

**Linguistic Equality and Quality of EU Law in 23 Languages:
a “Catch-23”?**



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1. INTRODUCTION

1.1. Law and language(s)

Law and language are very closely connected and, in fact, law needs language and cannot exist without it.¹ Although their relationship is complex and still the subject of much debate among lawyers and linguists, it is recognized, however, that the quality of law heavily depends on a careful use of language, in particular legal language, and that the wording of the law needs to be clear, coherent and unambiguous for it to be effective. Considering that this is true for the law of a legal system with one language, it is evident that matters become even more complicated when multiple languages are involved. This is the case for the European Union (the “EU”). While every country and every international or regional organization has at least one official language, i.e. a language with a special legal status, and while some of them have even more than one official language, after the latest enlargement to 27 Member States in 2007, the EU now has law in as many as 23 different official languages.² And this number will almost certainly increase in the future when candidate countries³ and other interested Western Balkan countries join the EU.⁴ Not to mention the fact that, since the Irish language was given the status of official language, other countries may request that the minority languages in their countries also be added to the list of official languages.

1.2. Effects of multilingualism on quality of EU law

The practical and logistic consequences of having to deal with 23 official languages are obviously immense but in most EU publications only positive words are said when reference is made to the present language regime. Great enthusiasm is always expressed about the fact that a union with 23 languages is still manageable⁵ and at the Ministerial Conference on multilingualism in 2008 it was once again confirmed that “a clear message of support [was heard] in favour of multilingualism and linguistic diversity, which is at the basis of the European project”.⁶ Legal experts, however, are more and more critical of the EU’s

¹ Gerard-René de Groot, ‘Language and law’ in Netherlands Reports to the fifteenth international congress of comparative law, Intersentia (1998) Antwerp/Groningen, at p. 21; Viola Heutger, ‘A more coherent European wide legal language’ (2004) European integration online Papers (EloP) Vol. 8 No. 2, at p. 2.

² “An official language is a language used for official purposes, especially as the medium of a national government”, Tom McArthur (ed.), *Concise Oxford Companion to the English Language* (Oxford University Press, 2005).

³ Croatia, Turkey and the Former Yugoslav Republic of Macedonia.

⁴ Albania, Montenegro, Bosnia and Herzegovina, Serbia, and Kosovo are potential candidate countries.

⁵ See, in particular, Speech DG for Translation Lönnroth ‘Efficiency, transparency and openness: translation in the European Union’ (2008) at <http://ec.europa.eu/dgs/translation/about_us/dg/dg_en.htm>.

⁶ Conclusions of the Ministerial Conference on multilingualism. Brussels, 15 February 2008.

multilingual regime and have even described this regime as “potentially explosive” and its effects as “potentially calamitous”.⁷ One of these effects is said to be the poor quality of European legislation,⁸ which may result in a lack of legal certainty for European citizens because the law in a single version alone cannot always be relied on without comparing it to all the other language versions. Another result of poor quality of law is that it may undermine the European integration and harmonization process⁹ because EU law - in its 23 different language versions - is implemented and interpreted in the various Member States as a result of which any linguistic inaccuracy or mistake may become part of a domino effect if the implementation and interpretation differs among the Member States.

1.3. Objective and structure of this thesis

The objective of this thesis is to examine whether the latest enlargements provide a reason to review the present language regime of the EU. Not so much because it has become a very expensive regime - as many as 1,762,773 pages were translated within the EU institutions in 2007, the costs of which amounted to 800 million euros¹⁰ - but, more importantly, because EU law in 23 languages has more chance of becoming unclear, incoherent and prone to mistakes, which may deteriorate the quality of this law with serious legal consequences as result.

Since most of the law coming out of the EU is made within the Community pillar, the focus in this thesis will be on EC law and the institutions responsible for making this law. First an overview will be given in Chapter 2 of how the institutions deal with multilingualism when making law. In Chapter 3 the problems will be surveyed and whether and how they have had or may have an effect on the quality and objectives of EU law. In Chapter 4 it will be examined whether there are any solutions or alternatives and in Chapter 5 a conclusion will be drawn as to whether it would be possible to maintain the existing equality of the 23 official languages on the one hand and high quality of EU legislation on the other, or whether the two concepts conflict to such an extent that the attempt to maintain both equality and quality actually constitutes a Catch-22 situation.¹¹

⁷ Jonathan Pool ‘Optimal language regimes for the European Union’ (1996) *International Journal of the Sociology of Language*, no 121, at p. 162.

⁸ Helen Xanthaki, ‘The problem of quality in EU legislation: what on earth is really wrong?’ (2001) *Common Market Law Review* 38, 651–676.

⁹ See also: Viola Heutger ‘Legal Language and the Process of Drafting the Principles on a European Law of Sales’ (2008) *Electric Journal of Comparative Law* vol. 12.2. At p. 6.

¹⁰ Speech DG for Translation Lönnroth, ‘Why is the language policy in EU political dynamite?’ (2008). See n 5.

¹¹ A Catch-22 is a dilemma or difficult circumstance from which there is no escape because of mutually conflicting or dependent conditions. *The New Oxford Dictionary of English* (Clarendon Press, Oxford 1998).

2. MULTILINGUAL LEGISLATIVE DRAFTING

2.1. The European law-makers

The purpose of this chapter is first of all to provide some background information about how and why European law is drafted and published in all the official languages, as well as about the legal grounds on which this is based.¹² For each individual institution involved in the legislative process it will be ascertained what their particular language policy is in respect of their legislative duties and how they deal with multilingualism. It will also be established, moreover, that although the language policies of the institutions – or rather, the lack of an overall policy - may not have a direct, major impact on the quality of law, these policies are still inextricably linked with the problems set out in the subsequent chapter.

According to Article 249 of the Treaty Establishing the European Community (the “EC Treaty”), the law-making institutions are the Commission of the European Communities (the “Commission”), the Council of the European Union (the “Council”) and the European Parliament (the “EP”).¹³ Although not formally a legislative body, the Court of Justice of the European Communities (the “Court”¹⁴), as the body having jurisdiction over the interpretation of European legislation and having the task of determining the meanings of the words and terms used in all the language versions, also plays an essential part in making and developing European law.¹⁵ This role will be addressed in more detail in Chapter 3.

For the record, it should be noted at the outset that the terms “multilingual”, “multilingualism” and “linguistic diversity” may sometimes be a little confusing. Within an EU context they refer at times to the ability of speakers of more than two languages and the projects that are developed to encourage European citizens to learn more languages, whereas at other times, including in this thesis, these terms refer to the use of and/or the respect for the different official languages by the European law-making institutions themselves.

¹² For the sake of clarity, the term “European law” or “EU law” encompasses both EU law and EC law (also called Community law) and includes both primary law (i.e. the Treaty establishing the Communities and the Treaty on the European Union), and secondary law (i.e. regulations, directives and other legal instruments based on the Treaties).

¹³ Article 249 EC Treaty: “In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.” Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community [2008] OJ C 115.

¹⁴ “The Court” is taken to mean both the European Court of Justice and the Court of First Instance.

¹⁵ Art. 220 EC Treaty (n 13): The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

2.2. Reasons for the institutions' multilingual regime

The question that could be asked is why can the EU not adopt the same kind of policy as many other international organizations. The United Nations, for example, considers that “an international organization must have effective ways to overcome language barriers to avoid becoming a Tower of Babel”, and has chosen to rely on only six official languages.¹⁶ One reason for this difference is that the formal equality of languages in the EU reflects the political equality of the Member States. Another reason is that the EU is different from other international organizations in the sense that the EU is not so much a union between governments, but a “union among the peoples of Europe”.¹⁷ Moreover, the EU passes laws that are not just binding on states, as is the case in some international agreements, but that are also directly binding on European citizens.¹⁸ These laws therefore have to be accessible to citizens in the languages these citizens can read.¹⁹

In many publications and reports the EU itself has often expressed the view that it is very much in favour of multilingualism and of the principle of language equality. It even appointed a commissioner for multilingualism.²⁰ On the EU's website it is explained in various ways on what the choice in favour of multilingualism is based: “The EU sees the use of its citizens' languages as one of the factors which make it more transparent, more legitimate and more efficient”²¹, and also “...the EU's charter of fundamental rights²², adopted in 2000, requires the EU to respect linguistic diversity.”²³ All of this is summed up in the EU's motto “United in Diversity”. According to the EC Treaty, respect for cultural diversity, which includes respect for linguistic diversity, is indeed one of the objectives of the European Community.²⁴ Another objective, however, is to harmonise the common and internal market by unifying the laws of the Member States²⁵ but it could be questioned whether the two objectives are compatible, i.e. whether it is really possible to effectively harmonise and unify laws while at the same time maintaining a policy of diversity and

¹⁶ Website of the Department for General Assembly and Conference Management, United Nations (2002) <http://www.un.org/Depts/DGACM/faq_languages.htm>.

¹⁷ Article 1 of the Treaty on European Union (n 13).

¹⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, ‘A New Framework Strategy for Multilingualism’ COM(2005) 596 final. At p. 12.

¹⁹ See also: *Many tongues, one family. Languages in the European Union*. Luxembourg: Office for Official Publications of the European Communities (2004) at pp. 17 and 21.

²⁰ EU Commissioner for multilingualism at <http://ec.europa.eu/commission_barroso/orban/index_en.htm>.

²¹ <<http://europa.eu>>, <<http://europa.eu/languages/en/home>>.

²² Charter of fundamental rights of the European Union (2000) OJ C 364/1.

²³ <<http://europa.eu/languages/en>>.

²⁴ Article 151 EC Treaty (n 13).

²⁵ Articles 94 and 95 EC Treaty (n 13).

equality of so many languages when, as will be shown below, such a language policy often impairs the quality of law and thus undermines the objective of harmonisation.

