to be permitted to'; 'ne pas permettre' → 'to preclude from', 'not to permit to', 'not to allow to'; 'empêcher de' → 'to preclude';
c. either meaning: 'present indicative' → 'shall not' Inf Act/Pass; 'être refusé à' → 'shall not' Inf Pass.; 'être interdit (de)' → 'to be prohibited (to)', 'not to be permitted to'; 'interdire' → 'to prohibit to', 'to preclude from'.

As a meaning contrary to the obligatory and contradictory of the permissible, the impermissible makes recourse to the illocutionary denegation of the forms under 4.2.1 and 4.2.2 above. However, both the ST and TT denegations seem to form smaller sets. Therefore, it is no surprise that 'must not' is the preferred option when translating 'ne pas devoir', as in (11), from the Ruling in (1). Also, 'shall not + Inf' renders the present indicative when used in quoted EU regulations, directives and case law, while 'not to be A-able/A-ible' can translate 'ne pas pouvoir' in sections other than the Ruling (e.g. Costs in 10) and appears to be a dispreferred option in the Ruling.

(iii) 95 [...] la réglementation nationale doit être ciblée et clairement justifiée à l'égard desdites catégories et *ne doit pas viser* tous les AT [...]. (Affaire C-333/08)
95. […] the national legislation must be targeted and clearly justified in relation to those categories and *must not envisage* all processing aids or all foodstuffs […] (Case C-333/08)

(9) 77. […] Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, *ne peuvent faire* l'objet d'un remboursement. (Affaire C-311/08)
77. Costs incurred in submitting observations to the Court, other than the costs of those parties, *are not recoverable*. (Case C-311/08)

5. Conclusions

This paper briefly discussed the link between moral order and social context on the one hand, and the expression of performativity, modal meanings and directive speech acts, on the other. Broadly speaking, ECJ cases are performative with informative and coordinating expressive powers. The legitimacy ascribed to the ECJ court and law is grounded in the authority and credibility of the court in relation to factual knowledge, morality and preservation of social order, as well as identification with the order itself on the part of the legal subject.

The court engages in a public, institutional dialogue with the legal subject as a collective institution that puts forth joint opinions and deliberations, not as a plurality of individual judges. If the continuity of the court over time overrides the continuous turnover of individual judges and teams, then it comes as no surprise that performativity is rendered via recourse to the third-person point of view.

As regards (non-native) drafting and translation practice, the English and French spoken at the EU and the ECJ are legal lingua francas – so-called Bruxellish and Court French. To speed up the translation delivery process, reinforce the rule of law and pursue equal effect and uniform intent of the instrument (Pigeon 1982; Šarčević 2000), legal secretaries at the ECJ adhere to written and unwritten guidelines and to the style and genre conventions of authenticated documents, make systematic recourse to glossaries constructed on settled cases of the ECJ, data bases and computer-aided translation tools.

There are links between these factors, departure from standard practice in national orders and legal systems, and the politically-driven effort to create one superimposed, supranational law that can compound and unify national diversity and different traditions.

On the linguistic side, the data suggest recourse to a varied set of modal indicators, comprising performative verbs in the prefix, normative indicative, expressions of deontic modal meanings and the anankastic in the Ruling. A closer look at the macrostructure of the text also reveals some preferences in the distribution of modal indicators. For example, 'shall' appears to show a preference for Provisions and Summaries of the Judgment. In this context, therefore, extensive corpus-driven and corpus-based research is envisaged to compare and contrast expressions of performativity and modality based on a much larger and more representative set of data, to allow thorough investigation of (dis-)similarities across Court French and the legal French spoken in France, Bruxellish and the legal English spoken in the UK, and, importantly, of the influence that each variant may exert on the other.

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