Articles

Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication?

By Theodor Schilling[*]

Abstract

The article discusses whether EU arrangements allow the opportunities offered by its multijuralism and multilingualism to be realized and the problems raised by them to be minimized. Those opportunities are defined, in the case of multijuralism, as the EU having at its disposal a toolbox of many legal solutions for many situations. In the case of multilingualism, one has to distinguish between a strong variety (all language versions are equally authentic) and a weak variety (one authentic language and so many official translations). One opportunity offered by both varieties is that multilingual laws are linguistically superior to monolingual ones because of the clarifying effect of translations. An opportunity offered only by the strong variety is that the meaning of such a law can best be pinned down by linguistic triangulation, i.e. by approaching it from different linguistic angles. Problems caused only by strong multilingualism are the intractability of contradictory language versions of a law and the very indeterminacy of all laws, which is the necessary counterpart of the possibility of linguistic triangulation. Concerning multijuralism, the article finds ample possibilities for EU lawmakers and adjudicators alike to make use of the toolbox. Concerning multilingualism, while the clarifying effect of translation is real enough, current arrangements allow the EU to profit from it only at some legislative stages. Further, linguistic triangulation is found not to be a workable concept in the EU, which has 23 authentic official language versions. Strong multilingualism therefore, cannot offset the problems it causes.

A. Introduction

The European Union (EU) at present has 27 Member States. Those Member States have between them even more legal systems,[1] belonging to at least three of the legal families

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[1] Some Member States have more than one legal system, the best-known example being the United Kingdom.

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widely acknowledged by comparative lawyers.[2] They also have between them 23 nation-wide official languages which are, at the same time, the official languages of the EU. These two facts, which shall be dubbed multijuralism and multilingualism respectively, are both defining features of the EU. Nothing of remotely similar complexity can be found in other composite state or other international organizations. Although not intimately related,[3] they both stem from the fact that the EU is made up of historically independent Member States, and the respective arrangements to deal with them can fruitfully contrast one with the other. Indeed, the EU's multilingualism and the multijuralism between its Member States raise problems, but may also offer opportunities[4] for legislation and adjudication. This article will discuss whether EU arrangements allow the opportunities offered by multijuralism and multilingualism to be realized and the problems raised by them to be minimized. It will also discuss the reality of those opportunities. In conclusion, it will consider whether the opportunities offered by multilingualism as it is organized in the EU context outweigh the problems it creates, or whether a different organization might be preferable.

In the EU context, there is an important difference in the way multilingualism and multijuralism play out: while it is entirely possible and, indeed, necessary for individual participants in the legislative and adjudicative processes of the EU to act sometimes or even regularly in a language that is not their mother tongue,[5] it is rather difficult and generally not required to forget one's legal background and to adopt a foreign one. As we shall see, this implies that opportunities offered by multijuralism are easier and more naturally realized than opportunities offered by multilingualism. To a certain degree, the circumstances allowing the benefits from multijuralism to be reaped can act as counterfoil to those concerning the benefits from multilingualism.

This article will start by opposing problems likely to be caused by multijuralism and multilingualism to opportunities offered by them. As multijuralism and multilingualism can

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[2] To wit common law, Romanistic legal family, Germanic legal family: KONRAD ZWEIGERT & HEIN KOETZ, INTRODUCTION TO COMPARATIVE LAW 68 (1998).

[3] *But see* European Commission Directorate General for Translation [EC-DGT]: RÉKA SOMSSICH, STUDY ON LAWMAKING IN THE EU MULTILINGUAL ENVIRONMENT 2 (2010), available at http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=HC3110678 (last accessed: 11 July 2001), which does seem not even to distinguish between the two concepts.

[4] Gérard Caussignac, *Empirische Aspekte der zweisprachigen Redaktion von Rechtserlassen* (Empirical Aspects of the Editorial Staff of Bilingual Law Decrees), *in* RECHTSSPRACHE EUROPAS. REFLEXION DER PRAXIS VON SPRACHE UND MEHRSPRACHIGKEIT IM SUPRANATIONALEN RECHT (Legal Language of Europe. Reflection on the Practice of Language and Multilingualism in Supranational Law) 157, 173 (F. Muller & I. Burr eds., 2004); William Robinson, *How the European Commission Drafts Legislation in 20 Languages*, 53 CLARITY 4, 6 (2005).

[5] Cf. e.g. William Robinson, *Manuals for Drafting European Union Legislation*, 4 LEGISPRUDENCE 129, 131 (2010).

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be put to advantage only within the applicable language regimes of the existing institutional framework, it is appropriate to continue with a description of those regimes including the current arrangements of the EU institutions. In view of the difference between multijuralism and multilingualism, the article will continue with the discussion of the former. It will go on to discuss how multilingualism plays out in the current arrangements. Since those arrangements are quite different between the administrative and legislative institutions — the European Commission ("Commission"), Council of the European Union ("Council") and European Parliament (EP) — on the one hand and the Court of Justice of the European Union (ECJ) on the other, this article will discuss the relevant mechanisms for producing legal texts separately, starting with the legislature. In conclusion, this article will make the case that the EU language regime could be much improved by opting for weak multilingualism instead of its strong variety.

B. Problems Caused and Opportunities Offered by Multijuralism and Multilingualism

I. Multijuralism

Multijuralism is not a clear-cut concept.[6] By `multijuralism,' I mean the simple fact that within the EU each Member State has at least one legal system which is entirely its own and whose validity, as opposed to its history, is independent of all other Member State legal systems. From this fact it follows that EU legislators and adjudicators, and their staff, coming as they are from different countries, have many different legal backgrounds, and must legislate for widely differing legal systems.[7] Of multijuralism it has been claimed that the latter fact may cause problems for devising general concepts which will be understood in the same way throughout the EU.[8] However, there is scant practical evidence for that.[9] In any case, those problems are accompanied by the unique opportunity offered to the producers of EU legal texts to have at their disposal a toolbox of more than 27 possible solutions for many situations. Therefore, instead of having to reinvent the wheel, they can choose the most adequate solution. Of course, comparative law has always been a source of inspiration for legislators[10] and adjudicators.[11] What gives additional traction to the

[6] On different meanings of multijuralism, *see* ALBERT BRETON, ANNE DES ORMEAUX, KATHARINA PISTOR AND PIERRE SALMON, MULTIJURALISM MANIFESTATIONS CAUSES AND CONSEQUENCES 1-101 *et seq*. (2009).

[7] In contrast to BRETON *et. al.*, *id.*, I consider the influence of the "subsets" on the whole, and not *vice versa*.

[8] *Cf*. Barbara Pozzo, *Multilingualism as a "value" in the European Union, in* THE MULTILANGUAGE COMPLEXITY OF EUROPEAN LAW: METHODOLOGIES IN COMPARISON 133 134 (Gianmaria Ajani, D. Tiscornia & G. Sartor eds., 2007).

[9] *Id.* at 133 & 134. The example provided by Pozzo is rather an example for divergent language versions, and therefore, of the problems caused by multilingualism.

[10] *Cf*. e.g. ALAN WATSON, LEGAL TRANSPLANTS *passim* (1974).

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special situation of the EU is the fact that while much of the said toolbox is accessible only in the language of the respective legal system, which is not necessarily widely understood outside its country of origin, the competent EU institutions have staff who are between them conversant with all those legal systems and fluent in all their languages. Those institutions therefore can do largely without the comparative lawyer as middleman.[12]

II. Multilingualism

Multilingualism exists in two varieties, a weak one and a strong one. In a system featuring strong multilingualism all official language versions of a law are equally authentic. Weak multilingualism as understood here differs from the strong variety in that only one language version of a law is authentic[13], the other ones being official translations. An example of a system featuring strong multilingualism is the EU law now in force.[14] An example of weak multilingualism was the now defunct European Coal and Steel Treaty which had only one authentic version which was the French one. An actual example is the case law of the ECJ which is authentic only in its respective language-of-the-case version.[15] The distinction between the two varieties of multilingualism is particularly important for this contribution, as I am convinced[16] that embracing weak multilingualism instead of the strong variety would solve some of the EU's multilingualism problems without creating new ones (purely political problems apart), and without squandering any of the opportunities multilingualism may offer in the EU context.

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[11] *Cf.* e.g. Peter Häberle, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat. Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode* (Basic Legal Validity and Interpretation of Fundamental Rights in the Constitution State. At the same time, the Law as a "Fifth" Method of Interpretation), JURISTENZEITUNG 913 (1989); *see* Advocate General Jacobs, *Opinion discussing the US "essential facilities" doctrine*: Case C-7/97, Oscar Bronner GmbH v. Mediaprint 1998 E.C.R I-7791, paras. 46-47.

[12] Of whom it has been said by Bernhard Großfeld (quoted from memory), rather skeptically, that she is considered an expert on foreign law at home and an expert on her domestic law in foreign parts.

[13] The authentic language need not be the same in the case of all laws of a multilingual system; *see* Theodor Schilling, *Beyond Multilingualism. On Different Approaches to the Handling of Diverging Language Versions of a Community Law*, 16 EUROPEAN LAW JOURNAL (ELJ) 47, 64 (2010).

[14] In the EU, all 23 language versions of a law are equally authentic. *Cf.* for the founding Treatie, the Treaty on European Union (EUT) art. 55 and Treaty on the Functioning of the European Union (TFEU) art. 358, 2010 O.J. (C83), 1; for secondary legislation e.g. ECJ, Case 283/81, CILFIT and Lanificio di Gavardo v. Ministero della Sanità, 1982 E.C.R 3415, para. 18.

[15] *Cf.* text at *infra* note 79.

[16] SCHILLING, *supra* note 13, 64.

