

LEGAL INTERPRETATION WITHIN THE EUROPEAN SYSTEM OF CENTRAL BANKS: IS THERE METHOD IN 'T?

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ABSTRACT

Che cosa significano le parole? Come arriviamo a stabilirne il significato? E' questo ancora possibile? Il contributo si incentra sull'utilizzo delle tecniche stabilite di interpretazione giuridica nel contesto del Sistema Europeo di Banche Centrali (SEBC). E' stato pubblicato un ampio e crescente corpus di pareri della Banca Centrale Europea (BCE) che ha posto in luce l'utilizzo dell'interpretazione giuridica all'interno del SEBC. Analogamente si può dire dei vari rapporti di convergenza e, inter alia, delle lettere inviate dalla BCE sulla bozza del Trattato che istituisce una Costituzione per l'Europa. L'interpretazione giuridica rappresenta il lavoro quotidiano del Comitato Legale (LEGCO) del SEBC. Se già l'interpretazione giuridica è di per sé una sfida, lo diventa ancora di più nell'ambiente multilinguistico e spesso multigiurisdizionale in cui opera il LEGCO. Negli anni, i membri del LEGCO hanno fornito un contributo a tali pareri, rapporti e lettere, per cui questi documenti possono essere rappresentativi del loro lavoro. Tale rassegna mostra che la BCE (e prima ancora il suo predecessore, l'Istituto Monetario Europeo) ha utilizzato un'ampia gamma di metodi e tecniche per poter interpretare i provvedimenti giuridici del caso, e ciò nell'ambito della struttura giuridica generale comunitaria di metodi e tecniche interpretative. Vengono fatte alcune raccomandazioni, tra cui quella di essere trasparenti sui metodi e sulle tecniche di interpretazione utilizzati, e quella di usare una terminologia il più coerente possibile. Questo studio chiarisce che la BCE, tramite "interpretazione anticipativa", cerca di evitare problemi interpretativi futuri già quando gli strumenti giuridici sono ancora in bozza, dimostrando così una lodevole consapevolezza dei problemi interpretativi. Lo studio mostra anche come la BCE tenti di realizzare i suoi obiettivi giuridici e di politica legislativa tramite le sue interpretazioni, pratica che può essere paragonata all'atteggiamento tradizionale pro comunitate della Corte di Giustizia e che è anche ben accettata.

**“Neque leges neque senatus consulta ita scribi possunt,
ut omnes casus qui quandoque inciderint comprehendantur,
sed sufficit ea quae plerumque accidunt contineri.”¹**

**“Et ideo de his, quae primo constituuntur,
... interpretatione ... certius statuendum est.”²**

**“Quamvis sit manifestissimum edictum praetoris,
attamen non est negligenda interpretaio eius.”³**

I INTRODUCTION

“Words, words, words”; thus Hamlet’s reply to Polonius’ inquiry as to what he was reading.⁴ What do words mean? How do we arrive at establishing their meaning? Is this even possible? Great minds have struggled with these questions.⁵ Theories of interpretation have been constructed, including a theory of theories of interpretation.⁶ This contribution does not propose to add yet another such theory, but will instead focus on the use of established methods and techniques of legal interpretation in the context of the European System of Central Banks (ESCB). Legal interpretation is the daily work of the Legal Committee of the ESCB (LEGCO).⁷ While legal interpretation is a challenge in itself, it is even more so in the multilingual and, often, multi-jurisdictional environment in which LEGCO operates. Its Opinions, proceedings and documents are however prevented from being published by the requirements of professional secrecy as laid down in Article 38 of the Statute of the European System of Central Banks and of the European Central Bank (“the Statute”). Fortunately for the purposes of this contribution, a wide and increasing body of European Central Bank (ECB) Opinions⁸ have been published which shed light on the use

- 1 Dig. 1,3,3,10. IULIANUS libro LVIII digestorum. “Neither laws nor decrees of the Senate can be formulated so as to include any case that might ever occur; it will suffice if they comprise matters that occur frequently” (translation courtesy of the translation department of De Nederlandsche Bank).
- 2 Dig. 1,3,3,11. IULIANUS libro LXXXX digestorum. “Therefore [the sense of] that which has been originally decided, must be [...] determined further by interpretation.”
- 3 Dig. 25,4,1. ULPIANUS libro vicesimo quarto ad edictum. “Although the praetor’s edict may be perfectly clear, yet its interpretation should not be disregarded.”
- 4 Shakespeare, Hamlet, Act two, Scene two.
- 5 See for an overview of recent thinking and thinkers on legal reasoning J. Dickson, “Interpretation and Coherence in Legal Reasoning”, in E. N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (fall 2001 edition), available at <http://plato.stanford.edu/archives/fall2001/entries/legal-reas-interpret>.
- 6 See for the latter A. Peczenik, “Kinds of Theory of Legal Argumentation”, draft paper posted on <http://peczenik.ivr2003.net/documents/draft2005.pdf>, referring to J. Wróblewski, *The Judicial Application of Law*, ed. by Z. Bankowski and N. McCormick (Dordrecht: Kluwer Academic, 1992).
- 7 Currently, the legal basis for LEGCO is Article 9 of the ECB Decision ECB/2004/2 (2004/257/EC) of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 080, 18.3.2004, p. 33 et seq.). Article 9.1 of this Decision provides: “The Governing Council shall establish and dissolve committees. They shall assist in the work of the decision-making bodies of the ECB and shall report to the Governing Council via the Executive Board”. Article 9.2 provides, inter alia, that “Committees shall be composed of up to two members from each of the Eurosystem NCBs and the ECB”.
- 8 On the basis of Article 105 (4) of the Treaty establishing the European Community (“the Treaty”). The limits and conditions referred to in this Article of the Treaty were laid down in Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42. See also A. Arda, “Consulting the European Central Bank: Legal Aspects of the Community and National Authorities’ Obligation to Consult the ECB Pursuant to Article 105 (4) EC”, *Euredia*, 2004/1, pp. 111-52.

of legal interpretation within the ESCB. The same holds true for the various convergence reports⁹ and, inter alia, the letters¹⁰ sent by the ECB regarding the draft Treaty establishing a Constitution for Europe. Over the years, all LEGCO members have contributed to these Opinions, reports and letters. These documents, therefore, may serve as a useful proxy for the work of that Committee. Together they constitute a small window through which the interpretative work of LEGCO may be observed and commented on.¹¹ Peeking, as it were, through this window, this contribution is structured as follows. First of all, Section 2 provides a very brief overview of what the Court of Justice of the European Communities (“the Court of Justice”) and the learned writers have had to say on legal interpretation within Community law. A small catalogue of methods and techniques of legal interpretation is proposed for the purposes of this contribution. Section 3 examines if and how these techniques are used in the body of ECB Opinions and other documents mentioned above, while Section 4 considers some related subjects. Finally, Section 5 draws some conclusions. It is then for the reader to establish whether we may agree with Polonius’ conclusion that “[t]hough this be madness, yet there is method in ’t.”¹²

2 A SMALL CATALOGUE OF METHODS AND TECHNIQUES OF LEGAL INTERPRETATION

According to Article 220 of the Treaty, “[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed”. The Court of Justice has ruled in a great number of cases on the aspects of what such “interpretation” may entail. For the purposes of this section, it suffices to mention some of the more general statements made by the Court of Justice regarding the interpretation of Community law. According to consistent case-law, in interpreting a provision of Community law it is necessary to consider “not only its wording but also the context in which it occurs and the objects of the rules of which it is part”.¹³ The Court of Justice sometimes uses slightly different wording to express the same idea: “it is necessary to examine, apart from their [i.e. the two secondary law instruments under scrutiny] wording and structure, their context and purpose”¹⁴ and “since the interpretations [...] based on their wording and the history and the scheme of the Regulation do not permit their precise scope to be assessed [...], the legislation in question must be

9 On the basis of Articles 121 (1) and 122 (2) of the Treaty.

10 See the letter dated 5 June 2003 from Willem Duisenberg, President of the ECB, to President Valérie Giscard d’Estaing, Chairman of the Convention on the Future of Europe; the letter dated 19 September 2003 from Willem Duisenberg to Franco Frattini, President of the Council of the European Union, and the letter dated 16 April 2004 from Jean-Claude Trichet, President of the ECB, to Brian Cowen, President of the Council of the European Union.

11 As a by-product of this search for interpretative methods, the examples given below show the wide variety of legal issues dealt with within the ESCB and LEGCO.

12 Shakespeare, *op. cit.*

13 Case C-292/82 *Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, paragraph 12. See also Case C-337/82 *St. Nikolaus Brenneerei v Hauptzollamt Krefeld* [1984] ECR 1051, paragraph 10; Case C-223/98 *Adidas Case* [1999] ECR I-7081, paragraph 23. Compare Article 31 of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”.

