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Multilingualism in the EU: a Necessary Evil?

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Les llengües de treball son castellà, català, anglès i francès

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Les lenguas de trabajo son catalán, castellano, inglés y francés

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Langues de travail: catalan, castillan, anglais et français

MULTILINGUALISM IN THE EU: A NECESSARY EVIL?

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Edició 2011-2012

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ABSTRACT:

The aim of this research study is to analyse multilingualism in the EU from an interdisciplinary perspective between translation and EU law. The EU as a multilingual legal system will be examined, focusing on the legal and political reasons behind the current language regime. This paper also aims at elucidating the effects that linguistic diversity has on the interpretation of EU legislation. There are twenty-three official languages and EU texts published in the different languages are equally authentic (Article 55 TFEU). But do rules carry the same legal implication in more than one language?

RESUM:

Aquest treball té com a objectiu analitzar el multilingüisme a la Unió europea des d'una perspectiva interdisciplinària entre traducció i dret de la Unió europea. Aquest article estudia la Unió com a un sistema multilingüe, amb especial èmfasi en les raons jurídiques i polítiques darrera l'actual règim lingüístic. També s'intentarà examinar els efectes que la diversitat lingüística té en la interpretació de la legislació europea. Hi han vint i tres llengües oficials i els textos publicats en les diferents llengües son igualment autèntics (Article 55 TFUE). Però les regles poden tenir la mateixa implicació jurídica en mes d'una llengua?

KEYWORDS: translation, multilingualism, linguistic diversity, interpretation of EU law, linguistic divergences.

Traducció, multilingüisme, diversitat lingüística, interpretació de la legislació de la UE, divergències lingüístiques.

ÍNDICE

“Multilingualism is in the genetic code of the Union” -

Leonard ORBAN, Speech/07/10

INTRODUCTION

The European Union is a unique endeavour, consisting in the integration by peaceful means of a group of States which are willing to render part of their sovereignty to a supranational entity. The uniqueness of the EU lies in its specific legal nature since it is not just a cooperative body; it is a union with power to legislate within the framework of the competences conferred by the Member States (Article 5 TEU). Most of its legislation is directly applicable and binding in every Member State[1]. In addition, individuals can, under the principle of direct effect, invoke a provision of the EU before a national court. Not only can treaties, regulations and decisions produce direct effect but directives also can, under special requirements.[2] Therefore, unlike other international organisations, the EU addresses States and also individuals, i.e. natural persons or legal entities in the Member States (Berteloot 2001:2).

The fact that EU law produces rights and obligations for individuals justifies the rendering of its texts in all its official languages. It is necessary for citizens to have access to EU legislation in their own languages (Dengler 2010:97; Felici 2010:95; Wagner 2001:67). "Multilingualism in the law can be effective only if the legal subjects affected by a given legal instrument are guaranteed equality before the law in all language versions" (Šarčević 2010:23).

Therefore, translation plays a fundamental role in the EU. Over time, translation services have adapted to face the challenges of translating in an enlarged Union from the original six to its current twenty-seven Member States. However, despite the crucial importance of translation, the term "language version" instead of "translation" is used, because in the EU texts in different languages are equally authentic (Article 55 TFEU). "Translation is a 'means' without 'status', whose existence is nowhere mentioned" (Felici 2010: 95). But is it possible to have twenty-three "authentic" versions? Can rules carry identical normative implications in twenty-three languages?

It is sometimes inevitable that linguistic divergences emerge among the different versions of multilingual texts (Kuner 1991:958) because each language shapes the world in a different way and each country has a different legal system. In cases of doubt, the Court of Justice of the EU is responsible for interpreting EU law (Article 267

[1] For legal acts of the EU, see Article 288 TFEU
[2] See Case 41/74 *Yvonne van Duyn v. Home Office* [1974] E.C.R. 1337.

TFEU) based on the premise that no language version prevails over others and that it is necessary to interpret them uniformly, i.e., in the light of the versions existing in other languages.[3]

The Court clearly expressed that "the different language versions of a Community text must be given a uniform interpretation and hence, in case of divergence between the versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part".[4] In addition, "the real intention of its author and the aim he seeks to achieve" must also be taken into account.[5] In this way, the Court ensures uniform interpretation of EU law because all versions constitute the same legal instrument.

The initiative for this research started after studying Translation and Interpretation at the Universitat Pompeu Fabra, and completing my double master's degree in EU Integration (Universitat Autònoma de Barcelona) and European Law: Area of Freedom, Security and Justice (Université Toulouse Capitole). The need to carry out interdisciplinary research grew as it became increasingly obvious that law is at the core of legal translation and, at the same time, law is a matter of legal language (Prieto Ramos 2009). Multilingualism is a transversal issue that has a profound impact on the lives of European citizens. Subtleties of language can result in complicated legal issues. Expressing the same reality in different languages is therefore crucial for the implementation of EU policies and the enforcement of EU legislation.

Methodology

This study will have two parts. First, the language regime will be explained and I will then focus on multilingualism and the rationale behind it. For that purpose, the principles of direct effect, the supremacy of EU law and legal certainty will be examined. Case law from the Court of Justice of the European Union will be of great importance since these principles have been developed over the years and by means of the different judgements of the Court. The debate around the sustainability of the current language regime will also be considered, including the diverging opinions for and against it.

[3] See Case 19/67 *van der Vecht* [1967] E.C.R. 345.
[4] Case 30/77 *Régina v Pierre Bouchereau* [1977*]* E.C.R. 1999, para 14.
[5] Case 29/69 *Stauder v. City of Ulm* [1969] E.C.R. 41.

Secondly, the study will then centre on how this multilingual EU system affects the interpretation of EU law, since the texts in the twenty-three official languages are equally authentic. Can rules carry the same legal implication in more than one language? It is believed that linguistic divergences are inevitable because of the nature of each language. This second part will include some practical examples of linguistic divergences between versions of EU texts. The way in which the Court of Justice of the EU reconciles the texts will also be examined.

OBJECT OF STUDY

The EU constitutes a legal order with its own features, its own personality and its own legal capacity.[6] Therefore, legal translators in this context do not really mediate between two legal systems, although they do mediate between two languages. This does not mean that translating in the EU context is easy; translators face other kinds of problems (Kjær 1999: 66) and other factors come into play in the translation of legal texts (Šarčević 2010:19).

Despite translating within the same legal system, it must be taken into consideration that the EU legal order is composed of twenty-seven Member States, each with its own legal system, and this poses a challenge for translators. EU texts follow certain formalisms and a standardised legal terminology. In fact, the Court of Justice of the EU has stated that "legal concepts do not necessarily have the same meaning in community law and in the law of the various member states".[7]

This project is framed within the scope of Legal Translation and Supranational Law studied from an interdisciplinary perspective. More specifically, this research deals with instrumental translation as defined by Nord (1991:72): "an instrumental translation can have the same or a similar or analogous function as the ST [source text]". Translators working in the EU multilingual context elaborate texts that will be equally authentic and will become part of a legal instrument. The translator then assumes the role of a text producer of binding rules in the target language (Šarčević 1997 and 2010; Felici

[6] Case 6/64 *Flaminio Costa v. ENEL* [1964] E.C.R. 585 states: "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves".

[7] Case 283/81 *CILFIT v. Ministry of Health* [1982] E.C.R. 3415, para. 19.

2010:98; Prieto Ramos 2011b:204). In other words, translators are expected to produce texts that are equal in legal effect.

HYPOTHESIS

My main hypotheses are as follows:

- Multilingualism in law can be effective only if the legal subjects affected by a given legal instrument are guaranteed equality before the law in all language versions.
- There are some areas of conflict between multilingualism and legal certainty. On the one hand, as a result of the direct applicability of EU regulations in the Member States and the doctrine of direct effect, individuals can derive rights from EU legislation directly while it can also directly impose obligations upon them. Legal certainty is ensured by the publication of legislation in all the language versions. On the other hand, translation that is not absolutely reliable poses a threat to the uniform interpretation and application of EU law, decreasing legal certainty.
- The Court of Justice of the European Union plays a crucial role in having the last word on the interpretation of EU law (Article 267 TFEU). Although exact equivalence in all language versions is difficult to attain, the Court has resorted to different criteria to reconcile diverging language versions and to assure uniform interpretation of EU law.

PART I: MULTILINGUALISM IN THE EU

1. THE ORIGINS

The European Union is a unique phenomenon. Such a close integration of a group of countries by peaceful means has not happened anywhere else in the world. This uniqueness has implications that are important when thinking about the EU of today. Nowadays, the EU has twenty-seven Member States and twenty-three official languages. Multilingualism is a defining feature of the EU and we must first understand its historical origins.

After the Second World War Europe lay in ruins, the economic and humanitarian situation was dire and hunger was widespread. Most European nations were either struggling to re-establish their governments and economies or were under direct military occupation (Baldwin and Wyplosz 2004: 5).

It was in this context that French leaders saw Franco-German integration as a way to become allies rather than military adversaries. The big step, though, came only in 1952 with the implementation of the Schuman Plan inspired by the "father of European integration", Jean Monnet, but promoted by French foreign minister, Robert Schuman. He proposed that France and Germany should place their coal and steel sectors under the control of a supranational authority. Belgium, Luxembourg, the Netherlands and Italy joined the European Coal and Steel Community (ECSC).

Some years later, the foreign ministers of the six members met in Messina to plan further integration, leading to the signing of two treaties of Rome in 1957: The European Atomic Energy Community (Euratom) and the European Economic Community (EEC). The EEC treaty committed the six to extraordinarily deep economic integration: in addition to forming a customs union, it promised free labour mobility, capital market integration and a range of common policies. The treaty also set up a series of supranational institutions such as the European Parliamentary Assembly (which became the European Parliament) and the European Court of Justice. (*ibid:* 11).

It can be seen that at the beginning the integration was primarily an economic and political question. Linguistic integration was not a priority during the first stage; in fact, the ECSC treaty was drawn up only in French. However, the Treaties of Rome were drawn up in Dutch, French, German and Italian. At this stage of the integration process, the founding members considered how important it was that all languages be on equal

footing. If one or two languages had been chosen, the other countries would have felt badly represented, paving the way to further conflict. Since the philosophy behind the integration process was to stop confrontations among the peoples of Europe, the six nations did not hesitate before multilingualism. They consciously opted for preserving linguistic diversity in the belief that integration would be achieved as long as this diversity was respected. Member States gave up part of their sovereignty but kept this defining feature: linguistic diversity.

2. LEGAL BASES

The discussions about the language regime started at the beginning of 1958 in the Committee of Permanent Representatives. On 15th April 1958, the Councils of the EEC and the Euratom passed Regulation No. 1 determining the languages to be used by both Communities (Commission 2009:11). Negotiations were carried out in French and a group of expert linguists were in charge of the German, Italian and Dutch version of the Regulation.[8] This regulation has been amended after each enlargement, incorporating the new official languages up to the current number of 23 (subject to increase depending on the next accessions.[9] This regulation refers to written use of languages. No mention is made of oral communication.

Article 1 of the regulation mentions "the official languages and the working languages of the institutions". It makes no distinction between them. In addition, Article 4 envisages that "regulations and other documents of general application shall be drafted in the four official languages." Therefore, when dealing with binding texts no text can prevail over another one and all language versions are authentic.

Moreover, what is very important from this regulation is that Article 6 gives EU institutions some freedom as to the applicability of this language regime: "The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases."

[8] EEC Council: Regulation No. 1 determining the languages to be used by the European Economic Community**,** Official Journal 017 , 06/10/1958 p. 0385 – 0386.
[9] For acceding and candidate countries see: http://goo.gl/oepDU

Since the Treaty of Lisbon there are seven EU institutions and each of them has applied the language regime differently.

3. EU INSTITUTIONS

3.1. European Parliament (EP)

The EP is elected directly by EU citizens every five years; therefore, members of the European Parliament (MEPs) represent the people. The Parliament is one of the EU's main law-making institutions, along with the Council of the European Union ('the Council').

As the most democratic institution, the EP firmly defends multilingualism. It has reaffirmed "its commitment to the equality of the official languages and the working languages of all the countries of the Union" [10] and considers it a cornerstone of the concept of a European Union, of its philosophy and of the political equality of its Member States. It asserts that different languages are one of the characteristics of European civilization and culture and an important aspect of Europe's diversity and cultural wealth.

The EP has also opposed any attempt to discriminate between the official and the working languages of the European Union and urges that citizens use their own language, both orally and in writing, in their communication with all European institutions.

It has adopted its own Rules of Procedure[11] pursuant to Article 232 (TFEU). One article is devoted to the question of languages:

> Rule 146: Languages
>
> 1. All documents of Parliament shall be drawn up in the official languages.
>
> 2. All Members shall have the right to speak in Parliament in the official language of their choice. Speeches delivered in one of the official languages shall be simultaneously interpreted into the other official languages and into any other language the Bureau may consider necessary.