2.3. Legal grounds

It is quite remarkable that in the EC Treaty and in the EU Treaty very little is said of the use of the various languages. Apart from Article 314 EC, which provides that all the language versions of the Treaty are equally authentic and Article 21 EC, which gives citizens the right to correspond with European institutions in their own language²⁶, the only other provision about the languages to be used by the institutions is found in Article 290 EC, which provides that “the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Statute of the Court of Justice, be determined by the Council, acting unanimously”. On the basis of this article, the Council's very first regulation determined the official languages that would be used by the institutions.²⁷ This regulation is amended whenever a new country becomes a member of the Union.²⁸ On that occasion a new Member State chooses the language that will be its official language, this language then being recorded in the Act of Accession. Some countries have more than one official language and some countries do not have an “official” language as such, in which case the regulation is silent about what exactly an official language is. The difference between an official language and a working language is not defined, nor is it set out when, where and why they are to be used. It may therefore be assumed that the terms “official language” and “working language” do not have particular legal meanings but should be understood as having their ordinary meanings.²⁹ Although the Regulation refers only to the institutions, and not to the EC or the EU as a whole - an issue in the famous *Kik* case³⁰ - its is clearly stated in Article 4 what Community lawmakers must do: “Regulations and other documents of general application shall be drafted in the official languages”. And while Article 6 of the Regulation

²⁶ Although Article 255 EC provides for the right of EU citizens to have access to documents of the institutions, nothing is stated about a right to have access to these documents in their own language.

²⁷ Council Regulation No 1 determining the languages to be used by the European Economic Community [1958] OJ L 17, P. 385. As amended by later acts of accession.

²⁸ In the latest version of this regulation, dating from 2007, the first article states that “the official languages and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish”.

²⁹ “Official languages” of the EU are generally defined as those used in communication between institutions and the outside world, and ‘working languages’ of the EU as those used between institutions, within institutions and during internal meetings convened by the institutions. Michele Gazzola, ‘Managing multilingualism in the European Union’ (2006) *Journal Language Policy*, Springer Netherlands, Issue Vol. 5, Number 4. At p. 396)e.

³⁰ Case T-120/99 *Kik v. Office for Harmonisation in the Internal Market* [2001] ECR II-2235. In this case it was claimed that a specific regulation included a language regime that was discriminating on grounds of language.

provides for some room for the institutions to reduce the translation workload in the course of their internal business (“The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases”), meaning that there is no obligation to draft every single document in all the official languages, Article 4 leaves no doubt as to the fact that legislative documents are always and without exception to be drafted in all the official languages.

2.4. The Commission of the European Communities

The Commission has the exclusive right of initiative in respect of EC matters, which is why the Commission’s own Translation Service is the largest of all the translations services of the institutions. According to the latest information on the Commission’s website this department is made up of about 1,750 linguists (i.e. translators).³¹ As recently confirmed by Commission president Barroso in an answer to a parliamentary question about language usage, the Commission is fully committed to the principles of linguistic equality and multilingualism.³² In its internal business, however, the Commission uses English, French and German as its working languages (also called the “procedural languages”, i.e. the languages in which the Commission conducts its internal business³³) and French and English as its “vehicular” and drafting languages³⁴, and only goes fully multilingual when it communicates with the other EU institutions, the Member States and the public.³⁵ Legislation is drafted in one or more of the working languages by technical experts from the more than 25 technical departments (the Directorate Generals). Surveys carried out in 2000 and 2001 showed that English has become the principal drafting language, with 55% of documents being drafted in English, 42% in French and 1-2% in German and it is said that nowadays almost 80% of the documents are drafted in English and less than 15% in French.³⁶ The preliminary drafts, produced in the language chosen by the relevant Directorate General (mostly English or French), are

³¹ <http://ec.europa.eu/dgs/translation/index_en.htm>.

³² “The Commission would like to reassure ... that it is fully committed to the respect of the principles of linguistic parity and multilingualism ... They represent one of the most remarkable riches of the Europe we are building on a day-by-day basis, as well as a cornerstone for the enhanced participation of the citizens in this process.” Parliamentary questions, 22 January 2008, P-0253/08.

³³ *Translating for a Multilingual Community*. Directorate General for Translation of the European Commission. Office for the Official Publications of the European Communities, Luxembourg, 2009. At p. 3.

³⁴ Speech DG for Translation Lönnroth, *Translation Practices in the Commission* (2006). See n 5.

³⁵ *Translating for a Multilingual Community* (n 33). At p.1.

³⁶ William Robinson, ‘Drafting of EU legislation: a view from the European Commission’ (2008) *federalismi.it* 1/2008 <www.federalismi.it>. At p. 2.

thoroughly revised by the lawyers of the Commission's Legal Service.³⁷ Only at the final stages are the texts translated into all 23 official languages by the Directorate-General for Translation (DGT) and submitted to the Parliament and the Council.³⁸

As stated above, Article 6 of Regulation No 1 allows the institutions to stipulate in their rules of procedure which language is to be used in specific situations. The latest amended version of the Commission's Rules of Procedure³⁹, however, makes no mention of the languages in which documents are to be drafted. This is remarkable because in a previous version of these rules⁴⁰ explicit mention was made of the working languages and that these would be prescribed by supplementary rules (which are nowhere to be found). The latest Rules of Procedure (dated 2006), however, refer to implementing rules that seem to assume that there are instructions as to the language to use, but it is unclear what these implementing rules are precisely. A question that I asked on this point to the Europe Direct Contact Centre⁴¹ was answered only in general terms and with references to various EU websites which, unfortunately, did not provide answers to the question. The parliamentary question about language usage referred to above also included the question "Does the Commission intend to clarify the rules governing language use in the Community institutions?"⁴² This was answered by Barroso in the same broad terms: without actually going into detail, reference was made to Regulation No 1 and the Commission's full commitment to multilingualism.

According to William Robinson, coordinator of the Legal Revisers Group of the Commission's Legal Service, multilingualism is one of the sources of mistakes and inconsistencies slipping in during the entire drafting process.⁴³ This is possible because during this multilingual drafting process, when the final text is still under discussion, the draft texts go from one department to the other and from drafting to revision and back to drafting and are often subjected to changes by people who are rarely native speakers of the language in question.⁴⁴ This may result in linguistic errors going unnoticed which leaves it up to the translators to correct any such errors or ambiguous wording. Although this may have the

³⁷ "The Legal Service shall be consulted on all drafts or proposals for legal instruments and on all documents which may have legal implications" Rules of Procedure of the Commission (not yet published in the Official Journal) 2000Q3614 (2006) 009.002 1 at p. 7 <<http://europa.eu/scadplus/leg/en/lvb/o10004.htm>>.

³⁸ *Many tongues, one family* (n 19). At p. 19.

³⁹ Rules of Procedure of the Commission (not yet published in the OJ) 2000Q3614 (2006) 009.002 1. <<http://europa.eu/scadplus/leg/en/lvb/o10004.htm>>.

⁴⁰ Rules of Procedure of the Commission [C(2000) 3614], OJ L 308, 8.12.2000, p. 26-34. Article 6.

⁴¹ Europe Direct is an internet service provided by the EU and gives answers to questions on any European Union policy. <http://ec.europa.eu/europedirect/index_en.htm>.

⁴² Parliamentary questions (n 32).

⁴³ William Robinson, 'How the European Commission drafts legislation in 20 languages' (2005) *Clarity* 53, p. 6.

⁴⁴ William Robinson, 'Drafting of EU legislation: a view from the European Commission', at p. 3 (n 36).

positive effect that at some point unclear or mistaken wording is spotted and improved or corrected, the chances are also that such flaws remain unnoticed and accumulate when translated and/or that the final versions in different languages differ.

2.5. The Council of the European Union

The Council has its own Translation Department (with more than 700 translators), which provides translations in all of the official and working languages, and which works closely together with the 69 lawyer linguists of the “Quality of Legislation” Directorate (3 lawyer-linguists for each of the 23 official languages). This Directorate is part of the Council's Legal Service (about 50 lawyers) and its main task is the legal finalisation of the legislative texts to be adopted by the Council.⁴⁵ This duty includes ensuring that the right terminology is used and that the act always states exactly the same thing in all the language versions. For these purposes, the lawyer linguists have drawn up “a manual to harmonise the finalisation of texts in the official languages of the Communities and to provide a guide on the practice followed in the Council for those responsible for drafting acts or proposals for acts”.⁴⁶ Under Article 6 of Regulation No 1, the Council drew up its own internal rules of procedure, which provide in Article 14(1) that “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” [emphasis added].⁴⁷ Although not explicitly specified, “rules” most likely refer to Regulation No 1. According to the Council’s website, internal communications are in the languages that are most widely known.⁴⁸ There is no doubt that the Council fully supports multilingualism because it stated that “the Council is always at pains to apply the principle of multilingualism as widely as possible”.⁴⁹ The base text of legislative documents, however, is drawn up in English or French and translated into the other languages.⁵⁰ This procedure is not laid down in any official document, but is followed as a rather informal custom and is often not without complications. When the language used to prepare the base text changes (e.g. because of a change in presidency from an anglophone or anglophile Member State to a francophone or

⁴⁵ Rules governing the languages used by the European Union's institutions. Website of the Council. <<http://ue.eu.int/>> (Contacts - Languages) or <<http://ue.eu.int/showPage.aspx?id=1254&lang=en>>.

⁴⁶ Manual of precedents for acts established within the Council of the European Union, 4th ed., General Secretariat of the Council of the European Union, 2002.

⁴⁷ Council Decision of 15 September 2006 adopting the Council's Rules of Procedure (2006/683/EC, Euratom).

⁴⁸ Rules governing the languages used by the European Union's institutions (n 45).

⁴⁹ Application of the language rules at the Council at <<http://ue.eu.int/showPage.aspx?id=1255&lang=en>>.

⁵⁰ Jean-Claude Piris, ‘The legal orders of the EU and of the Member States: peculiarities and influences in drafting’ (2005) *Amicus Curiae*. Issue 58. At p. 23.

francophile Member State or vice versa), the translation process often results in the inadvertent introduction of slight changes of meaning and small amendments, which are then subsequently magnified when translated into the other official languages, at which point they can turn into real differences in meaning between the various versions of the text.⁵¹

2.6. The European Parliament

The EP differs from the other EU institutions because of its intended close relationship with European citizens, which obviously has an effect on its language policy. It implies, among other things, that citizens have the right to communicate with the EP and to receive public documents in a language they understand.⁵² The Rules of Procedure of the European Parliament, i.e. the internal organizational and operational rules which the EP is to adopt according to Article 199 of the EC Treaty⁵³, provide that all parliamentary documents are to be published in all the official languages of the EU.⁵⁴ In its capacity of a law-making body, the EP is obliged to safeguard the linguistic and legal quality of the laws it enacts, and that all the various versions conform with each other.⁵⁵ This is done by the Parliament's lawyer-linguists, a team of about 170 people. On a day-to-day basis, however, only three working languages are used (English, French and German) for drafting policy papers and draft legislation.⁵⁶ To be able to produce the various versions of its written documents in other languages, and to be able to correspond with citizens in all the official EU languages, the D-G for Translation of the European Parliament maintains an in-house translation service consisting of about 1,500 translators and interpreters (a third of the total staff).

