

Lost in Translation; EU Law and the Official Languages – Problem of the Authentic Text

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This article deals with the problem of interpretation of Community² law from the perspective of the language in which the relevant source of Community law³ is expressed. The first part of the article defines the legal basis causing the problem in interpretation of Community law, which is caused by the fact that it is expressed in many languages, all of which are official and legal instruments expressed in them are deemed to be authentic. The second part contains an analysis of the way in which the European Court of Justice has dealt with this problem and the results of its jurisprudence. The third part presents the implications of the current legal status for the legal practice and it also deals with certain solutions proposed to solve the present problem in order to minimize the existing legal uncertainty as to what the true meaning of Community law is.

1. Legal basis

Article 314 (ex Article 225) of the EC Treaty⁴ confirms the agreement of the original Member States (later accepted also by the new Member States in the accession process) that all language versions of the EC Treaty shall be considered as authentic.⁵ Council Regulation 1/58/EEC determining the languages to be used by the European Economic Community then follows up on this principle by stating that the official languages and the working languages of the institutions of the Community shall be all official languages designated by the Member States.

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² Depending on the context and taking into account the historical development, the terms "Community", "EC", "EU" and "Union" are used further in the text of this article to define the European Economic Community, the European Communities, the European Community and the European Union.

³ The term "Community Law" in this article means the primary and secondary sources of EU Law and the judicature of the European Court of Justice creating the so called I. pillar of the European Union, supreme to the laws of each member state; see CRAIG, Paul, DE BÚRCA, Gráinne: *Eu law, text, cases and materials*, Oxford: Oxford University Press, 2003, p. 30-35

⁴ latest consolidated text published in the Official Journal C 321E of 29 December 2006

⁵ „This Treaty, drawn up in a single original in the Dutch, French, German, and Italian languages, all four texts being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which shall transmit a certified copy to each of the Governments of the other signatory States. Pursuant to the Accession Treaties, the Czech, Danish, English, Estonian, Finnish, Greek, Hungarian, Irish, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovenian, Spanish and Swedish versions of this Treaty shall also be authentic.“ Each Act on accession changes this Article, if there is a new language version of the Treaty that is to be declared authentic. See: http://eur-lex.europa.eu/sk/treaties/treaties_founding.htm.

In connection with the accession of new member states, the principle of the official language has been enacted in the respective acts concerning the conditions of accession.⁶

According to the “Translating for a Multilingual Community” booklet prepared by the Directorate-General for Translation (DGT) of the European Commission:

*“The Commission serves the European Union and its citizens, a community which is quite different from that served by a traditional intergovernmental organisation. Its legislation must be published in all the Member States' official languages because it becomes national law and thus directly binding on all the EU's citizens. So they – and their national courts - must be able to read and understand it in their own languages. But well before that point, proposals must be aired for the widest possible debate at all levels - European, national and local - in forms accessible to non-linguists and non-diplomats. Everyone in the Union is entitled to contribute to the discussion in the official language of his or her choice. It is a question of transparency and democracy. This is why, **from the very beginnings of the process of European unification, it was decided that the official languages would be those (initially four in number) of the Member States.** This principle is enshrined in Regulation No 1 of 1958, which is amended each time a new country joins the EU to include its language or languages. Its provisions have now been incorporated into the European Community Treaty.”⁷*

⁶ See, e.g. the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, Official Journal L 236 of 23 September 2003;

Particularly see Article 58 of this Act, which states: “**The texts of the acts of the institutions**, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank **in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present eleven languages.** They shall be published in the Official Journal of the European Union if the texts in the present languages were so published.”

See also Article 61 of this Act, which states: “The Government of the Italian Republic shall remit to the Governments of the new Member States a certified copy of the Treaty on European Union [...] in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages. **The texts of those Treaties, drawn up in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages, shall be annexed to this Act. Those texts shall be authentic under the same conditions as the texts of the Treaties referred to in the first paragraph, drawn up in the present languages.**” [*highlighted by the author*]

⁷ http://ec.europa.eu/dgs/translation/bookshelf/brochure_en.pdf; [*highlighted by the author*]

A noble cause seems to be hidden behind the concept of official and working communication in all languages of the Community. Community legislation must be accessible to every individual, so that transparency and democracy is preserved.

Accessibility of Community law itself is not a problem. If the best way to achieve it is through translation of all Community legal instruments into all official languages, then that is exactly what should be done in order to preserve transparency and democracy.