[10] European Parliament, Resolution on the use of the official languages in the institutions of the European Union**,** 20/02/1995, C 043, p. 0091, Article 1.
[11] Rules of Procedure of the European Parliament, 7th parliamentary term, July 2012.

> 3. Interpretation shall be provided in committee and delegation meetings from and into the official languages used and requested by the members and substitutes of that committee or delegation.
>
> 4. At committee and delegation meetings away from the usual places of work interpretation shall be provided from and into the languages of those members who have confirmed that they will attend the meeting. These arrangements may exceptionally be made more flexible where the members of the committee or delegation so agree. In the event of disagreement, the Bureau shall decide.

The Parliament considers the possibility of having discrepancies between the different language versions and states that if after the result of a vote it is announced that there are discrepancies, "the President decides whether the result announced is valid pursuant to Rule 171.5. If he declares the result valid, he must decide which version is to be regarded as having been adopted. However, the original version cannot be taken as the official text as a general rule, since a situation may arise in which all the other languages differ from the original text."

Rule 147.1 envisages that in case interpreters or translators for an official language are not available in sufficient numbers derogations from rule 146 shall be permissible.

The Parliament, in its resolution of 14 May 2003 on its 2004 estimates, stated its intention to develop the concept of 'controlled multilingualism' and called on the Bureau to submit practical proposals concerning a more effective use of resources, whilst maintaining equality among languages.[12]

3.1.1. Controlled full multilingualism

The linguistic services offered by the European Parliament are managed according to the principles of "controlled full multilingualism". Members have the right to use the official language of their choice, pursuant to Parliament's Rules of Procedure. The Code of Conduct makes it clear that resources to be devoted to multilingualism shall be controlled by means of management on the basis of users' real needs, a measure to make users more aware of their responsibilities and to allow for more effective planning

[12] Code of Conduct on multilingualism adopted by the Bureau, November 2008.

of requests for language facilities.[13] Article 1 (5) provides that the services will be provided according to the needs:

> The management of language resources shall be based on a system providing for the exchange of information between users and the language services. Users shall determine and update their language needs by means of an 'interpretation language profile' and quarterly forecasts of translation requirements designed to facilitate medium- and long-term management of language resources. Users shall notify the language services of their real needs by the deadlines laid down in this Code of Conduct. The language services shall inform users of any shortage of resources.

Another measure is that texts submitted for translation have maximum lengths (Article 14 of the Code of Conduct).

3.2. European Council

European Council meetings are essentially summits where EU leaders meet to decide on broad political priorities and major initiatives. Typically there are around four meetings a year chaired by a permanent president. The European Council brings together the heads of state or government of every EU country, the Commission president and the European Council president, who chairs the meetings. The EU's High Representative for Foreign Affairs and Security Policy also attends.

The Treaty of Lisbon transformed the European Council into an institution of the European Union and it should therefore adopt its Rules of Procedure.[14]

As happens in the case of the Parliament, the European Council deliberates and takes decisions only on the basis of documents and drafts drawn up in the languages provided for by the language rules in force.[15] In addition, "any member of the European Council may oppose discussion where the texts of any proposed amendments are not drawn up in the languages referred to in paragraph 1 as he or she may specify".[16]

[13] *Ibid*. Article 1.2.
[14] European Council Decision adopting its Rules of Procedure, December 2009.
[15] *Ibid*, Article 9.1.
[16] *Ibid*, Article 9.2.

3.3. Council of the European Union

The Council, jointly with the European Parliament, exercises legislative and budgetary functions. It carries out policy-making and has coordinating functions as laid down in the treaties (Art. 16 TEU).There are no fixed members as such. At each Council meeting, each country sends the minister for the policy field being discussed, e.g. the environment minister for a meeting dealing with environmental matters.

Article 14 of the Council Decision adopting the Council's Rules of Procedure[17]states that:

> 1. Except as otherwise decided unanimously by the Council on grounds of urgency, the Council shall deliberate and take decisions only on the basis of documents and drafts drawn up in the languages specified in the rules in force governing languages.

That means that when ministers meet up, they should have the documents in language versions for the participants before the meeting. Moreover, "any member of the Council may oppose discussion if the texts of any proposed amendments are not drawn up in such of the languages referred to in paragraph 1 as he or she may specify (Article 14.2)."

However, when ministers have informal meetings they normally work with two or three languages: French, English and German, or French, German and the language of the country that has the presidency this term (Siguán 2004:6).

At a lower level, the Committee of Permanent Representatives (COREPER), which is responsible for preparing the work of the Council (Article 16.7 TEU), normally works in German, English and French (Fenet 2001:247).

3.4. European Commission

The European Commission is the body that proposes legislation, implements EU policy and the budget, and makes sure the treaties are properly applied; it shares executive powers with the Council of the EU.[18] It is composed of 27 commissioners (subject to change in 2014)[19] chosen on the ground of their general competence and European

[17] Council Decision adopting the Council's Rules of Procedure, 11.12.2009, L 325/35.
[18] European Commission, Rules of Procedure, 8.12.2000, L 308/26.
[19] Article 17.5 TEU: 5. As of 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy,

commitment. Each commissioner is assigned responsibility for specific policy areas by the president. According to Article 249 TFEU "the Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate. It shall ensure that these rules are published." The rules consist of 29 articles and set out the institution's administrative organisation, its internal decision-making procedure, provisions for security and access to legal documents.

Article 25 establishes that "the Commission shall, as necessary, lay down rules to make these Rules of Procedure effective. The Commission may adopt supplementary measures relating to the functioning of the Commission and of its departments which shall be annexed to these Rules of Procedure." That means that the language choice may vary according to the situation.

English, French and German are the main working languages[20] of the European Commission (even if German is used far less than the other two) (Gazzola 2006:5).

3.5. Court of Justice of the European Union

Regulation 1/58 establishes that the Court has a specific language regime: "The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure."

Chapter 6 of the Rules of Procedure[21] (art. 29-31) is devoted to the language regime. First of all it is necessary to distinguish between working language and the language of a case. The working language is French and this is the language used by the members of the Court and the rest of personnel in their internal communications. The consequence is that procedural documents written in a language other than French are all translated into French for internal work purposes.

The language of a case is the one used in the written and oral pleadings of the parties and in supporting documents as well as in the minutes and decisions of the Court (Article 29.3). Any supporting documents expressed in another language must be accompanied by a translation into the language of the case.

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corresponding to two thirds of the total number of Member States, unless the European Council acting unanimously decides to alter this number.

[20] The webpage on traineeship establishes that "the working languages of the European Commission are English, French and German." http://goo.gl/GN8yO

[21] Court of Justice of the European Union, consolidated version of the Rules of Procedure, 2.7.2010. C177/1.

The language of a case shall be chosen by the applicant, except:

> (a) where the defendant is a Member State or a natural or legal person having the nationality of a Member State, the language of the case shall be the official language of that State; where that State has more than one official language, the applicant may choose between them
>
> (b) at the joint request of the parties, the use of another language mentioned in paragraph 1 for all or part of the proceedings may be authorised
>
> (c) at the request of one of the parties and after the opposite party and the Advocate General have been heard, the use of another language mentioned in paragraph 1 as the language of the case for all or part of the proceedings may be authorised by way of derogation from subparagraphs (a) and (b); such a request may not be submitted by an institution of the European Communities.

The language of the case is the only authentic version (Milian i Massana 1995:494). Subsequently, the judgement is translated into the other official languages. For preliminary rulings, the language shall be the one of the organ that poses the question to the Court.

3.6. European Central Bank

The European Central Bank (ECB, based in Frankfurt, Germany) manages the euro and safeguards price stability in the EU. The ECB is also responsible for framing and implementing the EU's economic and monetary policy.

The ECB has also become an institution since the Treaty of Lisbon. It also adopted its Rules of Procedure[22] and the language question is mentioned in Article 17. Multilingualism is ensured by publication of the documents in all language versions:

> "[…] any ECB guideline that is to be officially published shall be translated into the official languages of the European Communities" (Article 17.2.).
>
> "[…] any ECB instruction that is to be officially published shall be translated into the official languages of the European Communities". (Article 17.6.)

Moreover, Article 17.7 states that the Executive Board shall take steps to ensure the publication in the case of ECB regulations, ECB opinions on draft Community

[22] European Central Bank Decision adopting its Rules of Procedure, 18.03.2004, L 080/33.

legislation and those ECB legal instruments whose publication has been expressly decided in all the official languages of the European Communities in the Official Journal of the European Communities.

Despite all this, the home page of the ECB is only available in English; some subsections are provided in the other official languages. A complaint was submitted to the Ombusdman[23] regarding this issue and the ECB explained that the ECB develops its "multilingual communication" taking into account the recipients of the information. The ECB communicates with the European citizens and their representatives in their own languages whilst its communication with financial markets is made in English. It seems the ECB has opted for multilingualism 'à la carte', making a distinction between the lay people and the specialists.

The ombudsman noted that the ECB has a dual structure: on the one hand, it is a specialised EU law organisation, and on the other, it is the decision-making centre of the European system of Central banks. Therefore, the Ombudsman understood that the language used by the ECB in its external contacts with the public through its website could reasonably differ depending on the nature of the information concerned.

3.7. Court of Auditors

The European Court of Auditors audits EU finances. Its role is to improve EU financial management and report on the use of public funds. It was set up in 1975 and is based in Luxembourg. Now Also an EU institution since the Treaty of Lisbon, the Court of Auditors adopted its own rules of procedure[24]. One article is devoted to the language question:

> Article 28
>
> Languages and authentication
>
> 1. The reports, opinions, observations, statements of assurance and other documents, if for publication, shall be drawn up in all the official languages.
>
> 2. The documents shall be authenticated by the apposition of the President's signature on all the language versions.

[23] Case: 1008/2006/(BB)MHZ , Opened on 07 Jun 2006 - Decision on 31 Oct 2007.
[24] Court of Auditors of the European Union, Rules of Procedure, 23.04.2010, L 103/1.

Once again, multilingualism is guaranteed by publication in all official languages. All of the documents stemming from the Treaty, in particular the Annual Report, Special Reports, Special Annual Reports, Opinions, letters from the president and observations are translated into the Union's official languages. The same is true of documents forwarded officially to the European institutions and a number of other documents such as certain competition notices, vacancy notices, Court Decisions and staff notices. The same rule also applies to documents for general circulation, such as Court brochures, documents providing information on the Court's work and documents for internal use and circulation to the national audit institutions, such as the Audit Manual. The related translation work is entrusted to the Court's Translation Directorate, which consists of one language unit for each official language.[25]

However, for internal purposes (Court, Chamber and Administrative Committee meetings), the European Court of Auditors has adopted "limited multilingualism" as a solution, i.e., using two key/drafting languages: English and French.

4. OTHER BODIES

Article 6 of Regulation 1/58 applies to the institutions. “The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases”. Therefore, other bodies and agencies are not subject to it.

4.1. European Economic and Social Committee (EESC)

The EESC contributes to strengthening the democratic legitimacy and effectiveness of the European Union by enabling civil society organisations from the Member States to express their views at the European level.

On 14 July 2009, the European Economic and Social Committee, acting under Rule 29(a) of Implementing Provisions of the Rules of Procedure, decided to draw up an additional Opinion[26]on the EU's multilingualism policy. It stated that the multilingualism policy is part of the EESC's political priorities since it helps improve

[25] See The European Court of Auditors' language policy: http://goo.gl/pUaqh
[26] European Economic and Social Committee, Opinion on ‘The EU’s multilingualism policy’ (additional opinion), 15.2.2011, C 48/102.

the economy's competitiveness, achieve the Lisbon strategy goals and strengthen European integration through intercultural dialogue ('unity in diversity').[27]

Rule 30 of its Rules of Procedure[28] mentions that "the number of meetings and working languages shall be decided by the bureau." Moreover, Rule 64. 3. guarantees that "any citizen of the European Union may write to the Committee in one of the official languages and receive a reply written in the same language (in accordance with the fourth paragraph of Article 24 of the Treaty on the Functioning of the European Union).

The main working languages of the EESC are English, French and German.[29]

4.2. Committee of the Regions (CoR)

The Committee of the Regions is also a consultative body of the EU established by the Treaty of Maastricht. It is made up of 350 members and an equal number of alternate members appointed for 5 years. The ommittee must be consulted as part of the European decision-making process in the following areas: economic and social cohesion, trans-European infrastructure networks, health, education and culture, employment policy, social policy, the environment, vocational training and transport.

