Multilingual Lawmaking and Legal (Un)Certainty in the European Union

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In recent years multilingual lawmaking in the European Union (EU) has come under increasing attack for its failure to provide greater legal certainty to Union citizens. This article examines the extent to which EU multilingual legislation satisfies the requirements for the legal certainty of citizens recognized by human rights law. At the heart of the problem is legal translation which is inherently imperfect, thus resulting in divergences between the 23 authentic texts of EU legislation. While other bilingual and multilingual jurisdictions can rely on the courts to correct the imperfections of legal translation, an analysis of the case-law of the Court of Justice of the European Union shows there is no reason to expect the Court to strike a balance between legal certainty and multilingualism if doing so would risk undermining the effectiveness of EU law. Three proposals for the reform of EU multilingualism are discussed and evaluated. In a final attempt to preserve the status quo of EU multilingualism, the author examines what is being done and what could be done to improve the quality and thus reliability of EU multilingual legislation.

Keywords: EU policy of multilingualism, legal translation, legal certainty, multilingual interpretation, the right to rely on legislation in one's own language

1 Paradoxes of EU multilingualism

European Union multilingualism is unique for several reasons, the most obvious being the unprecedented number of official languages. The

only "international" organization to confer the status of official language on the major language of all of its Member States, the EU currently boasts 23 official languages, soon to become 24 with the accession of Croatia, which is scheduled to become the 28th Member State on 1 July 2013.

In keeping with the principle of language equality enshrined in Council Regulation 1/1958/EEC, all official languages enjoy equal status, at least theoretically, regardless of the extent to which each language is spoken or the economic power of the particular Member State. This follows from Article 1, as well as from Articles 4 and 5, which require regulations and other documents of general application to be "drafted" in all official languages and published in the Official Journal of the EU. Moreover, all instruments of primary and secondary EU law are deemed equally authentic, thus putting all language versions of EU legislation on equal footing for the purpose of interpretation.

Although considerable concern was voiced prior to the last three enlargements as to whether the benefits of multilingualism warrant the cost and whether the Union could function efficiently in more than 20 languages (see Šarčević 2007: 37), all proposals to discontinue the policy of EU multilingualism based on language equality were flatly rejected by politicians. More recently, however, legal factors have come into play, shedding light on the paradoxes of EU multilingualism, stressing the negative impact of multilingualism on EU lawmaking in light of the growing lack of legal certainty.

Back in 2001, the European Commission acknowledged that "linguistic inconsistency and incoherence in directives and their national transposing instruments pose a threat to cross-border transactions", thus creating legal uncertainty which hinders the proper functioning of the internal market.[1] The Commission's critical remarks sparked a lively debate on the intricate link between language, law and culture, encouraging scholars to examine the role of multilingualism in EU lawmaking. Early on, scholars of European private law agreed that multilingualism is essential as it enables EU law to function in an increasing number of languages. However, they conceded that, due to

[1] Communication from the Commission to the Council and the European Parliament on European Contract Law (OJ C 255 of 13.9.2001).

the imperfections of legal translation, multilingualism is an obstacle to the harmonization of European private law (on later developments in European contract law, see Baaij 2012a: 16-22).

More recently, lawyers of public law have joined the debate and are mounting attacks on EU multilingual lawmaking for its failure to provide greater legal certainty to Union citizens (e.g., Schilling 2010). On the one hand, Article 22 of the EU Charter of Fundamental Rights recognizes linguistic and cultural diversity as a fundamental right of European citizens. However, linguistic and cultural diversity is now alleged to be the very cause of growing legal uncertainty in EU multilingual legislation (Kjær 2011: 2). By shifting the emphasis to human rights, the attacks could prove to be fatal, driving the paradox of EU multilingualism to the point of self-destruction.

In the wake of the entry into force of the Treaty of Lisbon in December 2009, the discriminatory effects of EU multilingual legislation on Union citizens can no longer be neglected. Under Article 6(2) of the EU Treaty, as amended by the Lisbon Treaty, the EU is committed to accede to the European Convention of Human Rights (ECHR) and the negotiations for membership are currently in progress.[2] Upon accession of the EU to the ECHR, EU multilingual legislation will be subject to the criteria for legal certainty developed and practiced by the European Court of Human Rights in Strasbourg. In anticipation of this moment, this article examines the extent to which EU multilingual legislation satisfies the two basic requirements for the legal certainty of citizens recognized by human rights law and the rule of law (section 2). The focus then shifts to the imperfections of legal translation and inevitable divergences between the various language versions of EU legislation which undermine legal certainty (section 3). Following an analysis of the interpretive methods used by the Court of Justice of the European Union (hereinafter: Court of Justice, or the Court) in cases involving legal certainty, the question arises whether the Court is likely to strike a balance between legal certainty and multilingualism without compromising its main goal of promoting the uniform interpretation and application of Union law (section 4). In light of the growing legal uncertainty, three proposals made by scholars for

[2] See progress report at hub.coe.int/what-we-do-human-rights/eu-accession-to-the-convention.

reforming EU multilingualism are explained and evaluated (section 5). Closing with reflections on the future of EU multilingualism, the article examines what is being done to improve the quality and reliability of EU multilingual legislation, making suggestions for further action in an attempt to preserve the status quo of EU multilingualism (section 6).

2 EU multilingualism and legal certainty

The human rights law developed by the European Court of Human Rights sets two basic requirements for the legal certainty of national legislation, both of which will apply to EU multilingual legislation when the EU accedes to the ECHR. First, the legislation must be accessible to citizens and secondly, its effects must be foreseeable or predictable (Schilling 2010: 49). In the context of EU multilingualism, this means that EU legislation must be accessible to citizens in their own language and that it must be reliable in the sense that citizens are able to *foresee* the legal effects, thus enabling them to base actions in law on legislation in their own language without fearing discriminatory results.