This multilingual system is the subject of never-ending discussions. In 2001 the Bureau of the European Parliament⁵⁷ issued a Working Document⁵⁸ for the purpose of preparing the EP for the enlargement of the EU. In this document a Steering Committee proposed several scenarios for future changes to the language regime. This Committee concluded that the scenario of “controlled multilingualism” was the only one that would

⁵¹ Manuela Guggeis ‘Multilingual Legislation and the Legal-linguistic Revision in the Council of the European Union’ in B. Pozzo and V. Jacometti (eds.), *Multilingualism and the Harmonisation of European Law* (Kluwer, The Hague 2006). At p. 114.

⁵² Article 21 EC Treaty (n13).

⁵³ Article 199 EC Treaty (n 13): The European Parliament shall adopt its Rules of Procedure, acting by a majority of its Members.

⁵⁴ Rules of Procedure of the European Parliament (16th edition - 2004). Rule 138: Languages. <<http://www.europarl.europa.eu>>.

⁵⁵ See also the website of the European Parliament at <<http://www.europarl.europa.eu>>.

⁵⁶ *Many tongues, one family* (n 19). At p. 19.

⁵⁷ The Bureau is the body that lays down rules for Parliament. It draws up Parliament’s preliminary draft budget and decides all administrative, staff and organizational matters. Source: <<http://www.europarl.europa.eu>>.

⁵⁸ Working Document No. 9 for the Bureau on the language regime: additional options [2001] PE 305.382/BUR.

reduce the costs of multilingualism while still respecting the principle of the equality of languages, members and citizens. It also pointed out, however, that if departure from the equality principle ever became acceptable, an asymmetrical system with 21 source languages (at it was at that time) and only one or a few target languages would be another option. In 2003 the EP affirmed the controlled multilingualism proposal in a resolution and the Bureau subsequently issued another report which in 2006 resulted in a revision of the Parliament's Code of Conduct on Multilingualism.⁵⁹ One of the results of this policy was the increased use of a “pivot system” for the translation of certain documents. In this system, a text is first translated into one of the most widely used languages, the so-called “relay languages” (English, French, German, Italian, Polish and Spanish), and from there into the other languages.⁶⁰ This substantially reduces the need for translators able to work directly with the 506 possible bilateral language combinations that would be required for direct translations from each official EU language into all the others. With this “controlled multilingualism” policy the EP combines a pragmatic use of languages for its internal businesses and in the preparatory stages of legislation on the one hand and guarantees full translation of official documents on the other. Also the Parliamentary committees⁶¹, which draw up, amend and adopt legislative proposals and own-initiative reports, have established “linguistic profiles” of their membership, so that only languages actually needed by their members are used. For many smaller meetings, members may themselves agree to work in a limited number of languages, or sometimes just in one.

Apart from the fact that in spite of the measures taken the EP still suffers from serious backlogs of texts that are waiting to be translated, the EP seems to have worked out a practical working strategy, which, moreover, seems clearer than those of the other institutions. This policy, however, does not prevent its legislative drafting scheme from being subject to the same problems as described for the other institutions because law is made by the institutions together and the problems that occur are problems that mainly result from the many interactions among the institutions.

2.7. Final observations

When exploring the language policies of each of the institutions, at first sight they seem to be quite transparent, but this is less so when examined more closely. Apart from the obligations

⁵⁹ Code of Conduct on Multilingualism adopted by the Bureau on 4 September 2006, PE 338.978/BUR/REV1.

⁶⁰ *Many tongues, one family* (n 19). At p. 19.

⁶¹ The committees consider Commission and Council proposals and, where necessary, draw up reports to be presented to the plenary assembly. EP's website at <<http://www.europarl.europa.eu>> under “organisation”.

under the EC Treaty and Article 4 of Regulation No 1, the language use of the Community institutions is regulated in very broad terms only and this is not made any clearer in a 2006 report of the EP where it refers to the flexibility provided by Article 6 of Regulation No 1, stating that “the institutions are entitled to make specific arrangements for their internal use in their Rules of Procedure ... in so far as this is dictated by practical considerations and is consistent with their operation and with the general principles of the Community”.⁶² Such arrangements are difficult to find – if at all – and a term like “general principles” is hardly more than simply a vague guideline. It rather seems that the language policies of the institutions are mostly based on unwritten custom, and it is remarkable that so far no institution has seen fit to propose one single language policy for the entire law-making process. This is regrettable because the entire legislative process and the final result would benefit from such a policy. A policy not so much in respect of their day-to-day business and in their relation with citizens, but in particular with respect to their legislative duties where there is much interaction between the institutions and where the quality of the final legislative documents depends on their combined efforts to produce clear, unambiguous and flawless legislation. At present each institution is free to choose its own preferred method and working language in all the preparatory stages. One of the results is that a text starts with versions in all the languages drafted by the Commission; later, in the subsequent lengthy negotiation stages, only working languages are used by the Council and the EP; in the final stages the drafts become multilingual again. Lack of time often becomes a factor in the later stages, which means that the process is speeded up and translations are not always monitored by different people becoming involved and responsible (negotiating parties, technical experts (including lawyers), legal revisers and translators), resulting in a greater risk of errors and inconsistencies between the different language versions. What seems to matter at some point is the mere existence of authentic versions of EU law in the various languages, not the quality of their content. It is therefore not exceptional for a later check that an error was made in one or several versions of a regulation and for another regulation to have to be issued to correct these errors and differences.⁶³

The problems that are the result of this rather erratic procedure, and which adversely affect the quality of European law, will be addressed in more detail in the next chapter.

⁶² Report of the European Parliament on amendment of Rule 139 of Parliament’s Rules of Procedure (2006) PE 380.576v02-00 (Final A6-0391/2006).

⁶³ E.g. Commission Regulation (EEC) 2246/90 amending Regulation (EEC) 986/89 on the accompanying documents for carriage of wine products and the relevant records to be kept [1990] OJ L 203, P. 0050 – 0052.

3. PROBLEMS CAUSED BY MULTILINGUAL EU LAW

3.1. Introductory remarks

It is a fact that even in a country with a single common language and a single legal system the law is not always drafted in a clear and unambiguous manner. Even in these countries the statute law often has to be interpreted and fine-tuned at a later stage by legal experts and by the courts. Considering that at present the 27 Member States of the EU have 23 official languages and as many as 28 legal systems (including that in Scotland) there can be no doubt that this is even more so in European law and that drafting and interpreting European law is much more complicated than drafting and interpreting national law. Although the present status of the official languages is meant to be in accordance with democratic ideals and citizen-friendly, it also creates a number of problems and disadvantages and puts a significant extra burden on both the European lawmakers and on the national and European courts. They are not dealing with just a single legal text, but with 23 (and rising).

The most serious problem is that the multilingual regime may have negative effects on the quality of EU law, which may affect both the people governed by it and the EC Treaty objective of the approximation of laws. Apart from the fact that law always has to be accurate and precise in any event, in the European context matters are made more complex because EU law is drafted in many different language versions. It subsequently has to be implemented and interpreted in the various Member States which means that any mistake, ambiguity and inaccuracy may have multiple consequences if the implementation and interpretation differs among the Member States.

In this chapter these problems will be explored in more detail and it will be established what the legal consequences are. The problems will be illustrated by cases in which the language policy was either the subject of, or an element of, a legal dispute decided by the European Court of Justice. Some of the examples given below will show that this can be a delicate matter, because in such cases the Court must try to find a balance between respect for linguistic diversity on the one hand and the uniform interpretation and application of EU law in and by the Member States on the other.

First, however, a few remarks should be made about the term “translation” and the concept of equally authentic language versions because in particular this distinction is the cause of many problems.

3.2. Problems resulting from the equal authenticity of EU law in 23 languages

It is generally assumed that translations are hardly ever completely faultless and that total equivalence is almost impossible.⁶⁴ This is assumed for any translation and perhaps even more so for translations of legal texts. As Prof. Dr. van Calster put it: “One cannot expect different language versions of the same act or treaty always to say the same. Indeed, this would suppose a level of perfection difficult, probably even impossible to reach and/or to maintain”.⁶⁵ In respect of EC law the matter is even more complex because of the concept of “authentic versions”. While the first treaty establishing the European Coal and Steel Community was drawn up only in a single original language (in French), and the other versions were mere translations of the original and considered as such, today each version of the EC and EU Treaty is to be considered an authentic version and not a translation of one or more original documents.⁶⁶ Also in respect of secondary legislation, translation is not the proper term either. Council Regulation No. 1 does not speak of translating but of drafting.⁶⁷ This distinction⁶⁸ is quite significant because it means that the aim of EU translators - or drafters, to be more precise - is not so much to produce equivalent translations, but to produce identical original texts that not only have a communicative function, like a translation, but, perhaps even more importantly, also have to ensure that such texts have the same legal effects in all the Member States.

Although this drafting system, also called co-drafting⁶⁹, is successfully used in various bilingual and/or bi-jural countries (e.g. Canada), it is doubtful whether this is viable when many more languages are involved. According to the Director General of the Council’s Legal Service, it is not. He states that the EU uses a method that lies between the co-editing method and the authenticity of one sole text with translations.⁷⁰ Indeed, the reality (as also

⁶⁴ Richard L. Creech, *Law and Language in the European Union: The Paradox of a Babel ‘United in Diversity’* (Europa Law Publishing, Groningen 2005). At p. 26.

⁶⁵ G. Van Calster, ‘The Tower of Babel - The interpretation of multilingual texts by the European Court of Justice’ (1997) 17 Yearbook of European Law. At p. 369.

⁶⁶ Article 314 EC Treaty: This Treaty, drawn up in a single original in the Dutch, French, German, and Italian languages, all four texts being equally authentic ... Pursuant to the Accession Treaties, the Bulgarian, Czech, Danish, English, Estonian, Finnish, Greek, Hungarian, Irish, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish versions of this Treaty shall also be authentic. Cf. Article 53 EU Treaty (n 13).