14 Case C-286/02 *Bellio v Prefettura di Treviso* of 1 April 2004, paragraph 40.

interpreted by reference to its purpose”.¹⁵ The Court of Justice sometimes also refers to the “spirit” of the Treaty: in the *Continental Can* case it held that in order to answer the question whether Article 82 (now 86) of the Treaty applies to changes in the structure of an undertaking, “one has to go back to the spirit, general scheme and wording of Article [82], as well as to the system and objectives of the Treaty”.¹⁶ It follows from these citations that the Court of Justice attaches importance to a wide range of factors, including, inter alia, wording, structure, scheme, context, history, purpose and objectives. In the literature on the methods of interpretation of the Court of Justice, these and other elements have been categorised in various manners and under different headings.¹⁷

This diversity in categorisation indicates the subjective character of any such exercise. The lowest common denominator seems to be a division into three principal methods of interpretation: the (i) textual, (ii) systematic and (iii) teleological¹⁸ methods. It is proposed for the purposes of this paper to follow these three principal methods, each of which may serve as an umbrella for various sub-techniques and principles.¹⁹ It should be noted that some of these techniques can be used in the course of more than one of the principal methods. For example, references to the preliminary considerations, or “whereas” clauses, of a legal instrument, can be used both in a systematic approach (reading a provision in the light of other provisions of the instrument) and in a teleological approach (as the preliminary considerations often shed light on the purpose and objective of the instrument). This is however not the place for academic hair-splitting about the finesses of categorisation. Therefore, the following observations regarding the various methods and techniques of interpretation are limited to what seems necessary to bring some order into the subsequent discussion of the interpretative endeavours within the ESCB.

We start with the *textual* method of interpretation and the various techniques it has at its disposal. Although it certainly does not end there, interpretation starts by simply reading the text. This basic idea is famously laid down in the maxim, attributed to Vattel, that “in claris non fit interpretatio”.²⁰ Vattel notwithstanding, a purely literal interpretation is not sufficient, although the textual method might be considered as *primus inter pares* in relation to the other

15 Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraph 148.

16 Case C-6/77 *Continental Can v Commission* [1973] ECR 215.

17 See, inter alia, H. G. Schermers and D. F. Waelbroeck, *Judicial Protection in the European Communities*, 6th ed. (The Hague: Kluwer Law International, 2001), pp. 10-27; A. Bredimas, *Methods of Interpretation and Community law* (Amsterdam: North-Holland Publishing Company, 1978); M. M. Hintersteiner, “Zur Interpretation des Gemeinschaftsrechts”, *Zeitschrift für öffentliches Recht*, 53 (1998), pp. 239-61; C. Gulman, “Methods of Interpretation of the European Court of Justice”, *Scandinavian Studies in Law*, 24 (1980), pp. 187-204; J. Mertens de Wilmars, “Réflexions sur les Méthodes d’Interpretation de la Cour de Justice des Communautés Européennes”, *Cahiers de Droit Européen* (1986), pp. 5-20; J. A. Usher, “The Interpretation of Community Law by the European Court of Justice”, *Law Teacher*, 11 (1977), pp. 162-77.

18 From the ancient Greek word *télos*, meaning the end, the purpose.

19 Usher, op. cit., p. 162, refers to his former student textbook containing a grand total of “61 rules, presumptions, maxims or aids to be used in statutory interpretation”, adding that “since that particular student textbook is one of the more slender of its ilk, no doubts there are others which contain many more”. Usher in his article did not endeavor to go through all these 61 rules. Neither will I.

20 E. de Vattel, *Le Droit des Gens*, 1758, Book II, Chapter XVII, paragraph 263: “La première maxime générale est qu’il n’est pas permis d’interpréter ce qui n’a pas besoin d’interprétation; cited by Bredimas, op. cit., p. 26.

methods.²¹ The textual method of interpretation therefore comprises as a starting point the strict literal and grammatical techniques of interpretation.²² In the Community context, these include references to the various language versions of the provision being interpreted, and elements such as the principle that Community law is normally to be given its autonomous interpretation, without reference to national legal orders, unless such express reference is provided for in the Community provisions being interpreted. As a purely linguistic approach does not always guarantee a single outcome, logic needs to be adhered to in order to eliminate possible inconsistencies. Under the heading of logical interpretation (which still falls within the realm of the textual method of interpretation), many maxims have been coined over the centuries, such as *lex specialis derogat generali*, *lex posterior derogat priori*, *expressio unius est exclusio alterius*, *expressum facit cessare tacitum*, *a contrario*, *a fortiori*, *ab absurdo*, to name but a few. Although recourse to logic can hardly be deemed inappropriate under any circumstances, logical interpretation has been criticised when reduced to a list of maxims which are not always as useful in practice as they are well-known in theory.²³ The principle that exceptions to general rules are to be interpreted restrictively is also part of such logical interpretation.²⁴ The ECB sometimes uses these maxims to arrive at its interpretative conclusions.²⁵

Under the systematic method of interpretation, emphasis is shifted from the meaning of the words in isolation to what they mean in the context of the paragraphs, articles and the legal instrument as a whole. Systematic interpretation comprises techniques such as references to the place of the provision within the structure of the legal instrument and to its preliminary considerations. In addition, the phenomenon termed “legalising interpretation”²⁶ has been brought under the denominator of systematic interpretation, i.e. the view of the Court of Justice that where the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty, rather than the interpretation which leads to it being incompatible with the Treaty. As has been seen, the references to the preliminary considerations of a legal instrument may also be used when engaged in a teleological analysis. This is particularly true for techniques such as the study of the legislative history and the *travaux préparatoires* of the provision being interpreted, and to declarations and

21 Mertens de Wilmars, op. cit., p. 10. This view is echoed by Schermers and Waelbroeck, op. cit., pp. 11 and 12, who observe that “the Court rightly still attributes most importance to the text of the law itself. In most cases, the Court will first study the text of the provisions involved in all official languages. It is only when it finds that the text remains ambiguous that the Court may rule that the question may be examined in the light of the purpose which the provision was intended to serve”.

22 See Bredimas, op. cit., p. 34, who also includes references to the context of a provision in the textual method of interpretation. I prefer to categorise such contextual references under the heading of systematic interpretation.

23 See for this criticism (and more maxims), Bredimas, op. cit., p. 17.

24 See, among numerous examples, Case C-103/01 *Commission v Federal Republic of Germany* [2003] ECR I-5369, paragraph 32: “Since that provision constitutes an exception to the principle of free movement of goods [...] it must be interpreted strictly”.

25 For an example of the restrictive interpretation of exceptions to general rules, see Opinion of the ECB of 4 November 2004 at the request of the Belgian Ministry of Finance on a draft law introducing a tax on exchange operations involving foreign exchange, banknotes and currency (CON/2004/34), paragraph 15. This ECB Opinion, as are all those cited below, has been published on the ECB website at www.ecb.int.

26 Schermers and Waelbroeck, op. cit., pp. 19 and 20.

reservations made by (one or more of) the authors of the act at the time of its adoption. For the purposes of this paper, these last techniques will be discussed in the third of the three methods, the teleological method, as it is in this realm that they have surfaced most often in ECB Opinions.

This brings us to the third principal method of interpretation: the teleological method. The teleological or functional method of interpretation puts the emphasis on the function, utility (*effet utile*), aim and purpose that the legal instrument has to fulfil: “l’interprétation téléologique [...] explique un texte à la fois par les objectifs spécifiques qu’il poursuit et à la lumière de la contribution qu’il apporte à la réalisation des objectifs généraux des traités”.²⁷ Teleological interpretation is usually used for three purposes: to promote the objective for which the provision was made; to prevent unacceptable consequences to which a literal interpretation might lead; and to fill lacunae which would otherwise exist in the legal order.²⁸ Although the Court of Justice will generally try to combine all methods of interpretation²⁹, it would seem that a certain preference is given to interpretation by reference to the purpose of the law.³⁰ This teleological or purposive approach has been identified in the literature as “peculiarly appropriate in Community law where [...] [t]he Treaties provide mainly a broad programme or design rather than a detailed blueprint”.³¹ In addition, as every contemporary observer knows all too well, the Treaties are difficult to amend. Therefore, their development largely depends on the (often teleological) interpretation accorded to them by the judiciary over the years. To a certain extent it could be argued that in the realm of the objectives and tasks of the ESCB, the ECB plays a similar role by way of, principally, its Opinions.

3 APPLICATION WITHIN THE CONTEXT OF THE ESCB OF METHODS AND TECHNIQUES OF LEGAL INTERPRETATION

3.1 EXAMPLES OF THE APPLICATION OF METHODS OF TEXTUAL INTERPRETATION

3.1.1 LITERAL INTERPRETATION AND DIFFERENT LANGUAGE VERSIONS

In its Opinions the ECB takes as a starting point the ordinary meaning of the words of the provisions it is asked to analyse. Probably because of the self-evident nature of this premise, there are few instances of the ECB explicitly engaging in literal interpretation in its Opinions. One example of a literal approach is the suggestion in the Opinion of the European Monetary Institute (EMI) of 6 April 1998 that the words “or continuing implementation” should be deleted from the

27 Mertens de Wilmars, *op. cit.*, p. 16.

28 Schermers and Waelbroeck, *op. cit.*, p. 21.

29 Note, for example, the quotation from *Continental Can* above, which mixes together textual, systematic and teleological approaches.