Nevertheless, as of today, the EU has 22 official languages and, thus, 22 equally authentic language versions of legal instruments through which Community law is expressed. This fact causes a problem and creates an environment of legal uncertainty for those, who should benefit from Community law – i.e. individuals. The problem is systematic and is twofold.

The first aspect of the problem is caused by the mandatory process of translating the original texts⁸ of new legal instrument into all of the Community's official languages, which is happening during the lawmaking process. The translation process necessarily creates mistakes and the final official language versions of the Community instruments are many times not identical in their meaning.

The second aspect of the problem results from the process of translation of existing legal instruments into the official language of any new Member State joining the Community. Naturally, as with any translation, translations are statistically bound to contain mistakes and the translation of a document into another language may cause the fact that a different meaning will be given to the translation (or its part) than to the original document.

The results of such mistakes in legislation can have an impact on the rights and obligations of the addressees of Community law. Especially when a large number of documents has to be translated by many different translators (which happened with the 2004 and also the 2007 enlargement), mistakes occur⁹. If the meaning expressed in the translation differs from the meaning intended by the Community lawmaking bodies, it can have an impact on the addressee of the relevant source of law.

⁸ drafted mostly in English – 62%, but also in French – 26%, German – 3%, and other languages – 8%, see http://ec.europa.eu/dgs/translation/bookshelf/brochure_en.pdf; p. 6

⁹ See various discussions on this problem on various weblogs, e.g. on <http://jinepravo.blogspot.com/2007/01/postesknut-nad-jednm-pekladem.html>

There is an obvious difference between the lawmaking process and the translation process and although more mistakes may happen during the mere translation process, not even the lawmaking process ensures an error free output of a text which should have the same meaning in all 22 languages of the Community.

The problem caused by translation reflects not only in the directly applicable Community instruments (e.g. regulations), but also in the national legislation implementing directives. In many cases, the provisions contained in national laws are mere copies of the relevant provisions of the directives. If the directives are incorrectly translated, then also the implementing legislation is bound to contain mistakes. For an individual aware of this inherent “risk of translation”, the natural question then arises – how should one obtain the correct information about what really is his/her obligation or right in daily life either from harmonised national legislation or from directly applicable Community legal instruments?

Coming back to the notion of democracy and transparency expressed in DGT’s booklet above – it is likely that the official language of a Member State is more understandable to its citizens (e.g. Slovak to the citizens of Slovakia). Nevertheless, if a citizen reading a translation of a Community instrument can not rely on its meaning and be certain of his/her rights and obligations resulting from it, this fact does not, in my opinion, help transparency and democracy. It rather creates an environment of uncertainty.

2. Dealing with the problem created by the legal basis – interpretation

Legal interpretation (interpretation of the law) has always been in the forefront of interest of both, legal practitioners and academics.¹⁰ Legal theory defines legal interpretation as the clarification of the meaning and content of legal rules expressed in legal instruments in order to understand them and use them in accordance with the principle of legality.¹¹

Interpretation of the law expressed in legal texts depends on the interpretation of the language in which the text is written, therefore it is not possible to ignore general hermeneutics¹² when allocating a meaning to the symbols used in the specific language examined, especially when the

¹⁰ See http://en.wikipedia.org/wiki/Interpretivism_%28legal%29

¹¹ see e.g. KNAPP, Viktor: *Teorie práva (Legal Theory)*, 1st edition. Praha, C.H.Beck 1995. s 168

¹² See <http://en.wikipedia.org/wiki/Hermeneutics>

underlying goal is to allow access to the law to as many individuals as possible in order to preserve democracy and transparency.

A language is a system, used to communicate, comprised of a set of symbols and a set of rules (or grammar) by which the manipulation of these symbols is governed.¹³ Individual symbols should be put together according to the rules of grammar and logic¹⁴ so that they convey a clear meaning. This would, however, be the ideal situation. In reality, the language in all forms of communication, including drafts of legal instruments and translations, is used with mistakes.

Nevertheless, in case of legal texts, their clarity can be achieved either:

- (i) in advance – i.e. by logical use of the language symbols when defining the rules in the lawmaking process, with the aim of minimising the risk of ambiguity of a text or the used symbols and decreasing the need for subsequent clarifying interpretation, or
- (ii) subsequently – i.e. by interpretation¹⁵ of legal texts, bearing the risk that the intention of the law will not be observed (especially when using extensive or purposive methods of interpretation), since subsequent interpretation always depends on the person interpreting it, who is usually different from the author of the text.