Its Rules of Procedure[30] devotes one article to interpreting matters:

> USE OF LANGUAGES
>
> Rule 76 — Interpreting arrangements
>
> The following principles shall as far as possible be observed in relation to interpreting arrangements:
>
> (a) The Committee's debates shall be accessible in the official languages unless the Bureau decides otherwise.
>
> (b) All members shall have the right to address the plenary session in whichever official language they choose.
>
> Statements in one of the official languages shall be interpreted into the other official languages and any other language the Bureau considers necessary.

[27] *Ibid*, Article 1.2.
[28] European Economic and Social Committee, Rules of Procedure, version adopted by the assembly July 14, 2010.
[29] See the requirements for job applications: http://goo.gl/05KZQ
[30] Committee of the Regions, Rules of Procedure, 9.1.2010, L 6/14.

> (c) At Bureau, commission and working party meetings, interpreting shall be available from and into the languages used by the members that have confirmed they will attend the meeting.

The Committee of the Regions has defended multilingualism and linguistic diversity. In fact, its Rule 28 states that the Committee adopts the motto "United in Diversity".

From its Rules of Procedure, it seems that the Committee is open to work in different languages. However, the main working languages of the Committee of the Regions are English and French.[31]

National delegations permit each individual member to receive information and assistance in his/her official language (Rule 8.2). As far as the agenda is concerned, Rule 15 establishes that "the draft agenda accompanied by all the documents requiring a decision listed therein shall be emailed by the president to the members and alternates in each respective official language at least 20 working days before the opening of the plenary session. Documents shall also be made accessible electronically at the same time".

4.3. Ombudsman

The European Ombudsman investigates complaints about maladministration in the institutions and bodies of the European Union.

If one is a citizen of a Member State of the Union or resides in a Member State, one can make a complaint to the European Ombudsman. Businesses, associations and other bodies with a registered office in the Union may also complain to the Ombudsman.

Implementing provisions:

> Article 15: Languages
>
> 15.1. A complaint may be submitted to the Ombudsman in any of the Treaty languages. The Ombudsman is not required to deal with complaints submitted in other languages.
>
> 15.2. The language of proceedings conducted by the Ombudsman is one of the Treaty languages; in the case of a complaint, the language in which it is written.

[31] See the requirements for job applications: http://goo.gl/uskcB

> 15.3. The Ombudsman determines which documents are to be drawn up in the language of the proceedings.[32]

The main working languages of the European Ombudsman's office are English and French.[33]

4.4. Office for Harmonisation in the Internal Market (OHIM)

Ensuring equality of languages in the Office for Harmonisation in the Internal Market has been a controversial issue.

Article 115 of Council Regulation (EC) No. 40/94[34] provides that "the application for a Community trade mark shall be filed in one of the official languages of the European Community" (Art. 115.1). Nevertheless, the languages of the office are not all the languages but just English, French, German, Italian and Spanish. In addition, "the applicant must indicate a second language which shall be a language of the office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings" (Art. 115.3). If the application is not in a "language of the Office", it is translated into the second language indicated by the applicant and the Office may issue written communications in the second language even if that is not the language of the application.

The legality of this provision was at the heart of the *Kik* case[35]. A Dutch applicant had indicated Dutch as the second language for the proceedings, though it was not a language of the office. The Office rejected the application for a trade mark and the applicant thought that the decision and the decision and the legal provision it was based on infringed on the equality of official languages and that this affected her position in the market as compared with those agents who could run the whole procedure in their mother tongue. Therefore, she contested the decision at the Court of First Instance of the EU and then appealed at the Court of Justice.

The Courts dismissed the arguments of the applicant and considered them unfounded. The Court of Justice declared that although the Treaty of Rome had several references to the use of various languages, these "cannot be regarded as evidencing a general

[32] European Ombudsman, Implementing provisions: http://goo.gl/0j5Cp
[33] See requirements to apply for a traineeship: http://goo.gl/ZjdBS
[34] Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark, 14.01.94, No. L 11/01, Article 115.
[35] Case T-120/99, *Christina Kik v Office for Harmonisation in the Internal Market* [2001] E.C.R. II 2235, and C-361/01 P *Christina Kik v Office for Harmonisation in the Internal Market* [2003] E.C.R. I 8283.

principle of Community law that confers a right of every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances".[36] Furthermore, Article 6 of Regulation 1/58 applies to the institutions and the OHIM is not an institution.

The importance of the *Kik* judgements is that the idea of a constitutional principle of language equality was disregarded; thereby, differentiated language regimes are created for the various EU agencies though not for the institutions.

The official and working languages in the EU institutions and other bodies can be summarized as follows:

EU INSTITUTIONS	**Official languages**	**Main working languages**
European Parliament	All 23 official languages (Article 6 Regulation 1/58)	All 23 official languages
European Council		All 23 official languages
Council of the European Union		All 23 official languages Informal meetings & COREPER: English, French, German
European Commission		English, French, German
Court of Justice of the European Union		French
European Central Bank		English
Court of Auditors		English and French
OTHER BODIES	**Official languages**	**Main working languages**
European Economic and Social Committee	All 23 official languages	English, French, German
Committee of the Regions	All 23 official languages	English and French
Ombudsman	All 23 official languages	English and French

[36] Para. 32 of the ruling in C-361/01 P.

Office for Harmonisation in the Internal Market	English, French, German, Italian and Spanish (languages of the Office) But all 23 official languages to file application for a trade mark	English, French, German, Italian and Spanish (languages of the Office)

5. THE CONTESTED MULTILINGUAL SYSTEM IN THE EU

The sustainability of the current language regime in the EU has been challenged by some scholars. Radical views against multilingualism are, for example, those of Philippe Van Parijs (2007) and Abram de Swaan (2001, 2004, 2007). Van Parijs is very confident that we should all be using English as the *lingua franca* for the purposes of efficiency and fairness. Abram de Swaan goes beyond that and has even stated that multilingualism is a "damned nuisance"[37]and affirms that "the more languages that compete, the more English will take hold".

Let us examine some of the main arguments against multilingualism in the EU:

Language is an obstacle in the EU and communication would be better if we spoke a single language.

After the great enlargement in 2004 the language regime started to be viewed as a hindrance for the EU. "The intellectual exchange is hampered by the barriers of language and by the constraints of the national framework" (De Swaan 2007:9). This author affirms that the coexistence of all official languages is an obstacle to cultural opportunities.[38] Van Parijs, on his part, states that "we need a way of communicating directly and intensively across the borders drawn by the differences of our mother tongues, without the extremely expensive and constraining mediation of competent interpreters (Van Parijs 2004:219).

[37] http://euobserver.com/9/26742

[38] This inadequate cultural opportunity structure is coupled with a most persistent cultural obstacle structure: the coexistence of a dozen languages within the European Union. (De Swaan 2007:5)

It is commonly agreed that if we have to use a single language it would be English. "The *lingua franca* is inevitably English, as carrier of globalization, imperialism, capitalism, consumerism and commercialization" (De Swaan 2001:153). English has become the predominant medium of international communication in the EU. When mentioning globalisation, Van Parijs states that we need a single language "in particular if we do not want Europeanisation, and beyond it globalisation, to be the exclusive preserve of the wealthy and the powerful who can afford quality interpretation (2004:219).

However, at a closer analysis, these arguments seem to be unsustainable. First, the use of a single official language, most probably English, would imply moving backwards in the process of European integration. I shall analyse in section 6 that there are strong legal and political arguments that justify multilingualism. Moreover, if we do not want globalisation to be exclusively for those who can afford quality interpretation, then we should think about the cost of learning English. It could be argued that only the wealthy and the privileged can afford to learn English as a foreign language. Besides, what about those who do not have the gift of readily learning languages?[39] The only way of achieving monolingualism in the EU would be through linguistic imperialism, by imposing a single language on the peoples of Europe, which seems far-fetched.

Van Parijs reiterates that "we definitely need convergence to a single lingua franca. Those saddened by the fact that it is not the one they learned as infants will have to come to terms with it. Their narcissism should not jeopardise the satisfaction of our urgent communicative needs, in Europe and in the world" (Van Parijs 2004:224). The argument has been simplified to "come to terms with it"! He has even expressed the joy of being in a situation of monolingualism: "if a powerful language were to drive all others into gradual extinction, not only would we all enjoy the convenience of being able to use our mother tongue in all the conference rooms and hotel lobbies of the world, but incomparably more would be within our reach" (Van Parijs 2007:12). De Swaan also stated "there is no good reason why people should not switch to another, more viable language" (De Swaan 2001:188).

From these arguments we see a contradiction that is quite worrying. On the one hand, these authors endorse the use of a lingua franca but they seem not to take into account

[39] De Swaan has even recognized that "not everyone is endowed with the gift in which linguists take such pride" (2004:8)

the consequences of losing a language. By switching to a more viable language the use of other languages would be at risk. De Swaan has even recognised that the disappearance of a language "is an irreversible loss of culture. A language is a piece of cultural heritage comparable to the Egyptian pyramids or to medieval cathedrals, to African polyrhythm or European polyphony" (De Swaan 2004:3). So why would we want to put languages in danger?

Seize English!

De Swaan was involved in a debate on multilingualism in Europe and some of the arguments given in favour of a lingua franca are worth examining. He stated that we should seize the English language and dispossess the Anglo-Saxons of the monopoly od distinction:

> *De Swaan:* je rejoins là Pierre Bourdieu – s'approprient l'anglais comme langue européenne et qu'ils dépossèdent les Anglo-Saxons du monopole de la distinction, du bon et mauvais usage, de la bonne et mauvaise prononciation, comme les Indiens et les Nigérians sont finalement en train de s'approprier l'anglais dans leur propre version, au lieu d'être gênés de ne pas parler un bon anglais (Bourdieu *et al* 2001).

This argument seems to be illusory; only a tyrant can take this measure. In the debate, Claude Hagège argued against de Swaan's proposal stating it is utopian, unfair and even extremely dangerous.[40] As Flesh stated, « Si l'Europe s'uniformise sous une langue ou une culture "dominante", elle perdra son âme" (Flesh 1999: 99).

Professor Bruno de Witte makes an interesting analysis on the current linguistic situation and compares the adoption of a single language with the adoption of a single currency. He recognises the adoption of a single language would be inconceivable and states the change could take at least two generations (2004: 205-241). The adoption of a common language is implausible because each language has a history; each language shows the way in which people see the world from different perspectives. A currency is something invented, the Euro was created to have an economic and monetary union. It

[40] « Le point de vue qui a été ici développé consiste à dire qu'il nous faut précéder les anglophones, Américains comme Britanniques, en les dépossédant de leurs privilèges, de leur usage autochtone de la langue, pour devenir nous-mêmes de parfaits anglophones. Cela me paraît totalement utopique et injuste, voire extrêmement dangereux. »

is subject to the ups and downs of the global economy and its existance may be at risk, depending on the financial markets.

The cost of multilingualism

De Swaan has also stated that "one argument against the use of multiplicity of languages and in favour of a single vehicular language meets broad agreement in all multilingual constellations: the costs of translation and interpretation from and into all recognized languages are prohibitive" (De Swaan 2001:191).

Those expecting an exorbitant expenditure will be surprised by the small percentage the cost of multilingualism represents in the EU overall budget. In 1999, the Joint Interpreting and Conference Service estimated that the cost for translation and interpretation including all EU institutions was 0.8% of the total EU budget[41] (€686 million out of a total of € 85,557,748,703).[42] From this the press office of the language service of the Commission concludes that multilingualism costs each citizen of the EU just €2 per year (Kraus 2008:123). Moreover, according to one of the studies published by the European Commission in 2009, the cost of multilingualism is about 1% of the EU budget:

> Tous coûts des services linguistiques inclus. La traduction et l'interprétation coûtent environ 1 milliard d'euros par an, ce qui est moins de 1% du budget de l'EU. Pour mémoire, le budget de l'UE représente 1% du PIB agrégé des 27 Etats membres (European Commission-DGT).

Leonard Orban, former commissioner for multilingualism, declared in an interview given to EurActiv in 2008 that "if we divide [the €1.1bn] by population, we see that it is about €2.5 per citizen per year".[43]

Therefore, the cost of multilingualism turns out to be a weak argument. The European Parliament has clearly stated that "technical and budgetary arguments can in no circumstances justify a reduction in the number of languages".[44]

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[42] Source: European Commission. Joint Interpreting and Conference Service, 2001: Info/Web/Media – 6 March 2001 (internal fact sheet), cited in Kraus 2008, p.123.
[43] http://goo.gl/mgL9n
[44] Resolution on the use of the official languages in the institutions of the European Union, 20.02.1995, C 043. p. 0091.

In relation to this issue, the author Stéphane Lopez claimed that "Le coût du plurilinguisme est le pire des arguments. Chacun a compris que au global la chiffre qui passe le milliard d'euros est impressionnante mais que rapporté au nombre de citoyens, il parait comme ridicule, entre deux et trois euros par an" (2007:13).