⁶⁷ Article 4 Regulation No 1 (n 27): Regulations and other documents of general application shall be drafted in the official languages.

⁶⁸ The distinction between drafting and translating does obviously not apply to texts that are translated when a country joins the EU and when all the existing *acquis* is translated and not drafted.

⁶⁹ The “co-drafting” technique of drafting legislation “involves drafting the two versions of a bill together using a team of two drafters. One is responsible for the English version, while the other is responsible for the French”. Government of Canada, Privy Council Office, ‘Guide to Making Federal Acts and Regulations’, 2nd ed., 2001, at p. 121 (or on the Internet at www.pco-bcp.gc.ca).

⁷⁰ Piris (n 50) at p. 23.

shown in the previous chapter) is that the institutions do not simultaneously draft laws in all the official languages but make use of source texts in only one or a few languages. The “authentic texts” are in fact translations that at some point are declared to be authentic texts.⁷¹ Their authenticity, meaning that words in different authentic language versions are deemed to be equivalent and have the same meaning, is actually a legal fiction.⁷² Still, even though this linguistic equivalence may be nothing more than a legal fiction, it is believed by some scholars that such a legal fiction is “necessary for legal certainty and consistency so that citizens are governed by the same law, being treated equally irrespective of their linguistic diversity”.⁷³ The Court has agreed. In 1994 it ruled that the authentication of acts “guarantees legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding ... and an essential procedural requirement ... breach of which gives rise to an action for annulment”.⁷⁴

The legal fiction of having many authentic versions has two side-effects. In its Draft Articles on the Law of Treaties, the UN’s International Law Commission stated that “when the meaning of terms is ambiguous or obscure in one language but it is clear and convincing as to the intentions of the parties in another, the plurilingual character of the treaty facilitates interpretation of the text the meaning of which is doubtful”.⁷⁵ This is one of the positive aspects of multilingualism, both in the drafting/translation stage when the vagueness of a text in the working language can be discovered and can still be formulated in clearer words, and in the stage when interpretation is needed and ambiguities and other problems may be resolved by comparing the different language versions and thus provide more clarity.⁷⁶ The other side of the coin - as recognized by the ILC when it stated that the plurality of texts may be a serious additional source of ambiguity or obscurity - is that because of divergent or even conflicting versions of EU statutory texts, this legal fiction may actually be generating legal uncertainty instead of the legal certainty it was meant to provide because of the fact that the law in a single version alone cannot be relied on without

⁷¹ An authentic or authenticated text is the version of the treaty that has been authenticated by the parties, that is, the procedure whereby the text of a treaty is established as authentic and definitive. Deborah Cao, *Translating Law* (Multilingual Matters, Clevedon 2007) at p. 146.

⁷² *Ibid.*, p. 80.

⁷³ Deborah Cao, ‘Inter-lingual uncertainty in bilingual and multilingual law’ (2007) *Elsevier Journal of Pragmatics* 39. At p.73.

⁷⁴ Case C-137/92 P *Commission of the European Communities v BASF AG* [1994] ECR I-02555. Paras 75-76.

⁷⁵ Draft Articles on the Law of Treaties with commentaries. Adopted by the International Law Commission. *Yearbook of the International Law Commission*, 1966, vol. II. Article 29, Commentary under c.

⁷⁶ See also: Tito Gallas, ‘Understanding EC law as ‘Diplomatic Law’ and its Language’ in Pozzo at p. 123 (n 51).

comparing it to all the other language versions. The Court has often been asked to decide the meaning of a word, term or phrase because of the differences, ambiguities and inconsistencies that result from having various different versions of legislative texts and has dealt with such problems in sometimes similar ways but also in other specific ways. These differences, ambiguities and inconsistencies will be listed and discussed in the following subchapters, followed (in 3.4) by a general conclusion as to their consequences.

3.2.1 Grammatical and syntactical differences and ambiguities

Sometimes regulations and directives are phrased differently in one language than in one or more other versions. When such a difference is discovered, the question as to which of the authentic (!) language versions is decisive was answered as early as 1969 in the case of *Stauder v. Ulm*, when the wording of a Commission decision was not the same in all the four language versions (as it was at that time). The Court made it clear that “... the necessity for uniform application and accordingly for uniform interpretation [of Community regulations] makes it impossible to consider one version of the text in isolation but requires that it be interpreted ... in the light in particular of the versions in all four languages”.⁷⁷ Later, in the *CILFIT* case, the Court expressed this even more precisely, stating that “... community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of community law thus involves a comparison of the different language versions.”⁷⁸

When the different language versions do not correspond in all respects, this is often referred to as merely a “difference” or an “ambiguity” in the phrasing of the law in question whereas in many cases it is in fact nothing else but a mistake. In a 1997 case, the Court indeed observed that the Italian and Finnish versions of a regulation contained a substantive error and it once more confirmed the principle that legislation should be interpreted and applied in the light of the versions existing in the other official languages.⁷⁹ In a more recent case the Court compared different versions of a regulation because those versions used different wording in a text that was of particular relevance in the matter.⁸⁰ The issue was whether the stepson of a Turkish worker was entitled to install himself in Germany on the grounds that he was a member of the family within the meaning of a decision based on Community

⁷⁷ Case 29-69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECR 419. Para 3.

⁷⁸ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 03415, in para 18.

⁷⁹ Case C-177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and Others* [1997] ECR I-01111. Para 30.

⁸⁰ Advocate General's Opinion of 25 May 2004 in Case C-275/02 *Engin Ayaz v Land Baden-Württemberg*.

Regulation 1612/68 regarding the freedom of movement of workers.⁸¹ In Article 10, the German version speaks of “*Arbeitnehmer, (...) sein Ehegatte sowie die Verwandten*” (the “descendants”). The Italian and French versions, however, are more specific and refer to their descendants (“*i loro discendenti*” and “*leurs descendants*”, respectively). The Italian and French versions imply that only the children they had together would fall under this provision and not stepchildren.⁸² The Advocate General concluded that comparing different language versions was not helpful in this case because the Regulation did not “allow of an unambiguous answer regarding the position of stepchildren”.⁸³ He was rather lenient towards European lawmakers, implying that the wording of the directive had not been clear enough; in fact the wording had been clear enough in each of the individual language versions. It was the difference between the various versions that was the problem. The use of a pronoun in some versions (French and Italian) and the use of a definite article in other versions (German) resulted simply in different outcomes. It was plainly an error and nothing less, because this discrepancy might have easily been avoided by not using a definite article in one version and a personal pronoun in another version.⁸⁴ The Regulation was from the period when there were only four official languages but it remains to be seen whether in cases like this it will be possible to always compare 23 versions of a regulation.

In cases like the ones above, the law in a single version alone cannot be relied on without comparing it to all the other language versions, which is obviously virtually impossible but which in some cases may have serious implications for the parties involved.

3.2.2 Differences in meaning of ordinary non-legal terms

Sometimes the meaning of an ordinary word in one language does not correspond with its meaning in other languages (non-equivalence). At other times, however, the meanings do correspond somewhat, but one meaning has a wider scope than the other (partial equivalence). This is one of the most common issues in the language divergence cases.⁸⁵ In the *Fonden*

⁸¹ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L 257, P. 2–12 (DE, FR, IT, NL).

⁸² The Dutch version is somewhere in between: “*zijn echtgenoot en bloedverwanten*”.

⁸³ AG’s Opinion (n 80). Ground 65.

⁸⁴ See also Case C-132/99 *Kingdom of the Netherlands v. Commission of the European Communities* [2002] I-02709.

⁸⁵ Michael Fuchs, ‘Detection of multilingual divergence in EC laws’. Papers - Binding Unity and Divergent Concepts in EU Law [2006] Universiteit van Tilburg. At p. 11.

case⁸⁶, for example, it was found that in a directive⁸⁷ the word “vehicle” had a broader meaning in some languages than in others. In such cases it is the responsibility of the Court to give the word its definitive meaning. In this particular case the Court held that “vehicle” included aircraft and boats, whereas in some language versions the word “vehicle” was clearly restricted only to land-based wheeled means of transport. On the basis of the meaning of the word used in the Danish version, the Danish claimant was originally entitled to a VAT exemption, but this changed after the Court decided that the word was to be interpreted differently from what it may have suggested or from what the claimant believed it meant. As in many other, similar cases, the Court did not decide in favour of a specific version (the “correct one”, as it might be called) because that would be in conflict with the “equal authenticity” principle. The Court relied instead on the general purpose of the relevant law, stating that “where there is a difference 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”.⁸⁸ This does not mean, however, that the Court always applies a teleological interpretation.⁸⁹ If it is obvious that a material mistake has been made in one or in several versions, however, the Court does rely on the text of the correct version(s).⁹⁰

Another case was related to a term used in the same directive where “the term ‘*syndicale*’ in the French version and its equivalents in certain other language versions appear to be used in a wider sense than that of the expression ‘trade union’ in the English version and its equivalents in other language versions”.⁹¹ Although this seems to be in conflict with the principle of legal certainty, in the *Kelly-Milk* case (about, *inter alia*, an apparent discrepancy between the English wording of an article of a regulation and the wording of the same article in the other official languages) the Court had stated as a justification that “the elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words;

⁸⁶ Case C-428/02 *Fonden Marselisborg Lystbådehavn v Skatteministeriet and Skatteministeriet v Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527.

⁸⁷ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes [1977] OJ L 145, P. 0001-0040.

⁸⁸ Case *Fonden* (n 86).

⁸⁹ According to statistics, a grammatical approach is the basic method of interpretation in 70% of the Court's decisions. (Source: P. Lazaratos 'The grammatical interpretation in European law' (2006) at <translation.hau.gr/telamon/files/Lazaratos.pdf>).

⁹⁰ Case C-64/95 *Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v Hauptzollamt Cottbus* [1996] ECR I-05105.

⁹¹ Case C-149/97 *Institute of the Motor Industry v Commissioners of Customs and Excise* [1998] ECR I-7053. Para 11. See also Case C-257/00 *Nani Givane and Others v Secretary of State for the Home Department* [2003] ECR I-00345.

consequently, it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved”.⁹²

Also in these cases the fact that the law existed in many languages and because of a flaw in the text of some of these languages meant that one language version of the law alone did not provide the legal certainty that is required of good law.