In order to preserve clarity of legal texts and make them accessible to the general public, using the correct symbols of a language in legal texts should ensure that interpretation of the law is not different from semantic¹⁶ interpretation of the symbols contained in the language. Giving different meaning to language symbols (i.e. mostly words or phrases) used in legal texts than is given to them in general use creates confusion and risk of wrong interpretation and application of these symbols in legal practice.

Interpretation of legal texts is, however, considered to be a specific semantic issue.¹⁷ In my opinion, this is only due to the fact that legal texts contain linguistic mistakes, which cause these texts to have different meaning than purported. In case of law, mistakes may have severe consequences and therefore some theories qualify legal texts as a specific category of texts that require special interpretation in order to avoid the risk of damage created by the application of “wrong law”, even

¹³ See <http://en.wikipedia.org/wiki/Language>

¹⁴ See <http://en.wikipedia.org/wiki/Logic>

¹⁵ for the description of various methods of statutory interpretation see e.g. TERRET, Steve: English Legal System; Workbook 1; University of Cambridge Institute of Continuing Education; 2004; p. 32 et sub.

¹⁶ See <http://en.wikipedia.org/wiki/Semantics>

¹⁷ Ibid., para 10; see also <http://en.wikipedia.org/wiki/Hermeneutics#Law>

if such application occurs due to grammatical or logical application of the legal text expressing the law.¹⁸

Therefore the person or institution applying the legal text to a specific situation is bound to interpret it and many times search for its real meaning, even if this meaning is not expressed in the text.¹⁹

According to Article 220 EC Treaty – The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of EC Treaty the law is observed. Due to the fact that the Court of Justice has such an exclusive competence in interpretation of Community law, it is important to analyse how it has dealt with the above defined problem of multilingualism when ensuring that the law is observed in its jurisprudence.

The interpretation practice of the Court is generally defined in CILFIT²⁰, where in par. 20 the Court stated that every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

The Court, when interpreting provisions of Community law, must bear in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. Interpretation of a provision of Community law involves a comparison of the different language versions.²¹ If the language versions are not identical, the clearest version has to be identified and ambiguous language versions have to be ignored.²²

In case *Konservenfabrik Lubella*²³ the Court stated that the wording contained in the majority of the language versions should be accepted. In this case, most language versions of Commission Regulation 1932/93 establishing protective measures as regards the import of sour cherries referred to „sour cherries“, whereas the German version of this regulation contained a mistake and it referred to „sweet cherries“.

¹⁸ http://en.wikipedia.org/wiki/Interpretivism_%28legal%29

¹⁹ Therefore the idea expressed by Publius Juventius Celsus is still topical today: "To know the law means not to know the words, but to understand their meaning and application."

²⁰ Case 283/81, Srl CILFIT and Lnficio di Gavardo SpA v Ministry of Health [1982], ECR, para. 20

²¹ Case 283/81, Srl CILFIT and Lnficio di Gavardo SpA v Ministry of Health [1982], ECR, para. 18

²² Case 45/83, Ludwig-Maximilians-Universität München v Hauptzollamt München West [1984] ECR, para. 13

Given that these cases were decided at the time when the Community languages were not that many (six or seven), it would have been possible for the Court to consider that the costs of comparing²⁴ the language versions were justified when facing the principle of transparency and democracy, which advocated the status of all language versions being authentic. In a situation when the Community has 22 official languages and therefore 22 authentic versions of legal instruments, using such methods of interpretation in every ambiguous case would become tremendously costly, if not impossible.

In case *Dufour*²⁵ the Court stated that in certain circumstances a single language version can be given preference before the majority of language version. In this case, the Court was asked to interpret the word “undertaking” in Council Regulation 543/69 on the harmonization of certain social legislation relating to road transport. The Court decided that the term undertaking includes only an undertaking in road transport, since this results from the objective which this Community rule pursues, despite the fact that the term “undertaking in road transport” was used only in the Italian language version of the concerned regulation.

In case *Simutenkov*²⁶, in the opinion of advocate general Stix-Hackl, the advocate general stated (in accordance with the decision in *Dufour*²⁷) that recourse should be had to the method under which one proceeds on the basis of the original text, hence the version which served as the source text for the translations into the other languages.