6. THE RATIONALE BEHIND THIS MULTILINGUAL ORGANISATION

The special legal nature of the EU differentiates it from an international organisation and justifies multilingualism. The EU is not simply a cooperation body like other organisations; it has supranational competences. That means Member States have voluntarily handed over part of their sovereignty and the EU has the capacity to legislate under the principle of subsidiarity. According to Article 5 TEU, in areas which do not fall within its exclusive competence, the EU shall take action in accordance with the principle of subsidiarity only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the EU (see De Lange *et al* 2007:39).

6.1. POLITICAL REASONS

Multilingualism guarantees democratic accountability and public access to EU legislation. "Any approach that failed to respect the languages of the peoples of the union would betray the very foundations of Union philosophy" (European Commission 1999:4). As the Commission stated in one of its studies, "La diversité linguistique est mieux prise en compte au plan européen, comme base fondatrice de la démocratie et facteur d'adhésion des citoyens à la construction européenne."

The Member States are committed to the principle of democracy (Article 2 TEU and Article 9 to 12 TEU). The functioning of the Union shall be founded on representative democracy. The Union aimed at creating a more democratic process of integration, which began in the seventies when the Act of 20 September 1976[45] was passed.

European integration is based on the people's willingness and cannot be sustainable without the support of public opinion. The measure one of making each language official was a wise decision because it shows that European integration is a collective task and that each Member State can contribute to it.

[45] Act of 20 September 1976, 08.10.1976, OJEC L 278.

Member States decided to preserve linguistic diversity and many think that if they renounce their language their cultural identity is in danger. Clear examples of this tendency to preserve linguistic diversity are Austria, Malta and Ireland.

When Austria acceded the EU, it asked for the recognition of 23 Austrian terms which were set in Protocol No. 10, regarding the use of specific Austrian terms: "In the German language version of new legal acts the specific Austrian terms mentioned in the annex to this Protocol shall be added in appropriate form to the corresponding terms used in Germany".[46]

Malta opted to preserve Maltese although English is an official language there. A temporary derogation from the obligation to draft acts in Maltese and to publish them in the *Official Journal of the European Union* was adopted by the Council on 1 May 2004. This derogation was to be applied for a period of three years, extendable for one further year, to all acts with the exception of regulations adopted jointly by the European Parliament and the Council.[47] The Council decided to stop this derogation in 2007 after the first period of three years.

Ireland, for its part, fought for the recognition of Irish, although at the beginning they had renounced its official status. On 1 January 2007, Irish became a full EU official language, with a temporary derogation for a renewable period of five years[48] stating that 'the institutions of the European Union shall not be bound by the obligation to draft all acts in Irish and to publish them in that language in the *Official Journal of the European Union*', except for regulations adopted jointly by the European Parliament and the Council. This derogation has been extended for a period of five years (until 31 December 2016) by Council Regulation (EU) No 1257/2010.[49]

[46] Annex 5, Protocol no. 10 of the Treaty of Accession of Norway, Austria, Finland and Sweden to the European Union.
[47] see Council Regulation (EC) No 930/2004, 1.5.2004, L 169 , p. 1
[48] see Council Regulation (EC) No 920/2005, 18.6.2005, L 156, p. 3.
[49] Council Regulation (EU) No 1257/2010, 29.12.2010, L 343, p. 5.

6.2. LEGAL REASONS

6.2.1. Direct Effect

This principle was enshrined by the Court of Justice in the judgement *Van Gend en Loos.*[50] The case arose from the reclassification of a chemical, by the Benelux countries, into a customs category entailing higher customs charges. The broad definition derived from this judgement can be expressed as the *capacity of a provision of EU law to be invoked before a national court*. The narrower classical definition of direct effect is usually expressed in terms of the *capacity of a provision of EU law to confer rights on individuals which they may enforce before national courts* (Craig and De Búrca 2011: 182).

In *Van Gend en Loos* one of the questions posed to the Court was whether Article 12 of the EEC Treaty had direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which national courts must protect. The Court ruled that to decide whether Article 12 had direct effect it was "necessary to consider the spirit, the general scheme and the wording of those provisions". The Court examined the preamble to the Treaty which referred not only to governments but to peoples and concluded the object of the EEC treaty, which is to establish a common market, meant that this treaty did more than create mutual obligations between the contracting states. The objective of the Treaty was also confirmed by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.[51] The criteria used for interpretation were teleological, i.e., the Court took into account the purposes of the provisions and was not limited to the literal wording of Article 12 itself.

In addition, the Court considered its role to be that of securing uniform interpretation of the Treaty by national courts and tribunals under article 177 of the EEC Treaty (now 267 TFEU) and said that this confirmed that "the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals".

The Court finally stated that "the conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which

[50] Case 26/62 *Van Gend en Loos* [1963] E.C.R. 13.
[51] *Ibid*, On the substance of the case, page 12.

the states have limited their sovereign rights, albeit within limited fields, the subjects of which comprise not only member states but also their nationals". It decided that "independently of the legislation of the Member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage"[52].

The Court formulated that Article 12 met the criteria to produce direct effect since it was clear, negative, unconditional, contained no reservation on the part of the Member States, and was not dependent on any national implementing measure:

> The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.
>
> The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this article it is the Member States who are made the subject of negative obligation does not imply that their nationals cannot benefit from this obligation.

The doctrine of direct effect has been shaped by other judgements and "applies in principle to all binding EU law including the Treaties, secondary legislation, and international agreements" (Craig and de Búrca, 2011:180). Article 288 TFEU makes it clear that regulations shall have general application, are binding in their entirety and directly applicable in all Member States. Similarly, decisions shall be binding in their entirety and a decision which specifies those to whom it is addressed shall be binding only on them. However, "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

Therefore, the direct effect of directives is more controversial because they are instruments of indirect law-making. A directive represents only the first stage in a legislative operation; it does not create Community norms applicable as such but

[52] *Ibid*

imposes an obligation of result to be attained by the Member States, through amending or supplementing the relevant national provisions, in the manner appropriate to their respective legal orders (Dashwood 2006:84).

DIRECT EFFECT OF DIRECTIVES

The first case that dealt with this issue was *Van Duyn*[53] in 1974. Ms. Van Duyn, a Dutch national, had been refused entry to the United Kingdom where she was to take up a secretarial post with the Church of Scientology, whose activities were considered harmful by the British authorities. In contesting her exclusion, Ms. Van Duyn sought to rely upon a provision of the then Directive 64/221, limiting the scope of national authorities' power to restrict the free movement of workers from another Member State on public policy grounds.

The Court of Justice held that the relevant provision conferred on Ms. Van Duyn was an enforceable right. The following reasons were given by the Court for recognising that Directive 64/221 was capable of having direct effect:

> If, however, by virtue of the provisions of [Article 249] regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects.

The Court reminded that directives are binding and that "the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts". It can thus be concluded that individuals may invoke a provision of a directive before their national courts.

The Court further developed the doctrine of direct effect in *Ratti*[54]. Mr. Ratti, a manufacturer of solvents, was able to resist a criminal prosecution for not labelling his products in accordance with the applicable national standards, because he had complied with the requirements of a Community directive which Italy had failed to implement.

The development in *Ratti* was that the Court stated that "a Member State which has not adopted the implementing measures required by the directive in the prescribed periods

[53] Case 41/74 *Yvonne van Duyn v. Home Office* [1974] E.C.R. 1337.
[54] Case 148/78 *Pubblico Ministero v. Tullio Ratti* [1979] E.C.R. 1629.

may not rely, as against individuals, on its own failure to perform the obligations which the directive entails."

VERTICAL DIRECT EFFECT

The *Marshall* judgement in 1986 was also an important step with regard to the direct effect doctrine. Miss M. H. Marshall was employed by South West Hampshire Area Health Authority from June 1966 to 31 March 1980. From 23 May 1974 she worked under a contract of employment as senior dietician. On 31 March 1980, that is to say approximately four weeks after she had attained the age of 62, she was dismissed, although she had expressed her willingness to continue in the employment until she reached the age of 65. According to the order for reference, the sole reason for the dismissal was the fact that the appellant was a woman who had passed the retirement age applied by this health authority to women.

In this preliminary ruling the first question the Court was asked was whether it could be considered that the principle of equality of treatment laid down by Directive No. 76/207 had been infringed. The Court answered in the affirmative in that the cause for her dismissal constituted discrimination on grounds of sex, contrary to that directive. The second question was whether Article 5 (1) of Directive No. 76/207 may be relied upon by an individual before national courts and tribunals.

The Court stated that directives can only have vertical direct effect, i.e, in a relationship between an individual and the State, since the binding nature of a directive exists only in relation to "each Member State to which it is addressed":

> With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. It must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.[55]

[55] *Ibid*, para. 48.

Then it was concluded that the respondent, Southampton and South West Hampshire Area Health Authority (Teaching), was a public authority. The ECJ has given an expansive interpretation to the concept of the state for the purposes of vertical direct effect.

In *Faccini Dori*[56] the possibility of relying on a directive in proceedings between a trader and a consumer was discussed. The problem was that the Member State (Italy) had not taken any steps to transpose the Directive into national law, although the period set for transposition had expired. The Francovich principle was used by Ms Dori who relied on the Directive to withdraw from an English language course. The Directive allowed consumers to cancel contracts within seven days if the contract had been made away from business premises - in this case at railway station. Mss Dori could not rely on the Directive against a private body but that she should be able to gain compensation from the Italian state.

The Court repeated its ruling from *Marshall* stating that "a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual":

> The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.[57]
>
> It follows that, in the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.[58]

In *Foster*[59] the Court faced a similar situation as in *Marshall*. It restated that a Member State which has not transposed the measures provided by the directive cannot claim against the individual "its own failure to perform the obligations which the directive

[56] Case 91/92 *Faccini Dori v. Recreb* [1994] E.C.R. I-3325.
[57] *Ibid*, para. 24.
[58] *Ibid*, para. 25.
[59] Case 188/89 *Foster v. British Gas plc* [1990] E.C.R. I-3313.

entails".[60] So the State cannot take "advantage of his failure to comply with Community law". [61]

In addition, in *Foster* the notion of State was also discussed. As happened in *Marshall*, the Court adopted a wide interpretation of the notion of State for the purposes of vertical direct effect:

> Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions may be relied upon in a claim for damages against a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.[62]

"TRIANGULAR" DIRECT EFFECT

The Court of Justice of the EU has made it clear that vertical direct effect is not precluded even if the application of the directive against the Member State will have adverse consequences for the individual. This is known as the triangular situation.

The *Wells* case[63] was a clear situation in which an individual was challenging the validity of a national measure on the ground that it conflicts with an obligation imposed on the Member State concerned by a directive but the consequence of this would imply that another individual would stop enjoying a right under national law.

To be more precise, the owners of a quarry in Wales which had been dormant for many years were granted permission to recommence mining operations. Ms. Wells sought to have the permission revoked or modified on the ground that it had been given without due consideration as to whether an environmental impact assessment, as provided for by Directive 85/337.

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[60] *Ibid*, para. 16.
[61] *Ibid*, para. 17.
[62] *Ibid*, resolution of the Court.
[63] Case 201/02 *Wells v. Secretary of State for Transport, Local Government and the Regions* [2004] E.C.R. I-723.

The United Kingdom claimed that accepting that an individual is entitled to invoke an article of the directive "would amount to 'inverse direct effect' directly obliging the Member State concerned, at the request of an individual, such as Ms. Wells, to deprive another individual or individuals, such as the owners of Conygar Quarry, of their rights".[64]

The Court rejected this argument and immediately stated that "mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned". So Ms. Wells was held to be entitled to rely upon the Environmental Impact Assessment Directive, in spite of the 'adverse repercussions' that would be suffered by the quarry owners.

INDIRECT EFFECT

The Court has developed a number of "doctrinal devices" that have reduced the impact of there not being horizontal direct effect of directives (Craig and de Búrca, 2011:200).

Although the Court denied the possibility of direct horizontal effect, other ways of encouraging the effectiveness of directives were found, for instance, by developing a principle of harmonious interpretation which requires national law to be interpreted in the light of directives.

In *Von Colson*[65], the Court dealt with a directive that had been inadequately implemented and the case was brought against a state employer.

The case revolved around the interpretation of Council Directive No. 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions.

The Court did not hesitate to confirm that Member States were obliged to achieve the result envisaged by the directive in accordance with Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation. Additionally, the Court reminded that "national courts are required to

[64] *Ibid*, para. 55.
[65] Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] E.C.R. 1891.

interpret their national law in the light of the wording and the purpose of the directive".[66]

Marleasing[67] concerned a horizontal situation involving disputes between private parties before a domestic court, where the interpretation of national law in the light of an unimplemented directive would not impose a penal liability but was likely to affect its legal position in a disadvantageous way. The judgement confirmed that an unimplemented directive could be relied on to influence the interpretation of national law in a case between individuals (Craig and De Búrca 2011: 201).