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Indeed, strong multilingualism as practiced in EU law-making causes obvious problems. The fact that legislators and adjudicators, and their staff, speak many different languages, and that the results of their legislative efforts are authentic in all of them, inevitably and rather frequently leads to contradictory language versions of EU laws. In the case of weak multilingualism, such contradictions are easily resolved by looking at the single authentic version. In the case of strong multilingualism as practiced in the EU, given a system with 23 equally authentic language versions, contradictions are an intractable problem.[17] Obviously, the institutions must do their utmost to minimize that problem. It is therefore worthwhile to consider whether present EU arrangements are apt to serve this purpose. On the other hand, even without outright contradictions between the different language versions, ever so slight variations between them that are statistically unavoidable[18] must lead to a pronounced indeterminacy of the law.[19]

However, those problems caused by strong multilingualism are arguably accompanied by a number of benefits identified by different authors. Some of the benefits claimed for multilingualism accrue for strong and weak multilingualism alike, while others are exclusive to strong multilingualism. It is therefore necessary to distinguish between the following:

> a) Among the claims that can been made for both varieties of multilingualism is the claim that bilingual, and by extension multilingual, laws are linguistically superior to monolingual ones.[20] Translation, it is said, makes it possible to identify implied assumptions made in the original and may cause to make them explicit.[21] Thus it could lead to a clearer version of the original. Translation of course, is required in the case of both strong and weak multilingualism.

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[17] *Id.* at 52.

[18] 'Equivalence at any linguistic level is ... statistically rare. Full equivalence at the textual level understood as the sum total of the narrower equivalences is thus even more problematic': B. Lewandowska-Tomaszczyk, *Semantics and Translation, in* ÜBERSETZUNG — TRANSLATION — TRADUCTION. AN INTERNATIONAL ENCYCLOPEDIA OF TRANSLATION-STUDIES 1, 301, 310 (Harald Kittel, Juliane House & Brigitte Schultze eds., 2004).

[19] There are numerous examples for this in EC-DGT, *supra* note 3, at 97-131.

[20] CAUSSIGNAC, *supra* note 4, at 175; Robinson, *supra* note 4, at 6. The same is true of two positive effects of European multilingualism identified by EC-DGT, *supra* note 3, but extraneous to the present contribution, i.e. the claim "that it has increased in many Member States the state's awareness regarding language issues in general (48) and the contribution to the development of national languages (79-83)*;* EC-DGT, *supra* note 3, at 152: "The fact that multilingualism is something very beneficial is well shown by the institutional processes and the legal linguistic data we managed to explore."

[21] CAUSSIGNAC, *supra* note 4, at 175; Robinson, *supra* note 4, at 6.

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b) One claim that apparently can be made for strong multilingualism alone is that multilingualism is needed to achieve "the same rights and results from State to State"; monolingualism, in contrast, is "to have the same signifier of rights with quite different results from State to State."[22] This claim appears to be simply that all the citizens of the EU, and Member States' courts, should be able to take cognizance of EU law in their own languages as texts in a foreign language are easily misunderstood, and that therefore translations are needed. However, as I have argued elsewhere, this aim of easy access to the law is better served by weak multilingualism than by the strong variety, as the access to an official translation in one's own language, combined with the possibility ultimately to rely on a single authentic version, is a more reliable guide to the real meaning of a law.[23]

c) The one claim that truly can be made for strong multilingualism alone is that legislating and deciding cases parallel in different languages, and including, in the drafts of legal texts, the different contexts the respective language versions may have may allow the law to get closer to reality and result in higher quality and equity.[24] This claim, while an intriguing idea, is also somewhat elusive. If one is to understand "context" as legal context, the claim is not quite convincing. To give an example: if one realizes that "impossibility" in common law and "*Unmöglichkeit*" in German law have quite different contexts,[25] it is difficult to see how these contexts can be included in different language versions of one meaningful bill, and even more difficult to see how they could enrich the understanding of that law as opposed to making it simply dark, or meaning different things in different versions. Rather, it appears preferable to avoid the use of concepts which cannot comfortably be transported into another language or legal system, and to replace them, if possible already at the defining or the drafting stage, by structuring the law differently to circumvent that problem.[26]

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[22] POZZO, *supra* note 8, at 143.

[23] *Cf.* SCHILLING, *supra* note 13, at 65 *et seq*.

[24] Rainer J. Schweizer, *Sprache als Kultur- und Rechtsgut* (Language as Cultural and Legal Interest), 65 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 360, 379 (2006).

[25] Astrid Wallow, *Herausforderung zur begrifflichen Reflexion: Recht und Sprache aus der Sicht des Rechtsvergleichers* (Challenge to Conceptual Reflection: Law and Language From the Perspective of Comparative Law), *in* LAW AND LANGUAGE — RECHT UND SPRACHE 3, 8-11 (Thomas Lundmark & Astrid Wallow eds., 2006); Barbara Pozzo, *Multilingualism, Legal Terminology and the Problems of Harmonising European Private Law*, *in* MULTILINGUALISM AND THE HARMONISATION OF EUROPEAN LAW 3, 6-10 (Barbara Pozzo & Valentina Jacometti eds., 2006).

[26] CAUSSIGNAC, *supra* note 4, at 170; Robinson, *supra* note 4, at 154.

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On the other hand, on a different understanding of "context," the claim discussed is felt to coincide with this claim that in the case of two language versions of a law, light is shed on that law from different angles, producing a more complex and more exact picture of its meaning.[27] This I understand to mean that to look at more than one language version of a law permits an in-depth interpretation of that law by giving it additional texture and color. To put it differently, the meaning of such a law can best be pinned down by what might be called linguistic triangulation, i.e. by approaching it from different linguistic angles. Linguistic triangulation must be understood as combining the interpretive outputs from more than one language version. An important precondition of linguistic triangulation is that one of the problems apt to be caused by strong multilingualism, i.e. contradictory language versions, has been avoided. On the other hand, the other problem apt to be caused by strong multilingualism to wit the indeterminacy of the law inevitably caused by slight variations between the different language versions virtually is a precondition of linguistic triangulation.

It may be helpful to give an example.[28] Art. 175(2) of the Treaty Establishing the European Community (EC) used to provide for a special legislative procedure for the "management of water resources." The question (which meanwhile has found an authentic answer in Art. 192 (2) (b) of the Treaty on the Functioning of the European Union (TFEU) was whether this concept covers only quantitative or also qualitative aspects. A comparison of the different language versions reveals that two language versions militated in favor of an interpretation that would restrict the concept to cover only quantitative aspects whereas the remaining versions could be interpreted to cover also qualitative aspects. As the different language versions were mutually supportive — as no one version mandated an interpretation that another forbade, they were not contradictory — this was an admittedly rough-cut case for linguistic triangulation. The Dutch version (*kwantitatief waterbeheer*) clearly only covered quantitative measures and gave color and texture to the other language versions which did not prohibit such an interpretation.

Linguistic triangulation is only possible if there has been an input of legislative intention in all the relevant language versions of a law. In turn, this presupposes strong multilingualism, i.e. that all the versions are equally authentic. Non-authentic versions such as mere (even official) translations are generally not recipients of legislative intention.[29] An

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[27] CAUSSIGNAC, *supra* note 4, at 177.

[28] *Cf.* ECJ, Case C-36/98, Kingdom of Spain v. Council of the European Union, 2001 E.C.R I-779, para. 47 *et seq*.

[29] It is otherwise if the non-authentic version is the version in the drafting language and at the same time the basis of the decision, while the authentic version is but a translation of the former. Examples for this constellation are the decisions of the ECJ where the original working language version is dubbed a translation from the language-of-the-case version, while the reality is the other way around; cf. text at *infra* note 80. "There are many parallels at the Commission in individual decisions where the texts all pass through all the internal procedures in English only. At the very end, they are translated into the language of the addressee of the decision and checked

input of legislative intent is also excluded insofar as a specific language version of a law has been written only after the legislature has had its say. While the EU, under the policy of *acquis communautaire*, generally requires new Member States to accept all the EU laws in force at the time of their accession exactly as they find them and declares the translations of those laws into the new language version(s) to be authentic under the same conditions as the original ones,[30] such a version lacking any legislative intention[31] cannot meaningfully be included in a linguistic triangulation analysis,[32] provided that the new version has not in some way been made the object of legislative proceedings. The latter would be the case of those EU laws that are the subject of some accession-related modifications and therefore dealt with in the respective Acts of Accession.

As an opportunity offered only by strong multilingualism, linguistic triangulation is of particular interest for the question of the best way to organize EU multilingualism. If it can be realized, it can serve to refute the argument in favor of weak multilingualism, which is based on the problems caused specifically by the strong variety i.e. the intractability of contradictions between language versions and the inevitable indeterminacy of a law expressed in 23 equally authentic language versions, and also on the easier access to the law offered by weak multilingualism.

Linguistic triangulation as an approach to the interpretation of equally authentic versions of multilingual laws differs from the one adopted by Art. 33 (3) of the Vienna Convention on the Law of Treaties ["Vienna Convention"].[33] That provision presumes that treaty terms have the same meaning in each authentic text, "thus making it unnecessary to compare language versions on a routine basis (that is, when no allegation of an ambiguity in one version or a difference among versions has been made)."[34] While this (rebuttable) presumption may be reasonable in the context of multilingual treaties,[35] it presupposes a

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by the lawyer-linguists. Then the version in the language of the addressee is the authentic version. It happens too often that because of translation mistakes the version in the authentic language has to be corrected while the English version does not." Communication by William Robinson, on file with the author.

[30] *Cf.* e.g. Act Concerning the Conditions of Accession of the Czech Republic Art. 58, 2003 O.J. (L236), para. 33.

[31] Case C-161/06, Skoma-Lux sro v. Celní reditelství Olomouc, 2007 E.C.R I-10841, para. 19, shows the way such translations come into being.

[32] *Cf.* the solution chosen in two Hong Kong cases referred to in: Deborah Cao, *Inter-lingual Uncertainty in Bilingual and Multilingual Law*, 39 JOURNAL OF PRAGMATICS 69, 80 (2007).

[33] *See* the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331.