30 Schermers and Waelbroeck, *op. cit.*, p. 10.

31 L. N. Brown and T. Kennedy, *The Court of Justice of the European Communities*, 4th ed. (London: Sweet & Maxwell, 2000), p. 317.

proposed Article 1 (2) of the Council Decision of 29 June 1998³² (as was subsequently carried out). The stated reason for this suggestion was that “[t]he meaning of these words is not clear and this uncertainty might give rise to problems for the interpretation and application of the proposal”.³³ A second example of a literal approach can be found in the EMI’s Opinion of 23 February 1998, in which the EMI notes that “the wording of Article 10 of the draft law [on the Autonomy of Banco de España] does not explicitly and unambiguously recognise that the information to be given by the Governor to Parliament and Government is an ex post information”, and stated that this wording should be revised “in order to enhance legal clarity and certainty”.³⁴ As is the case with all European Union (EU) institutions and bodies, the ECB operates in a multilingual environment. As lawyers within the ESCB might take as a starting point of their legal analysis different language versions of the Treaties, the ESCB Statute and the secondary legislation, the comparison of such versions is an inherent feature of the legal discourse within the ESCB. However, no clear examples have been identified in the body of studied ECB Opinions of the ECB that explicitly engage in the comparison of different language versions. Nevertheless, given that this issue is ever-present, and as a possible guide for future instances, some of the main findings of the Court of Justice regarding different language versions are mentioned here. The starting point is that the Treaties are authentic in all official languages.³⁵ It is consistent case-law of the Court of Justice that the “interpretation of a provision of Community law involves a comparison of the language versions”.³⁶ This means *all* language versions, without discrimination according to the size of the population speaking a particular tongue: “to discount two language versions, as the applicants in the main proceedings suggest, would run counter to the Court’s settled case-law to the effect that the need for a uniform interpretation of Community regulations makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages. [...] Lastly, all the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question.”³⁷ What happens if, despite the identical weight to be given to them, there is nevertheless a discrepancy between language versions? According to settled case-law, “the need for a uniform interpretation of Community law requires in the case of divergence between different language versions of a provision, that it be interpreted by reference to the purpose and

32 Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities on draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

33 Opinion of the EMI at the request of the Council of the EU on a proposal from the Commission for a Council Decision on the consultation of the ECB by national authorities on draft legislative provisions (CON/98/14), OJ C 190, 18.6.98, p. 6, paragraph 4.

34 Opinion of the EMI of 23 February 1998 at the request of the Banco de España on a draft Law amending Law 13/1994 of the 1st of June on the Autonomy of Banco de España (CON/98/05), paragraph 5.

35 See for example Article 53 of the EU Treaty, Article 314 of the EC Treaty and Article 29 of the Rules of Procedure of the Court of Justice.

36 Case C-36/98 *Kingdom of Spain v Council* [2001] ECR I-779, paragraph 47; Case C-72/95 *Kraaijeveld and Others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 28, which refers to Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28.

37 Case C-296/95 *The Queen v Commissioners of Customs and Excise* [1998] ECR I-1605, paragraph 36, which refers to Case C-9/79 *Koschniske* [1979] ECR 2717, paragraph 6.

general scheme of the rules of which it forms part”.³⁸ This is an illustrative example of how the Court of Justice combines various methods of interpretation in order to safeguard the “uniform interpretation of Community law”.

3.1.2 THE UNIFORM INTERPRETATION AND APPLICATION OF COMMUNITY LAW

Part of the textual method of interpretation in Community law is the issue of the “autonomous meaning” of Community law terms. The Court of Justice has held consistently that words in Community law provisions have Community law meanings. In the words of the Court of Justice: “The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community”.³⁹ Even without such a reference, however, national law is not off-limits when interpreting Community law: “in the absence of an express reference, the application of Community law may sometimes necessitate reference to the laws of the Member States where the Community court cannot identify in Community law or in the general principles of Community law criteria enabling it to define the meaning and scope of such a provision by way of independent interpretation.”⁴⁰ One example of the ECB granting weight to, *inter alia*, national laws when interpreting a Community legal instrument can be found in its Opinion of 20 January 2000.⁴¹ In assessing a provision in the draft Luxembourg law implementing Article 9 of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.98, p. 45) (the Settlement Finality Directive), the ECB had to interpret the conflict of law rules in the Directive. In doing so, the ECB noted that these (Community) rules are consistent with “(i) the rule contained in Article 8 of the US Uniform Commercial Code, (ii) the national laws already in place in several Member States, and (iii) the current trend of academic authority on the complex matter of the cross-border trading of securities”.⁴² Whereas such references by the ECB to national law (and indeed US law as well as academic authority) while interpreting Community law are rare, there are many examples of the reverse

38 Case C-227/01 *Commission v Kingdom of Spain* of 16 September 2004, paragraph 45, which refers to Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 28. See also Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien* [2000] I-1157, which refers to Case C-372/88 *Milk Marketing Board of England and Wales v Cricket St Thomas Estate* [1990] ECR I-1345, paragraph 19; Case C-482/98 *Italian Republic v Commission* [2000] ECR I-1086, paragraph 49, which refers to Case C-434/97 *Commission v France* [2000] ECR I-1129, paragraph 22; Case C-420/98 *W. N. v Staatssecretaris van Financiën* [2000] ECR I-2847, paragraph 21, which refers to Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 14; Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28; and Case C-236/97 *Skatteministeriet v Codan* [1998] ECR I-8679, paragraph 28 and Case C-36/98 *Kingdom of Spain v Council* [2001] ECR I-779.

39 Case C-287/98 *Grand Duchy of Luxembourg v Linster and Others* [2000] ECR I-6917, paragraph 43 referring to Case C-327/82 *Ekro v Produktschap voor Vee en Vlees* [1984] ECR 107, paragraph 11. See also Case C-373/00 *Adolf Trully v Bestattung Wien* [2003] ECR I-1931, paragraph 35.

40 Case T-85/91 *Khouri v Commission* [1992] ECR II-2637, paragraph 32 with reference to Case C-327/82 *Ekro v Produktschap voor Vee en Vlees* [1984] ECR 107, paragraph 11. See also Case T-9/92 *Peugeot v Commission* [1993] II-493, paragraph 39.

41 Opinion of the ECB of 20 January 2000 at the request of the Luxembourg Ministry for the Treasury and the Budget on a draft legislative proposal implementing Directive 98/26/EC on settlement finality in payment and securities settlement systems in the law of 5 April 1993, as amended, relating to the financial sector and completing the law of 23 December 1998 creating a commission in charge of the prudential supervision of the financial sector (CON/99/19).

42 CON/99/19, paragraph 24.

situation, i.e. the interpretation of national law in conformity with Community law. The latter may also take the form of specific drafting suggestions, as in its Opinions the ECB comments on draft legislative provisions. This illustrates how the ECB seeks to ensure the uniform application of Community law, and is indeed a logical consequence of the primacy of Community law. The following examples should suffice to illustrate how the ECB typically addresses this issue: “it would be advisable to adjust Article 39(1) of the Act [regarding Banka Slovenije] more closely to the wording of Article 14.2 of the [ESCB] Statute since differences in interpretation cannot be excluded”⁴³; “it would be beneficial to reproduce more literally the text of Article 2(i), first indent of the [First Banking Co-ordination Directive (77/780/EEC)] Directive, since Article 3(1) of the Draft Law could be interpreted in the sense that private persons would not fall under its scope”.⁴⁴ Instead of volunteering specific drafting suggestions, the ECB might also subtly attempt to draw the attention of the guardian of the Treaties, the Commission, to proposed national law provisions which in the ECB’s opinion might not comply with Community law. One such example concerns the Finnish so-called Rounding Act, which provides for the rounding downwards or upwards of cash payments to the nearest multiple of five euro cents. The principal aim of the Rounding Act is to restrict the use of one and two euro cent coins, the reason being that the production costs of one and two cent coins greatly exceed their face value. In its Opinion of 30 April 2002 the ECB had to evaluate a draft proposal to extend the rounding rules for euro cash payments to cover payments effected by bank or other payment cards as well.⁴⁵ The ECB found that such an extension runs the risk of breaching Community law, in particular Article 2 of Council Regulation (EC) 974/98 of 3 May 1998 on the introduction of the euro. The ECB then alerted the Commission to the Finnish legislative proposal: “[t]he ECB considers it important for the competent Community institutions to assess the compatibility of the proposed rule with Community law”.⁴⁶ The same concern with the uniform application of Community law plays a role in another specific instance of the delicate interplay between Community law and national law, i.e. the question whether Member States may reproduce in national legal instruments parts of Community legislation that have all the features of direct applicability and direct effect. Three arguments can be advanced against such practice. First, “copy-pasting” in national law of directly effective Community law provisions is unnecessary precisely because of their direct effect: the Community acts are part of the legal order of each Member State without any further national step. Second, when the reproduction is not identical to the wording of the Community acts, it may jeopardise the simultaneous and uniform application of those acts in the whole of the Community.⁴⁷ Third, it may cast doubt on the hierarchy of legal sources, as the reader may be confused whether the provision originates in Community or national law. As regards this third objection, the Court of

43 ECB Convergence Report 2004, p. 233.

44 Opinion of the ECB of 30 March 2000 at the request of the Portuguese Ministry of Finance on a draft decree-law that aims to implement, in the Portuguese legal system, Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems (CON/00/04), paragraph 5.