2.1 Requirement of accessibility

Since EU law has direct effect on the citizens of the Member States, it follows that Union citizens have the democratic right to have access to the law in their own language (Strandvik 2012: 32; Paunio 2007: 396). The right of citizens to accessibility is undisputed and has been upheld by the EU policy of language equality from the very beginning. As regards the treaties of primary law, the founding fathers of the European Communities (today the EU) acted in accordance with principles of international law by drawing up the Rome Treaties of 1958 in the four languages of the six founding States – Dutch, French, German and Italian – and declaring all language versions to be equally authentic. In this spirit, the Council of Ministers conferred the status of official and working language on the four original languages of the six founding States in Council Regulation 1/1958/EEC of 15 April 1958, which has been amended upon the accession of new Member States to

include the new languages.[3] As confirmed by the Court of Justice in the *CILFIT* case,[4] all language versions of EU secondary law are also equally authentic.

Like the treaties of primary law, the legislative acts of secondary law (e.g., regulations, directives, decision) are "drafted" in all official languages and published in the Official Journal of the EU (OJ), which is accessible at the Eur-Lex database.[5] As for the case-law, judgments of the Court of Justice are drawn up in French, translated into the language of the case (if this is not French) and then translated into the other official languages and published in the European Court Reports, which are available at the Court's database.[6] Accordingly, it is safe to conclude that EU law is accessible to Union citizens and other individuals (natural and legal persons).

As an unwritten requirement of accession, all candidate countries must translate the entire body of EU law (*acquis*) into their language. After the final legal-linguistic revision, the translations are authenticated by the EU institutions and published in special editions of the Official Journal. Technically speaking, all EU legislation should be published and made available to the public by the date of accession. However, this did not happen in the historic enlargement of May 2004 when the number of official languages jumped from 11 to 20 overnight. The late publication of certain legislation and translation errors resulted in a number of court cases, the most famous of which is the *Skoma-Lux* case,[7] in which the Court of Justice held that, in accordance with the principle of legal certainty, obligations contained in Union legislation cannot be imposed on individuals (citizens and entities) of a new Member State if the legislation has not yet been published in the

[3] Pursuant to Article 1 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community, as amended by the respective Accession Acts, the official languages of the Union are: 'Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish'.

[4] Case 283/81 [1982] ECR 3415, para 18.

[5] At http://eur-lex.europa.eu/en/index.htm.

[6] At http://curia.europa.eu/en/content/juris. In this context, it should be menioned that only judgments in the language of the case are authentic.

[7] The language in question was Czech. See Case C-161/06, *Skoma Lux sro v Celní ředitství Olomouc* [2007] ECR I/10841.

Official Journal in the language of that State. Following this reasoning, the Court ruled, "A Community regulation which is not published in the language of a Member State is unenforceable against individuals in that State" (see Bobek 2011: 125).

From the date of accession the Commission's Directorate General for Translation (DGT), the largest translation service in the world, is responsible for the translation of EU legislation into all official languages. To dispel concerns that the DGT was unable to meet its obligations after the 2004 accession, the Commission issued a Communication on a New Framework Strategy for Multilingualism in which it renewed its commitment "to give citizens access to European Union legislation, procedures and information in their own languages" and concluded that "multilingualism is essential for the proper functioning of the European Union" (COM(2005) 596 final, 3, 15).

2.2 Right to rely on legislation in one's own language

While the criterion of accessibility is a mere formal requirement, the second requirement is problematic because it concerns the quality, more precisely the reliability of the equally authentic texts of multilingual legislation. In essence, this aspect of legal certainty guarantees Union citizens the right to rely on the authentic text of EU legislation in their own language without discriminatory effects. Pursuant to the case-law of the Court of Human Rights, the key criterion of the test of reliability of a legislative text is the foreseeability (or predictability) of its effects. According to Schilling, "Foreseeability of its effects requires that the law is sufficiently clear for the citizen to foresee, if need be with the assistance of a lawyer, its effects, ie what he must or must not, do and what he may, or may not, expect or require from public authorities" (2010: 49).

Since EU legislation is drafted in one language and translated into the other official languages, the question arises whether the language versions of EU legislation are "sufficiently clear" so as to enable citizens to foresee the consequences of the particular instrument on the basis of the text in their own language. As Schilling points out, citizens should have no reason to doubt the meaning of their own language version, thus enabling them to base actions in law on that text. These are "legitimate expectations" of Union citizens which need to be

protected by the courts; any decision contrary to the principle of legal certainty should be considered discriminatory (Schilling 2010: 53, 56, 61; on legitimate expectations, see Habermas 1996: 198, cited in Paunio 395, n. 74).

