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MULTILINGUALISM, DIVERGENT AUTHENTIC VERSIONS OF A LEGAL RULE AND LEGITIMATE EXPECTATIONS OF INDIVIDUALS

Abstract. The paper argues that the multilingualism of the EU legal order should be viewed from the point of view of the right of individuals to acquaint themselves with their rights and duties under EU law in the official language of their Member State. In case of discrepancies of equally authentic versions, individuals should have the possibility to rely on an ‘authentic version’ defence, especially in tax, customs and criminal law relationships.

Keywords: multilingualism, interpretation, legitimate expectations, legal certainty, non-discrimination

Introduction

The law of European Union (‘EU’, ‘the Union’) is a multilingual legal order without precedent in history both as regards the sheer number of its official languages (now 24 – Kuzelewska, 2014: 154) and the amount of pages of its legal texts translated and coordinated on a daily basis by its lawyer linguists and translators. This certainly begs the question of the purpose of such a far-reaching and unprecedented multilingual legal arrangement, understood as ‘the use of multiple equally authentic language versions within one legal system’ (Łachacz & Mańko, 2013: 75). It should be underlined that the form of multilingualism adopted by the EU is ‘strong’ multilingualism, i.e. all language versions are deemed authentic, whilst in ‘weak’ multilingualism only one version would be deemed such, whilst the others are officially considered as translations (Schilling, 2011: 1463). In fact, the entry into force of the Charter of Fundamental Rights in 2009 strengthened the legal foundations of multilingualism (Kuzelewska, 2014: 153), as it enshrines the principle of linguistic diversity (Article 22), explicitly prohibits discrimination on the basis of language (Article 21) and encompasses

the individual's right to communicate with the institutions in any official EU language (Article 41). Of course, whilst the EU is *de lege* multilingual, its internal communication is *de facto* dominated by English and, to a certain extent, also French (Doczekalska, 2006: 15; Křepelka, 2014; Kuźelewska, 2014: 154, 157–158).

Apart from due respect paid to the national identities of the Member States in line with the principle 'united in diversity' (cf. Doczekalska, 2013; Konieczna, 2013: 46; Kuźelewska, 2014: 151–152) and leaving aside issues of democratic legitimacy (cf. Baaij, 2012; Gajda, 2013: 16), an important and strictly legal reason for EU law's on-going and expanding multilingualism is the special position of the individual (understood as natural and legal persons) in the EU legal order (Kuźelewska, 2014: 156). From the landmark decisions in *Van Gend en Loos* (Case 26/62) and *Costa v Enel* (Case 6/64) the Court of Justice of the EU ('ECJ') has proclaimed the EU to be not only a legal order between states (as a classical 'international organisation' under public international law is), but as a community of states and citizens, i.e. a legal order which comprises as its subjects not only classical subjects of international law (states), but also private individuals (natural and legal persons, both of private and public law). Whilst the Court of Justice was certainly a predecessor of this kind of thinking about the EU, and it remains an open question whether the drafters of Treaty of Rome (1957) envisaged such an interpretation (rather not – see Alter, 2002: 37; Stone Sweet, 2007: 924; Conway, 2012: 29), it is beyond doubt that the Member States confirmed the special status of individuals in the EU legal order by introducing, in the Treaty of Maastricht, the concept of 'EU citizenship' conceived as a legal bond linking the nationals of EU Member States with the Union as such. Needless it to say that no international organisation provides for such a status for natural and legal persons inhabiting its member states.

Furthermore, the legal bond between the EU and individuals was strengthened by two further constitutional developments. First of all, the establishment, in the Treaty of Amsterdam, of a European 'Area of Freedom, Security and Justice', whereby the Union transcended the hitherto market-oriented paradigm of integration. Secondly, in 2000 a then non-binding EU Charter of Fundamental Rights was proclaimed, which took stock of three decades of judicial developments in this field. The Charter became legally binding, as a source of primary EU law, with the entry into force of the Treaty of Lisbon in December 2009.

