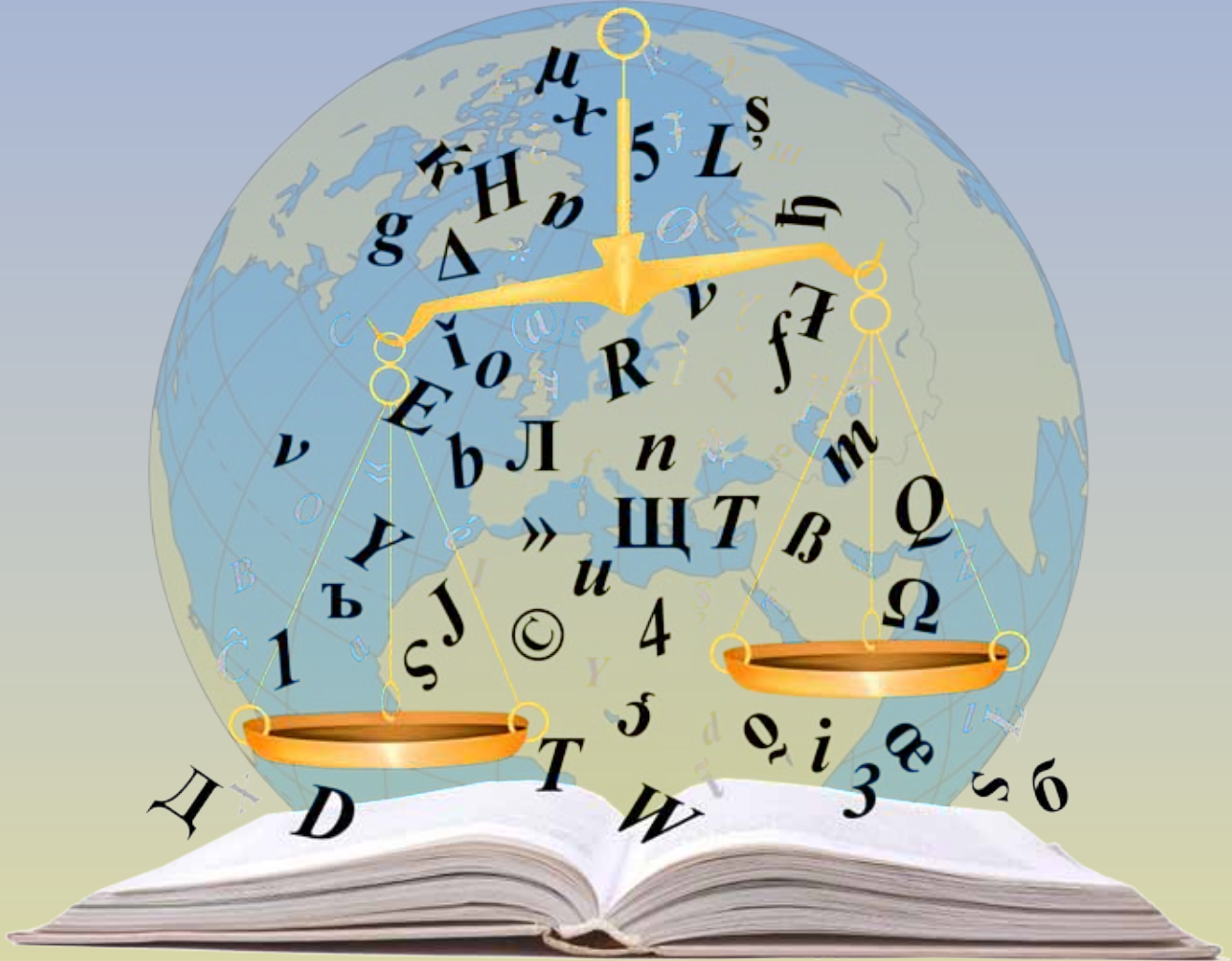




Studies on translation and multilingualism

Language and Translation
in International Law
and EU Law

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Executive summary

The study on Language and Translation in International law and EU law explores the role of language and translation in the global environment with special regard to legal instruments.

Divided into four thematic chapters and supported by two case studies, the study

- gives an overview of the language regime applied in international fora,
- presents the language-related aspects of the treaty-making powers of the EU, including the specific translation methods of treaties concluded by the EU and the impact of the terminology of international law on EU legislation,
- highlights the main regulatory instruments of international law on language rights and identifies the role and nature of linguistic rights,
- investigates the relationship between linguistic diversity and economic efficiency in view of the smooth functioning of the internal market and in a broader context, based on two case studies (one on labelling and the other on patents).

The research was based on a thorough analysis of the relevant literature and of other publicly available documents, on replies received to previously prepared questionnaires and on personal interviews.

At international level, language and translation come to play a role when sovereign states conclude agreements among themselves (macro level), or in the context of international trade when goods, services, capital and persons cross national borders (micro level). Some language-related aspects of international trade are regulated at international level (patents) and even if they are not, their existence cannot be ignored by the relevant instruments of international law (labelling) altogether.

At macro level, international law cannot ignore the issue of language. As international treaties are the main written legal sources of international law, the language in which they are binding, that is, in which they are authentic, is crucial. States acting at international level endeavour to have their official language(s) as the authentic language(s) of the international treaties, although restricted multilingualism is accepted as a general rule in the case of international treaties either with a very high number of contracting states or concluded under the auspices of international organisations.

In this regard, translation plays an important role both in an official and non-official context. International treaties are usually drafted in a commonly agreed language and then translated into the other authentic languages. As the legal value of all authentic texts will be the same, the quality of these "translations" must be unchallengeable. The current mechanisms of translating international instruments have been criticised by many, and new ideas have been put forward in order to ensure that the translation phase is not completely separated from the drafting phase of the agreement. Problems caused by diverging but equally authentic language versions also demonstrate the importance of translation.

On the other hand the impact of non-authentic translations of international agreements cannot be underestimated either. In cases where the official language of a contracting party is not among the authentic languages of the agreement, the non-authentic translation (generally contained in the promulgating law of the contracting party) will be the main source of information concerning the substance of the agreement. Bringing translation closer to drafting, managing multilingual terminology databases, setting

model conventions with commentaries and making the relevant case-law available in several languages are all methods that could efficiently contribute to the quality of translations, but they might remain fruitless without addressing the language awareness of drafters and translators.

The EU as an actor at international level is also confronted with the language regime of international treaties which of course separate from the regime defined by Regulation 1/58. Though it strives to have all of its official languages become at the same time authentic languages of the international treaties it concludes, it must in the vast majority of cases conform to the established language regime of the multilateral treaty concerned. An unconventional consequence is that the non-authentic language versions of the agreement will be published as "translations" in the Official Journal of the EU.

As a matter of fact, the translation of international treaties is not just a purely technical exercise: the terminology of international agreements can have a serious impact on European terminology even at the level of secondary law. Thus, very often the translation of international agreements presupposes and requires conscious linguistic choices made by translators and policy makers.

Beside the issue of authentic languages and the availability of international treaties in different languages, the extent to which instruments of international law deal with language rights is another aspect worth studying. Language rights have been explicitly dealt with by international law since the early 90s, although some earlier instruments also had certain provisions granting implicit rights on language use (for instance the right to a fair trial).

International law grants language rights at different levels and for different purposes. In some instruments language rights are seen as a tool for preserving peace and security; in others the use of one's language is intended to guarantee fair treatment of individuals while the preservation of linguistic diversity is also an objective followed by international law. These purposes include the protection of linguistic minorities, but at the same time they give rise to specific language rights which are necessary for exercising classic fundamental rights: procedural guarantees, freedom of expression and non-discrimination.

The European Union itself is fully committed to preserving and promoting multilingualism. On the one hand official multilingualism is a logical consequence of its legal order where EU legislation may directly affect individuals and must therefore be available in their official languages. On the other hand, multilingualism is an expression of an "ecological" approach to diversity. Moreover, multilingualism reflects the principle of subsidiarity: a sharing of competences between the EU and its Member States confirming that the EU will not intervene in areas which fall under the Member States' competences or which they are best placed to regulate.

It should still be recalled that since the Treaty of Lisbon, preserving linguistic diversity has been included among the objectives of the EU, and that the Charter of Fundamental Rights explicitly provides for the protection of linguistic diversity. However, the EU is at the same time committed to ensuring the smooth functioning of the internal market, and these two objectives may in certain cases contradict each other. Enhancing the internal market may increase the need for translation (interconnecting national authorities, provision of information in other EU languages on national legislation, labelling

requirements) while reducing language barriers to trade may weaken linguistic diversity (limited language regimes in the case of trademarks, standards and the future unitary patent), let alone weaken the protection of individual freedoms. The EU's main challenge is to strike a delicate balance between these equally important objectives.

The burden of translation under these provisions is borne either by the EU or by the Member States or by the market players, depending on the provision concerned. Thus translation and language run through the whole economic chain, from macro to micro levels, a horizontal dimension which affects more than final beneficiaries and that EU legislation takes into account. At the same time, however, the EU's competences are restricted in the field of language use which under the principle of subsidiarity is, as a general rule, a matter to be regulated by the Member States. The EU can only intervene and set rules at European level if it is necessary for the functioning of the internal market and thus dictated by some higher ranking objectives: the protection of consumers, health and safety. Such European provisions on the one hand eliminate language barriers (for consumers) and on the other hand create translation costs (for business); however, they do so for the sake of some higher ranking rules. Thus, the elimination of language barriers might result in more translation work. The nature and scope of these requirements varies. Some provisions explicitly provide for the use of the official languages of the Member States (for medicines), others authorise the Member States to foresee language requirements (for example in the case of toys) and some prescribe the use of a language which can be "easily understood" by the consumers (for distance contracts). All of these requirements express different forms and levels of language rights.

These tensions between economic efficiency and linguistic diversity are illustrated by two case studies. Both the issue of labelling and that of patents had to be tackled by international instruments and also by European legislation.

Labelling was studied in the light of the WTO system and under the relevant EU legislation, in both primary and secondary law. Historically speaking, both the WTO regime and the EU focused on the interests of producers when exporting goods. The protection of consumer interests was channelled into the existing legal frameworks only at a later stage of development. Language requirements related to labelling imposed by states of import aim, at least partly, at protecting consumers. From the perspective of human and economic rights, language-related labelling requirements in fact grant consumers the right to receive certain information in their own language. Consumer protection considerations are recognised in both systems as a legitimate interest, which increases the number of situations where the translation of labels is necessary. Although the WTO Agreements do not explicitly deal with labelling requirements, in practice, the issue could not be ignored under the Agreement's provisions on technical regulations, which seem to tolerate labelling requirements.

Within the ambit of EU law, linguistic labelling requirements are considered as measures having an equivalent effect to quantitative restrictions. Such measures, however, may be justified on the grounds of the protection of consumers as set out in the Court's case-law. Moreover, secondary legal sources – regulations and directives – contain various requirements concerning labelling. They impose diverse language requirements. Some require only the use of a language easily understood in the Member State concerned (including symbols or familiar expressions), while others – and this seems to be the new

legislative approach – permit, or even impose, an obligation on Member States to require the use of the language of the place of marketing on the product labels. EU labelling rules demonstrate a development towards a graduated (risk-based), more comprehensive approach to the impact of language and translation in economic transactions. Adequate translation of labels is important: mistranslation or non-translation is not only harmful for the consumer but it might also trigger reputational and also legal consequences for the producer or trader.

The introduction of a future unitary patent system, one of the most topical issues at European level, clearly shows that the role of languages can in no way be underestimated and that there is no “neutral” way to manage language issues. International treaties in force attempted to introduce some restrictions on the language regimes applicable to patents granted protection in more than one state. The restrictions were not supported by a significant number of states, which is perhaps explained by the following analysis: the restriction on the use of the national language raises efficiency and reduces costs, while it may also weaken legal certainty and pose constitutional problems. Needless to say, in the case of patents it is not the general public which is concerned by publication or non-publication, but a much narrower circle.

For reasons of cost-effectiveness, the language regime of the planned unitary patent would be based on three languages (English, French and German) although after a transitional period of twelve years, patents would be made available in all official EU languages for information purposes without binding force using machine translation. The costs of translations under the planned system would be transferred from the right holders to the European Patent Office to the competitors. The question therefore is not one of simple gains in competitiveness but rather of the distribution of benefits and costs among economic agents.

The findings of the study sustain that language plays a crucial role in an international context. It has a symbolic value for states, it expresses the cultural identity of language groups and it is essential for individuals to understand and make themselves understood in economic transactions and in judicial proceedings alike. Language and translation are also found to be highly significant elements in international transactions where they will generate positive or negative externalities depending on the status they are granted. States acting on their own or at international level have to articulate a policy to manage language matters. This requirement is even more important for the EU when acting on its own behalf.

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INTRODUCTION

What is the language that is used when sovereign states conclude international agreements and why does it matter? Do international agreements regulate only matters for the contracting governments or do they have an impact on individuals as well? Is the availability of international agreements in the national languages a crucial element of legal certainty?

These are the main language-related questions that arise once law goes beyond national boundaries. The last century has known a unique boom in international treaties which do not deal with classical issues of sovereignty and ending wars but regulate different forms of cooperation in trade or try to give coordinated answers to global challenges, such as the protection of vulnerable groups (minors, minorities, disabled people, refugees), the protection of the environment or the fight against transnational crimes. Many of these treaties contain provisions that might concern directly individuals, which is why it is of crucial importance that international treaties can be available in the national languages of the contracting parties, even if the linguistic regime of the international treaty itself is limited for reasons of efficiency.

This endeavour is of course fully followed by the European Union which is increasingly active at an international level and party to more than 1000 international agreements. The EU ensures that the agreements to which it is party are published in all of its official languages.

While international treaties and organisations minimise the number of their authentic languages in order to reduce translation costs, the need for availability in national languages justified by the principle of legal certainty generates translation costs at the contracting parties.

Law in a multilingual context automatically reveals other issues worth to be studied, such as the interpretation of diverging linguistic versions and the impact of the specific international language and terminology on national and European legislation. In this regard EU law has a special position: it is an intermediary between the two systems being neither national law, nor international law but an autonomous legal order.

On the other hand, at the international level the language issue is not limited to the availability of the treaty texts. International instruments of the last decades explicitly dealt with linguistic human rights although limited to the right of linguistic minorities and to certain procedural rights in order to guarantee fair hearing in one's language. Other international treaties are however silent on the possible linguistic implications of the subject-matters they regulate: the language of trade contracts, work contracts, the possibility to address authorities in a language other than the official language of the state, the language of labelling. In this regard the law of the contracting parties applies and possible language requirements which are sort of "soft barriers to trade" are rather tolerated by international law.

Is the European Union law different in this regard? Does the EU have competence to intervene in the area of language use other than the linguistic regime at the European institutions, or is it still a matter of subsidiarity? And, if the principle of subsidiarity applies, are there overriding reasons which might justify the intervention of the European legislator in order to safeguard the interests of European citizens?

The present study tries to demonstrate the importance of languages in international and European law and in the international and European context in general. It will make an

attempt to provide answers to the above questions, even if only indicative ones. As will be shown, even if there is room for intervention in language use in commercial relations or in any form of communication with authorities, every European rule aiming to eliminate language barriers for citizens creates at the same times translation costs for business or for national authorities. What is a difficult challenge is to strike a balance between the two objectives.

Two case studies sustain the findings of the present study. Both labelling (translation of labels) and the translation of patents had to be considered at international and European level as well. The issue of labelling products in languages of the states where the product will be marketed is not explicitly mentioned in the WTO Agreements. However in practice, the issue could not be ignored under the Agreement's provisions on technical regulations which seem to tolerate labelling requirements. On the contrary, European legislation on labelling and case-law is quite a detailed, regulated and evolving area of law.

The translation of patents having already a two level international regulation in Europe proved to be not only a crucial but the core and decisive factor of the EU regulation on unitary patent, making overall compromise among all EU Member States impossible.

The role of languages should not be underestimated. Language is much more than a simple tool of communication, a medium. For some it is a symbol of self-determination, for others it is the only way to understand and make oneself understood. Thus, language must have its place both in international public law and in international trade.

CHAPTER ONE

Drafting, translation and interpretation of international treaties

1. The different languages of international treaties

International treaties are written agreements between states.¹ By such treaties, states bind themselves in written form by the obligations laid down in the treaty. It is therefore important that the scope of the obligations (hence the provisions of the treaty), are clear for all contracting parties. The language (or languages) of international treaties play an important role because they embody and communicate the substance of the agreement. It is not irrelevant whether a treaty has only one or several languages, whether the language of the treaty is a third party language for (most of) the contracting parties or whether it is in their official language.

Until the beginning of the 20th century, international treaties were drafted and authenticated in a single language which was first Latin, then French. French was first accepted as a single treaty language for the General Treaty of the Congress of Vienna in 1815 while underlining that the option for this national language should not be seen as a precedent for the future.² After the First World War, the Treaty of Versailles had already two authentic languages: French and English. Today as a general rule international agreements are multilingual. An underlying interest of having several authentic languages is to demonstrate the broad acceptance that the international treaty achieved and the sovereignty of the states that are parties to the agreement. These languages draw our attention to the cultural diversity represented among the contracting countries.

However, in many cases the choice of authentic languages depends on the language regime of the treaty concerned or of the international organisation under which the treaty was created. Agreements concluded under the United Nations framework are usually authentic in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish).

What is the authentic language of an international treaty?

International treaties usually define in which language(s) their text is authentic. A treaty might have one or several authentic languages that question being also an issue to be decided by the contracting parties.

Only the authentic text(s) of a treaty is (are) authoritative for the purposes of interpretation.

¹ Some international treaties are concluded not between states but states and international organisations having legal personality.

² Dinah Shelton: Reconcilable Differences? The Interpretation of Multilingual Treaties, *Hastings International and Comparative Law Review*, 1997, p. 614.

Bilateral treaties are: treaties concluded between two states OR between a state and an international organisation or entity OR between two international organisations.

Multilateral treaties are: treaties concluded between several states and/or international organisations and entities.

WTO agreements have three official languages (English, French and Spanish) and agreements set up under the Council of Europe are as a general rule bilingual (English, French). It is seldom that a multilateral agreement would be authentic in the official languages of all its contracting parties; the number of authentic languages is restricted in the majority of these agreements. That is also due to the fact that the number of the contracting parties to these agreements, concluded under the auspices of international organisations, is in general relatively high and this high number already excludes or at least limits the possibility of

having all their official languages admitted as authentic languages. It would be, for instance, an illusion to have all the official languages of the 78 contracting parties to the UN Convention on the international sale of goods or the official languages of the 32 signatories to the Social Charter as authentic languages of these treaties.

As such, there are privileged languages chosen on political, cultural and geopolitical grounds. Although it does not seem to be the general rule, some multilateral treaties are monolingual, mainly English.³ Although at first sight such restrictions appear efficient since they eliminate the difficulties that multilingualism brings up – especially, in the case of organisations based on treaties, the need for continuous translation and interpretation – the fact of having its own official language among the authentic languages of a treaty can be seen as an expression of cultural identity or a way of ensuring the privileged status of its own language.

The Statute of the International Renewable Energy Agency (IRENA) signed in 2009 is, according to its Article XX, only authentic in English. English was accepted as the working language by the parties at the first meeting of the committee in charge of preparing the treaty. In the end, English became not only the working language but at the same time the only authentic language of the Agency and of the Statute, thereby triggering a diplomatic campaign on behalf of France and the francophone countries to have French obtain the same status as English. Finally, a Declaration was adopted at the signature of the Statute saying that the Statute has also to be authenticated in the official languages of the United Nations other than English (Arabic, Chinese, French, Russian and Spanish), as well as in the language of the depositary (German), on the request of the respective signatories. Of those entitled by this authorisation, France and Germany have availed of the possibility of authenticating the Statute in their language versions.

Even if the restriction of a linguistic regime might be justified for practical reasons, it might at the same time cause practical problems in the case of international treaties which might be applied directly by national courts and which might confer rights or impose obligations on individuals. Given the fact that only an authentic language version can be used for authoritative interpretation, the contracting parties which do not have

³ See the Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits.

one of the authentic languages as their national language or do not understand them might encounter difficulties in understanding and interpreting the legally binding text.

Nevertheless, these treaties are often translated into the official language(s) of the contracting parties and published in the national gazette of these states when promulgating the treaty concerned. These translations remain non-authentic texts; that is, that they will not be authoritative for interpretation and mainly serve informative purposes in order to ensure the availability of these texts in the national language. However, their importance might be crucial because individuals and the national courts of the contracting party will most probably consult and use these versions when applying treaty provisions.

While the language regime of multilateral treaties is – even if plurilingual – rather restricted, bilateral agreements are in general drafted in the official languages of the two contracting states and are authentic in both or in all of these languages. In some cases (typically for tax treaties), a ‘neutral language’ is added (in the majority of cases English or French), which shall be the decisive version in the event of diverging texts.⁴ Most recently, some countries⁵ began to conclude tax treaties only in English, even where English is not the official language of any of the contracting states.

Even if an international treaty has several authentic languages, the practice is that the text of the treaty is negotiated in a *lingua franca* (which is, in the majority of cases, English), and the (other) authentic texts are produced as translations by the contracting parties which later exchange the texts for scrutiny. Translation thus plays a crucial role in elaborating authentic texts of international instruments. It is important because, if the original contains ambiguities, it will cause even more misunderstanding and mistranslation at the stage of translation. If, for instance, a word or phrase can have several meanings, it is a high possibility that some of the translations will have a meaning that it is not the one the author or legislator originally intended.⁶ In addition, the language of negotiation (in which the original was produced) will lose its privileged status after the translations of the other authentic texts are prepared. According to the rules of interpretation of the Vienna Convention on the Law of Treaties, the drafting language will not play any further decisive role in the interpretation of the texts.

Finally it is interesting to note that the TEU and the TFEU are themselves classical multilateral international treaties. In that regard they are unique in being authentic in all of the official languages of their contracting parties. The peculiarity is due to the fact that the two treaties create at the same time a supranational international organisation, upon which traditional national competences are transferred and which therefore is based on the principle of linguistic equality of its members as an expression of their sovereignty.

2. Translation of international treaties

The translation of a multilateral treaty concluded under the auspices of an international organisation is normally provided by the organisation itself. Treaties are in general drafted in an agreed working language (usually English) and then translated into the authentic languages of the treaty. For example, in the United Nations framework

⁴ Jan Wouters – Maarten Vidal: Domestic Courts and Treaty Interpretation, *Institute for International Law, Working Paper No. 103*, K.U. Leuven, 2006, p.16.

⁵ Belgium, Israel and Norway (see Guglielmo Maisto (ed.): *Multilingual texts and interpretation of tax treaties and EC tax law*, IBFD, 2005.)

⁶ Eric Bergsten: Methodological Problems in the Drafting of the CISG. In André Janssen and Olaf Meyer (eds.): *CISG Methodology*. Sellier European Law Publishers, 2009, p. 18.

translation is executed by the UN Translation Services (one for each official language of the United Nations, plus German⁷) which is part of the Documentation Division in the Department for General Assembly and Conference Management.⁸

According to Article 102 of the UN Charter, every international treaty and agreement concluded by any UN Member State must as soon as possible be registered with and published by the UN Secretariat.⁹ The register is kept in English and French. Within the Secretariat, the Treaty Section is responsible for these functions. Although this obligation is mandatory for States Members of the United Nations, it does not preclude international organisations with a treaty-making capacity or non-member States from submitting, under Article 102, treaties or international agreements entered into with a State Member for registration. It is obviously not certain that the official language(s) of a treaty concluded by a UN Member State include(s) the official languages of the UN. In order to facilitate the prompt publication of the treaties by the UN Secretariat, Member States are urged to provide courtesy translations in English and/or French or any of the other official UN languages.¹⁰ In the United Nations *Treaty Series*,¹¹ the Secretariat shall publish as soon as possible every registered treaty or international agreement, in the original language or languages, followed by a translation in English and in French.¹² Agreements of the European Union are published only in English and French for practical reasons.

Agreements framed under the auspices of specialised agencies related to the UN might be subject to individual drafting and translation procedures. For example, the International Labour Organization uses a unique procedure to produce translations. After closing a session of a conference at which a convention is adopted, a "translation conference" for a specific official language is held on a single official translation of the text, in order to obtain the agreement of the countries where that language is spoken. Each participating State submits a draft translation to the conference, and a comparison of the various drafts results in the production of a uniform text.¹³ Specialised agencies of the UN often develop their own terminology databases in order to improve language quality and achieve uniformity at international level. The FAO's terminology database contains 13 thematic glossaries in the six UN official languages and the agency manages currently 11 terminology projects.¹⁴ Another example is the ILOTERM, a glossary for social and labour terminology in the UN official languages.¹⁵

Another interesting example of drafting/translating multilingual treaties was introduced for the 1982 UN Convention on the Law of the Sea. Here a special Drafting Committee was created, introducing a new multilingual drafting system.¹⁶ The Committee had the

⁷ The German Translation Section of the UN was established in 1974. Since 1975, all resolutions and decisions of the General Assembly and the Security Council as well as numerous other important UN documents have been issued in an official German version produced by the Section.

⁸ On the different tools of translation at the UN level (and also at the EU level) see Deborah Cao: *Translating Law. Multilingual Matters*, 2007, pp. 159-162.; Deborah Cao – Xingmin Zhao: *Translation at the United Nations as Specialized Translation*, *The Journal of Specialised Translation*, 2008 no. 9. pp. 39-54. A practical problem of the translation services is that it is obviously of far greater benefit to the states whose languages are official at the UN, yet a part of the dues of all UN Member States goes to support the language services. Humphrey Tonkin: *Language and the United Nations: A Preliminary Review* (draft). <http://esperanto-un.org/images/languages-un-tonkin-draft-dec2011.pdf>, p. 7.

⁹ A similar disposition is found in Article 80 of the Vienna Convention on the Law of the Treaties: Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication. The objective of the article is to ensure that all treaties and international agreements remain in the public domain and thus assist in eliminating secret diplomacy. UN Treaty Handbook, <http://treaties.un.org/doc/source/publications/THB/English.pdf>, p. 26.

¹⁰ UN Treaty Handbook, <http://treaties.un.org/doc/source/publications/THB/English.pdf>, p. 32.

¹¹ Available online at: <http://treaties.un.org/Pages/UNTSONline.aspx?id=1>
http://treaties.un.org/xml/db/MSDB/pageRegulation_en.html

¹² Mala Tabory: *Multilingualism in international law and institutions*. Sijthoff & Noordhoff, 1980, p. 111.

¹⁴ <http://www.fao.org/termportal/projects4/en/>

¹⁵ <http://www.ilo.org/TermBaseWeb/Main2.aspx>

¹⁶ Shelton, p. 625.

mandate to formulate drafts, give advice on drafting and coordinate and refine the drafting of all texts. The members of the Committee were divided into language groups representing the six languages of the conference. Members of the working groups tried to achieve uniformity between the different texts. Although the initiative was quite revolutionary, the Committee experienced problems due to the multiplicity of drafting sources.¹⁷

At the WTO, the texts of the agreements and the Appellate Body reports are drafted in English and then translated into Spanish and French. The WTO has its own translation service for translating into the official languages and it employs both internal and external translators. It has developed a number of translations aids, such as an official WTO terminology database or the TAS, which assists translators in identifying terms for which translation already exists in official WTO documents and synchronises texts.¹⁸

Similarly, the Council of Europe also has a Translation Service which employs in-house and freelance translators alike. The service has its own terminology bureau.

Quality problems linked to the translation and drafting of international treaties had already been recognised at an early stage. Dinah Shelton reports that the need for improved drafting of international treaties has already been expressed some 50 years ago. Jenks suggested the establishment of an international drafting bureau, the publication of a manual of rules of style, common forms of standards articles and a multilingual glossary.¹⁹

It is a unique situation if the official language of a State concluding an international treaty is not included in the official language(s) of that particular international treaty. This occurs usually in the case of multilateral treaties. It is a basic question whether the international treaty concluded by a State must be incorporated into a domestic legal act (for example, in Italy or Germany), or not (for example, in the Netherlands). However, domestic publication of the treaty is always a legal requirement.²⁰ Either the treaty is published as a domestic legal act or as an international treaty. If translated into the official language of the State – and that is a requirement if the treaty touches upon the rights of individuals – the State must provide for the translation of the treaty.

It is also a possibility that the EU provides assistance for the EU Member States to translate a multilateral treaty into their official languages. For example, the preamble of Directive 2008/68/EC on the inland transport of dangerous goods²¹ declares that the majority of Member States are contracting parties to the European Agreement concerning the International Carriage of Dangerous Goods by Road and to the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways. The Directive states that since „it is necessary to be able to adapt rapidly the Annexes to this Directive to scientific and technical progress, including the development of new technologies for tracking and tracing, in particular to take account of new provisions incorporated into the [above-mentioned treaties] and amendments to the [treaties] and the corresponding adaptations to the Annexes should enter into force simultaneously, the Commission should provide Member States with financial support, as appropriate, for the translation of the [treaties] and any amendments thereto into their official languages.”

¹⁷ Shelton, p. 626.

¹⁸ <http://members.wto.org/linguistics/waza.htm>

¹⁹ Shelton, p. 626.

²⁰ For example, the Dutch Supreme Court ruled in a judgment of 1997 that criminal liability could not be based on a treaty if the publication of the treaty did not contain an authentic text or translation in Dutch. *Hoge Raad*, 24 June 1997, *NJ* 1998, no. 70.

²¹ OJ L 260, 30/09/2008 p. 0013 - 0059

As far as bilateral treaties are concerned, different solutions are possible when determining the official language of the treaty: use of the official languages of the contracting parties; use of the language of one of the parties as the only official language; choice of a “neutral” language; or a combination of the above (e.g. official languages of the contracting states plus a “neutral” language).²² Generally it is the contracting parties who must provide for the official translations of the treaty by the competent state organ. Then the texts are usually exchanged for scrutiny and approval upon the parties.

„One among many curious things about the interpretation of treaties is that the rules on interpretation of treaties are themselves laid down in a treaty.“

(J. Klabbers: International legal histories: the declining importance of *travaux préparatoires* in treaty interpretation?)

As it will be demonstrated in the present Chapter, the accurate translation of international treaties is of major importance: translation errors, diverging language versions, ambiguous wording or misleading terminology might lead to interpretation problems. Translation errors might be corrected under the rectification procedure of the Vienna Convention on the Law of Treaties. In specific cases, if the terminology used in an international treaty proves to be inadequate, it can be altered at the revision of the treaty.

The European Convention for the Protection of Animals during International Transport signed in 1968 under the auspices of the Council of Europe had originally a different title using the expression „transit“ instead of „transport“. At the revision of the Convention in 2003, the term was replaced by „transport“ because „transit“ in several languages includes only transport passing through one or more intermediate countries and might therefore give rise to difficulties in translation.

3. Interpretation of international treaties

3.1 The legal basis for the interpretation international treaties

The main problem that might arise in connection with multilingual treaties being authentic in several languages is that “uniform words do not create uniform results”²³. Moreover, if there is diversity between the different language versions, one might have problems even with the uniform words. There is no question that a uniform text does not mean that a uniform application can be achieved automatically. Do we have a uniform text? This is a crucial question demanding a satisfactory answer, since only the application of textual uniformity will demonstrate whether similar results are reached and whether the aim of uniformity on different levels is reached.

As such, the degree of textual uniformity is a kind of precondition and not merely a technical matter, because textual uniformity (at an adequate level) alone justifies analysing, sharing and debating cases and determining the correct interpretation of an

²² For the examples see John King Gamble – Charlotte Ku: Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice. *Ind. Int'l & Comp. L. Rev.* 1993, no. 3. p. 240.

²³ Camilla Baasch Andersen: *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (Kluwer Law International 2007, p. 8.

international treaty. However, since language is not an exact science we must accept that the goal of absolute textual uniformity is not possible.²⁴

As Flechtner also argued, there is no such thing as perfectly transparent translation. With any two languages, the meaning of distinct expressions is seldom if ever exactly the same.²⁵ As a conclusion, the main issue or debate is not in connection with the nuances of differences but with their effect, because such differences obviously have an effect on the way academics and practitioners working in diverse languages interpret and use given provisions of a multilingual treaty. The degree of similarity of textual uniformity is essential since it directly affects the level of actual uniformity.

Although one might presume that the multiplicity of authentic texts increases textual discrepancy, according to Butler there has not been a disproportionate increase in the number of international disputes turning on issues of disparities in texts.²⁶

The problem of interpreting multilingual international treaties is a classic question in international law. This question is ultimately settled in general international law by Article 33 of the 1969 Vienna Convention on the Law of Treaties. Article 33 provides:

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

Article 33 paragraph 4 of the Vienna Convention on the Law of Treaties refers back to the general rules of treaty interpretation, should the authentic languages of an international treaty contradict each other. The starting point of the process is paragraph 3 of Article 33: The terms of the treaty are presumed to have the same meaning in each authentic text. This presumption, however, is not always possible; quite often, in fact, terms that are considered to be equivalent in two languages have in fact a somewhat different

²⁴ Andersen, p. 7-10.

²⁵ Harry M. Flechtner: The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7 (1). *Journal of Law and Commerce*, 1998, pp. 187, 188.

²⁶ W.E. Butler: *Comparative Approaches to International Law, Recueil des cours*, Dordrecht/Boston/Lancaster, Martinus Nijhoff, 1985, p. 65.

meaning in their respective languages. This might lead to a problem of lack of clarity, for which it is necessary to refer to paragraph 4 of the same article, where a comparison of the authentic texts of the considered treaty is suggested, in an effort to find their common meaning.

In the event this method proves unsuccessful as well, that is when there is in fact a difference in meaning between the texts, the general rule of interpretation provided by article 31 is applied, which, briefly, calls for grammatical interpretation as well as interpretation from context and teleological interpretation. If even this would not be sufficient, article 32 provides some supplementary means of interpretation that could be used, and that is considering the *travaux préparatoires*.²⁷ According to paragraph 4 of article 33, if all these efforts do not solve the problem, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."²⁸

3.2 Different types of linguistic discrepancies

Since international treaties have several languages, linguistic discrepancies between the different language versions are difficult to avoid. Some of these divergences are due to technical errors (typing errors, omissions), which are still capable of altering the substance of the agreement. Others are classical mistranslations, while at the level of implementation and interpretation, ambiguous terms might lead to different perceptions. When coming to the analysis of linguistic discrepancies in international treaties, most of the authors start by stating that some of these linguistic differences were so serious that they had even led to wars.

In 1889 Italy signed a treaty of friendship with Abyssinia (Ethiopia). The treaty was authentic in both Italian and the Amharic language, being the official language of Abyssinia. The treaty contained a clause which read in the Amharic version as "The King of Abyssinia may make use of the Government of the King of Italy in all matters whereon he may have to treat with other Governments." However, in the Italian version of the treaty the persuasive term "may make use" was turned into imperative: "agrees to make use", giving rise to the Italian claim to a protectorate. The difference in wording was partially held responsible for the Italo-Abyssinian war of 1896.

A similar „translation error“ occurred in a treaty signed in 1878 by the Kingdom of Spain and the Sultan of Sulu (Southern Philippines). According to the Spanish language version, Spain had complete sovereignty over the Sulu archipelago, while the Sulu official language version (Tausug) described its status as a protectorate. Interestingly, after the Philippine-American War, the peace treaty signed by the US and the Philippines based on the earlier Spanish treaty repeated the translation error: the English version referred to a complete dependency while the Tausug version described a protectorate.

While some of these divergences are not classical mistranslations but rather a reflection of certain political wills, one might find classical examples of divergent wording leading to somewhat different interpretations of the text. UN Security Council Resolution 242 was adopted after the Six Day War between Israel and Egypt, Jordan and Syria. The difference in languages lies in a definite article ('the'). According to the English version of

²⁷ On the interpretation of international treaties in general see Ulf Linderfalk: *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*. Springer, 2007. See also Anthony Aust: *Modern Treaty Law and Practice*. 2. ed. Cambridge University Press, 2007.

²⁸ See CB Kuner: *The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning*. 40 *The International and Comparative Law Quarterly*, 1991. p. 953 et seq.; Edoardo Bindazane: *The Interpretation Problems of Multilingual Treaties* (http://www.ambientediritto.it/dottrina/Dottrina_2008/the_interpretation_bindazane.htm#)

the Resolution, the Israeli forces must withdraw from "occupied territories" while the French version refers to "the" territories by using *les territoires occupés*. The question to be decided was whether the troops must withdraw from all the territories or from some of them and the dilemma provoked a lively debate at international level.

An example of typical mistranslation is the English translation of the Spanish language declaration by Mexico to Article 10 of the Hague Convention on Service, regulating the service of judicial and extrajudicial documents which concerned the rejection by Mexico of alternative methods of service. According to the English translation, the rejection applied only to the service of documents by diplomatic or consular agents while the original Spanish version wished to cover all kinds of services. As a consequence, many US courts were misled by the English version of the Declaration and used registered mail for service purposes which, according to the Spanish version, could not be used as it was considered as an alternative method of service.²⁹

Some divergences in wording are of a technical nature, not amounting to mistranslations. Technical errors or omissions might also be classified as "simple errors", which are not major ones but are able to alter the substance of the text. Article 79 (3) of the Vienna Convention foresees the possibility to introduce rectifications if the discrepancy is acknowledged by all contracting parties. The rectification procedure applies according to the Commentary of the Convention to errors of a technical nature due to typographical mistakes or to misdescription or mis-statements due to a misunderstanding.³⁰

Arabic is one of the six authentic languages of the UN Convention on the International Sale of Goods (CISG), one of the most important treaties effecting international commerce between traders.³¹ Comparing the Arabic version to the English language version, clear and serious discrepancies can be discovered, despite the fact that in 2001 the Arabic version of the CISG was amended in order to correct the numerous errors that had been logged. Hossam A. El-Saghir draws attention to serious errors that were overlooked by the UN at the time of correcting the Arabic version; one of them relates to Article 25³² on the fundamental breach of a contract. The English version of the CISG clarifies that a breach of a contract committed by one of the parties is fundamental if it results in such a detriment to the other party as to deprive him substantially of what he is entitled to expect under the contract, unless the party in breach did not foresee it and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. The Arabic version, however, simply omits the negation in the second phrase of the cited article. As a result, when interpreting and applying the Arabic version of the CISG, a breach is not fundamental if the breaching party foresees such a result and if a reasonable person in the same circumstances would have foreseen its occurrence.³³

²⁹ Charles B. Campbell: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention, *Minnesota Journal of International Law*, 2010, Vol. 19, pp. 107-136.

³⁰ Frank Engelen: Interpretation of Tax Treaties under International Law, IBFD, 2004, p. 413.

³¹ Full English text of the CISG available at: <http://www.cisg.law.pace.edu/cisg/text/treaty.html> (6 November 2011)

³² CISG Article 25: „A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.“

³³ Hossam A. El-Saghir: The Interpretation of the CISG in the Arab World. In André Janssen and Olaf Meyer (eds.): *CISG Methodology*. Sellier European Law Publisher, 2009. pp. 361-366.

We can find simple errors in the GATS Agreement as well. Bradley J Condom reports that Article XVII: 1 of the General Agreement of Trade in Services being authentic in English, French and Spanish uses "and" in the English and French version but "or" in the Spanish text. However, in this case the meaning of the text³⁴ does not change: equal treatment must be accorded to both categories of services.

In addition to translation problems, another category of linguistic divergence should be mentioned: when some terms of the treaty are ambiguous and are therefore open to different interpretations. The CISG offers several examples of inconsistencies between its authentic French and English versions due to the ambiguity of some adjectives. Article 71(1)³⁵ entitles a party to suspend temporarily its performance if it becomes apparent that the other party will not perform a "substantial" part of his obligation. On the other hand, Article 72 (1)³⁶ allows a party to void a contract, hence putting an end to performing its obligation, if it is clear that the other party will commit a "fundamental" breach. As a conclusion, while Article 72 laid down the requirement that the prospect of a future breach must be clear to justify avoidance, Article 71 seemingly requires that the threat of breach becomes apparent. In addition, the CISG requires the threat of a more serious breach with more significant consequences to call avoidance under Article 72 as compared with suspension of performance under Article 71. This was the English language version. However, in the French language version we cannot notice this difference between the two articles, since the discussed articles use the same adjective to describe the seriousness of a threatened breach. More precisely, in both articles the standard regarding the breach or non-performance is "*essentielle*."³⁷

Ambiguities can be corrected if possible at the level of interpretation. In its judgment of 5 December 2011 in the Former Republic of Yugoslavia v. Greece case, the International Court of Justice made it clear that the expression "to the extent which" used in the Interim Accord signed by the parties should be understood in the light of the French version *si et dans la mesure où*, and not simply *si* as it appeared in the text published in the United Nations Series.

The origin of translation errors might be different. In some cases they are due to the rushed nature of the process; in other cases they are due to the fact that the negotiation and translation phases are separated from each other and delegates are no longer available to ensure that translations reflect the exact sense of the treaty.³⁸ In addition, the original text often reflects heavily achieved compromises using vague terms, the exact meaning of which is difficult to be understood.

4. The role of non-authentic translations

National judges are limited in their interpretation activity by their linguistic abilities: if they do not understand the authentic language versions of the treaty concerned they will inevitably use the translation of the treaty often contained in the promulgating law, although the presumption of a similar meaning between the authentic version and the

³⁴ „Each Member shall accord to services and service suppliers of any other Member...treatment no less favourable than that it accords to its own like services **and** service suppliers.”

³⁵ CISG Article 71 (1): „A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the *other party will not perform a substantial part of his obligations* as a result of...”

³⁶ CISG Article 72 (1): „If prior to the date for performance of the contract it is clear that one of the parties will *commit a fundamental breach of contract*, the other party may declare the contract avoided.”

³⁷ Flechtner, p. 191.

³⁸ Shelton, p. 621.

translation does not apply in these cases. In addition, those individuals upon whom the treaty might confer rights will most probably consult the non-authentic translation of the treaty they are able to understand it. Substantial discrepancies between the authentic version and the translation might therefore lead to misunderstanding, misinterpretations and even misapplication of the treaty. The impact of non-authentic translations thus can in no way be underestimated and their linguistic quality is of crucial importance.

Soon after the European Convention on Human Rights entered into force, a German court held that the famous Article 6 (1) of the Convention on fair trial does not bind an administrative court to pronounce their decisions publicly but it only applies civil courts and criminal courts. This interpretation was based on the German (non authentic) text of the Convention, which reflected an erroneous translation of the English and French authentic versions.³⁹

Non-authentic translations play a significant role with regard to international treaties which affect individuals and which are often applied by national courts. The United Nations Convention for the International Sale of Goods, 1980 (CISG⁴⁰) is undoubtedly an international agreement of this kind. It is a uniform set of rules governing contracts for the international sale of goods and is one of the most important international legal instruments in trade. It is no exaggeration to say that the CISG is the lingua franca of sales with an enormous influence on the law of international commerce. Given the fact that the Convention has 78 contracting parties and only six official languages (Arabic, Chinese, English, French, Russian and Spanish) the importance of unofficial translations cannot be underlined enough, since in practice they serve as the basis of CISG application by practitioners. As the CISG applies to any contract of sale of goods between parties whose places of business are in different states, national courts often have to apply the Convention. That is why the high quality of these translations is important: even if they do not have a legal value they strongly influence the application and interpretation of the CISG.

Poikela reports, for instance, that the first unofficial Italian version appeared to be inappropriate and misleading in respect of various points, probably as a result of an unnecessarily technical approach to the translation process. A new (correct) Italian version therefore had to be drafted and was made available.⁴⁰ German is not an authentic language of the CISG either, but the unofficial German translation was prepared with the aim of it being shared among the German-speaking countries of the CISG. The joint translation was welcomed and praised since it eliminated the situation of having different versions in the same language. Without a joint translation it could have happened that the law applied in some parts of Switzerland is different from the law applied in Germany.⁴¹ The German version was prepared on the basis of the English text. Nevertheless, since the French version is stipulated to serve as the official text in Switzerland, the Swiss delegates were very careful in order to avoid discrepancies between the French and German version. They referred to the French version several times in the course of preparing the German version. Interestingly, the drafting of the German text also brought to light that the French and English text contained discrepancies.⁴²

An interesting and unique example is the way the unofficial Norwegian translation of the CISG was handled. The Norwegian legislator chose a path that was highly criticised. The

³⁹ Shelton, p. 623.

⁴⁰ Teija Poikela: Conformity of Goods in the 1980 United Nations Convention of Contracts for International Sale of Goods, *Nordic Journal of Commercial Law*, 2003/1, p. 68.

⁴¹ Bergsten, p. 21.

⁴² Flechtner, pp. 190-191, Bergsten, p. 21.

Norwegian text version of the CISG was directly incorporated into the Norwegian sales law. This solution was controversial since such direct incorporation into domestic law can create problems if translational errors are present. In addition, Norway created its own instrument instead of preserving the CISG in the "original" framework.⁴³

The Warsaw Convention of 1929 on carriage by air had one authentic language: French. The Convention (modified by the Hague Convention and subsequently by the Montreal Convention) governs the liability of airlines in the event of injury or death to passengers. The Convention was later translated into English. Article 25 of the Convention provided that a carrier's liability will not be limited when injury or death is caused by the "wilful misconduct" of the carrier or its agent. The term "wilful misconduct" was an attempt to render the French term *dol*, which was difficult to translate with the common law vocabulary. While *dol* in French law does require intent, "wilful misconduct" does not.⁴⁴ As different translations applied different wordings, the interpretation and application of the rule was not uniform throughout the contracting countries. The Hague amendment replaced the rule, and made the carrier's liability without limit when damage results from an act or omission of the carrier or its agent made with intent to cause damage, or recklessly and with knowledge that damage would probably result. In 1955 the Hague Convention was already approved in three authentic versions: French, English and Spanish.

5. Interpretation of diverging linguistic versions by national courts

Depending on the nature of the treaty and the legal disputes which the international treaty might give rise to, both special international courts and domestic courts can be faced with the obligation of interpreting the rules of an international treaty. Of course, international courts are often specifically created as an arbitrator for a given international treaty and are therefore much more accustomed with the application of the Vienna Convention interpretation rules than domestic courts interpreting national legislation as a general rule and international instruments only occasionally. For this reason, domestic courts are much more tempted to follow concepts and methods in the local legislation, even when interpreting international legal instruments, which might lead to a divergent understanding of identical provisions in different countries.⁴⁵

A good example of that is CISG Article 47.⁴⁶ Under the CISG, this provision governs the right for the buyer to require the seller to cure defective goods, or otherwise fulfil his/her contractual obligations within a reasonable time set by the buyer or be entitled to avoid the contract. This provision was modelled on the German *Nachfrist* rule (granting an additional period for delivery) and it has encouraged a long lasting trend and misunderstanding around the *Nachfrist* versus granting an additional period of time. The German procedure of *Nachfrist* and the French procedure of *mise en demeure* are not identical to granting an additional period of time under CISG Article 47. The main difference is that Article 47 is not mandatory and the buyer cannot be obliged to fix an additional period of time in order to declare the contract avoided if the delay in the

⁴³ Andersen, pp. 88-89.

⁴⁴ Andrea L. Buff: Reforming the liability provisions of the Warsaw Convention: Does the IATA Inter-carrier Agreement eliminate the need to amend the Convention? *Fordham International Law Journal*, Vol. 20, Issue 5, 1996, pp. 1768-1838.

⁴⁵ Wouters – Vidal, p. 5.

⁴⁶ CISG Article 47: „(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations. (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.”

performance already justifies a fundamental breach, while under German law *Nachfrist* is always of a mandatory nature. Although the UNCITRAL Secretariat, in its commentary to the CISG, differentiated between the terms and made clear the autonomous meaning of the rule, practice (including the unofficial German translation), insists on the *Nachfrist* term and on its traditional meaning. Not surprisingly, when the courts apply Article 47 they automatically apply the German *Nachfrist* rule.⁴⁷ As an example, in a case from Düsseldorf and Duisburg, the court came to the conclusion that, although no notice of non-conformity had been given, the court counted the lack of ensuring *Nachfrist* as an additional reason because of which the buyer was not allowed to rely on non-conformity.⁴⁸ Interestingly the German *Nachfrist* rule has been amended and it now appears to be more similar to the CISG in fixing an additional period of time than was the “original” *Nachfrist* rule.

The situation is the same in the case of diverging authentic versions, where the national judge is only able to understand the authentic version in his/her language; he/she will primarily rely on that version. However, equality of the different authentic versions is a rebuttable presumption and parties to the dispute may produce proofs that there are discrepancies between the linguistic versions.⁴⁹

Peter Sundgren reports on a case decided by the Swedish Supreme Court which makes an exception to the above rule: the Swedish high court gave precedence to the Spanish language version of a tax treaty instead of the Swedish one.⁵⁰

⁴⁷ Andersen, pp. 91-92.

⁴⁸ Germany 10 February 1994 Appellate Court Düsseldorf [6 U 119/93] (*Fabrics case*) available at: <http://cisgw3.law.pace.edu/cases/940210g2.html>, (15 November 2011), Germany 17 April 1996 District Court Duisburg (*Textiles case*), available at: <http://www.cisg.law.pace.edu/cases/960417g1.html>, (15 November 2011)

⁴⁹ Wouters – Vidal, p. 16.

⁵⁰ Peter Sundgren: Interpretation of tax treaties authenticated in two or more languages – a case study (Case number RÅ 2004 not 59.)

The case concerned the treaty between Sweden and Peru on the avoidance of double taxation and the term at the origin of the dispute was „income from other sources“ (in the Swedish text: inkomst från inkomstkällor, in the Spanish version: el rédito de fuente), and whether „capital gains“ are classified as such income.

The court deciding the case at first instance (Advance Rulings Board) based its judgment solely on the Swedish text without feeling the need to consult the Spanish version and concluded that capital gains shall be subject to tax only in Peru but, if Peru does not tax such gains, Sweden will be entitled to tax it as income from other sources.