[34] Christopher B. Kuner, *The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning*, 40 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (ICLQ) 953, 954 (1991).

[35] Contra *id.* at 962.

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language version which, in the individual instance, it would be natural to apply, especially the interpreter's own language or, in court cases, the language of the *forum*. In the EU context this would be a possible approach for national authorities. However, the ECJ has expressly excluded it for national courts.[36] On the other hand, as EU institutions are by nature multilingual, there is in principle no "natural" language version for them. Exceptionally, for the EU courts, the respective language of the case could be considered as the "natural" language.[37] However, to apply Art. 33 (3) of the Vienna Convention in the context of EU law would be contrary to the claim discussed here regarding the opportunities offered by strong multilingualism. Indeed, generally to consider only the language-of-the-case version of an EU law would be to squander the EU courts' multilingualism which, on the contrary, should be used to achieve the best possible interpretation of that law. In this vein, the ECJ states that "it follows from the consistent case-law of the Court that an interpretation of a provision of [EU] law involves a comparison of the language versions."[38]

d) There are therefore two points to be considered: (i) two claims to opportunities offered by multilingualism: clarification of the meaning of a law during the legislative process (offered by both varieties of multilingualism) and creation of the possibility of in-depth interpretation of a law (offered only by strong multilingualism), and (ii) the avoidance of one obvious problem caused by strong multilingualism: the intractability of contradictory language versions of a law. In discussing these points, it is important to keep in mind that the impact a second or further language version can have on the quality of a law is the greater the earlier this impact happens,[39] even if a lesser impact remains possible at a later stage of the text-producing procedure in which the different language versions are generated. The questions here to be discussed are whether current arrangements — the legislative and judicial text producing mechanisms of the EU institutions and, in the case of the ECJ, also the text applying mechanisms, provided for by the law and practice in force — allow those institutions to make the most of those opportunities offered by multilingualism, and to avoid as far as possible the problems it creates. However, before addressing those points, we shall have to discuss the existing institutional framework.

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[36] Case 283/81, CILFIT and Lanificio di Gavardo v. Ministero della Sanità, 1982 E.C.R 3415, para. 16.

[37] Which indeed they ought to apply, for rule of law reasons, in certain circumstances; *cf.* SCHILLING, *supra* note 13, at 58.

[38] Case C-36/98, Kingdom of Spain v. Council of the European Union, 2001 E.C.R I-779, para 47. However, according to Advocate General Jacobs' Opinion in case C-338/95, S.I. Wiener v. Hauptzollamt Emmerich, 1997 E.C.R I-6495, para 65, delivered at a time when the EU had only 11 official languages, `reference to all the language versions of Community provisions is a method which appears rarely to be applied by the Court of Justice itself, although it is far better placed to do so than the national courts.'

[39] Robinson, *supra* note 4, at 5. CAUSSIGNAC, *supra* note 4, at 170, proposes the stage of the design of a law, before even the draft is tackled.

C. The Language Regime

I. Generalities

Since the foundation of the European Coal and Steel Community in 1951, what has since become the EU has had to deal with different levels of multilingualism. One can roughly distinguish between an external and an internal side of the EU's language regime. The external side deals with the relations between the EU and its Member States or their citizens. On that side, it is possible to distinguish between communications by Member States and citizens to the EU institutions (input), and *vice versa* (output). Part of the rules concerning the input are the language rules for administrative and court proceedings involving citizens and EU institutions. Part of the output is the publication of legal texts such as legislation, administrative decisions and judgments which citizens must be offered the opportunity to become aware of. In contrast, the internal side of the language regime concerns intra- and inter-institutional proceedings (including judicial, administrative, governmental and parliamentary and inter-governmental proceedings) that relate among other things to the way those texts are drafted and adopted. It concerns the production of legal texts in the time between the relevant input and the final output. While the external side concerns at least in part questions of the rule of law — which requires e.g. access to the courts and the publication of a law to guarantee its accessibility[40] — the internal side deals mainly with questions of the internal procedures of a government, or a court, and therefore mainly with questions of good governance.

The main principle governing the external side of the EU language regime is the equality of Member State languages because no language can assert any special status.[41] This equality requires that most legal texts are published in all of the EU's 23 official languages. While this is, under comparative aspects, a wholly exceptional principle,[42] it obviously addresses political concerns of the Member States. With a view to protect those concerns, and also to respect the rule of law, there are, for the external side, hard and binding legal rules on

[40] *Cf.* e.g. ECtHR, Landvreugd v. The Netherlands, Appl. No. 37331/97, Jun. 6, 2000, para 54 (unreported).

[41] Christian Kohler, *Le droit de l'Union européenne face à la diversité culturelle: tensions et solutions* (The Law of The European Union, Face of Cultural Diversity: Tensions and Solutions), 62 REVUE HELLÉNIQUE DE DROIT INTERNATIONALE (RHDI) 473, 482 (2009).

[42] *Cf.* Theodor Schilling, *Language Rights in the European Union*, 9 GERMAN LAW JOURNAL (GLJ) 1219, 1220-1225 (2008).

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the use and the authenticity of languages. Those rules cover the Treaties themselves,[43] secondary legislation[44] and to a lesser degree also jurisprudence.[45]

Compared with the external side, the internal side of the EU language regime is less visible, and therefore has less symbolic value for the Member States. This has two consequences. On the one hand, the relevant rules are regularly laid down not in general acts of legislation but in rules of procedure of the institutions, or are just a question of their institutional practice. On the other hand, practical considerations, foremost questions of finance and manpower, play a much more important role in the internal side.[46] Indeed, the *leitmotiv* here is the tension between the criterion of equality of Member State languages which governs the external side and practical requirements.

Concerning the way in which this tension plays out, it appears that the more an internal procedure of an institution, or an inter-institutional procedure, involves elected or appointed politicians as opposed to civil servants or experts, the more the respective language regime tends to respect the criterion of the equality of Member State languages. This fact which will be demonstrated, *en passant*, by the example of the EU legislative procedure is easily explained by practical considerations: while EU "officials ... are expected to know two Union languages in addition to their mother tongue," and "experts in general also use at least one foreign language,"[47] national politicians participating in deliberations of the Council and MEPs are not selected according to their linguistic abilities.

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[43] *Cf. supra* note 14.

[44] *Cf.* Treaty on the Functioning of the European Union, art. 342, Mar. 30, 2010, 2010 O.J. (C383); Council Regulation, art. 1(1) the 1958 Regulation No. 1 Determining the Languages To Be Used By the European Economic Community, 1958 O.J. ENGLISH SPECIAL ED., Ser. 1 Chap. 1952-58, 59, (with later amendments), as amended from time to time; *see supra,* note 14.

[45] Most decisions of the ECJ and the General Court (but cf. *infra* note 80) are in fact published in all the official languages: Instructions to the Registrar of the Court of Justice Art. 24, 1974 O.J. (L350) 33, as amended from time to time, which refers to Regulation No. 1., art. 1, 18 (4) of the Instructions to the Registrar of the General Court of 5 July 2007 as amended on 17 May 2010, 2010 O.J. (L170) 53, requires the Registrar to ensure that the case-law of the Court is made public in accordance with any arrangements adopted by the Court.

[46] As the Council expressly acknowledges, "for practical reasons, there have always been limits on multilingualism at the Council": Application of Language Rules at the Council, available at http://www.consilium.europa.eu/showpage.aspx?id=1255@lang=en (last accessed: 31 March 2011) — Of course, those practical considerations are wholly legitimate. Indeed, as the internal side is not determined by law, but by an attempt at good governance, it is not possible to identify a legal rule against which to gauge the solutions found by the institutions. To put it differently, the dichotomy lawful/unlawful does not apply to the internal side of the EU language regime. Rather, it can be said that those solutions should respect, as much as possible, certain desiderata, which reflect aspects of good governance.

[47] *Id.*

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The striking exception is the ECJ, which strongly encourages Member States to appoint only judges having a working knowledge of French.[48]

II. Current Arrangements: The Legislature

Most legislative procedures in the EU formally start at the services of the Commission.[49] At those services, on the internal side, legal texts are regularly drafted in either English or, in a steadily decreasing percentage, French.[50] The language that is employed in the individual case is the working language of the administrative unit charged with the elaboration of the text in question.[51] However, those texts which are to be adopted by the Commission (in the sense of "college of Commissioners") thereby change over from the internal to the inter-institutional or the external side, as the case may be. Accordingly, for the purpose of the Commission's decision, they are translated[52] into "the authentic language or languages."[53] Thus, "instruments of general application" issued under the Commission's own authority, while originally drafted in only one language, are adopted by the Commission and published in all 23 official languages.[54] Similarly, all legislative Commission proposals to be submitted to the Council or the EP and the Council, while apparently adopted, by the Commission, in only three "procedural languages"[55] are submitted in 23 languages to the legislative institutions. Those proposals meticulously respect the equality of Member State languages: while "the language in which the original version was drafted is indicated in the documents distributed to the Members of the Commission for adoption"[56] the proposals as submitted to the legislative institutions do

[48] As the knowledge of French as a foreign language is generally in decline, this appreciably reduces the pool of eligible candidates, and potentially disqualifies the candidate with the strongest judicial credentials.

[49] Art. 17 (2) EUT; Robinson, *supra* note 5, at 130.

[50] *See* Robinson, *supra* note 5, at 131. The following are recent percentages given for French drafting: ROBINSON, *supra* note 5, at 131: 15% ; EC-DGT, *supra* note 3, at 89: 12% (2008); Robinson, *supra* note 29: 10%.

[51] Robinson, *supra* note 4, at 4; Robinson, *supra* note 5, at 131. (Provides more details on `Drafting within the Commission')

[52] Rules of Procedure of the Commission art. 17(1), (2), (3), 2010 O.J. (L55) 61; Robinson, *supra* note 5, at 133.