So the Court of Justice emphasized the national court's duty of consistent interpretation:

> "[…] in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty[68].

All these cases of indirect effect turn out to be really important for our study since the criteria of interpretation of the Court can be elucidated. The duty of harmonious interpretation became a very important criterion of interpretation for the Court, as well as the need to interpret a provision in accordance to the general scheme and the rules of which it forms a part.

The hermeneutical principles become important not only when dealing with linguistic divergences but also when interpreting EU in general, when EU principles are defined with the case-law.

6.2.2. Supremacy of EU Law

The doctrine of supremacy of EU law had no formal basis in the Treaty, but was developed by the ECJ on the basis of its conception of the "new legal order" (Craig and de Búrca, 2011:256).

In *Van Gend en Loos* the Court stated that the Community constituted a new legal order of international law for the benefit of which the states had limited their sovereign rights

[66] *Ibid*, para 26.
[67] Case 106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] E.C.R. I-135.
[68] *Ibid*, para 8.

but the ECJ's primary focus was on direct effect. The Court firmly established the supremacy of Community law in *Costa v. ENEL*.[69]

In this case Mr. Costa, a shareholder of a private electricity company in Italy, saw himself affected by the nationalisation of the production and distribution of electric energy (the organisation ENEL was created to manage electricity). He refused to pay an electricity bill sent to him by ENEL as he objected to the nationalisation of the electricity industry. ENEL sued him; in his defence he pleaded that the nationalisation was both unconstitutional under Italian law and in breach of community law.

One of the important issues in this judgement was the interaction between national and Community law. The Court stated that where two sets of rules, national and community, can apply to a situation one must take precedence. The question was which one prevailed and who decided. The problem also arose of the effect of national laws which came into effect after the Treaty and which conflicted with it. The Court stated that the EEC Treaty had created its own legal system which became an integral part of the legal system of Member States when the Treaty came into force. The national courts were bound to enforce this legal system:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[70]

The Court considered that the law stemming from the Treaty was an independent source of law and could not, because of its special and original nature, be overridden by domestic legal provisions. To do this would be to deprive Community law of its character and call into question the legal functions of the Community. Article 177 was to be applied regardless of any domestic law.

The Court's view on the supremacy of Community law was extended in other cases such as *Internationale Handelsgeselschaft* and *Simmenthal*.

[69] Case 6/64 *Flaminio Costa v. ENEL* [1964] E.C.R. 585.
[70] *Ibid*, on the application of Article 177, page 593.

In *Internationale Handelsgeselschaft*[71] the Verwantlungsgericht Frankfurt-am-Main (administrative court) referred to the Court two questions on the validity of a system of export licenses and deposits established by a Council regulation on the common organisation of the market of cereals and a Commission regulation on import and export licenses. The referring court took the view that the contested measures were incompatible with certain fundamental principles contained in the German Constitution which had to be protected within the framework of the Community. The national provisions in dispute were adopted before the entry into force of the Treaty. Moreover, they had constitutional status. By contrast, the rules of Community law at issue were contained, not only in the Treaty itself, but in acts of the Community institutions. The Court, however, stated that Community law takes primacy over the Constitutions of member states:

> Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of community law. In fact, the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore, the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.[72]

In *Simmenthal*[73] the Court further developed its supremacy doctrine by making clear that the supremacy of EU law applied irrespective of whether the national law pre-dated or post-dated the EU law.

Simmenthal S.p.A. was a company that imported beef for human consumption from France and was charged for an inspection on imported beef. Simmenthal was of the opinion that the veterinary and public health inspections of the beef when it crossed the frontier and the fees charged for such inspections were obstacles to the free movement of goods and as such forbidden under Community law. In Simmenthal the question

[71] Case 11/70 *Internationale Handelsgesellschaft* [1970] E.C.R. 1125.
[72] Ibid para. 3.
[73] Case 106/77 *Amministrazione delle Finanze dello Stato* v. *Simmenthal* [1978] E.C.R. 629.

arose whether a national court had the power to refuse the application of conflicting provisions of national law in favour of Community law. The Court decided that every national court was obliged to apply Community law, and if necessary, to refuse the application of conflicting national law:

> This principle of the precedence of Community law does not spring from the various constitutions of the Member States, which would involve clear danger that the solutions would vary according to the wording of those constitutions, but from Community law itself. The principles of the precedence and of the direct effect of Community law imply that inconsistent national laws can *ipso jure* not be set up against it without its being necessary to await their repeal by the national legislature or their annulment by a constitutional court.
>
> Community provisions having direct effect cannot be affected by conflicting national legislative provisions, whether prior or subsequent to them.[74]

6.2.3. Legal Certainty

Legal certainty is one of a number of general principles recognised by EU law.[75] The concept is applied in a number of ways (Craig and De Búrca 2011:533).

The principle of legal certainty expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly. In *Black Clawson Ltd v. Papierwerke AG, Lord Diplock* the Court stated that the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what the legal consequences that will flow from it are. In some ways, legal certainty is even more important than equality (Tridimas 2006:242).

What does legal certainty mean in EU law?

As Craig and de Búrca point out, the concept of legal certainty is found in many legal systems, although their content may vary (2011:533). We consider it necessary to analyse it from the perspective of the EU as a multilingual legal system. In that line, Dr. Paunio considers legal certainty as a two-dimensional concept consisting of both formal (predictability) and substantive elements (acceptability) (2011:1). She explains that

[74] *Ibid*, page 638.
[75] C 453/00 Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren [2004] E.C.R. I-837, para. 24.

formal legal certainty implies that laws and adjudication in particular must be predictable: laws must satisfy requirements of clarity, stability and intelligibility so that those concerned can with relative accuracy calculate the legal consequences of their actions as well as the outcome of legal proceedings (Paunio 1995:1469). Substantive legal certainty implies that laws be accepted by the legal community in question. It is necessary to analyse whether this twofold conception of legal certainty be applied in the context of the EU. The focus of this study is on legal certainty as an underlying principle expressing the fundamental rationality of the EU legal order (*idem*: 1470). Substantive legal certainty may be enhanced by emphasizing the communicative relationship between the Court and the EU legal community. On this view, transparent argumentation is a key to a more open dialogue. In the EU legal certainty cannot be reduced to predictability. "The focus should shift to the Court's reasoning: this is essential for the acceptance of judgements through which interpretative choices are communicated to the legal community" (*idem*: 1490). Paunio proposes the conception of communicative legal certainty making emphasis on the acceptability of judicial decision-making within a particular legal community (2011:5). The argumentation of the Court must include a certain reflexivity that takes into account the differing legal cultures, traditions that underlie the pluralistic EU legal community. In this sense, the dialectical relationship between the Court and its audience constitutes a forum where different normative views meet.

Moreover, I agree with Paunio in that a new conception of legal certainty is needed in which purpose, telos, and other dynamic methods of interpretation are of particular significance for the construction of meaning in multilingual EU law (2011:3). In this respect, teleological interpretation is highly important for the Court of Justice and legal certainty can be conceptualized within the context of EU law from the point of view of the legal reasoning by the Court of Justice of the EU.

Publication of EU legislation

As a result of the direct applicability of EU regulations in the Member States and the doctrine of direct effect, individuals can derive rights from EU legislation directly while it can also directly impose obligations upon them. Legal certainty is ensured by the publication of the legislation in the Official Journal of the EU (Milian i Massana 1995:497, 2010:113).

In the *Skoma-Lux* case, which concerned the legal effect of EU legislation in the event that one of the language versions was not published in the Official Journal, the ECJ held:

> The principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies.[76]

The Court makes it clear that the principle of legal certainty requires official publication; unofficial forms of publication, for example on websites, are not sufficient. This follows inter alia from Regulation 1/58. Secondly, only if a legal instrument has been published in the official language of a Member State can it be enforced against individuals in that Member State.

7. THE PARADOX OF LEGAL CERTAINTY AND MULTILINGUALISM IN THE EU

As I have argued before, the fact that EU law produces rights and obligations for individuals justifies the rendering of the texts in all the official languages. Multilingualism in the EU is then necessary because citizens need to have access to the EU legislation in their own language (Dengler 2010:97; Felici 2010:95; Wagner 2001:67; Wouter 2010:43); otherwise, legal certainty could be at risk (Athanassiou 2006:7) because those subject to the law must know what the law is so as to be able to plan their actions accordingly (Tridimas 2006:242). In addition, the principle of linguistic equality requires texts of general applicability to be drafted and published in all official languages and gives all these texts equal status for the purpose of interpretation (Wouter 2006:43).

However, there are some areas of conflict between legal certainty and multilingualism which show that the current language regime is not perfect and a paradox comes to light regarding legal certainty. Legal certainty requires that "Community legislation must be

[76] Case 161/06 *Skoma- Lux* [2007] E.C.R. I-10841, para. 21.

clear and precise and its application foreseeable by individuals".[77] But can rules carry identical legal implication in twenty-three languages?

Exact equivalence between twenty-three language versions of a legal text is difficult to attain (Wouter 2006:43) and some degree of divergence between the language texts is inevitable (Kuner 1991:958) because each language possesses its own genius, which influences the choice of words (*ibid*: 369). Pescatore also stated that "les décalages linuistiques sont inevitable dans un processus legislative multipartite" (1984:1008). "It goes without saying that a translation that is not absolutely reliable poses a threat to the uniform interpretation and application of Community law" (Sarcervic 2001:318). We can therefore think that multilingualism adds to uncertainty in law.

In case of doubt, the Court of Justice of the EU is responsible for interpreting EU legislation (Article 267 TFEU) based on the premise that no language version prevails over the others and it is necessary to interpret them uniformly, i.e., in the light of the versions existing in the other languages.[78] In addition, "the real intention of its author and the aim he seeks to achieve" must also be taken into account.[79] In this way, the Court ensures the uniform interpretation of EU law because all versions constitute the same legal instrument.

The paradox is that if all versions form part of the same legal instrument it means individuals are bound also by a norm of which they may not know or understand the content (Van Calster 1997:365). It could then be argued that the choice to have equally authentic texts, which are actually translations, in fact increases uncertainty and diminishes legal certainty (Wouter 2006:43).

Despite these concerns about the possibility of reconciling multilingualism and legal certainty, I agree with Paunio in that the two concepts can be reconciled. The above concerns simply demonstrate that "legal certainty cannot be transposed as such into the multilingual EU legal system" (2011:5). As it was mentioned before, multilingualism forces us to look at legal certainty in new terms and move away from a more positivistic view on legal certainty which relies on language as a static basis of interpretation. In this respect, I propose to place emphasis on the acceptability of judicial decision-

[77] European Parliament, the Council and the Commission, Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation**,** 17/03/1999, C 073, p.. 0001 – 0004

[78] See Case 19/67 *van der Vecht* [1967] E.C.R. 345.

[79] Case 29/69 *Stauder v. City of Ulm* [1969] E.C.R. 41.

making (communicative legal certainty), where teleological, purpose-oriented method of interpretation is essential. With its legal reasoning the Court can then increase legal certainty.

As section 8 and 9 will explain, context will play a very important role when adjudicating. Similarly, argumentation, i.e., the method the Court uses to reconcile texts, will be crucial.

PART II: TACKLING LINGUISTIC DIVERGENCES IN EU LAW

8. UNIFORM INTERPRETATION

8.1. Comparison of the language versions: criterion of doubt?

In the case *Van der Vecht*[80] a worker was employed to work in Belgium but at that time his company was engaged in some works in the Netherlands. The company was doing some work for a German undertaking. The worker, Mr. Van der Vecht, was conveyed by bus everyday from his work in Belgium to the Netherlands. One day the bus had an accident in the territory of the Netherlands. He was seriously injured but the company did not take any action regarding the insurance in Belgium nor in the Netherlands. Mr. Van der Vecht claimed damages but it was not clear which law was applicable.

The Centrale Raad van Beroep requested a preliminary ruling and the first question concerned the interpretation of Article 12 on the point "whether a worker who is employed in the territory of a member state [Belgium] other than that in which he resides [Netherlands] and in which the undertaking which employs him is established, but who, in order to carry out his work, is conveyed daily by and at the expense of his employer between his place of residence and his place of work, is employed in the territory of the latter state within the meaning of article 12 of regulation no. 3, even during the journey to the former state and, in particular, during that part of the journey which takes place in the territory of the latter member state".[81]

The problem revolved around the interpretation of Articles 12 and 13 of Regulation No. 3 of the Council of the EEC concerning social security for migrant workers (Official Journal of 16 December 1958, p 561). By virtue of Article 12 of Regulation No. 3, a worker is subject to the social security legislation of the State in whose territory he is employed. In the wording existing prior to the introduction of Regulation No. 24/64, Article 13 (a) laid down an exception to the above rule for workers who are permanently resident in the territory of one Member State and who are employed in another Member State's territory.