On the other hand, in his opinion in case *ARD v PRO Sieben Media AG*²⁸, advocate general Jacobs pointed out to the fact that the legislative history of a Community instrument has not been very frequently used by the Court as a guide to its meaning, and is generally regarded as only a supplementary means of interpretation. The Court has placed greater emphasis on the scheme of the instrument and its legislative context (systematic interpretation) and on the aims and purposes of the instrument.

²³ Case C-64/95, *Konservenfabrik Lubella Friedrich Büker GmbH & Co. KG v Hauptzollamt Cottbus* [1996], ECR, para. 18

²⁴ Such transactional costs naturally arise to individuals or corporations if they want to make sure as to what rights and obligations they have, especially when they consult lawyers for advice and the lawyers must calculate the comparative analysis of the language versions into their fees, if they want to provide comprehensive legal advice to their clients.

²⁵ Case 76/77, *Auditeur du travail v Bernard Dufour, SA Creyf's Interim and SA Creyf's Industrial* [1977] ECR

²⁶ Case C-265/03, *Igor Simutenkov v Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol* [2005] ECR I-2579; opinion of AG C.Stix-Hackl delivered on 11 January 2005, the analysis on interpretation in paras 14-27; in the actual judgement, the Court did not deal with the interpretation issue;

²⁷ Cited above, n. 25.

The above analysis of some of the Court's decisions²⁹ and opinions of advocates general shows that the Court does not yet have a clear policy on the basis of which it would solve the practical problem of authenticity of texts of all language versions of Community legislation. It seems that the Court's inclination has been towards looking for the purpose and aim of the relevant legislation, which does not exclude the possibility that a single language version may contain the real intention of the lawmakers, even in a situation where the majority of other language versions contain different wording³⁰. And although advocate general Stix-Hackl seemed to suggest that the language version of the draft legislation should be such "reference" version, the Court has not yet given a clear opinion on this suggestion.

3. Implications for the legal practice and the general public – is there a solution for this problem?

The intention of Community law makers was to make Community law "*accessible to non-linguists and non-diplomats*". The actual result of the current status quo (confirmed by the Court's jurisprudence) is different. A citizen whose only language of command is e.g. Slovak can not rely on the Slovak version of Community law published in the OJ without comparing it with other language versions in order to determine his/her rights and obligations. However, even such comparison may not guarantee that the actual meaning and purpose of the law will be revealed to him/her. Even if such person asked for professional legal advice, hardly any lawyer would give a clean opinion on the position of the client in such legally uncertain environment, without extensive research and linguistic comparison, which is time consuming and costly. And although such ambiguities in the various language versions may not occur often, where does one draw a line between when it is and when it is not reasonable to make the "extra" investigation, to be really sure, especially in the conduct of business, where severe penalties may be applicable for breach of the law? It appears, therefore, that the present status quo is not suitable for those who should benefit from it and it creates an environment of legal uncertainty and the risk of damages due to incorrect

²⁸ Case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v PRO Sieben Media AG* [1999] ECR I-7599; opinion of AG Jacobs delivered on 24 June 1999, para. 26

²⁹ There are many other judgments of the Court dealing with the issue of interpretation of language versions – e.g. *Stauder* (Case 29/69), *Migrant Workers* (Case 19/67), *Getreide* (Case 49/71), *Moulijn* (Case 6/74), *North Kerry* (Case 80/76), *Firefighters* (Case C-103/01), where the court also dealt with the issue of common terminology of Community law and the meaning given to it in the harmonization legislation of the Member States.

³⁰ This may be caused by the fact that translators in the DGT could consult each other when the original draft is unclear to them, thus sometimes they may arrive to a wrong conclusion, which, nonetheless, gets implemented into the translated language version.

application of Community law, the actual meaning of which can ultimately be confirmed only by the Court of Justice.

Pursuant to the Court's decision in the *Simmenthal II*³¹ case, it is the duty of a national court to give full effect to the Community provisions and not to apply any conflicting provisions of national legislation, even if it had been adopted subsequently. The Court also held that a national court should not wait for the national law to be set aside either by a constitutional court or by the legislature.³² Breach of this duty by the national courts may, in certain circumstances lead to state liability in accordance with the *Francovich*³³ doctrine.