[53] Rules of Procedure of the Commission art. 17(5), 2010 O.J. (L55): this expression signifies "the official languages of the European Union ... in the case of instruments of general application".

[54] A detailed description of the Commission lawmaking procedures under multilingualism aspects is in: EC-DGT, *supra* note 3, at 30-36.

[55] EC-DGT, *supra* note 3, at 20.

[56] *Id.*

not allow the determination of the language in which they were drafted originally. Nonetheless, this language may gain importance again at the very end of the legislative procedure.[57]

The most important procedure based on Commission proposals is the ordinary legislative procedure before the EP and the Council defined in Art. 294 TFEU.[58] In the inter-institutional context, the EP will deal with legal texts, especially Commission proposals and Council positions, only once they have been translated into all the official languages.[59] Intra-institutionally, as a rule, amendments for consideration in Parliament shall be put to the vote only once they have been distributed in all the official languages.[60] At the preceding committee stage, amendment proposals to be considered by the committee can be made by the committee members effectively in any official language[61] on the understanding that the proposal is then translated into all the other official languages.[62] For all the amendment proposals taken together that means that they contain, at least potentially, contributions in all the official languages, even though those contributions themselves, considered one by one, normally are drafted in only one language.[63] Similarly, while the representatives of the Member States may speak in their own languages in the deliberations of the Council,[64] the latter are based on documents submitted in all the

[57] *Cf*. text at, *infra* note 108.

[58] A detailed description of the procedure under multilingualism aspects is in: EC-DGT, *supra* note 3, at 20-30.

[59] *Cf.*, for Council positions, Rule 61 (1) of the Rules of Procedure of the European Parliament, 7th parliamentary term — July 2010, available at http://www.europarl.europa.eu (last accessed: 31 March 2011). For implementing measures envisaged by the Commission, which fall under the regulatory procedure with scrutiny, *cf.*, to the same effect, Rule 88 (4) (a).

[60] Rules of Procedure of the European Parliament, 156(6), *id*. Practice appears to differ from this rule and generally to be content with either a French or an English version.

[61] *Cf*. *Id.* at 195 (1).

[62] On multilingualism before the EP: *Id.* at 23(9), 29, 42 (3), 113(5), 123(1), 142(2), 181, 185(7), 201(5), 146.

[63] As the acting persons in these procedures are the members of the EP this respect for the equality of Member State languages on the internal side of the language regime was to be expected according to the general rule: *cf.* text at *supra* note 47.

[64] While the Council's Rules of Procedure (Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, 2009 O.J. (L325) 35, are not particularly clear as concerns the use of languages — art. 14 refers to unspecified "language rules" — it follows *e contrario* from the 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, 2005 O.J. (C148) 1, part b, that speeches at Council meetings in any of the official languages of the EU are actively and passively interpreted into the other official languages: Application of Language Rules at the Council*, supra* note 46.

official languages.[65] This implies that documents presented by the Member States in their own languages are translated at the Council into the other official languages.[66] On the internal side this implies that there is "no clearly identifiable `master version' available of the proposal,'"[67] indeed, that there is no "master version" at all. On the external side, of course, all legislative acts of the Council or of Parliament and Council are published in all 23 official languages.

III. Current Arrangements: The ECJ

EU adjudication is the domain of the ECJ. At the ECJ, while the external language regime is dealt with in the Court's Rules of Procedure,[68] the internal regime constitutes an established institutional practice based on tradition and expediency. As is well known, the working language of the ECJ, and of the General Court, at present is French.[69]

The input consisting of the pleadings and statements in the cases brought before the ECJ as well as its output follow the external regime. Applications and requests for preliminary rulings can reach the ECJ in any of the EU's 23 official languages,[70] and Member States are entitled to present observations in their own languages.[71] In general, the language of the

[65] Council's Rules of Procedure, *id.*, Annex IV ("Referred to in art. 16"), pt. 1(h)(n 1): "The Council confirms that present practice whereby the texts serving as a basis for its deliberations are drawn up in all the languages will continue to apply."

[66] As the acting persons in these procedures are the Member States' representatives in the Council this apparent respect for the equality of Member State languages on the internal side of the language regime was to be expected according to the general rule, *Cf.* text at *supra* note 47: But "[f]or communications within the institution ... the most widely understood languages are used; the same applies for work involving civil servants and experts from the Member States," *see* the Application of Language Rules at the Council*, supra* note 46.

[67] EC-DGT, *supra* note 3, at 20.

[68] Statute of the Court of Justice (Protocol on the Statute of the Court of Justice) art. 64, 2010 O.J. (C83) 210: "[t]he rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously". However, "[u]ntil those rules have been adopted, the [relevant] provisions of the Rules of Procedure of the [ECJ] ... shall continue to apply."

[69] This results clearly from the "Notes for the guidance of Counsel", published by the ECJ and available at www.curia.europa.eu/en/instit/txtdocfr/autrestxts/txt9.pdf (last accessed: 11 July 2011). According to point A.3 - Use of languages, 5th para. of those notes, "At present, the working language of the Court is French."

[70] Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 art. 29(2), 1991 O.J. (L176) 7, (as amended from time to time, with the latest amendment 23 March 2010, 2010 O.J. (L92) 12; consolidated version available at 2010 O.J. (C177) 1.

[71] Rules of Procedure art. 29(3) (Consolidated version).

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case which according to Art. 29 (3) of the Rules of Procedure "shall in particular be used in the written and oral pleadings of the parties .... and also in ... the decisions of the Court" will be the language chosen by the applicant or, in preliminary proceedings, in the language of the national court.[72]

Which texts get translated at the ECJ, and into which languages, depends on the type of case. Preliminary requests of national courts, which "shall be notified to the Member States,"[73] are translated, in full or as a summary, according to Art. 104 (1) of the Rules of Procedure, into all the official languages of the EU. Direct actions, written pleadings and statements of the parties and the Member States are translated into French[74] and, if they are not in the language of the case, into that language. The Commission's pleadings and statements are presented in the language of the case and in French. Questions the ECJ puts to the parties are drafted in French; if French is not the language of the case, they are translated into that language. The report for the hearing[75] is regularly drafted in French[76] and then translated into the language of the case.[77] The Opinions of the Advocates General are generally written either in their own languages or in one of the five languages English, French, German, Italian and Spanish; they are translated into all the official languages. Judgments, as just stated, are mentioned in Art. 29 (3) of the Rules of Procedure which implies that they are authentic in the language of the case,[78] this being a question of the external side of the language regime.[79] However, in fact, irrespective of that provision, judgments are drafted, deliberated and finalized in French. Before the final deliberation, the draft judgment is submitted to a *lecteur d'arrêts*, a "judgment reader," whose task is to

[72] Rules of Procedure art. 29(2) (Consolidated version).

[73] Statute of the Court of Justice art. 23, *supra* note 68, para. 1.

[74] *Cf.* Notes for the Guidance of Counsel, *supra* note 69.

[75] Statute of the Court of Justice art. 20, *supra* note 68, para. 4.

[76] Rules of Procedure art. 29(5) (Consolidated version): "the Judge-Rapporteur ... in his report for the hearing ... may use one of the [official] languages ... other than the language of the case."

[77] *Id.*

[78] Opinions of the court under Treaty of the Functioning of the European Union [TFEU] art. 218(11) are authentic in all the official languages.

[79] Notwithstanding this, the ECJ generally will consider them, in later proceedings, in its working language, i.e. French. Still, in rare cases it may be convenient for the Court to ground a new judgment on the language-of-the-case version, rather than the French version, of a former judgment.

burnish the French version. After the final deliberation, judgments are generally translated into the language of the case and all the other official languages.[80]

It is a common but little known feature of the translation of the Court's judgments especially into the language of the case that translators do not start afresh. Rather, those translations are the last chapter in an ongoing story. Concerning EU legislative texts quoted by the Court, the translation of the judgment into the language of the case generally will follow the language-of-the-case version of such a text even if that text is adopted as a *dictum proprium* by the Court and even if its language-of-the-case version is not, or only with difficulties, reconcilable with the French version on which the judges have based their judgment.[81] Concerning more specifically the Court's preliminary rulings, their translations into the language of the case are the last chapters in a story of back and forth translations starting with the translation into French of the national court's preliminary request. Inevitably, they retain vestiges of that story. Especially, as the preliminary ruling is the answer to the preliminary request, the ruling's translation will closely follow the original wording of the request, quite often even if the meanings of the translation of the request and thus of the French version of the ruling differ slightly from the language-of-the-case versions of those texts by being for instance more general or more specific.[82]

D. Multijuralism

I. The Legislature

Multijuralism, it has been claimed above, provides the EU legislature with a toolbox of possible solutions for certain situations. The more than 27 legal systems of the Member

[80] There exists a rather well defined class of judgments (although the definition apparently has not been made public), which are not published in the Court Reports. Those judgments are translated from the French only into the language of the case and can be found on the ECJ's website in those two languages. For example: Case C-17/09, *European Commission v. Federal Republic of Germany*, judgment of 21 January 2010, 2010 O.J. (C 179) 9, available at the Court´s website, http://curia.europa.eu (last accessed: 11 July 2011).

[81] *Cf.* e.g. ECJ, Joint cases C-57/09 and C-101/09, Federal Republic of Germany v B and D, judgment of 9 November 2010, para. 13, NVwZ 2011, 285, also available at the Court´s website, http://curia.europa.eu (last accessed: 11 July 2011) (quotation of Recital 9 of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004 O.J. (L304) 12 and para 118 (*dictum proprium* of the Court): "*à titre discrétionnaire par bienveillance ou pour des raisons humanitaires*" ("on a discretionary basis on compassionate or humanitarian grounds") *versus* "*aus familiären oder humanitären Ermessensgründen*" (on discretionary family or humantarian grounds).

[82] An example is given at *infra* note 123.