[80] Case 19/67 *Soziale Verzekeringsbank v. Van Der Vecht* [1967] E.C.R. 345.
[81] *Ibid*, p. 348.

The versions read as follows:

NL

[...] Een bedrijf...waarbij zij gewoonlijk werkzaam zijn [...] (an establishment...by which they are normally employed)

FR

[...] un établissement dont il (le travailleur) relève normalement [...] (an establishment to which he (the worker) is normally attached)

IT

[...] uno stabilimento de cui i lavoratori dipendono normalmente [...] (an establishment on which workers normally depend)

DE

[...] einen Betrieb hat, dem dir Arbeitnehmer gewöhnlich angehören [...] (an establishment to which workers normally belong)

The Italian and German versions "contain comparable if not identical terms".[82] However, "if this phrase is considered only as it appears in the Dutch version, it might suggest that a worker who is engaged solely in order to work in the territory of a Member State in which he does not permanently reside and in which the undertaking which employs him is not established is not covered by Article 13 (a), with the result that the general rule laid down in Article 12 is applicable to him".[83]

The court invoked the principle of uniform interpretation stating that "the need for a uniform interpretation of Community regulations necessitates that this passage should not be considered in isolation, but that, **in cases of doubt**, it should be interpreted and applied in the light of the versions existing in the other three languages".[84]

The Court decided that "Article 13 (a) applies equally to a worker who has been engaged exclusively to work in the territory of a Member State other than that in which the establishment to which he is normally attached is situated, in so far as the probable

[82] *Ibid* p. 354
[83] *Ibid*, p. 353.
[84] *Ibid*, p. 354.

duration of his employment in the territory of that State does not exceed twelve months".[85]

Similarly, in *Konservenfabrik Lubella*[86], the Court also stated that "the need for a uniform interpretation of Community regulations makes it impossible for a given piece of legislation to be considered in isolation and requires that, **in case of doubt**, it should be interpreted and applied in the light of the versions existing in the other official languages (Case 9/79 *Koschninske* v. *Raad van Arbeid* [1979] ECR 2717, paragraph 6, and Case C-372/88 *Cricket St Thomas* v. *Milk Marketing Board of England and Wales* [1990] ECR I-1345, paragraph 19)".[87]

What is important from these judgements is the expression "**in cases of doubt**". It seems that only when there is a doubt is comparison required. Derlén calls this criterion of doubt (Derlén 2009:34).

However, in other cases, the Court does not mention the criterion of doubt. In the *Kraaijeveld*[88] case the Court reminded the obligation to compare, stating that "interpretation of a provision of Community law involves a comparison of the language versions."

In the *Ferriere*[89] case, the Court referred to *Van der Vecht* and *CILFIT* and affirmed that "Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages." The Court stated explicitly that all language versions had to be consulted even if the version at hand was clear and unambiguous in isolation. The case concerned what was then Article 85 EC (now 101 TFEU) and the question was whether the relevant agreement should have as its object and effect the restriction of competition within the Community, or if it was sufficient that either that object or effect was at hand.

[85] *Ibid.*
[86] Case 64/95 *Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v. Hauptzollamt Cottbuss* [1996] E.C.R. I-5105.
[87] *Ibid*, para. 17.
[88] Case 72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland* [1996] E.C.R. I-05403, para. 25.
[89] Case 219/95 *P Ferriere Nord vs Commission* [1997] E.C.R. I-4411.

The different versions of Article 85 EC read as follows:

IT

Sono incompatibili con il mercato comune e vietati tutti gli accordi tra imprese, tutte le decisioni di associazioni di imprese e tutte le pratiche concordate che possano pregiudicare il commercio tra Stati membri e che abbiano per oggetto **e** per effetto di impedire, restringere o falsare il gioco della concorrenza all'interno del mercato comune

EN

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object **or** effect the prevention, restriction or distortion of competition within the common market

ES

Serán incompatibles con el mercado común y quedarán prohibidos todos los acuerdos entre empresas, las decisiones de asociaciones de empresas y las prácticas concertadas que puedan afectar al comercio entre los Estados miembros y que tengan por objeto **o** efecto impedir, restringir o falsear el juego de la competencia dentro del mercado común

FR

Sont incompatibles avec le marché commun et interdits tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre États membres et qui ont pour objet **ou** pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun

DE

Mit dem Gemeinsamen Markt unvereinbar und verboten sind alle Vereinbarungen

zwischen Unternehmen, Beschlüsse von Unternehmensvereinigungen und aufeinander abgestimmte Verhaltensweisen, welche den Handel zwischen Mitgliedstaaten zu beeinträchtigen geeignet sind und eine Verhinderung, Einschränkung **oder** Verfälschung des Wettbewerbs innerhalb des Gemeinsamen Marktes

The Italian language version seemed to suggest that both criteria had to be fulfilled if Article 85 was to apply, while the other language versions made it clear that conditions were alternative and not cumulative. The approach in *Ferriere* is somewhat difficult to interpret (Derlén 2009:34). It would appear that the Court did not seek to change their line of adjudication since it referred to the *Van der Vecht* case. The Court might be trying to say that a provision cannot be regarded as clear and unambiguous unless all language versions have been consulted (Kjaer 2011:147).

Moreover, in the *EMU Tabac*[90] case, the criterion of doubt is even more confusing. In the English language version of the judgement paragraph 36 states (italics added) as follows[91]:

> Furthermore, 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* (see, in particular, Case 9/79 Koschniske [1979] ECR 2717, paragraph 6). 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.

However, the German version states (italics added) as follows:

> Ferner würde die Nichtbeachtung zweier Sprachfassungen, wie dies die Kläger des Ausgangsverfahrens vorschlagen, im Widerspruch zur ständigen

[90] Case 296/95The Queen v. Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham [1998] E.C.R. I-1605.
[91] Example taken from DERLÉN, Matthias (2009): *Multilingual Interpretation of European Union Law*, p35.

> Rechtsprechung des Gerichtshofes stehen, wonach es die Notwendigkeit einer einheitlichen Auslegung der Gemeinschaftsverordnungen verbietet, *im Fall von Zweifeln eine Bestimmung für sich allein zu betrachten, sondern vielmehr dazu zwingt, sie unter Berücksichtigung ihrer Fassungen in den anderen Amtssprachen auszulegen* (vgl. insbesondere Urteil vom 12. Juli 1979 in der Rechtssache 9/79, Koschniske, Slg. 1979, 2717, Randnr. 6). Schließlich ist grundsätzlich allen Sprachfassungen der gleiche Wert beizumessen, der nicht je nach Umfang der Bevölkerung der Mitgliedstaaten, die die betreffende Sprache gebraucht, schwanken kann.

The German version states "im Fall von Zweifeln" (in *case of doubt*, instead of interpreting a provision in isolation, it should be interpreted in the light of the versions in the other official languages) while the English version does not.

How should the judgement be interpreted? The language of the case was English but if we check the French version it also uses the criterion of doubt:

> […] la nécessité d'une interprétation uniforme des règlements communautaires exclut que, *en cas de doute*, le texte d'une disposition soit considéré isolément, et exige au contraire qu'il soit interprété et appliqué à la lumière des versions établies dans les autres langues officielles […]

As we have mentioned before, the working language of the Court of Justice is French, which means that all the judgements are drafted in French and then translated into the language of the case (Derlén 2009:5). The problem is from a *de jure* perspective the language of the case is the only authentic version, and the French carries no weight unless it is the language of the case. However, from a *de facto* perspective, it is reasonable to assume that the French version best express the inention of the Court (*ibid*).

In *EMU Tabac* the language of the case was English and it is the only authentic version. However, the Court resorts as well to the criterion of uniform interpretation and the need to interpret the provision in the light of the other versions.

The Court has dealt with similar cases in later judgements. In *Kingdom of Spain v. Council of the European Union*,[92] when dealing with the concept of "management of water resources" the Court referred to the *Kraaijeveld* case and reminded that "it

[92] Case 36/98 *Kingdom of Spain v. Council of the European Union* [2001] E.C.R. I-779.

follows from the consistent case-law of the Court that an interpretation of a provision of community law involves a comparison of the language versions".[93]

On the basis of the above examples, the general use of the criterion of doubt is unclear (Wouter 2010:27, Kjaer 2011:148). The *Ferriere* case makes it clear that no reliance can be placed on a single language version if a divergence of meaning is detected. As a working method, a clear and unambiguous wording can be presumed to express the correct meaning of the provision, but if a divergence of meaning is detected, the clear meaning cannot be allowed to take precedence over the other versions (see Kjaer 2011:147).

8.2. Right to rely on a single language version

While the general use of the criterion of doubt was not clear, the right to rely on a single language version could still be claimed as part of the principle of legal certainty. The Court made it clear that it regards the principles of legal certainty and legitimate expectations as important aspects of the Union's legal system (Kjaer 2011:148). It would be reasonable to assume that the principles of legal certainty and legitimate expectations grant a right to rely on the wording of a single language version. The *Skoma-Lux* case seems to support this interpretation (see section 6.2.3.1).

It is worth remarking on the difference between the criteria of interpretation established in the Vienna Convention states and the criteria applied in the EU.

In Article 33 (3) of the Vienna Convention on the Law of Trieties of 1969 the presumption of similar meaning was introduced instead of a duty to compare the different language versions:

> Article 33
>
> Interpretation of treaties authenticated in two or more languages
>
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

[93] *Ibid*, para. 47.

> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts having regard to the object and purpose of the treaty shall be adopted.

Despite this, many authors have questioned the interpretation of Article 33 of the VCLT[94]. What seems clear is that the presumption in Article 33.3 ceases to operate in the face of a vague or ambiguous provision (Derlén 2009:24). Once a divergence of meaning has been discovered, Article 33.4 comes into play. If the divergence cannot be removed using Article 31 and 32, the meaning which best reconciles the different versions with regard to the object and purpose of the treaty shall be adopted (*ibid*:25).

In the EU the situation is different. With respect to the system of international law, the EU legal system has special features and characteristics of its own. The Court of Justice of the EU does not follow any written rules of interpretation and case-law should be analysed in order to elucidate the criteria applied.

As far as national courts are concerned, in the *CILFIT* case the Court made it clear under which circumstances a national court of last instance can refrain from requesting a preliminary ruling (Article 267 TFEU). According to the Court, "the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved".[95] This is known as the *acte clair* principle. Although the national courts have this margin of discretion, they are required to take into account the multilingual character of EU legislation because it "is drafted in several languages and the different language

[94] For a lengthier discussion see DERLÉN, Matthias (2009): *Multilingual Interpretation of European Union Law*, p. 22.
[95] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] E.C.R. 3415, para. 16.

versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions".[96]

Therefore, before reaching the conclusion that there is no reasonable doubt with regard to the correct application of EU legislation, national courts are required to compare the different language versions. In spite of this, in his extensive study, Derlén concludes that national courts play limited attention to the multilingual interpretation of EU law and comparison of the different versions is not done on a routine basis (Derlén 209:350).

Furthermore, when comparing different language versions, how many versions should be used? Translators may consider one or two versions other than the original and the target text; many national courts have limited resources to compare more than two versions and the Court of Justice is the one with the resources to carry out the proper comparison. In case of linguistic divergences difficult to solve we should then rely on the Court as having the competence to decise on interpretation problems.

9. TELEOLOGICAL CRITERIA: purpose and general scheme of the rules

Moreover, invoking the principle of uniform interpretation the Court also resorted to **teleological criteria** of interpretation.

The *Stauder*[97] case dealt with the decision by the Commission on measures to allow certain categories of consumers to buy butter at a reduced price (*Official Journal* 1969 L 52/9). This decision authorised Member States to make butter available at a reduced price to certain categories of consumers who are beneficiaries under a social welfare scheme and whose income did not permit them to buy butter at normal prices. The problem at issue was the wording of Article 4 because it presented some divergence between the different language versions (bold added):

[96] *Ibid*, para. 18.
[97] Case 29/69 *Stauder v. City of Ulm* [1969] E.C.R. 419.

DE

'Die Mitgliedstaaten treffen alle erforderlichen Maßnahmen damit ... die Begünstigten der in Artikel 1 vorgesehenen Maßnahmen Butter nur gegen einen *auf ihren* Namen ausgestellten Gutschein erhalten können.' ('Member States shall take all measures necessary to ensure that . . . those entitled to benefit from the measures laid down in Article 1 may only receive butter in exchange for a coupon issued in their names.')

NL

„de begunstigden van de artikel 1 bedoelde maatregelen slechts boter kunnen verkrijgen in ruil voor een op naam gestelde bon“

FR

Les bénéficiaires des mesures prévues à l’article 1er ne puissent obtenir du beurre qu’en échange d’un bon individualisé.