3.2.3 Difference in meaning of legal terms

Terms may be linguistically equivalent, but they often have a different legal meaning depending on the legal system they belong to and the area of law in which they are used.⁹³ Even Member States that share the same language (e.g. Germany and Austria) may have their own legal language. A single shared legal term may have different implications in the different legal systems.⁹⁴ In EC law there are numerous examples of legal terms that vary from legal system to legal system. Many of such examples have been discussed at length in the literature: “good faith” (Cao), “guarantee” (Heutger), “cancellation” (Pozzo) and “contract” (Whittaker), to name just a few.⁹⁵ In such cases the same terms are used (in translation), but each legal term has a clear and defined meaning in each language. They are meant to be equivalents, but when the meanings are compared they simply do not always match. If this is discovered and if it comes before the Court, the Court again relies on the general purpose of the relevant law or may sometimes also be ironed out by the application of the concept of the “autonomous meaning” of EC legal terms, which will be discussed in more detail in 3.3 below. If, however, the difference in meaning is not discovered, the result may be that the same piece of legislation has different effects in every Member State, thus undermining the European objective of harmonizing laws.

3.2.4 Inconsistent and incoherent use of words and terms

The inconsistent use of words and terms, either within the same document or in different documents, is another related result of multilingual law. In *Fonden*⁹⁶, for example, already

⁹² Case 80-76 *North Kerry Milk Products Ltd. v Minister for Agriculture and Fisheries* [1977] ECR 425. Para 11.

⁹³ In Dutch law, for example, the definition of undertaking (“*onderneming*”) in the Works Council Act is different from the definition in the Trade Register Act.

⁹⁴ Examples are given by, *inter alia*, Viola Heutger ‘A more coherent European wide legal language’ (2004) European integration online Papers (EloP) Vol. 8 No. 2. at p. 2 and by Gianmaria Ajani/Martin Ebers (eds), *Uniform Terminology for European Contract Law* (Nomos-Verlag, Baden-Baden 2005), at p. 14.

⁹⁵ Deborah Cao (n 73) at p. 76; Viola Heutger 2008 (n 9) at p. 7; Barbara Pozzo ‘Harmonisation of European Contract Law and the Need of Creating a Common Terminology’ (2003) European Review of Private Law, at p. 764; Simon Whittaker ‘Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract’ (2000) Law Quarterly Review 116, at p. 95.

⁹⁶ Case *Fonden* (n 86).

mentioned above in 3.2.2, misunderstanding and confusion about the meaning of the word “vehicle” was the result not just of the lack of a clear definition, but aggravated by the fact that in some, but not all, language versions of the same directive the terms “vehicle” and “means of transport” were indiscriminately used to refer to the very same thing. When different words are used, the presumption would be that the difference is intentional, whereas in fact – as in this specific case - there may not be any difference in meaning at all. In another case the Court had to deal with the use of the word “measures” in two different ways in two different articles of Directive 64/221/EEC.⁹⁷ In Article 2 of both the English and Italian versions of this directive the word “measures” and “*provvedimenti*”, respectively, referred to general rules of a legislative character, whereas the same word in Article 3 referred to acts in reaction to personal conduct. The same word was used for the two different concepts while in the other languages different words were used to make a clear distinction between the two (e.g. “*voorschriften*” and “*maatregelen*” in Dutch, “*dispositions*” and “*mesures*” in French). It was rightly observed by one of the parties (who were English) that when the same term is used in different articles it may be assumed that it is intended to have the same meaning in each case (and in this case it did not). The Court decided that “no legal consequences can be based on the terminology used” and once more confirmed that “the different language versions of a community text must be given a uniform interpretation and hence 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”.⁹⁸

In the above cases the intentions of the law-makers may be assumed to have been clear, but somewhere during the drafting and translating process the language versions began to differ. This might eventually lead to different interpretations in the Member States of the law concerned and subsequently to diverging legal effects, which undermines the European objective of harmonizing laws.

3.3. Problems resulting from the concept of the “autonomous meaning”

The concept of “autonomous meaning” is yet another feature of EC law and illustrates that translating (or drafting) EC law is not the same as working with only two different languages (e.g. German and English), each with its own different legal system, specific terms and specific application of these terms. EC legal terms, conversely, are expressed in different languages, but they belong to one and the same legal system, i.e. the European

⁹⁷ Case 30-77 *Régina v Pierre Bouchereau* [1977] ECR 01999.

⁹⁸ *Ibid.*, para 14.

legal system, and may therefore have their own autonomous meaning. According to this principle, its legal meaning is still the meaning given to it by European lawmakers or (in the absence of a statutory definition) by the Court,⁹⁹ even if the meaning of an EC term is linguistically exactly the equivalent of a term in use in one of the Member States (and therefore a possible cause of confusion). The main reason behind this principle is obviously to avoid each Member State giving its own interpretation to a term. Interpreting the term “worker”, for example, the Court stated that “...if the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of “migrant worker” and to eliminate at will the protection afforded by the treaty to certain categories of person”.¹⁰⁰ The concept of autonomous meaning, even if solving a problem, also creates a few of its own.

The first problem with the concept of autonomous meaning is that it is not always immediately clear whether or not a term has an autonomous meaning, in which case a national court may have to interpret the meaning of an EC legal term. The outcomes in the various Member States may differ, undermining the aim of integration and harmonisation, the contrary of what community law is meant to do. It is precisely for these reasons that the institutions emphasize that “the use of terms that are too closely linked to national legal systems should be avoided”.¹⁰¹ There are many examples of this advice not being followed, however, one of which can be found in Council Regulation 44/2001, where the phrase “matters relating to tort, delict or quasi-delict” is used in the English version.¹⁰² The individual words “delict” and “quasi-delict” exist as words in the English language, of course, but these terms are unknown to English law which is why English speakers will immediately understand that these must be EU legal terms. On the other hand, the phrase used in the Dutch version “*verbintenissen uit onrechtmatige daad*”, is a very well-known and well-defined legal term in Dutch law.¹⁰³ And although the Court has stated in quite a

⁹⁹ See, for example, Case *CILFIT* (n 78) in para 19: “It must also be borne in mind, even where the different language versions are entirely in accord with one another, that community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in community law and in the law of the various Member States”.

¹⁰⁰ Case 75-63 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177. Para 1.

¹⁰¹ In 5.3.2 of the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions. Luxembourg, Office for the Official Publications of the European Communities, 2003. Also in 5.3: “The use of expressions and phrases - in particular, but not exclusively, legal terms - too specific to the author’s own language or legal system will increase the risk of translation problems”.

¹⁰² Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 012, P. 0001 - 0023. Article 5 paragraph 3.

¹⁰³ Art. 162 Dutch Civil Code. Literally translated: obligations arising from a wrongful act.

few cases¹⁰⁴ that these expressions from the Brussels Convention (on which this Regulation is based) are to be interpreted independently, a Dutch speaker will most likely interpret the phrase according to the Dutch definition because the EU legal phrase in Dutch is linguistically exactly the same as the Dutch legal concept. In many cases like this, the EC law term is incorporated directly into the national (often codified) law without, as wittily put by Hondius, a warning sign saying “Attention please, this is where European law begins”.¹⁰⁵ Consequently, there is a possibility that such a term may be interpreted differently in the various Member States. In this sense it could be stated that “legal irritants”¹⁰⁶, a term used to describe legal concepts that are negatively regarded as alien to a national legal system and a disturbance to the national structure of the law, also have a useful positive side. Precisely because they “irritate” they draw attention to the fact that extra care should be taken in interpreting the term in question.

The second problem related to the autonomous meaning is that, if a concept does have an autonomous meaning, such meaning may in many cases only be related to the legislative instrument in question or, in other words: “each directive creates its own little normative system”.¹⁰⁷ The result may be that a term has different meanings in several legislative EC instruments, adding to the incoherence and uncertainty of EC law.

3.4. Recapitulation and legal consequences of the problems

The above examples of “quality flaws” in EU law can be recapitulated as follows. The “authenticity” of each of the multiple language versions of EU law may bring about grammatical and syntactical differences and ambiguities (3.2.1) and differences in meaning or scope of ordinary non-legal terms (3.2.2) in the different language versions. It may also happen that EU legal terms are very similar to terms in national legislation, without being totally equivalent in meaning (3.2.3) and that terms are used inconsistently, i.e. that they have a different meaning from document to document, or sometimes even within the same text (3.2.4). Finally, it is not always clear whether a term specifically belongs to EU terminology, i.e. whether or not it has an autonomous meaning and if so, it is not always clear whether this meaning is the same in all legislative documents (3.3).

¹⁰⁴ For example: Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-07357, Case 34/82 *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987.

¹⁰⁵ E.H.Hondius, ‘Nieuwe methoden van privaatrechtelijke rechtsvinding en rechtsvorming in een Verenigd Europa’ (2001) Mededelingen KNAW 64-4, Amsterdam. At p. 9.

¹⁰⁶ Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences’ (1998) *Modern Law Review*, Vol. 61, pp. 11-32.

¹⁰⁷ S.J. Whittaker, ‘The Terminologies of Civil Protection: Rights, Remedies and Procedures’ in Pozzo p. 46 (n 51).

All these problems resulting from multilingual law have or may have several legal consequences, either individually or in combination. First, in particular with respect to the problems described in 3.2.1 and 3.2.2, it becomes clear that the law in a single version alone cannot be relied on without comparing it to all the other language versions. This is because knowing the substance of the law requires a consideration of all the versions in the various languages or, as aptly expressed in other words by the Advocate General in his opinion in Case 13/61 (1962): “all languages are equally authentic, which means that no single one of them is authentic”.¹⁰⁸ If this were indeed the case, it would be necessary for those governed by Community law to examine and consider all versions of a text in Community legislation before being certain about what the law actually is. This is virtually impossible, for obvious reasons, and they would have to wait for the (perhaps unpredictable) interpretation of the Court. The question that might then be asked is what exactly is the point of giving every citizen access to EC law in their own language when other versions might still result in a spanner being thrown in the works. Would this not also be in conflict with the intended transparency of EC law? It is also rather paradoxical that, although the equal status of all the languages of the Member States was meant to underline the autonomy of these states, this autonomy is at the same time undermined when all other language versions also have to be taken into account before the true meaning of the law can be known. The result is that the “legal certainty” provided in having a version in a specific language frequently becomes “legal uncertainty”.