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States can be seen as so many testing grounds for such solutions. For the EU to have such a wide range of competing legal systems at its disposal is an asset which, for a number of reasons, it should strive to make the most of. There is the general consideration that new EU law should pay "attention to the lessons of national experience."[83] More specifically, from the point of view of the EU, to fully use this asset would enlarge the pool from which European legislation and jurisprudence can draw inspirations[84] with a view to identify the best available solution. From the Member States' point of view, it would respect the principle of the equal participation of all legal systems[85] in the EU process, which flows directly from the larger principle of legal equality of all Member States. This implies that legal concepts from all the legal systems of the EU should have an equal potential of becoming part of the European legal system.[86]

The question therefore is whether current arrangements effectively enable the European legislature to look for the most adequate solution for a given problem among as wide a range of Member State legal concepts as possible. At first glance, this appears doubtful; drafting a legal text in only one (alternating) language, chosen more or less at random among only two effective working languages, appears to make it more difficult for legal concepts from legal systems not available in the drafting language to enter the European legal system, irrespective of their substantive merits. But there are considerations which at least mitigate that difficulty. One consideration is that many EU officials do not work in their mother tongue. Quite often therefore the legal education, if any, of the draftsperson and/or of the legal reviser who will examine the draft[87] will provide them with the knowledge of legal concepts that are unknown to the legal system(s) corresponding to the drafting language.[88] Less haphazardly, the drafting of legislation at the Commission is not

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[83] John Mummery, *Links with National Courts*, *in* MAKING COMMUNITY LAW. THE LEGACY OF ADVOCATE GENERAL JACOBS AT THE EUROPEAN COURT OF JUSTICE 100, 109 (Philip Moser & Katrine Sawyer eds., 2008).

[84] Alexander Roth, *Die "Europäisierung" des rumänischen Rechts* (The "Europeanization" of Roman Law), BERLIN EASTERN EUROPEAN INFO 91, 92 available at www.oei.fu-berlin.de/media/publikationen/boi/boi_14/29_roth.pdf (last accessed 11 July 2011), claims that comparative lawyers and the legislature, by looking at Eastern European States, could occasionally find surprising, interesting and very helpful suggestions for our own legal systems.

[85] *Cf.* Rudolf Streinz & Stefan Leible, *Die Zukunft des Gerichtssystems der Europäischen Gemeinschaft — Reflexionen über Reflexionspapiere* (The future of the Judicial System of the European Community - Reflections on Reflection Papers), EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT (EWS) 1, 7 (2001).

[86] *See* Wolfgang Kahl, *Sprache als Kultur- und Rechtsgut* (Language as a Cultural and Legal Interest), 65 VEROFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 386, 451 (2006).

[87] On whom *cf*. text at *infra* note 113.

[88] Robinson, *supra* note 4, at 5.

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done by a single individual enclosed in her study room and cut off from communication with others. On the contrary, it is done through consultations with Member State officials in numerous committees and with lobbyists in public hearings. Thus, the draftsperson will have the benefit of suggestions from all kinds of interested parties ("stakeholders"). In this way, there is every reason to assume that at or even before the monolingual drafting stage it will be possible for her to make good use of the toolbox. This applies for both autonomous Commission law making and for the ordinary legislative procedure.

In the latter case, once a legislative proposal proceeds to the EP and Council stages, the MEPs and the representatives of the Member States in the Council, respectively, have every possibility to present, by proposing apposite amendments, concepts suggested by their home legal systems which they may think superior to the one chosen in the Commission proposal. This legislative procedure therefore offers further opportunities for Member State legal concepts possibly overlooked at the drafting stage to enter the EU legal system.

The conclusion must be that current institutional arrangements allow the legislative institutions full access to the toolbox of multijuralism. Whether those institutions are able to use it to best advantage is no longer a legal but a political question.

II. The ECJ

At the ECJ, the comparative method suggested by multijuralism has a connecting factor in the Treaties themselves. Indeed, the ECJ is required to apply it for a rather narrowly defined class of cases, to wit cases of non-contractual liability of the EU, by Art. 340, 2nd para. of the TFEU. Going far beyond that requirement, the Court from the very beginning has applied[89] the comparative method on a very large scale, thereby potentially granting itself access to concepts of all Member State legal systems. The application of the comparative method is facilitated at the Court by its Research and Documentation directorate. The directorate comprises lawyers from all Member State legal systems and provides the Court, at its request, with comparative research notes. In addition, because of the parties' input into the judicial proceedings the application of that method is more than a mere possibility. Well advised parties will be able to refer the Court to concepts advantageous to their case from any one of the legal systems of the EU's Member States and, perhaps even more importantly, will be able forcefully to push concepts known to their own legal systems. The ECJ's human rights jurisprudence which started out with a

[89] *Cf*. e.g. Advocate General Lagrange, Opinion 28, 29 and 30/62, Da Costa en Schaake et al. v. Nederlands Belastingsadministratie, 1963 E.C.R 31, 40. (Reviewing the principles common to the Member States which govern *res judicata*).

sequence of preliminary rulings requested by German courts and argued by German parties invoking the human rights protection guaranteed under German law is a case in point.[90] A more recent example of the application of this method is the acceptance of the EU's liability for unjust enrichment.[91] In conclusion, there can be no doubt that also at the ECJ all arrangements are in place to make the best possible use of the toolbox.

E. Multilingualism

I. The Legislature

1. The Question of the Early Impact of Multilingualism

It has been stated above that any impact a second or further language version can have on the quality of a law must be the greater the earlier this impact happens.[92] In the EU context, any approach that would provide for an involvement of all 23 official languages at the drafting stage or even before, at the stage where the law is designed, would require that speakers of all those languages be involved. For evident practical reasons,[93] such as the sheer number of officials that would be needed this is clearly impossible.[94] Thus, in the

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[90] *Cf.* ECJ, Case 29/69, Erich Stauder v. Stadt Ulm, Sozialamt, 1969 E.C.R 419; ECJ, Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R 1125; ECJ, Case 4/73, J. Nold Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft, 1974 E.C.R 491; ECJ, Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, 1979 E.C.R 3727.

[91] ECJ, Case 47/07, Masdar (UK) Ltd. v. Commission of the European Communities, 2008 E.C.R I-9761, para. 44.

[92] *Cf*. text at *supra* note 39.

[93] The same was true for the then 11 official languages of the EU: Isolde Burr & Tito Gallas, *Zur Textproduktion im Gemeinschaftsrecht* (For Text Production in the Legal Community), *in* RECHTSSPRACHE EUROPAS. REFLEXION DER PRAXIS VON SPRACHE UND MEHRSPRACHIGKEIT IM SUPRANATIONALEN RECHT (Legal Language of Europe. Reflection on the Practice of Language and Multilingualism In Supranational Law) 195, 199 (F. Müller and I. Burr eds.,2004). It is no coincidence that the ideal of the plurilingual drafting has been exemplified by legislative drafting in the Swiss Canton of Berne, making use of its only two official languages: SCHWEIZER, *supra* note 24.

[94] The consequences of this impossibility might be mitigated in the long run in this way that concepts of EU law, through constant use and autonomous interpretation, would gain their own uniform contexts, independent of the respective language versions, throughout the EU. This is considered a precondition of greater uniformity of EU law: Gianmaria Ajani & Piercarlo Rossi, *Multilingualism and the Coherence of European Private Law*, *in* MULTILINGUALISM AND THE HARMONISATION OF EUROPEAN LAW, *supra* note 25, at 79, 83-84. But in spite of efforts of the Commission going in that direction — on the question of terminologisation of EU law: Ralph Christensen and Friedrich Müller, *Mehrsprachigkeit oder das eine Recht in vielen Sprachen* (Multilingualism, Or the One right in Many Languages), *in* RECHTSSPRACHE EUROPAS. *supra* note 93, at 9, 13; POZZO, *supra* note 8, at 136 — we are still far from reaching that aim; Ajani/Rossi correctly see this as a "long term project." Also, such an approach would fail to achieve the specific advantages a parallel drafting might offer.

case of the EU, the realization of the ideal of a legislation truly drafted in parallel in all official languages is not a practical possibility. Rather, as not very much would be gained by aiming for a bi- or even trilingual drafting, the method of the (alternate) monolingual drafting of legal texts which are subsequently translated into the other official languages must be accepted as unavoidable.[95] But even so, the sooner translation happens the greater its chance of having any impact at all. It is under this notion that the different stages of the legislative procedure will be discussed.

As reported above, the Commission proposal of a law is drafted and finalized in a single language before being translated and submitted to the college of Commissioners and then, if approved, to the legislative institutions. In this process, translation and thus a possible impact of other languages on the draft happens only at the very end of the drafting process. Inevitably, this approach must diminish any possible impact the other 22 official languages might have in the elaboration of a law.

Things are different at the legislative stages before the EP and the Council. It is true that those stages mirror the Commission stage in this respect that as well as the Commission's proposals, proposed amendments by MEPs or Member States' representatives are produced monolingually. However, in contrast to the Commission stage, the translation of those proposals into the other official languages happens quasi-immediately, and in any case, before the drafts enter into the wider legislative procedure. An impact of the respective 22 other official languages is thereby possible.

Still, the legislative procedure is not geared towards a fine-tuned concern about the exact formulation of the different language versions. In Parliament it will generally be difficult to get MEPs of another mother tongue interested in the finer nuances of a certain language version.[96] Indeed, under Rule 157 (1) (d) of the EP's Rules of Procedure, in contrast to what such fine-tuning would require,

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[95] Robinson, *supra* note 5, at 153, proposes to consider `involving the [Commission's] legal revisers at the actual conception stage of all major new legislative initiatives'; EC-DGT, *supra* note 3, at 67-69, undertakes the demonstration of "the possible differences and similarities between the different forms of legal translation and multilingual drafting."