It is submitted that this special position of the individual in the EU legal order, considerably strengthened, not least on the symbolic level, by

the introduction of Union citizenship and EU fundamental rights, must be factored into any normative theory of interpretation of multilingual EU law (cf. Zerka, 2013: 60). Indeed, if EU law directly grants rights and imposes duties on natural and legal persons who are nationals and/or residents of the Member States, it would be inappropriate to disregard the right of the individual subject to Union law to take cognisance of it at least in the language of the Member State of their nationality or place of residence, and be allowed to rely on that linguistic version when planning their conduct (cf. Biernat, 2006: 275; Łachacz & Mańko, 2013: 79). Furthermore, owing to the fact that EU law is, in the light of ECJ case-law, to be applied by courts in all 28 Member States, it seems equally reasonable that judges and lawyers should be able to access it in the official language of their Member State.

However, this dimension of multilingualism focusing on individuals' and lawyers' access to EU law needs to be reconciled, at least from the point of view of the Union's legislature and judicature, with the principle of uniform application of EU law (cf. Gajda, 2013: 22). The tension between multilingualism and rights of individuals to rely on their national versions of EU legal texts (based on the principles of legal certainty and legitimate expectations), on the one hand, and the principle of uniform application of EU law, on the other hand, would not appear in an ideal world in which all linguistic versions of EU legal texts were perfectly equal and all official languages of EU Member States – perfectly inter-translatable. However, that is not the case. Indeed, discrepancies between linguistic versions are inevitable (Doczekalska, 2006: 17), not only because human beings who translate the texts, notwithstanding their high professional qualifications, from time to time commit errors, but also due to inherent features of natural language which is inherently open-textured (cf. Hart, 1998: 124ff; Doczekalska, 2006: 17) and cannot capture all possible meanings with infinite precision. As Doczekalska (2006: 17) points out, the at source of discrepancy is 'the very nature of languages, which differ on account of syntax, grammar and semantics.' This problem is aggravated by the co-existence of 24 equally authentic linguistic versions (Paunio & Lindroos-Hovinheimo, 2010: 400) and 28 epistemic communities of lawyers in each of the Member States (Marcisz, 2015: 56ff; cf. Łachacz & Mańko, 2013: 84–85). Indeed, any translation is only an approximation and it is impossible to preserve the original meaning without any modification (Doczekalska, 2006: 17; Lindroos-Hovinheimo, 2007: 371; Schilling, 2010: 50). As an experienced lawyer linguist pointed out, 'at least in extensive legal texts [of EU law], there will be quite regularly at least one significance divergence between at least two language versions (Schilling, 2010: 51). Furthermore, differences in meaning of legal

texts drawn up in different languages may arise not only due to lexical differences, but also the discursive context, encompassing legal culture, general societal culture, and the entire socio-economic context in which language is embedded (Sierocka, 2014: 189–190). In fact, ‘language, culture, identity and ideology are strongly connected’ (Kuzelewska, 2014: 152).

This paper aims at contributing to the debate about the tension between the need for protecting individuals’ legitimate expectations based on their national version of an EU legal text and their subjective legal certainty, on the one hand, and the need for general legal certainty and the uniform application of EU law, on the other hand. The gist of the argument boils down to the proposition that a balancing between the conflicting principles and interests should produce a compromise solution whereby an individual should be entitled to rely on his national authentic linguistic version of an EU legal act, especially in vertical relationships (*vis-à-vis* public authorities, such as in particular tax law and customs law), as well as in certain horizontal relationships.

Methodologically, the paper takes a normative approach. Its aim is to provide a normative model of judicial interpretation and application of EU law in situations where the linguistic versions of legislative acts or law-making precedents are at clear variance. The normative argument draws on a descriptive account of existing ECJ case-law on multilingualism, views of scholars, as well as philosophical assumptions regarding the nature of legal language and legal translation.