45 Opinion of the ECB of 30 April 2002 at the request of the Finnish Ministry of Finance on a draft proposal concerning the rounding of payments denominated in euro (CON/2002/15).

46 CON/2002/15, paragraph 7.

47 Case C-39/72 *Commission v Italian Republic* [1973] ECR 101.

Justice has held that “Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law [...] which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it”.⁴⁸ However, under certain circumstances the technique of incorporating Community provisions in a national act may be acceptable. This may be the case, first, when a national law incorporates some elements of Community regulations for the sake of coherence and in order to make the national law comprehensible to the persons to whom it applies⁴⁹, but only if the Community nature of the legal rule is clearly shown or disclosed.⁵⁰ A second instance in which the incorporation of Community provisions into a national act may be allowed is when the Community provision leaves room for interpretation and demands a national supplementary act that grants a certain discretion to the national legislator. In such instances, the Community provision lacks the clarity, precision and unconditionality required for it to be directly effective.

In various of its Opinions, the ECB has had occasion to apply this case-law. A first such example is the ECB Opinion of 21 July 1998 on the Spanish draft law on the introduction of the euro (the so-called Umbrella law).⁵¹ The aim of the Umbrella law was to supplement the EU Council Regulations 1103/97 of 17 June 1997 and 974/98 of 3 May 1998⁵², concerning the introduction of the euro. The overall intention was on the one hand to be pedagogic as far as the public was concerned, while on the other hand to facilitate the smooth introduction of the euro. While welcoming these intentions and the Umbrella law in general, the ECB took issue with the specific application of the legislative technique of incorporating parts of the said Council Regulations. The ECB pointed to instances in the draft Umbrella law which contained incomplete reproductions of Community provisions and variations on and additions to the Community wording, all of which it recommended should be remedied invoking the above mentioned case-law. The ECB even went as far as to deem it immaterial whether or not the draft national law provisions constituted improvements vis-à-vis the Community wording: “[w]hilst it may be said that the draft article improves the Community text, the above considerations would warrant identical wording or deletion”.⁵³ Another clear application of this “leave to the Community what is the Community’s” doctrine can be found in the ECB Opinion of 26 January 2001.⁵⁴ Here the ECB drew attention to a provision in the Portuguese draft decree-law under scrutiny which required in so many words that only a specific

48 Case C-34/73 *Fratelli Variola v Amministrazione Italiana delle Finanze* [1973] ECR 981, paragraph 10.

49 Case C-272/83 *Commission v Italian Republic* [1985] ECR 1057, paragraphs 26 and 27.

50 Case C-34/73 *Fratelli Variola v Amministrazione Italiana delle Finanze* [1973] ECR 981, paragraph 10.

51 Opinion of the ECB at the request of the Spanish Ministry of Economy and Finance on a draft law on the introduction of the euro (“Umbrella law”) (CON/98/31).

52 Council Regulation (EC) 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ L 162, 19.6.1997, p. 1 and Council Regulation (EC) 974/98 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1).

53 CON/98/31, paragraph 4.

54 Opinion of the ECB of 26 January 2001 at the request of Portuguese Minister of Finance concerning two draft decree-laws concerning (i) the dual circulation of banknotes and coins denominated in euro and in escudos; and (ii) amendments to the Organic Law of the Banco de Portugal (CON/2001/01).

conversion rate (1 euro = 200.482 escudos) be applied for the exchange and withdrawal of banknotes and coins and for the redenomination of bank accounts. The ECB expressed doubt about the appropriateness of this provision in the light of its content already directly following from the relevant Council Regulations.⁵⁵ The ECB first recalled that “consistent case-law of the Court of Justice has established that Member States should not pass any measures having the effect of transposing a Community regulation into national legislation”. The ECB continued by stating that “Community regulations are an integral part of the national legal order and Member States are under the obligation not to introduce measures that might affect the uniform interpretation and application of Community law”. The ECB then warned that such uniform interpretation and application of Community law might indeed be affected by converting the provisions of a Community regulation into national legislation. However, the ECB stopped short of advising that these references be struck out entirely, acknowledging that “these provisions may be intended for reasons of clarity and to reinforce the principle that the exchange and withdrawal of banknotes and coins and the redenomination of bank accounts should be made without charge and without mark-up or commission”. Therefore, the ECB argued for a cross-reference to be incorporated into the Portuguese decree-law to the applicable Community law provisions. The ECB seems to lean even further in the direction of the national legislator in its assessment of another provision in the draft decree-law, which unnecessarily mirrored Article 5 of Council Regulation (EC) 1103/97. The ECB admitted that such mirroring “would contribute to clarity and legal certainty for the cash changeover in Portugal”. Here the ECB did not plead that the draft decree-law should limit itself to a cross-reference to the applicable Community law provision, apparently considering a “mirroring provision” justified under the circumstances. The EMI also had to deal with national law provisions which, given the Community law background, were unnecessary at best. A clear example is a provision in the Austrian draft law amending the Central Bank Act, stating that banknotes denominated in Austrian schillings would cease to be legal tender on a date set specifically by Austrian federal law.⁵⁶ The EMI noted that this provision “has to be interpreted in the light of the fact that the latest date on which banknotes will cease to be legal tender will be defined by directly applicable Community legislation.”⁵⁷ In the light of the relevant case-law of the Court of Justice, the EMI might have added that the provision should therefore be deleted. The considerations in the cited ECB Opinions seem to indicate that on a case-by-case basis, the ECB seeks to strike a fine balance between safeguarding the Community law origin of provisions on the one hand, and acknowledging that national law provisions may play a useful explanatory role on the other. However, following in the footsteps of the Court of Justice, the ECB makes it clear that national law wording can never stand in the way of the fundamental importance of the uniform application of Community law.

55 More specifically, Articles 14 and 16 of Council Regulation (EC) 974/98 and Article 1 of Council Regulation (EC) 2866/98 of 31 December 1998 on the conversion rates between the euro and the currencies of the Member States adopting the euro (OJ L 359, 31.12.1998, p. 1).

56 Opinion of the EMI at the request of the Austrian Ministry of Finance on a draft law amending the Central Bank Act and other related laws (CON/97/30).

57 CON/97/30, paragraph 12.

3.2 EXAMPLES OF THE APPLICATION OF SYSTEMATIC METHODS OF INTERPRETATION

3.2.1 PLACE OF A PROVISION

The place of a provision in a particular chapter of the Treaty or under a particular heading of an instrument of secondary law is relevant for its interpretation. Provisions may be interpreted by examination of the system of the Treaty and by comparison with other passages of the legal instrument. A telling example of the application of such systematic thinking is laid down in the letter of 19 September 2003 from the President of the ECB to the President of the Council at the occasion of the issuance of the ECB Opinion on the draft Treaty establishing a Constitution for Europe (the Constitution).⁵⁸ In this letter the ECB proposed the “swapping of the headings of Title IV of Part I (currently ‘The Union’s Institutions’) and Chapter I of Title IV (currently ‘The Institutional Framework of the Union’), so as to clearly indicate that the ECB, as an ‘other institution’ of the Union, is part of the institutional framework of the Union even though it is not in the list of the ‘Union’s Institutions’ in Article I-18 [now I-19]”.⁵⁹ Although this suggestion was not followed exactly⁶⁰, it shows the importance attached to the systematic approach. What is in a name?, one might at first be tempted to ask, but the Court of Justice has also attached importance to the wording of titles and headings: “It is settled case-law that where there is a discrepancy between the wording of a provision and the title thereof, both must be construed in such a manner that all the terms employed serve a useful purpose”.⁶¹ The ECB Opinion on the Constitution also offers an example of the use of systematic interpretation when the ECB observes that the term ‘monetary policy’ in Article I-12 (now I-13) is to be read in a broad sense, namely “as reflecting the title of Section 2 of Chapter II of Title III of Part III of the draft Constitution and therefore considers that it encompasses all exclusive competences related to the euro as described in the relevant provisions of the draft Constitution, in particular Articles III-77 and III-78 (now III-185 and III-187)”.⁶²

3.2.2 PRELIMINARY CONSIDERATIONS AND EXPLANATORY MEMORANDA

The systematic method of interpretation includes the examination of the preliminary considerations (“whereas” clauses, statements of reasons) of legal instruments as well as, if available, explanatory memoranda. The Court of Justice has recognised “the general principle that the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to

58 Opinion of the ECB at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe (CON/2003/20), OJ C 229, 25.9.2003, pp. 7-11.