In keeping with the principle of equal authenticity, the ultimate goal of EU multilingual lawmaking is to preserve the unity of the single instrument in all authentic texts with the aim of promoting the uniform interpretation and application of EU legislation by the national courts in all Member States (Šarčević 2012a: 86-87). In theory, all authentic texts of EU instruments of primary and secondary law, including subsequent translations, are deemed to be "originals" and are thus presumed to have the same meaning. As for the treaties of primary law, the presumption of equal meaning is derived from Article 33(3) of the Vienna Convention on the Law of Treaties, which states that the terms of a multilingual treaty are presumed to have the same meaning in each authentic text. Similarly, the case-law of the Court of Justice has confirmed that each of the equally authentic language versions of EU instruments of secondary law is presumed to have the same meaning.[8]

Whether and to what extent the authentic texts of EU legislation actually have the same meaning is a matter of interpretation. In bilingual and multilingual jurisdictions[9] the meaning of the authentic texts of a single instrument is presumed to be the same *unless alleged otherwise*. This implies that the presumption of equal meaning stands as long as the wording of an authentic text is "sufficiently clear", as Schiller puts it (2010: 49), or is "unambiguous and free from doubt", as Derlén says (2011: 145). Therefore, as regards the test of reliability, the legal effects of an authentic text can be deemed foreseeable if the wording of that text is "sufficiently clear" so as not to raise a problem of interpretation. In Derlén's words, "The right to rely on a single language version exists as long as this version is unambiguous and free

[8] Referring to the *CILFIT* judgment, Advocate General Tizzano commented that the Court wanted the national courts "to bear in mind that the provision in question produces the same legal effects in all those versions", opinion delivered in Case C-99/00 *Kenny Roland Lyckeskog* [2002] ECR I/04839, para. 75; cf. Advocate General Stix-Hackl's opinion in Case C-495/03 *Intermodal Transports BV v. Staatssecretaris van Financiën* [2005] ECR I/08151, para. 99.

[9] For instance, section 10B(2) of the Hong Kong Interpretation and General Clauses Ordinance reads: "The provisions of an Ordinance are presumed to have the same meaning in each authentic text".

from doubt" (2011: 145). In such cases, the requirement of reliability is fulfilled and citizens should have no reason to doubt the "protection of legitimate expectations based on that language version" (Schilling 2010: 61). However, as we will see, this is not always the case in the practice of the Court of Justice. First, however, it is necessary to briefly examine the production of multilingual texts in the EU and the fallacy of the presumption of equal meaning.

3 Legal translation - a threat to legal certainty

Both lawyers and linguists are quick to concede that it is impossible to produce parallel texts of a single instrument which have the same meaning (Dolczekalska 2009: 361; Gémar 2006: 77), thus reducing the presumption of equal meaning to a mere fiction. This is particularly true in EU multilingual lawmaking, which, contrary to some bilingual jurisdictions such as Canada and Hong Kong,[10] is dependent on traditional methods of translation.

3.1 Production of EU multilingual legislation

The main actors in EU multilingual lawmaking include technical experts and policymakers who are not professional drafters, translators who are usually linguists, and lawyer-linguists who are lawyers with high-level language abilities. Today lawyer-linguists are mainly responsible for legal-linguistic revision, which goes beyond a purely linguistic revision of a target text to include legal and linguistic revision of the source text as well, as a result of which it is sometimes referred to as co-drafting (Šarčević and Robertson 2013: 186, citing Burr and Gallas 2004: 199).

In EU multilingual lawmaking, the source or base text is drafted in either English or French by policymakers and technical experts in the Commission who are usually non-native speakers of the source language. Whereas French and English were on par as drafting languages in 1997, most texts are now drafted in English. Since 2001

[10] The French and English texts of Canadian federal legislation and the English and Chinese texts of Hong Kong legislation are produced by professional drafters simultaneously using methods of co-drafting (on co-drafting in Canada, see Šarčević 2000:100-102) or simultaneous drafting, as it is called in Hong Kong (Cao 2007: 72; Cao 2010: 80).

lawyer-linguists from the Commission examine and revise the initial base text to ensure that the language is clear, precise and translatable into the other languages. Thereafter, Commission translators in the DGT translate the base text into all other official languages. The translations are then monitored by Commission lawyer-linguists with a view to verifying terminological consistency within the particular text and with other EU instruments in the same field.

After approval by the Commission, all language versions of the particular instrument are sent to the Council and Parliament for debate, amendment and enactment. As earlier, lawyer-linguists of the Council are responsible for the final legal-linguistic revision and verification of the concordance of all language versions prior to their publication in the Official Journal. More recently, a process of shared legal-linguistic revision known as co-revision is carried out by teams of lawyer-linguists from the Council and Parliament (see Guggeis and Robinson 2012: 70). In addition, Parliament lawyer-linguists are responsible for revising amendments submitted during the parliamentary processes, which have been translated into all languages by translators of the Parliament's Directorate for Translation (for details on the work of lawyer-linguists, see Šarčević and Robertson 2013).

3.2 Inevitable divergences

Although EU translators are called upon to convey the legal content of the base text as accurately as possible and all language versions are subject to legal-linguistic revision and verification, divergences in meaning between the various language versions of EU legislation are inevitable (on causes and types of divergences in EU legislation, see Šarčević 2006: 125-126).[11] Moreover, as Tabory has suggested, "The probability of confusion, errors and discrepancies is multiplied in direct proportion to the number of authentic texts" (1980: 146). While she is

[11] Cf. Cao, who identifies three sources of *inter-lingual uncertainty*, as she calls it: 1) lexical uncertainty, 2) syntactical and grammatical ambiguity and 3) uncertainty arising from errors or variations. She does not deal with the problem of legal certainty as a right of citizens to rely on a provision in their own language but rather the need for uniform interpretation regardless of the language version (2007: 73); Cao's later article (2010) has essentially the same content (without Canada); however, she drops the term *inter-lingual uncertainty*, using instead terms such as *linguistic disagreements* (71), *linguistic differences* (72), *divergences* (77), *linguistic discrepancies* (79) etc.

referring to the six authentic texts of UN legislation, this gives us a good idea of the probability of the divergences occurring between the 23 authentic texts of EU legislation. At the heart of the problem, however, is not only the diversity of the many languages but first and foremost the diversity of the legal systems and cultures of the 27 Member States, a fact which outsiders (e.g., Cao 2010: 85) and even insiders often overlook when discussing EU translation. Whereas De Groot remarked that EU translation is "relatively easy" because it involves only one legal system (1999: 14), in reality EU law is still developing and continues to be dependent on the legal systems of the Member States. Therefore, EU translation is not yet translation within one legal system but translation across systems. In this sense, Kjær describes EU translation as a complex operation involving 23 languages and 28 legal systems: EU law and the national systems of the 27 Member States (2007: 80).