The paper is structured as follows. First, two examples of linguistic discrepancies between EU legal acts, taken from ECJ case-law, are presented, in order to illustrate the problem and outline the approach of the Court. Then, the views expressed by scholars are presented, including both those, who approve the Court’s practice with regard to linguistic discrepancies and those, who criticise it. Finally, the paper proposes and theoretically justifies the introduction of an ‘authentic version defence’ which individuals could raise, on the basis of their national authentic version, especially in tax, customs and criminal cases which turn on EU legal acts.

Examples of linguistic discrepancy involving individual responsibility

Example I: Illegal *Federweißer*

Council Regulation (EEC) No 337/79 on the common organisation of the market in wine (‘Wine Regulation’) contained, in its Article 36, a rule

limiting the possibility of enriching the alcohol content of oenological products. Whilst the English version (left) seemed clear, the German (right) was open to ambiguities:

Article 36(1) of the Wine Regulation		
English version	German version	English translation of German version
<p><u>None of the processes</u> mentioned in Articles 33 and 34 <u>shall be authorized unless</u> carried out as a single operation at the time when the fresh grapes, grape must, grape must in fermentation or new wine <u>are still in fermentation</u> <u>are being turned into</u> wine suitable for yielding table wine or into table wine, and in the wine-growing zone where the fresh grapes used have been harvested. (...)</p>	<p>Jede der in den Artikeln 33 und 34 genannten Maßnahmen darf bei der Verarbeitung von frischen Weintrauben, Traubenmost, teilweise gegorenem Traubenmost und Jungwein zu für die Gewinnung von Tafelwein geeignetem Wein oder zu Tafelwein in derjenigen Weinbauzone, in der die verwendeten frischen Weintrauben geerntet wurden, nur einmal durchgeführt werden.</p>	<p><u>Any of the measures</u> mentioned in Articles 33 and 34 <u>may be used</u> only once for the processing of fresh grapes, grape must, grape must in fermentation or new wine <u>for the purposes of obtaining</u> wine suitable for yielding table wine or table wine, in the wine-growing zone where the fresh grapes used have been harvested.</p>

The difference between the English text (first column) and the German text can be seen in the Author's translation of the German text into English. It is evident that the English text is formulated as a prohibition ('None... shall be authorised...'), from which it creates exceptions ('...unless...'), whilst the German text is formulated as a permitting norm ('Any of the measures... may be used...'), which contains certain limiting conditions. Furthermore, the German text is limited to the processing of oenological products 'for the purposes of obtaining wine suitable for yielding table wine or table wine', whilst in the English text the oenological products in question simply are 'being turned into wine suitable for yielding table wine or into table wine', which does not presume that they actually must be turned into such wine or that the intent of the producer to turn them into such wine.

It was exactly within this gap between the English and German text that a German wine producer, Mr Röser, found himself, whilst enriching in his wine cellars a certain quantity of fermenting must imported from Italy, and subsequently selling it as *Federweißer*. The latter is a beverage popular in Germany, which is exactly a must in fermentation is intended to be consumer at that stage of fermentation, i.e. before it becomes a proper wine.

The German authorities found that Mr Röser violated the Wine Regulation and prosecuted him. They pointed out that the process of enrichment violated the requirement that the grapes must originate from the same wine-growing region, rather than be imported (*in casu* from Italy). Relying on the German text of the Wine Regulation, Mr Röser defended himself by pointing out that the Article 36 is not applicable to *Federweißer*, since this beverage is not intended to become table wine, but is consumed during the fermentation process. This argument was accepted by the trial court, which acquitted Mr Röser. However, on appeal the High Regional Court of Bavaria decided to clarify the normative content of Article 36 of the Wine Regulation by asking a question to the ECJ (Case 238/84 *Criminal proceedings against Hans Röser*)

The Court of Justice admitted that the German version of Article 36 was ambiguous, stating that it ‘is unclear (...) and is open to another interpretation, namely that the prohibition on carrying out the process of enrichment more than once or outside the wine-growing zone in which the grapes have been harvested applies only to the specified processing of the products mentioned in that article’ (Case 238/84, para. 22), i.e. to the turning of ‘fresh grapes, grape must, grape must in fermentation or new wine still in fermentation’ into ‘wine suitable for yielding table wine or into table wine’, just as Mr Röser had argued.