59 Letter dated 19 September 2003 from Willem Duisenberg to Franco Frattini, and the letter dated 16 April 2004 from Jean-Claude Trichet to Brian Cowen, President of the Council of the European Union, which contains the same suggestion, albeit in somewhat different wording.

60 In the officially published version of the Treaty establishing a Constitution for Europe (OJ C 310, 16.12.2004, p. 1), Title IV of Part I now reads “*The Union’s Institutions and Bodies*” and Chapter I of Title IV now reads “*The Institutional Framework*”. Chapter II of Title IV reads “*The other Union Institutions and Advisory Bodies*”, while the heading of Article I-30 (the first Article of this Chapter II) reads “*The European Central Bank*”.

61 Case T-143/99 *Hortiplant v Commission* [2001] ECR II-1665, paragraph 40.

62 CON/2003/20, paragraph 9. The ECB wanted to make clear that in the context of Article I-12 the term ‘monetary policy’ is not to be read in a narrow and technical sense as referring only to the basic task of the ESCB to which Article III-77 (2) (a) (now Article III-185) of the draft Constitution refers (i.e. “to define and implement the Union’s monetary policy”).

be interpreted, account must be taken of the reasons which led to its adoption”.⁶³ Examples can also be found in the so-called European Anti-Fraud Office (OLAF) judgement of the Court of Justice: “the contested decision must be read in the light of its recitals”.⁶⁴ In similar fashion, Article 253 of the Treaty provides, *inter alia*, that “[r]egulations, directives and decisions [...] shall state the reasons on which they are based”. In its Opinions the ECB very frequently refers to the explanatory memoranda attached to the draft legislative provisions under examination, for example using the contents of an explanatory memorandum to help it interpret the draft legislation in question. The ECB might also suggest that in order to achieve legal certainty, discrepancies should be remedied between the explanatory memorandum and the provisions it is supposed to explain or with the Treaty. A few examples may illustrate these uses: “[t]he ECB deduces from the wording of the Explanatory Memorandum that these securitisation entities will not be considered to be credit institutions for supervisory purposes”⁶⁵; “in order to properly reflect the wording and meaning of Article 106 of the Treaty, the ECB recommends to redraft the explanatory memorandum”⁶⁶; “it might be useful to confirm this interpretation in the explanatory note”⁶⁷; “it would [...] be useful to clarify [in the draft royal decree], in line with what is set out in the explanatory memorandum, that the data coverage relates to transactions and positions which should both be reported”.⁶⁸ (Further examples are provided below in sub-section 4.3 “Anticipative interpretation”).

3.2.3 “LEGALISING INTERPRETATION”

It is consistent case-law of the Court of Justice that “where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law [...] and, more specifically, with the principle of legal certainty”.⁶⁹ This principle also applies within the hierarchy of secondary legislation: “An implementing regulation must also be given, if possible, an interpretation consistent with the provisions of the basic regulation”.⁷⁰ Interpreting in such a manner so as to uphold the inner

63 Case C-298/00 *Italian Republic v Commission* of 29 April 2004, paragraph 97, which refers *inter alia* to Case C-355/95 *TWD v Commission* [1997] ECR I-2549, paragraph 21. See also Case T-93/02 *Confédération nationale du Crédit mutuel v Commission* of 18 January 2005, paragraph 74 and the case-law mentioned there.

64 Case C-11/00 *Commission v ECB* [2003] ECR I-7147, paragraph 172. See, on this landmark case for the ECB, F. Elderson and H. Weenink, “The European Central Bank Redefined? A Landmark Judgement of the European Court of Justice”, *Euredia*, 2003/2, pp. 269-301.

65 Opinion of the ECB of 4 February 2004 at the request of the Ministry of Finance of the Grand Duchy of Luxembourg on a draft law on securitisation (CON/2004/3), paragraph 12.

66 Opinion of the ECB of 3 September 1999 at the request of the German Federal Ministry of Finance on a bill amending currency-related provisions with respect to the introduction of the euro (*Drittes Euro-Einführungsgesetz*) (CON/99/10), paragraph 6.

67 Opinion of the ECB of 7 August 1998 at the request of the Portuguese Ministry of Finance on a draft decree-law containing measures adapting several Portuguese laws to the introduction of the euro (CON/98/36), paragraph 5.

68 Opinion of the ECB of 14 January 2002 at the request of the Governor of the Nationale Bank van België/Banque Nationale de Belgique on a draft royal decree and draft accompanying regulations on the compilation of balance of payments and the international investment position of Belgium (CON/2002/3), paragraph 8 (iv).

69 Case C-1/02 *Privat-Molkerei Borgmann v Hauptzollamt Dortmund* of 1 April 2004, paragraph 30, which refers to Case C-98/91 *Herbrink* [1994] ECR I-223, paragraph 9; see also Case C-135/93 *Kingdom of Spain v Commission* [1995] ECR I-1651, paragraph 37, which refers to Case 218/82 *Commission v Council* [1983] ECR 4063, paragraph 15. See also Case C-403/99 *Italian Republic v Commission* [2001] ECR I-6883, paragraphs 28, 32 and 37, referring to Case C-434/97 *Commission v France* [2000] ECR I-1129, paragraph 21; Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien* [2000] I-1157, paragraph 41.

70 Case C-90/92 *Tretter v Hauptzollamt Stuttgart-Ost* [1993] ECR I-3569, paragraph 11, which refers to Case C-38/70 *Tradax* [1971] ECR 145, paragraph 10.

coherence of the body of Community legal norms has been termed “legalising interpretation”.⁷¹ An example in the context of the ECB of the application of this legalising interpretation can be found in the judgment of the Court of Justice in the already mentioned OLAF judgement.⁷² The ECB had submitted that Regulation No 1073/1999 concerning investigations conducted by OLAF⁷³ must be interpreted so as to exclude the ECB from its scope. It argued that “the expression ‘bodies, offices and agencies established by, or on the basis of, the Treaties’ in Article 1(3) of the regulation lacks precision so that [...] it may be construed as not applying to ‘bodies’ whose financial interests are distinct from those of the European Community and are not linked to the latter’s budget”. According to the ECB’s submission, “such an interpretation is the only one which preserves the legality of the regulation, for which reason it should, in accordance with the Court’s case-law, be preferred”. Although this argument was rejected by the Court (which, on the basis of an analysis of the preamble, the provisions and the “clear terms” of the Regulation, concluded that there is no doubt that the Community legislature intended the Regulation to apply to the ECB, thus grouping together in typical fashion all three principal methods of interpretation), it is an illustrative example of legalising interpretation at work.

3.3 EXAMPLES OF THE APPLICATION OF TELEOLOGICAL METHODS AND TECHNIQUES OF INTERPRETATION

3.3.1 PURPOSE AND SPIRIT

As already noted in Section 2, the teleological or functional method of interpretation puts the emphasis on the function, utility (*effet utile*), aim and purpose that the legal instrument has to fulfil. There are a number of examples of the ECB employing such teleological reasoning: “taking into account the spirit of these provisions”⁷⁴; “the spirit of the Treaty”⁷⁵; “[t]he ECB understands that this interpretation does not represent the intention of the drafters”⁷⁶; “the true underlying intention”⁷⁷; “the reasoning behind this provision”⁷⁸; “the overall aim [of Articles 101 of the Treaty and 21.2 of the Statute]”.⁷⁹ Another example of the use of teleological interpretation in the context of the ESCB can be found in the Opinion of the Advocate General in the OLAF case.⁸⁰ The ECB had

71 Schermers and Waelbroeck, op. cit., pp. 19 and 20.

72 Case C-11/00 *Commission v ECB* [2003] ECR I-7147, see specifically paragraphs 60-67. See Elderson and Weenink, op. cit., pp. 269-301.

73 Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 1).

74 Opinion of the ECB of 2 December 2003 at the request of the Austrian Federal Ministry of Finance on a draft Federal law on the National Foundation for Research, Technology and Development (CON/2003/27), paragraph 9 (ii).

75 Opinion of the EMI of 13 May 1996 regarding a consultation by the Finnish Ministry of Finance on draft legislation establishing the statute of the Bank of Finland (CON/96/05), paragraph 4 (b).

