

ON MODALITY IN EU INSTITUTIONAL-LEGAL DOCUMENTS

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Abstract: This study explores the pragmatics of prescriptive and performative modality used to convey different degrees of obligation in EU legislation. Modal verbs emerge as a prime component in the EU institutional-legal language disclosing a semantic flexibility to fulfil various communicative tasks in the interaction between the EU institutions and their addressees. The identification of recurrent pragmatic patterns in the use of modal verbs makes it possible for the author to treat EU legislation as performative and prescriptive text genres. Employing the methods of corpus analysis and contrastive textual analysis, the study homes in on *shall* as the most prominent modal in legislative texts generally and in the reference corpus specifically. The perils of translating *shall* along with translation solutions for other identified modal verbs are also discussed.

Key words: modal verbs, prescriptive modality, performative modality, “shall”, EU institutional-legal texts, corpus analysis.

Introduction

Modality as such, beyond a shadow of a doubt, plays a crucial role in the language used in the EU setting since it reveals not only various pragmatic purposes of a given legislative text, but it mediates at the same time a communicative interaction between the legal authority (as represented by European institutions) and the addressee (as embodied by respective Member States of the EU).

The present study is developed through a text genre-driven investigation on the use of prescriptive and performative modality in EU text types. A macro analysis concerning the frequency distribution of modal verbs in the reference corpus will be carried out resulting in the translation analysis of English modality as occurring in the EU institutional-legal texts under scrutiny. In this connection, the text corpus underlying the present article is made up of the following three legislative instruments: *Decision No. 1720/2006/EC of 15 November 2006 of the European Parliament and Council establishing an action programme in the field of lifelong learning* (hereinafter referred to as “Decision”); *Council Directive 2004/114/EC of 13 december [sic!] 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service* (hereinafter referred to as “Directive”) and *Agreement between the European Community and the United States of America renewing a programme of cooperation in higher education and vocational education and training; done at Vienna this 21. day of June 2006* (hereinafter abbreviated as “Agreement” for this article’s purposes) including their pertinent Slovak language versions.

1 EU text types and pragmatic aims

Based on certain textual pragmatic features, institutional-legal texts (also known as *Acquis communautaire* documents) customarily split into constitutive and prescriptive rules (Caliendo, 2004: 245). This classification draws and builds upon such pragmatic parameters such as intentionality of the legislator, acceptability of the receiver and situationality of various communicative settings (cf. de Beaugrande and Dressler, 2002: 31).

Table 1: EU texts grouped on the basis of common pragmatic features

<i>Constitutive rules</i>	<i>Prescriptive rules</i>
Regulations and Decisions (performative language)	Directives and Framework decisions (prescriptive language)

Decisions, like constitutive rules, make for a specific type of EU institutional-legal documents in the sense that they are directly applicable in the Member States and have immediate legal effects. Expressed in the words of the British philosopher Austin, the language in Decisions takes on a “performative power” in the sense that the formulation of the norm does not prescribe a command but automatically performs it. With respect to the above-said dimension of the receiver’s acceptability, these legally binding documents impose inviolable obligations on EU citizens. In this connection, Carcaterra (qtd. in Caliendo, 2004: 245) observes the absence of an explicit recipient in constitutive rules: being “self-performative”, they cannot be rejected and this explains why they miss out on a specific addressee. On the other hand, EU Directives are not directly applicable. They require an active intervention from a given Member State for the purpose of achieving a particular aim. In other words, Directives call for the process of transposition into national legislation. By their nature, they are more normative as a result of which their language ought to be more prescriptive than in Decisions.

2 Prescriptive and performative voices in EU legislation

Once the texts have been singled out according to their common pragmatic features, the attention can now be shifted to prescriptive and performative modality as occurring in different EU text types. The distinction between the two categories of modality endorses the theoretical frameworks as provided by Palmer (1986) and Austin (1962). Prescriptive modality is bound up with imposing obligations, regulating and prescribing the recipient’s behaviour. In contrast, by performative modal verbs the action that is being mentioned is simultaneously performed. Thus, this realization makes it possible for us to explore the modals such as *shall*, *should*, *may* and *must* as performative or prescriptive vehicles of communication depending on the text type in which they occur. In the light of these considerations, information contained in Table 1 support the assumption that performative modals are to be found in the EU Decision while a more prescriptive tone ought to prevail in the EU Directive from our reference corpus.