The Spanish version of the treaty was first checked before the Supreme Administrative Court at a very late stage of the procedure and it completely changed the outcome of the case. The Supreme Court concluded that the Swedish version does not answer the question whether capital gains should be considered as income from other sources but, on the basis of the Spanish text, it is quite improbable they would, as the expression concerned and the structure of the Spanish text virtually excludes capital gains from this category. The Supreme Court found that capital gains might only be taxed in Peru, regardless of whether they are effectively taxed there or not. It meant that, in the case at hand, Sweden could not impose tax on any capital gains from Peru, thereby causing a considerable loss of income for the state budget.

Sundgren takes the view that the above interpretation is due to “an innocent – and most importantly – unintentional translation error” in the Spanish version, which is possibly due to the fact that the treaty in question was the first tax agreement ever signed by Peru. This presumption is further supported by the fact that the Supreme Administrative Court’s interpretation is not in line with the Commentary to the OECD Model Tax Convention interpreting the relevant article and the concept of “capital gain”.

The decision of the Supreme Court had severe consequences, generated a lively tax planning debate and led the Swedish government in the end to terminate the agreement with Peru.

6. Interpretation of diverging linguistic versions by international courts

International courts specifically created for the interpretation for a given international treaty might be more open for comparison of the authentic texts, although they often avoid to admit the existence of translation failures or to have a linguistic approach in interpretation.

Before the interpretation rules of the Vienna Convention had been adopted, the practice of international organs was quite divergent. In some cases it was the original intent of the treaty makers or of the international organ adopting the instrument in question which prevailed, as in the case of the *South West Africa Voting Procedure* where the International Court found divergence between the French and English version of a Resolution of the General Assembly of the United Nations. In other cases, however, a

common denominator was found. This approach is demonstrated by the *Flegenheimer* case of 1958 where the Italian-US Conciliation Committee had to decide whether the expression “treated as enemy” in French *traitées comme ennemis* presupposes that actions must have been taken against the persons or it is enough that they are just “considered” as such, as it was used in the Russian version of the text. The Commission found that “considered” is broader, involving “treated”, and therefore the term “treated” is the common denominator which should be taken into consideration for interpretation.⁵¹

Likewise, the predecessor of the International Court of Justice, the Permanent Court of International Justice (operational between 1922-1946) arrived at a similar conclusion in the *Mavrommatis Palestine Concessions* case⁵² which concerned the interpretation of the expression “public ownership or control” and *à la propriété ou au contrôle public* in Article 11 of the League of Nations Mandate for Palestine of 1922. The majority of the Court found a difference in meaning between *public control* and *contrôle public*, arguing that the French expression had a narrower meaning than the English. The Court declared in the judgment that “where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, [the Court] is bound to adopt the more limited version which can be made to harmonise with both versions”.⁵³

The Vienna Convention favouring the interpretation that best suites the purpose of the treaty clearly paved the way for any future problems of interpreting diverging language versions.

A relevant judgment of the International Court of Justice from 1984 was delivered in a dispute between the USA and Canada based on the Special Agreement on the Delimitation of the Maritime Boundary in the Gulf of Maine Area.⁵⁴ The Agreement requested the Chamber of the ICJ to decide “what is the course of the single boundary that divides / *quelle est le trace de la frontière maritime unique divisant*” the continental shelf and fisheries zones of the two States within a certain area. The Chamber pointed out that, in strict law, there is a remarkable discrepancy between the meaning of the words *boundary* and *frontière* as far as their legal implications are concerned. According to the Chamber, the term *frontière maritime* might incorrectly suggest the idea of a real boundary between sovereign States; however, the Chamber is only authorised to decide on the delimitation of sovereign rights of coastal States in certain marine areas.⁵⁵

A specific, yet in practice significant, issue is the interpretation of WTO law. The starting point is that English, French and Spanish are the official languages of the WTO. The English, French and Spanish legal texts of the WTO are all authentic. However, there are several linguistic discrepancies between these texts. Some discrepancies might be described as simple errors. Others arise from the difficulty of translating ambiguous terms. A further category consists of what may be referred to as harmonisation problems. In this latter category, phrases that are identical across different WTO agreements in one language diverge in another. Different placement of terms in the different languages can also create ambiguity, if not discrepancies per se. In addition, differences in language usage among countries that use different terminology in the same language can be a source of debate regarding the correct choice of terminology.⁵⁶

⁵¹ Shelton, p. 629.

⁵² Judgment available at: http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf

⁵³ Shabtai Rosenne: *An International Law Miscellany*. Martinus Nijhoff, Dordrecht, 1993, pp. 446-447.

⁵⁴ Available at: <http://www.icj-cij.org/docket/files/67/6369.pdf>

⁵⁵ Rosenne, pp. 442-443.

⁵⁶ Bradly J. Condon: *Language Discrepancies in WTO Law*, <http://ssrn.com/abstract=1789191>

The practice of the WTO Appellate Body has already produced a considerable jurisprudence on the interpretation of WTO law.⁵⁷ Within this, the WTO Appellate Body has dealt with the language question several times.⁵⁸ In general, the Appellate Body has taken the view that the customary rules of treaty interpretation reflected in Article 33 of the Vienna Convention require the treaty interpreter to seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language, but also to make an effort to find a meaning that reconciles any apparent differences, taking into account the presumption that they have the same meaning in each authentic text.⁵⁹

Looking at specific cases, it emerges that the Appellate Body is not completely consistent in relying on Article 33 of the Vienna Convention. As Condon recounted in 2010, the Appellate Body referred in seven reports explicitly to a specific paragraph of Article 33 of the Vienna Convention. In six reports, it compares the texts without any reference to Article 33 and without any of the parties raising arguments based on a comparison of the texts. In twelve reports, one or more parties presented arguments based on a comparison of the texts. In three of these reports, the Appellate Body also compares the texts and in nine it does not. In seven reports, the Appellate Body uses the French and Spanish texts to confirm or support its interpretation of the English text. In two reports, the Appellate Body misapplies the rule in Article 33(3). In two reports, the Appellate Body confuses the rules in different paragraphs in Article 33.⁶⁰

Amongst the reports expressly applying Article 33 of the Vienna Convention⁶¹ the case *EC Asbestos*⁶² is a good example of the interpretation method of the Appellate Body. Here the Appellate Body was confronted, inter alia, with the question of the interpretation of the concept of "like products" in Article III: 4 of the GATT 1994 Agreement, which prohibits the group of "like" imported products being provided "less favourable treatment" than it accords to the group of "like" domestic products. The Appellate Body noted that the ordinary meaning of the text suggests that "like" products are products that share a number of identical or similar characteristics or qualities. It then went on to note that "[t]he reference to "similar" as a synonym of "like" also echoes the language of the French version of Article III: 4, *produits similaires*, and the Spanish version, *productos similares*, which, together with the English version, are equally authentic."⁶³ Ultimately, however, the Appellate Body refused to base its interpretation on the ordinary meaning and the comparison of the different text versions. Instead, it interpreted the term "like" from the context and the objective at Article 3:4 of the GATT 1994 Agreement.

The Appellate Body noted that "dictionary meanings leave many interpretive questions open." It referred to three issues of interpretation that would have remained unresolved by this method: First, the dictionary definition of "like" does not indicate which characteristics or qualities are important in assessing the "likeness" of products under Article III: 4. Second, the dictionary definition provides no guidance in determining the

⁵⁷ Isabelle Van Damme: *Treaty Interpretation by the WTO Appellate Body*, OUP 2009; Isabelle Van Damme: *Treaty Interpretation by the WTO Appellate Body*, *EJIL* 21(2010) 605 et seq.

⁵⁸ For an exquisite overview see Bradley J. Condon: *Lost in Translation: Plurilingual Interpretation of WTO Law*, *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), pp. 191–216.

⁵⁹ Condon, p. 195.

⁶⁰ Condon, p. 200 et seq. with further references.

⁶¹ *EC – Asbestos* (2000) (Article 33(1)); *Chile – Price Band System* (2002) (Article 33(4)); *EC – Bed Linen* (Article 21.5 – India) (2003) (Article 33(3)); *US – Softwood Lumber IV* (2003) (Article 33(3)); *US – Countervailing Duty Investigation on DRAMs* (2005) (Article 33(3)); *US – Upland Cotton* (2005) (Article 33(3)); *US – Stainless Steel (Mexico)* (2008) (Article 33(3)).

⁶² Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products* (*EC – Asbestos*), WT/DS135/AB/R, adopted 5 April 2001.

⁶³ *Ibid.*, para. 91 of the Report.

degree or extent to which products must share qualities or characteristics in order to be "like products" under Article III: 4. Third, this dictionary definition of "like" does not indicate from whose perspective „likeness" should be judged.⁶⁴

Ultimately, the Appellate Body decided that a determination of "likeness" under Article III: 4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. According to the Report, "[a]s products that are in a competitive relationship in the marketplace could be affected through treatment of imports „less favourable" than the treatment accorded to domestic products, it follows that the word "like" in Article III: 4 is to be interpreted to apply to products that are in such a competitive relationship."⁶⁵

The Japan Film case of 1998⁶⁶ is a clear example where translation and divergence in text played an important role. The US claimed that Japan was infringing the GATT Agreement by treating Japanese photographic and cinematographic works in a more favourable way than similar works from abroad. There was a disagreement between the parties on how to translate the word "taisaku". The US understood it as a "countermeasure" while Japan thought that the term should be translated as a simple "measure," without the negative connotations the word "countermeasures" has. In addition, as the language of the Panel was English, documents had to be translated from Japanese into English. The panel foresaw the possibility of contesting the accuracy of these translations and appointed translations experts to clarify the problematic points concerned with translation. The experts submitted a report of more than 25 pages outlining several linguistic issues. The case is one of the rare instances when the WTO appointed experts.⁶⁷

7. How to reduce failures of textual non-uniformity?

Based on the introduced dichotomy of textual uniformity and textual non-uniformity, the reader might have the impression that the translational (minor) errors are something inherent and unavoidable. From one perspective it is true. From another point of view, however, both improved drafting and uniform and autonomous interpretation can overcome possible translational and linguistic errors. A correct balance between quality translation and continuous review and interpretation of the case law can result in the proper application of multilingual treaties.

There are several ways and methods to enhance the quality of multilingual international instruments.

- Raising the consciousness of drafters is a mental but still important factor, as drafting and, in the event of several language versions, translating is still a human activity;
- Secondly, multilingual terminology databases for certain type of agreements or for specific agreements could also contribute efficiently to raising the quality of texts;
- Thirdly, model agreements might also enhance drafting certain types of bilateral agreements that use standard or recurring formulae.

⁶⁴ Ibid, para. 92 of the Report.

⁶⁵ Ibid, para. 99 of the Report.

⁶⁶ WT/DS44, Report to the Panel.

⁶⁷ Caroline E. Foster: *Science and Precautionary principle in International Courts and Tribunals*, Cambridge University Press, 2011, p. 114.

Linguistic discrepancies between several equally authoritative texts of an international treaty are due to translation failures or to the ambiguity of the text in which treaty was drafted and which served as a basis for translation. In addition, ambiguities occur quite often in international agreements as they reflect the lack of agreement between the parties over certain issues. As Connolly points out, deliberate ambiguity often promotes international cooperation and provides political flexibility when seeking ratification of a treaty. However, this ambiguity proves fatal when seeking reliability and consistent interpretation.

„Thus, drafters encounter a conundrum; faced with the necessity of resolving inconsistency by avoiding ambiguity, drafters must turn to the very tool that is the crux of confusion: language. Further, not only do drafters need to use specific language, but they need to translate that language as well. So the problem stems from the combination of linguistic failures to capture intention universally and issues of translation.”

(Kelley Connolly)

Consensus on terms used by international instruments is a crucial element of both drafting/translation and the interpretation of these instruments. While pre-draft elaboration of the terminology enhances drafting and translation, the compilation of term banks of existing treaties is rather helpful for interpretation.

Such term banks are either managed by the international organisations in the framework of which the specific treaty was adopted or by academic institutes. They take various forms, from simple glossaries to systematic thesauruses based on conscious development of a uniform terminology.⁶⁸ In an ideal situation, a thesaurus should contain not only the mere translation of the terms but also a definition and if necessary an explanation of its meaning.

However, even very detailed and comprehensive thesauruses cannot resolve all interpretation problems as general terms or grammatical issues that can change meaning across translation will not be treated by them.⁶⁹

In certain areas, the emerging number of bilateral treaties with similar (but not identical) content and structure has stressed the need for model conventions issued by international organisations serving as recommended wording, often containing even different options for the contacting parties. The most commonly used model convention is beyond doubt the OECD Model Tax Convention with respect to taxes on income and capital. In many cases – and this is the case of the OECD Model Tax Convention too – the international organisation concerned issues commentaries to the model convention which might help in interpreting these standard provisions recurring in the bilateral agreements. Both model conventions and commentaries published thereto aim to enhance the uniform interpretation of the provisions and to create a uniform language in the legal field concerned.

However, even bilateral treaties based in principle on model conventions reflect the outcome of individual negotiations, which often leads to provisions diverging from the model rules. As such, in the end there will be a set of treaties which are broadly similar but at many points different in wording. Treaties inspired by the model conventions must therefore still be treated individually and read carefully, word by word. As such, the

⁶⁸ See on this point the LexALP project to be explained later.

⁶⁹ Kelley Connolly: Say what you mean: improved drafting resources as a means for increasing the consistency of interpretation of bilateral investment treaties, *Vanderbilt Journal of Transnational Law*, 2007.

problem of using the Model's Commentary is compounded by the fact that the existing treaties differ from the text of the model.

Another problem with the model conventions is that they are mostly monolingual (or bilingual), in the majority of cases drafted and available in English (in the case of the OECD Model Tax Convention, in English and French). However, bilateral treaties set up on the basis of the model conventions might have several authentic languages, mainly the official languages of the contracting states. This means that the risks entailed by translation cannot be completely circumvented by the model convention (except in cases where English becomes the authentic version of the agreement concerned and should be binding in the event of divergence, which is actually often the case for tax agreements). Adequate translation of treaties based on model conventions and, most preferably, adequate translation of model conventions therefore has an important role. Their importance can be illustrated by the fact that the translation of OECD Model Tax Convention prepared by the German tax authorities has been sharply criticised by the Austrian Ministry of Finance, which indicated disagreement with 26 terms or expressions and declared that it will use the "Austrian German" equivalents instead of them.⁷⁰ In addition, translations prepared by the individual countries might be influenced by one of the official versions if the two languages belong to the same linguistic family. Thus, the Italian translation of the Model Tax Convention was most probably influenced by the French version.⁷¹ Moreover, even if model conventions are translated into various languages, differences between in the wording of individual agreements still must be taken into account at the level of drafting/translating.

Beyond tax treaties, bilateral investment treaties (BITs) do often use a standard structure and formula and are similar in content. However, at present there is no internationally accepted model convention for BITs; certain Member States have developed their own model treaties.⁷² Despite standard formulae and terms, individual treaties differ in their language and wording depending on the actual outcome of the negotiations and reflecting, in many cases, traditional and cultural specificities of the legal system of the other contracting party. Kelly Connolly argues that, although model rules or conventions may be helpful, because of the differences in the individual treaties they will not resolve issues of translation and intention captured by language.⁷³

The most idealistic approach would of course be not to separate the translation process from the drafting of an agreement, that is to ensure that the elaboration of the different linguistic versions can have due regard to what the parties have actually agreed upon. This is however still seldom the case. As an exemplary exception the Drafting Committee, established during the negotiations of the 1982 United Nations Convention on the Law of the Sea, which worked in different linguistic groups, might be mentioned.⁷⁴

Consulting the case-law of national and international courts may also serve to eliminate discrepancies in interpretation, although this method takes place at the level of application and not at the level of drafting which would be the ideal situation. The mere existence and availability of case law is sufficient to invite practitioners to consult it. However, there is no doubt that such compilations of case-law might not be binding but be persuasive instead. Alternatively, they would be inspirational.⁷⁵ The term inspirational seems to be adequate since it perfectly expresses the main goal, namely inspiring the practitioners and in this way inviting them to think out of the box. In this context the

⁷⁰ See Maisto.

⁷¹ Maisto refers to the terms „capital gains“, „accrued“ which suffer from the influence of French.

⁷² The US Model BIT for instance.

⁷³ See Kelley Connolly.

⁷⁴ Shelton, pp. 624 and 635-637.

⁷⁵ Andersen, pp. 48-54.

fictional box is domestic law, case law and terminology. However, the language and translation problem appears at this level as well since, even if the case is not hidden in theory, it is hidden in practice while it is not translated into more languages.

An example could be UNCITRAL which, in order to help this independent and uniform interpretation, developed the CLOUT system as an initial step. The CLOUT system is a collection of court decisions and arbitral awards relating to UNCITRAL (including the CISG as well). There are national correspondents collecting and preparing the abstracts of court decisions and available arbitral awards. After preparing the abstracts the UNCITRAL Secretariat publishes them in English and in the other official U.N. languages, emphasising that the decisions and the awards are also available in the language of origin.

8. Conclusion

International law cannot avoid the language issue. As international treaties are the main written legal sources of international law, the language in which they are binding, that is in which they are authentic, is crucial. As we could see from what was written above, having the official language(s) of the contracting parties as the authentic language of the international treaty is an endeavour of states acting at international level, although restricted multilingualism is accepted as a general rule in the case of international treaties either with a very high number of contracting states or concluded under the auspices of international organisations.

In this regard, translation plays an important role both in an official and non-official context. International treaties are usually drafted in a commonly agreed language and are then translated into the other authentic languages. As the legal value of all authentic texts will be the same, the quality of these “translations” must be unchallengeable. The current mechanisms of translating international instruments have been criticised by many and new ideas have been put forward in order to ensure that the translation phase is not completely separated from the drafting phase of the agreement. Problems caused by the diverging but equally authentic language versions also demonstrate the importance of translation.

On the other hand the impact of non-authentic translations of international agreements cannot be underestimated either. In cases where the official language of a contracting party is not among the authentic languages of the agreement, the non-authentic translation (generally contained in the promulgating law of the contracting party) will be the main source of information concerning the substance of the agreement.

Bringing translation closer to drafting, managing multilingual terminology databases, setting model conventions with commentaries and making the relevant case-law available in several languages are all methods that could efficiently contribute to the quality of translations but they might remain fruitless without addressing the language awareness of drafters and translators.

CHAPTER TWO

Language-related aspects of international treaties concluded by the EU

1. International treaties in EU law

1.1 Treaty-making powers of the EU

The Founding Treaties conferred legal personality on the EC, ECSC and EURATOM,⁷⁶ and empowered them to conclude international agreements as far as the aims of these Treaties require. Now that it has acquired legal personality by the Lisbon Treaty,⁷⁷ the EU has become a subject of international law and is entitled to conclude international treaties on its own behalf.⁷⁸

Article 216 TFEU gives the EU the power to conclude international agreements with one or more third countries or international organisations (bilateral or multilateral treaties). According to the article, the EU may conclude international agreements where the Treaties so provide (express external competences); or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties or when it is likely to affect common rules or alter their scope (implied external competences); or when it is provided for in a legally binding Union act.

The TFEU grants the EU express treaty-making powers to conclude commercial agreements (Article 207 TFEU), association agreements (Article 217 TFEU), agreements on monetary matters (Article 219 TFEU), research and technological development (Article 186 TFEU) or the environment (Article 191 TFEU). The EU is also empowered to maintain relations with other international organisations, such as the Council of Europe, the OECD, the OSCE or the organs and specialised agencies of the UN (Article 220 TFEU).

Besides these express external competences, the EU may proceed in its so-called implied external powers. The concept of implied powers has been elaborated by ECJ case law and was codified in Article 216 TFEU. From the 1970's, the ECJ held in a series of cases that the EC has the authority to conclude international agreements in areas within its internal competence even where the Treaty does not expressly mention such capacity.⁷⁹

⁷⁶ Article 281 EC (before Lisbon), Article 6 ECSC and Article 184 Euratom. ECSC and Euratom Treaties refer to the Community's international personality while the EC Treaty (and the TEU) mentions legal personality. The ECJ, however, interpreted Article 281 EC as granting the EC international legal personality in Case 22/70, *Commission v. Council (ERTA/AETR)* [1971] ECR 263.

⁷⁷ Article 47 TEU.

⁷⁸ It must be noted that the EU, even if it did not have a legal personality *per se*, did conclude international agreements under the CFSP on the basis of Article 24 (before Lisbon): When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.

⁷⁹ *Inter alia*, Case 22/70, *Commission v. Council (ERTA/AETR)* [1971] ECR 263.; Opinion 1/76 [1977] ECR 741.; Opinion 2/91 [1993] ECR 1061. See Piet Eeckhout: *External Relations of the European Union. Legal and Constitutional Foundations*. OUP 2004, pp. 58-100.

When the EU holds an external competence (either express or implied), it concludes international agreements in either its exclusive competence or in a competence shared with the Member States.⁸⁰ Based on the principle of 'conferred powers', the EU must not act in any field exceeding the scope of competences conferred on it by the Member States in the Founding Treaties (Article 5 TEU).

If the agreement is concluded in exclusive competence, it is concluded between the EU acting alone and one or more non-member States or an international organisation, because the subject matter of the agreement falls wholly within the treaty-making competence of the EU.⁸¹ During the history of the EU the scope of exclusive competences has been subject to several ECJ decisions.⁸² Now Article 3 TFEU Para. 1 and 2 specify the areas in which the EU has exclusive competence to conclude international agreements:

- customs union,
- establishing the competition rules necessary for the functioning of the internal market,
- monetary policy for the Member States whose currency is the euro,
- the conservation of marine biological resources under the common fisheries policy,
- common commercial policy (express external competences);
- when the conclusion of the agreement is necessary to enable the EU to exercise its internal competence, or if its conclusion may affect common rules or alter their scope (implied external competences);
- when the conclusion of the agreement is provided for in a legislative act of the EU.

However, if not all matters covered by an agreement fall exclusively within EU competence or exclusively within Member State competence, a so-called mixed agreement is concluded, i.e., an agreement concluded by, on the one side, the EU and its Member States acting jointly and, on the other side, non-member States. Shared competences are specified in Article 4 TFEU. These include, *inter alia*, the internal market, agriculture, environment, consumer protection, transport, energy and the area of freedom, security and justice.⁸³

1.2 International agreements in the hierarchy of EU norms

International agreements concluded by the EU become part of the European legal order and, as such, are binding upon the EU institutions and the Member States.⁸⁴ Within the hierarchy of EU norms they are located between primary law (i.e. the EU Founding Treaties) and secondary law (legal acts adopted by EU institutions). In fact it means that international obligations contained in these agreements cannot be contrary to EU primary law. The ECJ is entitled to rule on the conformity of an international agreement with

⁸⁰ A third category of international treaties having legal effects within the framework of the EU are those concluded by Member States (acting alone) and non-member States. The ECJ has accepted that such agreements might be binding on the EU in special circumstances. See Case 21-24/72, *International Fruit Company III* [1972] ECR 1219.; Case 9/73, *Schlüter* [1973] ECR 1135. Since the EU is not a contracting party of such agreements, the present study does not investigate them any further. Cf T.C Hartley: *The Foundations of European Community Law*. OUP 2003, pp. 181-184.

⁸¹ Hartley, *op. cit.*, 159.

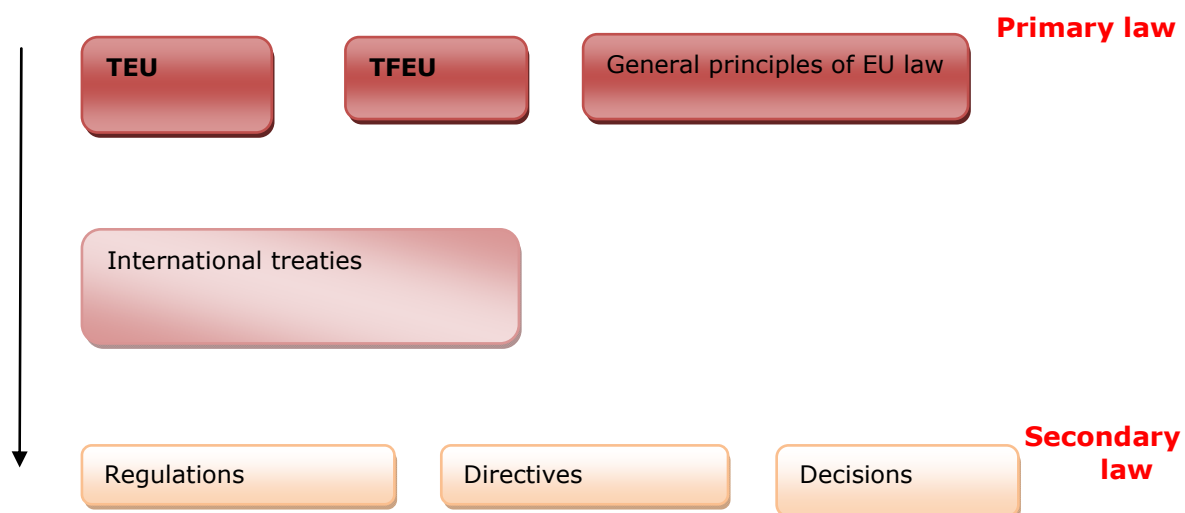
⁸² Case 22/70, *Commission v. Council (ERTA/AETR)* [1971] ECR 263.; Opinion 1/94, [1994] ECR I-05267.; Opinion 2/92, [1995] ECR I-00521.; Opinion 1/03, [2006] ECR I-01145.

⁸³ According to some authors, Member States are entitled to conclude international obligations on their own behalf as long as the EU has not decided to exercise the same competence. After it has engaged in international obligations in the same competence, it becomes an exclusive EU competence.

⁸⁴ *pacta sunt servanda*, Article 216 para. 2 TFEU

primary EU law prior to the conclusion of the agreement. The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the ECJ as to whether an envisaged agreement is compatible with the Treaties.⁸⁵ Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised. International obligations, however, have precedence over norms of secondary EU legislation⁸⁶ and EU legislation should, so far as possible, be interpreted in a manner consistent with international law, including international agreements concluded by the EU.⁸⁷

Figure 1. Hierarchy of EU law



Member States are obliged to respect international obligations of the EU, meaning that a national act in breach of an international agreement concluded by the EU is in breach of EU law. Moreover, international agreements concluded by the EU may contain provisions that are directly applicable by national courts.⁸⁸ Directly effective provisions override inconsistent provisions of national law or secondary EU law, thus international agreements may be relied upon by individuals in order to challenge legal provisions of either the national or the European legal order.⁸⁹ This possibility is gaining an ever-growing importance, since more and more international treaties touch upon areas that might be of direct concern for individuals,⁹⁰ such as the environment, social affairs and justice.

The hierarchical relationship between EU acts, international law and fundamental rights was further fine-tuned in a recent decision of the Court. Reconsidering the hierarchical relationship was due to the fact that individuals' rights were affected. In its *Kadi* judgment⁹¹, the Court ruled that the validity of EU acts implementing international treaty obligations (imposing sanctions upon individuals giving effect to UN Security Council

⁸⁵ Article 218 para. 11 TFEU.

⁸⁶ Case 69/89, Nakajima [1991] I-02069.

⁸⁷ Case C-61/94, Commission v. Germany [1996] ECR I-3989.

⁸⁸ Case 104/81, Kupferberg [1982] ECR 3641.

⁸⁹ However on this point the case-law of the Court is more nuanced. Provisions of the WTO agreement for instance cannot – in the view of the ECJ – produce direct effect (see case C-149/96, Portugal v Council [1999] ECR I-8395.)

⁹⁰ Christina Eckes: International law as law of the EU: the role of the Court of justice, Centre for the Law of EU External Relations, *CLEER Working Papers*, 2010/6, pp. 18-19.

⁹¹ Joined cases C-402/05, P and C-415/05 P, Kadi [2008] ECR I-6351.

resolutions) binding upon the Member States (but not the EU as such) might be called into question if they do not respect fundamental rights, such as the right to defence in the given case.

In addition, the Charter of Fundamental Rights of the European Union, which has the same hierarchical place as the founding treaties, integrates the case-law of the European Court of Human Rights in the primary law when it states that, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.⁹²

1.3 Treaty-making procedure

Article 218 TFEU lays down the general rules of the procedure by which the EU can conclude international agreements.⁹³ The essential decisions are made by the Council at every stage of the procedure.⁹⁴

The procedure starts with a recommendation from the Commission to the Council to initiate negotiations. Recommendations are prepared in comitology procedures, i.e., by Commission departments in consultation with national experts.⁹⁵ The Council adopts a decision authorising the opening of negotiations and nominating the Union negotiator or the head of the Union's negotiating team. The Council may address directives to the negotiator establishing the framework under which the negotiations must be conducted ('negotiating mandate'). These directives are usually rather general but the Council sometimes specifies the result which is sought and the margins of the concessions which the Commission is permitted to make.⁹⁶

The Commission then conducts negotiations in cooperation with Member States. Their involvement in the process depends on the field to which the agreement relates:

- when the agreement relates to a field of exclusive EU competence, the Commission is the sole negotiator, although national experts are closely involved in the proceedings through the special committees, in accordance with the rules laid down by the 'comitology' procedure;
- when the agreement relates to a field of shared competence, negotiations are conducted jointly by the Commission and national experts.

The Commission signs the text of the agreement but this is subject to subsequent adoption by the Council. The conclusion of an international treaty can be subject to a one-step or a two-step procedure. A one-step procedure implies that the agreement is concluded by one single act, authorising the signature or accession of the Community. A two-step approach implies two separate acts: the Council, following a proposal by the negotiator, adopts a decision (or in some cases a regulation) authorising the signing of the agreement; and finally adopts a decision on the actual conclusion of the agreement. The latter constitutes ratification of the agreement. In the case of mixed agreements, the adoption is accompanied by a procedure for ratifying the agreement within each Member State in accordance with their respective constitutional rules.

⁹² Article 52(3) of the Charter.

⁹³ Although the article refers to 'agreements', the ECJ ruled in Opinion 1/75 that this notion actually refers to any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.

⁹⁴ The Treaty contains special rules concerning, for example, commercial agreements (Article 207 TFEU) or agreements on foreign exchange and monetary matters (Article 219 TFEU).

⁹⁵ Where the agreement envisaged relates exclusively or principally to the common foreign and security policy, the High Representative of the Union for Foreign Affairs and Security Policy shall submit recommendations to the Council.

⁹⁶ Craig, Paul and de Búrca, Gráinne: *EU Law. Text, Cases, and Materials*. OUP 2008, p. 195.

The Council generally acts by a qualified majority throughout the procedure, except in four areas where unanimity is required.⁹⁷ The European Parliament also plays an important role in the procedure: it must approve the conclusion of the treaty⁹⁸ or if not, it must at least be consulted.

2. Linguistic aspects of international treaties concluded by the EU

Language-related examinations in the field of international agreements can be conducted from different aspects. International treaties are negotiated in one specific language. However, treaties might be authentic in more than one language, which is also a subject of negotiations. Indeed, treaties might be drafted in one or more languages, which might not be the same ones as the authentic language(s). It is another question in which EU official languages an international treaty concluded by the EU is published in the Official Journal.

The first point to address is the scope of applicability of the key document of the EU's language regime in the context of international agreements, Regulation 1/1958 determining the languages to be used by the European Economic Community (severally amended).⁹⁹ The Regulation applies to regulations and other documents of general application adopted within the EU, and determines the official languages to be used by the EU (institutions, Member States). The EU language regime outlined in Regulation 1/1958 therefore does not compulsorily apply to international agreements concluded by the EU, since these agreements are not separate acts of the EU but common acts of the EU and the contracting parties. However, the Regulation applies to Council decisions and regulations on the signature and conclusion of international agreements.

2.1 Authentic language(s) of international agreements

The EU generally seeks to achieve that every EU official language is acknowledged as an authentic language of the treaty. This demand can be justified by the fact that international agreements are part of the EU legal order and may contain provisions directly applicable to individuals. It is therefore necessary that the text of such agreements is not only available to the individuals throughout the EU in their own language but that each is, at the same time, a legally binding language version. Since only authentic languages are decisive for the interpretation of the agreement, this purpose is best served if the agreement is authoritative in all EU languages. Furthermore, the exclusion of some EU official languages from the list of authentic languages of a specific international agreement may raise the issue of discrimination on the basis of native language, which is strictly forbidden by EU law.¹⁰⁰

The choice of the authentic languages is also influenced by whether the international treaty is a bilateral or a multilateral agreement. In the case of bilateral agreements, the EU is in a much better bargaining position; it only has to convince a single contracting party to accept all the EU languages as authentic languages of the international treaty.

⁹⁷ Association agreements between the EU and third countries, agreements in areas subject to unanimity, agreements in the field of trade in cultural and audiovisual services, agreements in the field of trade in social, education and health services.

⁹⁸ All agreements covering fields in which the ordinary legislative procedure or the special legislative procedure are to be applied within which the approval of the European Parliament was required, association agreements between the EU and third countries, agreements creating a specific institutional framework by organising cooperation procedures (for example, when the agreement in question creates a joint committee with decision-making powers), agreements which have notable budgetary implications for the EU, agreements on the accession of a State to the EU.

⁹⁹ OJ 17, 6.10.1958, p. 385–386. The text in force is available at <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1958/R/01958R0001-20070101-en.pdf>.

¹⁰⁰ Universally by Article 2 TEU.

Some third countries or international organisations might be opposed to the high number of authentic languages, mostly because they fear not being able to verify all language versions before adoption. However, the general rule is that contracting parties to bilateral agreements accept the multiple authentic language versions. However, some exceptions can be found. In the case of bilateral agreements concluded with international organisations which have a restricted number of official languages, the same restricted system will usually apply: bilateral treaties concluded with the International Atomic Energy Agency are authentic in English and French only.

Even in the case of bilateral agreements concluded with third countries and not with international organisations, it might happen that there is only one authentic language of the agreement, generally English. This can be observed with regard to nine agreements concluded between the EU and the USA.¹⁰¹

However, some bilateral agreements between the EU and the USA, which are made in English, add that the agreement shall also be drawn up in all other official languages and that these language versions shall be considered equally authentic upon approval by both Parties. In these cases the text of the agreement, when published in languages other than English in the Official Journal, starts with the word 'Translation' to warn the reader that it is not an authentic text of the agreement. In such cases it is not easy to find out which language versions are considered authentic.¹⁰²

As mentioned, bilateral agreements are generally authenticated in the official languages of the EU and in the official language(s) of the other contracting party (if that latter is not an official language of the EU). In some cases the contracting party also demands the acknowledgement of all its official languages as authentic, for example, in the case of bilateral agreements between the EU and the Republic of South Africa:

Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one hand, and the Republic of South Africa, of the other hand - Protocol 1 concerning the definition of the concept of 'originating products' and methods of administrative cooperation (11 Oct. 1999)

Agreement between the European Community and the Republic of South Africa on trade in wine (28 Jan. 2002)

Agreement between the European Community and the Republic of South Africa on trade in spirits (28 Jan. 2002)

all authentic in all 11 EU official languages and in all official languages of South Africa, other than English (Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, isiNdebele, isiXhosa, isiZulu)

¹⁰¹ See for instance the Agreement between the European Union and the government of the United States of America on the security of classified information (30 Apr. 2007)

¹⁰² In the case of Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (23 Jul. 2007), publications of the text in the languages other than English in the OJ contain a Note to the reader in the specific language saying that 'The language versions of the Agreement, other than the English language version, have not yet been approved by the Parties. Once these other language versions have been approved, they will be equally authentic.' Interestingly the agreement concluded in 2006 on the same subject matter between the EU and the USA is authentic in every official language of the EU without future approval.

The situation is somewhat different in the case of multilateral agreements, if they are negotiated in the context of an existing linguistic regime, or if the large number of parties requires the definition of a more restrictive linguistic regime. In such a case, agreements are generally authenticated only in the languages used in this framework or chosen by the contracting parties as a compromise acceptable to all of them.

Agreements negotiated in the context of the United Nations are usually authentic only in the six working languages of the United Nations: Arabic, Chinese, English, French, Russian, and Spanish,¹⁰³ such as:

United Nations Convention on the Law of the Sea (UNCLOS) (10 Dec. 1982)
United Nations Framework Convention on Climate Change (09 May 1992)
Convention on the Protection and Promotion of the Diversity of Cultural Expressions (20 Oct. 2005)
The 2006 International Tropical Timber Agreement (not yet in force) (27 Jan. 2006)
Convention on the Rights of Persons with Disabilities (13 Dec. 2006)
Agreement on Port State measures to prevent, deter, and eliminate Illegal, Unreported and Unregulated fishing (not yet in force) (22 Nov. 2009)
European Convention for the protection of vertebrate animals used for experimental and other scientific purposes (13 Mar. 1986)
European Convention for the Protection of Animals during International Transport (25 Jun. 2004)

Agreements negotiated in the framework of the Council of Europe are concluded in English and French only:

European Convention for the protection of vertebrate animals used for experimental and other scientific purposes (13 Mar. 1986)
European Convention for the Protection of Animals during International Transport (25 Jun. 2004)

These two languages are accepted as authentic languages for some other agreements elaborated outside the framework of the Council of Europe, such as:

Convention on Choice of Court Agreements (not yet in force) (30 Jun. 2005)
Southern Indian Ocean Fisheries Agreement (SIOFA) (not yet in force) (12 Jun. 2006)
Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (not yet in force) (27 Nov. 2007)
Protocol on the Law Applicable to Maintenance Obligations (not yet in force) (23 Nov. 2007)

¹⁰³ The agreement on the Constitution of the Food and Agriculture Organisation of the United Nations (FAO), concluded in 1945, is authenticated in German instead of Russian besides the other five UN working languages.

Even where a multilateral agreement is not negotiated within an existing legal framework, the resulting linguistic regime may be more restrictive than that of the Union because of the high number of parties to the agreement. In these cases the languages chosen as authentic reflect the linguistic composition of the contracting parties.

Convention for the protection of the Mediterranean Sea against pollution (Barcelona Convention) (16 Feb. 1976)

authentic in Arabic, English, French and Spanish

Cooperation Agreement for the protection of the coasts and waters of the north-east Atlantic against pollution (Lisbon Agreement, not yet in force) (17 Oct. 1990)

International Coffee Agreement (28 Sep. 2007)

both authentic in English, French, Portuguese and Spanish

Energy Charter Treaty (17 Dec. 1994)

authentic in English, French, German, Italian, Russian and Spanish

Agreement on the international dolphin conservation programme (15 May 1998)

authentic in English and Spanish

International Agreement on Olive Oil and Table Olives (29 Apr. 2005)

authentic in Arabic, English, French, Italian and Spanish

Cooperation Agreement for the protection of the coasts and waters of the north-east Atlantic against pollution (Lisbon Agreement) (not yet in force) (17 Oct. 1990)

Additional Protocol to the Cooperation Agreement for the Protection of the Coasts and Waters of the North-East Atlantic against Pollution (not yet in force) (20 May 2008)

both authentic in Arabic, French, Portuguese and Spanish, French text prevails

Agreement on mutual recognition between the European Community and Japan (4 Apr. 2001)

authentic in all EU official languages and Japanese, English and Japanese texts prevail

Some agreements which are authentic in several languages distinguish one language to be determinative in the event of inconsistencies of interpretation (the language which should prevail). Usually it is the English version which has precedence but sometimes the French version or two language versions should prevail over the others. This solution is applied, *inter alia*, in the following agreements:

Agreement on mutual recognition between the European Community and the United States of America (18 Apr. 1998)

Agreement between the European Community and the United States of America on the Mutual Recognition of Certificates of Conformity for Marine Equipment (27 Feb. 2004)

Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (28 May 2004)

Agreement between the European Community and the United States of America on trade in wine (10 Mar. 2006)

Agreement between the European Community and the United States of America renewing a programme of cooperation in higher education and vocational education and training (21 Jun. 2006)

Agreement between the Government of the United States of America and the European Community on the coordination of energy-efficiency labelling programmes for office equipment (20 Dec. 2006)

Interim Agreement with a view to an Economic Partnership Agreement between, the European Community and its Member States, of the one part, and the SADC EPA States, of the other part (not yet in force) (04 Jun. 2009)

all authentic in all EU official languages (except Irish), English text prevails

2.2 Language of Council decisions

The decision authorising the signature of an international agreement on behalf of the EU is normally taken by the Council based on a proposal of the Commission. This applies in the case of a two-step procedure to the Council decision concerning the conclusion of the international agreement which contains in its annex the text of the agreement to be concluded.

The Council decision on the conclusion of an international agreement must be regarded as an 'act of general application', which, according to Regulation 1/1958, must be drafted in every EU official language. Since the annex to the decision constitutes an integral part thereof, this also applies to the text of the agreement annexed to the decision. Where the agreement is not authentic in all the EU languages, a translation of the agreement into the non-authentic EU languages must be provided, which will be annexed to the version of the decision in the respective EU language.

The decision on authorisation of signature may also contain in its annex the text of the agreement to be signed. The question might be raised if this annexed text of the agreement should be available in every EU official language or not (i.e. if Regulation 1/1958 applies). The Council decision is evidently an act of the EU; however, it is not *stricto sensu* a 'document of general application': it is to be concluded in the future and is not yet binding on the EU. However, the principle of loyal cooperation demands that the Council decision on the signature of an international agreement should be adopted in all official languages and, if the text of the agreement is annexed, the text should be available in every official language. (Obviously the authorisation to sign the agreement refers only to the signature of the authentic versions of the agreement.) This principle is traced back to the Vienna Convention on the Law of Treaties, which prescribes that 'a

State is obliged to refrain from acts which would defeat the object and purpose of a treaty' after it has signed the treaty or has expressed its consent to be bound by the treaty.¹⁰⁴

2.3 Language of publication

The Founding Treaties or Regulation 1/1958 do not prescribe that international agreements concluded by the EU should be published in the Official Journal. According to the ECJ, the non-publication of an international agreement does not as such render the agreement inapplicable.¹⁰⁵ However, the ECJ also ruled that provisions contained in international agreements may impose obligations on private individuals only if they have been published. Moreover, Regulation 1049/2001, regarding public access to European Parliament, Council and Commission documents, prescribes that international agreements concluded by the EU are to be published in the Official Journal, except if, *inter alia*, the disclosure of the document would undermine the protection of the public interest (public security, international relations, military matters, financial or economic policy), individual privacy, court proceedings etc.¹⁰⁶ It is not clear what is the legal consequence of the violation of the aforementioned disposition, however, it does surely not result in the inapplicability of the agreement.

It is therefore generally observed that international treaties concluded by the EU are published in the Official Journal in every EU official language. This is the case even if the agreement was not drafted in every EU official language or if these languages are not all authentic. In such cases the text of the treaty is translated into the other official languages which are not authentic, and the publication of the text in the OJ starts with a reference to 'translation' in the respective language.

Interestingly, in some cases the non-authentic text versions of the agreement are not labelled as 'translation' in the Official Journal, which can be misleading for the reader. The following agreements are published in every official language without such a reminder¹⁰⁷:

¹⁰⁴ Article 18 of the Vienna Convention, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

¹⁰⁵ Case C-149/96, Portugal v. Council, [1999] ECR I-8395.

¹⁰⁶ Article 4 and 13.

¹⁰⁷ There is an exception to this exceptional rule: the Agreement on Duty-Free Treatment of Multi-Chip Integrated Circuits (MCPs) signed on 21 Dec. 2005 is authentic only in English; it was published in every EU official language (except Maltese) but the texts of the 'new' official languages refer to 'translation' while the texts in the 'old' languages do not.

Protocol for the accession of Mexico to the General Agreement on Tariffs and Trade (17 Feb. 1987)

Protocol for the accession of Bolivia to the General Agreement on Tariffs and Trade (not yet in force) (30 Jan. 1990)

authentic in 3 EU official languages (English, French and Spanish)

International Agreement on Olive Oil and Table Olives (29 Apr. 2005)

authentic in 4 EU official languages (English, French, Italian and Spanish) and Arabic

Agreement on the privileges and immunities of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project (21 Nov. 2006)

both authentic in English

However, there are cases where the agreement is not published in every EU official language but only in the language(s) in which it is authentic. In such a case the Council decision on the conclusion of the agreement is published in every official language but the agreement itself is annexed in the authentic language (generally in the English version). Examples are:

Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (23 Sep. 1991)

authentic and published in English

European Convention for the Protection of Animals during International Transport (25 Jun. 2004)

authentic and published in English and French (both language versions attached to every official language version of the Council decision)

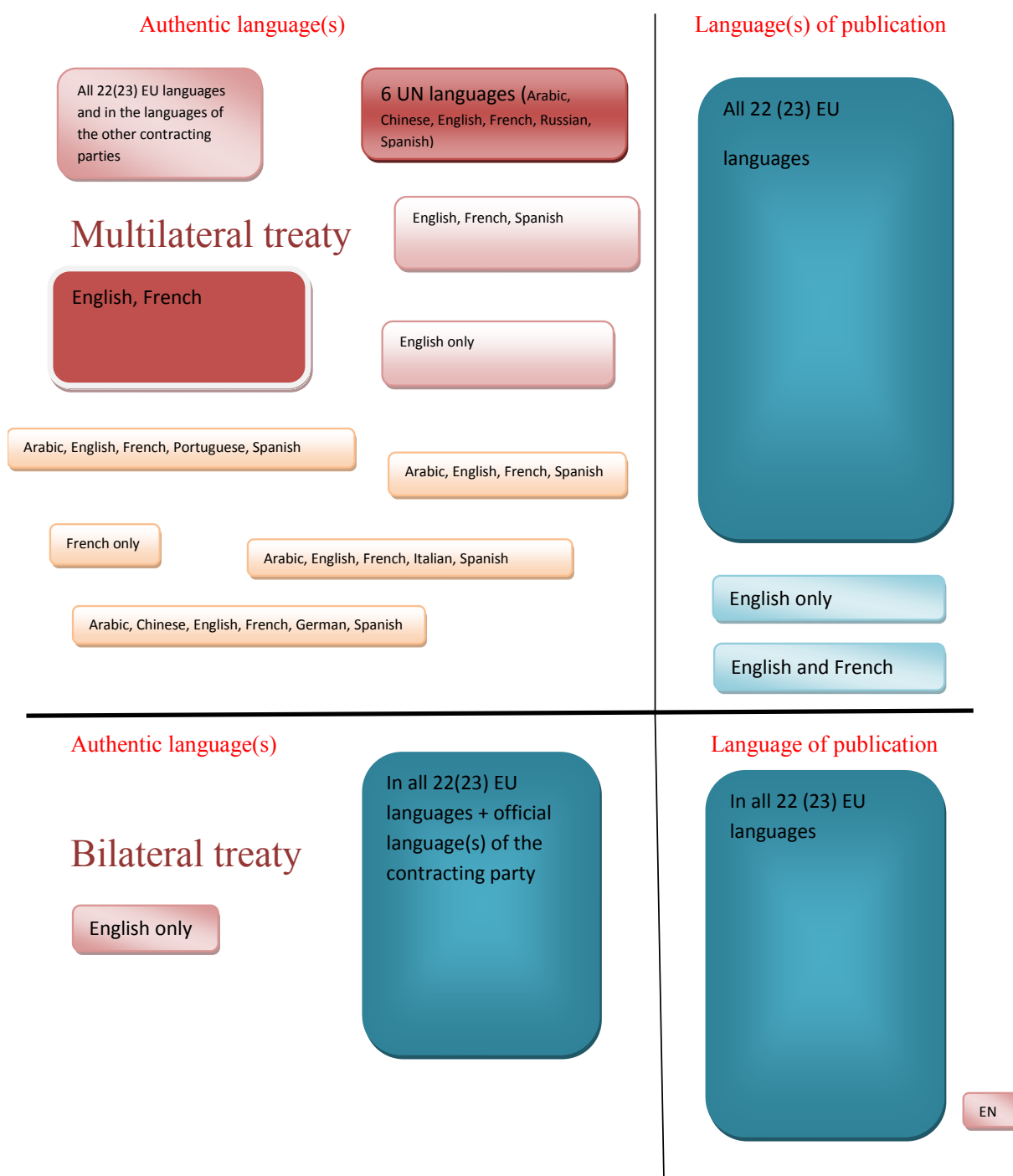
Convention for the strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention) (13 Dec. 2004)

authentic and published in English, French and Spanish

In a few cases it might also happen that international agreements, published only in a few EU official languages in the Official Journal, are published in the other languages in the national gazettes of the Member States. Advocate General Kokott mentioned in her opinion in Case C-197/08 Commission v France and Others that "The text of the [WHO Framework] Convention is published in the *Official Journal of the European Union* only in the authentic languages English, French and Spanish. A German translation is published in the *Bundesgesetzblatt* (Federal Official Journal) 2004, Part II, p. 158."

The chart below demonstrates the approximate proportion and possible variation of authentic languages and languages of publication in the case of both multilateral and bilateral treaties.

Figure 2. Authentic languages and languages of publication in the case of international treaties concluded by the EU



2.4 Translation of international agreements into EU languages

As can be seen from the above, international treaties have a special role and status in the legal order of the EU. From a legal point of view they are located in the legal hierarchy somewhere between the founding treaties (primary law) and the law adopted by the EU institutions (secondary law). No instrument of the secondary law can be contrary to an international treaty. From a linguistic point of view, international agreements have a special role as the text of a given treaty has to be translated into and published in all official language versions (Irish being usually an exception), even if these versions – not being always at the same time authentic versions of the treaty – will not be legally binding.

At the level of the key players, the translation process does not differ from the translation of any ordinary EU documents that will finally be adopted by the Council: the Commission is in charge of submitting the translations and the Council will take care of the legal and linguistic revision of the text. However the process has its specificities depending on the number of the authentic languages. If all EU languages are at the same time authentic languages of an international treaty, all language versions must be prepared for the signature of the treaty concerned because authentic language versions must be signed simultaneously. In cases where not all EU languages are at the same time authentic languages of the treaty, the treaty text must only be available for the publication in the Official Journal, although the practice is that it is already available at an earlier stage as is annexed to the Council decision authorising the conclusion.