76 Opinion of the ECB of 19 November 2003 at the request of the Irish Department of Finance on a draft Central Bank and Financial Services Authority of Ireland Bill (No 2) 2003 (CON/2003/24), paragraph 5.

77 CON/2003/24, paragraph 5. This wording is particularly intriguing, as it raises the question of a potential difference between a mere underlying intention and some apparently deeper, “truer” underlying potential.

78 Opinion of the EMI of 13 February 1998 at the request of the Austrian Federal Ministry of Finance on a draft law introducing a federal law which stipulates measures in fiscal law accompanying the introduction of the euro and amending the 1998 “*Einkommenssteuergesetz*” as well as the “*Zollrechtsdurchführungsgesetz*”; Euro Fiscal Accompaniment Act (CON/98/02), paragraph 5.

79 Opinion of the ECB of 2 December 2003 at the request of the Austrian Federal Ministry of Finance on a draft Federal law on the National Foundation for Research, Technology and Development (CON/2003/27), paragraph 9(i).

80 Case C-11/00 *Commission v ECB* [2003] ECR I-7147

brought Article 105 (4) of the Treaty into play by arguing that because the Council had failed to consult the ECB on the proposed Regulation⁸¹, the latter had been adopted in breach of Article 105 (4) of the Treaty and should therefore be declared inapplicable on the basis of Article 241 of the Treaty. When examining the scope of the “fields of competences” clause in Article 105 (4) of the Treaty, the Advocate General, after resorting to practically all other methods of interpretation available (systematic, historic and grammatical (in that order))⁸², had recourse to a teleological interpretation, stating that the purpose of the consultation under Article 105 (4) of the Treaty is “to ensure that the legislature is well informed when it adopts measures relating to subjects of which the ECB has particular knowledge or expertise, in particular, monetary policy”. The purpose of Article 105 (4) of the Treaty is “to enhance the quality of the Community legislation to the advantage of the European polity as a whole”.⁸³ The Court of Justice followed this teleological approach, although it held that with regard to the specific subject at hand (i.e. the prevention of fraud), the ECB did not enjoy such a high degree of expertise as to make it particularly well placed to play a useful role in the legislative process envisaged. Thus, the Court of Justice rejected the ECB’s argument that Regulation No 1073/1999 should be declared inapplicable on the ground that it was adopted in breach of Article 105 (4) of the Treaty.

3.3.2 LEGISLATIVE HISTORY, TRAVAUX PRÉPARATOIRES

As noted in Section 2, while the study of the legislative history of a provision may not be the exclusive domain of the teleological method of interpretation, it is in that context that this technique is used most frequently. One may distinguish *travaux préparatoires stricto sensu*, i.e. various written documents reflecting the attitudes of the negotiators of the Treaties through the successive stages of drafting, and *travaux préparatoires lato sensu*, i.e. opinions of governments submitted to parliaments in the course of ratification debates.⁸⁴ The first category of *travaux* of the Community Treaties are secret and therefore cannot be used by the Court of Justice.⁸⁵ However, the second category of *travaux* are available with regard to the Treaties. In addition, the Court of Justice can make use of the preparatory documents of secondary Community legislation. An example of the latter can be found in the Mecklenburg case: “[t]hat interpretation is borne out by the history of the directive. Article 8(1) of the proposal for a directive submitted by the Commission [...] was as a result of the opinion given by the Economic and Social Committee”.⁸⁶ The Stauder case offers another example: “[t]his interpretation is [...] confirmed by the Commission’s declaration that [the] amendment [...] was proposed by the Management Committee to which the draft of [the] Decision was submitted for its opinion”.⁸⁷ However, even in the context of secondary legislation, the Court of Justice remains cautious with the use of *travaux préparatoires*: “As regards the applicant’s arguments relating to the

81 Regulation (EC) No 1073/1999.

82 See Opinion of the Advocate General, paragraphs 136, 138 and 139 respectively.

83 Ibid., paragraph 140. See also Elderson and Weenink, *op. cit.*, pp. 294-300.

84 See Bredimas, *op. cit.*, p. 57.

85 See Schermers and Waelbroeck, *op. cit.*, p. 16.

86 Case C-321/96 *Mecklenburg v Kreis Pinneberg – Der Landrat* [1998] ECR I-3809, paragraph 28.

87 Case C- 29/69 *Stauder v City of Ulm – Sozialamt* [1969] ECR I-419, paragraph 5.

legislative history of the Regulation, it is necessary, when interpreting a legislative measure, to attach less importance to the position taken by one or other Member State when the measure was drawn up than to its wording and objectives”.⁸⁸ Unilateral declarations by a Member State issued at the time of the adoption of the instrument being interpreted, even if laid down in the minutes of the meeting concerned, hardly ever serve the Court of Justice as interpretative guidance: “it should be borne in mind that declarations recorded in minutes are of limited value, since they cannot be used for the purposes of interpreting a provision of Community law where no reference is made to the content of the declaration in the wording of the provision in question and the declaration therefore has no legal significance”.⁸⁹ It remains to be seen whether the Court of Justice will make a more liberal use of the *travaux préparatoires* of the Treaty establishing a Constitution for Europe, which to a great degree have been made available on the internet.⁹⁰ Regarding the use of *travaux préparatoires* within the context of the ESCB, it should be noted that although the *travaux* regarding the relevant Articles of the Treaty are secret, as are all those regarding the Treaty, to a large extent those regarding the ESCB Statute (which forms part of the Treaty) are not.⁹¹ One explicit example of the ECB referring to *travaux préparatoires* can be found in its Opinion of 3 February 2005. The ECB had to evaluate the compatibility of a draft Italian law with the prohibition of monetary financing laid down in Article 101 of the Treaty, which prohibits, inter alia, overdraft facilities or any other type of credit facility with the national central banks in favour of central governments. In making its analysis, the ECB delved into legislative history: “[a]lready in 1993 the Committee of Governors of the central banks of the Member States of the EEC notes that this prohibition is of ‘essential importance’ to ensure that ‘monetary policy [is not] hindered in the pursuit of its primary objective of price stability. Furthermore, central bank financing of the public sector lessens the pressure for fiscal discipline’”.⁹² Although there are few such explicit examples, the preparatory documents of the Committee of Governors constitute a wealth of legislative history which lawyers within the ESCB frequently turn to when interpreting the ESCB Statute.

3.3.3 FURTHERANCE OF EU AND EUROSISTEM OBJECTIVES

As we have seen, teleological methods of interpretation focus on the purpose, the aim and the function of the provision to be interpreted. From here, it is but

⁸⁸ Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraph 128.

⁸⁹ Case C-329/95 *VAG Sverige* [1997] ECR I 2675, paragraph 23, which refers to Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18; Case 143/83 *Commission v Kingdom of Denmark* [1985] ECR I-427, paragraph 13; Case C-104/01 *Libertel Groep v Benelux-Merkenbureau* [2003] ECR I-3793, paragraph 25; Case C-368/96 *The Queen v The Licensing Authority established by the Medicines Act 1968* [1998] ECR I-7967, paragraph 26. See, however, for an example of the Court of Justice accepting a unilateral declaration as leading for its interpretation: Case C-192/99 *The Queen v Secretary of State for the Home Department* [2001] ECR I-1237, paragraphs 23 and 24.

⁹⁰ See www.european-convention.eu.int.

⁹¹ For a detailed overview of the relevant publicly available documents, including successive drafts of the ESCB Statute drawn up by the so-called Committee of Governors, meeting in the course of 1990 and 1991, see C. C. A. Van den Berg, *The Making of the Statute of the European System of Central Banks. An Application of Checks and Balances*, Vrije Universiteit, doctoral thesis, 2004, pp. 495-97.