Second, the European integration and harmonization process is jeopardized because of the uncertainties and ambiguities relating to the meaning of words and terms and the lack of commonly and consistently used (legal) terminology in many Community legal documents (3.2.3 and 3.2.4), including whether a word or term has an autonomous meaning or not (3.3). This may lead to diverging legal effects in the various Member States when EC law is implemented in national laws or when interpreted by national courts because when terms are not clearly defined, it will always be possible for national judges to interpret European rules in different ways. The differences between the versions may even go unnoticed as long as not all the versions have been compared, with the result that although the piece of legislation concerned is meant to have the same effect in every Member State, the opposite may in fact be true.

¹⁰⁸ See also G. Van Calster (n 65) at p. 375: “Rather than each bearing the authentic content of the text in question, they [all the language versions] form that content together”.

4. POSSIBLE SOLUTIONS AND ALTERNATIVES

4.1. Response of the institutions to the problems

The fact that the European law-making institutions are also aware of the flaws in the drafting process of EU law is shown by that fact that this issue is often the subject of debate and that the institutions are constantly attempting to strike the right balance between the EU's own legal system and the various national legal systems and to deal with the many languages in which these national and European laws are expressed. Many efforts have been made by the institutions to improve the drafting of legislation and they have produced an almost endless number of reports, communications and manuals on this subject.¹⁰⁹ They began with the Council adopting the Birmingham Declaration¹¹⁰, which called for "Community legislation to become clearer and simpler", leading to the adoption of the Council Resolution on the quality of drafting of Community legislation¹¹¹ and eventually culminating in the Joint Practical Guide, a guide for persons involved in the drafting of legislation.¹¹² In spite of this documentary abundance, the reality is that the advice they provide is not legally binding and this actually often reduces them to nothing more than "statements of good intentions". Practice has indeed shown that the guidelines are not always followed and it is not inconceivable that this is precisely because of their abundance. Some scholars even believe that this poor or incorrect application of EU drafting rules is in fact the cause of the bad quality of EU legislation.¹¹³

4.2. A different approach to multilingualism

In none of the publications referred to above, the possibility of abandoning multilingualism is considered as an option, which is remarkable because, as shown in the previous chapter, the multilingual regime is one of the causes of the sometimes poor quality of EC law and, consequently, of the possibility of law being implemented and interpreted differently in the Member States and of legal uncertainty for citizens. Legal scholars and experts have different views on the use of multiple languages in EC law. Some are strongly in favour of

¹⁰⁹ E.g. Manual of precedents for acts established within the Council of the European Union (n 46); Interinstitutional agreement on better law-making [2003] OJ C 321; Communication from the Commission to the European Parliament and the Council, A more coherent European Contract Law. An Action Plan. COM(2003) 68 final; Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the acquis: the way forward. COM(2004) 651 final.

¹¹⁰ 'Birmingham Declaration - A Community close to its citizens' in European Council Presidency conclusions [1992] DOC/92/6.

¹¹¹ Council Resolution of 8 June 1993 on the quality of drafting of Community legislation [1993] OJ C 166.

¹¹² *Joint Practical Guide* (n 101).

¹¹³ Helen Xanthaki, (n 8). At p. 675.

multilingualism, including Pozzo and Van Calster, for mainly the same reasons as expressed by the EU¹¹⁴. Van Calster stated that “multilingualism is capable of enforcing European integration in that it is difficult for most of the Union’s citizens to sympathize with a structure such as the Communities if that structure works solely in a language they could not understand”.¹¹⁵ The opposite view is also taken, however, by those who believe that a different approach is required and who have come up with alternatives or possible solutions. The main issue is to find a balance between respect for linguistic diversity on the one hand, and legal certainty, good quality and unity of EC law on the other. This does not automatically imply that the current principle of equality of languages should be preserved. The criterion for any solution or alternative, however, is that it should remove or at least reduce the disadvantages and problems of the present regime as described above in Chapter 3. It should also be taken into account, moreover, that the European multilingual phenomenon is not really unique. There are many other international and regional organizations that rely on multiple languages. Even though they might pursue different goals, it may also be worthwhile to look at, and learn from, their approaches. Below some solutions and alternatives will be explored that may help to solve the problems of the current multilingual legislative regime. Those that depart from the current regime will be discussed (4.3), as well as those that allow for the preservation of the current equality of languages (4.4).

4.3. An alternative approach: a departure from multilingualism

If the position is taken that, as set out above in Chapter 3, the authenticity of EU law in 23 language versions is one of the main sources of many problems and that maintaining this regime is no longer appropriate in view of the latest enlargements, it might make sense to abandon this policy. This would in any event solve the problems of the occurrence of grammatical and syntactical differences and ambiguities (3.2.1) and of ambiguities and uncertainties in the various language versions because ordinary words do not always have the same meaning or scope in every language (3.2.2).

Even though this might be met with much political resistance, in theory this is possible. In the *Kik* case both the Council and the Court agreed - in the latest instance supported by the Commission and, remarkably, without objections from either the EP or most of the Member States - that “there is no Community law principle of absolute equality between the official languages” and that the EC Treaty “does not provide that once the

¹¹⁴ See n 21 – n 23.

¹¹⁵ G. Van Calster (n 65). At p. 391.

Council has established such rules they cannot subsequently be altered. It follows that the rules governing languages laid down by Regulation No 1 cannot be deemed to amount to a principle of Community law”.¹¹⁶

4.3.1 Limitation of authentic language versions of legislation

As far as the EU is concerned, abandoning multilingual law seems to be out of the question. The law must be published in all the official languages of the Member States because citizens are presumed to know the law¹¹⁷ and they can only know that law if it is written in a language they can read. But even if this is accepted, do all versions of the regulations and other legislation really have to be authentic or should there be only a few authentic versions and the other versions “merely” translations? When there are doubts about the wording and/or exact meaning of a word or term, the national courts and/or the European Court have to compare all the versions of a text in the various languages before being able to decide its precise meaning. This is becoming an almost impossible task, but one that could be done if the regime of “authentic language versions” were replaced by a regime where “reference languages” or “bridge-languages” were used. The authentic version or versions (the reference languages) would then be decisive and binding when problems, questions or uncertainties arose. Instead of comparing the versions in all 23 languages, which is unlikely to happen in any event, the courts would only have to take a few versions into account. Such an option was also suggested as early as 1966 by the International Law Commission which stated that “a plurilingual treaty may provide that in the event of divergence between the texts a specified text is to prevail”.¹¹⁸ This approach is indeed used by many international organizations (e.g. the Vienna Convention on the Law of Treaties¹¹⁹ and the European Convention of Human Rights of which the English and French versions are authentic) and is sometimes also used in judgments of the Court or in opinions of the Advocate-General when comparing different language versions and deciding on the basis of the “source texts”.¹²⁰

4.3.2 Lingua franca

Whenever the issue of the EU’s multilingual regime is discussed or criticized, the option of the use of a lingua franca is frequently mentioned. A lingua franca is a language that is used

¹¹⁶ *Kik Case* (n 30). Paras 52 and 58.

¹¹⁷ The principle of *Nemo ius ignorare censitu*, i.e. nobody should be thought to be ignorant of the law.

¹¹⁸ Draft Articles on the Law of Treaties with commentaries (n 75).

¹¹⁹ Article 85: the Chinese, English, French, Russian and Spanish texts are equally authentic. Vienna Convention on the Law of Treaties United Nations, United Nations, Treaty Series, vol. 1155.

¹²⁰ E.g. Advocate-General's Opinion in Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005].

as “a means of communication between populations speaking vernaculars that are not mutually intelligible”.¹²¹ In the words of sociologist De Swaan: “If transmission from one language to another is so tricky and troublesome, and inevitable nevertheless, then it had better be restricted to the native language and one widespread lingua franca.”¹²² As shown in Chapter 2, the institutions already make use of one or several of such languages for their internal communications and as pivot languages but so far this has never been seriously considered in respect of the final, authenticated versions of legislation. Even so, a few proposals have been made over the years, mainly in respect of English, French, Latin and Esperanto and although this is not the place to explore these options at length, a few observations will be made.

English is the language of international trade, politics, science and economics, and often used at international public gatherings. A survey in 2005 showed that although German is the most widely spoken mother tongue in Europe (18%), English remains the most widely-spoken foreign language throughout Europe: 38% of EU citizens stated that they have sufficient skills in English to have a conversation.¹²³ English is also the preferred drafting language and working language and one of the pivot languages used by the institutions. This is why it is argued by some that English has already in fact become the lingua franca of the EU. Others believe, however, that English should be ruled out as a lingua franca because it is the language of the Common Law.¹²⁴ This is disputed, in turn, by others who argue that many continental legal concepts have already been expressed in English – including, or maybe even in particular, in EC law - as a result of which a corpus of terms and explanations exists and is being used.¹²⁵

French is another language that is often mentioned as a potential lingua franca. In the past it used to be the language of diplomacy but has lost this position to English. It is still a working language and pivot language of the institutions, and it is the language of deliberation of the Court.¹²⁶ In 2004 a proposal was presented to the EP to use French as a reference language.¹²⁷ This proposal, called a “Manifeste en faveur de la langue française comme

¹²¹ Britannica online encyclopedia <<http://www.britannica.com>>.

¹²² Abram de Swaan, *Words of the World: The Global Language System* (Polity Press, Cambridge 2001). P. 189.

¹²³ Special Eurobarometer 243 ‘Europeans and their Languages’ (2006) European Commission, Brussels.

¹²⁴ Anne Lise Kjaer ‘A common legal language in Europe?’ in: Van Hoecke, Mark (Ed.) *Epistemology and Methodology of Comparative Law* (Hart Publishing, Oxford and Portland 2004). At p. 384.

¹²⁵ S. Ferreri ‘Communicating in an International Context’ in Pozzo at p. 44 (n. 51).

¹²⁶ Court of Justice of the European Communities at <http://curia.europa.eu/jcms/jcms/Jo2_10739/regime-linguistique>.