[96] This lack of interest may easily lead to the distortion of linguistic arguments. An example taken from a (quasi-) parliamentary context is telling. One of the subjects of the debates of the Convention on the Charter of Fundamental Rights of the EU was the question whether the Preamble of the Charter should refer to the religious foundations of Europe. The Convention decided against such a reference and in favor of a reference to Europe's `spiritual' heritage. The German party did not like this outcome. Indeed, for rather spurious "translation reasons" this concept was successfully claimed to have to be rendered as "*geistig-religiös*" in German, making the German version the only one retaining an undisguised reference to religion (2nd para of the Preamble). On the relevant debates of the Convention: Matthias Triebel, *Religion und Religionsgemeinschaften im künftigen Europäischen Verfassungsvertrag. Die Debatten des Europäischen Konvents* (Religion and Religious Communities in the Future European Constitutional Treaty. The Debates of the European Convention), para. 82-88, available at http://www.nomokanon.de/abhandlungen/014.htm (last accesssed: 31 March 2011).

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> "[n]o amendment shall be admissible if ... it is established that the wording in at least one of the official languages of the text that amendment is seeking to change does not require amendment; in this case, the President shall seek out a suitable linguistic remedy together with those concerned."[97] In the Council, there exists a real danger that otherwise insurmountable differences between the Member States will lead to formulaic compromises, which, under the specific conditions of multilingualism, may take the form of intentionally diverging language versions.[98]

The earliness of the impact of (the translation into) other official languages is relative in this sense that it can be considered in relation to the legislative procedure as a whole or in relation to the individual input into that procedure. In the first context, earliness is not well developed in the EU legislative procedure. In contrast, in the post-Commission stages and in the second context, while regularly the drafting of amendment proposals is monolinguistic, translation into the other language versions is quasi-instant. We shall now discuss how these different shades of earliness play out with regard to clarifying the meaning of an EU law and to avoid divergences during the legislative process and, after the conclusion of that process, with regard to creating the possibility of linguistic triangulation.

2. The Clarifying Effect of Translations

The clarifying effect of translations — which applies as well for weak as for strong multilingualism — is based on two facts. As mentioned above, translation makes it necessary to re-think the original thought so that it fits into the different way of thinking required by the foreign language/system. This makes it possible to identify implied assumptions the original covertly made. The second fact is simply that the translator is the

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[97] The "suitable linguistic remedy" is apparently sought by the EP's legal/linguistic experts (on whom *cf.* text at *infra* note 103) under the guidance of the President.

[98] The clause quoted from Federal Republic of Germany v. B and D*, supra* note 81, appears to be a case in point. There is no earthly reason why a translator should render "*bienveillance*" or "compassionate grounds" as "*familiäre ... [G]ründe*". Rather, it appears that, most likely at the instigation of the German representative in the Council, the wording of the pertinent German law was inserted into the German version of the directive. *See also* the French Conseil d'état, Rapport public 1992, Le droit communautaire (Etudes et documents n. 44): 'là où les juristes cherchent la précision, les diplomates pratiquent le non-dit et ne fuient pas l'ambiguïté. Il arrive donc, plus souvent qu'on ne croit, qu'ils ne se mettent d'accord sur un mot que parce qu'il n'a pas la même signification pour tout le monde. […] De même encouragent-ils des techniques de rédaction qui permettront de laisser subsister ici et là d'intéressantes – et prometteuses – contradictions.'

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closest reader of the text being translated. As such, she is in a position to advise the author of that text of any ambiguities or implied assumptions the latter might contain. While it will always be up to the author to decide whether or not to act upon an such an advice, her willingness to do so will depend on the time which has elapsed between the original drafting of the text and the translator's advice (among others) and especially on whether the text is still in her hands or has already been disseminated and become the object of dealings with other persons. Both these situations demonstrate the importance of an early translation to allow any impact of other languages. Under both aspects, the legislative procedure before Parliament and Council is more open to the clarifying effects of translations than the Commission stage. Indeed, an advice by a translator that a proposed amendment contains ambiguities or implied assumptions is more likely to be acted upon by its author, especially if it has not yet been submitted to the competent committee or to Parliament, as the case may be, than an advice which can only be given once the original draft of a legislative proposal has been discussed through the different layers of the Commission's hierarchy.

3. The Avoidance of Divergences

A very important aspect of every legal system is the avoidance of contradictory laws. In the EU's multilingual system this aim is particularly difficult to achieve in view of the sheer number of its laws, as every single law is protean in the sense that it exists in 23 different versions. Still, to the extent that we have discussed the EU's legislative procedure, from the drafting stage at the Commission to the voting of the bill by the EP and the Council, there is no special provision in place to try and avoid divergences between different language versions,[99] although the problem of such divergences is of course well known.[100] In most parliamentary systems of government that would be the end of the matter. In those systems, once parliament has voted a law, the only acts necessary for the coming into force of that law are its promulgation by the head of State, which may or may not allow for control of that law, and its publication in a gazette. In the case of EU legislation however, in view of its 23 equally authentic languages, a final control of the consistency of

[99] While the Commission's legal/linguistic experts in principle have the task to intervene in the case of legislative proposals the Commission submits to EP and Council, they consider it regularly more important to concentrate on the Commission's own law-making which is immediately finalized: Stefania Dragone, *The Quality of Community Legislation and the Role of the European Commission Legal Revisers, in* MULTILINGUALISM AND THE HARMONISATION OF EUROPEAN LAW, *supra* note 25, at 99, 101.

[100] *Cf.* the interpretation (pursuant to Rule 211 (5)) of Rule 146 of the Rules of Procedure of the EP, available at http://www.europarl.europa.eu: "Where it has been established after the result of a vote has been announced that there are discrepancies between different language versions, the President shall decide whether the result announced is valid ... If he declares the result valid, he shall decide which version is to be regarded as having been adopted. However, the original version cannot be taken as the official text as a general rule, since a situation may arise in which all the other languages differ from the original text." (Last accessed: 11 July 2011).

the 23 language versions at the very end of the legislative process is imperative to minimize the incidence of contradictions between language versions.[101] On the other hand, it is a democratic anathema to have unelected experts working on the text of a law once it has been adopted by the legislative bodies. A possible solution for this dilemma is to have the legislative bodies vote twice on a bill — once before and once after finalization by the experts — or at least to have them take cognizance, with the possibility of another vote, of the finalized language versions.[102]

Such procedures are indeed in place in the EU although treaty and legislative texts are silent about them.[103] Rather, the legislative institutions have provided for the editing of legal texts and their finalization by their respective legal/linguistic experts.[104] Those experts, when finalizing the outcome of an ordinary legislative procedure, act in close cooperation and by mutual agreement.[105] The legislative institutions have also provided for the possibility of two votes on a bill. Indeed, there are two "categories of decision or outcome at a Council — terms referring to a decision adopting a text finalized by the Legal/Linguistic experts: 'adoption' or 'common position' (for co-decision procedures) — and terms referring to a decision adopting a definitive position on a text, subject to finalization of that text by the Legal/Linguistic experts: 'political agreement.'"[106] The EP

[101] While this final control is imperative in the case of strong multilingualism, it would also be strongly advisable in the case of the weak variety.

[102] The ECJ appears to be less demanding. Following the Opinion of its Advocate General, it has held that certain amendments "do not appear to have exceeded the limit applicable when language versions of a Community measure are harmonized", ECJ, Case C-380/03, Federal Republic of Germany v. European Parliament and Council of the European Union, 2006, E.C.R I-11573, para. 127. Neither the Court nor its Advocate General say anything about that limit which obviously is less restrictive than the limit laid down in ECJ, Case 131/86, United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities, 1988 E.C.R 905, para. 35, i.e. the correction of spelling and grammar. It is noteworthy that judgment C-380/03 was handed down before the EP procedure to deal with the results of legal/linguistic finalization described in the text below had been in place.

[103] The actual basis of the procedure appears to be the Joint Declaration on Practical Arrangements for the Co-Decision Procedure, 2007 O.J. (C 145) 5; and *cf.* Council's Rules of Procedure, art. 22: "[T]he Legal Service shall be responsible for checking the drafting quality of proposals and draft acts at the appropriate stage."

[104] The Council's Legislative Quality directorate is staffed by some 70 experts, three for each official language: Jean-Paul Piris, 'The Council Legal Service', available at www.europeanlawyer.co.uk/yb_europeancouncillegalservice.html (last accessed: 31 March 2011). The actual number appears to be 90: Robinson, *supra* note 29. The corresponding unit of the EP appears to be staffed by four experts for each official language.

[105] Rules of Procedure of the European Parliament 216(2), 180(2), *supra* note 59.

[106] Guidance given by the Council's legal service, insofar as here relevant: *cf.* HOUSE OF LORDS, Select Committee on European Union Session 2001-02 Twenty-Third Report Part 3: Summary of Correspondence (ordered to be printed 18 June 2002), para. 28, available at http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/publications/previous-sessions (last acccessed: 11 July 2011). The coming into force of the Lisbon Treaty has changed nothing on that matter.

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has adopted a similar procedure. According to Rule 180 (2) of its Rules of Procedure, "[t]exts adopted by Parliament shall be subject to legal-linguistic finalization under the responsibility of the President." This indicates that before a legislative text is finalized and published in the Official Journal (OJ),[107] that text is edited by legal/linguistic experts. Only at the end of the meeting of those experts are all language versions considered to be final. While, in contrast to the Council, the EP generally will not vote again on the finalized version, according to Rule 180 (3), the procedure laid down in Rule 216 shall apply "[w]here, in order to ensure the coherence and quality of the text in accordance with the will expressed by Parliament, adaptations are required." Under that procedure the EP's President refers, where errors are identified in a text adopted by the EP, a draft corrigendum to the committee responsible. That committee will examine it and submit it to the EP where it will be deemed approved unless a request is made that it be put to the vote.