However, despite the fact that a strict interpretation of Article 36 – in the context of criminal proceedings – would have warranted Mr Röser a ‘non guilty’ verdict, the ECJ opted for a different approach, less favourable to the defendant. The Luxembourg judges pointed out that ‘it is apparent from a comparative examination of the different language versions, and in particular of the English, French and Italian versions, in which there is no ambiguity, that Article 36 must be understood’ in a way rendering Mr Röser’s conduct punishable (Case 238/84, para. 22). They corroborated this reading by pointing to teleological and systemic arguments. Without putting into doubt that the Court’s reading indeed corresponded to the purpose of the Regulation as envisaged by the Community legislature, one cannot resist the impression that Mr Röser’s condemnation, despite his reliance on the authentic German text of an EU legal act, was nothing short of an ‘unfair consequence’ (Conway, 2012: 149) of the Court’s uniform interpretation of the Wine Regulation.

Example II: Do boats count as (road) vehicles?

The Sixth VAT Directive (77/388/EEC) provided in Article 13(B)(b) for a number of exemptions from VAT. One of the exemptions cov-

ered ‘the leasing or letting of immovable property excluding (...) the letting of premises and sites for parking vehicles’. The term ‘parking vehicles’ in English corresponded to similar versions in French (*stationnement de véhicules*), German (*Abstellen von Fahrzeugen*), Italian (*parcheggio dei veicoli*), Spanish (*estacionamiento de vehículos*), and similar terms in Portuguese and Finnish. The ECJ pointed out that these terms encompass ‘means of transport in general (...) including aircraft and boats’ (Case C-428/02 *Fonden Marselisborg*, para 41). In Dutch, Danish, Swedish and Greek, however, the term *vehicle* was rendered by terms which, like the Dutch ‘*parkeerruimte voor voertuigen*’, or Danish ‘*parkering af køretøjer*’, are ‘more precise term[s] (...) which serv[e] to designate principally “land-based means of transport”’ and, specifically, the Danish *kjøretøjer* refers only to ‘land-based transport on wheels’ (Case C-428/02, para. 41).

The importance of the term ‘vehicle’ arose from the fact that it was an exception to the VAT exemption, therefore ‘premises and sites for parking vehicles’ were subject to VAT, whilst the letting and leasing of other immovables was not. The Danish implementing law did not use the term ‘vehicle’ at all, and simply formulated the exception from the VAT exemption by referring to ‘parking areas’ (cited after Case C-428/02, para. 7). A Danish company, *Fonden Marselisborg Lystbådehavn* (FML) managed a pleasure boat port, where it let mooring berths as well as land sites for the storage of boats. The question arose whether this activity falls under the VAT exemption (if boats are not ‘vehicles’), or whether it is subject VAT, because it falls under the exception to the exemption (if boats are ‘vehicles’). Not unsurprisingly, the Danish tax office took the view that FML’s business is subject to VAT, whilst FML argued to the contrary. The court deciding the disputed between FML and the tax office asked the ECJ whether the term ‘vehicle’ in the Sixth VAT Directive should be understood as including boats.

Before the Court of Justice, FML argued that the Sixth Directive uses two different terms, namely ‘means of transport’ and ‘vehicles’, and that the latter means only road vehicles, but not boats. The Danish government, on the contrary, argued for a broad interpretation. The Court pointed out that an exception to an exemption brings about the application of the general VAT regime, and therefore ‘cannot (...) be interpreted strictly’, on account of which ‘the term “vehicles” used in that provision must be interpreted as covering all means of transport, including boats.’ (Case C-482/02, para. 43–44). It also supported its view by teleological arguments, pointing out that mooring berths for leisure boats do not fall within the ‘rea-

sons, including the social ones, that originally justified' the VAT exemptions (Case C-482/02, para. 45).