¹²⁷ Maurice Druon ‘Manifeste en faveur de la langue française comme langue juridique de l’Europe’ (2004) <<http://www.institut-idef.org/Manifeste-en-faveur-de-la-langue.html>>.

langue juridique de l'Europe" was presented by Maurice Druon, French ex-minister and member of the Académie française. This initiative, however, has been suspended because of Mr Druon's recent demise.

A first disadvantage of using English or French as a lingua franca, however, would be that most drafters will not be native speakers of the language chosen. A research project on the impact of enlargement and administrative reform on the European Commission carried out in 2006 and 2007 showed that working in a non-native language results in: "confusions caused by mistranslations, the loss of nuance, and the development of a somewhat simplified common form of the language combined with jargon specific to the organization or discipline".¹²⁸ Another disadvantage is that native speakers would be given a head start. It would create inequality between the official languages and, thus, between citizens. On the other hand, this does not seem to apply to English anymore because it has been "de-nativised" to a large extent, that is to say, the global number of English speakers who are not native English speakers is in fact larger than the number of native English speakers. Within the EU a kind of Euro-English that is no longer dependent on its Anglo-Saxon roots has developed. Perhaps English is seen as "owned" by native English speakers but – within an international and European context - English has become an international language. There are even UK universities that offer a degree called "Masters in Teaching English as an International Language", illustrating that there is some recognition in the UK that English is now an "international language". Still, for reasons of non-discrimination between Member States languages, the use of a language that is not spoken in any of the Member States is also frequently proposed.

Latin has already left its stamp on the terminology and substance of the law of many of these countries because of the major influence of Roman law on many legal systems in Europe. Latin terms like *culpa* and *in rem*, and phrases like *pacta sunt servanda*, are as familiar to European legal experts as the equivalents of those terms in their own language. Beyond that, new Latin terms have been created to be used in EC law. One example is the term for "European company", the *Societas Europaeae*. In the inter-institutional terminology database of the EU, IATE¹²⁹, which combines the terminological data of all the European Union Institutions and bodies, Latin has even been added to the official European languages. The disadvantage of Latin, however, is that it does not seem to be able to solve the problems

¹²⁸ Carolyn Ban, 'Sorry, I Don't Speak French: the Impact of Enlargement on Language Use in the European Commission,' in Michel Gueldry, ed. *Walk the Talk. Integrating Languages and Cultures in the Professions*. Volume 1 (The Edward Mellon Press forthcoming, 2009).

¹²⁹ Interactive terminology for Europe <<http://iate.europa.eu/>>.

that arise from legal multilingualism because even though Latin terms may sound familiar to everyone, their meanings have sometimes developed differently in the various legal systems. A Latin term would still require a clear definition and a description of the meaning in EU law.

Esperanto, another neutral language, does not have the advantages of Latin but does not have its disadvantages either. Even though it is an artificial language, it is considered an easy-to-learn, living language with simple grammar. Its downside is that a large-scale project would be required if Esperanto were to become the lingua franca of legislation.

If language is simply considered a means of communication and a tool for the coherency, clarity and accuracy of legislation - therefore securing legal certainty – *and* if the issue of maintaining linguistic diversity in every area of Community matters could be tackled, a lingua franca would be an effective way to solve many of the problems that result from multilingual law.

4.4. Solutions preserving the existing principle of the equality of 23 languages

As long as Article 4 of Regulation No 1 is in force, meaning that regulations and other documents of general application shall be drafted in the official languages, and considering that the institutions strongly defend their commitment to multilingualism on many occasions, there seems to be no way around a system in which the law is drafted and published in all the official languages. It is not very likely that this will change in the near future as shown by many statements made by the institutions.¹³⁰ Leaving aside the matter of whether or not respect for cultural diversity (which includes respect for linguistic diversity) actually does depend on preserving the authenticity of law in all 23 languages, there are some solutions for improving the quality of law that might also keep the current language regime intact. These solutions would be an answer to the problems - which are repeated here for convenience - caused by the difference in meaning of legal terms (as described in 3.2.3), the inconsistent and incoherent use of words and terms (3.2.4) and the problems resulting from the concept of the “autonomous meaning” (3.3), i.e. those that in particular lead to diverging legal consequences in the various Member States when EC law is implemented in national laws.

4.4.1 Logistic solutions, including an overall language policy

Logistic solutions are a first and easy step towards solving the problems resulting from multilingualism while preserving the multilingual regime. It has been shown in Chapter 2 and

¹³⁰ E.g. “...without it [the multilingual system], a democratic and transparent European Union is simply not possible” in Commission Communication ‘A New Framework Strategy for Multilingualism’, at p. 13 (n 18).

3 that all the institutions have been making attempts to improve the efficiency and efficacy of the law-making process. These attempts include encouraging the production of shorter documents and checking whether specific translations are really necessary, developing machine-translation tools and computer-assisted translation tools, and the raising of translation skill standards.¹³¹ Such practical solutions are useful for making the procedures more cost-efficient and less vulnerable to delays, but there are other measures which may have a more direct effect on the quality and uniformity of legislation as such. As also shown in Chapter 2 when describing the law-making process of the institutions, many mistakes and inconsistencies arise as a result of the various stages a draft has to go through and of the fact that each institution uses its own policy in the preparatory stages of drafting law. It should therefore be considered whether an overall language policy for all the institutions during the entire law-making process is not called for and whether there should not be one supra-institutional legislative department with a supervisory role and responsible for the final result.

Suggestions along these lines have also been proposed from outside the institutions. In 2003, for example, a UK report on the implementation of EU law and the corresponding problems (the “Bellis Report”), which states that “the quality of EU legislation is not at all bad but that there are sometimes anomalies likely to increase with enlargement”, suggested setting up a “Legislative Drafting Office” that would be independent of EU institutions.¹³² Such an office would have to monitor the drafting of law during the entire legislative process in all the official languages without the need for legal drafters in each individual institution. Enquiries have revealed, however, that this Bellis Report seems most likely to have been filed quietly away by the British Foreign Office (which had commissioned this report) and as far as the EU is concerned, no such drafting office is yet in sight.

Another handicap of the current language regime(s) is that, during the final stages in particular, texts are sometimes translated after negotiations have ended, which means that the negotiators, the ones responsible for the new legislation, can no longer verify the concordance of all the language versions. This problem could be solved if the number of languages used were limited during the preparatory stages and if these specific languages were used by all the institutions. Only in the very final stage would translators and legal experts have to combine forces to produce final versions in all the languages instead of being involved during the entire process.

¹³¹ Speech Lönnroth, DG for Translation (2008) (n 5).

¹³² Robin Bellis ‘Implementation of EU Legislation, an independent study for the FCO’ (2003). At p. 25. Available on <http://www.fco.gov.uk/resources/en/pdf/pdf7/fco_eulegislationbissetreport>.

Several scenarios are possible. The most used languages could be used, as is already done during many stages. Or a choice could be made to have a system of “language blocks”, i.e. one language for countries with the same language or with languages belonging to the same language family, or one language for countries whose legal systems are the most similar.

4.4.2 A common legal language

Another solution with which it would be possible to preserve multilingualism would be a “common legal language”. The term “legal language” in this context does not refer to a language in the general sense of the word, but is taken to mean the particular use and meaning of words and terms in a particular context, i.e. for the formulation of legal texts.¹³³ It is therefore different from the concept of a *lingua franca* as discussed above, which has a broader meaning, although a common legal language could be dubbed a *legal lingua franca*. With a common legal language, i.e. a list of terminology or a set of definitions, the drafters of law and/or translators would not run the risk of using a legal term that is too specific to a national legal system nor of using the same word for the same concept in one or several documents. In this way the occurrence of differences in meaning of legal terms (3.2.3), inconsistent and incoherent use of words and terms (3.2.4) and the problems resulting from the concept of the “autonomous meaning” would be avoided or at least reduced.

As these specific problems may result in diverging legal consequences in the various Member States when EC law is implemented in national laws, it could be concluded that the European integration and harmonization process is undermined because the lack of a common European legal language, which is why there are legal scholars who believe that harmonisation and integration can indeed only be attained by standardising the legal terms used within the EU.¹³⁴ Within this context standardisation is understood to mean the offering of clear definitions, concepts and principles for specific use.¹³⁵ Just like any national legal system, the European legal system should also have its own terminological apparatus, underlying conceptual structure, and rules of classification.¹³⁶ In this sense much can be learned from approaches used by comparative lawyers and legal translators, e.g. the use of

¹³³ Because there is much disagreement among scholars about the meaning of the term “legal language”, I take the liberty to use my own meaning here, i.e. legal language is the language used in legal texts and in particular in legislative documents.

¹³⁴ Ajani/ Ebers (n 94); Heutger (2008) (n 9).

¹³⁵ Heutger (2004), at p. 2. (n 94).

¹³⁶ Susan Šarčević, *New Approach to Legal Translation* (Kluwer Law International, The Hague 1997). At p. 13.

neologisms¹³⁷ and paraphrasing¹³⁸. As a matter of fact, although EU law is still a relatively new legal system and is still developing its own structure, system and terminology, over the years many new terms and concepts have already been created, either by the lawmakers themselves or, at a later stage, by the Court when it had to interpret the law. This has resulted in the slow growth of a system in which terms have their own specific meanings within European law and, after implementation, in national laws as well. However, more is needed than these piecemeal developments. In its Action Plan¹³⁹, and later followed by a Communication¹⁴⁰, the Commission did indeed recognize the incoherencies and inconsistencies within EC legislation and the need for improvement in the quality and consistency of the *acquis communautaire* by means of a coherent, uniform set of common principles and terminology. It also acknowledged the criticism directed at the use of abstract legal terms in directives (including fundamental terms like “contract” and “damage” and more specific terms like “equitable remuneration”, “fraudulent use” and “durable medium”).¹⁴¹

One step towards an improvement - mentioned in the aforementioned documents - would be the creation of a “Common Frame of Reference” (CFR), which would have to provide “solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms”.¹⁴² The CFR is focused on contractual law and on existing and future *acquis* and its main uses and purposes are: (a) a tool box when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law, (b) a way of simplifying the *acquis*, (c) an aid to the Court when interpreting the *acquis* on contract law, and (d) a useful tool for national legislators when transposing EC directives into national legislation.¹⁴³ These goals are precisely the mix of solutions that might solve many of the problems referred to above.