The legal/linguistic experts intervene after the "political agreement" on a text in the Council and, as the case may be, after the vote of the EP on that text but before its publication in the OJ. This is to say, they intervene at the latest imaginable moment of the legislative procedure, at a point where, but for the idiosyncrasies of a multilingual system, there would be a final text. This implies that those experts are not at all free to remake the different language versions of a law as they might think fit. In particular, they cannot change the structure of the text to make it amenable to the requirements of certain languages (provided that any structure could be found that is amenable to all 23 languages). More than that, they appear regularly to be restricted to align the different language versions with the "reference version"[108] which generally will be the version in the language in which the original Commission proposal was drafted.[109] While amendments of other versions appear to be frequent the reference version remains mostly unchanged.[110] Thus, any clarifying effect of translation is excluded at that stage, as is any other impact on

[107] Rules of Procedure of the European Parliament, 180(1)&(2), *supra* note 59.

[108] *Cf.* Advocate General Léger, Opinion, Federal Republic of Germany v. European Parliament and Council of the European Union, *supra* note 102, para. 193.

[109] *Cf.* EC-DGT, *supra* note 3, 23: "The language of [the antecedent] political consultations and the drafting is usually the source language of the text or another *lingua franca* (generally English or French)."

[110] In Federal Republic of Germany v. European Parliament and Council of the European Union, *supra* note 102, eight of the (then) eleven language versions were amended: *cf.* Opinion, para 193. According to Robinson, *supra* note 29, the jurist-linguists meeting goes through the whole text in English and agrees on the final English text, which is then distributed to the Council lawyer-linguists for all the other languages. The jurist-linguists meeting does not consider any points that are specific to other languages, unless they raise issues that can be resolved only by changing the original (retroaction).

the reference version. For this, it is too late.[111] The experts are strictly limited to eliminating divergences and thereby shaping the different language versions in such a way that they become mutually supportive. But even in this limited area, there is a further restriction in those cases in which diverging language versions are politically intended as part of a formulaic compromise.[112]

Concerning autonomous Commission law-making a similar procedure is in place. The Commission has its own legal revisers who have similar tasks and competences as the legal/linguistic experts of the Council and the European Parliament.[113] Therefore, the conclusions reached above apply *mutatis mutandis* also to Commission law making.

4. The Question of Linguistic Triangulation

The possibility of linguistic triangulation is dependent on the plausibility of the assumption that different language versions of a law are the expression of a single legislative intent in different linguistic forms. As mentioned above, this requires that those versions be the result of some legislative input. At the very least, before the issuance of the act in question, the legislature must in some way have taken cognizance of those versions and approved them. As it is inconceivable that contradictory versions are the expression of a single legislative will, it further requires that the different language versions not be contradictory. These two minimum requirements are normally fulfilled once the legal/linguistic experts have finalized the different language versions of an EU law and those versions have found renewed legislative approval. Thus the EU legislative procedure in principle allows for linguistic triangulation and thereby permits, again in principle, to reap the one benefit claimed for strong multilingualism.

This is not to idealize the linguistic side of the EU legislative procedure. On the contrary, while in the ideal case the drafters of a law are working in parallel in different languages and on a clean slate, the legal/linguistic experts' involvement, as just discussed, is so late that their contribution is restricted to attuning the different language versions to one another. In view of the necessities of the EU legislative procedure, this is still the solution which best allows to prepare the ground for linguistic triangulation. Whether the latter is a real possibility can only be discussed at the level of the application of the laws.

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[111] EC-DGT, *supra* note 3, at 37: "[t]he source text might have to be modified retroactively according to other language versions if these reveal errors or ambiguities."

[112] *Cf.* text at *supra* note 98; Robinson, *supra* note 5, 134: `At this stage, it is difficult to improve the quality of drafting significantly because of the risk of undoing a delicate political compromise.'

[113] *Cf.* Dragone, *supra* note 99; Robinson, *supra* note 5, at 132.

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II. The ECJ and its Different Functions

In deciding cases, the ECJ sometimes has to develop general principles of law. A well known example is the development, in the late nineteen-sixties, of human rights as a new institute of EU law.[114] In other cases the ECJ simply deals with the interpretation and application of general legal texts of primary or secondary EU law. The former group of decisions is more in the way of making laws, the latter more in the way of applying them. In considering multilingualism, it is therefore necessary to distinguish between the relatively free creation of judge-made law, which is quasi-legislative, and the relatively text-bound simple interpretation and application of EU law.[115] It is also important to recall that the multilingualism of the Court's output is of the weak variety under which the concept of linguistic triangulation cannot apply.[116]

1. The Question of the Impact of Multilingualism and the Creation of Judge-Made Law

In the ECJ's decision-making, the equivalent of the legislative procedure is the drafting of a decision by the judge-rapporteur and the deliberation of this draft by the judges sitting on the case. The equivalent of the design of a law might be the Opinion of the Advocate General and the first deliberation of the judges based on that Opinion and indicating the general direction the judgment should take. While the Opinion may be given in any of the 23 official languages, it will be considered in the deliberation only in its French version. This version, however, will generally have been approved by the Advocate General. Here, an early impact of the original language version of the Opinion on its French working language version is possible even beyond the fact that the latter is a translation of the former. At the design stage therefore an impact of one other language is possible.

Once the Advocate General has given her opinion, the ECJ has only a single working language. The Court's internal output (drafts, *notes en délibéré* [judges' written notes for the deliberation]) is not translated. Any further early impact of another language on the drafts of its decisions is thereby largely excluded. It is true that the Court may look for a different expression in its working language if a sitting judge indicates that an expression

[114] *Cf.* citations, *supra* note 90.

[115] Similarly, Walter van Gerven, *The Role and Structure of the European Judiciary Now and in the Future*, EUROPEAN LAW REVIEW (ELR) 211, 222 (1996), distinguishes between "cases where the law is sufficiently clear for a decision simply to be reached by applying it" and "less straightforward" cases.

[116] *Cf.* text at *supra* note 23.

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used in the draft may be translated into her language only with difficulties or not at all.[117] However, this possibility can only prevent the very worst problems, and only in those cases in which the judge whose language is concerned by the problem participates in the deliberation. Seen statistically, as there are at present 27 judges at the ECJ, and as it sits only exceptionally as a full court but regularly in formations of three or five judges, those cases must be rare exceptions.

In addition, while the Court's external output is generally translated into the 22 other official languages, there is no mechanism in place to avoid divergences between language versions that could be compared to the role the legal/linguistic experts play in legislation.[118] While the *lecteur d'arrêts* who generally intervenes before the final deliberation of a draft judgment may superficially resemble those experts, she is concerned only with the French version of a judgment. After her intervention, the text decided by the judges in their deliberation, in French, is, in principle, final and only then sent to translation. In particular, there is at the Court no equivalent to the distinction at the Council's between "political agreement" on and adoption of a legal text.[119] It is therefore not possible for the judges to make the language-of-the-case version of a judgment their own,[120] although it is the authentic version,[121] and the one which is, in preliminary proceedings, transmitted to the national court for consideration. Rather, this version is routinely submitted to the cabinet of the judge whose mother tongue is the language of the case, irrespective of whether she has been sitting in the case or not, but not to the formation which will hand down that judgment.

While judicial decisions, whether or not containing judicial law making, are authentic only in the language of the case, in view of the Court's working language monolingualism it is quasi-exclusively the French version of its judgments which will be considered by the Court in later judgments.[122] That said, the clarifying effect of translations at the ECJ is in principle

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[117] Ninon Colneric, *Recht und Sprache, in* LAW AND LANGUAGE, *supra* note 25, at 15, 21-22.

[118] This problem is exacerbated by the feature of translation at the ECJ reported in the text at *supra* note 81.

[119] *Cf.* text at *supra* note 106.

[120] To develop such an equivalent adapted to the needs of the Court would require but a minor change in the current arrangements: the draft judgment would have to be submitted before the final deliberation not only to the *lecteur d'arrêts* but also to the translator of the language of the case — while not the rule, this happens already quite often to expedite proceedings — *and* the translation, being the authentic version of the judgment, would have to be, together with the French version, the subject of the final deliberation.

[121] *Cf.* text at s*upra* note 79.

[122] Under the practice of the Court which has no mechanism to make the authentic language-of-the-case version of a judgment its own there are good reasons for this approach. To give but one example: *Nold Kohlen und Baustoffgroßhandlung v. Ruhrkohle Aktiengesellschaft*, *supra* note 90, para. 14. The French version of the clause

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the same one as in the case of the legislature. However, while it is open to translators, especially to those translating into the language of the case, to try to clarify the meaning of a judgment, amendments of the French version that would necessitate a reopening of the judges' deliberation are very difficult to achieve.[123] Any clarifying effect of translation is thereby largely excluded.

It follows from the above that general principles of EU law are developed by the ECJ monolingually in French, and all the other language versions simply are, and should be perceived as, translations. In judicial law making, multilingualism — as opposed to multijuralism — does not play any appreciable role.

2. The Interpretation of Laws

In the group of decisions that simply interpret and apply EU law, while the above applies, the emphasis is on different questions. In those cases, the ECJ is not only the author but also the addressee of a legal text. As addressee, under the paradigm of strong multilingualism currently in force in the EU, it ought to accept the different language versions of an EU law issued by the legislature as equally authentic expressions of the legislature's intention. However, in the pathological but still rather frequent cases of contradictory language versions of an EU law the legislative efforts to safeguard the EU's multilingualism have clearly foundered. In those cases, the ECJ regularly[124] heads for a uniform interpretation of the contradictory versions. This interpretation is not necessarily according to the (contradictory) wording of the provision in question but rather according

in the judgments stating that there are, under EU law, inherent limits to fundamental rights ("*... les droits garantis, loin d'apparaître comme des prérogatives absolues* ....") has never changed. In contrast, there are at least five German versions, most of them also used in judgments in which German was the language of the case. *See* Theodor Schilling, *Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts* (Inventory and General Teachings of the Civil Protective General Principles of Community Law*)*, EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (EUGRZ) 3 (2000).