Nevertheless, national courts might find it difficult to give full effect to the Community provisions without being sure of their meaning. And given the Court's previous jurisprudence, they never really will be sure of their meaning if interpretation of Community law involves a comparison of the different language versions as stated in *CILFIT*³⁴, for which the national courts may not have the necessary facilities. A solution for the national courts (to be on the safe side) seems to be to request an interpretation from the Court pursuant to Article 234 EC Treaty in each case when a previously not interpreted Community provision is invoked by a party to the proceedings. The Court would then serve as the subsequent decision maker as to which language version should be "really" taken as the authentic one in order to get the correct meaning of Community law. Given the workload that the Court would have to deal with, such solution would not be very practical.

Democracy and transparency are both important. So is legal certainty. The question is whether there is a solution that satisfies both – democracy and transparency, and the need for legal certainty. The answer seems to be – a reference language for Community law.

It is customary in international public law conventions to define a limited number of authentic language versions. This is so despite the fact that these conventions are many times translated into languages of all member states of the relevant convention either before signing or during the

³¹ Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

³² Stiernstrom, Martin. *The Relationship Between Community Law and National Law*, Jean Monnet/Robert Schuman Paper Series, Vol. 5 No. 33., October 2005.

³³ Cases C-6 and 9/90, *Francovich and Bonifaci v Republic of Italy* [1991] ECR I-5375 para. 33

³⁴ Cited above, n. 20.

process of the convention's ratification, and they also become directly applicable in the member states of the convention.³⁵

Introducing a single general reference language for Community legislation and for the Court's judgements could solve the existing problem of legal uncertainty resulting from the existence of 22 authentic language versions, although such idea currently seems to be politically unenforceable.³⁶

Taking into account AG Stix-Hackl's opinion in the Simutenko case³⁷, adopting a rule that each Community instrument should have a reference language could be politically less controversial, and it would also reflect the standard practice in the drafting and enacting of international treaties and the drafting of general commercial agreements when various language versions are used³⁸.

However, taking politics aside, the question remains – which one should be the reference language³⁹? If we derive the logic from AG Stix-Hackl's opinion⁴⁰, the drafting language of the relevant legal instrument seems to be the logical choice. Considering the statistics, English would certainly dominate for recent legislation and most present drafts, whereas French would most likely serve for many legal instruments enacted in the past.⁴¹

It seems to be necessary to preserve the translations of the Community legal instruments into all Community's official languages in order to protect the idea of transparency and democracy, but these translations should not be given the force of an authentic version. Such force is also not given to translations of international agreements even in situations where these translations undergo a formal process of ratification.

³⁵ See e.g. the European Convention on Human Rights from Rome, 4 November 1950, which defines the English and the French version as authentic. See also the Universal Declaration of Human Rights, which is authentic in according to Article 111 of the Charter of the United Nations in its English, French, Chinese, Spanish and Russian language. In many countries of Europe, these international conventions are directly applicable. Also in the area of international private law, e.g. the Hague Convention on the Service of Judicial and Extra-judicial Documents in Civil and Commercial Matters from 15 November 1965 defines the English and the French version as authentic.

³⁶ The idea of a single reference language has been recently discussed on various weblogs, e.g. http://professorgeradin.blogs.com/professor_geradins_weblog/2007/02/french_as_a_ref.html. Both arguments for and against this idea are discussed. On the negative side, the arguments mostly concerned the issues such as loss of legal culture and independence to the legal system of the language that would remain as the reference language. On the positive side, the notion of practicality seemed to be the strongest one. Even if the idea of a single general language is rejected, the idea of two authentic language versions (e.g. English as the most used drafting language and French as the second most used drafting language and one of the original languages of the EC Treaty) would also be worth considering.

³⁷ Cited above, n. 26.

³⁸ I.e. the "binding language" provisions usually contained among the contract's boiler plate provisions.

³⁹ Regardless of whether it is a single general reference language, or a particular reference language for each Community instrument.

⁴⁰ Cited above, n. 26.

⁴¹ Statistical information cited above, n. 8.

Having a reference language does not undermine the idea of transparency and democracy. In order to understand the law in a multilingual society, there needs to be one point of reference, so that there is no (or at least less) doubt as to what the law actually is. The mere fact that someone is able to read a text does not mean that the text this person is reading actually reflects the law. This status should be remedied if the EU wants to be an environment of legal certainty.

Since it is unlikely (due to political reasons) to expect that a single reference language, or a reference language for specific Community instruments will be introduced in the near future, it is most important that at least lawyers are trained to understand the most widely used drafting languages of Community legal instruments (in accordance with the opinion of AG Stix-Hackl) and compare national harmonised legislation or directly applicable language versions against the original language version in order to minimise the risk of misinterpretation of Community law.