This initiative on the part of the Commission eventually resulted in a response in 2008 by the Study Group on a European Civil Code and the Research Group on EC Private Law (the Acquis Group¹⁴⁴). A Draft Common Frame of Reference (DCFR) was presented - a draft for a future CFR - which is intended to help in the process of improving the existing *acquis*

¹³⁷ A new term is created that does not form part of the terminology of the language legal systems of the Member States, in combination with an explanation.

¹³⁸ A description is used of a specific language term in the language in which one single term would not convey the same meaning.

¹³⁹ An Action Plan (n 109).

¹⁴⁰ The way forward (n 109).

¹⁴¹ An Action Plan, at p. 8 (n 109).

¹⁴² Ibid. At pp. 2 and 16.

¹⁴³ The way forward (n 109). At p. 3 and 5.

¹⁴⁴ European Research Group on Existing EC Private Law (Acquis Group) at <<http://www.acquis-group.org/>>.

and in drafting any future EU legislation in the field of private law by developing a coherent terminology.¹⁴⁵ Although meant for contract law purposes, and therefore limited in scope, the creation and use of such a list of definitions could in the future also be expanded and used for other sectors of EU law. Such a step-by-step approach is also advocated by Heutger, who calls this process “minimum sector-specific harmonisation” and explains that “in this incremental way (e.g. first harmonising the law of sales, then insurance law, then tort law, etc.) the use of a coherent European legal language will develop gradually and naturally. Citizens will have time to become familiar with new terminology and do not have to quickly acquaint themselves with an artificial legal language with an enormous amount of legal terms”.¹⁴⁶ Also for these purposes a kind of “Legislative Council” could be established, as also suggested in other proposals for streamlining the drafting process (see above in 4.4.1), which would be tasked with the independent review of legislative proposals and final legislation.¹⁴⁷ Such a body could create and maintain a set of definitions, like the ones referred to above, which should exist separately from the directives and regulations. In addition to being useful when new law is drafted and guaranteeing the coherent and consistent use of legal terminology, the other advantage is that when a specific definition requires amendment, it would not be necessary to amend many different legislative documents and there would be less chance that one of them would be overlooked.

Another project that may help to solve the problems resulting from different languages and different legal systems within the EU and that is targeted at “the identification of similarities and differences, common principles and concepts within national and European legal acts” is the creation of a database, called the “Legal Taxonomy Syllabus”.¹⁴⁸ With regard to the European or national legislator, the aim of the Syllabus is “to enhance coherency already at the drafting stage by providing for an insight into the existing consumer law terms and concepts and a better understanding of the impact of any further legislative act within the Member States”.¹⁴⁹

In addition to these two projects many more efforts have been made and are being made to contribute to improving Community law but it is beyond the scope of this thesis to

¹⁴⁵ Christian von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition* (Sellier European Law Publishers, Munich 2008). At p. 30-31.

¹⁴⁶ Heutger (2008) at p. 14 (n 9).

¹⁴⁷ See also: A.E. Kellermann et al. (eds), *Improving the Quality of Legislation in Europe* (Kluwer Law International, The Hague 1998). At p. 100.

¹⁴⁸ Piercarlo Rossi and Christian Vogel ‘Terms and concepts: Towards a syllabus for European Private Law’ (2004) *European Review of Private Law* 293–300.

¹⁴⁹ Legal Taxonomy Syllabus at <http://www.eulawtaxonomy.org/index_en.php>.

give a complete overview of them all. Worth mentioning, however, are long-term projects that aim at building a new European legal culture, like the Trento Common Core project¹⁵⁰, and projects that have already produced concrete results, like the Lando Project (the Commission on European Contract Law) with the Principles of European Contract Law.

Recent developments have indicated, however, that despite all the Commission's intentions of removing inconsistencies from EC legislation, its approach is rather inconsistent in practice. It is clear that the mere creation of certain guidelines does not yet on its own guarantee high quality legislation. Good intentions alone do not solve any problem. A painful example is that the Action Plan itself had translation difficulties. In some places a single word was used in the English version, different words were used in the German version.¹⁵¹ Another example is the on-going struggle with consumer right directives. Much criticism was expressed in the past about the inconsistent use of terms, the use of confusing terms and the lack of definitions for words like "consumer", "contract", "purchaser", "cancellation" and "damage".¹⁵² The Commission's answer to this was a Green Paper¹⁵³, followed by a proposal to merge four consumer rights directives¹⁵⁴ into a single instrument, the Directive on Consumer Rights.¹⁵⁵ Although the Commission had stated in the aforementioned Action Plan that it would take into account a common frame of reference,¹⁵⁶ there are no signs of that at all in the proposal. The proposal does not rely on the definitions provided in the DCFR - in fact, no mention is made of the DCFR at all - and it still fails to properly define essential legal terms like "contract" and "purchaser" and uses terms like "rescind" and "terminate" without explaining the difference in meaning and legal scope. The Commission should be aware of the need to give a clear definition of a term, knowing that there is no single definition available in European law nor a universal understanding of the concept in the laws of the various Member States and that this may lead to different interpretations at a national level with different effects for European citizens as a result. According to Hesselink, "this question will have to be resolved in one way or another (i.e. by adapting the DCFR to the directive or vice versa) before both texts will be adopted by the European legislator, because it would be

¹⁵⁰ The Trento Common Core project at <<http://www.common-core.org/>>.

¹⁵¹ Viola Heutger, 'Law and Language in the European Union' (2003) in *Global Jurist Topics* Vol. 3, 1. At p. 6.

¹⁵² See, among many others, Heutger (n 151) at pp.8 and 9; Pozzo at p. 14 (n 51).

¹⁵³ Green Paper on the Review of the Consumer Acquis. COM (2006) 744 final.

¹⁵⁴ Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts and Directive 1999/44/EC on consumer sales and guarantees.

¹⁵⁵ Proposal for a Directive of the European Parliament and of the Council on consumer rights [COM(2008) 614 final, 2008/0196 (COD)].

¹⁵⁶ An Action Plan (n 109). At p. 2.

absurd for the same legislator to enact or endorse two divergent and even contradictory texts on (in part) exactly the same subject".¹⁵⁷ Also, there are many other consumer rights directives left that have not been included in this attempt to harmonise consumer rights law.

As the DCFR was in fact produced at the instigation of the Commission, it still has a chance of being taken into consideration, even though the latest developments have been disappointing. In spite of this, the fact remains that each Member State is dealing with two legal languages within a single tongue: the wording used in its own national laws and the wording used in EC law a Community legal language. This also considerably increases the need for a final decision by the Court whenever there is a dispute or doubt about a specific term, which is obviously exacerbated each time that more languages are involved and which has become much more complicated and time-consuming than before. The development of a common legal language is therefore desirable and necessary. Although Europe will never again share a common language, sharing a common legal language might very well be possible.¹⁵⁸

¹⁵⁷ Martijn W. Hesselink 'The Consumer Rights Directive and the CFR: Two Worlds Apart?' (2009) *European Review of Contract Law*, Forthcoming; Centre for the Study of European Contract Law Working Paper Series No. 2009/02. <<http://ssrn.com/abstract=1346981>>.

¹⁵⁸ Cf. Anne Lise Kjaer (n 124), pp. 396-398; Jan Engberg, 'Statutory texts as instances of language(s): consequences and limitations on interpretation' (2004) *Brooklyn Journal of International Law*, Vol. 29-3, p. 1162.

5. CONCLUSION

The objective of this thesis is to examine whether the EU's present multilingual system should be reviewed as a result of the recent enlargements and because this system may have negative effects on the quality of European legislation. Considering the problems and disadvantages of multilingual EU law and the legal consequences of that, as set out in Chapter 3, it can be concluded that the present language regime, i.e. drafting legislation in all the official languages, does indeed have negative effects on the quality of EC law. Many of the problems are related to the lack of a clear language policy. Apart from Regulation No 1, Europe's language policy is mainly a policy of non-intervention. In fact, there is not *one* single language regime, but there is one for each institution. The obligation under Regulation No 1 is to draft law in all the official languages, but this is from a time when there were only four languages. It is strange that now, more than half a century later, it is still not thought that the policy adopted in 1958 might be unworkable with 23 languages and might be a potential and actual source of some of the EU's legislative problems. As shown by the *Kik* case¹⁵⁹, it is not impossible for the rules to be changed because, as the Court stated, there is no principle in Community law of the absolute equality of the official languages.¹⁶⁰

The poor quality of legislation has various legal consequences. Legislation may have different effects in the various Member States because differences between the versions may go unnoticed. The "legal certainty" provided by having a version in one's own language frequently becomes "legal uncertainty", since the law in that one language version alone cannot be relied on without comparing it to all the other language versions. The law can only be known with certainty by looking at all the versions together, virtually an impossible task. Finally, the overall lack of definitions in many community law documents, as well as the lack of consistently and commonly used (legal) terminology causes uncertainties and ambiguities relating to the meaning of words or terms. This too may lead to diverging legal consequences in different Member States. It could obviously be argued that in every legal system there is always a certain degree of uncertainty about the law until the court has had its final say. This is no different for EU law. The point about EU law, however, is that such indeterminacies are easily multiplied because of the different languages and legal systems.

Several solutions for improvement are possible and have also been proposed over time, both from within the institutions and from outside groups and committees. This has,

¹⁵⁹ Case *Kik* (n 30).

¹⁶⁰ See Chapter 4.3 "An alternative approach: a departure from multilingualism".

unfortunately, not led to major, concrete changes. In fact, the institutions have initiated ideas for improvement, but subsequently ignored proposals (as has happened to the DCFR in respect of the merger of consumer right directives) or failed to take care of properly monitoring. It is hoped that in the future the institutions will take the need to take action more seriously as well as the projects that have been and are being developed. The fact that the institutions themselves frequently express their wish for improvement of Community law and the fact that at many levels and by many groups work is done to give effect to this wish, means that forces have to be combined and that there should be one coherent and comprehensive body of guidelines for all the institutions, which may have to be laid down in either the Treaty or in a binding document and the use of which should preferably have to be monitored by one supra-institutional legislative department.

Respect for linguistic diversity and maintaining the existing principle of the equality of all the official languages, while simultaneously safeguarding the quality and unity of EU law, may seem to be incompatible tasks. However, as long as a clear policy is developed and consistently followed and when use is made of the effective tools and solutions that are offered, it does not necessarily have to be a Catch-22 situation.

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