3 Modal verbs in the EU text corpus

3.1 *Shall: distribution and occurrence*

As results of the corpus analysis in Table 2 show, the verb *shall* appears to be the most significant modal verb in the reference corpus. This finding concurs with a good number of studies on deontic modality¹ according to which *shall* makes for the most frequent modal in

¹ Deontic (or intrinsic) modality refers to actions and events that humans (or other agents) directly control: meanings relating to permission, obligation, or volition. By contrast, epistemic (or extrinsic) modality refers to the logical status of events or states, usually relating to assessments of likelihood: possibility, necessity, or prediction (Biber et al., 2000: 485). While the former is “concerned with language as action, mostly with the expression by the speaker of his attitude towards possible actions by himself and others”, the latter is “concerned with language as information, with the expression of the degree or nature of the speaker’s commitment to the truth of what he says” (Palmer, 1986: 121). Compare the following: *The Member State*

legislative texts (Hiltunen, 1990: 75; Garzone, 2001: 156; Slivkova, 2002: 3; Caliendo, 2004: 244, Caliendo, 2005: 386; Bázlik and Ambrus, 2008: 63-64).

Table 2: Frequency distribution of modal verbs in the corpus

<i>EU Text Type</i>	<i>SHALL</i>	<i>SHOULD</i>	<i>MAY</i>	<i>MUST</i>
Decision	128	23	67	6
Directive	41	11	23	2
Agreement	32	3	16	1

Moreover, the distribution of the modal verb *shall* is also noteworthy on a wider scale since the frequency list of the entire reference corpus shows that the modal under discussion stands out as quite a prominent word, ranking thirteenth in the list, leaving all the other modal verbs far behind (see Table 3).

Table 3: Position of *shall* in the corpus frequency list

<i>Rank</i>	<i>Word</i>	<i>Frequency</i>	<i>% of the Overall Word Count</i>
1	the	1698	7.86
2	of	1032	4.78
3	and	864	4
4	to	700	3.24
5	in	670	3.1
6	a	315	1.46
7	for	293	1.36
8	be	239	1.11
9	article	236	1.09
10	programme	223	1.03
11	or	220	1.02
12	education	205	0.95
13	SHALL	201	0.93
...
26	MAY	106	0.5
...
83	SHOULD	37	0.17

The data in the Table above take on greater relevance when compared with the occurrence of *shall* across the British National Corpus (BNC) and the research results into EU documents conducted at Naples in the time span of 2001-2005 when almost 600 miscellaneous EU legal texts were subject to analysis (see Caliendo, Di Martino, Venuti, 2005: 383). While the *shall* frequency of occurrence for 1000 words in the BNC reached the value of 0.2, in the Naples Corpus it reached that of 11, which clearly supports the distinctiveness of *shall* in the institutional-legal language.

may adopt this Decision next year stands for epistemic modality while *Such networks may include thematic networks working on issues related to the content of Lifelong Learning* exemplifies deontic modality.

3.2 Shall or must?

The deontic *shall* in the sense of “imposing an obligation” is generally taken for a stylistic marker of legal texts, forming a stable part of the legal language inventory. Within legal discourse the modal assumes almost “a biblical status” (Seymour, 2002: 9). Tracing the origins of *shall*, it found its way into English as a translation of the Latin future imperative (Šarcevic, 1997: 138). Its specific use rests in conveying something which is bound to happen in the aftermath of some legal decision. The modal under discussion fulfils this function within the reference corpus very often. Since the modal *shall* expresses obligation, one may argue that it can be roughly put on a par with the meaning of *must*. Although these two modals might appear synonymous at first sight, the modal *must* is not very common in legal English, though. One of the reasons why *shall* is preferred over *must* is that the latter is more connected with the meaning of logical necessity, which is, however, not expressed by *shall*. Besides, the modal *must* is at the same time fairly subjective (since objective obligation tends to be expressed by means of *have to*) and it is this less objective nature of *must* that could be responsible for its low frequency in legal texts in general, and in our reference corpus in particular (see Table 2).