In the case of bilateral agreements, all official languages of the EU and the official language (or languages) of the other contracting party become as a general rule authentic languages of the international treaty as well. The treaty is negotiated in a *lingua franca*, which is in the majority of cases English.¹⁰⁸ The text is agreed in this language and this text will serve as a basis for producing the authentic texts, then the authentic texts are produced by each party for its own languages. Thus, the EU prepares the EU language versions and the contracting party prepares its own language version. However the EU works under serious time constraints: while the contracting party must only produce one language version (or a strictly limited number of languages), the EU is in charge of producing 21 or in some cases 22 versions within the same time limits. Though for treaties of only a few pages in length this specificity does not seem to be challenging, the translation into all official language versions becomes extremely difficult in the case of free trade agreements or association agreements amounting to several thousands of pages.

One of the most recent examples is the free trade agreement with Korea, the text of which embraces 1338 OJ pages or the trade agreement with Columbia and Peru (Andean Agreement) not yet published, amounting to more than 2200 OJ pages.

The careful translation and quality control of documents of that size into all official languages takes several months and requires the full time contribution of at least 12-13 in-house translators. Outsourcing translation could be a solution to speed up the process; however it is not advisable in every case. Sometimes, the original text (that is, the text in which the treaty was drafted and negotiated) of international treaties is vague or not clear enough for the translators producing the different language versions: as such,

¹⁰⁸ Sometimes there are two languages of negotiation, especially in the case of international treaties concluded with Latin American states where, besides English, Spanish is also used for producing the text of the agreement.

translators might have to contact their colleagues at the competent DG in order to ask for further (and rapid) clarification of the text so that they will be able to produce quality translations reflecting the original will of the treaty makers. That can only be done by in-house translators working on a daily basis and in an informal and flexible manner.

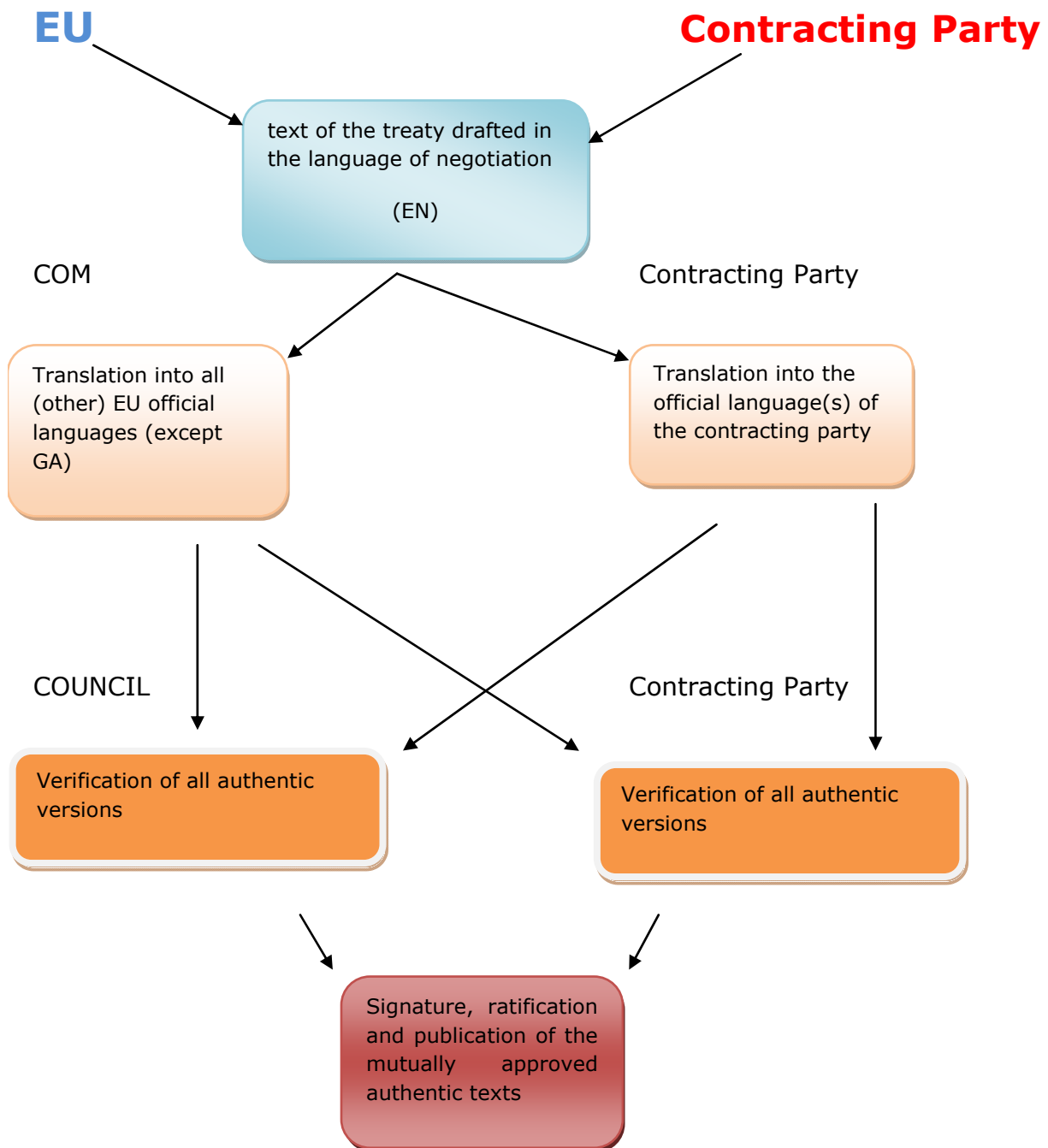
The translation phase is even more important because translators might reveal the inconsistencies of the original text which, as a consequence of their alerting, might be improved by agreement with the other contracting party. This kind of late intervention into the original treaty text makes one think about the possibility of involving translators and represent linguistic aspects already at the drafting phase of an international treaties, especially of those which are of a complex nature.

Agreements where the contracting party's official language is identical to one of the official languages of the EU might bring up interesting linguistic issues of a terminological nature. This phenomenon most commonly concerns agreements concluded with Latin-American states, where Spanish or Portuguese is the official language of the contracting state and where Spanish or Portuguese translators and lawyer linguists at the EU institutions cannot accept the text of the agreement in these languages because of disagreement over certain technical or legal terms used in it. If the parties cannot reach a consensus, there will be two slightly different versions published as authentic in the same language.

After the treaty text is translated into the official languages of the EU, these versions and the language version(s) of the contracting party are submitted to the Council for legal and linguistic verification of the text. The Council must make sure that all official language versions and the language version(s) of the contracting party are equal in substance. The staff of the Council's Legal Service is of course able to make legal revision in the official languages of the EU; however the revision of the language version of the contracting party – being often an exotic language in the EU context – must be in the majority of cases outsourced.¹⁰⁹ At the same time, the contracting party verifies the translations in the official languages of the EU. Time constraints are again a decisive factor, often affecting the quality of the revision. The treaty must be signed and, if all official languages are authentic languages of the treaty, they must all be ready (translated and legally revised) for the date of signature.

¹⁰⁹ Only in the case of a few non-EU languages can in-house revision be done (like Russian, Chinese or occasionally Arabic).

Figure 3. Translation of treaties being authentic in all official languages of the EU



As translation is above all a human activity, in the case of lengthy documents, translation errors are almost unavoidable. For obvious translation errors, the Vienna Convention on the Law of Treaties foresees a somewhat flexible correction procedure. Under Article 79 of the Convention, if, after the authentication of a text, the signatory and contracting states are agreed that it contains an error, it can be corrected by initializing the corrected treaty text, by executing or exchanging an instrument containing the correction or by executing the corrected text of the whole treaty by the same procedure as in the case of the original text. If there is a depositary, the depositary must communicate the proposed corrections to all signatory and contracting states. In the case of bilateral agreements signed by the EU, the general rule is that the Secretariat General of the Council is appointed as depositary, thus it is in charge of sending the corrected text to all contracting parties. If none of the parties raises objections, the corrections will be

approved, than produced in each language version and signed by the Secretary General. The corrected text will be submitted to the parties in the form of a certified copy.

One of the recent correction procedures that had considerable echo in the international press concerned the free trade agreement with Korea signed in 2010. The translation error was discovered at a very late stage, after the European Parliament had already approved all authentic language versions (official languages of the EU and the Korean version) and just before the Parliament of Korea proceeded to the ratification of the treaty. The error was discovered in the Korean language version and concerned tariff benefits. According to the English text of the agreement, up to 50 percent of material for toys and wax products made in Korea can receive tariff benefits if they are used in Korean-made products. However under the Korean text the limit was 40 percent for toys and 20 percent for wax products. The Korean version was evidently less advantageous for Korean producers than the English text. In the end, the Korean Parliament ratified the incorrect text and the mistake was rectified later, together with several other mistakes discovered when scrutinising the text again. The incidence provoked mistrust in the government and led it to a review of the correctness of the text of all international treaties ever concluded by Korea.

For multilateral treaties where not all EU languages will be authentic languages, translations must only be prepared for the publication of the text of the agreement in the OJ. They will not become authentic texts; just simple translations serving mainly informative purposes by enforcing the principle of legal certainty. If the EU enters a multilateral agreement to which its Member States are already party, it is strongly advisable that the same text is published in the OJ as a non-authentic translation of the treaty and as the one already published in the national gazettes of the Member States. These translations must therefore be gathered for publication instead of retranslating the authentic EU treaty.

3. Multilingual interpretation of international treaties concluded by the EU

The multilingualism of international agreements concluded by the EU can have effects on the interpretation of these agreements. Multilingual interpretation of acts adopted by the EU is a common method used by the ECJ and national courts and it could be suitable for resolving difficulties in interpretation as far as international agreements are concerned. However, ECJ cases where multilingual interpretation of international agreements took place are extremely rare compared to those of EU institutions' acts.

The ECJ has played an active role in EU international relations, especially in determining the existence, scope and nature of the EC's (EU's) competences and the legal nature of international law within the EU legal framework.¹¹⁰ International agreements concluded by the EU can be subject to ECJ procedures in different ways.

(1) Before an agreement is concluded it may form the subject of a request for an opinion by the ECJ as to its compatibility with the Founding Treaties. The Court may be addressed by a Member State, the Council, the Commission or the European Parliament. The compatibility question may touch upon both the adoption procedure and the substance of the agreement. If the ECJ's opinion is adverse, the agreement envisaged may not enter into force unless it is amended or the Founding Treaties are revised.¹¹¹ Although the ECJ's decision is called an 'opinion' it is binding on the EU institutions.

¹¹⁰ Craig-de Búrca, p. 168.

¹¹¹ Article 218 Para. 11 TFEU.

(2) Once an agreement is concluded and has entered into force, interpretation of its provisions or its validity may form the subject of a question for a preliminary ruling arriving from a national court of a Member State.¹¹²

(3) An agreement may be relied upon to challenge the legality (validity) of an act of an EU institution, in a direct action for annulment.¹¹³ According to ECJ case law, it is also possible to challenge the compatibility of an international agreement with the Founding Treaties through the Council's decision on conclusion.¹¹⁴

(4) A party may invoke breach of the provisions of an international agreement in the context of a claim concerning the Community's non-contractual liability.¹¹⁵

(5) The Commission or a Member State may rely upon an agreement concluded by the EU in an enforcement action against a Member State.¹¹⁶

The ECJ's interpretative methods of EU legal acts include textual, historical, contextual, comparative, teleological and multilingual interpretations.¹¹⁷ Multilingual interpretation has been applied several times concerning legal acts of EU institutions.¹¹⁸ The ECJ ruled that 'the need for a uniform interpretation requires that, in the event of a divergence between the various language versions, the provision in question should be construed by reference to the purpose and general scheme of the rules of which it forms part'.¹¹⁹ The method of multilingual interpretation is applicable as regards international agreements concluded by the EU; however, it is relatively rare in ECJ case law.¹²⁰ An important question regarding such cases would be if the ECJ should consider non-authentic EU official language versions of an agreement or solely the authentic ones, even if those are not all EU official languages. With respect to the principle of interpretation consistent with international agreements regarding the interpretation of EU legal norms, it is assumed that authentic versions should have precedence.

Case C-63/09 *Walz* concerned the interpretation of the provision on liability for lost baggage of the Montreal Convention for the Unification of Certain Rules for International Carriage. The national court referring for a preliminary ruling asked whether the term 'damage' in Article 22(2) of the Montreal Convention, that sets the limit of an air carrier's liability for the damage resulting from the loss of baggage, must be interpreted as including both material and non-material damage. The ECJ applied different methods of interpretation including a comparison of the authentic language versions (French, English, Arabic, Chinese, Spanish and Russian) of Chapter III of the Convention (of which Article 22(2) is part): "First of all, it must be stated that, for the purposes of interpreting the Montreal Convention, the 'préjudice' referred to in both the heading of Chapter III and Article 17(1) of the French-language version of that convention must be regarded as synonymous with the 'dommage' referred to in the heading of Article 17 and in Article 17(2) of the convention. Indeed, it is apparent from other authentic language versions of the Montreal Convention that an identical term ('daño' in the Spanish language version; 'damage' in the English language version) is used without distinction to designate both the 'préjudice' and the 'dommage' of the French language version. In addition, although

¹¹² Article 267 TFEU.

¹¹³ Article 263 TFEU.

¹¹⁴ Case 327/91, *France v. Commission*, [1994] ECR I-03641. In case the ECJ annuls the decision on conclusion, the agreement remains valid under international law and will have to be renegotiated or terminated.

¹¹⁵ Article 268 and 340 TFEU.

¹¹⁶ Article 258 and 269 TFEU; *Ibid*, Eeckhout, pp. 226-227.

¹¹⁷ Case 283/81, *CILFIT* [1982] ECR 3415.

¹¹⁸ *Inter alia*, Case 29/69, *Stauder* [1969] ECR 419.; Case 824-825/79, *Sas Prodotti Alimentari Folci* [1980] ECR 3053.; Case 300/86, *Luc Van Landschoot* [1988] ECR 3443.; Case C-259/95, *Parliament v Council* [1997] ECR I-05303.; C-72/95, *Kraaijeveld* [1996] ECR I-5403.

¹¹⁹ Case C-259/95, *Parliament v Council* [1997] ECR I-05303.

¹²⁰ Advocates General also refer to multilingual interpretation of international agreements in their opinions, for example, in C-142/07 *Ecologistas en Acción-CODA*, C-308/06 *Intertanko* or C-204/09 *Flachglas Torgau*. In these cases the ECJ did not make use of multilingual interpretation in its judgment.

like the French language version the Russian language version of the convention uses two terms, namely 'вред' (damage) and 'повреждение' (damaging), those two terms, derived from a common stem and used without distinction, must also be regarded as synonymous for the purposes of interpreting the convention."¹²¹ Finally the ECJ concluded that the term 'damage' must be construed as including both material and non-material damage.

Multilingual interpretation did not help the ECJ to answer a reference for a preliminary ruling¹²² concerning the interpretation of the 1989 San Sebastian Convention, a convention amending the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters on the EU accession of Spain and Portugal. The referring judge was doubtful whether Article 29 of the San Sebastian Convention, which established the judge's duties in proceedings which were pending in two different Contracting States, was applied in parallel judicial proceedings if the first proceedings had been initiated before the date of entry into force of the Brussels Convention between those States. Relevant dispositions of the Brussels Convention and the San Sebastian Convention were not clear on this point. The ECJ noted that "most of the language versions of Article 21 of the Brussels Convention admittedly refer to the institution of the proceedings and thus appear to suggest that Article 29 of the San Sebastian Convention is to be interpreted as providing that Article 21 is to apply only if all the proceedings were commenced after the entry into force of the Convention. However, the German ('werden ... anhängig gemacht') and Dutch ('aanhangig zijn') versions refer to the situation where the proceedings are pending, so that they permit the interpretation that, by reason of Article 29, the rule in Article 21 applies where that situation is shown to exist before the court second seised after the entry into force of the San Sebastian Convention."¹²³ Since a multilingual interpretation of the relevant provisions was not conclusive, the ECJ applied the method of teleological interpretation to answer the referring judge's question.

„it is possible to draw different conclusions from the relationship between the directive and the Convention. On the one hand, it may be said that the difference of wording must reflect a difference in the intended meaning. On the other hand, it may be said that the difference of wording should be overlooked, since it is unlikely that the same States, negotiating at the same time (admittedly in the somewhat wider framework of the Council of Europe and including also other States which are parties to the European Cultural Convention), would have agreed on inconsistent provisions.“

(Opinion of Advocate General Jacobs in case C-6/98, ARD)

Multilingual interpretation was applied in a unique way in Case C-6/98 ARD. The ECJ compared the English and French (i.e. the authentic) language versions of Article 14 of the 1989 European Convention on Transfrontier Television and Article 11 of Directive 89/552 on the pursuit of television broadcasting activities. The two provisions were almost identical.

According to the Convention, "the transmission of audiovisual works, such as feature films and films made for television ..., provided their *duration* [durée in French] is more than 45 minutes, may be interrupted once for each complete period of 45 minutes." The Directive, however, prescribed that "the transmission of audiovisual works such as feature films and films made for television ..., provided their *scheduled duration* is more than 45 minutes, may be interrupted once for each complete period of 45 minutes."¹²⁴

¹²¹ para. 24.

¹²² Case C-163/95, Freifrau von Horn [1997] ECR I-05451.

¹²³ para. 12.

¹²⁴ para. 24.

The impact of the interpretation was crucial since it concerned a restriction on one of the fundamental economic freedoms, that of provision of services. The ECJ came to the conclusion that the wording of Article 11 of the Directive was ambiguous and made use of teleological interpretation to find the proper meaning of the provision. It stated that if such restrictions have not been drafted in clear and unequivocal terms, they must be given a restrictive interpretation. Therefore, in the case of interrupting the transmission of audiovisual works to allow advertising in order to calculate the 45-minute period for the purpose of determining the number of advertising slots authorised in the broadcasting of audiovisual works, the duration of the advertisements must be included in that period.

From the judgments mentioned above it seems the results of multilingual interpretation are not decisive arguments for the ECJ. Multilingual interpretation supports teleological and contextual interpretation and is not expected to be the substantive interpretational method of the decision.

4. The impact of language and terminology of international agreements on EU law

The fact that international treaties concluded by the EU become part of the *acquis* already has an influence on the terminology of EU law. As we have seen above, such treaties are published in the Official Journal, in the majority of cases in all official languages of the EU. In the case of treaties which are authentic in all EU languages this impact is quite obvious: terms will be “officially” admitted to European terminology. In the case of multilateral treaties not being authentic in all EU languages but translated into them and published in the Official Journal, the impact of the treaty terminology is less immediate, but is still existent as translated texts will most probably be consulted and used by recipients of the non-official language versions. The text, terminology and list of definitions of the international treaties published in the Official Journal are thus integrated automatically into European legal language but they maintain their self-standing character as international treaties, with their own concepts and vocabulary which must be interpreted within the ambit of the treaty concerned.

However, treaty terminology might easily reach the level of secondary legislation. International treaties impose obligations upon the parties. Such obligations often need implementation at the level of internal legislation, which is, in the case of the EU being party to an agreement, at a European level. When implementing such treaty obligations, the European legislator might find it wise to adopt international treaty definitions for certain concepts in order to avoid conceptual discrepancy between international and the European legal order. In the context of terminology, it means that already existing terms might gain a slightly new meaning. At the same time, new terms expressing new concepts created by certain international treaties might enter the field of European secondary legislation. These terms will become an integral part of the EU terminology; the concepts they express will be EU concepts, although of international origin, and will be interpreted by the European Court of Justice in the light of the relevant international agreement.

As will be demonstrated below, even international agreements to which the EU is not party can have a substantial and linguistic effect on EU acts when they are integrated into European legal acts.

Moreover not only agreements but other documents, such as standards or guidelines issued by international organisations, might have an influence on European terminology.

The impact of the language of international treaties on EU legislation is so manifold and complex that it would be practically impossible to give a general overview on how each international agreement entered into by the EU influenced the terms and definitions of European legislation. The analysis below will try to give some examples of these multiple influences.

Before entering into the presentation of the illustrative examples it must be made clear that the linguistic impact of international treaties is twofold:

- in some cases the international agreements create new terms (very often artificial compound terms) that have never existed as such before,
- in other cases international agreements give strict definitions to terms which were either not defined in national or European legal instruments or which had different, often even diverging definitions.

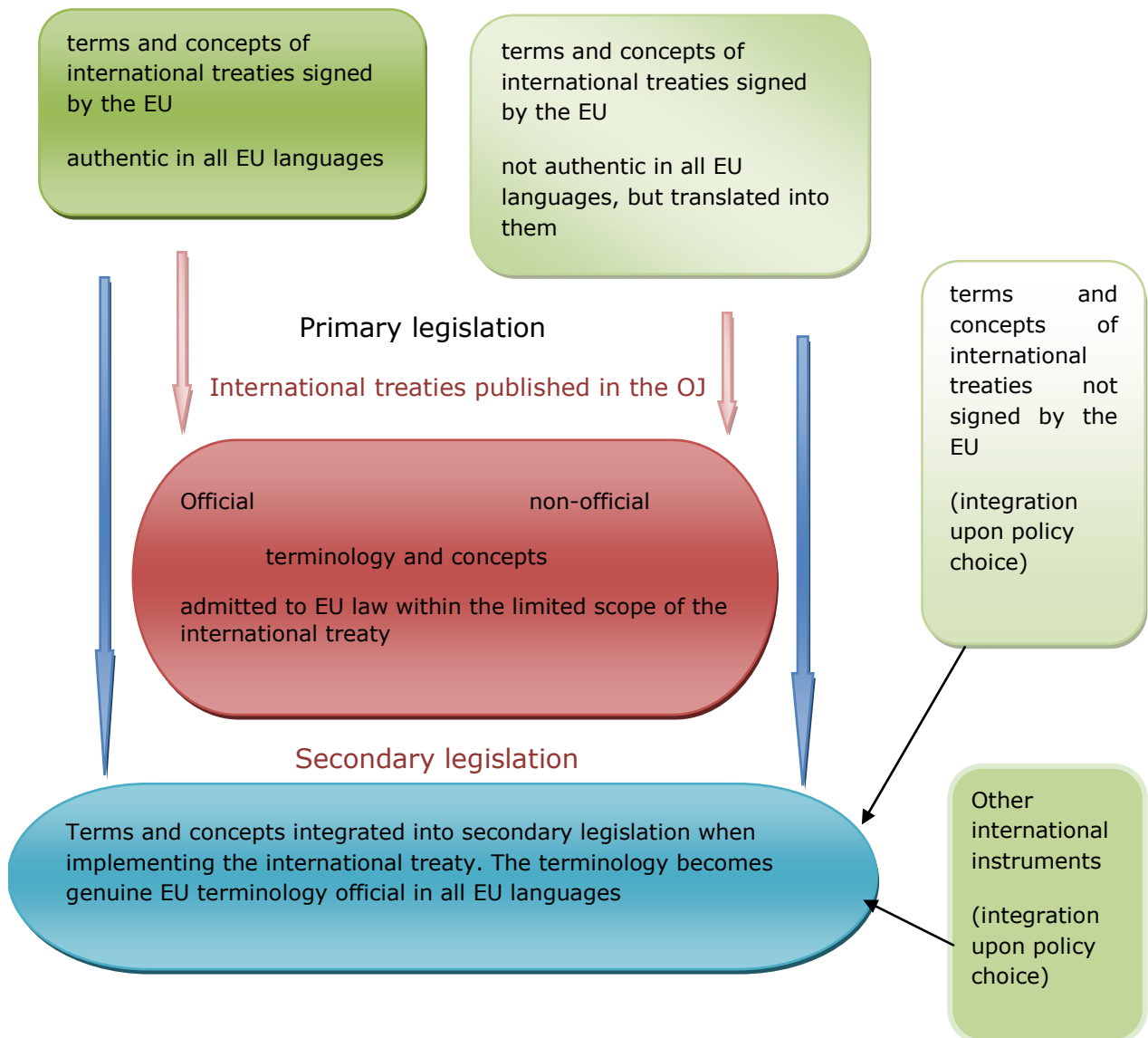
The first scenario seldom occurs. The creation of new terms is mostly linked to technological development, inventions or newly established methods, policies or principles, which are in the majority of cases already known by the technical language previously regulated at an international level.

By contrast, the second case is quite frequent. International treaties do very often contain a list of definitions of their core terms. It is a policy choice for the European and national legislator whether they adopt these definitions and reproduce them in their legal instruments or they maintain their own definition, thereby duplicating concepts.

While admitting new terms has a clear linguistic impact, aligning definitions to international agreements is more of a legal issue but not without linguistic implications: the meaning of a term changes.

The diagram below makes an attempt to demonstrate how both terms and concepts (defined terms) penetrate the sphere of EU law.

Figure 4. Terms and concepts of international treaties in EU law



4.1 Already existing terms redefined or new terms admitted

When implementing international treaties in European legislation, the EU is free to decide on the extent to which it wishes to stick to the terminology of the agreement concerned or to deviate from it. This freedom is similar to that enjoyed by Member States when implementing European directives in national legislation. The choices of the EU will be most probably governed by pragmatic reasons and by the need for conceptual and terminological coherence between the European and international legal order.

It would not be wise, for instance, to use a different term in the implementing EU act for terms

- agreed and created by the international agreement concerned,
- which were not created by the international agreement but are core terms of it,
- which are of a very technical nature.

If defined by the international agreement, the above terms should be admitted accompanied by their definitions. It would not make sense, for example, to use "biological diversity," first defined at international level in the Rio Convention of 1993,

with a diverging definition at the European level. This is fortunately not the case, as European instruments relating to biological diversity all refer directly or indirectly to the Convention's definition. The same goes for the concept of "refugee," deriving from the commonly agreed UN Refugee Convention of 1951 and subsequent Protocol of 1967.¹²⁵ To take a recent example, the definition of "renewable energy" of the Statute of the International Renewable Energy Agency (IRENA) of 2009 will most probably freeze the meaning of this term at EU level. The above terms are core terms of the relevant international agreements; they were defined by the international community before entering EU law, and so sticking to their internationally agreed meaning was a quite self-evident consequence of regulating them in European instruments.

For other terms that are not core terms of an agreement, the complete equivalence at the level of terminology and definition is not so self-evident, although in the majority of cases the EU takes over the vocabulary of the agreements in its implementing legislation, thereby making a linkage between the two legal orders. In certain cases where it avoids doing so, it is put under pressure to align its wording to the applicable convention. Although European plant protection legislation is based on the UPOV Convention¹²⁶ not only as to its substance but also by taking over the terms created by it (like "essentially derived varieties") or by adjusting European concepts to its definitions (such as the definition of "plant variety"), voices were raised for further alignment both at the level of terminology and definitions. In June 2011 the Secretary General of CIAPORA¹²⁷ urged the EU to use clear terms in its plant variety protection laws and adapt the wording of Regulation (EC) 2100/94, which uses the somewhat unclear and broad term "variety constituent," to the wording of the UPOV Convention, which uses "propagating material". Other studies in the field do not only advocate using the same terms but also using the same language in the EU Regulation as the UPOV Convention uses in defining certain terms. Such a proposal was put forward in the case of the term "harvested material".¹²⁸

The UPOV Convention might also be cited as an example where the international organisation under which the Convention was adopted issues guidance documents and model laws for the efficient implementation of the Convention. The document "Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention," adopted in 2009 by the International Union for the Protection of New Varieties and Plants, is intended to provide assistance to States and intergovernmental organisations wishing to draft a law in accordance with the Convention. Part I of the guidance is a model law, also containing a set of definitions ("breeder", "breeders' right", "variety", "novelty", "distinctness", etc.) which should be reflected in the implementing legislation either among the article on definitions or in specific articles.

The EU is an intermediary level between international and national law. Terminological discrepancy between international and European level might suggest to Member States, bound by both legal orders, that the use of different terms should be explained by substantial differences. However, this is not always the case.

Waste management, for instance, is regulated in international instruments (in the UN Basel Convention¹²⁹ and by OECD decision) and in an EU directive. However, when defining "waste," the Basel Convention uses the term "disposal" of waste while Directive 91/156/EEC refers to "discarding" waste without either of them being further defined.

¹²⁵ See Joint position 96/196/JHA of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonised application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees.

¹²⁶ International Convention for the Protection of New Varieties of Plants, adopted in Paris in 1961.

¹²⁷ International Association of Breeders of Vegetatively Reproduced Ornamental and Fruit Varieties.

¹²⁸ Evaluation of the Community Plant Variety Acquis – Final Report, GHK Consulting for with ADAS UK for DG Sanco, 2011.

¹²⁹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted in 1989.

This terminological difference is even more interesting in the light of the former version of the Waste Directive (Directive 75/442/EEC), which still used the term “dispose”. One cannot find any clear reference to why former terminology had to be replaced by a new one, not being identical with that of the Basel Convention. As a consequence, many Member States considered “discarding” as a broader concept than “disposal”.¹³⁰ Some commentators assume that “discard” covers any careless act, in the sense that the discarder does not care what becomes of the object, while “disposal” suggests a deliberate and thoughtful act and thereby the European legislator wanted to broaden the reach of the Directive to include the widest possible actions.¹³¹ However this concept cannot be sustained purely on the wording of the Directive.

Keeping its own European terminology or admitting the terms used by the international instruments is always a policy choice. The EU might be faced with such kind of choices in cases where it accedes to a multilateral agreement at a stage where its own terminology is already settled. The EU is not party to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration but, since the entry into force of the Lisbon Treaty, it is entitled to accede. In this respect it must be pointed out that the Agreement and the relevant EU legislation apply different terms for the same concept: the Agreement uses the term “appellation of origin” while EU law applies the term “designation of origin”.¹³²

Some areas, characterised by the need for international cooperation and by an always evolving technical terminology, have an impact on both adjusting definitions and taking over new terminology. The field of civil aviation is an area of strong cross-border implications where safety and security are at stake. For these reasons there is an express need for precise definitions of legal and technical terms used by the relevant international instruments. The international civil aviation standards are developed by the International Civil Aviation Organisation (ICAO) set up on the basis of the Chicago Convention and which are published in the annexes of the Convention. The EU itself is not (yet) party to the Convention, although the areas it has competence to regulate at European level are highly influenced by the Convention. Both technical terms sometimes reflecting new terminology, such as “scheduled air service”¹³³ or “airspace reservation”, and purely legal terms, such as “serious injury” or “incident”,¹³⁴ are defined in EU instruments according to ICAO definitions.

Given the fact that, in the field of civil aviation, the aim of international regulation was to have uniform standards, the terms and definitions in EU legislation cannot deviate from them either. As far as liability for international air transport is concerned, it is the Montreal Convention that applies and to which the EU is party to. Terms and definitions of the Montreal Convention

According to Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents „concepts contained in the Regulation but not defined in paragraph 1 shall be equivalent to those used in the Montreal Convention”.

¹³⁰ The Legal Definition of Waste and its Impact on Waste Management in Europe, a Report prepared by IPTS for the Committee for Environment, Public Health and Consumer Protection of the European Parliament, 1997, p. 12.

¹³¹ Éva Pongrácz refers to Cheyne and Purdue (Éva Pongrácz: *Re-defining the concepts of waste and waste management*. University of Oulu, 2002, p. 66).

¹³² Matteo Gragnani: *The European Union and the Lisbon Agreement on the Protection of Appellations of Origin and their International Registration*. Centre d’Etudes Juridiques Européennes, 2010.

¹³³ Regulation No 1008/2008 (EC) of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

¹³⁴ For both terms see Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents and Annex 13 to the Convention.

penetrate EU law, sometimes in a direct manner. They are not repeated in the text of the EU Regulation but only contain a reference to them.

Both the Chicago Convention (and its annexes) and the Montreal Convention have six authentic languages¹³⁵, three of them being EU languages too. When integrating the terms of the Chicago Convention into EU law, the European legislator had to stick to the language of the authentic language versions. However, this could not be done for all other EU languages that were not authentic languages of the Convention, because they were not available. Moreover, as the EU is not party to the Chicago Convention, no non-official translation was available at the European level. It was therefore the task of the EU, when adopting its civil aviation regulations, to create adequate and coherent civil aviation terminology in non-authentic languages. For that it could only use the non-official national translations of the Chicago Convention, published often in the promulgating law, or it could take as a basis the national civil aviation language. The situation is somewhat different and less problematic in the case of the Montreal Convention. As the EU is party to this Convention, its text was published and available in all official languages. The terminology and wording of these translations was therefore already created and could be used even if these versions could not be deemed authentic. In addition, the Montreal Convention does not have technical annexes, as does the Chicago Convention.

Health and environmental safety are also areas where international cooperation began to intensify in the 80s through several fora. Numerous guidelines and recommendations have been adopted since, in the field of chemicals, medical devices, biocides etc., based on very technical terminology and opening the way for the emergence of new terms and concepts. One example of this latter category is the term "Good Laboratory Practice," referring to a quality system of management controls for research laboratories and organisations to try to ensure the uniformity, consistency, reliability, reproducibility, quality, and integrity of chemical safety and efficacy tests. The concept was developed by the OECD and it was elaborated in its Principles on Good Laboratory Practice of 1981. Although the EU is not a member of the OECD, the Principles, their technical terminology and definitions have been integrated in EU law.¹³⁶ Among other concepts and related new terms becoming core regulatory concepts and terms of European legislation and entering there from the OECD, one could mention the concept of (and also the term) "long-term care".¹³⁷

4.2 Integrating in annexes to directives international agreements to which the EU is not party

In some cases, as a result of a policy choice, the EU integrates international agreements to which it is not party but its Member States are in its secondary legislation. In such cases the norms, language and the specific terms of the international treaty become European legislation. In 2008, the European Parliament and the Council adopted Directive 2008/68/EC of the European Parliament and of the

¹³⁵ Arabic, Chinese, English, French, Russian and Spanish.

¹³⁶ Directive 2004/9/EC of the European Parliament and the Council of 11 February 2004 on the inspection and verification of Good Laboratory Practice (GLP), Directive 2004/10/EC of the European Parliament and the Council of 11 February 2004 on the harmonisation of laws, regulations and administrative provisions relating to the application of the principles of good laboratory practice and the verification of their applications for tests on chemical substances.

¹³⁷ The term first used in Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, in Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 883/2004 on the coordination of social security systems, and determining the content of its Annexes and in Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

Council of 24 September 2008 on the inland transport of dangerous goods. As the recital of the Directive points out, the transport of dangerous goods is regulated by three major treaties, the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), the Regulations concerning the International Carriage of Dangerous Goods by Rail (RID) and the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN) to which most of the Member States are party. Recital (17) of the Directive specifies that its annexes should be adapted to scientific and technical progress by incorporating the amendments of the above treaties into its annexes. Unchanged text and terminology of such international treaties will be transformed into secondary legislation.

It is interesting to note that the translation of such treaties – as an exception to the rule – is usually provided by the governments of the Member States. As these agreements are frequently updated and amended, the translation of the texts puts a heavy burden on the national administration. As such, the Commission provides some financial support for them.¹³⁸

In other cases such agreements are not translated at all and the relevant EU act in question only contains a reference to the agreements, the text of which is only available in a specific language. For instance Regulation (EEC) 3922/91 in its Annexes refers to international agreements that are available only in English and that normally have not been translated and published in the Official Journal (Arrangements concerning the Development, the Acceptance and the Implementation of Joint Aviation Requirements (JAR)).

4.3 Abandoning international treaty terminology in favour of new European terms

As far as the impact of the language of international treaties on EU law is concerned, the former third pillar offers interesting examples. Until the entry into force of the Treaty of Amsterdam, Member States concluded international treaties among each other in the field of cooperation in criminal matters. The style, structure and wording of these treaties was strongly inspired and influenced by existing mutual assistance agreements. However, in 1997 the TEU introduced the possibility of adopting framework decisions in order to harmonise legislation in criminal matters and the European Council in Tampere in 1999 officially declared mutual recognition as a cornerstone of judicial cooperation in criminal matters. Since then, old, mutual assistance-related terminology ("extradition") has been abandoned and new European terminology has been created ("European arrest warrant", "European evidence warrant").

4.4 The linguistic impact of financial standards adopted by international bodies

Not only international treaties but certain standards adopted by international bodies might have an impact on the terminology of EU legislation. In 2002, the Council adopted Regulation (EC) 1606/2002 (the IAS Regulation), requiring European companies listed in an EU securities market to prepare their consolidated financial statements in accordance

¹³⁸ See Article 8 of Directive 2008/68/EC according to which „1. The amendments necessary to adapt the Annexes to scientific and technical progress, including the use of technologies for tracking and tracing, in the fields covered by this Directive, in particular to take account of amendments to the ADR, RID and ADN, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 9(3). 2. The Commission shall provide financial support, as appropriate, to the Member States for the translation of the ADR, RID and ADN and their modifications into their official language.“

with International Accounting Standards (renamed since 2001 as International Financial Reporting Standards) starting with financial statements for the financial year 2005 onwards. These standards are adopted by the International Accounting Standards Board (IASB), a London based international body from 1973. The aim of these uniform standards adopted at present by some 100 countries is to achieve standard convergence at a global scale in order to foster transparency in accounting, as accounting standards play an important role before investment decisions are taken.

According to the IAS Regulation, the European Commission adopts the standards issued by the IASB after a so-called endorsement procedure. Article 3 paragraph (4) foresees that the adopted international accounting standards shall be published in full in each of the official languages of the Community, as a Commission Regulation, in the Official Journal of the European Communities. Language and terminology now come into play. The IAS are officially issued in English. Although many foreign users applied the English language version of the standards without reconciliation, there was an emerging need to have their translation in other languages. In 1997 the IASCF¹³⁹ established its own translation unit and the standards have been progressively translated into other languages, the first official translation being German. In 2004, the IASCF Board approved a Policy Statement on *Translation of Standards and Guidance Issued by the International Federation of Accountants* in order to facilitate high quality translations, and it encouraged cooperation among countries using the same language.¹⁴⁰

Adopting IAS at the European level meant a linguistic challenge, both at the level of translation workload¹⁴¹ and terminology. In order to ensure consistency the EU producing the different language versions tried to stick to the already existing translations and terminology developed at the IASB, a terminology that – despite the well-organised and quite rigorous translation process at the IASCF¹⁴² – was already highly influenced by the original English text and criticised by Member States, stakeholders and national jurisdictions for errors and for the use of poor and out of date translations.¹⁴³ According to a study carried out in 2003, German accountants fluent in English were asked to interpret the English language original and the German translation of some 20 expressions used in IFRS, and significant differences between the two language versions were found in 8 cases.¹⁴⁴ Another problem identified with regard to German IAS terminology was that they rigidly stick to the national classifications and terminology, which leads to significant discrepancies between official IAS German and actual IAS German.¹⁴⁵ In addition several discrepancies were identified between the English and German version of certain standards, which are due to omissions or simple mistranslations which broaden or narrow the scope of the German text in comparison to the English one.¹⁴⁶

The fact that the standards and their amendments are published in the Official Journal meant that language versions other than English could not be considered as mere

¹³⁹ International Accounting Standards Committee Foundation

¹⁴⁰ Challenges and Successes in Implementing International Accounting Standards. Achieving convergence to the IFRS and IAS, International Federation of Accountants, 2004, p. 14.

¹⁴¹ Initially, the European Commission indicated that it might take some 9 months from the adoption of an IFRS by the IASB until translation into all official languages is done (Achieving convergence in the IFRS and IAS, p. 12).

¹⁴² Tsakumis-Campbell-Doupnik: IFRS: Beyond the Standards, *Journal of Accountancy*, 2009.

¹⁴³ EU implementation of IFRS and the fair value directive, a Report for the European Commission, Institute of Chartered Accountants in England and Wales, 2007, p. 46.

¹⁴⁴ The study „Interpretation of Uncertainty Expressions: A Cross-National Study“ by Doupnik and Richter, *Accounting, Organisations and Society*, 2003, is cited by Tsakumis-Campbell-Doupnik op.cit.

¹⁴⁵ Robin Bonthron cites several examples of incorrect German terms in IAS. For instance the official IAS German uses the terms *Vermögenswerte*, *kurzfristige Vermögenswerte*, *angesammelte Ergebnisse* for which the actual IAS German is *Aktiva*, *Umlaufvermögen*, *Bilanzgewinn/-verlust* (Robin Bonthron: German Financial Accounting and Reporting, *Banking & Finance*, Vol. 4. No. 3, 2000.

¹⁴⁶ Andreas Hellmann, Hector Perera, Chris Patel: Equivalence in IFRS across languages: Translation issues from English to German. Macquarie University, 2010.

translations anymore but as legally binding texts. At the level of terminology it meant that the terminology of the IAS in the different languages became official. Linguistic discrepancies and misleading or erroneous terminology should therefore be adjusted not only at the level of the issuing body but also at European instances. The linguistic quality of the standards is important as they will serve as the basis on which accountants prepare the financial statements of companies. For instance, Kettunen reports that the endorsed Swedish translation of the IFRS was misleading as the term *rapport över totalresultat* was used both for "profit and loss" and "other comprehensive income".¹⁴⁷

For these reasons, in 2008 the Commission Services responsible started a major consolidation project coupled with a detailed language review of all endorsed standards and interpretations.¹⁴⁸ Since 2010, it is the Commission alone which ensures translation of the financial standards to be published in the Official Journal. It means that all language versions other than the original English version are created at the DGT. Thus, the English language terminology enters the sphere of EU law unchanged, while for other language versions the EU might have an influence – even if moderated – on the linguistic expression of the relevant terms.

An important challenge for translators at the Commission is that they should not align in every case the vocabulary of the IFRS to EU legislation as in many cases the terminology of the financial standards must remain specific and autonomous.

4.5 International treaty terminology that will not be integrated into secondary legislation

An array of specific terms in international agreements will never reach the level of secondary legislation, at least in a context which is completely unrelated to the agreements they are stemming from, because they were created for the purposes of the agreement alone and would not make sense outside its scope. Part of the WTO terminology clearly belongs to this group of terms. Terms such as "countervailing measures/duty", "decoupled income support" "product mandating" and "above quota delivery" are specific WTO terms exclusively used in a WTO context.

4.6 The need for well-defined concepts and consistent terminology both at international and at European levels

Taking over terminology from international instruments and integrating them into European law presupposes the existence of a coherent and consistent vocabulary in these instruments, otherwise it would harm European efforts aimed at fostering consistency in terminology. Some areas with strong historical traditions of transnational regulation and application, such as maritime law, already offer a mutually intelligible conceptual vocabulary for maritime lawyers from common law and civilian jurisdictions, thereby making the creation of a uniform set of rules and concepts easier.¹⁴⁹ This is however not so evident in other areas. As Judith Aigner-Kast points out, although a significant amount of legal terminology is incorporated in international agreements, having far-reaching

¹⁴⁷ Jaana Kettunen: Translation of IFRS Standards into local languages: Understanding Problematics of Translation, University of Jyväskylä, <http://www2.lse.ac.uk/accounting/pdf/Kettunen.pdf>

¹⁴⁸ COM(2008) 215 final, p. 9.

¹⁴⁹ Paul Myburgh: Uniformity or Unilateralism in the law of Carriage of Goods by Sea? 2000 (31) *VUWLR*, p. 357.

implications for the contracting parties, the terminology used in these texts often remains fuzzy and vague.¹⁵⁰

Several international organisations or bodies in charge of the implementation or alignment of certain international treaties, most of them also dealing with very technical issues, have recognised the need for multilingual glossaries and term banks, some of them providing not only linguistic equivalents but also definitions. In the area of carriage of goods for instance, the United Nations Economic Commission for Europe (UN/ECE) issued a glossary of the terms used in combined transport and related fields. The glossary is intended for the work of the three intergovernmental organisations, namely the European Community, the European Conference of Ministers of Transport (ECMT) and the UN/ECE. It is however specified that the "definitions are not applicable in their strictest sense to the legal and statistical fields, whose relevant documents of reference exist already."¹⁵¹ In other words, the glossary will not and cannot overrule already existing legal definitions of EU law. The aim of the glossary was „to determine the meaning of the terms currently in use and to make them easily understandable by the increasing number of people who use them."¹⁵²

Another similar example is the TIR Glossary,¹⁵³ managed by the International Road Transport Union, or the Road Transport Informatics terminology database containing 488 concepts linked to the so-called „intelligent transport systems” - an umbrella concept that is the product of globalisation and is becoming a core concept of current European transport law¹⁵⁴ and which covers a range of technologies that are applied to a transportation system. DG Transport recommends that the glossary is consulted in order to become acquainted with ITS terminology.¹⁵⁵

Such kind of glossaries might be very useful in settling certain definitions and terms, but they can never be as multilingual as the European Union. The UN combined transport glossary, for instance, is available in four languages (English, French, German and Russian); the TIR Glossary is available in English French and Russian; the ITS Glossary, edited by the Nordic Road Association, has six languages (French, English, Danish, German, Norwegian and Swedish). Even if the European legislator uses these sources as reference tools in its legislation, it still has to find or create the equivalents in all other EU languages not covered by such glossaries.

The need for thematic multilingual glossaries at European level in areas strongly influenced by international law is sustained by the fact that the European Migration Network (EMN)¹⁵⁶ felt it necessary to compile a glossary of terms relating to Asylum and Migration terms in order to improve comparability between EU Member States through the use and common understanding of the terms and definitions contained therein.¹⁵⁷ In the Glossary, containing some 300 terms, both international and European context is indicated for each relevant term and reference is made to other international multilingual glossaries if they were used as source material (ILO Thesaurus, Undocumented Worker

¹⁵⁰ Judith Kast-Aigner: Terms in context: a corpus based analysis of the terminology of the European Union's development cooperation policy with the African, Caribbean and Pacific group of States. *The International Journal of Speech, Language and Law*, Vol. 17.2. 2010, p. 304.

¹⁵¹ <http://www.unctad.org/en/docs/posdteitbd2.en.pdf>

¹⁵² Melten Demiz Güner-Özbek: Extended scope of the Rotterdam Rules: Maritime Plus and Conflict of the Extension with the Extensions of other Transport Law Conventions. In Güner-Özbek: *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Springer, 2011, p. 108.

¹⁵³ http://www.iru.org/en/iru_tir_glossary

¹⁵⁴ See Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport.

¹⁵⁵ http://ec.europa.eu/transport/its/road/glossary_en.htm

¹⁵⁶ Coordinated by the Directorate General for Home Affairs of the European Commission and the so-called National Contact Points appointed by the Member States who, in turn, develop a national network consisting of a wide-range of entities representing all relevant stakeholders.

¹⁵⁷ <http://emn.intrasoft-intl.com/Glossary/index.do>

Transition Glossary, Glossary for Gender Related Terms, and UNESCO's People on the Move Handbook). For the time being, terms are not available in all EU languages (although in many of them), but, due to continuous updating, in the long term all official languages will be represented.

4.7 The impact of European terminology on other terminology standardisation initiatives at the international level.

The Alpine Convention is an international agreement signed by the states of the Alpine region¹⁵⁸ in order to enhance cooperation among these countries for protecting the natural resources of the Alpine area and to ensure sustainable development. The EU itself is not party to the Convention but is associated with it. The Convention has four official languages: French, German, Italian and Slovene.

The project LexALP is a special project related to the Convention, the aim of which is to harmonise the terminology of the Convention so that contracting states could cooperate effectively, surpassing the obstacles posed by the differences in their legal systems and by linguistic barriers by reaching an equal understanding of the concepts used in the Convention.¹⁵⁹

In this respect the LexALP project is an exemplary initiative at an international level: it recognises the need for uniform terminology and common definitions within one international agreement. As a result some 1000 terms have been treated under the project.¹⁶⁰

When elaborating definitions for the concept of the Conventions, the lawyers and terminologists of the project often used definitions of EU instruments as a starting point, in some cases adopting them without modifications, in other cases adapting them slightly to the Convention's objectives. This approach seemed to be reasonable since most of the contracting parties (except Switzerland) were at the same time Member States of the EU.

The definition of "environmental damage," for instance, was taken over from Directive 2004/35/EC but amended slightly as references to other directives were deleted to make the definition useful for the Convention's system.¹⁶¹ Another central term of the Convention, the term "mountain area," was also defined according to EU law. The definition of Regulation 1257/1999 (EC) was chosen as a compromise basis, which could avoid the use of a definition based on the criterion of altitude given the fact that the limits of altitude for such areas are set in a variety of forms in the contracting states to the Convention.¹⁶² Similarly, "renewable energy sources" were defined in line with Directive 2001/77/EC.

„When elaborating definitions for the concepts of the Alpine Convention system we, the lawyers and terminologists in the LexALP project, often used definitions that could be found in the other legal systems (International, European and national legal systems) as a starting point. Most definitions adopted by the Harmonising Group were based on European and on International Law. Indeed, European and International legal texts often contain definitions of the terms used in order to ensure their common understanding by all the Member States or Contracting Parties.“

Céline Randier: Definitions for Harmonising Legal Terminology

¹⁵⁸ Austria, Italy, France, Switzerland, Germany, Slovenia, Lichtenstein, Monaco.

¹⁵⁹ Céline Randier: Definitions for Harmonising *Legal Terminology*, p. 93.

¹⁶⁰ Elisabeth Lavault-Olléon – Francis Grossmann: *Langue du droit et harmonisation terminologique multilingue: l'exemple de LexALP*, Lidil, Revue linguistique et didactique de langue, 38/2008, p. 12.

¹⁶¹ Randier, p. 94.

¹⁶² Randier, p. 101.

4.8 How does the European Court of Justice interpret concepts of secondary legislation stemming from international agreements?