Most lawyers regard divergences in meaning between the various language versions as an inevitable fact of EU multilingual lawmaking that must be accepted. While many divergences are not harmful, others have the potential to lead to different results in practice. Under ordinary circumstances this would not be cause for alarm. However, according to Schilling, harmful or significant divergences, as he calls them, are "the rule rather than the exception" in EU legislation. Based on his 25 years of professional experience in the linguistic service of the Court of Justice, Schilling estimates that at least one significant divergence between two or more language versions occurs regularly in lengthy EU legal texts (2010: 51). This is cause for concern as it considerably increases the risk of legal uncertainty.

In fact, as Professor Solan warns, "The opportunity for inconsistencies among the various language versions is so profound that it would not be surprising if the entire system collapsed under its own weight" (2007: 2). According to Solan, the reason the system has not yet collapsed is the sensitivity of the Court of Justice to strike a proper balance when ascertaining the uniform meaning of the equally authentic language versions of EU legislation. Like judges in bilingual

Canada and Hong Kong (Beaupré 1986: 156; Cao 2010: 84[12]), it is up to the judges of the Court of Justice to correct the inherent imperfections of translation by resolving divergences between the various language versions of EU multilingual legislation in cases brought before it.

4 Corrective role of the Court of Justice

As the sole authority to interpret EU law, the Court of Justice promotes the uniform interpretation and application of EU law by ascertaining the meaning of disputed provisions referred to it by national courts in references for a preliminary ruling. This also includes any provision which is unclear or ambiguous in the language version of the referring national court or is alleged to diverge from the other language versions. The Court's task is not to decide the national case in question but rather to determine the uniform meaning of the disputed provision, which is binding on all national courts.

4.1 Basic interpretive methods of the Court of Justice

Unlike in Canada and Hong Kong where special rules for construing bilingual legislation are codified in their respective Interpretation Acts,[13] in EU law the decision on how multilingualism is to affect the interpretation of EU legislation has been left to the Court of Justice. Over the past 50 years the Court has developed dynamic methods of multilingual interpretation which have enabled it to accommodate the increasing number of languages. In keeping with the principle of equal authenticity, the starting point of EU multilingual interpretation is the general requirement to compare all language versions of the disputed provision.

In the *Van der Vecht* case (1967), the Court addressed the controversial issue whether the comparison is mandatory at all times. The somewhat awkward wording of the Court's judgment states that

[12] However, in my opinion, Cao goes too far when she suggests that the interpretive methods of the Court of Justice «may serve as a point of reference and guidance» for other jurisdictions such as Hong Kong (2010: 85).

[13] Canadian Federal Interpretation Act (R.S.C., 1985, c. I-21), at http://laws-lois.justice.gc.ca/eng/ acts/I-21/index.html; Hong Kong Interpretation and General Clauses Ordinance, at http://www.legislation.gov.hk/eng/drafting.htm.

national courts need to consult the other language versions "in cases of doubt", thus implying that no comparison is needed if the national text is sufficiently clear.[14] Later the Court explained in *Stauder* (1969) that European law needs to be interpreted and applied in a uniform manner in all Member States and therefore the disputed provision in question must be interpreted in light of all language versions. Since the different language versions together form the meaning of the provision, it concluded that the courts have the duty to compare all language versions in all cases, not only in the event of a linguistic discrepancy between the various language versions.[15] At that time there were only four authentic texts. Nonetheless, subsequent enlargements have not led the Court to change its position. Instead, it has repeatedly emphasized the obligation to compare the other language versions and now refers to the matter as settled case-law (Baaij 2012b: 218; cf. Derlén 2009: 35; also Šarčević 2002: 248). While the Court of Justice is in a better position to compare the 23 language versions of a disputed provision, it is highly questionable whether this is done on a regular basis in practice. As for the national courts of the Member States, they generally rely solely on the version in their own language, unless it is ambiguous or obscure (Paunio 2007: 398).

As a cumulative requirement, all authentic texts of a particular instrument are to be given equal interpretive weight in the event of divergence or ambiguity. In the famous *CILFIT* case the Court made it clear that this general rule of international treaty law applies to the interpretation of instruments of both primary and secondary primary law. Among other things, the Court recognized in its judgment of 1982 that all language versions of EU secondary legislation are equally authentic and therefore need to be given "the same weight",[16] a position it has repeatedly confirmed in later cases as well (e.g., *EMU Tabac* 1998[17]). However, reconciling linguistic discrepancies in a way that gives equal weight to each language version is extremely difficult, if not downright impossible in EU multilingual legislation, especially for the national courts. Using the metaphor "Castles in the Air", Derlén

[14] Case 19/67 [1967] ECR 345.
[15] Case 29/69 [1969] ECR 419.
[16] Case 283/81 [1982] ECR 3415, paras. 18-19.
[17] Case 296/95 [1998] ECR /I1605, para.36.

scolds the Court for creating extensive obligations for the national courts without providing any genuine guidance as to how they can be realized in practice (2009). Moreover, from the point of view of legal certainty, the Court's basic requirement that all language versions must be compared and given equal weight when resolving divergences between authentic texts is contrary to the principle of legal certainty for individuals (cf. Paunio 2007: 401). Above all, it defies the test of reliability. Instead of promising the reliability of one's language version without the threat of discrimination, it sends the very opposite message, warning Union citizens that they cannot rely on their own language version of a EU legislative text, even in cases where it is sufficiently clear.