Although the Court admitted that the Danish version of the Directive (alongside with the Swedish, Dutch and Greek versions) used a term which referred only to land-based means of transport, but excluded boats (Case C-482/02, para. 41), it simply remarked that 'where there is a difference between the language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part' (Case C-482/02, para. 42), i.e. made subject to teleological and systemic interpretation, thereby simply dismissing the linguistic interpretation of such rules as impracticable. The view of the Court in *FML* is, therefore, that a linguistic discrepancy simply excludes linguistic interpretation. Notably, The ECJ did not take into account in any way the legitimate interests of the taxable company who could have relied on the Danish version of the Directive in assessing its obligations regarding VAT.

The ECJ's approach

The two cases briefly described above are representative of the Court's approach to discrepancies between language versions of EU legal acts: linguistic arguments give way to systemic and teleological arguments (Schilling, 2010: 60; Kalisz, 2014: 201). Indeed, this is in line with the ECJ's general approach which favours policy arguments over linguistic interpretation (Stawecki, 2015: 108; Arnall, 2006: 612; Paunio, 2007: 392; Paunio & Lindroos-Hovinheimo, 2010: 399; Łachacz & Mańko, 2013: 82–83; cf. Gajda, 2013: 26). Therefore, despite the formally proclaimed need to verify all language versions, the ECJ – especially now, with 24 official languages – bypasses the step of linguistic interpretation and heads straight for systemic and teleological interpretation. The ECJ's established approach is therefore to interpret the provision which has divergent linguistic versions 'by reference to the context and purpose of the rules of which it forms part' (Case C-510/10 *DR and TV2 Danmark*, para. 45; Case C-89/12 *Bark*, para. 40; Case C-257/14 *Van der Lans*, para. 25). However, the Court generally avoids originalist interpretation, i.e. based on the will of the historical legislator (Itzkovich, 2009: 553). Therefore, despite the position originally announced in *CILFIT* (Case 238/81), the ECJ does not compare all language versions in order to ascertain the linguistic meaning through a comparative semantic exercise, a method referred to as 'linguistic triangulation' (Schilling 2011: 1488).

Views on the ECJ's current practice

Justification of the ECJ's approach

Some authors approve its methodology of replacing comparative linguistic analysis with teleological reasoning. Thus Miguel Poiares Maduro argues that teleological reasoning is 'an increased necessity' in the pluralistic legal order of the EU, whose pluralism is a consequence of, *inter alia*, its multilingualism (Poiares Maduro, 2007:8–9). Likewise, ECJ judge (now President) Koen Lenaerts writing extrajudicially and jointly with his *référéndaire* Gutiérrez-Fons emphasise the paramount importance of uniform application of EU law, rejecting any pleas for the protection of legitimate expectations of individuals (Lenaerts & Gutiérrez-Fons, 2013: 12). Furthermore, they posit that allowing for the protection of individual expectations based on authentic language versions would 'run counter to the principle of equal treatment, given that one and the same normative text would be interpreted in different ways depending on the language of the procedure at national level' (Lenaerts & Gutiérrez-Fons, 2013: 12). Finally, they resort to the notion of 'autonomous concepts' of EU law which, as the ECJ has consistently held, allegedly detach themselves from any specific language (Lenaerts & Gutiérrez-Fons, 2013: 13).