The European Court of Justice is often asked to interpret certain concepts of directives or regulations aiming to implement international obligations. The recitals of such directives and regulations usually contain explicit reference to the international treaty to which they aim to align EU legislation. In such cases, if the EU act in question does not define the relevant concept, its meaning will be deduced by the Court from the international agreement concerned.

In case C-393/09, the Court was asked to interpret the notion of „expression in any form of a computer program” a term used but not defined by Directive 91/250/EEC. The Court ruled that „In those circumstances, that notion must be defined having regard to the wording and context of Article 1(2) of Directive 91/250, where the reference to it is to be found and in the light of both the overall objectives of that directive and international law”. The concept was thus interpreted with reference to the Berne Convention and to the TRIPS agreement.

Following the same line of argumentation, the Court interpreted the concept of “refugee status” of Directive 2004/83/EC in the light of the Geneva Convention¹⁶³ and the concept of “operating restrictions” used Directive 2002/30/EC on the basis of the relevant Resolution of the ICAO Assembly in order to ascertain whether these include rules imposing limits on noise levels, as measured on the ground, to be complied with by aircraft overflying areas located near the airport.¹⁶⁴

5. Conclusion

The EU as actor at international level is also confronted with the language regime of international treaties. Against its endeavour to achieve that all of its official languages become at the same time authentic languages of the international treaty concerned it must conform in the vast majority of cases to the established language regime of the multilateral treaty concerned. This fact does not ease the translation burden of the EU as – according to the general rule – all international treaties are to be translated into the official languages of the EU and must be published in the Official Journal.

On the other hand, translation of international treaties is not just a purely technical exercise: the terminology of international agreements might have serious impact on European terminology even at the level of secondary law. Thus, very often the translation of international agreements presupposes and requires conscious linguistic choices made by translators and policy makers.

¹⁶³ Joined cases Aydin Salahadin Abdulla (C-175/08), Kamil Hasan (C-176/08), Ahmed Adem, Hamrin Mosa Rashi (C-178/08) and Dier Jamal (C-179/08) v. Bundesrepublik Deutschland, ECR 2010, I-01493.

¹⁶⁴ Case C-120/10, European Air Transport SA v. Collège d’Environnement de la Région de Bruxelles-Capitale, not yet reported.

CHAPTER THREE

Language rights and human rights

The general aim of the present study is to give an overview on the role of languages and translation in international agreements and in cross-border trade, both at international level and in the context of the internal market. As visible from the preceding and forthcoming Chapters, languages appear basically in two sorts of roles in the relevant areas. In most of the cases under international law, language is dealt with as a source of difficulty, either because of diverging but equally authentic treaty languages or because of the obstacles posed by different languages in international trade. On the other hand, international law provides a certain degree of protection to language rights. A similar tension is visible also in the law of the European Union, yet with different accents. The EU, as a Union of states and individuals, lays special emphasis on the equality of languages within the European Union, and the consequences of this reach far beyond general international law. In contrast, the needs of the internal market call for resolving the difficulties posed by the different languages in the Member States. Accordingly, the EU has been forced to consider and resolve the inherent tension between respecting the variety of languages on the one hand and diminishing the language related obstacles facing the creation and operation of the internal market.

In order to explore this inherent tension, this chapter attempts to describe the nature of language rights, both in international law and in European Law, bearing in mind that the purpose and scope of protection is different in these legal orders. This will serve as the general context in which the language related issues of international trade and of the operation of the internal market can be assessed.

Language rights in international law

1. Purposes of protecting language rights in international law

There is no agreement, either in state practice or in scholarly literature, on the objectives of protecting languages or persons speaking that language. There are nevertheless three commonly recognised, partly competing, purposes of the protection of language rights in international law. They can be summarised as preserving peace and security, promotion of the fair treatment of individuals and preservation of linguistic diversity.¹⁶⁵ These purposes are closely interrelated but may also contradict each other.

1.1 Language rights as a tool for preserving peace and security

The underlying idea of the first approach may be found in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the General Assembly.¹⁶⁶ In its Preamble, the Declaration states that "the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in

¹⁶⁵ Lauri Mälksoo: The Language Rights in International Law: Why the Phoenix is Still in the Ashes, 12 *Florida Journal of International Law* 1998-2000, pp. 431, 434 et seq.

¹⁶⁶ A/RES/47/135, 92nd plenary meeting, 18 December 1992.

which they live.” In other words, prohibiting individuals or groups from speaking their native language can contribute to ethnic conflicts, de-stabilise multi-ethnic countries and threaten the peace and security in the world.¹⁶⁷

This theory equates the problem of language rights in international law with the linguistic rights of minorities. The goal behind this approach is to achieve peace and security, since when the language of a minority is threatened or prohibited, that minority will feel suppressed and start to revolt. Granting linguistic rights for the minorities may help to avoid the escalation of ethnic conflicts.¹⁶⁸ Although this theory does not attempt expressly to protect language rights as collective rights, this impression is inevitable.

This approach was the underlying idea of minority protection in the post World War I era. The system of the League of Nations had one major deficiency: minority rights only applied to vanquished or newly emerged states, and the victors of the war did not accept them within their own territory.¹⁶⁹ Moreover, as the minority protection treaties of this era related to certain countries and certain minorities, they de facto made the impression of protecting the individuals of a certain ethnic group collectively: Linguistic rights were implicitly endowed to the minority as a group. It is argued that this led to the perception that the international legal protection of the minorities in Central and Eastern Europe had a reverse effect: instead of enhancing security, those measures in a way threatened and damaged security.¹⁷⁰ It seems that one of the reasons for a far more cautious approach to the (language) rights of minorities within the system of the United Nations was doubt as to whether international peace and security can be safeguarded this way. It became contentious whether granting linguistic rights to minorities actually reduces potential conflict, or actually creates it.¹⁷¹

1.2 Language rights to ensure the fair treatment of individuals

Individual fairness is the starting point of this approach to the objectives of language rights. This theory regards justice for individuals as decisive for the protection of linguistic rights. Some scholars talk about the protection of human dignity¹⁷² instead of justice here, but the idea is basically the same. It does not necessarily contradict or conflict with the purpose of preserving peace and security. Nevertheless, this approach stresses that the potential for conflicts between the majority and minorities is not the ultimate rationale of the protection. Rather, it would be unjust in general to deny the right to use the native language of the individuals who live compactly together in a certain territory. This way of thinking puts the individual rather than the minority as a whole in the spotlight of international protection. In order to achieve justice, the individual must be granted certain linguistic rights, prerogatives and guarantees. After World War II, the common thinking seems to have been that the linguistic rights could only be protected through individual human rights.¹⁷³

It occurs that securing individual fairness was the main motivation behind the central universal norm of international law on language rights, Article 27 of the International Covenant on Civil and Political Rights, which guarantees rights to persons belonging to minorities, but not to minorities as such.

¹⁶⁷ Mälskoo, p. 435.

¹⁶⁸ Mälskoo, p. 435.

¹⁶⁹ Mälskoo, p. 436.

¹⁷⁰ Mälskoo, p. 437.

¹⁷¹ See Tove Skutnabb-Kangas-Robert Phillipson, Linguistic human rights, past and present. In: Tove Skutnabb-Kangas-Robert Phillipson-Mart Rannut: *Linguistic Human Rights: Overcoming Linguistic Discrimination*, 1995.

¹⁷² Joseph P. Gromacki, The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights, 32 *Virginia Journal of International Law*, 1991-1992, p. 515.

¹⁷³ Mälskoo, p. 440.

The difficulty connected with the approach of "language rights as individual human rights for the creation of justice" is that language controversies always involve collectivity. Linguistic and ethnic identities are usually tightly interrelated with each other. To argue that linguistic issues in international law can be solved through recognition of individual rights only, and the aspect of collectivity can be avoided, does not solve the problem.¹⁷⁴

1.3 Preserving linguistic diversity

The third approach to language rights is intended to protect the diversity of languages on the Earth.¹⁷⁵ As such, this school of thought has close links to the broader concept of the cultural diversity of mankind, which forms part of our common heritage. As the Declaration on the Responsibilities of the Present Generations Towards Future Generations, adopted on 12 November 1997 by the General Conference of UNESCO, states in Article 7: "With due respect for human rights and fundamental freedoms, the present generations should take care to preserve the cultural diversity of humankind. The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations."

Preserving linguistic diversity necessitates protection of language rights because of language death. The underlying idea is that humanity suffers losses with the extinction of a language and that loss of diversity diminishes the range of options for development (economic and also cultural, intellectual and spiritual). As Kloss argues, with a language death, a unique way of seeing the world vanishes.¹⁷⁶ A language which is lost or threatened leaves an irreparable gap in the cultural heritage of mankind.¹⁷⁷

This approach has close resemblance to the idea of environment protection. At the same time, the recognition of the need to protect endangered languages inevitably leads to the recognition of language rights as collective rights belonging to the linguistic group.¹⁷⁸ However, the implications of this right are unclear.¹⁷⁹ Especially, it must be further clarified whether and to what extent the protective measures can prevail over claims of individual rights of the persons speaking other languages. Further, a problem connected with the idea of language rights as group rights is that "being endangered" is always a somewhat subjective criterion. In the era of globalisation, even the speakers of some major languages feel that their language rights and prerogatives may be lost in the global competition of languages under "free market" conditions.¹⁸⁰

1.4 Individual or collective rights?

As it could already be seen above, one of the most debated issues related to these guarantees is the question whether language rights are individual or collective rights. International law in general is rather sceptical about collective rights and put emphasis on the protection of individual rights. Even so, language rights are inevitably collective.¹⁸¹ Individuals use their language when they communicate with other human beings who understand this particular language, usually members of the same ethnic group. The right to language preservation may be crucially important for an individual in

¹⁷⁴ Mälskoo, p. 443.

¹⁷⁵ Mälskoo, p. 444.

¹⁷⁶ Kloss, p. 288.

¹⁷⁷ Tove Skutnabb-Kangas-Robert Phillipson: *Wanted! Linguistic Human Rights*, 1989, p. 3.

¹⁷⁸ Mälskoo, p. 445.

¹⁷⁹ Kay Hailbronner: The legal status of population groups in a multinational state under public international law, 20 *Israel Yearbook on Human Rights*, 1990, pp. 127, 153.

¹⁸⁰ Mälskoo, p. 444.

¹⁸¹ Mala Tabory, *Language Rights as Human Rights*, 10 *Israel Yearbook on Human Rights*, 1980, pp. 167, 208.

order to be able to use his or her language, but it cannot be secured through individual rights.¹⁸²

Although one can notice the tendency of accepting the group rights aspect of individual rights in international adjudication, states have been reluctant to recognise language rights as group rights. Even the recognition of language rights as individual rights is rather weak. Whereas classic fundamental rights offer a clear cut and enforceable protection for certain usages of the language as an enabling condition of the exercise of the right, linguistic rights are barely protected by universally binding international documents. In the following we will first attempt to summarise this approach in a model and then address the specific relevant areas.

1.5 Different circles of the protection of language rights

The protection of language rights in international law can be best described as a system of concentric circles. The larger the circle is, the broader the scope of the protection of such rights, but also weaker. At the same time, it can be seen that the function of protection is different in the different circles.

In the centre of international language rights protection we find traditional human rights, which protect the use of the language of the bearer of the right as a necessary enabling precondition of a right which is primarily not concerned with languages. The best examples are for this the right to personal freedom, and the specific aspects of the right to a fair trial, as well as freedom of expression. Broader is the scope of those binding instruments in international law that aim to protect certain minorities, and, as part of that, the use of their respective minority language. Finally, there are soft law instruments with a wide sweep but no binding force.

The international law protection of language rights is in stark contrast with the language regime of the European Union, which is based on the principle of equality of the languages of the nations forming the Union. Accordingly, the European Economic Community has, because of its legal nature, from the beginning recognised the right of individuals and public authorities to use their mother tongue in their exchanges with EEC institutions.¹⁸³

In the following, we give a short account of the different circles of language rights in international law. This will allow a comparison with the language regime of the European Union. That comparison shows a more far-reaching approach on the side of the European Union.

2. Language rights as enabling conditions and consequences of classic fundamental rights

There are basically three categories of classic human rights that address language questions. First, some procedural human rights in international law can only operate under all circumstances if they also address language issues. Second, the freedom of expression also covers the choice of the language in which one would like to express their opinion. Third, the prohibition of discrimination serves as a general guarantee based on the use of a certain language.

¹⁸² Mälskoo, p. 443.

¹⁸³ Regulation 1/58 of the EEC Council determining the languages to be used by the European Economic Community, Official Journal 17 (1958) P. 0385 – 0386.

2.1 Language related aspects of procedural guarantees

Both the right to personal freedom as well as the right to a fair trial are futile if the person affected cannot understand the charges raised.

Accordingly, Article 5 (2) of the European Convention on Human Rights provides in relation to the *habeas corpus* guarantee that “[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.” More articulate are the guarantees related to the right to a fair trial in Article 6 of the Convention.

On the one hand, Article 6 (3) a) declares that everyone charged with a criminal offence “has to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.

Further, Article 6 (3) e) also guarantees for those charged with a criminal offence “to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court.”

It occurs that Article 5 (2) of the Convention requires less detailed information on the arrest than Article 6 (3) a) on the criminal charges.¹⁸⁴ The European Court of Human Rights could elaborate on the language aspect of Article 6 (3) a) of the Convention.¹⁸⁵ In *Brozicek v. Italy* the applicant was not of Italian origin and did not reside in Italy. The Public Prosecutor’s office sent a letter to him in Italian, and his response indicating that he did not speak the language remained unanswered. Later, when he moved home and could not be contacted by the authorities, he was convicted in absentia. The Court found this to be a violation of Article 6 (3) a) of the Convention.

„The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English.”

(judgment in *R. v. Baulac* case of the Canadian Supreme Court)

Fair trial rights are classic freedoms limiting the action of the state. However, the right to an interpreter in criminal proceedings for free is close to what is called “*Leistungsrechte*” in the German terminology, which are rights putting an obligation on the state to provide actively for the realisation of the right. This is best demonstrated by the judgment in the case *Luedicke, Belkacem and Koc v. Germany*.¹⁸⁶ Here the three applicants were charged before the German courts with the commission of various criminal offences. Since they were not sufficiently familiar with the language of the country, they were assisted by an interpreter in accordance with German law. After conviction, however, they were ordered, amongst other things, to pay the costs of the proceedings, including the interpretation costs. The Government argued that the right to the free assistance of an interpreter – together with the various guarantees of a fair trial – because they are intended to enable the accused to preserve the presumption of innocence, lapse at the same time as that presumption, i.e. with the final conviction. The European Court of Human Rights countered this submission not only with the deterring effect of obliging the convicted to pay for the interpretation, but also with a broader

¹⁸⁴ Jacobs, White & Ovey: *The European Convention on Human Rights*.

¹⁸⁵ *Brozicek v. Italy* (Application no. 10964/84) Judgment of 19 December 1989.

¹⁸⁶ *Luedicke, Belkacem and Koc* (Application nos. 6210/73; 6877/75; 7132/75), Judgment of 28 November 1978.

reference. According to the Court, the interpretation of the Government would leave in existence the disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language - these being the disadvantages that Article 6 (3) e) is specifically designed to alleviate. As a result, the Court found a violation of the right in Article 6 (3) e) of the Convention

The requirements of Article 6 (3) e) are not met if the accused just roughly understands the language of the criminal procedure.¹⁸⁷ In *Cuscani v. Italy* the European Court of Human Rights was confronted with a criminal procedure involving crimes related to tax issues in which the trial judge had been clearly informed by counsel that the applicant had a "very poor" command of English. The judge in consequence directed that the applicant be assisted by an interpreter, but the interpreter failed to appear at the hearing; this was sufficient to find a violation of the right to the free assistance of an interpreter, even if the accused's counsel consented to the trial being held without an interpreter.

The Court was also ready to extend the protection of the right to free assistance of an interpreter beyond procedures that are qualified as criminal in the respective legal order. In *Öztürk v. Germany*¹⁸⁸ the Court ruled that a procedure aimed at finding a regulatory offence (*Ordnungswidrigkeit*) is also covered by Article 6 (3) e) of the Convention. In the Court's view, what matters was the criminal nature of the sanction and not its classification in the German legal order. Consequently, the right protected by Article 6 (3) e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from them the payment of the costs thereby incurred in both criminal procedures and procedures relating to petty offences (such as the regulatory offences in German law).

The – to date – final extension of the right to the free assistance of an interpreter occurred in the case *Kamasinski v. Austria*.¹⁸⁹ In that case, the European Court of Human Rights ruled that this right applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.¹⁹⁰

2.2 Freedom of expression and language rights

Freedom of expression is an individual "natural right" protected by Article 10 of the European Convention of Human Rights, irrespective of its form and content.¹⁹¹ Accordingly, the expression of an opinion may take different forms, and can include symbolic gestures as well.¹⁹² In view of the importance of this freedom for the functioning of a democratic society, Article 10 of the Convention "is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."¹⁹³

¹⁸⁷ *Cuscani v. Italy* (Application no 32771/96) Judgment of 24 September 2002.

¹⁸⁸ *Öztürk v. Germany* (Application. no. 8544/79) Judgment of 21 February 1984.

¹⁸⁹ *Kamasinski v. Austria* (Application No. 9783/82) Judgment of 19 December 1989.

¹⁹⁰ *Ibid.*, Para. 74 of the Judgment.

¹⁹¹ Jacobs and White: *The European Convention on Human Rights*, 4th ed. 2006. p. 317.

¹⁹² *Steel and Others v. the United Kingdom* judgment of 23 September 1998; *Hashman and Harrup v. the United Kingdom*, Judgment of 25 November 1999.

¹⁹³ *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Para. 49 of the Judgment.

As a result, the freedom of expression clearly protects the use of any language in private or in public. Naturally, it cannot guarantee a right to use that language in official proceedings or in education, since it only protects the expression of the self, but not a communication from entities that have some sort of connection with the bearer of the right. In that sense, the freedom of expression has a very limited reach, insofar it can only protect communications between persons using the same language, or provocative, unilateral usages of a certain language in an environment which is hostile to that language. Nevertheless, protection in these situations may also be of great help.

A further aspect of the freedom of expression is demonstrated by a communication of the Human Rights Committee in a case under Article 19 of the International Covenant on Civil and Political Rights dealing with the right to commercial advertising in English language in the francophone Quebec in the famous *Ballantine* case.¹⁹⁴ The case concerned the commercial free speech of English speaking citizens of Canada who had used the English language in different commercial signs. A modification of the Bill of the Provincial Government, known as the Charter of the French Language, however provided that public signs and posters and commercial advertising, outside or intended for the public outside, or in some cases inside certain buildings, should solely be in French.

The Committee did not consider Article 27 of the Covenant to be applicable to the petitioners, because, in its view, the minorities referred to in article 27 are minorities within a State, and not minorities within any province. Accordingly, the petitioners could not be considered a linguistic minority as they constitute a majority in the state. However, this did not mean for the Human Rights Committee that their linguistic behaviour is not protected by general human rights. The Committee actually applied here the freedom of expression in Article 19 of the Covenant to commercial free speech as well. As the Committee noted: "Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom."¹⁹⁵

The decisive question was, therefore, whether the commercial free speech of the petitioners can be limited lawfully under the specific circumstances to protect the French language. With regard to that, the Committee noted: "the issue to be addressed is whether [the limitations] are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. [...] The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. [...]. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice."¹⁹⁶

¹⁹⁴ *Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

¹⁹⁵ *Ibid.* para. 11.3.

¹⁹⁶ *Ibid.* para. 11.4.

This communication shows a general preference for individual rights over minority rights. At the same time, the Human Rights Committee does recognise the lawfulness of official languages and with that the legitimacy of a language policy for the sphere of public life.

2.3. Prohibition of discrimination

The prohibition of discrimination is a general human right that may be utilised if certain persons are exposed to an unjustified disadvantage because of their use of a certain language. As Fernand de Varennes¹⁹⁷ puts it: "non-discrimination on the ground of language may be the single most powerful right for individuals seeking more just and responsive conduct from public authorities in language matters. When properly understood and applied, non-discrimination offers a balanced mechanism which recognizes that a state may have legitimate reason for favouring one or a few select languages in carrying out its affairs."

A famous example of the use of the prohibition of discrimination to protect language rights is the judgment of the European Court of Human Rights in the Belgian Linguistic case.¹⁹⁸ This judgment, however, also demonstrates the limited reach of the prohibition of discrimination. Here the applicants were French-speaking or they expressed themselves most frequently in French, and they wanted their children to be educated in that language. They complained, inter alia, that Belgium does not provide any French-language education in the municipalities where the applicants live, withholds grants from any institutions in the said municipalities which may fail to comply with the linguistic provisions of the legislation for schools; refuses to homologate leaving certificates issued by such institutions; does not allow the Applicants' children to attend the French classes which exist in certain places; and thereby obliges the Applicants either to enrol their children in local schools, a solution which they consider contrary to their aspirations, or to send them to school in the "Greater Brussels district". The Court made it clear that the prohibition of discrimination in Article 14 of the Convention, taken together with the right to education in Article 2 of Protocol 1 to the Convention, "does not have the effect of guaranteeing to a child or to his parent the right to obtain instruction in a language of his choice. The object of these two Articles, read in conjunction, is more limited: it is to ensure that the right to education shall be secured by each Contracting Party to everyone within its jurisdiction without discrimination on the ground, for instance, of language." Nevertheless the Court found it to be discriminatory that certain children were prevented, solely on the basis of the residence of their parents, from having access to the French-language schools existing in the six communes on the periphery of Brussels invested with a special status.

In general, it occurs that the European Court of Human Rights was not ready to open a wide gate for importing minority rights in the context of the Convention. Further, the Court was certainly reluctant to derive rights from the prohibition of discrimination which create a positive obligation on the state to create and finance education facilities.

3. Protection of minorities and language rights

One of the groundbreaking scholars of language rights, Heinz Kloss, has famously distinguished between tolerance-oriented and promotion-oriented linguistic rights

¹⁹⁷ Fernand de Varennes: Language Rights as an Integral Part of Human Rights, 3 *International Journal on Multicultural Societies*, 2001. pp. 15, 17.

¹⁹⁸ Case relating to certain aspects of the laws on the use of languages in education in Belgium, (Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) Judgment of 23 July 1968.

(duldende und fördernde Sprachenrechte).¹⁹⁹ It occurs that international law in its present state only obliges to guarantee the tolerance-oriented language rights of the individuals.²⁰⁰ The best examples for this are the classic human rights described above, which promote tolerance for the use of languages.²⁰¹

Beyond these, language rights or linguistic human rights are mostly a concern for international law from the perspective of the protection of national minorities and of indigenous peoples. This is the area of promoting the interests of a group.²⁰² This is because minority languages are in a weaker position; they do not only need tolerance, they also have to be promoted. Minorities usually speak a language different from the majority and these groups deserve special protection for preserving their cultural identity. Accordingly, express guarantees of language rights are most prominently found in conventions for the protection of these groups and their members. The only exception to this is the International Covenant on Civil and Political Rights, which contains in its Article 27 of the only binding universal source for the protection of language rights. Even so, this Article is also concerned with the rights of minorities.

3.1. Article 27 International Covenant on Civil and Political Rights

Article 27 of the International Covenant on Civil and Political Rights (CCPR) represents the most important obligation to positively support minority language maintenance or revitalisation. According to that, "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Article 27 is not a programmatic provision or a statement of principle without mandatory force. As usual in international law, it is up to states to specify the measures necessary to comply with it. Article 27 identifies only the priority—respect and accommodation of the minorities' characteristics: language, culture and religion—but it requires signatory states to articulate a policy to fulfil that obligation.²⁰³ In this sense, it is argued that there remains a certain ambiguity about the legal obligations of States deriving from Article 27.²⁰⁴

The Human Rights Committee dealt with Article 27 in its General Comment 23 of April 6 1994.²⁰⁵ The Committee observed that this article establishes and recognises a right which is conferred on individuals belonging to minority groups, thereby making it clear that Article 27 does not enshrine a group right. The Committee further drew a distinction between the rights protected under Article 27 and the right to self-determination in Article 1 CCPR, as well as the prohibition of discrimination under Articles 2.1 and 26 CCPR.²⁰⁶ The Committee went on to note that the terms used in Article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language and that the individuals designed to be

¹⁹⁹ Heinz Kloss: *Grundfragen der Ethnopolitik im 20. Jahrhundert. Die Sprachgemeinschaften zwischen Recht und Gewalt. Ethnos - Schriftenreihe der Forschungsstelle für Nationalitäten- und Sprachenfragen*, Marburg. Band 7. p. 132.

²⁰⁰ Lauri Mälskoo: The Language Rights in International Law: Why the Phoenix is Still in the Ashes, 12 *Florida Journal of International Law* 1998-2000, pp. 431, 441.

²⁰¹ Xabier Arzoz: The Nature of Language Rights, *Journal on Ethnopolitics and Minority Issues in Europe* 2/2007. 9. See also Arzoz: Language rights as legal norms, *European Public Law* 15, 2009, 4, p. 541 et seq.; Arzoz: Accommodating linguistic difference, five normative models of language rights, *European constitutional law review* 6(2010), 1, p. 102 et seq.

²⁰² Arzoz, p. 9.

²⁰³ Arzoz, p. 10.

²⁰⁴ Mälskoo, 1998-2000, p. 442.

²⁰⁵ General Comment Nr. 23 (50), UN Doc. CCPR/C/21/Rev.1/Add.5.

²⁰⁶ General Comment Nr. 23 (50), UN Doc. CCPR/C/21/Rev.1/Add.5. Points 2-4.

protected need not be citizens of the State party.²⁰⁷ What is more, the person belonging to a minority need not be permanent residents in order to enjoy the protection of Article 27. According to the General Comment, even migrant workers or visitors in a State constituting a minority are entitled not to be denied the exercise of these rights.

In contrast to these progressive findings, the Committee remained rather vague as regards the content of the rights in the Article. The Committee stated that although Article 27 is expressed in negative terms, it also requires positive measures of protection, not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.²⁰⁸ Positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.²⁰⁹ What these positive measures shall be was not specified by the Committee and so their definition is within the states' margin of appreciation. In light of this, it seems to be justified to claim that even this General Comment of the Human Rights Committee was unable to provide an exact and satisfactory formulation about the rights deriving from this Article.²¹⁰

3.2. Regional and universal documents for the protection of minority languages and languages of indigenous people

Beyond Article 27 of the Covenant, international law only offers binding norms on language rights in conventions and treaties of mostly regional application. The most important such document is the *European Charter for Regional and Minority Languages of 1992* adopted within the framework of the Council of Europe. As the first international legal instrument devoted to the protection of minority languages, the Charter has pioneering attainments. It considerably advances the standards of protection in areas where universal instruments are very deficient. Nevertheless, the Charter allows, in its Article 3 (1), each state that ratifies it to specify which minority or regional languages it wants to include within the scope of the Charter. Signatory states are allowed to differentiate, if they wish, between their regional or minority languages, although this option should be non-arbitrary. Further, some European states, including members of the European Union, have not signed or ratified the Charter: Belgium, Bulgaria, Estonia, Greece, Ireland, Latvia, Lithuania, Portugal and Turkey have not signed the ECRML; France and Malta have not yet ratified it.

The Council of Europe also produced a general document for the protection of national minorities, the *Council of Europe Framework Convention for the Protection of National Minorities of 1995*. This framework convention, however, lacks teeth. As the European Court of Human Rights noted, in the case of *Chapman v. The United Kingdom*: "The Court observes that there may be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle [...] However, the Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention, for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation."²¹¹

²⁰⁷ General Comment Nr. 23 (50), UN Doc. CCPR/C/21/Rev.1/Add.5. Points 5.1.

²⁰⁸ General Comment Nr. 23 (50), UN Doc. CCPR/C/21/Rev.1/Add.5. Points 6.1.

²⁰⁹ General Comment Nr. 23 (50), UN Doc. CCPR/C/21/Rev.1/Add.5. Points 6.2.

²¹⁰ Mälskoo, 1998-2000, p. 442.

²¹¹ *Chapman v. the United Kingdom* (Application no. 27238/95) Judgment of 18 January 2001, para. 93-94.

Beyond the protection of minorities international documents for the protection of indigenous peoples – such as the *ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries of 1989* – contain a list of language rights, amongst guarantees of other nature. Such language rights of indigenous peoples are not primarily concerned with the protection of trade related interests. Yet some of them have implications for imparting and receiving information related to trade in a language different from the majority language. Article 30 (1) of the ILO Convention 169 provides, for instance, that “Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.”

3.3 Soft law instruments on language rights

Soft law instruments of international law have in common that they do not lead to a formal legal obligation of states, which is why they can contain far more reaching provisions on protecting language rights than binding sources of law: states are more ready to accept them without having to fear legal consequences.

A good example of a soft law document with a wide range is the Universal Declaration on Linguistic Rights adopted within the framework of UNESCO on the World Conference on Linguistic Rights in 1996.²¹² The Declaration states in its Article 1(2) that linguistic rights are individual and collective at one and the same time. Besides listing a number of inalienable individual personal rights in Article 3(1), the Declaration considers in Article 3(2) that the collective rights of language groups may include the following: the right for their own language and culture to be taught; the right of access to cultural services; the right to an equitable presence of their language and culture in the communications media; the right to receive attention in their own language from government bodies and in socioeconomic relations.

The innovative aspect of this Declaration is that it introduces the concepts of language community and language group. Language community according to Article 1(1) is any human society established historically in a particular territorial space, whether this space be recognised or not, which identifies itself as a people and has developed a common language as a natural means of communication and cultural cohesion among its members. Language group is, according to Article 1(5), in contrast, any group of persons sharing the same language which is established in the territorial space of another language community but which does not possess historical antecedents equivalent to those of that community. Examples of such groups are immigrants, refugees, deported persons and members of Diasporas. This innovative conceptual framework, once adopted in a widespread fashion, might help overcome the difficulties linked to the traditional focus on rights of the minorities in the relation to language rights.

The overview of the different instruments for the protection of minority language rights indicates the unwillingness of the international community to grant detailed, enforceable rights to these groups. At the same time, it is also clear that minority language rights are a concern for the international community. What is more, the issue of language rights in international scholarship is mostly relevant because of the protection of national minorities.

²¹² <http://www.unesco.org/cpp/uk/declarations/linguistic.pdf>

4. Other language related aspects in international treaties

Beyond provisions on classic human rights and specific language rights, one can hardly find provisions on the use of certain languages between private parties. These aspects remain in general a matter for the contracting parties. The Convention on the International Sale of Goods (CISG) is, for instance, silent on the language in which the sale contract should be drafted or in which other statements and declarations should be made. Most authors acknowledge that in practice it can be contested to what extent declarations or statements between parties might be effective if they are not drafted in the recipient's language.²¹³ According to the rules of interpretation of the CISG, the statements and declarations must be interpreted as the other party or at least a reasonable person should have understood them, and this is only possible if that party knows the language that is used. Similarly we cannot find provisions on the language of work contracts in any of the ILO conventions. There is a single legal instrument of the Council of Europe: the Convention on the legal status of migrant workers ratified only by 11 states which deals with this aspect. According to Article 5 of the Convention "Every migrant worker accepted for employment shall be provided prior to departure for the receiving State with a contract of employment or a definite offer of employment, either of which may be drawn up in one or more of the languages in use in the State of origin and in one or more of the languages in use in the receiving State. The use of at least one language of the State of origin and one language of the receiving State shall be compulsory in the case of recruitment by an official authority or an officially recognised employment bureau,,. Another instrument having somewhat similar provision is the Private Employment Agencies Recommendation adopted in Geneva in 1997 at the General Conference of the ILO. According to the Recommendation, private employment agencies should inform migrant workers, as far as possible in their own language or in a language with which they are familiar, of the nature of the position offered and the applicable terms and conditions of employment.²¹⁴

As far as labelling requirements are concerned, as it will be demonstrated by the next Chapter, language use is not regulated but rather tolerated by the relevant international instruments, with the exception of the WHO Convention on Tobacco Control.

Language use is regulated only there where it is a core element of the relevant system like in the case of trade marks regulated by the Madrid Agreement and in the case of European patents regulated under the European Patent Convention. Both of them specify the languages that can be used in the relevant procedures.

²¹³ Peter Huber: Some introductory remarks on the CISG, *Internationales Handelsrecht*, 6/2006.

²¹⁴ Article 8 b) of the Recommendation.

Language rights in the European Union

The law of the European Union is in many respects different from international law. Being an autonomous legal order to which states and individuals are subjects, it is based on different structural principles and pursues objectives of its own. The question of language related rights within the European Union can be understood in this specific context. It occurs that the European Union expressly desires to promote linguistic plurality within the Union, an approach that is reflected in the founding treaties and secondary sources of EU law. It is not exaggerated to claim that multilingualism is part of the Union's self-portrayal.²¹⁵ On the other hand, the promotion of linguistic rights or the protection of certain languages by the Member States may hinder the operation of the fundamental freedoms of the internal market. Here the Union, especially the European Court of Justice, strives to prevent Member States from abusing the protection of languages to evade binding rules of the internal market.

1. The founding treaties as an expression of the importance of multilingualism

The Treaty of Lisbon explicitly includes linguistic diversity amongst the objectives of the European Union. According to Article 3(3) TEU, the European Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced." Linguistic diversity is not only an objective of the European Union; it is also protected by Article 22 of the Charter of Fundamental Rights of the EU which provides: "The Union shall respect cultural, religious and linguistic diversity." It is argued that Article 22 of the Charter does not create an individual right. Rather, it should be seen as a binding principle, which requires further concretisation by legislation.²¹⁶ Even if this holds true, it is undeniable that respect for linguistic diversity is a legal obligation upon the European Union.

Arguably, this development in the language of the founding treaties created more visibility for the issue of language rights and made it clear that linguistic diversity is part of our cultural heritage. In that sense, Article 3(3) TEU and Article 22 Charter fit very well in the doctrinal framework of protecting language rights outlined above in relation to international law: The reference to linguistic diversity as part of Europe's cultural heritage implies a sort of "ecological" approach, which does not derive linguistic rights from individual justice or maintaining peace and stability. The underlying idea is that Europe does not aspire to a uniform culture. On the contrary, cultural diversity is a strength of the European Union, in contrast with other organisations of integration.²¹⁷

In spite of this considerable development in the visibility of the importance of linguistic diversity, it is arguable that this matter has long been a concern for European integration. Since the Treaty of Maastricht, Article 151 TEC (now Article 167 TFEU) provides that the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing their common cultural heritage to the fore. Even if Article 151 TEC has not produced significant results,²¹⁸ it indicated the legal relevance of cultural diversity.

²¹⁵ Armin von Bogdandy, Die Europäische Union und das Völkerrecht kultureller Vielfalt – Aspekte einer wunderbaren Freundschaft. In Georg Nolte-Helen Keller-Armin vob. Bogdandy (ed.): *Pluralistische Gesellschaften und Internationales Recht*, 2008, p. 43.

²¹⁶ Thorsten Kingreen Art 22 EU-GR Charta Art. 22 [Vielfalt der Kulturen, Religionen und Sprachen] in, Calliess/Ruffert, EUV/AEUV 4. Auflage (2011) Rn. 2.

²¹⁷ Matthias Ruffert Art. 3 EUV [Ziele der EU] in, Calliess/Ruffert, EUV/AEUV 4. Auflage (2011) Rn. 42.

²¹⁸ Robert F. Weber, Individual rights and group rights in the European Community's approach to minority languages, *Duke Journal of Comparative and International Law* (2007) pp. 361, 377.

Article 4(2) TEU could also be regarded as an expression of similar values, inasmuch as it refers to the respect of the national identity of Member States. Arguably, national identity encompasses a set of ideals and values that make a nation or a state. These can include many areas, such as history, economy or religion, but also culture and language. The language of Article 4(2) TEU, however, links national identity with the fundamental political and constitutional structures of the Member States, inclusive of regional and local self-government. In that sense, Article 4(2) TEU focuses on the political and constitutional structures of the members, and not on culture or language,²¹⁹ which are protected under the general heading of "diversity", part of the EU's common values and objectives.

Article 55(2) TEU further provides that the Treaty "may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council."

This provision recognises the existence of additional official languages in the Member States without, however, giving them any specific status in Community law. In particular, Treaty versions in those languages would not be authentic.²²⁰ The inspiration behind this provision appears to be the same as the one behind Conclusions of the Council from the year 2005.²²¹ In order to enhance the role of languages which are the official languages only in a specific region of a Member State but not official languages of the EU, the Council of the EU has adopted a conclusion according to which, on the basis of an administrative arrangement to be made between the Council and a Member State, and at the latter's costs, (a) translations into such language made by that Member State of certain legislative measures of the EU will be added to the Council's archives and published on its website, which will however clearly be stated not to have the status of law, (b) speeches in that language at Council meetings will be passively interpreted and (c) private communications to the Council and, on the basis of further administrative arrangements to be concluded with other EU institutions, to those institutions in that language can be sent to a body designated by the Member State in question to be there translated into one of the EU's official languages and then sent on, together with the translation, to the institution in question.²²²

Besides the general interest of maintaining linguistic diversity, the EU is concerned with protecting the use of languages to enhance the participation of citizens in the democratic life of the Union and thereby contribute to its legitimacy. Article 10(3) TEU declares expressly that every citizen shall have the right to participate in the democratic life of the Union. Closely linked to this is Article 11(1) TEU, which obliges the institutions to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union activity. These provisions are based on a concept of dual legitimacy, partly originating from national parliaments, partly from the participation of EU citizens in the elections to the European Parliament.²²³ Such participation is possible if the citizens can use their mother tongue, or at least the official language of their respective home state. Hence there are 23 Treaty languages, and all the language versions of legislative (as opposed to judicial and administrative) texts are

²¹⁹ Adelheid Puttler EUV Art. 4 [Zuständigkeiten der Union, nationale Identität, loyale Zusammenarbeit] in, Calliess/Ruffert, EUV/AEUV 4. Auflage (2011) Rn 14.

²²⁰ Theodor Schilling: Language Rights in the European Union, *German Law Journal*, Vol. 09. No. 10, pp. 1219, 1233.

²²¹ Council Conclusion of 13 June 2005 on the official use of additional languages within the Council and possibly other Institutions and bodies of the European Union, OJ 2005, C 148, p. 1

²²² Schilling, p. 1233.

²²³ Matthias Rufert Art. 10 [Demokratische Grundsätze] in, Calliess/Ruffert, EUV/AEUV 4. Auflage (2011) Rn. 5 et seq., Rn. 12.

equally authentic.²²⁴ It is for the same reason that Article 24 (4) TFEU provides that every citizen of the Union may write to any of the institutions or bodies in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.

Putting the approach of the European Union in the general context of the different functions of language rights, it is fair to argue that the centre of EU language policy is not the preservation of linguistic diversity for the sake of this diversity itself, which would imply certain group rights, but the reflection of a given distribution of powers between the EU itself and the Member States (subsidiarity). EU law is not aimed at granting collective language rights. Rather, linguistic diversity can be regarded as a general guidance for creating individual linguistic rights.

2. Secondary sources and case law on multilingualism; multilingualism as policy

Article 342 TFEU provides that the rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations. It is remarkable as an expression of respect for the national identity of Member States of the EU that here the Council has to act unanimously, a decision making method otherwise largely replaced by majority decision making via the Treaty of Lisbon.

Article 342 TFEU can be regarded as the legal basis of the most important secondary norm that expresses the importance of multilingualism within the European Union, Regulation 1/58.²²⁵ The Regulation governs, inter alia, communications between the institution of the EU and Member States, as well as persons subject to the jurisdiction of a Member State, stating that communications to the institutions of the EU may be drafted in any one of the official languages selected by the sender and the reply shall be drafted in the same language. Similarly, documents which an institution of the EU sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

„The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.“

Recital 14, Directive 2010/64/EC

Most important are, however, the provision of Article 4 of the Regulation, according to which regulations and other documents of general application shall be drafted in the official languages, and Article 5, according to which the Official Journal of the European Union shall be published in the official languages.

The implication of the Regulation cannot be overestimated. It provides for the equality of the official languages of the EU and preserves multilingualism. It occurs, however, that

²²⁴ Article 55 (1) TEU

²²⁵ Regulation 1/58 of the EEC Council determining the languages to be used by the European Economic Community, Official Journal 17 (1958) P. 0385 – 0386.

the European Union also strives to extend specific language rights related to some of the rights of the Charter of Fundamental Rights. The first example of this is Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010, on the right to interpretation and translation in criminal proceedings,²²⁶ which specifies the minimal concrete obligations of the Member States to ensure the right to a fair trial as protected by the Charter and the European Convention of Human Rights.

According to the Directive, the right to interpretation and translation must be provided to persons who do not speak or understand the language of the criminal procedure. This right must be provided from the time these persons are made aware of being suspected or accused of a criminal offence until the end of the criminal proceedings, including sentencing and ruling on appeal. From the perspective of the above-cited Öztürk case it is remarkable that, in the case of minor offences, if sanctions are imposed by an authority other than a court having jurisdiction in criminal matters (e.g. the police following a traffic check), the right to interpretation and translation will only apply to the proceedings following an appeal before such a court.

The directive therefore has turned the general provisions of the ECHR into specific obligations for the competent authority, which must check the language needs of the suspect or accused. Interpretation can never be waived. The Member States must make interpretation available for the persons concerned to communicate with their legal counsel on matters relating directly to any questioning or hearing during the proceedings or to the lodging of an appeal (whereas the ECHR was vague on this right). They must also provide the suspected or accused persons with a written translation of essential documents defined in the Directive in line with the Charter and the European Convention on Human Rights. These documents are the decision depriving a person of liberty, the charge or indictment and any the judgment, though not the evidence.

EU countries must also make interpretation available for the persons concerned to communicate with their legal counsel on matters relating directly to any questioning or hearing during the proceedings or to the lodging of an appeal.

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In this context, it is also necessary to refer to the decision of the European Court of Justice in the case *Bickel und Franz*²²⁷ concerning the right to defence in one's language in criminal proceedings. In this case the Italian rules restricted the right to have proceedings conducted in German to German-speaking citizens of the Province of Bolzano. German-speaking nationals of other Member States, particularly Germany and Austria - such as the defendants in the criminal case - who travelled or stayed in that province could not require that criminal proceedings be conducted in German.

Long before the Treaty of Lisbon and the entry into force of the Charter of Fundamental Rights, the Court utilised former Article 6 of the EC Treaty which in general prohibited discrimination on the basis of nationality and protected the language rights of the accused. According to the ruling, in so far as they may compromise the right of nationals of other Member States to equal treatment in the exercise of their right to move and reside freely in another Member State, national rules concerning the language to be used in criminal proceedings in the host State must comply with Article 6 of the Treaty.²²⁸ At

²²⁶ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, pp. 1–7

²²⁷ C-274/96 – *Bickel und Franz*, [1998] ECR I-7639.

²²⁸ *Ibid*, para. 22 of the Ruling.

the time of the ruling, criminal legislation and the rules of criminal procedure were matters for which the Member States were responsible. However, the Court ruled that Article 6 of the EC Treaty precludes national rules which, in respect of a particular language other than the principal language of the Member State concerned, confer on citizens whose language is that particular language and who are resident in a defined area the right to require that criminal proceedings be conducted in that language, without conferring the same right on nationals of other Member States travelling or staying in that area, whose language is the same.

3. The European strategy for multilingualism

The above developments in the founding treaties and in secondary legislation take place against the background of a development of a language policy of the European Union. The European Commission first addressed the question of languages in a communication in 2005, which set out a New Framework Strategy for Multilingualism.²²⁹ The Framework Strategy views languages as the most direct expression of culture and takes cultural diversity as a starting point. This serves as motivation and justification for the new field of Commission policy that promotes a climate that is conducive to the full expression of all languages, in which the teaching and learning of a variety of languages can flourish.

According to the Framework Strategy, the Commission's multilingualism policy has three aims: to encourage language learning and promoting linguistic diversity in society; to promote a healthy multilingual economy, and to give citizens access to European Union legislation, procedures and information in their own languages. The Framework Strategy admits that responsibility for making further progress mainly rests with Member States, but assures that the Commission will also do all within its remit to reinforce awareness of multilingualism and to improve the consistency of action taken at different levels.

In 2008, the Commission released a new communication entitled "Multilingualism: an asset for Europe and a shared commitment".²³⁰ The 2008 Communication identifies the objective as to raise awareness of the value and opportunities of the EU's linguistic diversity and encourage the removal of barriers to intercultural dialogue and to mobility. The Commission seems to pursue here two distinct purposes: the preservation of linguistic diversity on the one hand; enhancing competitiveness on the other by deepening the proper knowledge of the national languages and promoting the learning of an increasing number of languages. Whereas the latter purpose could not be linked directly to language rights, it certainly has a strong indirect effect to them inasmuch it may also contribute to the understanding of the importance of a diverse linguistic landscape.

In the same year, the Council adopted a Resolution on a European strategy for multilingualism.²³¹ The strategy, which replaced the previous Framework Strategy, sets out basically five goals that need be achieved by the Member States and the EU institutions in their respective field of competence. These are to promote multilingualism with a view to strengthening social cohesion, intercultural dialogue and the European construction; to strengthen lifelong language learning; better promote multilingualism as a factor in the European economy's competitiveness and people's mobility and employability; to promote the linguistic diversity and intercultural dialogue by stepping up assistance for translation, in order to encourage the circulation of works and the

²²⁹ Brussels, 22.11.2005 COM(2005) 596 final.

²³⁰ Brussels, 18.9.2008 COM(2008) 566 final.

²³¹ Council Resolution of 21 November 2008 on a European strategy for multilingualism, OJ C 320, 16/12/2008, 1 et seq.

dissemination of ideas and knowledge in Europe and across the world; and to promote EU languages across the world. Obviously, this is an agenda with a wide range and multiple secondary purposes. Yet it will certainly contribute to promoting the diversity of languages in Europe.

4. The jurisprudence of the European Court of Justice and the control of Member States' policies on the use of languages

As far as the jurisprudence of the European Court of Justice is concerned, these mostly do not address language rights of individuals but instead cover measures of the Member States or even private entities that aim to protect certain languages, sometimes the official language. The relevant cases indicate that the ECJ is anything but hostile towards such attempts. The cases demonstrate the limits Member States are bound to respect if they invoke language policies as an exception to a fundamental freedom.

In *Angonese*²³² the Court was confronted with an attempt of the Italian state to control linguistic skills necessary for the performance of certain jobs. Here an Italian national whose mother tongue was German and who was resident in the province of Bolzano, went to study in Austria. Upon return he applied to take part in a competition for a post with a private banking undertaking in Bolzano. One of the conditions of entry to the competition was possession of a certain type of certificate of bilingualism (in Italian and German), which used to be required in the province of Bolzano for access to the former managerial career in public service. The certificate was issued by the public authorities of the province of Bolzano after an examination which is held only in that province. Although Mr Angonese was not in possession of the certificate, he was perfectly bilingual. He also produced documents that proved his language skills. Nevertheless he was not admitted to the competition because he had not produced the certificate required.

The Court noted that, under former Article 48 EC Treaty, freedom of movement for workers within the Community entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The Court also found that the prohibition of discrimination on grounds of nationality laid down in former Article 48 EC Treaty must be regarded as applying to private persons as well.²³³ Because persons not resident in the province of Bolzano had little chance of acquiring the certificate and it was difficult for them to gain access to the employment in question, the Court found the requirement to be discriminatory on the grounds of nationality.²³⁴ As such, it should have been based on objective factors unrelated to the nationality of the persons concerned and in proportion to the aim legitimately pursued. In the view of the Court, requiring an applicant for a post to have a certain level of linguistic knowledge may be legitimate and possession of a diploma such as the certificate in question may constitute a criterion for assessing that knowledge. However, the fact that it was impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, was considered disproportionate in relation to the aim in view.²³⁵

Angonese is the perfect example of striking a proper balance between treating linguistic pluralism as a value and at the same time only allowing for measures that are indeed necessary and inevitable to protect linguistic pluralism. In *United Pan-Europe*

²³² C-281/98 – *Angonese*, [2000] ECR I-4139.

²³³ *Ibid.* para. 36 of the Ruling.

²³⁴ *Ibid.* para. 40 of the Ruling.

²³⁵ *Ibid.* para. 44 of the Ruling.

*Communications Belgium and others*²³⁶ the Court had to rule indirectly on certain aspects of the maintenance of plurilingualism in a bilingual region. In this case the Court had to deal with a must carry regulation in Belgium, which obliged non-local cable operating companies to carry the programmes of local broadcasting channels. Here the freedom to provide services was affected. The Court accepted that a cultural policy may constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services.²³⁷ The Court was also ready to accept that the legislation in question guaranteed to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture and therefore was suitable for securing the attainment of the aim pursued.²³⁸ On the other hand, the Court required that the limitation of the freedom to provide services is not disproportionate, leaving the final decision in this question to the national court.²³⁹

A similar question arose in *Unión de Televisiones Comerciales Asociadas (UTECA)*.²⁴⁰ Here the ECJ found that EC law does not preclude a measure adopted by a Member State which requires television operators to earmark 5% of their operating revenue for the pre-funding of European cinematographic films and films made for television and, more specifically, to reserve 60% of that 5% for the production of works of which the original language is one of the official languages of that Member State. The Court admitted that the measure constitutes a restriction on several fundamental freedoms, namely the freedom to provide services, freedom of establishment, the free movement of capital and freedom of movement for workers. Even so, the Court considered that the measure may be justified by the objective of defending and promoting one or several of the official languages of a Member State concerned, and that the measure was not disproportionate, because, inter alia, it affected only a small portion of the operating revenue of the operators. The Court was even ready to take into account that the beneficiaries of the financing concerned were mostly cinema production undertakings of the Member State, since, according to the Court, this effect was inherent in the measure.