4.2 Priority of the teleological approach

In 1977 the Court addressed the issue of legal certainty in *North Kerry Milk Products*, acknowledging that "the elimination of linguistic discrepancies by way of interpreting may in certain circumstances run counter to the concern for legal certainty inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words."[18] In an attempt to find a compromise solution, the Court argued, "It is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved".[19] In essence, this approach excludes giving priority to a single language version and as such is the flipside of the same-weight principle, both of which signal a departure from literal interpretation based on the wording of the text. As the best method of reconciling linguistic divergences, the Court proposed its teleological approach, which it supplemented to include not only the spirit and objectives of the text but also its wider context and general scheme. In this sense, the Court succeeded in reconciling the linguistic discrepancies in the case at hand by examining other EU legislation on the same subject matter, enabling it to determine the uniform interpretation of the disputed provision by a contextual, broader interpretation taking account of the purpose and general scheme of the rule regulating the issue at stake. However, by promoting integration

[18] Case 80/76 [1977] ECR 425, para. 11.
[19] Ibid.

and uniformity of laws, the Court's teleological approach may "collide with the principle of legal certainty", as Paunio puts it (2007: 396).

In cases hinging on linguistic discrepancies, recent studies show that the prevailing approach is not the teleological but rather the literal method of interpretation (Baaij 2012b: 219). Greatly simplified, the literal approach consists mainly of two main categories: the majority argument in which the Court gives preference to the meaning attributed to the majority of language versions, and the clarity argument where preference is given to the language versions that the Court considers clearer or less ambiguous than the other versions. However, as a rule, it also examines the purpose of the disputed rule after having determined the majority or clearer language versions in order to ensure their compatibility. Moreover, in the case of incompatibility, the Court reserves the right to give priority to a teleological argument even though it contradicts the clear meaning. The fact that the Court may resort to the teleological argument to correct a literal interpretation has serious implications for legal certainty. First, it makes it impossible for individuals to predict with any degree of certainty which interpretive methods will be used by the Court in a particular case, thus creating even greater legal uncertainty. Secondly, it sends a strong signal suggesting that there is no reason to expect the Court to strike a balance between legal certainty and multilingualism if it would put the effectiveness of EU law at risk.

The issue of legal certainty is particularly sensitive in cases where plaintiffs or applicants who bring an action based on a provision in their own language stand to suffer economic loss or criminal consequences as a result of conflicting interpretations that may not be evident in their own language version. In such cases, courts are generally encouraged to uphold the principle of legal certainty by ruling in favour of the individual who relied on the provision, as the Court of Justice did in *Privat-Molkerei Borgmann* (2004).[20] However, closer scrutiny of the judgment reveals that, although legal certainty may appear to have been the overriding factor, there were other considerations as well, above all the compatibility of the German-language provision with EU (then Community) law. As the Court put it,

[20] Case C-1/02 [2004] ECR I-03219.

"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" (para. 30).

The dispute turned on a formal question, i.e., whether the time-limit in Regulation 536/93 should be interpreted as the time of dispatch, as the majority of language versions suggested, or the time of receipt, as indicated in the Greek, Dutch and Finnish versions. Since the various language versions diverged in meaning, the Court examined the purpose of the Regulation by referring to the preamble. However, as Derlén points out, the teleological approach offered no interpretive guidance at all (2011: 150), thus allowing the Court to rule in favour of the individual. In this case, Borgmann had the good fortunate that his language version sided with the majority and did not compromise the objectives of the provision. In other words, the Court's decision favouring Borgmann posed no risk to the effectiveness of European law.

Individuals in other cases concerning financial and taxation issues were not as fortunate, thus suggesting that the Court of Justice does not hesitate to rule against the language version of an individual if the wording of that text does not comply with the clarity or majority argument and is found to be contrary to the purpose of the disputed provision. For example, in *Röser* (1988),[21] a case involving the prosecution of a German citizen for not complying with EU legislation relating to the marketing of wine, the Court admitted that the interpretation of the German wording of the provision in question was open to an interpretation according to which Röser's conduct seemed lawful. Despite a warning from the Commission that it would be against the basic principles of criminal law to punish the defendant, the Court ignored the warning and ruled in favour of the other language versions. According to the Court, the other language versions made it *clear* that the broader interpretation leading to the opposite result had to be adopted (paras. 22-25; see Derlén 2011: 149). Referring to the *Pubblico Ministero v Sail* case,[22] the Court argued that the effectiveness

[21] Case 238/84 [1986] ECR 795.
[22] Case 82/71 [1972] ECR 119.

of European law must be consistent and cannot vary according to its possible effects on various branches of national law.