IT

I beneficiari delle misure di cui all’articolo 1 possano ottenere del burro solo in cambio di un buono individualizzato

There is a clear discrepancy; the German and Dutch versions require the name of the beneficiary while the French and Italian do not specify that.

The Federal Republic of Germany made use of this authorization and issued cards which consisted of detachable coupons with a stub which had to bear the name and address of the beneficiary in order to be valid. According to Chapter V of the above directives, the retailer when selling butter at a reduced price may only accept coupons still attached to the stub, on which must appear, among other things, the name of the beneficiary.

An important point in this judgement is that the Commission argued that the version to be preferred is the French version if the decision’s origin was born in mind. However, the Court does not seem to take this argument as a criterion of interpretation and

insisted on the necessity of uniform application and accordingly, uniform interpretation. It reminded that it is impossible to consider one version of the text in isolation and that the provision needs to be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light in of the versions in all four languages.[98]

The Court finally ruled that "the second indent of Article 4 of Decision No. 69/71/ (EEC) of 12 February 1969, as rectified by Decision No. 69/244/(EEC), is to be interpreted as only requiring the identification of those benefiting from the measures for which it provides; it does not, however, require or prohibit their identification by name so as to enable checks to be made".[99]

In the *Bouchereau* case,[100] a worker of French nationality was brought before the Marlborough Street Magistrates' Court on a charge of unlawful possession of drugs. Bouchereau pleaded guilty and the Court intended to make a recommendation for deportation to the Secretary of State.

The Marlborough Street Court asked the Court of Justice to give a preliminary ruling to answer, among others, the following question: "Whether a recommendation for deportation made by a national court of a Member State to the executive authority of that State (such recommendation being persuasive but not binding on the executive authority) constitutes a "measure" within the meaning of Article 3 (1) and (2) of Directive No. 64/221/EEC". [101]

That question sought to know whether a court, which under national legislation has jurisdiction to recommend to the executive authority the deportation of a national of another Member State, must take into account the limitations resulting from the Treaty and from Directive No. 64/221/EEC on the exercise of the powers which, in that area, are reserved for Member States.[102]

The issue was the interpretation of the term "measures" because there was some divergence between the different language versions. In the English version the term "measures" is used in both article 2 and 3. However, in other language versions different terms are used:

[98] *Ibid*, para.3.
[99] *Ibid*, ruling I.
[100] Case 30/77 *Régina v. Pierre Bouchereau* [1977] E.C.R. 1999.
[101] *Ibid*, p. 2001.
[102] Case 30/77 *Bouchereau*, para. 7.

EN

Article 2	Article 3
"measures"	"measures"
1. This Directive relates to all **measures** concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health.	1. **Measures** taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.

ES

Article 2	Article 3
"disposiciones"	"medidas"
1. La presente Directiva se refiere a las **disposiciones** relativas a la entrada en el territorio, a la concesión o renovación del permiso de residencia, o al abandono del territorio, que sean adoptadas por los Estados miembros, por razones de orden público, seguridad o de salud públicas.	1. Las **medidas** de orden público o de seguridad pública, deberán estar fundamentadas, exclusivamente, en el comportamiento personal del individuo a que se apliquen.

FR

Article 2	Article 3
"dispositions"	"mesures"
1. La présente directive concerne les **dispositions** relatives à l'entrée sur le territoire, à la délivrance ou au renouvellement du titre de séjour, ou à l'éloignement du territoire, qui sont prises par les États membres pour des raisons d'ordre public, de sécurité publique ou de	1. Les **mesures** d'ordre public ou de sécurité publique doivent être fondées exclusivement sur le comportement personnel de l'individu qui en fait l'objet.

santé publique.	

DE

Article 2	Article 3
"Vorschriften"	"Maßnahmen"
(1) Diese Richtlinie betrifft die **Vorschriften** für die Einreise, die Erteilung oder Verlängerung der Aufenthaltserlaubnis oder die Entfernung aus dem Hoheitsgebiet, welche die Mitgliedstaaten aus Gründen der öffentlichen Ordnung, Sicherheit oder Gesundheit erlassen.	(1) Bei **Maßnahmen** der öffentlichen Ordnung oder Sicherheit darf ausschließlich das persönliche Verhalten der in Betracht kommenden Einzelpersonen ausschlaggebend sein.

The Government of the UK stated that the term 'measures' used in the English text in both Articles 2 and 3 shows that it is intended to have the same meaning in each case and that it emerges from the first recital in the preamble to the directive that when used in Article 2 the expression only refers to provisions laid down by law, regulation or administrative action, to the exclusion of actions of the judiciary.[103]

The Court ruled that "a comparison of the different language versions of the provisions in question shows that with the exception of the Italian text all the other versions use different terms in each of the two articles, with the result that no legal consequences can be based on the terminology used".[104] It continued invoking the principle of uniform interpretation reminding that "in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part."

As a conclusion, the Court ruled that "any action affecting the right of persons coming within the field of application of Article 48 of the Treaty to enter and reside freely in the Member States under the same conditions as the nationals of the host State constitutes a 'measure' for the purposes of Article 3 (1) and (2) of Directive No. 64/221/EEC. That

[103] *Ibid*, para. 13.
[104] *Ibid*, para. 14.

concept includes the action of a court which is required by law to recommend in certain cases the deportation of a national of another Member State where such recommendation constitutes a necessary prerequisite for a decision to make a deportation order".[105]

Another question was the interpretation of the words "public policy" in Article 48 (3) of the Treaty establishing the European Economic Community. The Court stated that the concept of public policy "must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community policy in the context of the Community".[106] The Court also considered that "the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation".[107]

The Court's conclusion was that recourse by a national authority to the concept of public policy presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[108]

The case *Ekro v. Produktschap voor vee en vlees*,[109] dealt with the interpretation of Commission Regulation (EEC) No. 2787/81 of 25 September 1981 fixing the export refunds on beef and veal (*Official Journal* 1981, L 271, p. 44) in relation to boned or boneless cuts of meat which include a piece of "thin flank".

The Court also resorted to uniform interpretation and the principle of equality and remarked 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 independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations".[110]

[105] *Ibid*, ruling (1) p. 2015.
[106] *Ibid*, para. 33.
[107] *Ibid*, para. 34.
[108] *Ibid*, Ruling (3), p 2015.
[109] Case 327/82 *Ekro v. Produktschap voor vee en vlees* [1984] E.C.R. 107 para. 11.
[110] *Ibid*, para. 11.

The case *Commission v. United Kingdom* [111] revolved around the definition of the concept of the origin of goods. During 1979 and 1980 the fishing industry in the Community was in difficulties owing to declining catches, in particular of cod, and overcapacity in terms of fishing vessels. British trawlers sailed to a fishing zone in the Baltic Sea over which Poland claims exclusive rights.

In the absence of an agreement between the EEC and Poland permitting Community vessels to fish in those waters participation in joint fishing operations with Polish vessels seemed to be the means of enabling Community vessels to gain access to them. The Polish vessels were supplied with quantities of fish by way of recompense in kind.

British trawlers cast empty nets into the sea which were taken over by Polish trawlers. The Polish trawlers trawled the nets without at any time taking them on board or entering territorial waters. When the trawl was completed, the British trawlers drew alongside the Polish vessels and lifted the nets, the ends of which were passed to them by the Polish vessels. The contents of the nets were taken on board the British trawlers, which then took the fish to the United Kingdom.[112]

The problem was to define whether the fish was of Polish origin and subject to import duties, since Poland did not belong to the Community at that time. The European Commission brought an action claiming that:

Article 4 of the aforementioned Regulation No. 802/68 of the Council of 27 June 1968 provides as follows:

> (1) Goods wholly obtained or produced in one country shall be considered as originating in that country.
>
> (2) The expression "goods wholly obtained or produced in one country" means:
>
> > (e) products of hunting or fishing carried on therein,
> >
> > (f) products of sea-fishing and other products taken from the sea by vessels registered or recorded in that country and flying its flag.'

On the basis of a literal interpretation of Article 4 (2) (f) of Regulation No. 802/68, the Commission takes the view that the phrase at issue, 'taken from the sea' ('extraits de la

[111] Case 100/84 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1985] E.C.R. 1169.
[112] *Ibid*, para. 2 and 3.

mer'), must be interpreted as signifying not only the act of taking out of the sea but the act of separating a substance from the whole of which it is a part. In the case of fishing this cannot mean anything other than the act of catching fish in the net and so separating them from the sea where they lived before being caught.

The different versions of Article 4 (2) (f) of Regulation No. 802/68 read as follows:

EN

Products of sea-fishing and other products **taken from the sea** by vessels registered or recorded in that country and flying its flag

FR

Les produits de la pêche maritime et autres produits, **extraits de la mer** a partir de bateaux immatricules ou enregistres dans ce pays et battant pavillon de ce même pays

ES

Los productos de la pesca marítima y otros productos **extraídos del mar** por barcos matriculados o registrados en este país y que enarbolen su pabellón

DE

Erzeugnisse der seefischerei und andere meereserzeugnisse, die von schiffen aus **gefangen** worden sind, die in diesem land ins schiffsregister eingetragen oder angemeldet sind und die die flagge dieses landes führen

It should be noted that the phrase 'extraits de la mer' or its equivalent employed in the other language versions can mean both 'taken out of the sea' and 'separated from the sea'. Even allowing that the English version, which uses the phrase 'taken from the sea', has the significance attributed to it by the United Kingdom ('complete removal from the water'), the German version of the regulation employs the term 'gefangen' meaning 'caught', which, as the United Kingdom itself acknowledges, ‘seems ... to be an inappropriate term to use'.[113] Accordingly, a comparative examination of the various language versions of the regulation does not enable a conclusion to be reached in favour

[113] *Ibid*, para. 15.

of any of the arguments put forward and so no legal consequences can be based on the terminology used.[114]

The Court reminded its adjudication in the *Bouchereau* case stating that "in the case of divergence between the language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part".[115]

It finally ruled that "for the purposes of the application of Article 4 (2) (f) of Regulation No. 802/68 in the case of a joint fishing operation the origin of the fish must be determined by reference not to the flag flown by the vessel which merely raises the nets out of the water but to the flag flown by the vessel which carries out the essential part of the operation of catching fish, that is to say, in particular, the location of the fish and netting them so that they can no longer move freely in the sea".[116]

Moreover, the need for uniform interpretation and the duty to compare other language versions has been made very clear in the *Cricket St. Thomas* judgement.[117]

In this case, it was necessary to define the object of the monopoly of the Milk Marketing Boards in the United Kingdom, i.e., milk producers' organisations set up in the 1930s to manage the milk and milk products market. After the UK acceded to the European Community, various amendments of regulations concerning the common organisation of the dairy market enabled the Milk Marketing Boards operating in the UK to be recognised with regard to the prerogatives they enjoy in the marketing of milk, in particular their exclusive right to buy milk from producers established in their area.

Cricket St. Thomas was a producer-processor under agreement with the Milk Marketing Board and stopped paying contributions to the Board, which led the latter to bring action to recover the sums. Before the High Court, Cricket St. Thomas claimed that the exclusive right to buy milk pasteurised by the producer was contrary to Community law. The High Court then asked the Court for a preliminary ruling.

Among the questions, it was studied whether the concept of milk produced and marketed without processing includes milk pasteurized by the producers in question.

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[114] *Ibid*, para. 16.
[115] *Ibid*, para. 17.
[116] *Ibid*, para. 21.
[117] Case 372/88 *Milk Marketing Board of England and Wales v. Cricket St. Thomas Estate* [1990] E.C.R. I-1370.

Regarding this point, there were conflicting interpretations of Article 25(l) (a) of the basic regulation, No. 804/68, as amended, particularly on the basis of the different language versions of that subparagraph. “Cricket St. Thomas relies on the English version to support the interpretation that the Board's exclusive purchasing right does not cover pasteurized milk, while the Board relies on the other language versions to reach the conclusion that the exclusive right in question extends to milk pasteurized by producers.”

The versions of Article 25(l) (a) of Council Regulation (EEC) No. 1421/78 read as follows:

EN

...the milk which they produce and market without processing

FR

…le lait produit et mis en vente en l’état…

DE

...die von ihnen erzeugte und in unverarbeitetem Zustand auf dem Markt gebrachte Milch anzukaufen...

The English version of Article 25(l) (a) of the basic regulation appeared to exclude from the Board's exclusive purchasing right any milk which had been processed, referring to 'the milk which they produce and market *without processing'*. However, the Court detected that other provisions in the same language version, which defined the Board's commercial powers according to the state of preparation of the milk or milk products, contained a number of terminological discrepancies in the use of the terms 'processing', 'manufacture' and 'conversion'.