5. Conclusion: The language policy of the European Union

The above overview of the language related aspects of EU law reflects a fine equilibrium between the interest of maintaining linguistic diversity on the one hand and assuring the smooth functioning of the internal market, on the other. It is fair to state the European Union addresses linguistic diversity at two levels: One is the level of the individual whose certain language related rights are strongly protected and whose linguistic interests shall be promoted as a matter of policy. The other level is that of the states whose competence to foresee language related legislation affecting the internal market is not challenged fundamentally. Linguistic rights of national minorities, however, are still somewhat missing from the map of the European Union.

²³⁶ C-250/06 - United Pan-Europe Communications Belgium and others, [2007] ECR, I – 11149.

²³⁷ Ibid. para. 41 of the Ruling.

²³⁸ Ibid. para. 43 of the Ruling.

²³⁹ Ibid. para. 51 of the Ruling.

²⁴⁰ C-222/07 Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado, [2009] ECR I-01407.

CHAPTER FOUR

Language rights and translation in the internal market: ensuring the smooth functioning of a multilingual market

Although the European Union has extended its competences over the last decades to beyond purely economic areas, it was originally founded as an economic community and the internal market still represents the very essence of it. In cross-border trade in goods, services and capital and in making the free movement of persons from one Member State to another a reality, language might be seen as a “soft barrier to trade”: goods must be relabelled and in certain cases accompanied by instructions for use in the language of the importing country; business and consumer contracts must be drawn up in a certain language which is often a foreign language for at least one of the parties; official documents issued by the home Member State’s authorities might have to be presented in the language of the host Member State and adequate language skills might be needed for the exercise of certain professions.

Some of these requirements stem from national provisions; others are laid down by European legislation itself. It must still be pointed out that certain language requirements might create barriers for traders (for instance when they have to provide information or draw up a contract in a given language), and eliminate barriers for another group of persons (for consumers who are entitled to receive information or a contract in the language of their choice) at the same time. Consumer protection is a typical example where the weaker party to the contract, namely the consumer, must be protected by additional legal means. Such provisions guarantee linguistic rights to vulnerable parties in contractual relationships, which is unique at an international level.

However, it seems such kind of soft language barriers are not seen by business as a major obstacle to cross-border trade. According to a survey carried out in 2006 by Eurobarometer²⁴¹, costs arising from language differences as obstacles to cross-border trade were considered important by fewer business leaders (43%) than other barriers such as the insecurity of transactions (61%), the different national fiscal regulations (58%), the difficulty of resolving complaints and conflicts across borders (57%), the differences in national laws (55%), the difficulties in providing effective after-sales service (55%) and the extra costs arising from delivery (51%).

Another survey published by Eurobarometer five years later, on European contract law in consumer transactions,²⁴² proves more or less the same, although language problems (communication or translation of documents) were mentioned in fourth place (36%) after difficulties in finding out about foreign consumer contract law (40%), tax regulations (39%) and the need to adapt to local consumer rules (38%). According to this survey, language problems were rated by respondents at approximately the same level as the

²⁴¹ Business attitudes towards cross-border sales and consumer protection, Eurobarometer, Flash Eurobarometer Series 186, 2006.

²⁴² European contract Law in consumer transactions, Eurobarometer, Flash Eurobarometer Series, 321, 2011.

need to comply with formal requirements to enter the market (35%), obtaining legal advice regarding foreign contract law (35%), and resolving cross-border conflicts (35%). Delivery and after-sales services were identified as problems by 31%. It must also be underlined that only 6% thought that language and translation have a large impact on their decision to sell to cross-border consumers, while all the other aspects mentioned above were identified as having a large impact. After having questioned some 250 companies in each Member State, the results of the survey showed that the Member States where a larger proportion of companies identified language and translation of documents as having a large impact on their decisions to trade cross border with consumers were Bulgaria (19%), Greece (13%) and Sweden (10%), followed by Spain, Germany, France, Lithuania, and Latvia where this proportion was around 9%. The countries in which companies were less worried about language issues were Italy, Malta and Slovakia.²⁴³ However, there was no difference or clear tendency in answers according to the companies' size. Another survey argues in that respect that 11% of SMEs are aware of having lost business as a result of their lack of language competencies²⁴⁴.

The above surveys did not ask consumers about the extent to which their propensity to buy cross-border is influenced by certain barriers and whether language plays a role in it. The Impact Assessment on the Directive on Unfair Commercial Practices did examine this aspect. According to the findings of the Commission, the barriers that hold back the consumer dimension of the internal market can be divided into two categories: natural barriers (language and distance) and policy induced barriers (taxation). Based on a Eurobarometer study of 2001, the impact assessment finds that language barriers for consumers are falling: 53% of EU consumers said that they can speak at least one European language in addition to their own and 26% speak two other languages. Seventy-one percent thought that everyone in the EU should be able to speak another European language in addition to their mother tongue.²⁴⁵ Some commentators find however the above conclusions too idealistic. They argue that being able to understand a foreign language and understanding the content of commercial communication in that language are not the same thing.²⁴⁶

1. Language use in trade: as a general rule a matter for the Member States

The EU is based on the equality of its official languages as far as communication between European institutions and the EU citizens is concerned, including access to the official versions of all European legal acts in any language version of the official languages. According to Regulation No. 1 of 1958, legal acts adopted by the EU must be drafted and published in all official languages. Communication between EU citizens or Member States on the one hand and EU institutions on the other is also covered by this Regulation. Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

Likewise, documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

²⁴³ European contract law in consumer transactions, Eurobarometer, Flash Eurobarometer Series, 321, 2011, p. 60.

²⁴⁴ CILT: Effects on the European Economy of Shortages of Foreign Language Skills in Enterprise, 2007.

²⁴⁵ 1.3. of the Impact Assessment.

²⁴⁶ Wilhelmsson: The Average European Consumer: a Legal Fiction? In *Private Law and the Many Cultures of Europe*, Kluwer, 2007, p. 261.

The linguistic regime of the EU does not however concern language use in trade or language use in general at the infra-European level. In the light of the subsidiarity principle, this aspect is normally left to be regulated by the Member States.

There are however cases where European legislation does foresee certain provisions on the use of languages or on the right to receive information in a certain language in order to safeguard some overriding reasons, namely the protection of the weaker party to a contractual relation or to protect health or safety. The aim of such linguistic provisions is to set common harmonised safeguards that EU citizens can access throughout the European Union. The scope and necessity of legal intervention must however be thoughtfully considered in each case. By virtue of the subsidiarity principle, the EU should legislate only in cases where it can be adequately proven that Member States cannot effectively regulate the subject-matter concerned on their own and the objective pursued can only be attained by EU wide measures. Since the *Commission Communication of 1993 on Language use in the information of consumers in the Community*, it is clear that, according to the Commission, rules concerning languages naturally fall within the competence of the Member States.²⁴⁷ This approach is reinforced by a number of provisions of the secondary legislation. The EU intervenes if provisions on the use of languages are necessary to ensure an adequate level of protection for EU citizens.

2. The language of consumer contracts in EU law

Since the 80's, the EU has adopted a series of directives in the field of consumer protection on different types of contracts or different aspects of contractual relationships where it thought a uniform level of protection should be ensured for European consumers. These instruments normally confirm the above principle that they do not prejudice the right of the Member States to regulate the language used for contracts. In the preamble of the Directive on distance contracts,²⁴⁸ one can find an explicit reference that the languages used for distance contracts is a matter for the Member States. Likewise, recital (15) of the preamble of the new Directive on consumer rights²⁴⁹ integrating the Directive on distance contracts and the Directive on contracts negotiated away from business premises²⁵⁰ states that the Directive will not harmonise language requirements applicable to consumer contracts and therefore Member States may maintain or introduce in their national law linguistic requirements regarding contractual information requirements and contract terms. Member States are thus free to set requirements in their national legislation concerning the use of a certain language (which is generally the language of the Member State where the consumer is resident) for consumer contracts concerned, but at the same time they remain free not to regulate the question at all.²⁵¹ It is interesting to note that the above recital was not part of the original Commission proposal but was inserted at a later stage in the legislative process.

The language issue is mentioned again in the Directive on consumer rights among the formal requirements concerning distance contracts and off-premises contracts. Information on both types of contract must be given in plain and intelligible language (but it is of course not specified in which language). This requirement (contained in almost all directives on consumer protection) might be seen as a soft expression of individual language rights, since the requirement of using plain and intelligible language

²⁴⁷ Paragraph 2 of COM(93) 456 final

²⁴⁸ See recital (8) of the Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

²⁴⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

²⁵⁰ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

²⁵¹ A similar provision or recital cannot be found in the former off-premises Directive.

implicitly presupposes that the contract is written in a language which is understood by the consumer.

The Directive on unfair contract terms²⁵², which was finally not integrated in the Directive on consumer rights, is silent on the use of languages as well. It only stipulates that contracts should be drafted in plain, intelligible language (whichever language it is). Although it is not explicitly stated, according to the subsidiarity principle, Member States remain free to foresee special provisions on language of the contract. For instance, in France according to the Loi Toubon, consumer contracts must be drawn up in French²⁵³ and under the Polish Act of 1999 on the Polish Language, all contracts to which a Polish entity is a party and which are to be executed on Polish territory must be written in Polish.²⁵⁴

At this point it is worth stressing that the choice of the language of the contract does in no way determine the law applicable to it, although the fact that the language of the contract and the language of the law applied to that contract are different might cause difficulties when interpreting the contract. It might happen that certain terms and concepts in the contract do not have equivalents in the applicable legal system or when translated they might alter their scope or definition. In our globalising world, contracts are very often drafted or standard contracts are pre-drafted in English, sometimes using the legal terms and concepts of common law systems while the applicable law will be a legal system of civil law which is not familiar with such concepts. The law governing a transnational contractual relationship between the parties established in different Member States is either stipulated by the parties themselves in the contract or, in the absence of such stipulation, it is governed by the Rome I Regulation²⁵⁵ according to different contract types. In virtue of the Rome I Regulation, in the case of consumer contracts it is the law of the country in which the consumer is resident which applies.

Although the EU is quite prudent in intervening in the use of languages in contractual relations, of those directives adopted in the field of consumer protection, those which might have strong cross-border implications contain some compulsory provisions on the use of language in order to protect consumers. Such provisions entail translation costs for the trader who is bound to provide information and produce the text of a contract in a given language but this is for the sake of a higher ranking principle: the protection of the consumer. Timeshare contracts are typical cross-border contracts where the trader and the consumer are in many cases residents of different Member States and timeshare objects are often located in a country different from that of the consumer's home country. The Directive on timeshare and long-term holiday products²⁵⁶ contains provisions on both the language of pre-contractual information and that of the contract. Pre-contractual information and the timeshare, long-term holiday product, resale or exchange contract must be drawn up in the language or one of the languages of the Member State in which the consumer is resident or a national, at the choice of the consumer, provided it is an official language of the EU.²⁵⁷ In addition, Member States may set more stringent rules regarding the use of languages. The Member State in which the consumer is resident may stipulate that, in every instance, the contract be provided to the consumer is in the language or in one of the languages of that Member State, provided it is an official language of the EU. They may also stipulate that, in the case of timeshare contracts concerning one specific immovable property, the trader provides the

²⁵² Council Directive 93/13/EEC of 5 April on unfair contract terms.

²⁵³ Law No 94-665 of August 4, 1994.

²⁵⁴ Published in Journal of Laws (Dziennik Ustaw) of 1999 No 90 item 999 with subsequent amendments.

²⁵⁵ Regulation 593/2008/EC of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

²⁵⁶ Directive 2008/122/EC of the European Parliament and the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange of contracts.

²⁵⁷ Article 4 and 5 of the Directive.

consumer with a certified translation of the contract in the language or in one of the languages in which the property is situated, provided it is an official language of the EU. Annexes to the Directive lay down standard information forms for the different types of contracts. Each of these forms requires the trader to indicate the language(s) available for communication with the trader in relation to the contract, for instance in relation to management decisions, increases in costs and the handling of queries and complaints.

How these language requirements have been implemented by Member States varies. The *Consumer Law Compendium*²⁵⁸ gives an overview on the different methods of implementation. Some Member States, for instance offer a wider choice of languages than that foreseen by the Directive. In Malta the purchaser can choose not only the language of the Member State in which he/she is resident but also the language of his/her nationality and any official language of the EU. In Estonia, in addition to the language of the residence or nationality, the Estonian language can be chosen alternatively in any case. In Denmark, Finland and Sweden not only the official EU languages can be chosen but also Norwegian and Icelandic too. Many Member States established more stringent rules. In Greece, Latvia, Lithuania, Portugal, Slovenia and Spain the contract must be drawn up in the official language of the Member State in every case²⁵⁹, while in France and in Bulgaria the contract must be available in the language of these states if the purchaser is French or Bulgarian or if the property is located in these countries. In Ireland, the seller must provide a version in English (and Irish) if the purchaser so requests and he/she is resident in Ireland. In Malta the seller must provide a version of the contract in English or in Maltese if the purchaser so requests even if the purchaser is not resident in Malta.²⁶⁰

The Consumer Sales Directive²⁶¹ contains provisions on language requirements with regard to guarantees. First, we can find plain language requirements concerning the content of the guarantee, and second, the Directive authorises Member States to provide that the guarantee be drafted in one or more languages which they shall determine from among the official languages of the EU. Fifteen Member States availed of this possibility.²⁶²

The Directive on e-commerce²⁶³ refers to language use among the provisions on the information the service provider must give prior to the order being placed by the recipient of the service. Such information embraces the languages offered for the conclusion of the contract. Derogation from this rule is only possible if the parties are not consumers and agree to it.²⁶⁴ At the same time, the Directive foresees codes of conduct being drawn up at Community level by trade, professional and consumer associations or organisations, which should be accessible in all EU languages by electronic means.

In 2005, the European Parliament and the Council adopted the Directive on unfair commercial practices.²⁶⁵ The misleading or abusive use of languages is considered as unfair commercial practice and is covered by the Directive. Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a

²⁵⁸ Hans Schulte-Nölke: *EC Consumer Law Compendium – Comparative Analysis*, Universität Bielefeld, 2008.

²⁵⁹ In the case of Spain this language is not necessarily an official language of the EU.

²⁶⁰ See pp. 465-467 of the *Consumer Law Compendium*.

²⁶¹ Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

²⁶² Belgium, Bulgaria, Cyprus, Denmark, Estonia, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovenia, Spain, United Kingdom (*Consumer Law Compendium*, 689.).

²⁶³ Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

²⁶⁴ Article 10 (1) d) of the Directive.

²⁶⁵ Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

transaction in a language which is not an official language of the Member State where the trader is located and then making such a service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction is considered under the Directive as commercial practice which is in all circumstances unfair.²⁶⁶

In the field of contract law, the most significant achievement of the last years is undoubtedly the proposal of the Commission for a Regulation on Common European Sales Law of October 2011.²⁶⁷ This initiative is not without antecedents and precedents: the European Commission has been publishing communications since 2001 on European contract law, followed by a Green Paper published in 2010. As a consequence of these instruments and invited by the Commission, academics drew up the Draft Common Frame of Reference, considered as a toolbox for the common rules of sales. In 2011, an expert group, set up by the Commission, presented a Feasibility Study on a Possible Future Contract Law Instrument. All these instruments handle the question of the necessity for common terminology in contract law in order to avoid discrepancies due to the slightly different national concepts. However, the question of language use is not addressed by them. The draft Regulation goes further in this respect. Although it integrates the outcome of the Feasibility Study, it lays down some additional rules as far as language requirements are concerned.

According to the Commission, it is the difference in national contract laws which is the major obstacle in cross-border transactions: business is faced with the uncertainties of the different contract laws and, for cross-border trading, they need to invest in translating national laws and in receiving professional legal advice while consumers often refrain from getting involved in cross-border business because of the lack of information on their rights and the lack of confidence. The draft Regulation would offer the possibility for the parties both, in a business to business context and in the case of business to consumer contracts to choose, on an optional basis, the European Sales Law as the applicable law to their contractual relationship.

The fact that European Sales Law will be part of an EU Regulation means that its text will be equally authentic and official in each official language of the EU. Opting for the use of these common rules will eliminate the translation costs of the applicable national legislation and costs linked to legal consultancy for business and it will raise consumer confidence. The draft Regulation then goes even further than this. It aims to increase transparency and consumer confidence by requiring the trader to provide the consumer, in the language of his/her choice, a standard information notice on the nature and special features of the European Sales Law, the standardised text of this notice being annexed to the Regulation in each official language.²⁶⁸ Ignoring this obligation has severe legal consequences: the agreement to use the Common European Sales Law should not be binding on the consumer until the consumer has received the information notice together with the confirmation of the agreement and has subsequently expressed consent.

On the other hand, the draft Regulation does not call into question the subsidiarity principle as far as the language of the contract is concerned. Recital (27) of the preamble is quite clear on this issue. It lists those aspects which fall outside the scope of the European Sales Law and will be governed by pre-existing national legislation. The determination of the language of the contract is among these issues. However, one could reasonably suppose that the language of the contract plays a less dominant role if the main rights and guarantees are already available to the consumer in his/her language as a set of rules and also in the form of an information notice. However, providing

²⁶⁶ Annex I, paragraph 8.

²⁶⁷ COM(2011) 635 final.

²⁶⁸ Annex II of the draft Regulation.

information on the languages offered for the conclusion of the contract is a duty in the case of distance contracts concluded by electronic means.²⁶⁹

In Article 61 of the draft Regulation, one can find special rules for resolving language discrepancies between contracts drafted in two or more languages where none of them is deemed to be authoritative. According to the proposed rule, the one in which the contract was originally drafted should be authoritative. The draft provision does not resolve the discrepancy by seeking the objective and the purpose of the contract but refers back to the drawing up of the contract and to the language in which the agreement was reached.

In contractual relations the language of the communication between contracting parties is equally important as the language of the contract. Article 76 of the draft Regulation lays down rules to determine the language used for communication if the parties failed to do it. In such cases the language of communication should be the language used for the conclusion of the contract.

Of course, the draft Regulation repeats the standard formula of consumer directives on the need to provide information in plain and intelligible language and to draft contract terms which have not been individually negotiated plainly and intelligibly, without defining the language to be used, which is a subject-matter for the Member States according to the principle of subsidiarity.

²⁶⁹ Article 24 paragraph 3 (d) of the draft Regulation.

3. Language requirements in EU law on consumer information: where health and safety are at stake

Beyond protecting the consumer in contractual relations by laying down language requirements, either on accessibility of the information or on the actual use of a language, there are other reasons for which the EU intervenes and sets compulsory language requirements, such as consumers' health and safety. Some of these provisions concern labelling requirements, which will be dealt with in a separate case study; others relate to the availability of package leaflets, instructions for use or safety instructions in the official language of the Member State where the product is placed on the market. Here, the burden of translation is put on the producer or trader wishing to put a product on the market.

Products concerned are those which might represent a high risk to human health or safety, such as medicines, medical devices, toys or lifts. The analysis below will give a short insight into how EU law regulates these aspects.

According to the Directive on the Community code relating to medicinal products for human use²⁷⁰, the package leaflet of such products must be written in clear and understandable terms for the users and be clearly legible in the official language or languages of the Member State where the medicinal product is placed on the market. The package leaflet might be printed in several languages, provided that the same information is given in all the languages used. Derogation from these provisions is only allowed in respect of products not intended to be delivered to the patient for self-administration.

Recognising the need for high quality translations and consistent product information, in the early 2000's the European Medicines Agency (EMA) introduced a multi-step linguistic review process for Centrally Authorised Products of product information in all EU languages in order to ensure a high quality of the translations and consistent product information.²⁷¹ The process was further enhanced after 2004. According to the process, first the English version of the product information is submitted and reviewed and it is the English version which is agreed. Translation of the agreed Summary of Product Characteristics, labelling and leaflets proceeds after the adoption of the English version. According to the Guideline on the Readability of the Labelling and Package Leaflet of Medicinal Products for Human Use, issued by the Commission²⁷², all efforts must be done in order to improve the text of the original package leaflet, so that it can be easily translated to other languages. Then, within the review process, each translation will be

During the drafting of the original package leaflet every effort should be made to ensure that the package leaflet can be translated from the original to the various national languages in a clear and understandable way. It is important that the outcome of the user consultation is then correctly translated into the other languages. Strict literal translations from the original language may lead to package leaflets which contain unnatural phrases resulting in a package leaflet which is difficult for patients to understand. Therefore, different language versions of the same package leaflet should be 'faithful' translations allowing for regional translation flexibility, whilst maintaining the same core meaning.

(Guideline on the Readability of the Labelling and Package Leaflet of Medicinal Products for Human Use, Revision 1, 12 of January 2009, European Commission)

²⁷⁰ Article 63 of Directive 2001/83/EC of the European parliament and the Council of 6 November 2001 on the Community code relating to medicinal products for human use.

²⁷¹ EMA/5542/02/Rev 2, The new Products Information linguistic review process for new applications in the Centralised Procedure.

²⁷² ENTR/F/2/SF/jr (2009)D/869, Paragraph 5.

subject to one Member State's review coordinated by a member of the Quality Review of Documents Group, who will forward translation comments directly to the applicant, who is bound to correct translations. A strict timetable applies during the process.

In addition, the EU has taken action to mitigate SMEs' relative lack of scale economies and prior experience in bringing medical products to market via Commission Regulation (EC) No 2049/2005, including services and support relating to translation. Article 10 of the Regulation stipulates that the EMEA shall provide for the translation of the documents that are required for the purpose of granting a Community marketing authorisation. In December 2006 the EMEA issued a user guide for SMEs, covering the administrative and procedural aspects of bringing human and veterinary medical products to market and the assistance that the EMEA can provide for them²⁷³. As well as summarising the essential stages in the process, it listed the main forms of assistance it can provide as administrative and procedural assistance, reduction or deferral of fees and assistance with translations of the product information documents (summary of product characteristics, conditions of the marketing authorisation, label and package leaflet) submitted in the application for marketing authorisation into all European languages.

As far as clinical trials of medicinal products are concerned, Directive 2001/20/EC does not set requirements on the availability of protocols in the language of the Member State where the trial is carried out, leaving this issue for the Member States. In Spain, for instance, where national legislation does not require translation of the protocol into Spanish, a survey carried out in 2007 showed that researchers might overestimate their English reading comprehension skills and might misunderstand texts as a result.²⁷⁴ As such the question remains whether, even if skipping translation might shorten a clinical trial approval process by at least 15 days, is it worth the risk of not having translations at all.

We can find language requirements at European level in the case of some other products representing risks to health. In the case of lifts, the relevant Directive is also quite clear: the instruction manual must be drawn up in an official language of the Member State of the lift installer or another Community language acceptable to him, so that assembly, connection, adjustment and maintenance can be carried out without danger. In addition, each lift must be accompanied by documentation drawn up in the official language(s) of the Community, which may be determined in accordance with the Treaty by the Member State in which the lift is installed.²⁷⁵ For appliances burning gaseous fuels, the Directive foresees that the instructions and warning notices must be in the official language or languages of the Member States of destination.²⁷⁶

The Directive on the safety of toys²⁷⁷ establishes a sort of mixed system, wherein Member States' competence to regulate language requirements is limited by the provisions of the Directive imposing certain obligations on manufacturers and traders. The instructions and safety information must be produced by the manufacturer or the importer in a language easily understood by the consumer, the language itself being determined by the Member State concerned.²⁷⁸ Distributors in addition must make sure that these requirements have been fulfilled before putting the product on the market.

²⁷³ European Medicines Agency (2006) User Guide for Micro, Small and Medium-sized Enterprises (SMEs) on the administrative and procedural aspects of the provisions, laid down in Regulation (EC) No 726/2004, that are of particular relevance to SMEs

²⁷⁴ Karen Shashok: Should clinical trial protocols be translated into researchers' local language? Ethics, science and the language of research, Panace@, Vol IX, 2008.

²⁷⁵ Paragraph 6 of Annex I.

²⁷⁶ Council Directive 90/396/EEC of 29 June 1990 on the approximation of laws of Member States relating to appliances burning gaseous fuels.

²⁷⁷ Directive 2009/48/EC of the European Parliament and the Council of 18 June 2009 on the safety of toys.

²⁷⁸ Articles 4 and 6 of the Directive.

Member States have the right to stipulate that safety warnings on toys be written in a given language.

There are some directives relating to product safety or to certain types of dangerous products which do not foresee a general obligation to translate instructions or warnings into the language of the Member State where the product is put on the market but authorise Member States to set such requirements.

According to the Product Safety Directive,²⁷⁹ establishing at EU level a general safety requirement for any product placed on the market, national authorities might require that the product be marked with suitable, clearly worded and easily comprehensible warnings, in the official languages of the Member State in which the product is marketed, on the risks it may present.²⁸⁰

The same approach is reflected in the Directive on *in vitro* diagnostic medical devices²⁸¹. According to the free movement article of the directive, Member States shall not create any obstacle to the placing on the market or the putting into service within their territory of devices bearing the CE marking. However, they may require the information needed to use them safely and properly to be in their official language(s) when a device reaches the final user. Similarly, the Directive on Cosmetic Products allows Member States to require that certain particulars²⁸² of the cosmetic products be expressed at least in their official language(s). As of 2013 the Directive will be replaced by a Regulation²⁸³ determining slightly stricter rules on languages than the Directive. Manufacturers and importers of a certain cosmetic product shall, at the request of the national authority, demonstrate the conformity of the product in a language that is easily understood by the authority.²⁸⁴ The same applies to the product information file.²⁸⁵ As far as information on the product is concerned, Member States remain free to determine the language to be used.²⁸⁶

The importance of languages with regard to instructions for use has been further underlined by a Council Resolution of 1998. The Resolution on operating instructions for technical consumer goods – as a non binding instrument – goes further than the wording of the individual directives.

In its preamble, the Resolution states that consumer protection involves the protecting the health and safety of consumers; and that consumers are entitled to be provided with the information on safety issues which will enable them to assess the risks inherent in a product and to take precautions against those risks. One of the aims of the Resolution is to enhance consumer confidence by requiring a thorough translation of consumer manuals.

²⁷⁹ Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 on general product safety.

²⁸⁰ Article 8 (1) i).

²⁸¹ Directive 98/79/EC of the European Parliament and the Council of 27 October 1998 on *in vitro* diagnostic medical devices.

²⁸² Nominal content and the type of packaging; expiry date for products with a stability of less than three years and particular precautions observed in use.

²⁸³ Regulation 1223/2009/EC of the European Parliament and the Council of 30 November 2009 on cosmetic products.

²⁸⁴ Article 5 of the Regulation.

²⁸⁵ Article 12 of the Regulation.

²⁸⁶ Article 19 of the Regulation.

Paragraph 5 of the Resolution addresses the language of the manuals. According to this provision, consumers should have easy access to operating instructions at least in their own official Community language, in such a way that they are legible and easy for the consumer to understand. In the case of multilingual instructions, for the sake of clarity and user-friendliness, language versions should be set out separately from one another. Translations of the instructions must be based on the original language only and take into account the distinctive cultural characteristics of the area where the relevant language is used; this requires that translations are done by suitably trained experts who share the language of the consumers that the product is aimed at, and that, ideally, they are tested on consumers for comprehension.

Whereas, in the light of the growing variety of items available on the market and the frequent innovations triggered by technical progress, operating instructions for technical consumer goods are often perceived by consumers as inadequate, both because they are unclear and present language difficulties, owing to faulty translations or to the use of terms which are too complex, and because they lack structure and have inadequate content; whereas the use of the appropriate language is crucial for clear, user-friendly operating instructions.

Recital (5), COUNCIL RESOLUTION of 17 December 1998 on operating instructions for technical consumer goods (98/C 411/01)

Non translation or incorrect translation of package inserts of medical devices or diagnostic tools might have severe consequences. In order to demonstrate the practical impacts, let us briefly present a recent result of checks carried out by the Czech Trade Inspection Authority.²⁸⁷

In April 2011 the Czech Trade Inspection Authority conducted an inspection concerning a „Home HIV test” widely promoted in the media. The media campaign claimed that people at home can check on their own in 60 seconds whether they are contaminated by the AIDS virus. The inspection revealed that there was a significant divergence between the original English version and the Czech translation of the package insert. The original version specified that the test is to be used only by trained personnel in medical facilities or clinical laboratories and is not for home use. In the Czech version of the leaflet however this text was significantly simplified („the test is specifically for professional single- and quick use”) and typed in small letters. Warnings about home use were not translated and potential users of the test could, under the influence of the campaign, easily believe that they could use the test by themselves, although the incorrect performance of the test can bring false results. According to the remedy measure ordered by the Authority, the package insert had to be adapted to the English version.

Adequate translation of instructions for use is even more important, as false translation or lack of translation might trigger costly consequences. In certain cases it can cause injuries or even death.²⁸⁸ In the case of a mistreatment in a German hospital, it was the

²⁸⁷ Press release on the control result available under <http://www.coi.cz/en/tiskovy-servis-1/vysledky-kontrol-1/ctia-alerts-hiv-tests-are-not-for-home-use.html> (downloaded: 04.10.2011).

²⁸⁸ Radiothérapie: améliorer encore la sécurité, Le Figaro, 2007.03.07; Inspection générale des affaires sociales, Résumé du rapport ASN no 2006 ENSTR 019 – IGAS no RM 2007-015P sur l'accident de radiothérapie d'Épinal, février, 2007.

lack of a German language warning which caused improper operations on several patients.²⁸⁹

In 2006 it was discovered that 23 patients in a French hospital in Épinal received radiation overdoses during radiotherapy in 2004 and 2005. As a consequence three patients died and 13 others showed localised radiation injury. After the incidents were identified, the French Inspection Authority of Social Affairs (Inspection générale des affaires sociales, IGAS) undertook inspections and released a report on the potential causes. The report identifies a number of reasons, among others that the new protocol on the therapy was not properly adapted, the traceability of the operations was not ensured, staff were not adequately trained and the instructions for use of the machine were not available in French. Although it is quite clear that the non-availability of the instructions in the language of the staff was not the sole reason for overdosing the patients, it contributed to the accident.

In St. Hedwig Hospital in Berlin, artificial knees were installed incorrectly in 47 patients because of the lack of German translation of the product description. The medical staff misunderstood the English indication „non-modular cemented“ and interpreted it as „nicht zementpflichtig“ (does not have to be cemented). As a consequence, the prosthesis was implanted without being cemented. The patients suffered from the incorrect installation, they had to be reoperated on and received compensation from the hospital's insurance company up to a sum of 3000-5000 EUR each.

Apart from the legal and factual consequences of missing translations or bad translations, companies are anyway interested in investing in the translation of instructions or manuals. A well-translated manual can boost a company's image in other countries, while translation errors in a manual might be embarrassing and lead customers to question the quality of the product, thereby decreasing their trust in the company.²⁹⁰

A survey carried out by the German Institute for Standardisation (DIN) demonstrates that, in the event of mistranslations in consumer instructions, the most frequently used remedy is the correction of the instructions (50%), followed by legal consequences (37%) and finally by actions for damages (12.5%). Missing translation is in every case remedied by re-translation.²⁹¹

The Yearly Report of the Consumer Protection Board of Estonia on its activities in 2009²⁹² also reports that, once the authority detects the absence of danger information or a user manual in Estonian, the trader is immediately required to equip the sold product with the appropriate instructions in Estonian. The lack of product information in Estonian was identified by the Board as one of the major defects in certain products, such as lighters, smoke detectors, TV sets and DVD players, boats, jets and motorbikes.

In Slovakia²⁹³ the trader is obliged to inform the consumer of the characteristics of the product being sold or the nature of the service being provided, on the method of use and maintenance of the product, on the hazards associated with its incorrect use or maintenance, on storage conditions and on the risk associated with the provided

²⁸⁹ Wolfgang Sturz: Haftung bei Übersetzungsfehler, trügerische Sicherheit, Produkt Global, 01/08., http://www.welt.de/regionales/berlin/article1360827/Knie_Patienten_fordern_mehr_Schadenersatz.html (downloaded 04.10.2011.)

²⁹⁰ Why should you translate your safety manual? Accredited Language, www.alsintl.com/blog/translate-safety-manual (downloaded 04.10.2011)

²⁹¹ Studie des Verbraucherrates des DIN: Folgen fehlerhafter Anleitungen am Markt und Lösungsansätze zur Verbesserung technischer Anleitungen, 2010, p. 84.

²⁹² Activities of the Consumer Protection Board in 2009, Consumer Protection Board in Estonia, Tallinn, 2010.

²⁹³ The information below was provided by the Slovak Trade Inspection.

services. If this information is provided in writing, it must be provided in the state language.²⁹⁴

In 2010 the Slovak Trade Inspection (STI) received 30 complaints regarding to alleged breaches of obligatory manual instructions in the Slovak language; 16 complaints were upheld. Until September 2011 the STI had received 47 complaints, and 18 complaints were upheld. Mistranslations in manuals were only occasionally found by the STI, although some of these had serious impacts.

The Slovak version of a manual for use of a steam iron contained information on using sugar instead of salt into water. A consumer used the iron according to the instruction manual and added sugar to the ironing water. As a consequence, the sugar dissolved in the water and changed its consistency into caramel; the iron started to burn and then exploded.

4. Language in cross-border consumer disputes

One of the reasons for consumers refraining from buying from abroad is the fear that they will have major difficulties, in the event of problems, in making their claims successful in another Member State because of distance, lack of knowledge about their rights and the competent authorities or because of language problems. One third of European citizens believe that they are more likely to experience difficulties when resolving problems, such as complaints and returns of faulty products, when they purchase products in another country.²⁹⁵

The European Consumer Centres' Network was set up by the Commission in order to assist consumers in cross-border complaints and disputes by providing them with information and easy access to redress in the event of a complaint. Since 2005 a European Consumer Centre (ECC) has been established in each Member State to provide these services. Due to the cross-border element, language plays an essential role in such kinds of claims and disputes: most consumers could not effectively enforce their rights in front of the national authorities or courts of another Member State without being able to lodge their complaints or submissions in the official language of that country. This is why ECCs also provide translation assistance. Moreover, according to an evaluation carried out by the Commission, one third of ECCs were of the view that access to translation services in the event of disputes is a challenging service to deliver, even if not the most challenging one, this latter being advice relating to a specific issue of cross-border purchase, assistance with the process of making a complaint and information on rights when making a complaint.²⁹⁶ The Evaluation also makes clear that access to translation services in relation to a complaint or to a dispute is less resource-intensive than providing information or assistance in such processes.

Although providing translation services is only an auxiliary task of the ECCs, and which is provided if needed, in certain cases lodging an effective complaint without adequate translation is impossible.

In 2009, the Slovak airline company Sky Europe ceased trading and started bankruptcy proceedings. Consumers had to lodge their claims by a definite date in the Slovak language. Being aware of the fact that many consumers cannot lodge their claims in Slovak, the ECC in Bratislava offered translation services to these persons.

²⁹⁴ Act no. 250/2007 on Consumer Protection and amendments to Act of the Slovak National Council No. 379/1990 Coll. On Offences.

²⁹⁵ Special Eurobarometer No. 298 (2008) - Consumer protection in the internal market

²⁹⁶ Evaluation of the European Consumer Centres Networks, DG Health and Consumers, Technical Annex to the Final Report, February 2011, point 3.1.1.

One of the guiding principles of the free movement of goods in the EU is the principle of mutual recognition, which was drawn up by the European Court of Justice in the 70's. By virtue of this principle, in the absence of harmonisation at EU level, Member States may not impede the marketing of products lawfully marketed in another Member State in their own territory, unless justified by mandatory requirements.

In the course of time, the European legislator adopted a number of legal instruments in order to facilitate the effective functioning of the mutual recognition principle. Under Directive 98/38/EC, Member States are bound to notify draft technical measures concerning products, as such regulations might impede the free movement of goods. Although it is the Commission and the Member States who are the main actors in the procedure, it is not only them, but also business that is entitled to comment on these drafts, as to whether they are in breach of the mutual recognition principle (amongst other issues), and, if that would be the case, whether they could be justified by one of the mandatory requirements. Business or anyone who feels like commenting on notified drafts can send their opinion either to the Commission or to the competent national authorities in the Member States. In order for businesses potentially affected by the legal effects of the draft legislation to have access to the text of these draft measures, the Commission set up the TRIS (Technical Regulations Information System) database, containing all the notified drafts and available to the public. In order to ensure access to information, notified drafts are, in principle, translated into all EU languages (except Irish). Exceptions may be justified depending on the length and nature of the text. Translating draft measures means a significant translation workload depending each year on the number, length and complexity of notified measures. Texts which exceed 40 pages will normally only be translated into the three working languages of the Commission (English, French and German), and into another official language at the justified request of a Member State. In 2010, for instance, the number of pages to be translated into additional 22 languages amounted to 27 000 pages and as a result

215 500 pages of translations were produced.²⁹⁷ Given the fact that the deadline for submitting comments on notified drafts is quite short, translations must be prepared to short deadlines.²⁹⁸

Making notified drafts available in all EU languages enhances transparency on national draft legislation and contributes to the identification of potential barriers to trade. However, what business could be most interested in knowing before marketing products where there are no harmonised rules in force at European level in another Member State is the relevant legislation on the product concerned. In 2008, a set of new European measures was adopted in order to make the principle of mutual recognition operational. According to Regulation (EC) 764/2008, it is important for the internal market in goods that the accessibility of national technical rules in non-harmonised areas be ensured, so that enterprises, and in particular SMEs, can gather reliable and precise information concerning the law in force. The European Commission maintains at its website a list of products which do not fall under harmonisation;²⁹⁹ providing information on national technical product requirements is however entrusted to Member States, which must according, to the Regulation, set up Product Contact Points which are in charge of providing, free of charge, information concerning their national technical rules and the application of the principle of mutual recognition as regards products.

²⁹⁷ Invitation to tender: Translation of technical regulations in relation to Directive 98/34/EC, ARES(2011)868930.

²⁹⁸ According to the tender specifications of the invitation to tender published by DG Enterprise in 2011, for draft measures below 10 pages, the deadline is one week. For all other measures exceeding 10 pages the deadline is extended by one week for each additional 10 pages.

²⁹⁹ <http://ec.europa.eu/enterprise/intsub/a12/index.cfm?fuseaction=a12.menuproducts>, available only in English.

Given the fact that those seeking information on products requirements of a Member State are in the majority of cases non-nationals of that country, language again plays a crucial role, especially regarding languages which are less widely spoken. However, the EU cannot impose an obligation upon Member States to guarantee the availability of such information in all official languages as this would put an inappropriate burden on them. Recital (30) of the Regulation therefore contains a soft recommendation to the Member States, according to which Product Contact Points (PCPs) should be adequately equipped and resourced and also encouraged to make the information available through a website and in other Community languages.

As a consequence of the Regulation, Member States designated their PCPs, the list of which was published in the Official Journal. After a brief overview on the availability of PCPs, it can be stated that, by October 2011, 10 EU countries³⁰⁰ from the 27 had created a special website for PCPs. Only seven of these websites³⁰¹ provide information in a language other than the official language of the Member State, this language being exclusively English. In the majority of cases the English language version of the website contains only general and basic information, sometimes only indicating the e-mail address that can be contacted. Others, like the Czech portal, provide a product requirement orientation table listing non harmonised products and the title of the relevant legislation in English. Three websites, the Danish, Lithuanian and Hungarian sites, offer a search engine in English with simple search or detailed search functions according to product categories or TARIC (Integrated Tariff of the European Communities) codes. The Danish site is exemplary in that regard, as visitors of the site do not only receive information on the number and title of the relevant national

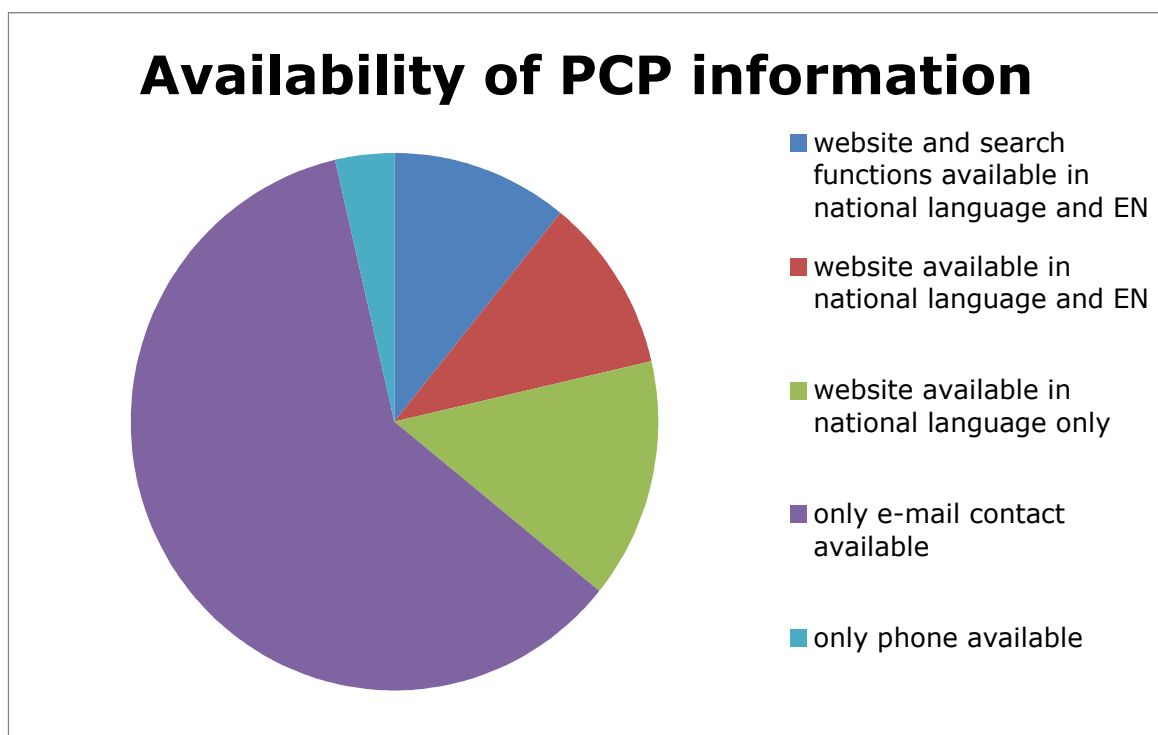
legislative act but they can display the (non-official) English translation of the applicable Danish acts. In that regard the Danish PCP's services are unique. The French website offers search opportunities as well but searching is only possible in French.

In all other countries product information can only be obtained upon contacting the PCP by e-mail and the PCP does not have its own website. In the Netherlands information can only be obtained by phone.

³⁰⁰ Austria, Czech Republic, Denmark, Germany, Hungary, Italy, Lithuania, France, Poland, Romania, Sweden, United Kingdom.

³⁰¹ Czech Republic, Denmark, Germany, Lithuania, Hungary, Poland, Sweden.

Figure 5. Availability of PCP information



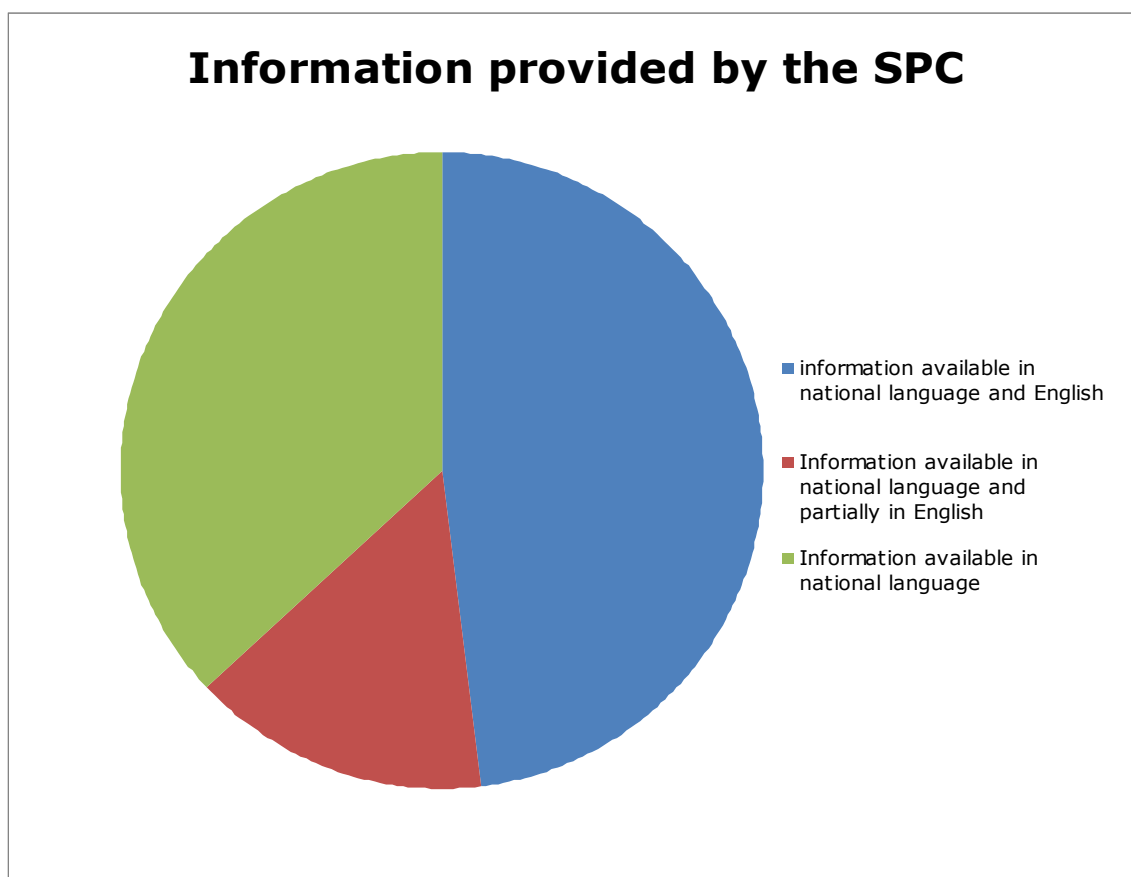
The Services Directive is another core legal instrument and concerns another freedom, the freedom to provide services. Providing information on applicable national requirements is covered in it, this task being entrusted to the points of single contact. The points of single contact set up by the Services Directive have a similar function as far as providing information is concerned as the Product Contact Points. They not only should offer providers the possibility to complete the procedures and formalities through that single point but should at the same time make information on requirements on formalities and procedures, on contact details and on the means of accessing public registers and databases available. As to the language of such information, the directive goes further than the Regulation on Product Contact Points for goods. Although one cannot find a strict obligation to display information in other EU languages, according to Article 7 (5), Member States and the Commission shall both take accompanying measures in order to encourage points of single contact to make the information provided for in this Article available in other Community languages. The paragraph however makes it clear that this obligation does not interfere with Member States' legislation on the use of languages.

As a result, 13 websites of the points of single contact are available in another language than that of the Member State, this language being exclusively English.³⁰² The websites of four Member States³⁰³ are partially available in English and all other websites can only be accessed in the national language of the Member State.

³⁰² Belgium, Cyprus, Denmark, Finland, Germany, Greece, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Spain, Sweden.

³⁰³ Czech Republic, Estonia, Latvia, Italy.

Figure 6. Information provided by the SPC



6. Translation, non-translation or certified translation of official documents submitted to national authorities

Taking up economic activity in another Member State, either as an economic entity or as a self-employed person, or getting employment in another Member State, presupposes, in the majority of cases, the accomplishment of certain administrative procedures before the national authorities. Depending on the activity concerned, clients often have to submit official documents issued by their country of origin in the national language of the host country. Professional qualifications, registration of firms and official documents issued by tax authorities are those most concerned. In order to be able to make a well-founded decision, the national authorities of the host Member State must be able to understand these documents and so clients need to produce translations.

In many Member States the practice was to ask for certified translations of all documents to be submitted to the authorities so that their exact meaning could be detected with certainty. However, requiring certified translations raises the administrative costs of the procedure significantly, given the fact that certification in general entails high costs. Therefore even if translation of such documents is seen as a necessity in administrative procedures, requiring certified translation might be identified as an unnecessary administrative burden, unless justified by overriding reasons.

Although language use in administrative procedures is clearly a matter for regulation by Member States, there have been measures or recommendations taken at European level

in order to reduce or at least neutralise administrative burdens due to certified translation requirements.

In that respect the most striking example is the Services Directive. Member States do not only have to mutually accept documents produced by another Member State's authority serving equivalent purpose, but they have to accept a simple (non-certified) translation of these documents. Certified translations can only be required in exceptional cases, if provided for in other Community instruments or where such a requirement is justified by an overriding reason relating to the public interest, including public order and security. The Directive does not prejudice Member States' right to ask for translations but their rights are limited by a prohibition on formality.

This right of the Member States to require translations for certain documents was acknowledged by the Court as not violating the principle of free movement of services if justified by an overriding reason of general interest and being proportionate. The test is more or less the same as for certified translations (although less strict), given that the administrative burden is lower than in the case of certified translations.

In case C-490/04, the Court was asked to rule on the compatibility with the Treaty provisions of a German rule which requires foreign employers employing workers in Germany to translate into German certain documents required to be kept at the place of work for the duration of the posted workers' stay. The Court first admitted that the obligation imposed constitutes a restriction on the freedom to provide services, in that it involves additional expenses and an additional administrative and financial burden for undertakings established in another Member State, so that those undertakings do not find themselves on an equal footing, from a competitive point of view with employers established in the host Member State and may thus be dissuaded from offering services in that Member State. However, it went on to say that the obligation may however be justified by a general-interest objective, linked to the social protection of workers, since it enables the competent authorities of the host Member State to carry out the monitoring necessary to ensure compliance with relevant national provisions. In so far as it requires the translation of only a few documents and does not involve a heavy financial or administrative burden for the employer, it does not go beyond what is necessary to achieve the objective sought, which is social protection.