3.3 The perils of translating “shall”

Furthermore, the Czech legal expert Tomášek also pays heed to the translation of modal verbs. He argues that in the case of using *shall* as an implicit command it is appropriate to translate the modal into Slovak by *musieť*. However, when expressing immediacy of the commanded actuality it is deemed proper to express this fact by the Present or Future tense. In the exemplifying instances below the latter translation variant has correctly been chosen : *The Lifelong Learning Programme shall have the following objectives (a), (b), (c)... ~ Program celoživotného vzdelávania má tieto osobitné ciele: a), b), c)... ; Commission shall ensure the effective and efficient implementation of the Community actions ~ Komisia zabezpečí účinné a účelné vykonávanie akcií Spoločenstva* (Decision). In the second quoted translation variant, however, it would be more precise to view the chosen modal translation variant as the Present Tense with a future meaning in the target language. This is closely connected with institutional requirements to avoid translation of the English modal *shall* by means of the Future Tense in a consistent manner² (cf. 2.3.2 of the Joint Practical Guide). Overall, it may be argued that *shall* has been translated correctly by the Present Tense in the whole reference corpus with the exception of the Directive, where its translation variant with *musí* has been realized as a result of expressing a command . Compare the following: *A third-country national who applies to be admitted for the purposes set out in Articles 7 to 11 shall: (a) present a valid travel document as determined by national legislation ~ Štátny príslušník tretej krajiny, ktorý žiada o prijatie na účely ustanovené v čl. 7 až 11: a) musí predložiť platný cestovný doklad v súlade s vnútroštátnymi právnymi predpismi*. It should be noted that the translation variant with *musí* concurs more with the hypothesis concerning greater prescriptive tone bound to prevail in EU Directives to which the given modal only contributes (Caliendo, 2004: 245). At the same time, it is vital to underscore that the incidence of the translation variant with *musí* is much higher in the Slovak language version of the Directive in comparison with the English version, which is caused by the English *shall* referring to all the

² The translation of *shall* by the Future tense is seen as one of the most recurrent translation errors on the part of ‘novice’ translators in the EU Pre-Accession period (Slivkova, 2002). Miscellaneous quasi-legal and psychological explanations are to be sought behind this. In all probability, the requirement to translate the total bulk of *Acquis communautaire* by the date of Central and Eastern European countries’ accession to the EU in 2004 could have subconsciously caused that many translators from the new Member States interpreted their accession as a future event, which had a negative bearing on their translation.

following Article's paragraphs while its Slovak translation variant is drawn attention to separately in each and every subparagraph (cf. especially Pgs. 4 and 5 of English and Slovak Directive).

3.4 “shall” as a carrier of performative and prescriptive modality

Moving onwards, *shall* can acquire either performative or prescriptive pragmatic use depending on EU text type. For illustration compare the following sentences:

(1) *The operational details of such action shall be decided in accordance with the procedure referred to in Article 10 (2).*

(Decision)

(2) *Each Member State shall determine the maximum number of hours per week or days or months per year allowed for such an activity, which shall not be less than 10 hours per week, or the equivalent in days or months per year.*

(Directive)

Example (1) is drawn from Decision and *shall* acquires unequivocally a “performative power” here: the assertion of a legal condition corresponds to its same performance, so that the effect is produced *ipso jure* (Caliendo, 2004: 247). In addition, the use of the passive voice (“shall be decided”) can be considered as a valid indicator of performativity (Austin, 1962: 57). By contrast, in (2) the same modal is set into a new semantic framework and communicates a different intentionality of the legislator. *Shall* carries a clear prescriptive message of the Directive and points to the final goal to be achieved (“determine the maximum number of hours per week or days or months per year”) within a given period of time (“not less than 10 hours per week”).

Garzone (2001: 165) draws attention to the importance of agent-orientedness in deontic modality, the presence of (an animate) recipient of the obligation in prescriptive discourse, in particular. In the light of this statement it is indubitable that EU legislation's recipients are the Member States. By searching the reference corpus with the *WordSmith Tools* concordancer it was possible to identify that the concordate *Member State(s) shall* occurred more often in the Directive (9 times) than in the Decision (3 times), which corroborates that *shall* acquires a stronger prescriptive connotation in the Directive for it is used to instruct Member States in what objectives are to be achieved.