The Court considered that the other language versions, particularly the French and German versions, both consistent in their use of the terms in question, contained a distinction between the concept of the treatment of milk and processing operations:

> “In those versions, Article 7(1) and Article 10(2) of Regulation No. 1422/78 I-1375 JUDGEMENT OF 27. 3. 1990 —CASE C-372/88 and Article 3(1) of

> Commission Regulation (EEC) No. 1565/79 of 25 July 1979 laying down rules for implementing Regulation (EEC) No. 1422/78 distinguish between milk which is 'en l'état', meaning milk as such, and 'produits transformés', meaning products processed from milk".[118]

In any event, the Court decided in line with the principle of uniform interpretation adjudicating that "the English version of Article 25(l) (a) of Regulation No. 804/68 cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in this regard. Such an approach would be incompatible with the requirement for the uniform application of Community law". [119]

A reference was made to Case 19/67 *Van der Vecht*, emphasizing the need for uniform interpretation of Community regulations, which means that "a particular provision should not be considered in isolation but in cases of doubt should be interpreted and applied in the light of the other languages". Similarly, the Court referred to Case 30/77 *Bouchereau,* reminding that the different language versions of a Community text must be given a uniform interpretation and hence, **in the case of divergence** between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part.

By way of conclusion, it can be said that exact equivalence between the different versions is difficult to achieve. As Gémar (2006: 71) puts it, "language is still the common denominator with all its limits and ambiguities reflecting the impossibility of the human mind to translate in a non-equivocal manner-using the Saussarian sense- as bearer of the definite sense conjured by a mental image." Perfect equivalence between the content of the source text and that of the target text is, according to George Steiner[120] a myth. Nevertheless, the Court of Justice of the EU has used different mechanisms to ensure the uniform application of EU legislation.

[118] *Ibid*, para. 16.
[119] *Ibid*, para. 18.
[120] Cited in Gémar 2006:71, STEINER (1992): *After Babel*, 2nd ed. Oxford University Press

10. TRANSLATING IN A SUPRANATIONAL ORGANISATION

The EU constitutes a legal order with its own features, its own personality and its own legal capacity.[121] It can be said that the EU has a legal system of its own and as a result it has conceptual autonomy and terminological autonomy (Gómez González-Jover 2002:5).[122] In fact, the Court of Justice of the EU has stated that "legal concepts do not necessarily have the same meaning in community law and in the law of the various member states".[123]

Despite the fact that legal translators do not really mediate between two legal systems, they face other kinds of problems (Kjær 1999: 66) and other factors come into play in the translation of legal texts (Sarcevic 2010:19). It must be taken into account that the EU legal order is composed of twenty-seven Member States, each with its own legal system, and this poses a challenge for translators.

As was mentioned before, this study deals with instrumental translation as defined by Nord (1991:72), which means translators elaborate texts that will be equally authentic and will become part of a legal instrument. As a result, translators are expected to produce texts that are equal in legal effect.

Regarding the notion of "legal equivalence", it was used by Beaupré (1986:179), Gémar (2006:76) and Sarcevic (2010:29). This last explains that neither Beaupré nor Gémar have provided a definition for "legal equivalence". Therefore, she states that "legal equivalence can be regarded as a synthesis of content, intent and legal effect, with the emphasis on the latter" (2010:20). According to Gémar, the problem of achieving equivalent legal effects in the translated text is not the same for the translator and the jurist. The translator generally strives for linguistic equivalence, the lawyer for legal equivalence. He then concludes that in both cases, it is the meeting and the harmonious fusion of the two constitutive ingredients of the text – form and content- that produce the desired equivalence. It is definitely a combination of different factors what allows

[121] Case 6/64 *Flaminio Costa v. ENEL* [1964] E.C.R. 585 states: "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves".

[122] The author states: "Se trata, pues, de un Derecho multilingüe que exige una aplicación uniforme, uniformidad que tiene como consecuencias necesarias la autonomía conceptual y la autonomía terminológica frente a los Derechos internos […]"

[123] Case 283/81 *CILFIT v. Ministry of Health* [1982] E.C.R. 3415, para. 19.

for equivalence; the translator looks for linguistic equivalence and should also think of the legal consequences that translating a text in a way or another will have. In this way, the translator will strive for legal equivalence.

10.1. EU terminology different from that of the Member States'

When translating texts about legal concepts recommended or imposed at the Europe-wide level, it may be misleading to translate a generic term with the "correct" specific term used at national level, even if an exact equivalent exists. Using a correct but nationally specific term could lead to confusion; a supranational term which has no immediate national "meaning" may be preferable (Wagner et al 2002:64).

Eurojargon is also excusable when used to refer to genuinely Europe-wide concepts that have no equivalent at national level and they may be convenient because they avoid confusion. For example, "subsidiarity" (taking decisions and action at the lowest feasible regional, national or central level) is probable preferable to "devolution", which means the same in the UK when talking of the relations with Scotland, Wales and Northern Ireland (*Ibid*).

Moreover, the Court has explicitly referred to this question. In *Rockfon AS v. Specialarbejderforbundet i Danmark*,[124] the Court dealt with the interpretation of Article 1 of Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

The company Rockfon A/S is a company which produces and markets insulating materials made from mineral wool. Between 10 and 28 November 1989 Rockfon dismissed 24 or 25 employees from its workforce of 162. Rockfon did not consult the employees concerned nor did it inform in writing the authority with responsibility in the matter of redundancies. It is undisputed that, if Rockfon by itself constitutes an 'establishment', the dismissals were carried out in breach of the consultation requirements laid down in Chapter 5a of the 1977 Law which implements the Directive.[125] The problem was that the Directive did not define the term 'establishment'.

The Court observed that the term 'establishment', as used in the Directive, is a term of Community law and cannot be defined by reference to the laws of the Member States.[126]

[124] Case 449/93 *Rockfon AS v. Specialarbejderforbundet i Danmark*, [1996] ICR 673.
[125] *Ibid*, para. 13.
[126] *Ibid*, para. 25.

The various language versions of the Directive used somewhat different terms to convey the concept in question:

EN

establishment

FR

établissement

ES

Centro de trabajo

DE

Betrieb

A comparison of the terms used shows that they have different connotations signifying, according to the version in question, establishment, undertaking, work centre, local unit or place of work.[127]

Once again, the Court followed its argument used in *Bouchereau* and invoked uniform interpretation and the need to interpret the provision by reference to the purpose and general scheme of the rules of which it forms part. The final ruling is as follows:

> The term 'establishment' appearing in Article 1(1)(a) of the aforesaid directive must be understood as meaning, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order for there to be an 'establishment', for the unit in question to be endowed with a management which can independently affect collective redundancies.

This shows, once again, how subtleties of language may result in important legal issues, since at first sight nobody would imagine the interpretation of the concept of "establishment" would cause any problem.

[127] *Ibid*, para. 26.

10.2. Freedom translating EU legislation?

EU texts follow certain formalisms and a standardised legal terminology:

> All language versions must contain the same sentence breaks so as to enable uniform citation. Furthermore, translators are required to use the formulae set forth in the Manual of Precedents of each official language. As a result, the visual appearance of the authentic texts of a given act is basically the same and even the pagination is identical in each language version of the Official Journal (Sarcevic 2010:38).

EU translators must observe the golden rule of terminological consistency. Translators are encouraged to write in the genius of the target language, always taking into account the macrotextual factors.

As far as the genius of languages is concerned, the translator of multilingual legislation encounters the same interlinguistic lexical and structural divergences as any other translator. In a supranational context, terminological harmonization will help with notions of law (Prieto 2011b: 206). However, EU legislation is often the result of complex negotiations between different interests and ideas. The intention of the authors is sometimes not clear.

Sometimes that ambiguity is deliberate. In some circumstances, reaching agreement on the terms of the covered agreements may have necessitated the use of constructive ambiguity. Negotiators sometimes leave unresolved particular issues by agreeing on language that does not resolve the issue and is capable of more than one interpretation. Constructive ambiguity can serve as a placeholder marking an area where negotiators accept that it may be appropriate to agree on disciplines but where further negotiation is necessary before those disciplines can be specified.[128] The result of decision-making sometimes requires that the final text adopted is fuzzy and vague so that it can cater for different political interests present in the law-making process (Paunio 2011:7).

Accordingly, the goal of translators is to preserve the unity of the single instrument by coordinating the terminology and syntax of all the authentic texts as closely as possible (Sarcervic 2010:32). “As in all multilingual law, the ultimate goal is to produce texts in

[128] TN/DS/W/82/Add.1**,** 25 October 2005.

the national languages that will promote the uniform application of the single instrument (*ibid*: 37)".

In order to achieve that, translators need to study the blurry parts of the texts and, in order to be able to find the intended meaning, they have to interpret the text (Prieto Ramos 2011b: 208). Of course they have to be objective and should follow the same hermeneutic rules that the Court of Justice of the EU would follow. They need to transmit the same degree of ambiguity. When faced with a problem, translators have to make a textual analysis and take into account the effects that each way of interpreting a certain provision can have. They "should be able to foresee how the translation will be interpreted and applied by the receivers in the target jurisdictions (Sarcevic 2010:24)."

Contrary to what some authors think,[129] translators do interpret. They should, of course, respect the *skopos* of the text and the macrotextual factors. In this respect, interpreting texts is predominantly a quest for the contextual meaning of the texts in order to discover what consequences the text has in the legal situation in which the interpretation is carried out (Engberg 2002:375).

Furthermore, Pelage (2011:21) sees overlap in the work of lawyers and translators. However, he sees a difference between the two: "lawyers must interpret the text fully and completely in order to see whether it is applicable to the actual situation, while translators can concentrate more on the concrete written text at hand." In the EU context translators should also take into account the aim and object of the provision because they produce texts that become part of the same legal instrument.

[129] See for example FELICI, Anarita (2010): "Translating EU law: legal issues and multiple dynamics", *Perspectives: Studies in Translatology*, vol. 18, 2, pp. 95-108

11. CONCLUSIONS

The EU creates a legal system, producing rights and obligations for citizens of the Member States. Multilingualism could then be seen as a guarantee of legal certainty; the citizens have the possibility to read the rules in their own language.

Legal certainty, predictability and conflict avoidance require the greatest clarity and precision in the drafting of legal texts. The fact that EU law is rendered in twenty-three languages can alleviate or exacerbate divergences. On the one hand, a comparison of different texts may help to resolve an ambiguity inherent in a term or phrase used in one language, making clearer the intention of the drafters. Ambiguities in an official text may be clarified and overcome by means of another official text (Vismara 2006:64). What might appear as a costly hindrance can be turned into a valuable opportunity for improving the quality and comprehensibility of the law.

In addition, since multilingualism forces the Court of Justice to look beyond words in individual language versions when reconciling diverging texts, one could say that multilingualism represents a possibility for dialogue among legal systems, legal rules and legal principles as well as their underlying values and policies, instead of a risk to legal certainty (Paunio 2011:9).

On the other hand, when comparing the different language versions equivalence comes into play. The notion of equivalence remains controversial because of the difficulties experienced by translation scholars and linguists when attempting to define the term precisely. In the EU institutions, the question of equivalence becomes especially important since it must not only be semantic, stylistic and pragmatic equivalence but also legal equivalence (González-Jover 2002:1), which makes all language versions become the same legal instrument because they are all equally authentic.

As many authors argue, equivalence, understood as identity, may with reason be described as an illusion. At best, legal translation, just as any translation for that matter, is only an approximation (Focsaneanu 1970: 262) Paunio 2011:2, Gémar 2006:77). For the purpose of this research we have considered equivalence as the balance between linguistic equivalence and legal equivalence. Translators should measure how far they can depart from the source text in order to keep the intented ambiguities and produce a text that leads to the same legal effect.

The Court has done a good job to ensure uniform interpretation and application of EU law. The Court can, by way of argumentation, assure more legal certainty (Paunio 1995: 1470). The key is not to be limited to the wording of the rules but rather to go beyond the words, trying to elucidate the "autonomous, 'cross-language' meaning by taking into account context, system, objectives, effectiveness and consequences" (Paunio 2011:6). It comes as no surprise that this poses a big challenge to translators working in the EU context. They deal with instrumental translation and they become text producers of binding rules in another language.

The multilingual EU legal order ensures communication among the peoples by means of translation. The role translation has in gaining, maintaining and supporting legitimacy is signicant. Limiting the number of official languages would jeopardise transparency**.** The European Commission has expressed on many occasions that we need to support and strengthen multilingualism in the EU and help bring the Union's policies closer to the citizen, thereby promoting legitimacy, transparency and efficiency (European Commission 2009b:1). Besides, favouring monolingualism would mean standardization and, with time, the disappearance of cultural identities.

Throughout this study, many of the points discussed are not black or white; they are in a grey area that has to be interpreted. Results confirm that no language regime can be considered the best solution in absolute terms (Gazzola 2006:395). I have focused on the legal and political reasons for multilingualism but many readers may still wonder whether multilingualism is a necessary evil.

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