Although translation of official documents is undoubtedly most required in procedures for the recognition of professional qualifications, the Directive on Professional Qualifications does not foresee similar prohibition as the Services Directive. The Directive itself is silent on translations. Here the general rule followed by Member States is still to require the provision of certified translations. This duty mainly concerns diplomas, certificates of nationality and diploma supplements. In some countries the approach is somewhat more liberal: requiring certified translations is the general rule with certain exemptions in favour of certain languages. In Belgium documents drawn up in English are exempted from translation requirements and in Sweden documents in Danish, Finnish, English or French do not have to be translated. Likewise, in Denmark documents in Swedish or English (in some cases German or French) do not have to be translated. In addition, documents must not necessarily be translated into Danish; an English translation is also accepted.

However, the case-law of the Court of Justice set some limits on the freedom of Member States to require certified (official) translations of all documents to be submitted to the authorities. The requirement to submit certified translations may run counter to the principle of free movements in cases where such a requirement seems to be disproportionate and cannot be justified by some overriding interests.

Case C-298/99 concerned an infringement procedure initiated by the Commission against Italy for requiring, under the administrative procedure for the recognition of professional qualifications, certified translations of all documents to be submitted including certificates of nationality. The Commission claimed that the obligation in question was disproportionate and the production of a copy of the passport would be sufficient evidence. The Commission pointed out that the provision of certified translations not only lengthens the procedure but increases costs as well in cases where non certified translations would be equally appropriate. In addition, the Italian government itself acknowledged that in many cases authorities do not apply these provisions and accept in practice simple copies of certificates of identity. The Court made it clear – without giving detailed reasoning – that the obligation to submit a certificate of nationality and to provide certified translations of all documents relating to the application for recognition cannot be regarded as necessary or be justified by overriding reasons in the public interest

In 2009, the Commission drew up a (non binding) Code of Conduct based on best practices of Member States' authorities and on the case-law in order to promote the implementation of the Directive. Among document requirements, time limits and compensation measures, language requirements are covered by the Code as well. According to the Code, translations may only be required if genuinely needed for processing an application and that certified or approved translations must be confined to essential documents (professional qualification, certificate of acquired rights, personal information, and certificates on professional experience). Certified translations of standard documents, such as identity cards or passports, may not be required. The Code mentions, as best practice, not requiring translation in the case of professional qualifications whose denomination is clearly indicated in the Directive.³⁰⁴

There is another important aspect covered by the Code, namely the mutual recognition of certified translations. In view of this, Member States must accept certified translations issued in another Member State and cannot insist on the presentation of certified translations prepared by sworn translators under their own jurisdiction.

Although the need for translation is a justified need in administrative procedures, and one which cannot be completely removed in the case of all kinds of official documents, the understanding of documents issued by the authorities of other Member States can be enhanced by several means. The Database for Regulated Professions run by the Commission includes all professional titles falling under the Directive and which are considered as regulated professions in one of the Member States. Professional titles are indicated in the language of the Member State where they are regulated. In this way, authorities should easily identify the profession indicated in the diploma of the person concerned. However the database received critical comments from stakeholders during public consultation held by the Commission in early 2011 because of the often poor or misleading translations of national titles it contains.³⁰⁵

Other means of reducing translation burdens is standardisation of qualifications or references to qualifications. A step towards this direction was taken in 2008 when the Commission issued a Recommendation on the European Qualification Framework (EQF). In the Commission's view, the EQF is a common European reference framework which links countries' qualifications systems together, acting as a translation device to make qualifications more readable and understandable across different countries and systems in Europe. Under the EQF, learning outcomes are divided into different levels, making it

³⁰⁴ In Denmark for instance, diplomas for professions falling under the automatic recognition procedure do not have to be translated.

³⁰⁵ Evaluation of the Professional Qualifications Directive, European Commission, July 2011, p. 83.

easier for workers to describe their competences and employers to interpret applicants' qualifications.

In mid-2011, the European Commission adopted its Green Paper on Modernising the Professional Qualifications Directive.³⁰⁶ The Green Paper identifies the translation of documents for the verification of professional qualifications as a difficulty for the professional. It further states that, even if translated, the verification of qualifications by the competent authority in the receiving Member State is a resource-intensive task. According to the Commission, a European professional card, issued by the competent authority in the Member State where the qualification is acquired, could facilitate the process. Under this system, authorities in the receiving Member State would not have to engage administrative resources to verify all the information that has already been examined by the Member State of departure. Verifying the validity of the card itself might be sufficient to confirm that the holder can exercise the profession in the host Member State. The card could partly replace the translation of documents within the process.

7. Interconnecting national authorities

Very often national authorities encounter difficulties when they have to take administrative decisions on the basis of documents issued by foreign authorities, especially if they have doubts about the authenticity of these documents. The Internal Market Information System (IMI) was set up by the Commission in order to eliminate this kind of barriers by interconnecting the competent authorities of the Member States and enabling them to communicate and exchange information with each other. Initially IMI was designed to support mutual assistance provisions of two directives, the Services Directive and the Professional Qualifications Directive. Since May 2011 its scope is extended on a pilot basis to the Posting of Workers Directive and the system is being expanded for the eventual inclusion of new directives.

The system as a whole aims to make national administrative procedures work better and to reduce administrative burdens because national authorities will not have to ask for certified copies of or certified translations of certain documents if they are able to verify their authenticity using a simple tool at their disposal.

However, language again might be seen as a barrier in the functioning of this tool: how can interconnected authorities communicate with each other if they do not share a *lingua franca*? This problem has been considered by the Commission, which developed language support tools. IMI is above all a multilingual system which can be used in any official EU language. In cases where the requesting authority is not able to send its questions to the receiving authority in the language of that latter, it may choose to use pre-translated questions in the system or, in the case of more complex texts, it may use the IMI's machine translation function, which provides a rough translation of the text. There is set of pre-translated questions in the case of each directive concerned. The objective is to

cover every potential question that might arise in order to avoid or at least minimise the use of free text translation. Pre-translated, pre-defined questions and answers are available in all official languages (except Irish).

Since December 2010 the automatic translation of free texts is not available to national authorities as, due to the judgment of the General Court in case *Systran v. Commission*³⁰⁷, the Commission suspended the operation of its machine translation tool.

³⁰⁶ COM(2011) 364 final.

³⁰⁷ Case T-19/07, *Systran SA and Systran Luxembourg SA v European Commission* (not yet reported).

A new tool is being developed by the Commission and an early version is planned to be linked to IMI in 2012. According to the plans, the new tool will even further the use of the „free text“ function, making it available to all official languages (except Irish) with the help of a pivot language while the previous MT translation system only covered certain language pairs. The new system would allow the following combinations.

Figure 7. Languages supported by the new machine translation system

FROM	INTO
22 languages	English
English	22 languages
French	German, Greek, Spanish, French, Italian, Dutch, Portuguese
German, Spanish	French

IMI is only one example of cooperation between Member States' authorities where language problems had to be tackled. Currently there is a new Commission proposal in the pipeline, which aims to interconnect a specific type of authority and their registers, namely central, commercial and company registers.³⁰⁸ The aim of the Proposal is to facilitate cross-border access to business information. Such access requires cross-border cooperation between business registers. Here again, language might be a natural obstacle to such kind of cooperation and to accessing the relevant data by anyone in another Member State if the language of that country is not known by the person. Standardisation of the information and data to be stored and transmitted is one way to reduce obstacles to comprehension; it cannot however replace translation. The issue of language and translation is crucial in cross-border mergers and transfer of company headquarters procedures, when issuing authorities are sending their notifications to the authorities of the receiving Member State in their own language.³⁰⁹ In order to overcome these difficulties, according to the Proposal an electronic network should be set up among Member States to facilitate the exchange of data. The use of languages in the proposed network is not regulated by the Proposal itself, the right being conferred on the Commission to adopt the relevant provisions in the form of a delegated act.

8. A more restricted regime of languages: the case of European standards

A standard is a technical publication that is used as a rule, guideline or definition. Standards mostly relate to products, services or systems and they are developed through consensus by the interested parties including industry, consumers and regulators. Being the outcome of consensus, standards ensure increased product safety and quality as well as lower transactions costs and prices. A standard represents a model specification, a technical solution against which a market can trade. It codifies best practice and is usually state of the art.³¹⁰ At European level, European standards are adopted by one of the three recognized European Standardization Organizations (ESOs): CEN, CENELEC or

³⁰⁸ COM(2011) 79 final, Proposal for a Directive of the European Parliament and the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers.

³⁰⁹ 6.2. of the Explanatory memorandum to the Proposal.

³¹⁰ See: www.cenelec.eu

ETSI. Standards play a crucial role in the internal market since under the New Approach in harmonisation, directives only lay down the so-called essential requirements products must comply with if marketed in the internal market and the detailed technical rules are contained in the standards, which are of a voluntary nature. Thus, European standards are not “European legislation” in the meaning of Regulation no. 1 of 1958, but they are closely connected to European legislation. Manufacturers or importers wishing to put a product on the market must either comply with the relevant European standard or to prove that the product satisfies the essential requirements laid down in the relevant directive. Secondly, the European standards are not devised by EU organs but standardisation organisations, which are not an integral part of the European institutional framework. Although availability of European standards in national languages is important for market players so that they can conform to its rules, the current procedure of the ESOs is based on three official languages (English, French and German) and national standardisation bodies are free to translate the standards into their languages.

ESOs’ standards are drafted in a well-established procedure. A standard can be proposed by users, traders, consumers, NGOs and regulators. The technical experts appointed by the standardisation organisations (the Technical Body, TB) are in charge of drafting the standards. The draft is then submitted to the national committees for public consultation, which might result in adjusting the text. The improved draft is then submitted for voting. Approved standards are published in the three official languages: English, French and German. Should national standardisation committees choose to translate the standards, the accuracy of these translations can be certified in accordance with the CEN-CENELEC Internal Regulations and they will become definitive language versions of the published standard. There shall only be one definitive language version of any publication.³¹¹ If two or more Member States share a common language they shall agree among themselves on the responsibilities to produce the definitive language version.

In the case of the three official languages, time constraints play a crucial role and delays in translation cannot hinder the publication process. In December 2011 the internal translation procedure of the CEN and CENELEC has been simplified in order to accelerate the process. According to the new rules, the TB is not required to produce drafts in three languages, instead in one reference language, that being English in the majority of cases. The linguistic quality of the reference text must be of such quality which facilitates the translation into the other two official languages; therefore the quality of the reference text is checked by a native speaker. The draft in the reference language becomes independent of the translations. If translation deadlines are missed, then the draft will automatically proceed to its next stage, irrespective of the fact that the draft may only be available in one single language and translation will be produced later.

Translation of European standards into EU languages that are not among the three languages in which European standards are published is decentralised. According to the CEN and CENELEC, national committees are best located to translate these standards because of the complexity of the translations and because they participate anyway in the adoption of the standards and play a key role in the implementation thereof.³¹² However, the cost of these translations is high. The ESOs request each year a certain amount from the European Commission to co-finance the translation activity of the national committees. The Commission thus provides financial support towards the costs of the translation of the European harmonised standards by Member States. This takes the form of grant agreements between the Commission and the ESOs, which act as managers for the national standardisation bodies. The Commission’s contribution varies according to

³¹¹ Guidelines for the distribution and sales of CEN and CENELEC publications (January 2010) 6.1.6.2.

³¹² CEN, CENELEC Position paper on the Review of European Standardisation Systems, 11.

the grant agreements of each year, but in general it covers 50% of the translation costs.³¹³

The complexity of the translation issue was handled by the Council at several occasions as well. The Council conclusions of the Competitiveness Council of 25 September 2008 emphasised the importance of providing standards in national languages to ensure proper understanding by all users and invited European standardisation bodies, in close link with the European Commission, to examine the possibility of using automatic translation systems, in order to facilitate the validation of European standards into national versions by the national standardisation bodies. At the same time the Council encouraged the European Commission, in cooperation with European and national standardisation bodies, to simplify the financing arrangements for the translation of standards, while respecting European financial rules.

It must be stressed that, although the translation of the European standards puts a heavy financial burden on the national standardisation bodies, the non-availability of these standards in the national language (that is if they are endorsed in the English/French/German version as implementing national standards) might hinder the consolidation of uniform technical terminology in the national language and might negatively affect the competitiveness of the sector concerned by the standard.³¹⁴ An evaluation carried out between 2005 and beginning of 2007 concludes that the translation of harmonised standards is a key element in the overall effectiveness of the European standardisation system and the optimisation of its contribution to the competitiveness of industry.³¹⁵ Standards are often complex and technical documents and many users would fail to use them correctly or would be excluded from using them if they were not available in their language.³¹⁶

In 2010 for instance the Hungarian Chamber of Engineers raised its voice against the non-availability in Hungarian of 60% of the Eurocode standards applicable in the construction sector. Because of the high translation costs, some 70% of the harmonised standards have been endorsed in Hungary in the English version. The campaign of the Chamber was supported by the National Association of Translation Companies, which was worried about the consistency of the technical vocabulary. What also makes this state of affairs inappropriate is that the Hungarian construction industry tends to use German as its day-to-day foreign reference language.

As the deadline for the adoption of the harmonised standards is usually very short (2-3 months), very often standards are first endorsed in English and later translated into the national language.

It is also important that the translation of the harmonised standards is centralised in order to avoid competing translations and diverging quality of texts. However, as the above Report of the Evaluation of the Standardisation Translation System points out, many national standardisation bodies reported that they have considerable difficulties in accessing funding for translation of harmonised standards from domestic resources and that they could not maintain their translation activity without Commission support.³¹⁷ Although during the last years the Commission support has fallen, which has led to the decrease in translation in several Member States, according to its Communication

³¹³ Evaluation of Standardisation Consultants and Translation Systems, ENTR/04/093, 2007, 10.

³¹⁴ For instance in Latvia and Estonia harmonised standards are almost exclusively published in English, in Hungary they are published partly in Hungarian, partly in English, while in Czech Republic, Spain and Slovakia the general rule is the translation instead.

³¹⁵ Evaluation of Standardisation Consultants and Translation Systems, ENTR/04/093, 2007, p. 1.

³¹⁶ Evaluation of Standardisation Consultants and Translation Systems, ENTR/04/093, 2007, p. 12.

³¹⁷ Evaluation of Standardisation Consultants and Translation Systems, ENTR/04/093, 2007, p. 14.

published in June 2011³¹⁸ the Commission will continue to support the translation of harmonised standards into official EU languages.

Standards as non compulsory but still important regulatory elements do not fall under Regulation 1/1958 and are not concerned by its translation and publication requirements. For reasons of efficiency they operate in a restricted language regime in ESOs. However the availability of such standards in national languages is dictated by the necessity of legal certainty and so their translation is crucial. The translation of the European standards is carried out in a decentralised system by the national standardisation bodies. However, recognising the importance of the availability of the standards, the cost consuming translation activity of these bodies is financially supported by the Commission. The question whether the translation of standards should be centralized at European level remains an open and debated issue.

9. Conclusion

The EU based on an internal market cannot disregard the problems of language use or other linguistic aspects of trading or moving cross-border the way international instruments remain free not to regulate these issues.

Although as a general rule regulating language use falls under the competence of Member States, the intervention of the European legislator might be justified under the principle of subsidiarity in cases where health and safety of European citizens is at stake. In addition in some areas the EU encourages Member States to make information relevant for the functioning of the internal market available in at least one other language than the national one.

Such European provisions eliminate on the one hand language barriers (for consumers) and create on the other hand translation costs (for business); this however is for the sake of some higher ranking rules. Thus, the elimination of language barriers might result in more translation work. At the same time, European initiatives try to reduce translation work and costs where translations or certified translations are not absolutely necessary. Where translation requirement is justified however, only high quality and accurate translations can best serve the objectives of the internal market.

³¹⁸ Commission Communication on a strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020, COM(2001) 311 final.

CASE STUDY

Labelling of products and languages in the context of the legal regime of the World Trade Organization and the European Union

In the context of international trade, linguistic labelling requirements imposed by the state of destination imply a barrier to trade. This is because compliance with those provisions requires the modification of the product, and thus results in additional costs to the producer or the trader exporting the goods concerned.

States attempt to impose language requirements related to labelling on imported products. This principally serves the protection of consumers by reducing the information costs by granting them information through the labelling.³¹⁹ Second, it may also aim at the protection of domestic producers by increasing the costs of importing because of the required compliance with labelling requirements. The same cost is not incurred by companies producing for the domestic market only (except in a country with more than one official language).³²⁰ The adoption of language-related labelling requirements can weaken economies of scale: the same product may be placed on the market only with different labels or packaging in different countries or linguistic areas.³²¹ Although it must be acknowledged that, while linguistic costs may indeed make entry into a market more difficult, they do not lock out new entrants but rather delay their appearance on the market.³²²

Language-related labelling requirements may be imposed at national as well as international level. States tend to adopt rules on the language of labels for various reasons. In addition to the above economic reasons, such regulations may aim at safeguarding the use of the state's official language or the language of a linguistic minority living in that state, or the protection of consumers. Linguistic requirements may be of particular importance where a state has more than one official language, consists of different linguistic regions or if a significant part of its population cannot speak the official language of the state concerned.

According to the federal regulations of the United States, subject to certain narrow exceptions the required information must appear on food labels in the English

³¹⁹ Jill E Hobbs: Labeling and Consumer Issues in International Trade. In Michelmann Hans J., Rude James, Stabler Jack and Storey, Gary (eds.): *Globalization and Agricultural Trade Policy*, Lynne Rienner Publishers, London, 2001, pp. 269-270; Aurélien Portuese: *Law and Economics of the European Multilingualism*. Available at: <http://xa.yimg.com/kq/groups/2479191/1767660274/name/Law+&+economics+of+the+EU+multilingualism.pdf>, p. 12.

³²⁰ Portuese, p. 15.

³²¹ Portuese, p. 12.

³²² Portuese, p. 16.

language.³²³ If a foreign language is used on a label, all required label information must appear also in English language.³²⁴ The same rules are provided for drugs.³²⁵

However, difficulties arise in respect to US citizens with limited English proficiency. A survey on the labels of drugs offered for sale in the Bronx, New York, demonstrated that 73% of the pharmacies participating in the survey provided medicine labels in Spanish, most of them using computerised translation programmes. Of the 76 examined medicine labels, "32 Spanish labels (43%) included incomplete translations (a mixture of English and Spanish), and 6 additional labels contained misspellings or grammar errors, which resulted in an overall error rate of 50%."

(Source: Iman Sharif, Accuracy of Computer-Generated, Spanish-Language Medicine Labels (2010) 125 Pediatrics 5, 960. Available at: <http://pediatrics.aappublications.org/content/125/5/960.full.pdf>)

Bilingual or multilingual countries, such as Belgium, Canada or Switzerland, often provide for the use of one or all of their official languages on labels of goods.³²⁶ Concerning Quebec, for example, the Charter of the French Language states that "every inscription on a product, on its container or on its wrapping, or on a document or object supplied with it, including the directions for use and the warranty certificates, must be drafted in French. This rule applies also to menus and wine lists. The French inscription may be accompanied with a translation or translations, but no inscription in another language may be given greater prominence than that in French."³²⁷ In Canadian law, in addition to the Charter, several acts contain rules on the language of labelling.³²⁸ Thus, the Consumer Packaging and Labelling Regulations lay down that, subject to certain exceptions, all information to be shown on the label of a prepackaged product shall be shown in both official languages (English and French), except that the identity and principal place of business of the person by or for whom the prepackaged product was manufactured, processed, produced or packaged for resale may be shown in one of the official languages.³²⁹

A grocer in Vancouver was fined \$20,000 for failing to comply with bilingual-label requirements. The popular corner store offered locally produced products for sale. "The inspectors flagged 11 suppliers - a third of the store's stock - which failed to meet labelling requirements, including providing French translations and nutritional fact tables." The owner "was given a policy manual and nine pages of recommendations for her and her suppliers..."

(Source: <http://anth.ucalgary.ca/bse/sites/anth.ucalgary.ca.bse/files/July7-food.pdf>)

In Belgium, all information required to appear on labels must be in the official language of the region where the product is on sale. (French for the Walloon region, Dutch for the Flemish region, French and Dutch for the Brussels region and German for the d'Eupen-Malmedy area). In Finland, product information on the label must be in Finnish and Swedish. On the other hand information on food labels in Luxembourg must not appear

³²³ 21 CFR 201.15 (c)(1); Ryan Arai: *English is not Enough: The Language of Food and Drug Labels* <http://leda.law.harvard.edu/leda/data/495/Arai.html> chapter 1.

³²⁴ 21 CFR 201.15 (c)(2). See also Food Labeling Guide - Guidance for Industry: A Food Labeling Guide (September 1994; Revised April 2008; Revised October 2009) 10.

³²⁵ 21 CFR 201.15 (c)(1).

³²⁶ Bernat Gasull i Roig: *Multilingualism in labelling* http://www.plataforma-lengua.cat/media/assets/1261/Multilingualism_in_labelling_2007.pdf pp. 3-5.

³²⁷ Charter of the French Language art 51; Gasull, pp. 4-5.

³²⁸ Office of the Commissioner of Official Languages, Cost Impact Of Two-Language Packaging And Labelling On Small And Medium-Sized Businesses In Canada - (February 1997) http://www.ocol-clo.gc.ca/html/stu_etu_021997_e.php.

³²⁹ Consumer Packaging and Labelling Regulations (C.R.C., c. 417) art 6 (2).

in all official languages; they must be at least either in German or in French or in Luxembourgish.³³⁰ Likewise, in Malta product information must be either in English or in Maltese. Countries with one official language usually prescribe that labels must be in that language, although English is acceptable in Romania and English, French and German are all acceptable languages in Bulgaria.

Several countries also provide guidelines to give some instruction to foreign traders and producers on local linguistic labelling requirements. As such, the Food Safety Authority of Ireland published a guide to assist market players in complying with food labelling rules.³³¹ Here, the use of the English language is obligatory and additional labelling text in Irish is also allowed.

Similarly, at an international level, multilateral and bilateral international treaties, the rules of international organisations and regional economic integrations directly or indirectly provide for the language to be used on labels. Both the system of the World Trade Organization (WTO) and the law of the European Union (EU) address the issue of labelling, including language requirements.

Labelling requirements have two important human rights aspects. First, a requirement regarding labelling in an appropriate language may be interpreted as a right of consumers to receive certain crucial information, usually in their own language. Second, a label may certify that the product concerned was produced in a socially responsible manner, such as respecting human rights without child labour.³³² In both the EU and WTO systems, there may be ways to include these human rights concerns. For our purposes, the first aspect is significant and it will be discussed below how the WTO and EU rules and the related case law take into account the rights of consumers to information.

1. The regime of the WTO

The current form of the WTO rules was shaped in the 1986-1994 Uruguay Round negotiations. The objective of the WTO is to open markets and lower barriers to trade among its members, whose number amounted to 153 by February 2011. However, the WTO itself recognises that, contrary to the main aim of eliminating trade barriers, in some circumstances its rules support maintaining trade barriers — for example, to protect consumers or prevent the spread of disease.³³³ Labelling requirements might well belong to these rules that might be justified by special circumstances.

Language requirements are relevant from the perspective of more agreements concluded under the WTO regime. Language requirements affecting the provision of services (such as advertising or media services) may be considered as non-tariff barriers according to the General Agreement on Trade in Services.³³⁴ As far as the labelling of goods is concerned, the agreements related to the trade in goods are more important. If linguistic labelling rules are adopted for the protection of food safety, the Agreement on the Application of Sanitary and Phytosanitary Measures (the “SPS Agreement”) may be

³³⁰ Règlement grand-ducal du 14 décembre 2000 concernant l'étiquetage et la présentation des denrées alimentaires ainsi que la publicité faite à leur égard (Au Mémorial A n° 138 du 27.12.2000) art 14.

³³¹ S.I. No 483 of 2002 European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations 2002, s 14 (1). See <http://www.foodnavigator.com/Legislation/Ireland-issues-multi-lingual-food-labelling-guidance>. See also the Labelling leaflet and the report Labelling of Food in Ireland 2007 on the website of the Food Safety Authority of Ireland http://www.fsai.ie/legislation/food_legislation/labelling_of_food.html.

³³² On this second aspect, see: Jessica Karbowski: *Human Rights Labeling: A WTO Compliant Strategy to Harness the Power of Consumer Preference*. Student Prize Papers. Paper 36, 2008. Available at http://digitalcommons.law.yale.edu/ylsspps_papers/36.

³³³ http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

³³⁴ Jean-Claude Usunier: *Langue et commerce international des services: un point de situation*. In François Grin: *Langue, Économie et Mondialisation*. Français et Société 22-23, EME Éditions, Bruxelles 2011, pp. 69-88.

applicable to such requirements. Linguistic labelling requirements adopted for ensuring food safety may be considered as sanitary or phytosanitary measures.³³⁵ Under the SPS Agreement, Member States remain free to adopt sanitary and phytosanitary measures,³³⁶ but these must comply with the provisions of the SPS Agreement; in particular, they must be based on scientific evidence,³³⁷ cannot be applied arbitrarily or be unjustifiably discriminatory and cannot constitute a disguised restriction on international trade.³³⁸ For our purposes, however, the Agreement on Technical Barriers to Trade (the "TBT Agreement") is the most significant agreement.

In general, linguistic labelling rules may constitute technical barriers to international trade. More precisely, labelling requirements (including linguistic ones) may qualify as technical regulation pursuant to the TBT Agreement. Technical regulation is defined in Annex I to the TBT Agreement. Accordingly, a technical regulation is a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."³³⁹

Member states of the WTO must comply with several obligations set out in the TBT Agreement. Article 2.1 TBT Agreement lays down that "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country" (an obligation of national treatment and most favoured nation principle). Article 2.2 TBT Agreement provides that "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." The prevention of deceptive practices may be matched to the protection of consumers, a parallel exception to the free movement of goods under the EU regime.

Thus, it can be deduced that the WTO regime – even if it does not have specific rules on labelling – is rather tolerant towards national labelling requirements, as they might be justified by the protection of consumers. However such requirements could, in principle, be called into question if they are not proportionate.

In the WTO regime, the case law on language-related labelling requirements seems to be scant, making it difficult to make definitive statements on this issue. Trade disputes between WTO members addressed the language of labelling a few times, although these cases do not necessarily end in a panel decision.³⁴⁰

³³⁵ Annex A Definitions (1) Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and *packaging and labelling requirements directly related to food safety* [Italics by the author].

³³⁶ SPS Agreement, art 2 (1).

³³⁷ SPS Agreement, art 2 (2).

³³⁸ SPS Agreement, art 2 (3).

³³⁹ TBT Agreement Annex I (1).

³⁴⁰ See: WTO Committee on Technical Barriers to Trade, Notification G/TBT/N/IDN/47, 3December 2010; Ambassador Ronald Kirk, Office of the United States Trade Representative, 2011 Report on Technical Barriers to Trade; WTO Committee on Technical Barriers to Trade G/TBT/M/52, Minutes of the Meeting of 3-

Thus, Indonesia required producers and traders of imported goods to affix a label in the Indonesian language to products specified by regulations. The alleged aim of the regulations was the protection of consumers, human health and safety and the environment. Several WTO members criticised the regulations and the attitude of Indonesian authorities, since they did not clarify whether affixing labelling stickers suffices to comply with legal provisions. Furthermore, the eventual prohibition of using stickers was asserted to increase the compliance costs of exporters in the other WTO member states.

The conformity with WTO law of EC Commission Regulation No 753/2002 of 29 April 2002, laying down certain rules for applying Council Regulation (EC) No 1493/1999 as regards the description, designation, presentation and protection of certain wine sector products, with WTO law was called into question by several new-world wine producer members of the WTO, such as the US, New Zealand, Argentina and Australia. The new regulation required the appearance of some mandatory information on wine labels and restricted the use of certain terms, such as 'chateau', on wine labels marketed in the EU. The complaining states claimed that the regulation restricts trade disproportionately. Nonetheless, language issues also arose in a different context. The language use on labels was the subject of a debate between the EC and Japan that was ended in a panel decision in 1987.³⁴¹

Japanese producers produced wines and other alcoholic beverages bearing English, French and German words on their labels. The EC alleged that the use of these languages on the labelling (without translation) misled consumers regarding the origin of the products, and such practice is contrary to Article IX:6 of the GATT, according to which "the contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation." The panel concluded that Japanese law required the Japanese origin of the products to be stated on the labels. In addition, no infringement of a distinctive regional or geographical product names protected in the EU was found by the panel.

In addition to technical regulations, Article 2.4 of the TBT Agreement provides that „where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems." International standards must therefore be appropriately taken into account.

4 November 2010, 10 March 2011 and <http://ictsd.org/i/news/bridgesweekly/5609/> and <http://ictsd.org/i/news/bridgesweekly/6880/>.)

³⁴¹ Report of the Panel adopted on 10 November 1987 (L/6216 – 34S/83).

The Codex Alimentarius, a set of standards, guidelines and principles elaborated by the Codex Alimentarius Commission, contains standards on food labelling. The Codex Alimentarius Commission was created by the United Nations Food and Agriculture Organization and the World Health Organization. In itself, the Codex membership does not involve any obligation to follow the standards:³⁴² the standards become mandatory through the cited provision of the TBT. Moreover, WTO panels take the Codex Alimentarius provisions into consideration.³⁴³

The General Standard for the Labelling of Prepackaged Foods adopted by the Codex Alimentarius Commission sets out certain provisions on the language of the labelling.³⁴⁴ According to this standard, statements required to appear on the label by virtue of this standard or any other Codex standards shall be clear, prominent, indelible and readily legible by the consumer under normal conditions of purchase and use.³⁴⁵ If the language on the original label is not acceptable to the consumer for whom it is intended, a supplementary label containing the mandatory information in the required language may be used instead of relabelling.³⁴⁶ In the case of either relabelling or a supplementary label, the mandatory information provided shall be fully and accurately reflect that in the original label.³⁴⁷ These general provisions require that any labelling is comprehensible for consumers and, based on the information received from the national authority, they may be interpreted as to authorise states to require the use of their official language.³⁴⁸ According to the experience of national authority, no discussion arose so far regarding the language of the labelling in relation to the Codex Alimentarius standards.³⁴⁹

Similar rules are determined for specific areas. The language used for the statements in the labelling of food additives sold as such shall be a language acceptable to the country in which the food additive is intended for sale. If the language on the original label is not acceptable, a supplementary label containing the mandatory information in an acceptable language may be used instead of relabelling.³⁵⁰

The Codex Alimentarius rules are created in a narrow interconnection with the provisions of EU law. In elaborating new Codex standards or other documents, the EU, as a member organisation of the Codex Commission, endeavours that the standards to be adopted are in line with the already existing EU rules. In the opposite direction, the relevant Codex Alimentarius standards, if they exist, are taken into account in the adoption of new EU-law provisions. It may also be noticed that the Codex rules provide something of a framework, while EU legal sources lay down stricter provisions.³⁵¹

Taking the above into account, it may be concluded that the WTO regime does not raise obstacles to the adoption of linguistic labelling provisions by the members, instead it tolerates linguistic labelling requirements. Although the TBT Agreement and marginally the Agreement on the Application of Sanitary and Phytosanitary Measures contain certain rules on labelling, these provisions give little guidance and the related case law is also scant.

³⁴² On the role of the Codex Alimentarius Commission and the application of the Codex Alimentarius: see Marsha A Echols: *The International Tower of Babel: The Small Business, Perspective, Food & Drug L. J.*, 1996, 51, p. 179.

³⁴³ For example, USA/European Communities, Panel report adopted on 18 August 1997 (WT/DS26/R/USA); Canada/European Communities, Panel report adopted on 18 August 1997 (WT/DS48/R/CAN).

³⁴⁴ General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985).

³⁴⁵ General Standard for the Labelling of Prepackaged Foods, 8.1.2.

³⁴⁶ General Standard for the Labelling of Prepackaged Foods, 8.2.1.

³⁴⁷ General Standard for the Labelling of Prepackaged Foods, 8.2.2.

³⁴⁸ Based on the information provided by the Hungarian Ministry for Rural Development.

³⁴⁹ Based on the information provided by the Hungarian Ministry for Rural Development.

³⁵⁰ General Standard for the Labelling of Food Additives when Sold as Such (CODEX STAN 107-1981), 6.2.

³⁵¹ Based on the information provided by the Hungarian Ministry for Rural Development.

2. EU law: The free movement of goods and product labelling

The EU integrates Member States with different official languages, fragmenting the internal market into various linguistic territories. The multilingual regime of the EU hinders the free movement of goods.³⁵² A product must often be modified in order to be in conformity with the language requirements of the Member State of import regarding labelling. As such, language requirements may raise barriers to one of the fundamental economic freedoms of the EU; the free movement of goods

According to the assessment of the Court of Justice of the European Union (the "Court") and the European Commission (the "Commission"), a requirement to translate labelling into the language of the Member State of marketing is a barrier to the free movement of goods, even if it is applied indiscriminately to domestic and imported products, since products to be sold in the Member State of destination must be adapted to the language requirement concerned.³⁵³ Language requirements constitute a measure having equivalent effect to quantitative restrictions under Article 34 TFEU as rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the EU.³⁵⁴

Under certain circumstances however, a restriction may be in conformity with EU law. A restriction on the free movement of goods does not infringe EU law if it falls under an express exception of the TFEU or it is justified based on mandatory requirements determined by the case law of the Court.

Article 36 TFEU lists the express exceptions. Accordingly, the provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. This Article does not refer to a possible exception related to consumer protection considerations.

In its case law, the Court elaborated certain grounds that may justify a restriction on the free movement of goods. Among others, as the Court put in its *Cassis de Dijon* judgment, obstacles may be justified on the grounds of the protection of consumers by informing them of the characteristics of the product in the required language.³⁵⁵ Similarly, most of the secondary legal sources expressly refer to the protection of consumers as a goal to be realised.³⁵⁶ Therefore, under EU law, linguistic labelling provisions do not only qualify as a measure having equivalent effect to quantitative restrictions, but may be justified in accordance with the Court's case law.

3. Other legal sources of the EU on labelling – Regulations and directives

If, in a certain area, there is a lawfully adopted and exhaustive secondary legal source, such as a regulation or directive, this shall be primarily applied. The question of labelling of goods is covered by numerous secondary legal sources. The question whether the

³⁵² Portuguese, 11.

³⁵³ C-51/93 *Meyhui v Schott Zwiesel Glaswerke* [1994] ECR I-3879, para. 13; Case C-33/97 *Colim NV v Bigg's Continent Noord NV* [1999] ECR I-3175, para. 36; Interpretative Commission communication concerning the use of languages in the marketing of foodstuffs in the light of the judgment in the Peeters case, COM(93) 532 final OJ C 345 of 23.12.1993, para. 6.

³⁵⁴ Portuguese, p. 11; see Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, para. 5.

³⁵⁵ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para. 8; Commission communication, para. 7.

³⁵⁶ Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 OJ L 189, 20.7.2007, p. 1-23 (the "Organic Products Regulation"), recital (23).

relevant rules are included in a regulation or a directive depends on how the objective of the legislative act concerned may be achieved in the most efficient way and on the chosen legal basis.

As for the information appearing on the label in the required language, secondary legal sources contain different requirements depending on the nature of the product and the branch of industry concerned. Sometimes secondary legal sources determine under which conditions a particular name in a given language may appear on the label,³⁵⁷ while others require more detailed information on the label in the required language, such as the list of ingredients or precautions.³⁵⁸

The linguistic rules on labelling contained in secondary legal sources may be divided into four categories. First, several secondary legal acts require the use of a language easily understood by consumers on labels. Second, other legal sources in fact authorise Member States as the place of the marketing of the products to stipulate the use of their own official language. Third, certain legislative acts directly require the use of language of the Member State where the product is marketed on the label. Finally, there are regulations and directives that restrict themselves to determining the required linguistic appearance of certain terms or descriptions on labels.

3.1. Requirement on the use of a language easily understood

Several secondary legal sources refer to the 'use of a language easily understood'. Some concerns may arise in determining what is a language easily understood by consumers. This may be illustrated by the regulation of food labelling, in relation to which the Court has intervened several times to clarify what is a 'language easily understood by consumers'.

In connection to the language-related labelling requirements, the Court had to interpret several times the Old Foodstuffs Directive.³⁵⁹ The Old Foodstuffs Directive contained a provision on language requirements that raised several concerns. Article 14 of the Old Foodstuffs Labelling Directive provided that Member States cannot lay down more stringent requirements than those contained in the relevant provisions of the Directive concerning the manner in which the compulsory particulars provided for by the Directive (e.g., name of the product, list of ingredients, the date of minimum durability, etc.) are to be shown. It was added that the Member States shall ensure that the sale of foodstuffs for which the compulsory particulars provided for by the Directive do not appear in a language easily understood by the purchasers is prohibited within their own territories, unless other measures have been taken to ensure that the purchaser is informed. However, this provision did not prevent the particulars from being indicated in various languages.

The question arose of what the 'language easily understood by the purchasers' actually means. The background of the *Piageme I* case was that Belgian rules transposing the Old Foodstuffs Directive required that the compulsory particulars must at least appear on the label in the language of the linguistic region where the foodstuffs are offered for sale.³⁶⁰ A company established in the Flemish-speaking part of Belgium sold imported mineral

³⁵⁷ See, for example, the Organic Products Regulation, art 23.

³⁵⁸ See, for example, Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, arts 6-7.

³⁵⁹ Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer OJ L 033, 08/02/1979 p. 1-14 (the "Old Foodstuffs Directive"). See, Király Miklós, *Unity and Diversity: The Cultural Effects of the Law of the European Union* (Eötvös University Press, Budapest 2011) 60-62.

³⁶⁰ Case C-369/89 *Piageme and others v BVBA Peeters* [1991] ECR I-2971 (*Piageme I*); Vanston, Christine, In Search of the Mot Juste: The Toubon Law and the European Union (1999) 22 *Boston College International and Comparative Law Review* 1 [Vanston], 183.

waters in bottles labelled only in French or German, but not in Dutch. The Court was asked whether this provision is compatible with the free movement of goods and the Old Foodstuffs Directive itself. The Court stated that the Old Foodstuffs Directive imposes the obligation on Member States to prohibit the sale of foodstuffs whose labelling is not easily understood by the purchaser, but this cannot be automatically extended to require the use of a particular language. In addition, the Old Foodstuffs Directive also permitted the granting of information by other means. The Court finally concluded that the requirement of the exclusive use of a particular language imposed by Belgian law constituted a measure having equivalent effect to a quantitative restriction on imports and thus infringed Article 30 EC Treaty. Accordingly, Member States must have permitted the possibility of using another language easily understood by purchasers or of ensuring that the purchaser is informed by other measures.

With essentially the same legal and factual background, in the *Piageme II* case the conclusion of *Piageme I* was confirmed and elaborated in a more detailed manner by the Court.³⁶¹ The Court reiterated that the expression 'a language easily understood' used in Article 14 of the Old Foodstuffs Directive is not necessarily the same as 'the official language of the Member State' or 'the language of the region'. It is designed to ensure that the consumer is provided with the necessary information rather than to impose the use of a specific language. This also follows from the fact that other Community legal acts explicitly required the use of the official language(s) of the Member State where the product in question is placed on the market. Such a requirement was not contained in the Old Foodstuffs Directive. Instead, national courts must examine on a case-by-case basis whether the compulsory particulars given in a language other than the language mainly used in the Member State or region concerned can be easily understood by consumers in that State or region.

Other factors may be relevant, such as the possible similarity of words in different languages, the widespread knowledge amongst the population of more than one language, or the existence of special circumstances such as a wide-ranging advertising campaign or widespread distribution of the product providing sufficient information to consumers. Furthermore, other measures, such as designs, symbols or pictograms, may also deliver the required information to purchasers. The Court added that it must be ensured that consumers have access to the compulsory particulars specified in the Old Foodstuffs Directive (particularly the date of minimum durability and any special storage conditions or conditions of use of the product), not only at the time of purchase, but also at that of consumption. It should also be borne in mind that the ultimate consumer is not necessarily the person who purchased the foodstuffs. It follows that consumer protection is not ensured by measures such as, for example, information supplied at the sales point or as part of wide-ranging advertising campaigns instead of labelling.³⁶²

In the *Goerres* case, the Court confirmed in essence the *Piageme* cases.³⁶³ The German regulation on the labelling of foodstuffs required that certain particulars are to be stated on the packaging or on a label in German. The German regulation allowed the use of another easily intelligible language, if the provision of information to the consumer is not adversely affected thereby. A criminal procedure was brought against Mr Goerres, since he offered various foodstuffs for sale without German labelling in his shop in Germany. In relation to the products labelled in French, Italian and English, he claimed that a particular language cannot be imposed based on the Old Foodstuffs Directive and the products labelled in foreign languages were well known to consumers. The Court referred back to *Piageme I* and *Piageme II* and stated that the German regulation did not impose

³⁶¹ Case C-85/94 *Groupeement des Producteurs, Importateurs et Agents Généraux d'Eaux Minérales Etrangères, VZW (Piageme) and others v Peeters NV* [1995] ECR I-2955 (*Piageme II*).

³⁶² *Piageme II*, paras. 23-26.

³⁶³ Case C-385/96 *Criminal proceedings against Hermann Josef Goerres* [1998] ECR I-4431.

a stricter obligation than that of using a language that is easily understood. The Court passed the task of analysing from case to case whether the required information was communicated, either by an easily intelligible language or by another means, to the national courts.

As a general rule, according to the General Labelling Directive, Member States shall prohibit the marketing of the relevant products in their territory if certain particulars required by that Directive do not appear in a language easily understood by the purchaser, unless the latter is given such information by other means; these provisions do not preclude the appearance of the said particulars in several languages. Several legal sources follow the same pattern, such as the Aromatized Wine Regulation,³⁶⁴ the Spirit Drinks Regulation,³⁶⁵ the Lactoprotein Directive³⁶⁶ and the Extraction Solvents Directive³⁶⁷. There is a difference, however, between these legal sources according to whether the language should be considered as easily understood by the final consumer or any other purchaser (along the supply chain). The standard of easy understandability may be different in the case of an end-consumer and of a merchant conducting regular activity in a certain branch of business.

In addition to the Court's statements, the Commission adopted a communication concerning the use of languages in the marketing of foodstuffs adopted after the Piageme I decision in a useful tool for interpreting what is understood as a language easily understood.³⁶⁸ The Commission's communication refers exclusively to the Old Foodstuffs Directive, but its findings on the 'language easily understood' may be extended to other secondary legal sources containing the same criterion.

As a language easily understood, a Member State may require the use of its official language. Nevertheless, any national measure must be in conformity to the principle of proportionality. Accordingly, the consumer protection purpose of the national provision must be weighed against the benefits of the free movement of goods. Member States cannot preclude consumers from receiving the necessary information in other languages easily understood by them or by other appropriate means. The aim of the rule is to prohibit the marketing of products whose label is not understood by the consumers rather than giving priority to one selected language. In addition, the Old Foodstuffs Directive and several other secondary legal sources refer only to the required particulars, but not other elements of information.

The Commission's communication points out that, under certain circumstances, Member States must permit particulars to appear on the label in a foreign language and thus mentions certain exceptions to the use of the official language(s) of the Member State of marketing. These include (i) the use of terms and expressions generally known to the consumer, such as 'made in...'; (ii) the use of terms which are untranslatable or have no equivalent in the language of the Member State of marketing; (iii) the use of terms having a similar spelling in the languages of the Member States concerned, such as

³⁶⁴ Council Regulation (EEC) No 1601/91 of 10 June 1991 laying down general rules on the definition, description and presentation of aromatized wines, aromatized wine-based drinks and aromatized wine-product cocktails OJ L 149, 14.6.1991, p. 1-9 (the "Aromatized Wine Regulation"), art. 8 (5)-(8).

³⁶⁵ Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89 OJ L 39, 13.2.2008, p. 16-54 (the "Spirit Drinks Regulation"), art. 14 (1)-(4).

³⁶⁶ Council Directive 83/417/EEC of 25 July 1983 on the approximation of the laws of the Member States relating to certain lactoproteins (caseins and caseinates) intended for human consumption OJ L 237, 26.8.1983, p. 25-31 (the "Lactoprotein Directive"), art. 4 (2).

³⁶⁷ Directive 2009/32/EC of the European Parliament and of the Council of 23 April 2009 on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients (Recast) OJ L 141, 6.6.2009, p. 3-11 (the "Extraction Solvents Directive"), art. 7 (4).

³⁶⁸ Interpretative Commission communication concerning the use of languages in the marketing of foodstuffs in the light of the judgment in the Peeters case, COM(93) 532 final OJ C 345 of 23.12.1993 (the "Commission Communication").

coffee, puree or soya.³⁶⁹ If the words on the label are comprehensible to consumers, there is no need to translate them into the language of the Member State of destination.³⁷⁰ Consequently, a distinction must be made between a language which is easily understood and terms and expressions which are easily understood.³⁷¹

An additional question is who should be considered as a yardstick in terms of “easily comprehensible”: the average consumer of the Member State of import or the average Union citizen? Usually, whether a language is easily understood depends on the language skills of the citizens of a particular Member State or linguistic region.³⁷² Exceptionally, however, the Court considered consumers in the EU in order to determine whether a particular label misleads consumers or not. In the *Clinique* case, a German trade association brought proceedings against the subsidiaries of Estée Lauder, the parent company incorporated in the US, for selling cosmetics under the name ‘Clinique’ in Germany.³⁷³ German law prohibited the use of misleading information in general and in particular the marketing of cosmetics using misleading names or packaging, including the attribution to such products of properties which they do not possess. The trade association, as plaintiff, argued that, based on the name ‘Clinique,’ consumers may believe that the products in question had medicinal properties. The Court found that the marketing practice is not misleading. First, the products were sold in Germany exclusively in perfumeries and cosmetic shops and were presented as cosmetics and not medicinal products. Secondly, the Court also noted that the same products were marketed under the same name in other Member States, where the name did not mislead consumers. The Court therefore rejected any allegation to the protection of consumers and health despite any connotation of the word ‘Clinique’ in German.

3.1.1 The French example – Toubon Law

French legislation had already addressed the mandatory use of the French language in product labelling in the 1970’s. In 1975, the French legislation adopted the Bas-Lauriol Law, requiring the mandatory use of the French language for the designation, offer, presentation, written or oral advertisement, instructions for use, and description of the scope and conditions of a warranty of goods, products and services, as well as on bills and receipts.³⁷⁴ This involved the use of French language on labels.³⁷⁵ The Bas-Lauriol Law was never scrutinised by the Court. Eventually, the Bas-Lauriol Law, having been considered as less effective, was repealed upon the adoption of the Toubon Law.³⁷⁶

Similarly to the Bas-Lauriol Law, Article 2 of the Toubon Law declares that the use of French shall be mandatory for the designation, offer, presentation, instructions for use, and description of the scope and conditions of a warranty of goods, products and services, as well as bills and receipts.³⁷⁷ In fact the rules of the French Consumer Code constituted the implementation of the Toubon Law to labelling. Article R 112-8 of the

³⁶⁹ Commission communication, paras. 34-43.

³⁷⁰ Oliver, Peter, *Free movement of goods in the European Community* (3rd ed. Sweet & Maxwell, London 1996) [Oliver], 229.

³⁷¹ Commission communication, paras. 31.

³⁷² Oliver, 236.

³⁷³ Case C-315/92 *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH* [1994] ECR I-317.

³⁷⁴ Loi n° 75-1349 du 31 décembre 1975 relative à l’emploi de la langue française.

³⁷⁵ Loretta Nelms-Reyes: *Deal-Making on French Terms: How France’s Legislative Crusade to Purge American Terminology from French Affects Business Transactions*. *California Western International Law Journal*, 1996, 26, pp. 280-281.

³⁷⁶ La loi n° 94-665 du 4 août 1994 relative à l’emploi de la langue française. Elisabeth Manera Edelstein : *The Loi Toubon: Liberté, Egalité, Fraternité, but Only France’s Terms*, *Emory International Law Review*, 2003, 17, p. 1134.

³⁷⁷ Translation of the Toubon Law from the website of the Délégation générale à la langue française et aux langues de France <http://www.dglf.culture.gouv.fr/droit/loi-gb.htm>.

Consumer Code provided that all the labelling particulars required by this chapter must be easy to understand, be written in French and have no abbreviations other than those provided for by legislation or international agreements. According to a survey conducted in 2000, 93% of French people agreed with the Toubon Law.³⁷⁸

Before the adoption of the Toubon Law, a group of French MPs challenged several articles of the Toubon Law, asserting that the objected provisions violate the French Constitution. In its decision, the Conseil Constitutionnel referred to Article 2 of the French Constitution, which declares that “the language of the Republic is French” and stated that the legislation is free to require the use of the French language as well as the mandatory use of an official terminology in the cases and under the conditions determined by itself.³⁷⁹ At the same time, however, it was pointed out that the legislator has to strike a balance between Article 2 of the Constitution and the freedom of communication and expression enshrined in Article 11 of the Declaration of the Rights of Man and of the Citizen. According to the Conseil Constitutionnel, this freedom implies that everybody has the right to choose the terms found the most appropriate to express their thoughts. Taking into considerations these statements, the Conseil Constitutionnel concluded that a distinction must be made between, on the one hand, legal persons of public law and private persons conducting a public function and, on the other hand, private persons acting exclusively outside any public function, and found it unconstitutional to require the use of an official terminology in the private sphere.³⁸⁰

Some cases arising in relation to the Toubon Law became famous.³⁸¹

Disney offered for sale in its Champs-Élysées store several toys without French labelling and other products labelled in French, but containing warnings only in English. A language protection organisation grouping, created as a corollary to the Toubon Law, initiated proceedings against Disney for non-compliance with Article 2 of the Toubon Law. Disney invoked the free movement of goods provisions of the EC Treaty and the relevant case law of the Court. The claims were dismissed on procedural grounds, but in the end Disney removed the products concerned from its shop.

The rules of the Toubon Law were called into question in terms of conformity to EU law. In 2000, the Court decided a case on the relevant provision of the French Consumer Code. The requirement on the exclusive use of the French language was the background of the *Geffroy* case.³⁸² In relation to the sale of, among others, Coca Cola labelled in English, the Court made it clear that Member States could not require the use of a single language on labels excluding other languages easily understood or of other means of granting information to purchasers.