Similarly, in *Herinksen* (1989)[23] the Court of Justice adopted a broad interpretation in a matter of taxation, which hinged on the question whether letting of garages was excluded from value added tax. A number of language versions, including the national version relied on by Herinksen, indicated that it was. However, after examining the other language versions and the purpose of the provision, the Court came to the opposite conclusion. Again there were words of warning, this time from Advocate General Jacobs, who favoured a literal interpretation of the provision, given the tax law context (Derlén 2011: 149). Nevertheless, the Court ruled against the individual in the interest of promoting uniform law and ensuring the effectiveness of European law.[24]

Summing up, we agree with Derlén that the limited weight attributed to legal certainty amounts to "an abdication on the part of the Court" (2011: 150). For our purpose, this leads us to conclude that, based on the case-law, it is not reasonable to expect the Court to strike a balance between legal certainty and multilingualism if favouring the individual would undermine the effectiveness of EU law. The apparent incompatibility of these three factors sends a strong warning that the paradox of EU multilingualism has reached the point of absurdity. Unable to rely on their own language version and unable to foresee how the Court will rule after comparing the other language versions of a disputed provision, Union citizens are trapped in a discriminatory position which denies them their right to legal certainty. As the number of victims of EU multilingualism increases, it can be expected that the individuals will take their cases to the Court of Human Rights when the EU accedes to the ECHR. This alarming situation raises a red flag signaling that the time has come to seriously consider proposals to reform EU multilingualism.

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[23] Case 173/88 [1989] ECR 2763.

[24] Similarly, in the area of indirect taxation, the Court concluded in *Codan* (Case C/236 97[1998] ECR I-8679) that the meaning of the Danish term for *stock exchange turnover taxes* (*boersomsaetningsskater*) in Council Directive 69/335 must be extended to cover all "taxes on the transfer of securities", the broader expression used in all other language versions except German.

5 Proposals to reform EU multilingualism

Of the numerous proposals made by various authors, only three are discussed here as any more radical solution, such as reducing the number of official languages and thus language versions of EU legislation, would be contrary to the principle of accessibility of the law, which is also a requirement for legal certainty. The first two proposals call for a reduction in the number of authentic texts of EU legislation, thus sacrificing the principle of equal authenticity but continuing to require instruments of primary and secondary law to be "drafted" and published in all official languages. The third proposal retains the principle of equal authenticity *per se* but would introduce mandatory consultation languages.

5.1 One authentic text

Discussing the criterion of foreseeability, Schilling claims that, in order to foresee the effects of any EU instrument, theoretically Union citizens would need to consult all 23 language versions, which is highly unreasonable. On the other hand, in his view, it would be reasonable to expect citizens to consult or hire experts to consult one, two or maybe three authentic language versions and to compare them with the text in their own language. Nonetheless, he concludes that legal certainty would be best achieved if there were only one authentic text of EU legislation, while the others would be reduced to official translations (2010: 64). In such case, any ambiguities and divergences in the official translations would be resolved on the basis of the authentic text.

Like the earlier practice in international treaty law, Schilling proposes that the language version of the base text be declared authoritative, as it would most likely reflect the true legislative intent. In his opinion, a system of rotation between all the official languages would also be acceptable, as this would effectively guarantee equal treatment of all languages but would be impractical under other aspects. In pragmatic terms, he agrees that the simplest solution would be to make one and the same language authoritative for all legislative texts, that language being English.[25] However, he acknowledges that the one-

[25] In defence of English, Schilling mentions that the Group of Intellectuals for Intercultural Dialogue engaged by the Commission in 2008 accepted English as the language of international

authentic-text solution would probably be the most difficult to achieve politically (2010: 65).

5.2 European reference language model

Another proposal, also by Germans, is to adopt a European reference language model, which would reduce the number of authentic texts of EU legislation to two reference languages at the EU level, which would serve as reference texts for the other languages (C. and K. Luttermann 2004: 1008-1010). This system of bilingualism would be extended to the mother tongue by requiring the other Member States to translate all EU legislation into at least one of their official languages. The "authenticity" of the other language versions would be upheld insofar as they are in agreement with the two authentic reference language texts. All legal and linguistic questions of interpretation would be resolved by comparing the two authentic reference texts and the uniform interpretation would be binding for the whole Union. According to K. Luttermann, the two reference languages – English and German – have been chosen on the basis of the democratic majority principle. Namely, English is the first most commonly used language in the EU, and German the second.[26] Since these two languages ensure that both Continental law and Common law are represented, in her opinion, the model preserves cultural and legal diversity (K. Luttermann 2009: 332-335).

5.3 Mandatory consultation languages

An expert on EU multilingual interpretation, Derlén regards the system as "broken" but is confident that it can be fixed. In his view, requiring the national courts to consult all language versions is absurd and, furthermore, the Court of Justice has failed to provide viable guidelines as to how that rigid requirement is to be fulfilled in practice (2011: 152, 157). Contrary to the other proposals, Derlén's model does not sacrifice the principle of equal authenticity, at least not in theory, but calls for sweeping reforms in practice by making English and French

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communication (2010: 65 n. 121). Braselmann supported the one-authentic-text solution back in 1992; however, the language was French (1992: 73-74).

[26] Based on statistics in the Annex of the Commission's Communication on a New Framework Strategy for Multilingualism (COM(2005) 596, 16).

consultation languages, which the national courts would be required to consult in addition to their own national language. Mandatory consultation of the three language versions would apply at all times, not just in "cases of doubt". Moreover, the consultation languages would not be decisive when reconciling divergences but would carry the same weight as the national language, thus respecting the same-weight requirement of the current multilingual policy (2011: 157).

Derlén concedes that his proposal would elevate English and French to a privileged position; however, as he points out, these languages already enjoy a special position, which is *de facto* recognized by the national courts. Emphasizing the assets of multilingual interpretation, Derlén is optimistic that using English and French as mandatory consultation languages would contribute to a "truly multilingual Union", considerably improving the chances of achieving uniform interpretation and application of EU law in the Member States. To counter criticism that introducing two mandatory consultation languages would be too difficult and/or too burdensome for the national courts, Derlén reminds potential critics that settled case-law requires judges to consult all language versions and that the Commission is empowered to bring an enforcement action against a Member State whose courts do not comply with the Court's case-law (2011: 157, n. 44). Stressing the advantages of multilingual interpretation, he concludes that comparing three language versions is better than no comparison at all (2011: 161-164).