⁹² Opinion of the ECB of 3 February 2005 at the request of the Italian Ministry of Economic Affairs and Finance on a draft law amending Law Decree No 7 of 25 January 1999, as converted by Law No 74 of March 1999, concerning urgent provisions on Italian participation in the International Monetary Fund's interventions to confront severe financial crises of its member countries (CON/2005/1), paragraph 6. The ECB cites a letter dated 20 April 1993 of the Committee of Governors to the Commission President, Jacques Delors.

a small step to introducing the furtherance of the objectives of the EU and the ESCB in the interpretative activity undertaken by the ECB when drafting its Opinions or other instruments. In this context, the objectives of the ESCB are to be understood not just as the primary objective to maintain price stability and the secondary objective to support the economic policies in the Community as laid down in Article 105 (1) of the Treaty and Article 2 of the ESCB Statute, but as the policy objectives it pursues within its mandate embodied by these primary and secondary objectives. There are a number of examples of the ECB playing such a proactive role. A first such example shows the ECB promoting the creation of a Single Euro Payments Area in its Opinion of 23 December 2004.⁹³ The ECB started by noting that a certain interpretation of a provision in SNCE [Sistema Nacional de Compensación Electrónica, National Automated Clearing System], which the ECB considers should in principle be possible”. Then the ECB recalled that “a very important Eurosystem objective and European banking industry project is the creation of a Single Euro Payments Area (SEPA). [...] Decisions related to the next generation of national systems should in the future be made from a pan-European perspective to ensure compliance with SEPA instruments and standards and the overall SEPA infrastructure”.⁹⁴ In the same vein of furthering its objectives, sometimes the ECB advances an interpretation which is not strictly necessary for providing an opinion on the draft national provisions at hand (obiter dicta, one might say): “The ECB has no objection with regard to the proposed abolition of the liquidity criterion for certain monetary policy operations, though would observe that the requirement of ‘adequate collateral’ may be interpreted as also containing an element whereby the collateral must be realisable without undue delay. However, to expressly maintain a specific statutory liquidity requirement in addition to the requirement of adequate collateral is not necessary for the operations now under consideration”.⁹⁵ Another example of such reasoning which borders on obiter dicta is the ECB Opinion on two draft Directives amending Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (the UCITS Directive).⁹⁶ First, the ECB stated that instead of expressing its opinion in two different Opinions on these two draft Directives, for the sake of clarity, transparency and legal certainty, a discussion of a complete and integral new version of the UCITS Directive would be preferable. Then the ECB added: “This is all the more the case since the UCITS Directive appears to have been interpreted differently by Member States. Such

93 Opinion of the ECB of 23 December 2004 at the request of the Spanish Ministry for Economic Affairs and Finance on the draft State Budget Law for 2005 amending Law 41/1999 of 12 December 1999 on payment and securities settlement systems and Law 13/1994 of 1 June 1994 on the autonomy of the Banco de España (CON/2004/39).

94 CON/2004/39, paragraphs 10 and 11.

95 Opinion of the ECB of 14 August 2002 at the request of Sveriges Riksbank on a draft legislative proposal to amend the Sveriges Riksbank Act (1988:1385) with regard to the collection of balance of payments statistics and the liquidity for securities used in monetary policy operations (CON/2002/21), paragraph 9.

96 Opinion of the ECB of 16 March 1999 at the request of the Council of the EU on two Commission proposals for European Parliament and Council Directives amending Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (CON/98/54), OJ C 285, 7.10.1999, pp. 9-13. The UCITS Directive had been published in OJ L 375, 31.12.85, p. 3.

different interpretations are undesirable in the context of a single money and financial market and may lead to competitive distortions and misallocation of funds.”⁹⁷ Yet another example: “[t]he ECB welcomes that proposed introduction of a harmonised definition of public offer, which will avoid different interpretations of Community rules and ensure the same level of investor protection throughout the EU”.⁹⁸ While directives are good, regulations are better. At least, this appears to follow from the ECB’s citing in its Opinion of 12 June 2003 of the Committee of Wise Men statement that “[directives] leave more latitude for Member States to implement Community Law but too often lead to uneven transposition and different interpretations”. Then the ECB added: “The ECB notes that indeed regulations offer significant advantages as opposed to directives, as they are directly applicable in the Member States without any need of implementation through national legislation.”⁹⁹ Yet another example of the ECB’s proactive approach is that although the obligation of the authorities of the Member States to consult the ECB on draft legislative provisions within the field of competence of the ECB does not apply to “draft provisions, the exclusive purpose of which is the transposition of Community directives into the law of Member States”¹⁰⁰, nevertheless, when asked, the ECB might gladly accept the invitation and take the opportunity to promote its own objectives. An example can be found in the ECB Opinion of 20 January 2000 at the request of the Luxembourg Ministry for the Treasury and the Budget on the implementation of the Settlement Finality Directive in Luxembourg.¹⁰¹ Although noting that the Luxembourg authorities “were not, strictly speaking, legally obliged to consult the ECB”, the ECB stated that it “very much welcomes the opportunity to give its opinion on the Draft Law”. The ECB justified this stance as follows: “[t]he ECB is seeking to promote pro-actively a harmonised EU-wide implementation of the Directive in the legislation of the Member States, in order to foster maximum transparency and legal certainty for the closely connected payment and securities settlement systems, and to ensure a level playing-field throughout the European Union”.¹⁰² In a nutshell, we see that (i) the ECB is willing to issue an Opinion although, strictly speaking, the national authority was under no obligation to consult; (ii) the ECB does not hesitate to pronounce itself in favour of the rethinking of existing Community directives and of the use of regulations when possible; and (iii) promotes a series of policy objectives, among which “the creation of a Single Euro Payments Area”, “the promotion of a single money and financial market”, “the avoidance of competitive distortions and

97 CON/98/54, paragraph 3.

98 Opinion of the ECB of 16 November 2001 at the request of the Council of the EU on a proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading (CON/2001/36), OJ C 344, 6.12.2001, pp. 4-7, paragraph 6.

99 Opinion of the ECB of 12 June 2003 at the request of the Council of the EU on a proposal for a Directive of the European Parliament and of the Council on investment services and regulated markets, and amending Council Directive 85/611/EEC, Council Directive 93/6/EEC and European Parliament and Council Directive 2000/12/EC (CON/2003/9), OJ C 144, 20.6.2003, pp. 6-12, paragraph 5.

100 Article 1 (2) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the ECB by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

101 Opinion of the ECB of 20 January 2000 at the request of the Luxembourg Ministry for the Treasury and the Budget on a draft legislative proposal implementing Directive 98/26/EC on settlement finality in payment and securities settlement systems in the law of 5 April 1993, as amended, relating to the financial sector and completing the law of 23 December 1998 creating a commission in charge of the prudential supervision of the financial sector (CON/99/19).

102 CON/99/19, paragraph 2.

misallocation of funds”, “ensuring the same level of investor protection throughout the EU”, “the promotion of the harmonised EU-wide implementation of directives in the legislation of the Member States”, “the fostering of maximum transparency and legal certainty for the closely connected payment and securities settlement systems” and “ensuring a level playing-field throughout the European Union”.

4 SOME FURTHER OBSERVATIONS

4.1 CONSISTENCY IN THE DENOMINATION OF METHODS OF INTERPRETATION

Words, as it is hoped should be clear from the above, obviously matter. Given the complications that arise when seeking to establish their meaning, they should be chosen with great care. This is all the more so because the very act of describing how one arrives at certain interpretations of words requires in turn more words. Hence, the need to employ consistent terminology when using methods and techniques of interpretation is paramount. Unfortunately, in its Opinions the ECB does not always use such consistent language. This may be illustrated most clearly by quoting from a number of the examples mentioned in sub-section 3.3.1 of the ECB, which employ a single (the teleological) method of interpretation, while using all sorts of terminology: “the spirit of these provisions”¹⁰³; “the spirit of the Treaty”¹⁰⁴; “the intention of the drafters”¹⁰⁵; “the true underlying intention”¹⁰⁶; “the reasoning behind this provision”¹⁰⁷; “the overall aim [of Articles 101 of the Treaty and 21.2 of the Statute]”.¹⁰⁸ As single words – especially vague ones like “spirit”, “aim” and “intention” – may already have different meanings, different words may have many different meanings. Many vague words could end up being meaningless. Therefore, it is proposed that the ECB should henceforth attempt to use as consistent a wording as possible. Though this be not madness, there might be a little more method in ’t.

4.2 TRANSPARENCY REGARDING THE METHOD OF INTERPRETATION

As we have seen, the ECB uses a wide range of interpretative techniques. Often it specifies which method it uses, although, as noted above, improvements might be made in the consistency of the terminology used. However, sometimes the

103 Opinion of the ECB of 2 December 2003 at the request of the Austrian Federal Ministry of Finance on a draft Federal law on the National Foundation for Research, Technology and Development (CON/2003/27), paragraph 9 (ii).

104 Opinion of the EMI of 13 May 1996 regarding a consultation by the Finnish Ministry of Finance on draft legislation establishing the statute of the Bank of Finland (CON/96/05), paragraph 4 (b).

105 Opinion of the ECB of 19 November 2003 at the request of the Irish Department of Finance on a draft Central Bank and Financial Services Authority of Ireland Bill (No 2) 2003 (CON/2003/24), paragraph 5.

106 CON/2003/24, paragraph 5.

107 Opinion of the EMI of 13 February 1998 at the request of the Austrian Ministry of Finance on a draft law introducing a federal law which stipulates measures in fiscal law accompanying the introduction of the euro and amending the 1998 “*Einkommenssteuergesetz*” as well as the “*Zollrechtsdurchführungsgesetz*”; Euro Fiscal Accompaniment Act (CON/98/02), paragraph 5.

108 Opinion of the ECB of 2 December 2003 at the request of the Austrian Federal Ministry of Finance on a draft Federal law on the National Foundation for Research, Technology and Development (CON/2003/27), paragraph 9 (i).