After the *Geffroy* judgment, in 2001 a *circulaire* was issued on the application of the Toubon Law, in which it was made clear that Article 2 of the Toubon Law does not exclude the possibility of using other means of information besides words not translated into French, such as designs, symbols or pictograms, so long as these are not

³⁷⁸ Références 2008 Délégation générale à la langue française et aux langues de France - l'emploi de la langue française : le cadre légal. Available at: <http://www.dglf.culture.gouv.fr/publications/publications.htm>, 3.

³⁷⁹ Conseil Constitutionnel Décision n° 94-345 DC du 29 juillet 1994.

³⁸⁰ Edelstein, pp. 1140-1144; Nelms-Reyes, p. 293 (fn 120).

³⁸¹ Nelms-Reyes, pp. 309-310; Amity Feld, p. 170.

³⁸² Case C-366/98 *Criminal proceedings against Yannick Geffroy and Casino France SNC* [2000] ECR I-6579; Mark Wise: Defending national linguistic territories in the European Single Market: towards more transnational geolinguistic analysis, *Area*, 2006, pp. 206-208.

misleading.³⁸³ However, no amendment was made to the wording of the Loi Toubon or the Consumer Code. Due to the adherence to the use of French, in 2002 the Commission decided to send a reasoned opinion to the French authorities, asking them to bring French law into line with the Geffroy judgment.³⁸⁴ The Commission objected that French legislation required the exclusive use of French without allowing the use of another language that is easily understood by the consumer or allowing the consumer to be informed by other means. As an effect of the Commission's objections, a decree was adopted amending Article R. 112-8 of the French Consumer Code that 'implements' the Toubon Law concerning labelling.³⁸⁵ The amendment supplemented that Article with a provision allowing the additional use of one or more other language(s) on the label. It appears from the wording of the Consumer Code in force after the amendment that other languages may be used in addition to the French language, instead of as an alternative to that. Nevertheless, the New Foodstuffs Directive that repealed the Old Foodstuffs Directive may provide support for the French rules, since it introduced a more lenient regime explicitly allowing Member States to require the use of their own official language in accordance with the Treaty.³⁸⁶

Body Shop stores also became the target of language protection groups. In respect to a shop in Chambéry, a fine was imposed for failing to label some products in French. Similar claims could not be successfully enforced against the Paris branch of Body Shop, since the competent French court dismissed the claims for procedural reasons.

3.2 Requirement on the use of the language of the place of marketing if the Member State concerned so stipulates

The New Foodstuffs Directive provides that Member States have the option to stipulate the use of the official language of the Member State where the product was put on the market or made available to end users. According to Article 16 (1), Member States shall ensure that the sale is prohibited within their own territories of foodstuffs for which the particulars set out in the same Directive do not appear in a language easily understood by the consumer, unless the consumer is in fact informed by means of other measures, determined as regards one or more labelling particulars.

Section 16 (2) adds that 'within its own territory, the Member State in which the product is marketed may, in accordance with the rules of the EC Treaty, stipulate that those labelling particulars shall be given in one or more languages which it shall determine from among the official languages of the Community.' It is not precluded, however, that the labelling particulars be indicated in several languages.

"The prime consideration for any rules on the labeling of foodstuffs should be the need to inform and protect the consumer. That need means that Member States may, in compliance with the rules of the Treaty, impose language requirements."

Recitals (6) and (7) in the preamble to the New Foodstuffs Directive

³⁸³ Circulaire du 20 septembre 2001 relative à l'application de l'article 2 de la loi du 4 août 1994 relative à l'emploi de la langue française.

³⁸⁴ Press release, IP/02/1155, Brussels, 25/07/2002.

³⁸⁵ Décret n°2002-1025 du 1 août 2002 modifiant les dispositions du code de la consommation relatives à l'étiquetage des denrées alimentaires.

³⁸⁶ Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs OJ L 109, 6.5.2000, p. 29-42. (the "New Foodstuffs Directive").

The same approach is followed by several secondary legal sources, such as the Flavouring Regulation,³⁸⁷ the Food Enzyme Regulation,³⁸⁸ the Food Additive Regulation,³⁸⁹ the Dangerous Preparation Directive,³⁹⁰ the Cosmetics Directive,³⁹¹ the Cosmetics Regulation,³⁹² the Dangerous Substances Directive,³⁹³ the Detergent Regulation³⁹⁴ and the Footwear Directive.³⁹⁵ The Textile Directive provides for the same general rule, but it explicitly allows exceptions for certain textile products where any Community language may be used.³⁹⁶

As with the New Foodstuffs Directive, some of these legal sources first require the use of a language easily understood by the purchaser and then grant Member States the right to require a particular language.³⁹⁷ As such, the requirement on the use of the language easily understood appears subsidiarily in the absence of a national provision requiring the use of the national language. Many times, it is provided that any rule on the compulsory use of an official language must be 'in accordance with the Treaty'. The reference to the language easily understood and the compliance with the Treaty in the New Foodstuffs Directive may seem to require Member States to make possible granting the necessary information to consumers by means other than the labelling in a particular language.³⁹⁸

Replying to a question by Renate Sommer (EPP, DE), rapporteur for ENVI on the Food Information to Consumers dossier, Mr. Dalli said that the aim would be to "empower the consumer" - consumers "must be informed, so they can decide for themselves what is good or bad for them", he said, adding that "I would not want to tell them what to eat, but what they are eating".

Mr. John Dalli, (then designate) Commissioner for Health and Consumer Policy on his hearing before the European Parliament

Source:
<http://www.eph.org/a/3823>.

³⁸⁷ Regulation (EC) No 1334/2008 of the European Parliament and of the Council of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods and amending Council Regulation (EEC) No 1601/91, Regulations (EC) No 2232/96 and (EC) No 110/2008 and Directive 2000/13/EC OJ L 354, 31.12.2008, p. 34-50 (the "Flavouring Regulation").

³⁸⁸ Regulation (EC) No 1332/2008 of the European Parliament and of the Council of 16 December 2008 on food enzymes and amending Council Directive 83/417/EEC, Council Regulation (EC) No 1493/1999, Directive 2000/13/EC, Council Directive 2001/112/EC and Regulation (EC) No 258/97 OJ L 354, 31.12.2008, p. 7-15 (the "Food Enzyme Regulation"), art. 10 (1)-(2).

³⁸⁹ Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives OJ L 354, 31.12.2008, p. 16-33 (the "Food Additive Regulation"), art. 21 (1)-(2).

³⁹⁰ Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations OJ L 200, 30.7.1999, p. 1-68 (the "Dangerous Preparation Directive"), art. 11 (5).

³⁹¹ Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products OJ L 262, 27.9.1976, p. 169-200 (the "Cosmetics Directive"), art. 7 (2).

³⁹² Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products OJ L 342, 22.12.2009, p. 59-209 (the "Cosmetics Regulation"), art. 19 (5).

³⁹³ Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances OJ 196, 16.8.1967, p. 1-98 (the "Dangerous Substances Directive"), art. 7 (4).

³⁹⁴ Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents OJ L 104, 8.4.2004, p. 1-35 (the Detergent Regulation), art. 11 (5).

³⁹⁵ Directive 94/11/EC of the European Parliament and of the Council of 23 March 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer OJ L 100, 19.4.1994, p. 37-41 (the "Footwear Directive"), art. 4 (2).

³⁹⁶ Directive 2008/121/EC of the European Parliament and of the Council of 14 January 2009 on textile names (recast) OJ L 19, 23.1.2009, p. 29-48 (the "Textile Directive"), art. 8 (4).

³⁹⁷ Flavouring Regulation, art. 14 (1)-(2); Food Enzyme Regulation, art. 10 (1)-(2); the Food Additive Regulation, art. 21 (1)-(2).

³⁹⁸ Amboise, Jean-Claude, Union européenne et régime de commercialisation des biens de consommation: quelles garanties pour le multilinguisme? in Grin, François, Langue, Économie et Mondialisation, *Français et Société* 22-23 (EME Éditions, Bruxelles 2011) p. 60-61.

The Commission proposed in 2008 a new regulation on the provision of food information to consumers that intends to replace Directives 2000/13/EC and 90/496/EEC.³⁹⁹ The Foodstuffs Regulation was adopted in 2011.⁴⁰⁰ The regulation repeats in fact Article 16 from the New Foodstuffs Directive. According to Article 15 of the Foodstuffs Regulation, mandatory food information shall appear in a language easily understood by the consumers of the Member States where a food is marketed. Within their own territory, the Member States in which a food is marketed may stipulate that the particulars shall be given in one or more languages from among the official languages of the Union.

These provisions do not preclude the particulars from being indicated in several languages. Subject to certain exceptions, the new food labelling rules, including the ones relating to language requirements, shall be applied as of 13 December 2014.⁴⁰¹ Until that date, the New Foodstuffs Directive remains applicable.

3.3 Obligation to use the language of the place of marketing on the label

A third solution is adopted by the Substance and Mixture Regulation, one that requires that the label shall be written in the official language(s) of the Member State(s) where the substance or mixture is placed on the market.⁴⁰² However, Member States may choose to provide otherwise, attenuating the rigidity of the above provision. The Substance and Mixture Regulation allows that suppliers may use more languages on their labels than those required by the Member States, provided that the same details appear in all languages used.⁴⁰³

In a stricter way, the Tobacco Directive requires the use of the language of the Member States where the product is marketed and it takes into account that certain Member States are bilingual.⁴⁰⁴ The tar, nicotine and carbon monoxide content of cigarettes shall be printed on one side of the cigarette packet in the official language or languages of the Member State where the product is placed on the market, so that at least 10 % of the corresponding surface is covered.⁴⁰⁵ That percentage shall be raised to 12 % for Member States with two official languages and to 15 % for Member States with three official languages.⁴⁰⁶

3.4 The restriction on using certain words or terms on labels

A fourth category of secondary legal sources do not contain general linguistic requirements on labelling, but they are restricted to determine the language of certain terms or descriptions used on the label. It is true, however, that these terms or names express many times the essence of the product and so they are sensitive in terms of consumer protection. In addition, a product covered by such a legal sources may fall

³⁹⁹ Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers /* COM/2008/0040 final - COD 2008/0028 */.

⁴⁰⁰ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 OJ L 304, 22.11.2011, p. 18-63 (the "Foodstuffs Regulation").

⁴⁰¹ Foodstuffs Regulation, art. 55.

⁴⁰² Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 OJ L 353, 31.12.2008, p. 1-1355 (the "Substance and Mixture Regulation").

⁴⁰³ Substance and Mixture Regulation, art. 17 (2).

⁴⁰⁴ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products OJ L 194, 18.07.2001 p. 26-35 [Tobacco Directive]. Amboise, 59.

⁴⁰⁵ Tobacco Directive, art 5 (1).

⁴⁰⁶ Tobacco Directive, art 5 (2).

under the scope of another secondary legal source that determines the more general and wider linguistic rules on labelling.

In the *Meyhui* case,⁴⁰⁷ the German manufacturer Schott did not affix to its products their description in the languages of the Member State where the products were placed on the market, although this was required under the Crystal Glass Directive.⁴⁰⁸ Schott's products were imported into Belgium by Meyhui, which claimed for the French, Dutch and German description. The Crystal Glass Directive contains certain provisions on the labelling of products falling under its scope of application. Language requirements depend on the category (and thus the quality) of the products. For lower quality products, the Crystal Glass Directive requires the use of the language(s) of the country in which the goods are marketed. Pursuant to the Crystal Glass Directive, Member States shall take all necessary steps to prevent the descriptions determined in the annex of the Directive from being used commercially for products which do not have the corresponding characteristics specified in the same annex. The Court argued that, for products of a higher quality, consumers are adequately protected by the fact that, in all the descriptions adopted by the Directive, the word 'crystal' is easily recognisable in any language and the percentage of lead is also indicated. On the contrary, in the case of products of lower quality, the difference in the quality of the glass used is not easily discernible to the average consumer based on the descriptions in the different language versions. In order to avoid any confusion and to provide consumers with the appropriate information, the requirement on the use of language of the Member State of where the products are placed on the market is an appropriate means of protection and not disproportionate.

The Organic Products Regulation determines the use of terms referring to organic production on labels. The relevant terms are listed in the annex of the Organic Products Regulation. The terms listed in the annex of the regulation, and their derivatives or abbreviations (such as 'bio' and 'eco'), may be used throughout the Community and in any Community language for the labelling of products only if they satisfy the requirements of the organic production method set out in the Organic Products Regulation.⁴⁰⁹ The relevant terms shall not be used anywhere in the Community and in any Community language for the labelling of a product which does not satisfy the requirements set out under the Organic Products Regulation, unless they are not applied to agricultural products in food or feed, or clearly have no connection with organic production.⁴¹⁰

The Dehydrated Preserved Milk Directive and the Fruit Juice Directive supplement the New Foodstuffs Directive.⁴¹¹ They determine the characteristics of certain products belonging exclusively to a particular product name or designation in the languages of a certain Member State. These designations may only be used in the language and under the conditions laid down by the Directives.⁴¹²

⁴⁰⁷ See *supra* note 16 above.

⁴⁰⁸ Council Directive 69/493/EEC of 15 December 1969 on the approximation of the laws of the Member States relating to crystal glass OJ L 326, 29.12.1969, p. 36-39 (the "Crystal Glass Directive").

⁴⁰⁹ Organic Products Regulation, art. 23 (1).

⁴¹⁰ Organic Products Regulation, art. 23 (2).

⁴¹¹ Council Directive 2001/114/EC of 20 December 2001 relating to certain partly or wholly dehydrated preserved milk for human consumption (the "Dehydrated Preserved Milk Directive") and Council Directive 2001/112/EC of 20 December 2001 relating to fruit juices and certain similar products intended for human consumption OJ L 15, 17.1.2002, p. 19-23 (the "Fruit Juice Directive").

⁴¹² Dehydrated Preserved Milk Directive, art. 3 (1) and Fruit Juice Directive art. 3 (1).

4. Non-harmonised fields

In the *Fietje* judgment, the Court was to assess whether Dutch rules requiring the use of the term 'likeur' for the beverages specified by those rules were in conformity with Community law.⁴¹³ As a consequence of the application of these rules, criminal proceedings were initiated against a dealer in beverages for the importation of a beverage with the label 'Berentzen Appel – Aus Apfel mit Weizenkorn 25 Vol.%'. The word 'likeur' did not feature on the label, although the beverage fell under the scope of the relevant Dutch legislation. The Court considered the Dutch rule as a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 EEC Treaty, since compliance with those provisions renders the marketing of products more difficult, thus impeding trade between the Member States. At the same time, the Court acknowledged that the protection of consumers may serve as a ground to impose such an obligation on imported products and requiring the alteration of their labelling. The Court, however, added that the restriction may not be justified if the original label of the imported product contains the same information as the description prescribed by the rules of the host Member State and this information is also capable of being understood by consumers in the importing state. To determine whether such an equivalence exists is the task of the national courts.

In the *Colim* judgment, the Court discussed in detail the situation where no harmonisation exists in a field or where the harmonisation is not exhaustive.⁴¹⁴ The Belgian Law on Trade Practices and Consumer Information and Protection provided that the particulars, required by that law, which appear on the labelling must be given at least in the language or languages of the area in which the products are placed on the market. Despite this legal provision, two companies operating stores offered several products for sale without labels in Dutch, that being the language of the region in which the stores were located.

In *Colim*, the Court made clearly a distinction between harmonised fields and areas not or not fully harmonised. In the event of exhaustive harmonisation, Member States cannot impose additional language requirements. On the contrary, in areas not or not fully harmonised, Member States retain the power to impose additional language requirements. Nevertheless, Member States may impose language requirements only within the limits of the free movement of goods. Language-related labelling requirements are considered by the Court as constituting a barrier to the free movement of goods, since they result in an increase in costs: products must be packaged or labelled specifically in order to comply with the rules of the Member State of destination. The Court pointed out that Article 30 EC Treaty prohibits obstacles to the free movement of goods resulting from rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling or packaging), even if those rules apply without distinction to all national and imported products, unless they are justified by a public-interest objective. The need to alter the packaging or the labelling of imported products prevents such requirements from being treated as selling arrangements, within the meaning of the *Keck* judgment that fall out of the scope of Article 30 EC Treaty (now Article 34 TFEU), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.⁴¹⁵

⁴¹³ Case 27/80 *Criminal proceedings against Anton Adriaan Fietje* [1980] ECR 3839.

⁴¹⁴ See supra note 16 above; Melchor Sebastián Romero: La sentencia "Colim" del Tribunal de Justicia de las Comunidades Europeas: ¿malas noticias para el nacionalismo lingüístico? *Gaceta Jurídica de la Unión Europea*, 1999, 203, pp. 74-82.

⁴¹⁵ See also, Amity Feld, p. 184; Christof R. A. Swaak and Henk Jaap Albers: The trouble with Toubon: language requirements for slogans and messages in the light of Article 30 EC, *European Law Review*, 1996/21, p. 74;

Language requirements may be justified on the grounds of consumer protection, but they must be always proportionate to the aim pursued. As a consequence, other means that are appropriate for giving information to consumers cannot be excluded (designs, symbols or pictograms). National courts have to determine on a case-by-case basis whether the labelling provides full information to consumers. In addition, such a language requirement must be restricted to the information made mandatory by that Member State. Such a regulation may be justified on the grounds of consumer protection only in so far as it is applicable without distinction; it cannot, in addition, be applied solely to imported products, so that products from other language areas of the Member State concerned are not at an advantage compared with products coming from other Member States. Taking into account all these, the Court concluded that, in the absence of full harmonisation of language requirements, Member States may adopt national measures requiring such information to be given in the language of the area in which the products are sold or in another language which may be readily understood by consumers in that area, provided that those national measures apply without distinction to all national and imported products and are proportionate to the objective of consumer protection which they pursue.

5. Liability for compliance with national language requirements

The next question is who can be made liable for non-compliance with language requirements? The producer of the product? Or even the retailer of the product, from whom the product is bought by the consumer? In the *Lidl Italia* case, Lidl Italia offered for sale in Italy an alcoholic beverage manufactured by a German producer that had a lower alcoholic strength than the one indicated on the label.⁴¹⁶ Lidl Italia argued that Community provisions on the labelling of pre-packaged foodstuffs are addressed exclusively to producers, and not to traders who merely market the products. Here, concerning the New Foodstuffs Directive, the Court stated that, based on its context and purpose, the New Foodstuffs Directive may be interpreted as to impose obligations not only on the producer, but on any trader. The wide definition of the circle of persons which may be held liable for infringements of the obligations on labelling in fact contributes to the aim pursued by the New Foodstuffs Directive, namely the protection of the ultimate consumers. It is another question whether and how national laws settle the respective liability between producers and traders.

It must be noted that it was not Article 16 of the New Foodstuffs Directive on the language of labels that was the rule concerned in the *Lidl Italia* case, but it could be argued that the statements of the *Lidl Italia* case may also be extended to any infringement of Article 16 of the New Foodstuffs Directive. This is much more so, since a trader can much more easily monitor the language of the labels put on the goods to be sold than the truth of the statements on the label. The trader can refuse to accept products not labelled in compliance with the legal provisions in force.

Otherwise, it seems that the Court suggests a case-by-case analysis. The various secondary EU legal sources must be examined separately in order to determine those persons made liable for the compliance with labelling rules, including potentially language requirements. However, from the *Lidl Italia* case, it seems quite clear that consumer protection considerations as a purpose for a set of regulations and directives is widely taken into account and compel business actors to provide for appropriate labelling at any stage of the production and marketing chain. Depending on the legal source to be

Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, paras. 15-16.

⁴¹⁶ Case C-315/05 *Lidl Italia Srl v Comune di Arcole (VR)* [2006] ECR I-11181.

applied, the absence or erroneous translation of labels may result in rendering the trader liable.

6. Conventions concluded by the European Union (European Community)

The European Union (previously the European Community) itself is party to several international agreements containing provisions on labelling.

Both the EC and its Member States became party to the WHO Framework Convention on Tobacco Control. The WHO Framework Convention imposes an obligation on parties to require that certain information, such as the information on relevant constituents and emissions of tobacco products, appear on each unit packet and package of tobacco products and any outside packaging and labelling of such products in their principal language or languages.⁴¹⁷

Free trade agreements concluded by the EU also contain provisions on language-related labelling requirements. For example, the free trade agreement between the European Union and its Member States and the Republic of Korea refers back to Article 2 (2) of the TBT Agreement and paragraph 1 of the Annex 1 of the same agreement, but it lays down that a party shall remain free to require that the information on the marks or labels be in a specified language. The simultaneous use of other languages shall not be prohibited, provided that either the information provided in the other languages shall be identical to that provided in the specified language, or that the information provided in the additional language shall not constitute a deceptive statement regarding the product.⁴¹⁸

7. Experience of national consumer protection authorities and other consumer protection organisations

In the framework of the research interviews were made with some consumer protection authorities and consumer protection organisations on their experiences in relation to labelling and instructions for use. Additionally, reports published by consumer protection authorities and other consumer protection organisations in the same fields were studied in order to see what kind of problems might arise in connection with language requirements in labelling.



Source: <http://www.globalization-group.com/edge/2010/10/product-label-translation-omissions/>

⁴¹⁷ Council Decision of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control (2004/513/EC) art 11 (3).

⁴¹⁸ Free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part art 4.9 (2) d).

Concerning the issue of labelling, the picture is quite diverse. In certain Member States, no or only an insignificant number of complaints were made in relation to labelling.⁴¹⁹ In other Member States, labelling problems arose more often. However, these problems are not primarily related to translation issues: language-related labelling problems are due to the non-availability of certain information in a language that would be understood by the consumers rather than to inadequate translation.

In 2010, the Directorate-General for Enforcement and Mediation in Belgium received 118 complaints about inadequate labelling. Twenty-two of them had to do with problems regarding languages. In several cases the required information on conservation, use or on the possible consequences on health was not translated into a comprehensible

language. The languages most concerned, thus most incomprehensible, were Russian and Japanese. Lack of the use of comprehensible language was most frequently detected in the case of lists of ingredients.⁴²⁰

In Spain complaints from consumers about inadequate labelling are very rare in comparison to the total number of consumer complaints and infringing labelling rules is in general rare, mostly detected by the authorities ex officio and not on the basis of consumer complaints.⁴²¹ The most frequent labelling infringements in Spain concern the indication of ingredients in foodstuffs.

In Slovakia, pursuant to Act no. 250/2007 on Consumer Protection and amendments to Act of the Slovak National Council No. 379/1990 Coll. on Offences, the trader is obliged to inform the consumer about the characteristics of the product being sold or the nature of the service being provided, on the method of use and maintenance of the product, on the hazards associated with its incorrect use or maintenance, on storage conditions and on the risk associated with the provided services.⁴²² If this information is provided in writing, it must be provided in the state language. According to the data provided by the Slovak Trade Inspection, from a total number of 7556 complaints in 2010, 109 concerned adequate labelling. Inadequate labelling was determined in 45 cases. From January to September 2011 the Slovak Trade Inspection received 6 806 complaints. From the total, 113 complaints concerned adequate labelling. Inadequate labelling was determined in 36 cases. The most frequent complaints in 2010 were in relation to furniture, home and technical appliances, audio – video, and chemical substances and preparations. In 2011, the types of product concerned were, among others, home appliances, textiles, audio – video, domestic goods, computer equipment and building materials.⁴²³

The Office of Fair Trading in the UK received for the period from 1 November 2010 to 31 October 2011 a total of 2,563 complaints about labelling in general.⁴²⁴ 706 complaints were received in relation to food labelling and 1,857 complaints in relation to non-food labelling. The OFT could not provide information on how many of these complaints related to language issues. The complaints mostly concerned the lack of important information on the label (for example, in the case of rechargeable batteries, the label did not provide information on voltage or the type of charger to be used) or misleading advertising.

The Food Safety Authority of Ireland received a total of 11 171 queries in 2011; 132 of these were complaints relating to labelling. From all of these complaints only one

⁴¹⁹ See, for example, Luxembourg, based on the answers received from Union Luxembourgeoise des Consommateurs nouvelle to our survey on 21 October 2011 or Sweden, based on the answers received from the Swedish Consumer Agency on 4 November 2011.

⁴²⁰ Based on the answers received from the Belgian Directorate-General for Enforcement and Mediation to our survey on 3 November 2011.

⁴²¹ Answer received by the Instituto Nacional de Consumo on 1 March 2012.

⁴²² Based on the answers received from the Slovak Trade Inspection to our survey on 21 October 2011.

⁴²³ It must be noted that the list of complaints in assortment provided by the Slovak Trade Inspection concerns both cases related to inappropriate labeling and instructions for use.

⁴²⁴ Information provided by the OFT to our survey, received on 09.11.2011.

complaint related to an issue with language.⁴²⁵ This complaint was about ingredient information that was not included in the English version of the list of ingredients but was included in other languages.

In Hungary, the National Consumer Protection Authority monitors compliance with labelling rules. Mislabelling was revealed, for example, in 2009 in the course of an inspection related to the marketing of antibacterial shower gels and soaps.⁴²⁶ A product was erroneously marketed under the description 'hand disinfectant', since the disinfective effect has a wider spectrum than the antibacterial effect. Similarly, the name of a product containing the word 'antiseptic' was found to be misleading. Misleading information was found on the label of a product regarding its effect, which stemmed clearly from translation errors.

In Lithuania, the State Non Food Products Inspectorate under the Ministry of Economy received 1,937 consumer complaints in 2011. Out of these, 37 complaints concerned labelling and provisions of information (1.9 % of all complaints) and 30 (81.1 %) of these complaints were found justified. Fourteen complaints from the 37 complained about the absence of information or inaccurate or incomplete information in Lithuanian, of which 12 complaints were found justified. Although no serious accidents were caused by mistranslation of labels the Inspectorate had been alerted by an incident where a radiator cleaning fluid was labeled in Lithuanian as „liquid for diesel engine fuel system protection“. As a consequence of the misleading information, the liquid was filled into a car and it clogged the fuel pipes and fuel filter, thereby causing considerable harm.⁴²⁷

Based on the report on the activities of the consumer protection board of Estonia of 2009, the lack of translation of labels into Estonian appeared several times, in particular in relation to toys, candles, cosmetics products, chemical products or lighters where the danger information in Estonian was missing.⁴²⁸

Issues from missing translation of labels arose also in Romania. In 2011, as part of a national campaign the consumer protection office of Covasna (Háromszék) county inspected the marketing of shoes and clothes. The inspection revealed several irregularities in connection with labelling. Three of the nine inspected shoe shops were fined, since they failed to put labelling in Romanian on the goods. The sale of the products concerned was provisionally prohibited. Similar infringements were revealed also in the case of clothes. In 12 of 22 shops, the authorities found irregularities, including the absence of Romanian translations.⁴²⁹

In terms of labelling, criticism mostly concerns the understandability of labels. This is only partly due to translation problems and is instead inherent in the technical terminology used on labels, which is often not known to consumers. A survey carried out in 2009 by KEPKA Consumer Protection Centre on Food Labelling⁴³⁰ shows that 82% of those interviewed by KEPKA (983 consumers were interviewed) do not understand the information relating to ingredients on labels and only 18% answered that they do not have difficulties in understanding it. Ninety-five percent thought that ingredients labelling should in general be improved and 69% believed that using more simplified terms on labels could enhance labelling. As far as nutritional labelling is concerned, the picture is somewhat better: only 38% answered that they do not understand nutritional labelling,

⁴²⁵ Information provided by the Food Safety Authority to our survey on 23.02.2012.

⁴²⁶ The report on the inspection of the National Consumer Protection Authority, available at: http://www.nfh.hu/informaciok/vizsgalati/vizsg2006-2009/vizsg_2008/antibakter_08.html?query=antibakteri%C3%A1lis.

⁴²⁷ Information provided by the Non Food Inspectorate of the Ministry of Economy in Lithuania the 08.03.2012.

⁴²⁸ Activities of the Consumer Protection Board in 2009 (Tallin 2010) Available at: www.tka.riik.ee/public/Consumer_Protection_Board_of_Estonia_2009.pdf.

⁴²⁹ Article from the daily newspaper Háromszék, available at: http://www.3szek.ro/load/cikk/38727/cipo_ruha_cimke_nelkul.

⁴³⁰ The report of KEPKA was communicated to us the 10.10.2011. as feedback to our questionnaire by KEPKA.

but 84% thought that it still should be improved and the most favoured option, by 59% of respondents, was the use of more simplified terms, followed by a larger size of letters (24%) and the same positioning on packaging (16%).

8. Conclusion

Historically, both the WTO regime and the EU focused on the interests of producers when exporting goods. The protection of the interests of consumers was channelled into the existing legal frameworks only at a later stage of development.⁴³¹ Language requirements related to labelling imposed by states of import aim, at least partly, at protecting consumers. From the perspective of human rights, language-related labelling requirements grant in fact to consumers the right to receive certain information in their own language. Consumer protection considerations are recognised in both systems. The recognition of consumer protection as a legitimate interest increases the number of cases where translation of labels is necessary. The WTO case law on language-related labelling requirements appears scant, while the system of EU law is more nuanced as to the acceptability of language requirements on the grounds of consumer protection.

Within the ambit of EU law, linguistic labelling requirements are considered as measures having an equivalent effect to quantitative restrictions. Such measures, however, may be justified on the grounds of the protection of consumers as it was set out in the Court's judiciary practice.

Secondary legal sources – regulations and directives – contain various requirements concerning labelling. These legal sources impose diverse language requirements. Some of them require only the use of a language easily understood in the Member State concerned, while others permit or even impose an obligation on Member States to require the use of the language of the place of the marketing of the product on labels. The development of the regulatory approach may be illustrated by the labelling rules on foodstuffs. The Old Foodstuffs Directive required that the label appears in a language easily understood by the purchasers, unless other measures have been taken to ensure that the purchaser is informed. The New Foodstuffs Directive contain the same requirement, but at the same time it expressly authorises the Member State in which the product is marketed to stipulate that the labelling particulars shall be given in one or more official languages of the Union (that is usually one or more official languages of the Member State concerned). This latter approach has been recently reinforced by the Foodstuffs Regulations adopted in 2011.

In the absence of secondary law in a certain field, the goal of consumer protection is balanced against the free movement of goods with the help of the proportionality test in the judiciary practice of the Court. Depending on the secondary legal sources at issue, the liability for mislabelling may burden not only the producer but, under certain circumstances, the trader too.

The practice of national consumer protection authorities and other organisations demonstrates that several cases arise in relation to labelling requirements on language use and competent national authorities proceed against cases of absent or erroneous translation of labels even if the number of such cases is not dominant.

⁴³¹ Hobbs, p. 277.

CASE STUDY

Multilingualism in patent systems

Patents play a leading role in innovation. They aim to protect inventions by granting the right to the patent holder to prevent others from using, selling or making the invention without permission. The regulation of patents is multilevel: it is an interaction between national, international and European instruments. The national, international and European patent systems are not absolutely separate protection systems: they strongly depend on each other from organisational aspects, although the national intellectual property offices play a leading role in the management of every single system and the scope and content of the protection is defined at different levels of the overall system according to the national laws. It is obvious that the procedure and the granting of patents cannot avoid the use of national languages entirely, and it is unrealistic to expect any protection system not to use the national languages at all. In a multilingual Europe it is a crucial question which languages can be used, in which procedural steps, and how widely.

The present case-study will analyse the different regulatory levels of the patent system, the possibilities for transition between them, their effect on each other from the point of view of using languages and, finally, the connection between the possibility (or restriction) of using different languages and the effectiveness of patent protection. As will be demonstrated, translation plays a dominant role in that respect. On the one hand, the availability of patents in the language of the state where protection is sought serves legal certainty and maintains and develops technical vocabulary; on the other hand however, the costs of such translations are one factor limiting the geographic scope of protection.

In March 2011 the Council of the EU authorised the launch of an enhanced cooperation for the creation of a unitary patent title among EU Member States, after the European Parliament gave its consent in February. All EU Member States except Italy and Spain are supportive of the use of enhanced cooperation. The main obstacle to agree with unanimity on the creation of an EU patent was the number of languages in which the future unitary patent will be valid; hence the recourse to enhanced cooperation. The language regime for the future unitary patent system would be based – with some special rules – on the language regime of the European Patent Office (EPO), where the official languages are English, French and German.

The restriction of the number of languages in the proposed European regulation was justified by practical constraints, but could not be accepted by the two Member States mentioned above, which claimed that one language regime was much less expensive and much less discriminatory as everyone would use the same and unique language. Nevertheless, if the Commission wants more than one language, in that case Spanish and Italian have to be included. For these reasons Italy and Spain did not only refuse the idea of a patent system with a restricted language regime but at the same time they both initiated proceedings before the Court of Justice of the EU for the annulment of the decision on enhanced cooperation.

„Let me start by telling you that this morning, the Spanish Government has appealed for the decision of cooperation adopted by the Council to be revoked and this was presented to the Court of Justice of the European Union in Luxembourg. We consider that decision, as we had the opportunity to say, goes against European law, that is a major breach in the law, that is a discrimination because Spanish language, like other languages, has not the same linguistic status as French, German or English.“

Diego López Garrido, Secretary of State for the European Union, Ministry of Foreign Affairs and Cooperation at the Council meeting of 30 May 2011

The already existing European patent – independent from the EU and based on the European Patent Convention – requires validation of the granted patent separately in each and every EPO member state, as well as a full translation of the patent into the official language(s) of that member state. The future unitary patent proposed by the EU would be automatically valid throughout the territory of the EU Member States participating in the enhanced cooperation in the (EPO) language in which it has been granted.

The planned patent system is a clear example of limiting linguistic equality and language rights in favour of justified economic reasons. Some are of the view that, without such a limited language regime, an efficiently working and cost effective system for granting patents would not even be possible.⁴³² The study will further analyse the impact of such a limitation from an economic and legal point of view.

The study will also analyse regimes of the procedural language and language related questions of granted patents, and will have a separate sub-section on the possible role of machine translations in the granting procedure or later in the enforcement of rights.

The case-study is based on the relevant literature available, on reports, studies and impact assessments done for the European Commission or for the European Patent Office, on news, articles and comments published on the issue and on the answers received to the questionnaire prepared specifically for this study by three national patent offices and by the European Commission.

⁴³² Answer communicated to the questionnaire by the German Federal Ministry of Justice on 21.02.2012.

1. The proposals for a unitary patent protection and their language regimes – a historical review

The European Commission issued its proposal for a Council Regulation on the Community patent in 2000,⁴³³ the proposal still being the one under discussion on the basis of different text variants (the Commission had come up with several initiatives earlier but they remained fruitless). It was a landmark in this process that has been going on for ten years, when the Council of the European Union approved a common political approach in 2003.⁴³⁴

The common political approach states that the language regime of the Community patent should meet the requirements of affordability, cost-efficiency, legal certainty and non-discrimination. Thus, the language regime of the Community patent should follow the regime of the European Patent Convention (EPC) based on the three EPO languages and translation into any other Community languages would have been needed in connection with actions or claims for damages.

„The Commission considers that it should be possible to find effective solutions and will explore with the Member States how to improve the language regime with a view to reduce translation costs of the Community patent while increasing legal certainty for all, and in particular for the benefit of SMEs. Possible options could involve fee reductions for SME's or schemes allowing for flexibility in the translation requirements.“

(COM (2007) 165 final)

„This means that the applicant has to present a complete application document in one of the three official languages of the EPO as well as, at the time of grant of the patent, a translation of the claims into the two other EPO languages. However, where the applicant files the application in a non-EPO language and provides a translation into one of the EPO languages, the cost of that translation will be borne by the system ("mutualisation of costs").

For reasons of legal certainty – in particular in connection with actions or claims for damages – non-discrimination and dissemination of patented technology, the applicant must, upon the grant of the patent, file a translation of all claims into all official Community languages except if a Member State renounces the translation into its official language. The translations will be filed with the EPO and the costs borne by the applicant, who decides on the number and the length of claims to be included in the patent application, thereby having an influence on the cost of translation.“ (Points 2.2 and 2.3 of the political agreement)

However, the political agreement was not followed up by the approval of the Regulation: although the positions became closer on some issues, the rest of the debated articles led to a dead-end in the negotiations by 2004, which were continued two years later when the European Commission consulted professional organisations concerning the future of the patent system.⁴³⁵

⁴³³ Proposal for a Council Regulation on the Community patent. COM(2000) 412 final, 2000/0177(CNS), Brussels, 1 August 2000.

⁴³⁴ 7159/03 PI 24, Brussels, 7 March 2003.

⁴³⁵ European Commission, Internal Market and Services DG, Questionnaire on the patent system in Europe. Brussels, 9/01/06, http://ec.europa.eu/internal_market/indprop/patent/consultation_en.htm

In 2007, the Commission issued a communication on the possible directions of the development of the European patent system.⁴³⁶

The Communication notes that the dissension in the language issue was not eliminated: some said it would have been satisfactory if English had been declared to be the sole official language; according to others, the whole documentation of Community patents should have been translated into all the official languages of the EU.⁴³⁷ The London Agreement (see point 3.3) adopted by some contracting parties of the EPC and, aiming to reduce the translation costs of European patents, seemed to be a good compromise between these two extreme options.

In addition, the consultation launched by the Commission in 2006 showed that the majority of respondents (2500 replies were received), the users of the patent system, rejected the translation arrangements included in the Council's 2003 common political approach which laid down that the patent holder would have to supply a translation of the claims (having legal effect) into all official Community languages.⁴³⁸

In the wake of the Communication, the work continued on several issues, but after a while, negotiations were about to fail again. For this reason, on the initiative of 12 Member States, joined by 13 others, the Commission put forward to the Council further proposals to the effect that unitary patent protection should be achieved at least within the frame of an enhanced cooperation. In the spring of 2011, the European Parliament and the Competitiveness Council approved the political agreement on enhanced cooperation between 25 out of the 27 Member States on the unitary patent system.

The execution of the political agreement requires two regulations to be passed: one on the unitary – and no longer EU – protection and another on the translation requirements concerning the unitary patent. Adopting two legal instruments is necessary because, according to the new legal base created by the Lisbon Treaty⁴³⁹, a different legislative procedure should be applied in the case of unitary protection titles (qualified majority within the Council), and in the case of the language regime applicable to them, where the decision must be made by the Council unanimously. The fact that the authors of the Treaty laid down different procedural rules on the unitary protection and for the language regime applicable to it further underlines that the language issue had been seen as a strategic question. However the two issues are strongly interrelated, one legal instrument can not function without the other: the rules on the unitary protection would be meaningless without the rules on the language use.

The Commission presented the two proposals and their impact assessment on 13 April 2011, which, at the time of the drafting of this study, are still subject to debate.⁴⁴⁰ According to the Impact Assessment of the proposal⁴⁴¹, the main reasons for the

⁴³⁶ Communication from the Commission to the European Parliament and the Council – Enhancing the patent system in Europe, COM(2007) 165 final.

⁴³⁷ For instance Spain which finally did not join the enhanced cooperation on unitary patent was of the view that the language regime should be based on either English only or Spanish along with other languages (Answer received to the questionnaire by the Spanish Patent Office, on 17.02.2012.).

⁴³⁸ Paragraph 2 of the Explanatory memorandum of the Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of a unitary patent protection with regard to the applicable translation arrangements, COM(2011)216 final.

⁴³⁹ See Article 118 TFEU

⁴⁴⁰ Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection. Brussels, 13.4.2011, COM(2011) 215 final, 2011/0093 (COD).

Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent. Brussels, 13.4.2011, COM(2011) 216 final, 2011/0094 (CNS).

⁴⁴¹ Commission Staff Working Paper Summary of the Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and the Council implementing enhanced cooperation in the area of the creation of unitary patent protection and the Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements Brussels, 13.4.2011 SEC(2011) 483 final.

introduction of a new system are the following: the high costs related to the translation and publication of patents, differences in the maintenance of patents in the Member States, administrative complexity of registering transfers, licences and other rights, and that the EU-wide patent protection is expensive. Therefore a one language solution was envisaged.

2. A brief survey of the current proposals for a unitary patent

The proposal for the Council Regulation on the unitary patent mainly goes along the lines of the original proposal put forward by the Commission in August 2000 however it differs as far as language rules are concerned.

The unitary feature of the new patent protection is reflected by the fact that the same legislation would apply in the territory of all Member States participating in the enhanced cooperation.⁴⁴² A unitary patent could only be granted, transferred, annulled or its protection could be considered null and void with the same effect together in all participating Member States. According to the general opinion, the unitary feature of the patent is completely in line with the objectives of the internal market, satisfying its needs. However, the unitary patent system would not annul, supersede or render national patent systems useless, according to the planned regulation these two systems would co-exist. Unitary patents would be granted by the European Patent Office (EPO). Until the patent is granted, issues would be settled by the European Patent Convention (EPC), i. e. in this respect unitary patent would be a sub-type of European patent. Therefore the regulation is reduced to settling the issues arising after the patent is granted; but in these issues it would set up an autonomous EU legislation.

As a result of the political decision on the enhanced cooperation, the Commission proposed another plan on the language regime of the unitary patent, which had proved to be a sensitive issue earlier, in fact it was the reason why the EU patent system with the participation of all the Member States had not been worked out that no compromise on the language regime that would have been acceptable to all, had been reached.

According to the proposal, if the description of the unitary patent has been published in the procedural language and the claim have been translated into the other two official languages of the EPO, it is not necessary to make further translations to grant the protection. Further translations are only required in case of a legal dispute or during the transitional period (see below detailed rules to be applied during the transitional period). Applications for unitary legal effect should be submitted in the procedural language. Following a transitional period patents would be available in all EU languages through machine translation however without legally binding force.

3. The background of the unitary patent: the national and the European patent systems

In order to understand the linguistic debate around the unitary patent, it is worth presenting a short overview of how national and current European instruments handle the language and translation issue and why the proposed unitary patent's linguistic regime could still be more attractive than the current ones despite the fact it is limited.

3.1 The language regime of the national patent

⁴⁴² According to Article 3 Paragraph (2) of the Proposal.

Considering the fact that the patent protection, like any other intellectual property protection, is territorial, i. e. the protected party is granted legal protection against those infringing its rights only in the territory of a particular state, the language regimes of the national patent systems reflect the principle of territoriality as well. Thus, national patent systems are predominantly monolingual as a rule: the language of a particular state is the procedural language, the complete documentation (the description and the claims) of the patent shall be handed in this language. The average length of a patent description amounts to 20 pages, while claims are 1-2 pages long at most.

A patent description discloses the invention in a clear and complete manner.

The claims define the final scope of the patent, the different drawings of the invention and the short extract of the description.

The steps of the patent procedure are taken in the appropriate language (including the publication) and in the end the protection is granted in this language. National patent procedures usually do not exclude that applications may be submitted in foreign languages, but national regulations often stipulate that for their content to take any legal effect, they must be translated into the official language of that state. The fact that a patent is granted in the language of a particular state has manifold purposes and is of high importance.

First of all, the patent authority integrated in the national administration will use the national language. The rightholder of a patent (who is a person using the patent in a particular country) or any competitor in the national market will logically use the language of that particular country, given the fact that if they want to receive protection in a particular country, they most probably will pursue some of their business activities in the same country.

Due to the above-mentioned national integration it is logical that a patent shall be written in the technical vocabulary of a particular country, using the vocabulary used and understood by every expert.

3.2 Language rules of European patents

In the patent system there has been growing demand for inventions to be covered not only by national protection but also to be protected in all those foreign markets where the patent holders wish to monetise their patents. Although not under the auspices of the internal market of the European Union, the European Patent Convention⁴⁴³, as a classical instrument of international law, was a landmark in the series of legal instruments aiming to provide protection in more than one country by enabling protection to be granted in the territories of several states in the European area in a simplified procedure.

The European Patent Convention (EPC) is an international treaty signed by European states independently of whether they are Member States of the EU or not. Its aim is to facilitate patent protection for the territories of several states being procured in a unified procedure. The granted European protection will provide national protection (after it is granted, the protection is 'broken down' to the national protections of the states where the protection has been granted).

⁴⁴³ The European Patent Convention has 38 contracting parties. All EU Member States are party to the Convention.

The European Patent Convention provides⁴⁴⁴ that the content of the European patents taking effect in the particular states that signed the agreement is equivalent to the patents granted by the national offices, as European patent has the same effect as those granted by national offices. As such, the same directives hold for those procedures concerning the maintenance, termination or annulment of the European patent, and its infringement with all the legal consequences as for the patents granted in national procedures. However, the unitary procedure includes the possibility that not all the languages of the states concerned with the patent are needed during the whole procedure and with regard to all the documents.

The European Patent Organisation set up on the basis of the Convention in 1977 has 'only' three official languages: English, French and German.⁴⁴⁵ The applicant can choose among these languages the language of the procedure before the EPO, which means that the patent will be applied for in one of these languages, the European patent application must be translated into that language, and the descriptions will be issued in this language too. Only the claims (and not the entire documentation) are to be translated into the two other official languages of the European Patent Organisation. Registration is made in all the three languages; in case of doubt the registration made in the procedural language shall be considered valid.⁴⁴⁶

However, most countries require the complete text of the European patent to be translated into their national language as a pre-condition for the European patent taking effect in the territory of that country. They are authorised to do so under Article 65 (1) of the Convention, according to which any of the contracting countries may require the applicant to submit the translation of the patent as granted (amended or limited) to the central authority for protecting industrial rights if the European patent granted by the EPO was not drawn up in one of its official languages. In such cases the proprietor of the patent must bear the costs of the translation, but third parties can access the full text of the patent without any costs.

It means in fact that, even if the EPO language rules are limited, the discretionary power of the contracting states to make the effect of the patent dependent upon translation does not reduce the translation burden.

The EPC has clear rules⁴⁴⁷ on the legal consequences of the absence of submitting a translation. Any contracting state may stipulate that failing to meet the requirements concerning the translations may result in the European patent protection being considered as invalid from the beginning.

Figure 8. Language regime of the EPC



⁴⁴⁴ Article 2, Paragraph (2) and Article 64

⁴⁴⁵ EPC Article 14 Paragraph (1) and Article 31

⁴⁴⁶ EPC Article 14 Paragraphs (2)-(8) and the Executive Rules 3-7

⁴⁴⁷ Article 65 Paragraph (3)

Under the EPC rules, even temporary protection attached to the publication of the European patent application in the contracting state indicated in the application is dependent on the translation of at least the patent claims into the official language of that state.

Article 70 EPC lays down rules on defining the authentic text of the European patent and that of the European patent application. The authentic text of the European patent and that of the European patent application in any contracting state or in any proceedings conducted by the EPO is the text in the procedural language. However, any contracting state may provide that a translation into one of its official languages shall in that state be regarded as authentic, except for revocation proceedings, in the event of the European patent application or European patent in the language of the translation conferring protection which is narrower than that conferred by it in the language of the proceedings. If any of the contracting states avails itself of this regulatory option, it has to make it possible to amend the translation and it has to provide rights for those persons who trusted the earlier translation with good faith to use it further.

3.3 The London Agreement for a simplified post-grant language regime

With the flexible language regime of the EPC authorising contracting states to ask for translations into their official language, the translation issue and especially its costly and time-consuming effects were neither neutralised nor solved. In 2000 a revision of the EPC coming into effect in 2007,⁴⁴⁸ enabled contracting states to conclude separate special agreements, especially such agreements which provide that the contracting states concerned will waive the translation requirements of Article 65 EPC. Based on this rule, the London Agreement for a simplified language regime was concluded in 2000, which at last came into effect in 2008, in 14 of the 34 contracting states of the EPC: Denmark, UK, France, the Netherlands, Croatia, Iceland, Latvia, Lichtenstein, Luxemburg, Monaco, Germany, Switzerland, Sweden, Slovenia. Later Finland, Hungary and Lithuania joined the Agreement. Currently 15 EU Member States do not share the simplified language regime of the London Agreement and continue to use the EPC rules.

„Translation costs are one factor limiting the geographic scope of protection of a European patent and explain why far more patents are validated in some countries than in others. States with fewer designations benefit to a lesser extent from patents as a driver of innovation and technology transfer. In the interests of the cohesion of the European market – the world’s largest regional market – what is needed is a simple and efficient way of validating European patents granted by the European Patent Office throughout Europe. Under the current system, the high translation costs deter patent proprietors.“

EPO: The London Agreement, European patents and the cost of translations, 2006

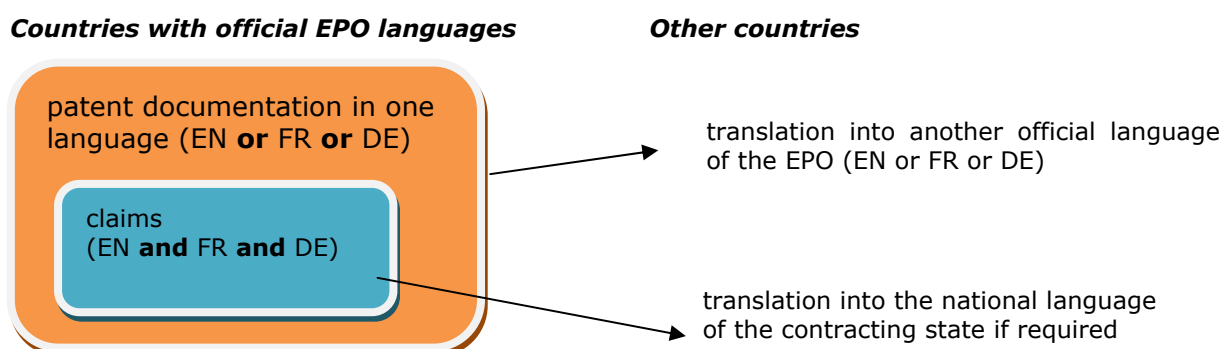
Article 1 (1) refers to those states whose official language, or any of their official languages, is identical to any of the official languages of the EPC. These contracting states cannot enforce the provisions of Article 65 of the EPC, i. e. they are not to prescribe that the translation of either the complete text or the claims into their official language should be filed. On the other hand, in these contracting states the translation of the claims is always available due to the language regime of the European Patent Organisation. In the said contracting states therefore the complete text of the European patent is available either in English or in French or in German and the claims are

⁴⁴⁸ See Article 149a.

available in all the three languages. This language regime applies in the following contracting states of the Agreement: the UK, France, Lichtenstein, Luxemburg, Monaco, Germany, Switzerland.