[123] If an argument in the French draft of the judgment is based on a former judgment of the Court, and the same argument cannot be made in the identical language of the former and the present case, the Court may be prepared to cut this argument. To give an example: if the former judgment, French version, referred to *véhicule* and, German language-of-the-case version, to *Kraftfahrzeug*, the argument that motorboats are covered by the former judgment is possible in French but not in German.

[124] If one of the language versions is the result of a typing error, and if this error is discernible, as such, from other data contained in the Regulation, and from a comparison with the other language versions, these other versions are decisive: ECJ, Case C-64/95, Konservenfabrik Lubella v. Hauptzollamt Cottbus, 1996 E.C.R I-5105, para. 18.

to its meaning and purpose.[125] As I have discussed elsewhere, for rule of law reasons this approach is not without its problems.[126]

In contrast, in the entirely healthy case of slightly differing but mutually supportive language versions, a true acceptance of the multilingualism of the law to be interpreted and applied may be claimed to require linguistic triangulation by the Court which should allow for an enhanced understanding of that law. All the efforts which have gone, during the legislative procedure, into achieving an EU law that as much as possible respects the EU's multilingualism, it could be argued, would be brought to naught if the Court were simply to ignore differences between the language versions.[127] However, it does not appear that the Court accepts that argument. Indeed, one would be hard pressed to identify in the abundant case law of the ECJ any instances of linguistic triangulation. Such instances would be recognizable by the ECJ stating that such and such interpretation of an EU law was comforted by a different language version, or words to that effect. But it appears that the ECJ knows of only two *modi* of relationship between different language versions of an EU law: either they have the same meaning (which, if only for statistical reasons, cannot be the general rule[128]) or they are contradictory. The *tertium* which would be the *modus* of linguistic triangulation appears not to be recognized in the jurisprudence of the Court. Rather, cases of potentially mutually supportive language versions are dealt with according to one or the other *modi*, generally the first one. While both modes of interpretation — as well as linguistic triangulation — undoubtedly respect the supposed[129] need for a uniform interpretation of EU law, the Court's approach may neglect the multilingualism of that law and thereby miss a chance for an enhanced understanding. Indeed, in regularly supposing that all language versions have the same meaning as the Court's working language version the Court acts as if Art. 33 (3) of the Vienna Convention (which however creates only a rebuttable presumption) would apply or, possibly more to the point, as if the French version were, in those cases, the only authentic version.

Still, at least today, in an EU with 23 official languages, there are valid reasons for the Court's approach. Indeed, I do not think a linguistic triangulation involving 23 language

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[125] *Cf.* e.g., ECJ, Case 100/84, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, 1985 E.C.R 1169, para. 17.

[126] *Cf.* SCHILLING, *supra* note 13, at 55-56.

[127] Indeed, according to P.G. Monateri, *Clashing Strategies: Law, Language and Identities in a Framework of Failures?, in* MULTILINGUALISM AND THE HARMONISATION OF EUROPEAN LAW, *supra* note 25, at 209, 217: "[the multilingual] regime is wholly nullified ... by the way in which the Court operates."

[128] *Cf.* LEWANDOWSKA-TOMASZCZYK, *supra* note 18.

[129] For a variety of reasons the uniform interpretation of divergent language versions is but one of three equally unappealing solutions; *cf.* SCHILLING, *supra* note 13, 52 *et seq*.

versions of a law is a workable proposition. Scarcely any single person will be able to comprehend the finer points of 23 language versions of a law. This implies that any practical attempt at a 23-angulation would only be possible with the help of a group of translators which would effectively negate the whole purpose of linguistic triangulation as the finer points of the different versions necessarily would be lost in translation. There is simply no way to meaningfully integrate 23 language versions into a single interpretative effort. Linguistic triangulation, therefore, it is submitted, is not a practical possibility in the EU. The ECJ's approach thereby appears to be justified: *impossibile nulla est obligatio*.

F. Conclusion

This contribution has looked at two features of the EU, its multilingualism and the multijuralism between its Member States, which are claimed to provide assets, and not only liabilities, for EU legal text production. It has tried to define more precisely those aspects of the said features that may be considered assets. It has identified a toolbox of many possible solutions for EU legal questions as an asset linked to multijuralism, the clarifying effect of translations as an asset linked to multilingualism generally and the possibility of linguistic triangulation as a claimed asset linked to strong multilingualism specifically. It has continued to discuss whether current arrangements allow the producers of EU legal texts to use those assets to the full. The results have been mixed.

Concerning the asset of multijuralism, this article has found ample possibilities for EU lawmakers and adjudicators alike, at all levels of the legislature and at the ECJ, to make use of the toolbox offered by the more than 27 legal systems existing in the Member States. Concerning the assets of multilingualism, the answer is less straightforward. While the clarifying effect of translation is real enough, current arrangements allow to profit from it mainly during the legislative stages before the EP and the Council but neither at the drafting stage before the Commission nor at the finalization stage. Also before the Court that clarifying effect is largely excluded. Further, linguistic triangulation has been found not to be a workable concept in an EU with 23 authentic official language versions.

In conclusion, therefore, the larger question must be raised of whether the opportunities offered by strong multilingualism as prescribed by EU law effectively offset the problems it causes. Two such problems have been identified: the possibility of intractable contradictions between language versions which in spite of institutional arrangements set up to prevent them is real enough, and the very indeterminacy of all laws which is the necessary counterpart of the possibility — purely theoretical in the EU context — of linguistic triangulation. This larger question must be answered in the negative. The main aspect of this evaluation is that the one additional opportunity strong multilingualism is claimed to offer over the weak variety to wit the possibility of linguistic triangulation has historically never been grasped by the ECJ and that today a 23-angulation is not a practical

possibility. In short, strong multilingualism offers nothing to offset the problems it causes, leaving aside that it may address certain political preoccupations of Member States.

As I have argued elsewhere,[130] there is therefore much to be said for replacing the 23 equally authentic official language versions of EU law by one such version and 22 official translations, thereby opting for weak multilingualism. The above study of linguistic triangulation can be read as an argument in favor of the adoption of weak multilingualism which, compared to strong multilingualism, (i) avoids the problem of intractable contradictions between language versions, (ii) allows to reduce the indeterminacy of EU law to what is inevitable in any legal system, (iii) facilitates a meaningful access to EU law and (iv) offers citizens the same practical opportunities as strong multilingualism. Weak multilingualism therefore should be the system of choice for the EU also under the aspects discussed in this contribution.

Indeed, weak multilingualism is not completely unknown to the practice of EU law. Rather, under certain aspects, some variants of weak multilingualism are already applied. One such aspect is the existence of a single reference version of a legislative text that appears generally to be the version in the language of the original Commission draft.[131] At the final editing of a text, this version is the yardstick against which all other language versions are gauged, making it the only authentic version on the internal side of the language regime. Of course, as this approach concerns only that internal side, it is compatible with strong multilingualism on the external side although, coming at the very end of the former, it sits somewhat uneasily with the latter.

Another aspect is that Member State courts, especially German courts, if they experience difficulties in interpreting an EU legal text in its *lingua fori* version, tend to have a look at its English and/or French versions, assuming that those versions somehow are more reliable than the *lingua fori* one. This assumption which concerns the external side of the language regime is incompatible with strong multilingualism under which no language must assert a special status[132] and therefore, as the law stands, erroneous from a purely legal point of view. However, if one takes into account the internal side, it certainly is correct in reality if (but only if) the Member State court happens upon the reference version.[133]

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[130] SCHILLING, *supra* note 13, at 64 *et seq*.

[131] *Cf.* text at *supra* note 108. According to Robinson, *supra* note 29, this is generally the English text.

[132] *Cf.* text, *supra* note 41.

[133] In trying to apply the reference version, the Member State courts' reasoning is similar to that followed by the Hong Kong courts. *See* CAO, *supra* note 32.

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A somehow similar third aspect is the ECJ's interpretive practice in those cases in which it does not find a contradiction between different language versions. In those cases, it effectively embraces weak multilingualism each time it decides a case by simply applying its working language, i.e. the French version without having regard to other versions (although it is quite impossible to know in advance whether it will decide a case on the basis of the French version of an EU law or according to the object and purpose of that law). Similar to the Member State courts' approach, underlying this embrace may be the assumption that the French version is more reliable than other versions. While this assumption, incompatible though it is with strong multilingualism, was undoubtedly correct `in the early years' when French used to be the working language of all the institutions,[134] it is rather doubtful at present when French is the drafting language in a steadily decreasing percentage of Commission procedures.[135] In any case, if intended as a remedy for the illness that constitutes strong multilingualism, the Court's practice can only go half way. It has no answer to the other problem of strong multilingualism, which is the intractability of conflicts between different language versions.

Those last two aspects demonstrate the reliance of both the ECJ and Member State courts on different versions of weak multilingualism on the external side of the language regime. The ECJ continues to rely on an outdated model of the French version as the reference version. The Member State courts assume that a modern model of a reference version exists even if it is not officially acknowledged. Both approaches, taken together, manifestly demonstrate the practical need for a reliable reference version. Such a version can be offered only by weak multilingualism. Without a legislative embrace of weak multilingualism, the courts' respective approaches cannot be more than a groping-in-the-dark for a reference version that officially does not exist, and the identity of which therefore must remain uncertain. This must further add to the already unnecessarily high level of indeterminacy of EU law. To remedy this aspect of the problems of indeterminacy, and at the same time to make inevitable conflicts between different language versions tractable, requires a quite radical change in the direction of EU language law and policy in favor of weak multilingualism. It requires a political decision on the one authentic language, or on the method to determine the language version in which a given law is to be authentic. Above all, such a change ought to be declared openly and not operate by subterfuge.

[134] *Cf.* e.g. Robinson, *supra* note 5, at 131.

[135] *Cf.* Robinson, *supra* note 5, at 131: 15%; EC-DGT, *supra* note 3, at 89: 12% (2008). The latest available percentage appears to be 10%, Robinson, *supra* note 29.

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