ECB simply “interprets” and the reader is left guessing which method of interpretation the ECB has used to arrive at the stated conclusion. A number of examples may serve to illustrate this point: “[t]he ECB is [...] of the view that interests in securities held through one or several financial intermediaries can be [...] interpreted as [...]”¹⁰⁹; “[t]he ECB understands that [...] all credit institutions in the EU can be considered as ‘operating in Spain’”¹¹⁰; “[t]he ECB understands that this interpretation does not represent the intention of the drafters”¹¹¹; “[t]he reference in Article 1 of the draft law to Articles 105(1), 105(2) and 105(5) may be interpreted as an exhaustive enumeration”¹¹²; “[t]he ECB interprets Article 9(1) as setting out mandatory obligations of the competent authorities to cooperate and share information, both generally and in specific instances”.¹¹³ By “being of the view that”, “understanding” and “interpreting as”, the ECB makes it clear that it is engaged in an interpretative process, but it leaves the reader in the dark as to the method used. By enhancing the transparency regarding the method of interpretation used, the ECB’s reasoning in its Opinions would be easier to verify and thus be more convincing.

4.3 “ANTICIPATIVE INTERPRETATION”

This sub-section does not deal with a specific method of interpretation, but instead with the many instances in the body of ECB Opinions and other relevant instruments that show that the drafters are acutely aware of the importance of interpretation and the need to avoid misunderstandings when drafting legal instruments.¹¹⁴ Thus, also in this indirect and often implicit way, these Opinions shine light on the use of methods of interpretation within the ESCB. It should be recalled that interpretation is not the exclusive domain of the courts. Indeed, interpretation is an inherent feature of all the links in the entire chain from the very initial stages of drafting a legal provision right up to the establishment of its meaning by the highest court in the land. Precisely because of the length of this chain, and the many actors engaging in interpretative activity along it, it

109 Opinion of the ECB of 9 October 2000 at the request of the Luxembourg Ministry of Finance on (1) a draft law pertaining to the circulation of securities and other financial instruments; and (2) a draft law (a) concerning transfers of title intended to serve as security; (b) amending and completing the law of 21 December 1994 concerning repurchase transactions carried out by credit institutions; (c) amending and completing the amended law of 5 April 1993 concerning the financial sector; (d) amending and completing the law of 21 June 1984 concerning the options and futures markets of the Luxembourg exchange and concerning the forward markets in which a credit institution operates (CON/2000/18), paragraph 4.

110 Opinion of the ECB of 23 December 2004 at the request of the Spanish Ministry for Economic Affairs and Finance on the draft State Budget Law for 2005 amending Law 41/1999 of 12 December 1999 on payment and securities settlement systems, and Law 13/1994 of 1 June 1994 on the autonomy of the Banco de España (CON/2004/39), paragraph 10.

111 Opinion of the ECB of 19 November 2003 at the request of the Irish Department of Finance on a draft Central Bank and Financial Services Authority of Ireland Bill (No 2) 2003 (CON/03/24), paragraph 5.

112 Opinion of the EMI at the request of the French Ministry of Economy, Finance and Industry on a draft law amending Act 93/980 of 4 August 1993 on the Statute of the Banque de France and the activities and supervision of credit institutions (CON/98/12), paragraph 5.

113 Opinion of the ECB of 13 September 2001 at the request of the Council of the EU on a proposal for a Directive of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 98/78/EC and 2001/12/EC of the European Parliament and of the Council (CON/2001/25), OJ C 271, 26.9.2001, pp. 10-14, paragraph 13.

114 An unexpected example of such awareness of the importance of interpretation can be found in Article 20 of the Headquarters Agreement between the ECB and the Government of the Federal Republic of Germany concerning the seat of the ECB: “*Consultations on the interpretation [...] of this Agreement shall take place at the request of either party to the Agreement*” (translation of the German original (which is the only authentic version) dated 18 September 1998, available at www.ecb.int).

falls upon the shoulders of those drafting a legal instrument in the first place to anticipate how it might be interpreted at a later stage, and to draft the legal instrument, its considerations, preamble, structure and explanatory memorandum in such a way as to ensure as far as possible the coherence between its intended meaning and its later actual interpretation. The ECB's Opinions on draft legislative provisions places the ECB at the very beginning of the chain just depicted. Hence a need to anticipate how draft provisions might be interpreted in the future and to evaluate in a proactive manner whether such interpretations are to be welcomed or whether the draft provisions should be reworded to avoid undesired interpretative outcomes. There are many examples of drafting proposals based on such "anticipative interpretation". A number of those anticipate textual methods of interpretation: "[i]t is suggested that [...] the words [a, b, c] are deleted. The meaning of these words is not clear and uncertainty might give rise to problems for the interpretation"¹¹⁵ (anticipation of literal interpretation). A clear example of the anticipation of a *contrario* reasoning, and thus another example of the anticipation of a textual method of interpretation, is the following: after first expressing "its concern that the exclusions listed under Stage I should not be interpreted as being the only adjustments which may be made to the national price indices", the EMI suggests to add "in particular" in order to express the non-exhaustive character of the enumeration.¹¹⁶ Another example of the anticipation of a *contrario* reasoning is the following: "to avoid misinterpretations when comparing Section 14 (1) (containing a reference to Article 106 (1) of the Treaty) and Section 14 (2) (which does not include that reference), the ECB recommends either that both sub-sections of Section 14 of the Bundesbank Act be merged or that an explicit reference to Article 106 (1) of the Treaty be made in Section 14 (2) so as to mirror the wording of Section 14 (1)".¹¹⁷ Examples of drafting proposals based on the anticipation of systematic methods of interpretation may also be found: "in order to properly reflect the wording and meaning of Article 106 of the Treaty, the ECB recommends to redraft the explanatory memorandum on Article 3 [of the Drittes Euro-Einführungsgesetz] [...] accordingly"¹¹⁸ (anticipation of interpretation by reference to the explanatory memorandum); "some uncertainty could possibly arise [...] from the combined reading of the relevant articles of the draft proposal and the comments on these articles. [...] The ECB would appreciate a clarification of this issue"¹¹⁹ (another example of anticipation of interpretation by reference to the explanatory memorandum); "the EMI expresses its concern about the fact that [...] the reader might conclude that the Community, contrary to the Treaty provisions, does not envisage the start of Stage Three of EMU until

115 Opinion of the EMI at the request of the Council of the EU on a proposal from the Commission for a Council Decision on the consultation of the European Central Bank by national authorities on draft legislative provisions (CON/98/14), OJ C 190, 18.6.98, p. 6, paragraph 4. The proposal the EMI provides an opinion on is the very Council Decision which regulates the consultative procedure on the basis of Article 105 (4) of the Treaty, i.e. Council Decision 98/415/EC.

116 Opinion of the EMI on a consultation from the Council of the EU on a draft proposal for a Council Regulation concerning Harmonised Consumer Price Indices (CON/95/1), paragraph 5 (E).

117 Opinion of the ECB of 3 September 1999 at the request of the German Federal Ministry of Finance on a bill amending currency-related provisions with respect to the introduction of the euro (*Drittes Euro-Einführungsgesetz*) (CON/99/10), paragraph 6.

118 CON/99/10, paragraph 6.

119 Opinion of the ECB of 24 April 2002 at the request of the Belgium Ministry of Finance on a draft proposal for a law on prudential supervision of the financial sector and financial services (CON/2002/13), paragraph 10.

after January 1998. To avoid this interpretation, it is suggested that: (a) The following paragraph is included in the Preamble¹²⁰ (anticipation of systematic interpretation). No examples of drafting proposals by the ECB based on the anticipation of teleological methods of interpretation have been identified, although these may very well be imagined in theory.

5 CONCLUDING REMARKS

This overview shows that in its Opinions and other cited instruments, the ECB (and before it, its predecessor, the EMI) has used a wide range of methods and techniques in order to interpret the legislative provisions before it. It has done so within the overall Community law framework of interpretative methods and techniques, many of which stem from centuries and even millennia-old legal traditions. A few recommendations are made, including the suggestion to be transparent about the methods and techniques of interpretation used and the suggestion to use as consistent a terminology as possible. This paper clearly demonstrates that the ECB, by means of “anticipative interpretation”, tries to prevent future interpretative problems already in the drafting stages of legal instruments, which shows a commendable awareness of interpretative issues. The paper also shows how the ECB attempts to further its legal and policy objectives through its interpretations, a practice which can be compared with the traditional *pro comunitate* stance of the Court of Justice and can be welcomed. Through all this, albeit in an indirect way, the lawyers within the ESCB and among them the LEGCO members may be seen at work, as they have contributed over the years to this growing body of “jurisprudence”. As the Union grows, and with it the number of jurisdictions and languages, the meaning of words, whether examined on their own, in the context of the relevant legal instrument or seen in the light of the purpose thereof, will continue to be the subject of legal debate and interpretation. It is unlikely that on the subject of words, anyone will ever have the final word.

120 CON/95/1, paragraph 5 (D).