3.5 Other modal verbs in the corpus and their translation solutions

Granted, *shall* is not the sole modal verb in the corpus. Other modals have been revealed by a thorough corpus analysis as well. These were treated in their translation as follows: *may*, expressing permission and authorization mostly as *môžu*; *should* implying a less binding nature of obligation as *majú byť*, or *mali by byť* and the marginal *must* was often rendered as *musia* (see Table 4 below). In this connection it seems noteworthy that *can* is almost entirely absent from the corpus with the exception of the Decision and Directive under analysis where it was found only once in both texts, e.g. *The objective can be better achieved at Community level ~ [...] cieľ možno lepšie dosiahnuť na úrovni Spoločenstva*. This finding is in line with observations by Slivkova (2002: 1) and Bázlik and Ambrus (2008: 70). Notably, the relative absence of the modal *can* (or *could*) is bound up with its polysemantic nature which is not consistent with the need for precision in legal discourse and therefore this verb is of little avail in legal English.

Table 4: Other modal verbs translation examples

<i>Modal Verbs</i>	<i>EN version</i>	<i>SK version</i>	<i>EU Text</i>	<i>Text Passage</i>
MAY	The candidate countries for accession to the European Union and the EFTA countries which are members of the EEA may participate in Community programmes.	Kandidátske krajiny na prístupenie do Európskej únie a krajiny Európskeho združenia voľného obchodu (EZVO), ktoré sú členmi Európskeho hospodárskeho priestoru (EHP), sa môžu zúčastňovať na programoch Spoločenstva.	Decision	(38)
SHOULD	RECOGNISING that the cooperation in education and vocational training should complement other relevant cooperation initiatives between the European Community and the United States...	UZŇAVAJÚC, že spolupráca v oblasti vzdelávania a odbornej prípravy by mala dopĺňať ostatné príslušné iniciatívy spolupráce medzi Európskym spoločenstvom a Spojenými štátmi, ...	Agreement	Preamble
MUST	Each national agency must have an appropriate infrastructure, in particular as regards informatics and communications.	Každá národná agentúra musí mať vhodnú infraštruktúru, najmä pokiaľ ide o informačné a komunikačné prostriedky.	Decision	Art 6, 2b) iii)

The only modal verb translation variants one could slightly object to have been encountered in the Directive: *The Member States should be able to issue in timely manner a residence permit* ~ *členské štáty môžu dočasne vydať povolenie na pobyt*, where the Slovak translation variant with *môžu* should be superseded with *by mohli*. The perpetrated semantic difference on the part of the translator comes to the fore even more with the following sentence: *The duration and other conditions of preparatory courses for students covered by the present Directive should be determined by Member States in accordance with the national legislation* ~ *Doba trvania a iné podmienky prípravných kurzov pre študentov, na ktorých sa vzťahuje táto smernica, sú určené členskými štátmi v súlade s vnútroštátnymi predpismi* (Directive). In our view, by the realized Slovak translation the modal verb *should* loses its tone of recommendation and undergoes a transformation into a certain degree of obligation, which is not negligible. The realized translation of the modal quoted above, however, may be advocated by Coates' (1983: 58) interpretation of the semantic value of *should*, according to which the given modal verb shares some pragmatic roots with the verb *must* in the way of demanding some action or expressing some obligation. Overall, when assessing the translation of modal verbs in the corpus, no serious transgressions against the common Slovak translation norm or deviations from the English EU document version have been observed.

Conclusion

To sum up, *shall* (201 counts) and *may* (106 counts) make for the most frequent modals in the examined reference corpus. By this, findings of other scholars (e.g. Caliendo, 2004; Bázlik and Ambrus, 2008) concerning their distribution in the legal discourse have been corroborated. Attention has also been devoted to the modal *shall* as a stylistic marker of specialized legal language. The modal verb under investigation has been rendered in tune with official EU prescriptions correctly by means of the Present tense, or in some text passages by the variant with *musí* when expressing a command. Simultaneously, it has been found out that the modal *shall* can acquire either performative or prescriptive shades of the meaning depending on the legislative text type, its function and pragmatic force towards the final receiver of legal message. Precisely this identification of common pragmatic patterns in the use of modality has enabled us to classify EU legislation and its multifarious text genres into performative and prescriptive ones. Furthermore, modal verbs *should* and *must* have been

treated as representatives of rather minor modal verbs in the reference corpus. The almost complete absence of *can* from the corpus concurs with overall requirements imposed on the EU institutional-legal language.

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