Article 1 (2) of the London Agreement refers to those states whose official language is not identical to any of the official languages of EPO. These contracting states will not enforce translation requirements defined in Article 65, i. e. they are not to prescribe that the translation of either the complete text or the claims shall be filed in their official language so that the European patent can take effect in their territory, provided the European patent was filed in an official language of the EPO chosen by that contracting state or its text has been translated into this language. These states can therefore choose, from the three official languages, the one into which the patent documentation should be translated even if the procedural language was not that official language. Nevertheless, these contracting states may require that the translation of the claims shall be issued in their official languages so that the European patent can come into effect in their territory. However, these states can also renounce the complete translation requirements or they can set more lenient rules.

Figure 9. Language regime of the London Agreement



As a consequence of these translation requirements 'tolerated' by the London Agreement, the complete text of the European patent coming into effect in one of the contracting states is available in one or two official languages of the EPO, always at least in one and the claims will be always available in all the three official languages of the EPO and in (one of) the official language(s) of that contracting state if it is required so by the state. Among the contracting states the following ones require the English translation of the European patents to be filed in German or French, so that the patent can take effect in their territories: Denmark, the Netherlands, Hungary, Finland, Croatia, Iceland, Sweden. Nevertheless, in Denmark, in the Netherlands, in Iceland and in Sweden it is not necessary to file the English translation of the patent if the translation is filed in the official language of the particular state (Danish, Dutch, Icelandic or Swedish). Three contracting states of the Agreement, Latvia, Lithuania and Slovenia, have not used the opportunity to prescribe that the European patent shall be translated into the official language of the EPO chosen by these states so that it can take effect in the territories of these states. In these three states the texts of the patents being in effect in their territories might not be available in English, it can occur that it is available only in French or German.

Under the Agreement the following contracting states require the patent holder to file the translation of the claims in their official languages: Denmark, Finland, the Netherlands, Hungary, Croatia, Iceland, Latvia, Lithuania, Sweden, Slovenia.

However, contracting states may ask for the translation of the complete text of the European patent into their official language in the event of any legal dispute concerning the European patent. The costs of such translations shall be borne by the patent holder. If there is no concrete legal debate between the rightholder and any third party, the costs of a full translation into the national language shall be borne by the third party. That seems to be a fair solution since in such cases the third party does not get in direct contact with the rightholder but only seeks information on the actual state of the art.

It is interesting to note that the ratification of the London Agreement revealed lively debate even in countries with „privileged languages“.

In France some MPs feared that the Agreement will phase out French from the languages of innovation and the system will instead encourage patent holders to file the documentation in English as under the Agreement there is no obligation to translate the documentation into the two other official languages of the EPO. This means that if the language of the procedure was English, the documentation will no longer be available in French. Thus, 60 MPs asked the Constitutional Council to rule on the compatibility of the Agreement with Article 2 of the Constitution according to which the language of the Republic is French. The Constitutional Council upheld the constitutionality of the Agreement, arguing mainly that the legal effects of the translation into French of a patent fall under the scope of private law and that the Agreements does not oblige public bodies or bodies governed by public law to use any other language than French.

Nevertheless the restriction of translation conditions in the frame of the London Agreement is a free choice of the contracting states of the EPO and the same preliminary economic and constitutional aspects considered before joining the London Agreement would most probably apply before deciding to take part in the unitary patent system.

4. Human rights and constitutional aspects of whether to use the national language

The restriction on the use of most national languages (in the case of patent systems covering several states it is practically curtailing it) on the one hand raises efficiency and reduces costs, while on the other hand it might weaken legal certainty and pose constitutional problems. There are two aspects worth being analysed:

- First, patent information would not be readily available to those who do not speak any of the major foreign languages;
- Second, the restriction of national languages may have a direct influence on the availability of technological information, with consequent opportunity losses for national research and development, and it may result in the further impoverishment of their technological vocabulary.⁴⁴⁹

The main dilemma of a restricted linguistic regime for patents is whether the right to receive information in one's language in a state where this language is official and the constitutional principle of legal certainty are infringed when the text of a patent is not available in the national language of the state in which patent protection is granted. As will be demonstrated below, both the jurisprudence of national courts and that of the European Court of Justice shows that these principles are not violated by such a restriction.

⁴⁴⁹ These main arguments were highlighted by the Sar and Partners Law Firm and the Danubia Law and Patent Office responding to the questionnaire of the study on 26.02.2012.

The German Federal Supreme Court (BGH) passed the following sentence in the *Kehlrinne case*⁴⁵⁰ concerning the so-called European patent issue.

According to the BGH, legal certainty is met by filing only the claims and not the complete text of the European patent in German. It also argued that the costs of translation, in case of any doubt or legal debate, do not mean a disproportionate weight to the entrepreneurs concerned. This weight has a logical reason: the need for international cooperation.

On the other hand the Court of Justice examined another aspect in case C-44/98. *BASF*. It had to decide on the issue whether the translation requirement – where applicable – in the case of patents is an obstacle to the free movement of goods.

In this case the Court ruled that the national regulation drawn up based on Article 65 of the EPC and requiring the translation of the European patent into the national language is not an obstacle to the free movement of goods under the EC Treaty. In this case BASF argued that, owing the high costs of translation, a considerable number of patent holders decide not to apply for protection of their inventions in all the Member States of the EU but choose protection in only some of those states, thus dividing the internal market into 'protected zones' and 'free' zones. However, the Court rejected this argument by noting that, even supposing that in some circumstances the division of the internal market may have restrictive effects on the free movement of goods, those repercussions are too uncertain and too indirect to be considered an obstacle within the meaning of the Treaty.

In that respect, as far as the limitation of the patents' language regime is concerned, a certain parallelism might be drawn between the proposal of the Commission and the judgment of the Court in the C-361/01 *Kik* case, which analysed the language regime of the Community trademark system. In this particular case, the legal issue in the main proceeding was that Ms. Kik contested the language rules of the EU trademark system according to which the Office for Harmonization on the Internal Market (OHIM) only recognizes English, French, German, Italian and Spanish as its working languages. Under Regulation (EC) 40/94 on Community trade marks, the application for a Community trade mark shall be filed in one of the official languages of the European Community while the applicant must indicate a second language which shall be a language of the Office the use of which he/she accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings. Ms. Kik lodged her application in Dutch and indicated Dutch as second language as well, thereby infringing the rules of procedure. Following the appeal of Ms. Kik, first the Court of First Instance and then the Court of Justice had to decide whether the language regime of EU trademarks must take Regulation 1/1958 and the equality of languages into account.

In its judgment, the Court ruled that the EC Treaty contains „several references to the use of languages in the European Union. None the less, those references cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances“⁴⁵¹. Consequently „an individual decision need not necessarily be drawn up in all the official languages, even though it may affect the rights of a citizen of the Union other than the person to whom it is addressed, for example a

⁴⁵⁰ X ZR 27/86 of 3.11.1987, GRUR 1988, 290.

⁴⁵¹ Paragraph 82 of the judgment.

competing economic operator.”⁴⁵² Paragraph 92 of the decision lists the aspects that had to be taken into consideration for the operation of the trademark system of the Community when the language regime of the OHIM was created in order to achieve a proper balance between the interests of economic operators and the public interest in terms of the cost of proceedings, on the one hand, and, on the other hand, the interests of applicants for Community trade marks and those of other economic operators with regard to access to translations of documents which confer rights, or proceedings involving more than one economic operator, such as opposition, revocation and invalidity proceedings. Taking all these into consideration the decision concludes that it was appropriate and proportional to restrict the official languages of the OHIM to those that are „the widest known” languages in the European Community.

Here, it must be noted that, according to the Council, the language regime outlined in the common political approach concerning the Community patent, approved in March 2003 by the EU Council, must meet the requirements of legal certainty and non-discrimination.⁴⁵³

However, the Court has not made a decision yet in the pending actions for annulment of the decision on reinforced cooperation for the unitary patent brought by Italy (case C-295/11) and by Spain (C-274/11). The pleas of both states are based upon the allegation that the EU infringed the rules applicable to enhanced cooperation, as they did not use reinforced cooperation as last resort and that the authorisation adversely affects the internal market by establishing barriers to trade, discrimination between undertakings and causing distortion of competition. The pleas in law published in the Official Journal do not explicitly mention the issue of language or the violation of the principle of linguistic diversity.

Although it is quite clear that Regulation 1/1958 does not apply to patents, as they are not acts of general application, and since the Treaty of Lisbon the EU has explicit competence to regulate the languages applicable to unitary protection of intellectual property under Article 118 TFEU, there are authors arguing that the explicit commitment of the EU under the Treaty of Lisbon to respect linguistic diversity under Article 3 of TFEU and the Charter of Fundamental Rights might call into question the possibility to restrict, by a European instrument, any linguistic regime for efficiency reasons.⁴⁵⁴ At this moment however this approach should be seen as an open ended hypothesis which might be neutralised by the argument that the Treaty offered freedom to the Council to decide by unanimous voting the language regime of a unitary patent.

In that regard it is interesting to note that, according to the original plans, legal disputes linked to the unitary patent would have been decided by the European and Community Patent Court, which would have been established by an international agreement outside the structure of the Court of Justice of the European Union. Before signing such an agreement the Council of the European Union requested the Court to deliver an opinion on the compatibility of the planned regime with the Treaty. The outcome of the opinion⁴⁵⁵ was negative, mainly for breaching the principles on preliminary references. Although the Court did not deal with the linguistic regime of the planned court system, the Advocates General in their opinion covered the language issue. In paragraphs 116-122 they point out that the planned language regime of the court would violate the right to defence. The patent court would have had local and regional divisions. The language regime would have followed these divisions. From a linguistic point of view there would have been

⁴⁵² Paragraph 85 of the judgment.

⁴⁵³ See above.

⁴⁵⁴ Anne Sophie Lamblin Gourdin: La diversité linguistique, défi à l'intégration juridique, ou l'impossible brevet communautaire. In Rouyer, de Wrangel, Bousquet, Cubeddu (dir.): *Regard sur le cosmopolitisme européen*, Peter Lang, 2011.

⁴⁵⁵ Opinion 1/09 of 8 March 2011.

three options. The first one is if the patent court of first instance is located in the country of the defendant. In such a case no infringement of the right to defence would be established, as the language of the procedure would be the language of the home state of the defendant. The second option is if the action is brought to the patent court of first instance located in a country where an infringement or threat of an infringement has occurred or is likely to occur, and which is different from the country where the company in question is established and accustomed to use the language thereof. However, in such a case one can easily argue that the use of foreign languages is a logical consequence of the fact that the company started to carry out business abroad and the litigation in question is the result of its activities abroad. On the contrary, the Advocates General assume that the situation is more delicate under the third option, when the country to which a company must be assigned does not participate in any local or regional division of the patent court of first instance. In such a case, the dispute would be brought before the central division of the patent court of first instance, and the language of the proceedings would be that of the patent, namely German, English or French.⁴⁵⁶ That is to say that a company or entrepreneur may be sued before a court whose language is neither the language of its country nor the language of the state where it carries out commercial activity. The Advocates General are of the view that the right to defence would be violated in such a situation as the proposed agreement did not contain any rule on deviating from the above language regime, nor did it foresee the possibility of translating the procedural documents.

As the planned agreement was found contrary to the TFEU by the Court of Justice, a new agreement will be proposed, most probably with the same language rules, as they were not explicitly criticised by the Court itself which did not articulate its view on the eventual infringement of the right to defence.

5. The expected economic, financial and social effects and consequences of the simplified language regimes, and first of all those of the unitary patent

Translation of patents is costly. These costs might amount to EUR 75 to EUR 85 per page which means, in the case of a patent with typical length of 20 pages, that the costs for a single translation of a patent may be more than EUR 1500.⁴⁵⁷

According to the information that can be found on the website of the EPO⁴⁵⁸ (reflecting the situation in 2006) if seven or more contracting states are involved in the application, the costs of gaining a European patent through the procedure conducted by the EPO could reach EUR 4600. According to the EPO manual on the London Agreement, the translation costs can be reduced by 45%⁴⁵⁹ under the system introduced by the Agreement. However, according to the Impact Assessment of the European Commission of 2011, even if the London Agreement reduced the costs of validation requirements in some Member States, the overall cost of validation in the three Member States with the EPO official languages (DE, FR, UK) equal EUR 680.

The validation costs of a patent include:

- translation costs
- publication costs
- costs linked to filing requirements

⁴⁵⁶ Paragraph 122 of the Opinion of 10 July 2010.

⁴⁵⁷ <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/240&type=HTML>

⁴⁵⁸ <http://www.epo.org>

⁴⁵⁹ The London Agreement: European patents and the cost of translations. European Patent Office, Munich, 2005

These costs reach EUR 12,500 in 13 Member States and over EUR 32,000 if a patent is validated in the whole EU. It is estimated the actual validation costs are around EUR 193 million per year in the EU.⁴⁶⁰

This and competitive discrimination were the exact reasons for the Communication of the European Commission of 2007 on 'Enhancing the patent system in Europe' urging that measures should be taken to create a unitary patent. According to the Commission, a European patent covering 13 contracting states costs eleven times more than in the US and thirteen times the price of a Japanese patent because of translation and procedural costs. Considering the twenty year long protection time, European patents cost nine times more than Japanese or American patents. If we compare claims, the cost differences are even more striking at the expense of Europe.

On the other hand, European patent applications filed by applicants out of Europe are in a slight majority (with 51.47%, according to the EPO statistics⁴⁶¹ of 2006), and among the holders of European patents, the percentage of non-Europeans is slightly below 50% (48.26%, out of which 23.63% is the share of the USA and 19.18% is that of Japan). It is therefore not only European industry that benefits from the cost reduction achieved by any simplified language regime, but all foreign competitors too.⁴⁶² In Europe those states which can generate the most patent activity, which have an innovative national economy and which have one of the official languages of the ÉPO as their official language will benefit most from the cost reduction. Germany falls in this category with its 22.74% share of the European patents granted in 2006, leading the list, together with France (7.16%) and the four states (the UK, Holland, Italy and Switzerland) that could reach the 3% threshold.

All this seems to show that applicants from the US, Japan and in those older contracting states of the EPO with more advanced economy and technology that would primarily benefit from the restricted system, although everything considered, the system would enhance the competitiveness of European industry in general, which in time could enable the enterprises based in states where non-EPO languages are spoken to benefit from the alleviation of the language-connected obstacles to a greater extent.⁴⁶³

The supporters of the unitary patent often articulate the argument in favour of the cost reduction of translations, claiming that these expenses hinder innovation unnecessarily, as translations are seldom if ever used and legal debates are rare and what is more, by the time the translation is made (which might take years) technological advancement renders it obsolete. On the other hand, it seems a sound counter-argument that translations are needed to avoid legal debates, and it is useful not only for competitors but for everyone who would like to know more about technological development if they become familiar with the patents. It is argued, for instance, that the major objective of the patent system is the dissemination of the information for the benefit of the society and to allow the further development of technology. If patent documents are not accessible in the language used or known by inventors and enterprises established in a

⁴⁶⁰ 3.1. of the Impact Assessment

⁴⁶¹ <http://www.epo.org/about-us/office/annual-reports/2006>

⁴⁶² This counter-argument is mentioned also by the Sar and Partners Law Firm responding to the questionnaire on 26.02.2012.

⁴⁶³ Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System" study written by Prof. Dietmar Harhoff

http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf

Economic cost-benefit analysis of the Community patent" study written by Prof. Bruno van Pottelsberghe http://ec.europa.eu/internal_market/indprop/docs/patent/studies/compact-cost%20-benefit-study-final_en.pdf

Patent fees for a sustainable EU (Community) patent system" study by Prof. Bruno Van Pottelsberghe and Jérôme Danguy http://ec.europa.eu/internal_market/indprop/docs/patent/patent_fees_report_en.pdf

Study on the quality of the patent system in Europe" written by the research team of Giuseppe Scellato http://ec.europa.eu/internal_market/indprop/docs/patent/patqual02032011_en.pdf

given state, it could have a negative impact on IP protection itself and on the aims of the patent system.⁴⁶⁴

The new proposal of the Commission of 2011 aims to devolve all the translation costs of the rightholders onto the actual or potential competitors of the rightholders, those who are obliged to respect the patent, obliged by the exclusive user rights, hindered and limited by the patent in their economic activities. It is especially so in the case when the enterprise concerned (the competitor of the rightholder) is to have the translation out of legal debate, at their own expense. As a consequence of this, the proposal reduces not so much the total social cost of the operation of the European patent system as it reduces the costs on the side of the applicants, the rightholders, by transferring them to another group, the competitors. This partial cost devolution undeniably means an extra burden to the competitors of the patent owner; however, the more patents these competitors have, the more they can counterbalance this by saving on the translations of their own patents. From this aspect the proposal is in favour of innovative businesses, providing them with an opportunity to cut costs as opposed to the non-innovative ones. This cost devolvement does not work, or hardly works between innovative businesses; it has no palpable effect. From the point of science and technological policy, this kind of inducement and preference for innovative enterprises seems to be allowable and even desirable.

It cannot be said that in small countries the reduction of translation requirements has only negative effects, when mostly foreign patent owners benefit from it. Since apart from the static aspect of the patent, i. e. the exclusive rights or monopoly, there is a dynamic dimension too: technology transfer, research and development cooperation, the advancement of licence trade, the inducement of investments and the enhancement of business and investor trust in the sectors of modern technology, which traditionally involve high inherent risk.

In connection with the relief of language expectations, one cannot avoid trying to answer the question of how this can influence the use of languages and the development of underused national languages, especially in terms of technology, engineering sciences, research and development and patent information. It is an important factor in the decision-making process all over Europe where English is not an official language.⁴⁶⁵ It is a widespread opinion that renouncing the translation requirements or the relief of them might result in the impoverishment of the national technical vocabulary. When introducing and accepting the restrictions, the extent to which the official languages of the EPO are spoken in a particular country must be taken into consideration (obviously, the command of language of ordinary people is not as relevant as that of the economic and trade circles concerned).

Another aspect of this is that, in the considerations serving the philosophical background for patent protection, according to contract theory, the inventor (patent rightholder) reveals his/her secret technological solution to the public and the public grants the licensee exclusive rights to use the solution for a certain time period and under the conditions ruled by the law. This has to mean the objective availability of information, which discriminates against countries with poor levels of foreign language competence. Although experts in technological fields are expected to speak English, only 30-40 % of technological experts in Hungary can speak English at an intermediate level (compared with 80-90% in Germany); moreover, in many cases the intermediate knowledge of a language is not satisfactory to understand the technological information contained in the

⁴⁶⁴ Answers communicated to the questionnaire by the Spanish Patent Office, on 17.02.2012.

⁴⁶⁵ Answers communicated to the questionnaire by the Sár and Partners Law Firm and Danubia Patent and Law Office on 27.02.2012.

patent descriptions. Given the relatively number of technical experts in large companies, it is likely that the language competence can eventually be found but it certainly does discriminate against SMEs.⁴⁶⁶

Another point is that technological vocabulary forms an important an integral part of the language culture. With technological advancement newer and newer terms are coined, which, linguistically, mainly appear in the patent documentation. The lack of translations would mean a considerable disturbance in this process and a major pillar of the continuous development and richness of the technical vocabulary would be lost. After a certain transitional period, this effect may fade with the development of general language culture, but the tendency for national technical vocabularies to adopt the foreign words used by their original inventors may be exacerbated.

It must be emphasised in connection with the above-mentioned considerations that the Agreement and the unitary patent regime do not bring about but reflect the already existing dominance of the English language. Furthermore, because of the short time limit given for filing translations, the main aim of patent descriptions is not to spread the new terms or to renew the language but to introduce an invention to their peers using a vocabulary they can understand and use. We cannot say that the patent documentation creates a new technical language but it uses the technical language that is in a state of constant renewal.

The following data, besides others, also show this. The WIPO report states: in 2007 58,4 % (91,114) of the patent applications filed according to the Patent Cooperation Treaty were in English (Japanese takes the second place with 17.4 % and German is the third with 11.7%). According to the figures made available by the EPO at the request of the HPO, in 2007 English was the procedural language in 77.3 % of the patent applications, German in only in 17.8 % and French in 4.9 % of the cases. Taking into account that the procedure at EPO may take years, these figures do not only show the dominance of the English language but we can also infer that this dominance has grown even stronger in recent years. All these data make it clear that for getting information on the latest technological developments, at least a passive knowledge of English is necessary today.

As such the pessimistic presumption that those entrepreneurs who cannot speak or do not learn English (even at a level to be able to read in this language in their field) will be excluded from much of the world of patents seems beyond dispute, while the opposite presumption, that it is enough for them to keep up with the global technological development if they only study the patent descriptions in national languages other than the official languages of the EPO seems undefendable.

It can be admitted that it is a significant means of conserving or rather maintaining multilingualism if the patent claims are to be translated into the official languages of all countries concerned. The claims, mainly in their characteristic parts, describe briefly the new elements of the protected invention, defining the scope of the patent protection, by their nature incorporating those new technical terms and expressions whose translation into a particular national language might be necessary for conserving the richness of the technical vocabulary. In the case of the unitary patent it will prevail within certain limits from the very beginning, because even in the transitional period those descriptions whose procedural language is French or German must be translated only into English, and they have to be translated into the two other languages if the procedural language is English. It will presumably result in practice that the number of applications filed in

⁴⁶⁶ It is referred in the answers of the Sár and Partners Law Firm and the Danubia Patent and Law Office on 27.02.2012.

French or German will grow, as in these cases only the English translation must be filed.⁴⁶⁷

6. Rules in effect in the transitional period with special respect to the problem of machine translations

The current proposal on the language regime of the unitary patent system would strongly restrict the use of official languages for cost-efficiency reasons. Applicants could file their patent application in any language but they should provide a translation into one of the official languages of the EPO (English, French or German). The European patent would then be granted in one of the three official languages of the EPO and the applicant would be required to provide a translation of the claims into the other two official EPO languages.

In the light of the proposed system nobody would be deprived of the possibility to lodge the patent application in any of the EU official languages. To ensure that translation of the applications into one of the official languages of the EPO does not have a deterrent effect and does not raise significantly the costs, the system foresees compensation for such translation costs. In this way, the costs would not be borne directly by the patent holders but by the EPO. It is still not decided how the reimbursement of costs will work.

The proposed system would introduce a transitional regime for a period of a maximum 12 years, during which support would be given for translations into the languages of those Member States which are not the official languages of the EPO. After the interim period has elapsed and high quality machine translation has been set up, patent descriptions would be available in all the languages of the Member States. These translations would not have legally binding force, so they could merely serve informative purposes.

During the transitional period neither the descriptions, nor the claims would be available in any other EU language than the three official languages of the EPO. However, there would be special rules to be applied. If the applicant chooses French or German as the procedural language, the complete patent description should in addition be available in English so that the patent could take unitary effect. This solution is based on the presumption that, without translation French or German patent descriptions would not be available to commercial actors, the majority of whom understand English.

The proposal provides on the other hand provisions aiming to ensure linguistic diversity. According to this rule, if the procedure is conducted in English, the complete patent description must be translated into another official language of the Member States participating in the enhanced cooperation.

⁴⁶⁷ Mihály Ficsor: All quiet on the western front? Report on the „Trench War” fought for the Community patent. *Iparjogvédelmi és Szerzői Jogi Szemle*, 8/2009. András Jókúti: The birth of a chimera. Attempts at the establishment of a unified European patent litigation system. *Iparjogvédelmi és Szerzői Jogi Szemle*, 8/2009. Jürgen Schade: Is the Community (EU) patent behind the times? – Globalization urges multilateral cooperation. *Iparjogvédelmi és Szerzői Jogi Szemle*; 3/2011, Tivadar Palágyi: The European patent with unitary effect and the envisaged new patent court. *Iparjogvédelmi és Szerzői Jogi Szemle*, 4/2011.

This solution is not so much to be interpreted as supporting the languages other than the official languages of the EPO but as an expectedly weak restriction of the further advancing hegemony of English. The translations prescribed in the transitional period shall be published by the EPO as soon as possible after the application for unitary legislative effect is filed. However the costs of the translation are not borne by the patent owner but will be administered by the EPO. Given the fact that during the transitional period machine translation would still not be available, the translation of the patent documentation into a chosen EU language would raise translation costs, but according to the estimates of the European Commission even under these

„We need to be aware that a significant proportion of the costs arising from the unitary patent system will be due to financial compensation for translation costs. Their level will have a big impact on the size of the fees that users will ultimately have to pay. Granting such compensation only to SMEs, universities, public research centres and independent inventors would ease the financial burden on the system while increasing the support available for those that need it. In my view that would be wholly in keeping with the Small Business Act 2008, which since then has led to a new set of measures adopted in Spring 2011.“

(speech of Mr. Benoit Bettistelli, President of the EPO given in front of the Legal Affairs Committee of the EP, October 2011)

arrangements patent protection will cost less than EUR 2500 for 25 Member States. The Commission estimates that the total costs of translation during a transitional period may vary from approximately EUR 980 to EUR 2380 per patent. Following the transitional period, the translation costs will be around EUR 680. Finally, a single annual renewal fee will be paid centrally at the EPO and its level is expected to be much lower than the sum of the actual renewal fees in the 25 participating Member States.⁴⁶⁸

However it must be noted that, according to some views, the proposed language regime of the European patent with unitary effect only reduces translation costs on the applicant's side but this does not necessarily entail the reduction of such costs at the level of the whole economy.⁴⁶⁹ Instead, the same expenses are redirected at those who are obliged to respect the patent rights acquired by the right holder, i.e. those whose economic activities may be affected by others' patent rights. According to this perception, the total costs of the European patent system are thus not lowered but may even be increased as the proposed system does not guarantee an authentic, good quality translation of European patents with unitary effect being available centrally. Undertakings will be bound to make their own parallel translations of the same patent, which will be neither authentic nor accessible to the public.

All translation requirements until today have been based on the principle that the translation of the patent has to be carried out at the responsibility and expense of the patentee, and it is the patentee who bears the risk of erroneous translations. The proposed regime abandons this principle, liberates the person enjoying the benefits of protection from the obligation to provide different language versions and imposes the translation costs on the budget of competitors, the EPO – and presumably the Member States.

The availability of machine translations is one of the major elements in the overall translation regime for the EU patent. The texts of these translations would not have any legal effect and would serve informative purposes only, which means a step back

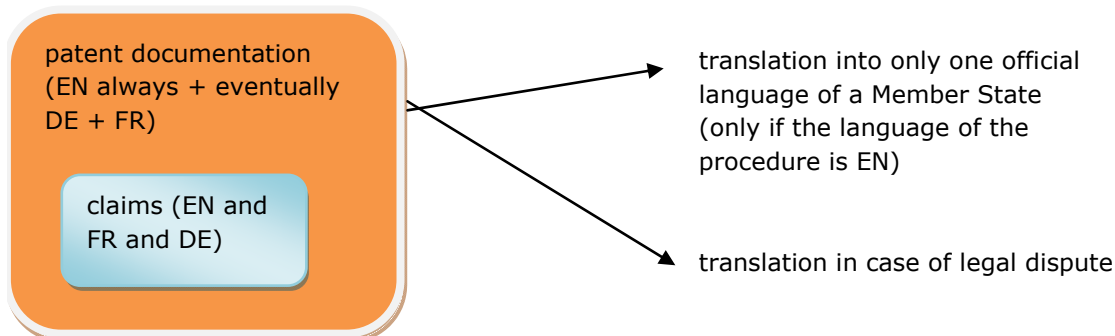
⁴⁶⁸ Information communicated in reply to the questionnaire by the Industrial Property Unit of the DG for Internal Market of the European Commission on 15.11.2011.

⁴⁶⁹ Information communicated in reply to the questionnaire by the Hungarian Intellectual Property Office of 13.02.2012.

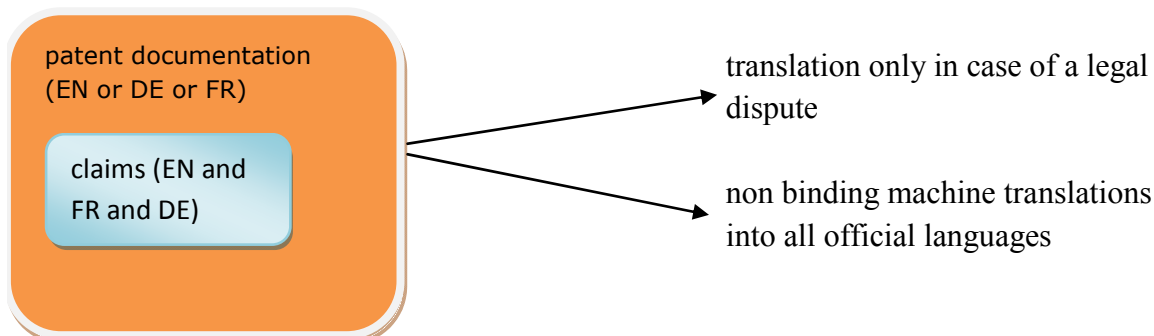
compared to the translation regime of the European patents, since there the translations (either that of the complete patent description or only the claims) have legal relevance as has been shown above, so they are important both for the patent holders and for the users.

Figure 10. Proposed system during and after the transitional period

Proposed translation system during the transitional period



Proposed translation system after the transitional period



According to the plans, the transitional regime will terminate when there will be good quality machine translations available in all the official languages of the EU. The quality of the machine translations must be inspected objectively and regularly by an independent expert committee consisting of the representatives of the users of the European patent system and the European Patent Office. This committee would have to file a report on the availability of good quality machine translations every two years. On the basis of the findings of the committee, the Commission will present a report to the Council and if necessary, propose to end the transitional period.

The system based on machine translations will automatically replace the transitional rules in 12 years time at the latest, even if the Commission would not propose the termination of the transitional period. This would mean in practice that in 12 years' time languages that are not official languages of the EPO will gain an almost equal status, even if the texts concerned will not be able to produce legal effects. That is the balance that was struck by the proposal between ensuring legal certainty (that is the availability of the texts) and cost efficiency (the availability will only be guaranteed after the translation costs could be significantly reduced due to machine translation).

In the view of the Commission, after the interim period has elapsed the availability of machine translations will make monitoring of European patents much easier than it is today, as even those patent descriptions will be available in the languages of the Member

States participating in the enhanced cooperation which are not validated in the territory of the state concerned. Contrary to today, automated translations will be available at the moment of publication of the patent application and thus enable efficient monitoring of the applications. Currently, translations are available only months after a patent is granted, which can mean several years after the publication of the patent application. This is normally too late for companies who want to monitor technological developments in their sector. Multilingual access to patent applications and granted patents will especially benefit SMEs who have limited financial resources for this purpose.⁴⁷⁰

Counter-arguments against machine translation mainly assume that such translations cannot guarantee high quality and cannot serve the aims of legal certainty either. It is argued, for instance, that it does not enhance legal certainty if the only patent information available in an undertaking's own language "has no legal effect," and so cannot be relied on and has to be verified at the competitor's own expense. For instance, a court hearing a patent infringement case can hardly be prevented from assessing that the alleged infringer was acting in good faith, relying on a translation downloaded from the EPO's website. If legal consequences are linked to erroneous translations, the patentee is likely to file carefully drafted language versions which are more suitable for the purposes of disseminating technological information.⁴⁷¹

As far as the cost reducing effect of the machine translation is concerned, the Commission in its impact assessment estimated that when high-quality machine translations become available, the cost of translation would be reduced to EUR 680. The cost of protection for the whole EU could be 20% of the costs today as a consequence of which the overall savings could reach EUR 50 million per year.⁴⁷²

The main question remains however whether a transitional period of 12 years will be sufficient to develop proper quality machine translation for every language pair. In the case of patents, quality expectations are quite high as in these cases a superficial understanding of the text is not satisfactory but each word is important. The EPO has been working on machine translation development for years. By 2014 it will most probably be able to provide translations from English, French and German into 28 European languages plus Chinese, Japanese, Korean and Russian.⁴⁷³ However, it has recently been confirmed by the International Office of the World Intellectual Property Organizations (WIPO) that the development of machine translating devices able to produce high quality translations can only be realised in the long term.⁴⁷⁴

"The quality of machine translation is expected to constantly increase ...However, there is no expectation that such translations will become sufficiently accurate to be useful for publication purposes and thus legal purposes in the near future."

(WIPO)

In March 2011 the EPO signed an agreement with Google to collaborate on machine translation of patents into European and Asian languages. Under the partnership, the EPO will use Google Translate technology to offer translation of patents on its website into 28 European languages, as well as into Chinese, Japanese, Korean and Russian. The EPO will provide Google access to its entire corpus of translated patents to enable Google to optimise its machine translation technology for the specific language used in patent

⁴⁷⁰ Information communicated in reply to the questionnaire by the Industrial Property Unit of the DG for Internal Market of the European Commission on 15.11.2011.

⁴⁷¹ Information communicated in reply to the questionnaire by the Industrial Property Unit of the DG for Internal Market of the European Commission on 15.11.2011.

⁴⁷² 6.3.2. of the Impact Assessment

⁴⁷³ <http://www.epo.org/news-issues/press/speeches/20111011.html>

⁴⁷⁴ WIPO PCT/A/38/4, July 31, 2008.

registrations.⁴⁷⁵ The arrangements will enable anyone to search for patents in one of the official languages of the EPO and translate into the language chosen. It is important to note that the automated translations exclusively serve information and research purposes and do not have legal value.

The fact that machine translations might only serve information purposes is outmost important. It means at the same time that machine translations will never replace completely human translation. Information obtained from machine translated patents might give impetus to patent agents to order accurate human translation. Machine translation is seen by many as useful for retrieving accurate technical terminology in a fast and reliable way but for using such translations for scientific or legal purposes, human activity is not avoidable.⁴⁷⁶

„Machine translation helps to overcome language barriers and make information contained in patents globally accessible and available. The new translation tool is a further stepping stone to improving innovation in Europe, and enabling European businesses to play level with their competitors in other regions. Moreover, I am convinced that it will facilitate the development of the unitary patent“

(Benoit Bettistelli, President of EPO)

The machine translation of unitary patents will most probably be based on the machine translation system of the EPO. In order to be able to cover all official languages of the EU, the Commission would cooperate and support the EPO to extend its system.

7. Conclusion

Introduction of a unitary patent system can be a big step forward to a well-functioning internal market. However, the effectiveness of a new level of patent protection strongly depends on whether it can gratify the requirements of affordability, cost-efficiency, legal certainty and non-discrimination.

We could see that the restriction on the use of the national language on the one hand raises efficiency and reduces costs, while on the other hand it might weaken legal certainty and pose constitutional problems although it is not the general public which is concerned by the publication or non-publication but a much narrower circle.

It is commonplace that primarily those states which can produce bigger patent activity, which have an innovative national economy and which have one of the official languages of the EPO as their official language will benefit most from the cost reduction. The proposal is in favour of innovative business, providing them opportunity to cut costs as opposed to the non-innovative ones. Other states can profit from the planned regime as well, however only on a subsidiary basis.

All things considered, it is crucial from the point of view of the whole new regime whether human translations can be superseded by machine translations in every language relation by the end of the transitional period.

⁴⁷⁵ EPO and Google break the language barrier for Europe's innovators, <http://www.epo.org/news-issues/news/2011/20110324.html>

⁴⁷⁶ Steve Vlasta Vitek: More reflections of a human translator on machine translation in the field of patent translation, *Translators and Computers, Translation Journal*, Volume 15, No 3, July 2011.

Figure 11. Comparative table on the different language regimes under the various patent systems

	National patent	EPC	London Agreement for states with EPC languages	London Agreement for states with no EPC languages	EU Patent during transition	EU Patent after transition
claims	official language	EN and DE and FR	EN and DE and FR	EN and DE and FR (and the official language of the state of validation if decided)	EN and FR and DE	EN and FR and DE
descriptions (with claims = full documentation)	official language	EN or DE or FR (language of the procedure)	EN or DE or FR (language of the procedure)	EN or DE or FR (independent from the language of the procedure)	EN, EN + DE, EN + FR and one official language of the EU	EN or FR or DE
further translations	-	if validation (official language of the country)	-	only in case of legal dispute	only in case of legal dispute (official language of the country where the infringement was committed)	all official EU languages (machine translation)
costs of further translations	-	patent holder	patent holder	patent holder	patent holder	EPO (from fees paid by the patent holders)

OVERALL CONCLUSIONS

There is every sign that the status and impact of language and translation in a globalised legal environment are largely uncharted and deserve thorough investigation. The findings of this study clearly prove that the delicate balance found in the equal treatment of languages has to do less with national sensitivities than with broader purposes such as competitiveness, social inclusiveness, safety or cost effectiveness.

It is no wonder that having one's own official language as one of the authentic languages of an international treaty is perceived as a strategic advantage. This is even more visible and intense if the international treaty or EU regulation intervenes in the field of language use in trade and business. The "unitary patent saga" illustrates how language issues could block the adoption of the proposed Regulation for years, which in the end led to a decision on reinforced cooperation between 25 Member States.

Multilingualism is an increasingly common feature of international treaties and EU law, though to a varying extent. The double vision of language as a barrier and that of rights to be protected runs through international law and EU law alike. The emphasis varies from tolerance to promotion. Trade-related international treaties are mostly silent on the issue of language use (labelling, instructions for use, language of contracts) leaving them untouched within the competence of the Member States. However, in cases where national language requirements create soft barriers to trade, the issue under the treaty mechanism cannot be avoided as is demonstrated by the labelling requirements under the WTO Agreements. This proves that the role of language in international trade cannot be neglected.

Language rights appear in international treaties in three well-defined areas: preservation of peace and security, promotion of fair treatment of individuals and preservation/toleration of linguistic diversity as an ecological approach. Although language rights have in the last decades been granted enhanced visibility, their scope remains limited to the above issues: they often aim to guarantee the effective exercise of already existing human rights (i.e. right to fair trial); in other cases they offer protection to groups of minorities with strong cultural self-determination.

The EU has been built since its foundation on the principle of the equality of all of its official languages, reflecting a quasi constitutional distribution of powers. However, this commitment had one main long-term practical consequence: the availability of legislative acts and the communication with the Member States and EU citizens in the official languages. The fact that the Lisbon Treaty mentions linguistic diversity as one of the objectives of the EU brings more visibility to the system which is further strengthened by the integration of the Charter of Fundamental Rights into primary law. Even if that provision does not create additional competence for the EU, the requirement to respect linguistic diversity is a general objective that must be implemented by the EU when exercising its competences.

Regulating language use, however, comes under the competence of the Member States in the light of the principle of subsidiarity. The EU intervenes only if the use of languages touches upon one of the basic objectives of the Single Market. In practice these rules are justified in the majority of cases by the protection of consumers and, above all, the protection of their health and safety. That is why one can find detailed rules in EU legislation on language use in labelling, some provisions on the availability of instructions

for use in the language of the Member State where the product is out on the market, or general requirements for a clear and easily understandable language in consumer contracts without specifying the language to be used. EU law therefore uses a gradation from less to more stringent prescriptions, depending on the domain and the risks that might arise.

Such European provisions eliminate on the one hand language barriers (for consumers) and create on the other hand translation costs (for business); this, however, is for the sake of general interest: protection of vulnerable groups or overriding values to be protected, like health. At the same time, European initiatives try to reduce the burden of translation costs where translations or certified translations are not absolutely necessary. Where a translation requirement is justified, however, only high quality and accurate translations can best serve the objectives of the internal market, as is the case for public health matters, for example.

The language-related aspects of EU law thus reflect a fine equilibrium between the interest of maintaining linguistic diversity on the one hand and assuring the smooth functioning of the internal market on the other. EU law prevents linguistic rights abuse consisting of disproportionate language requirements imposed in order to evade the rules of the internal market. Member States' language policies must also be scrutinised in the light of the non-discrimination and proportionality test: a balance must be struck between legitimate restrictions for general interest considerations and the protection of fundamental freedoms. By virtue of the jurisprudence of the European Court of Justice, language policy might in certain cases restrict fundamental freedoms (free movement of persons, goods or services) for the protection of other fundamental rights.

At the same time, EU law also enhances the Member States' obligations as regards individual rights by granting language rights to ensure fair trial for non-nationals within the EU. However, when legislating, the EU must consider whether the costs of translation exceed the benefits of making the documents available in national languages. Such a restrictive regime has been adopted in the case of standards and trademarks, and is proposed in the case of patents. These restricted regimes addressing issues of innovation and competitiveness do not in general eliminate translation costs entirely but often redirect them to other actors (decentralised agents, national authorities, business). The study shows that attempts to save on translation will normally result in a new distribution of the burden rather than its suppression altogether.

The role of languages in the international field should not be downplayed for financial reasons either. In the case of international agreements, contracting parties generally ensure the availability of the treaties in their official languages even if they are not regarded as authentic versions of that treaty. These translations are needed for reasons of legal certainty, especially if they have an impact on individuals. However, many of these treaties are long documents, sometimes amounting to several hundreds or even thousands of pages. The EU itself is committed to translating and publishing all the international treaties it signs in all of its official languages, although Regulation 1/1958 does not apply to international treaties.

Both public international law and international trade provide numerous examples of the importance of accurate and high-quality translations, as a divergence between the equally binding authentic versions of a treaty can easily result in misinterpretations. International lawyers are reflecting about ways to manage such risks by bringing translation closer to the negotiation phase. Moreover, the findings of the study demonstrate that non-authentic translations of international agreements, often the only versions that national judges are able to understand, may also have severe consequences when applied in legal disputes before national courts.

The assumption that translation is a transaction cost has, on occasion, led to its being seen as little more than an abstract item in an expense ledger. Translation is essential for effectively conducting business in the global or European marketplace and most successful companies already regard it as part of their multilingual strategy. For them, translation is not the last step in the localisation process but a need that affects the entire authoring and productive process. Relative to the other costs of doing business at the international level (research and development, legal fees, selling costs), translation is a highly marginal activity, whereas the consequences of poor translations can be severe: mistranslations in product descriptions, instructions for use or on labels can compromise human health and life. Companies not investing in good quality translation of documents such as those mentioned above suffer not only financial but reputational losses as well.

Thus, there is a general need to raise language awareness at both international and European levels among all key players of public international law, international trade and those who are best positioned to adopt rules on language use either at national, European or at international level. Their attention should be drawn to the fact that language and translation must be treated with a conscious and balanced approach where the values of linguistic quality, linguistic diversity and competitiveness in international trade are all well considered.

GLOSSARY OF TERMS

Authentic language(s) of an international treaty

The authentic language of an international agreement is the language in which the text of the treaty is authoritative for the purposes of interpretation. A treaty might have one or several authentic languages as agreed upon by the parties.

Bilateral agreements

Bilateral agreements are agreements concluded between two states or between a state and an international organisation/entity or between two international organisations.

BITs

Bilateral investment treaties (BITs) are international agreements signed between two states on the terms and conditions of private investment by companies or nationals of one of the contracting states in the other contracting state.

Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union was adopted at the signature of the Treaty of Nice in 2000. It brings together into a single instrument all personal, civic, political economic and social rights enjoyed by people within the EU. Since the Treaty of Lisbon the Charter has the same legal value as the treaties. The Charter is binding upon the EU institutions and upon the Member States when they implement EU law.

CLOUT

CLOUT (Case Law on UNCITRAL Texts) is a system developed by the UNCITRAL Secretariat for collecting and disseminating information on court decisions and arbitral awards relating to the Conventions and Model Laws that have emanated from the work of the UN Commission on International Trade Law. See: http://www.uncitral.org/uncitral/en/case_law.html

Council of Europe

The Council of Europe is an international organisation which was founded in 1949 in order to promote co-operation between all countries of Europe in the areas of legal standards, human rights, democratic development, the rule of law and cultural co-operation. Currently it has 47 Member States. The Council of Europe does not have legislative powers, however international treaties, conventions and charters are concluded under its institutional framework.

European Charter for Regional and Minority Languages

The European Charter for Regional and Minority Languages is an international treaty which was adopted under the auspices of the Council of Europe in 1992. Its aim is to protect and promote historical regional and minority languages in Europe. It applies to languages traditionally used by the nationals of the state and which differ from the majority of official languages.

European Convention of Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms (called as European Convention of Human Rights) was adopted in 1950 and all members of the Council of Europe are parties to the Convention. Its aim is to protect human rights and fundamental freedoms in Europe. The Convention has its own court, the European Court of Human Rights.

European Court of Human Rights

The European Court of Human Rights is the court of the European Convention of Human Rights. Anyone who believes that his or her rights have been violated under the Convention by a state party to the Convention can take a case to the Court. Judgments of the Court are binding on the States concerned and they are obliged to execute them.

European Patent Convention

The European Patent Convention is a multilateral treaty instituting an autonomous centralised procedure according to which European patents are granted. It provides for the creation of the European Patent Organisation. A European patent does not grant a unitary right, but a group of essentially independent nationally enforceable, nationally revocable patents.

Exclusive competence

Under Article 2 of the TFEU in areas where the EU has exclusive competence only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. The TFEU lists the areas falling under the exclusive competence of the EU.

Express treaty making powers

Express treaty making powers are areas where the TFEU explicitly enables the EU to conclude international agreements.

Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities is an international treaty signed under the auspices of the Council of Europe in 1995. It was ratified by 39 states. The Convention's aim is to ensure that the signatory states respect the rights of national minorities, undertake to combat discrimination, promote equality, preserve and

develop the culture and identity of national minorities, guarantee certain freedoms in relation to access to the media, minority languages and education and encourage the participation of national minorities in public life.

Internal Market Information System (IMI)

IMI is a secure online application that allows national, regional and local authorities throughout the EU to communicate quickly and easily with their counterparts abroad. IMI is accessible via the internet. This support system was developed and is managed by the European Commission.

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights is a multilateral treaty signed under the auspices of the United Nations in 1966. It entered into force in 1976 and until today 167 states have ratified it. Its parties commit themselves to respecting the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial.

Mixed agreements

Are international agreements concluded both by the EU and its Member States because the areas regulated by the international treaty fall partly under the competence of the EU, partly under the competence of the Member States.

Multilateral agreements

Multilateral agreements are international treaties signed by several states either under auspices of an international organisation or separately.

OECD Model Tax Convention

The OECD Model Tax Convention on Income and Capital provides consensual rules for taxing income and capital while avoiding having income or capital taxed twice by two different countries. Many bilateral tax treaties are based on it worldwide. Because the economic and tax environment is constantly changing, articles and commentaries are under constant review and are periodically updated.

Official languages of the EU

The official languages of the EU are defined by Article 1 of Regulation 1/1958. Currently the EU has 23 official languages. The number of official languages increases with each accession as according to the practice at least one official language of each Member State becomes at the same time official language of the EU.

Patent claims

Patent claims define the final scope of the patent, the different drawings of the invention and the short extract of the description. They are very short (maximum of 1-2 pages).

Patent descriptions

Patent descriptions disclose the invention in a clear and complete manner. Their length is about 20 pages in general.

Product Contact Points

Product Contact Points shall be set up in each Member State in accordance with Regulation 764/2008/EC. Their purpose is to make the principle of mutual recognition work in practice. The contact points provide information on the principle of mutual recognition, the national regulations in the field where mutual recognition applies and the remedies generally available in case of dispute.

Ratification of a treaty

Ratification is an international act whereby a State establishes on the international plane its consent to be bound by a treaty.

Signatories of a treaty

Signatories of an international treaty are those states which sign the treaty. They will not necessarily be bound by the treaty if they do not ratify them later.

UN Convention on Contracts for the International Sale of Goods (CISG)

The CISG was signed in 1980 under the auspices of the United Nations. Its aim is to offer uniform substantive rules on international sale in order to avoid choice of law or to apply national law which is not completely known to one of the contracting parties. The treaty has been ratified by 78 states. The treaty is automatically applied if the parties are established in countries being party to the Convention unless parties explicitly exclude its application.

UNCITRAL

The United Nations Commission on International Trade Law is a legal body of the United Nations with universal membership specialising in commercial law reform worldwide for over 40 years. UNCITRAL's business is the modernisation and harmonisation of rules on international business.

UN languages

The "UN languages" are the six official languages of the United Nations: English, French, Spanish, Arabic, Chinese and Russian. Treaties concluded under the auspices of the UN are usually authentic in these languages.

Vienna Convention on the Law of the Treaties

The Vienna Convention on the Law of the Treaties was signed in 1969 and entered into force in 1980. Until today it has been ratified by 111 states. Its aim is to regulate the conclusion of international treaties between states.

World Trade Organisation (WTO)

The World Trade Organization (WTO) is a global international organization dealing with the rules of trade between nations. It is based on the so-called WTO agreements. The WTO has 153 members. The official languages of the WTO are English, French and Spanish.

QUESTIONNAIRE

on labelling requirements

1. Do you often receive consumer complaints about inadequate labelling?
2. How often do they have to do with infringements of labelling obligations regarding languages?
3. How serious is the impact?
4. Could you describe some illustrative examples of such complaints?

QUESTIONNAIRE

on multilingualism in the patent system

1) Supposing that the actual proposals will be supported what kind of positive or negative expectations do you have in relation to the EU patent?

2) Do you think that the introduction of the EU patent will have a direct or indirect effect on your institution? If the answer is yes, what will be the direction of the effect?

3) Do you think that the strongly limited multilingualism of the EU patent could impact harm the development of the technical language (and innovation capacity?) in your country?

4) Do you think that SMEs in your country will be able to use the limited multilingual EU patent for protection of their inventions and access to public industrial innovation?

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