5.4 Evaluation of the proposals

From the legal point of view, the question arises as to how radical the reform can be without causing the entire system to collapse. Above all, is it feasible and desirable to sacrifice the principle of equal authenticity? Both Schilling and Luttermann attempt to justify their respective proposals to radically reduce the number of authentic texts by reference to the language policy of the Court of Justice. As mentioned earlier, the Court's judgments are drawn up in French, translated into the language of the case (if this is not French) and then into the other official languages. Although all language versions are published, the only authentic and thus authoritative version is the judgment in the language of the case, which is usually the language of

the parties, and in preliminary rulings, the language of the referring court. In my view, the Court's restrictive regime of authenticity is justifiable because the authentic judgment has direct effect only on the parties to the case. On the contrary, EU legislation has direct effect on all Union citizens. Therefore, citizens whose language version would no longer be authentic stand to lose a lot; hence, this would entail discrimination on a huge scale.

As to the individual proposals, Schilling compares his one-authentic-text solution to international treaty law, commenting that it is common practice for countries whose languages are not official to publish their official translation of an instrument together with one of the authentic texts, thus guaranteeing accessibility of the law. Indeed, Union citizens would have access to the "real" law if they published their official translation together with the authoritative text. However, the one-authentic-text solution was abandoned in international treaty law long ago. While it can be argued that equal authenticity is only a fiction, it is firmly anchored in the EU treaties and settled case-law. Therefore, in my opinion, any attempt to repeal the equal authenticity of the language versions of EU legislation would destabilize the entire system. From this point of view, Derlén's proposal provides the only viable option as it retains the legal basis of equal authenticity. Furthermore, it preserves EU multilingualism to the greatest extent possible, changing only the requirements of the national courts when interpreting EU multilingual legislation.

Apart from the issue of equal authenticity, one could say that Luttermann's and Derlén's proposals are similar in that she proposes adopting two reference languages, he two consultation languages. However, Derlén's proposal is much more sophisticated and preserves the equal-weight requirement and the mandatory comparison rule in all cases. As for the number of consultation languages, Schilling suggests that it would be reasonable to require citizens or their counsel to consult one, two or perhaps three language versions in addition to the text in the national language. Since English is already the quasi *lingua franca* of the EU (Pozzo 2012: 185-201), it is logical that it will be one of the consultation languages, however, as Schilling concedes, not necessarily the only one. If two other language versions are to be consulted, the question is which two. In light of the historical role of

French in the European Communities and its significance in the EU institutions today, in my opinion, French is the obvious second language. For almost 50 years French was the main drafting language and still is one of the drafting languages, although English is the base text in most new legislation. Moreover, French is the sole working language of the Court of Justice and one of the working languages of all EU institutions involved in the lawmaking process.

While Derlén's proposal is acceptable from the legal point of view, it is questionable whether EU politicians are ready for such a reform. From the procedural standpoint, any change in the Union's present policy of multilingualism would require unanimous approval by the Council. Needless to say, achieving political consensus on such a sensitive issue as EU multilingualism would be a difficult, if not impossible task. But is there another alternative to save the system?

6 Future of EU multilingualism

Before endorsing the proposed reform, in my opinion, it is not only advisable but also necessary to examine what is being done behind the scenes in an attempt to preserve the current status of EU multilingualism. Since legal uncertainty is attributed largely to the imperfection of legal translation, we turn our attention first to EU translation. As mentioned in section 3.2, Kjær regards EU translation as a process involving 23 languages and 28 legal systems: EU law and the laws of the 27 Member States (2007: 80), thus making both linguistic and systemic divergences inevitable.

6.1 Attempts to preserve the status of EU multilingualism

According to Strandvik, Quality Manager at the DGT, the Commission is doing everything in its power to improve the quality of the translations (2012: 32). Some of the initiatives launched by the DGT over the past decade include the "systematic use of term bases and translation memories, elaboration of language-specific style guides, clear drafting campaigns, creation of networks to improve communication and integration between the different actors involved in the legislative process throughout the workflow, including national experts for terminological queries, etc." (Strandvik 2012: 32 n. 27).

Other actions include a Total Quality Management exercise and, more recently, a Programme for Quality Management in Translation: 22 Quality Actions. Nonetheless, as Strandvik admits, there is room for improvement.

As I see it, the main problem is not just the quality of the translations, but drafting quality in general. It is well known that improving the quality of the base text will in turn improve the quality of the translations. Considerable progress has already been made in this respect by broadening the role of the lawyer-linguists. As mentioned in section 3.1, lawyer-linguists from the Commission (native speakers of English or French) examine and revise the initial base text before it is sent to the translators. Lawyer-linguists of all languages participate in so-called translatability sessions to ensure that the source terms are translatable into their respective languages and make suggestions to revise the base text if necessary. Legal-linguistic revision in all institutions now includes the opportunity to revise the language of the base text as well, provided no substantive changes are made. Increasing the number of lawyer-linguists would certainly improve the reliability of all language versions, especially because the translators in the legislative institutions are mostly linguists without sufficient knowledge of law.

EU multilingual lawmaking can be successful only with team effort. Therefore, greater interaction is needed between all actors in the production process: policymakers, technical experts, legal-linguists and translators. Although the responsible policymakers and technical experts cooperate with the lawyer-linguists at all stages of the legislative process, the translators work in isolation. Since lawyer-linguists are responsible for terminological consistency within their own language version and across languages, interaction between lawyer-linguists and translators would bring valuable insight to both sides, reducing the risk of significant divergences between the various language versions. Furthermore, it would be helpful to require the so-called lead translator[27] to attend the pre-translation strategic meetings

[27] The lead translator's responsibilities are mentioned in sub-action 5.2 of the DGT's Programme for Quality Management in Translation, http://ec.europa.eu/dgs/translation/publications/studies/quality_management_translation_en.pdf (2009: 13).

organized by the DG responsible for the particular instrument. This would enable her/him to gain a greater understanding of the key concepts and potential pitfalls, including any intentional ambiguities, which must remain in tact in all language versions. Sharing this information with all translation teams assigned to the project would certainly enhance reliability. Moreover, greater interaction is needed between the 23 Translation Units of the DGT to encourage translators to take account of the multilingual aspects of the translation operations and to consult several language versions.

6.2 Greater harmonization of national laws

While such programmes and actions will help improve the quality and thus reliability of all language versions, a more sweeping reform is needed on several fronts in a final attempt to save EU multilingualism. With the aim of improving the drafting quality of EU multilingual legislation, basic drafting guidelines were set forth in the Joint Practical Guide,[28] which was adopted by the three legislative institutions back in 2003. Based on the Swiss drafting tradition, the guidelines are instrumental for developing drafting practices that respect multilingualism and multiculturalism. For instance, guideline 1 calls for the base text to be drafted in "clear, precise and simple language", taking account of the fact that it "must fit into a system which is not only complex, but also multicultural and multilingual" (point 1.2.1). As set forth in guideline 4, "Targeted emphasis on simplification plays a central role in respecting multilingualism." Guideline 5 advises drafters to avoid technical terms of national law as a means of enhancing the translatability of the base text (see comments in Šarčević 2007: 42-51). To what extent these drafting principles are implemented in practice is another matter.

The best example is probably the Principles, Definitions and Model Rules of European Private Law, better known as the Draft Common Frame of Reference (DCFR),[29] which was prepared mainly

[28] Joint Practical Guide of the European Parliament, the Council and the Commission (for persons involved in the drafting of legislation within the Community institutions), at http://eur-lex.europa.eu/en /techleg/pdf/en.pdf.

[29] Published by Sellier Publishers in 2009, the full edition of the DCFR consists of five volumes containing ten Books of model rules regulating the entire life of a contract and specific contracts but also *negotiorum gestio*, torts and unjust enrichment. A terminology list with

by academics of the Study Group on a European Civil Code and the Research Group on EC Private Law. Written in neutral English, the DCFR is formulated in a meta-language intentionally detached from national legal languages, laws and cultures to the greatest extent possible. Conscious efforts were made by the drafters to use the above drafting principles. First, they consistently avoided technical terms, choosing neutral terms, which are easily translatable and understood across most legal systems. Secondly, they use simple, clear and direct sentence structures with the aim of avoiding any inaccuracies, approximations or real mistranslations in one or more of the other languages (see Šarčević 2010: 34-40). While the drafters have succeeded in producing a base text that is transparent and translatable, their greatest achievement is undoubtedly their pioneer efforts to create a uniform terminology in a number of areas of European private law by attempting to create uniform concepts which will guarantee legal certainty in cross-border transactions. In my opinion, this is where the heart of the problem lies and holds the key for preventing (or greatly reducing) not only linguistic but also systemic divergences between the various language versions of EU legislation.

Accordingly, greater harmonization of national laws is needed to bring about the convergence of the national legal systems and the development of autonomous EU concepts which would be understood in all official languages and implemented uniformly in the national legal systems of the Member States. From the standpoint of translation, this would bring us closer to De Groot's view of EU translation (1999: 14) as translation within one legal system with an autonomous conceptual system (section 3.2). This, indeed, would be the ideal situation, but it would require an autonomous conceptual system in all areas of law and the existence of a European legal culture (on a European legal culture, see Hesselink 2009: 1-6; Hesselink 2002: 11-71). While Euroskeptics view this as a vision that cannot be achieved in reality (Legrand 1996: 61-62), optimists regard it as a commitment that could be achieved with greater harmonization (e.g., Ajani and Rossi

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definitions is also included, as well as notes and scholarly comments. Its predecessor, the outline edition of the DCFR is available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

2006: 83-84). This, of course, would require dedicated work by many future generations.

6.3 The final test

As for now, EU politicians are testing whether the Member States are ready and willing to move forward in this direction. In the interest of providing greater legal certainty to consumers and traders in cross-border transactions, the Commission proposed a Regulation on a Common European Sales Law (CESL),[30] which is based on the DCFR. Although the CESL would be an opt-in instrument providing a "neutral modern contract law regime" which would co-exist in each national legal system with the existing national contract law, it is the first attempt to create uniform rules of a European contract law that would be applicable in all Member States. Since traders and consumers will be encouraged to choose this optional instrument only if their rights, obligations and remedies are clearly spelled out and predictable in all language versions, legal certainty will be instrumental in determining the success or failure of the CESL. For this and other reasons, the CESL is the first EU legal instrument to be drafted in plain language. This is a significant step forward and could also be crucial for determining the future of EU multilingualism. If the combined efforts of maximum harmonization, strict adherence to the drafting principles in the Joint Practical Guide and the use of plain language significantly improve the reliability of all language versions of the CESL, then this model could provide the key to averting the reform of EU multilingualism. On the other hand, failure of the CESL to provide a sufficient degree of legal certainty to individuals would indicate that the time has come to act on Derlén's proposal of limited multilingualism.

[30] COM(2011)635 final, 2011/0284 (COD), Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law SEC(2011)1165 final and SEC(2011)1166 final.

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