Critique of the ECJ's approach

Critics of the ECJ take a different view. For instance, in his monograph setting out a blueprint for a normative theory of interpretation for the ECJ (Conway, 2012), Gerard Conway suggests that the ECJ, if faced with inconsistencies between language versions of an EU legal act, should start from gathering expert evidence from translators (Conway, 2012: 149). If such expert linguistic analysis would prove insufficient, Conway suggests that the Court is ultimately left with either a broad or narrow interpretation of the litigious term (as was the case with 'vehicle' in the *FML* case), and in such a case it 'could adhere to the narrower reading not affected by translation problems, out of respect for the prerogative of the legislature or constituent authority to amend the law if needed' (Conway, 2012: 149).

Whilst Conway's suggestion seems attractive thanks to its *prima facie* simplicity, and its similarity to the Canadian 'shared meaning' approach (Solun, 2014: 12–13), it might pose practical problems especially when combined with the *exceptiones non sunt extendendae* rule of interpretation (as in *FML* where the term under consideration was an exception to an exception, therefore subject to a broad, rather than restrictive reading). On

the other hand, if the ‘minimum common denominator’ rule suggested by Conway were implemented consequently, and openly declared by the ECJ as a *linguistic* directive of interpretation deployed before *systemic* directives, this would undoubtedly increase legal certainty and predictability of the Court’s case-law.

Theodor Schilling, in turn, argues that the rule of law requires that citizens’ legitimate expectations based on their own authentic version of an EU legal act should be protected (Schilling, 2010: 64). However, *de lege ferenda* he argues that the multilingualism of the Union should be weakened and that only one version of EU legal acts should be authentic, whilst all others would be mere translations, not only *de facto*, but also *de iure* (Schilling, 2010: 64–66). Therefore, citizens would be obliged to consult not only their national version, but also the authentic version in order to ascertain their rights and duties under EU law.

Towards an ‘authentic version’ defence

Theoretical assumptions: legal force of equally authentic but divergent versions of an EU legal act

As Solan correctly points out, ‘the EU does not recognize that the various language versions [of EU legal acts] emanated from multiple translations of an original text. Acknowledging the translation history in which one version was the source of another violates the principle of equal authenticity that is so much a part of EU legislative culture’ (Solan, 2014: 16). Obviously, the authenticity of all versions and the insistence that none of them is a translation is, empirically (not legally) speaking, a pure fiction (Doczekalska, 2006: 15). 95% of all EU legislation is drafted, scrutinised and revised in English, before being translated into other languages (Łachacz & Mańko, 2013: 80).

But let us assume that this fiction is true and let us push its premises to the very end. It is submitted that if all the linguistic versions are really equally authentic, i.e. they ‘have the same legal force, are legally effective and produce the same legal consequences’ (Doczekalska, 2006: 15) and if the legal system does not contain an explicit rule on removing the discrepancies (save for the vague rule requiring the ‘comparison of the different language versions’ proclaimed in Case 283/81 *CILFIT*, para. 18, which is not applied in practice – see e.g. Case C-257/14 *Van der Lans*, para. 25), the outcome is, pending a binding interpretation by the Court of Justice, temporary legal pluralism, i.e. the simultaneous presence of ‘different com-

mands, or different legal consequences – all equally authentic, or equally binding’ (Schilling, 2010: 52; cf. Gajda, 2013: 25; but see Doczekalska, 2006: 15–16).

The idea of temporary legal pluralism will be illustrated by resorting to a simplified model of a multilingual legal order LO_m which contains 9 equally authentic languages (A, B, C..., I). Further simplifying, let us assume that the text of legal rule R is sufficient to reconstruct a legal norm N , i.e. it is not necessary to take into account other legal rules belonging to the system ($R \rightarrow N$). Let us assume that legal rule R exists in 9 equally authentic versions ($R_a, R_b, R_c, \dots, R_i$). Versions in languages A, B and C coincide between each other, but differ from versions D, E, F, which in turn differ from versions G, H and I. If all versions are equally authentic, there will be three different legal norms in legal order LO_m , unless there exists a collision rule (CR) which provides how to eliminate the discrepancy. For the time being assuming that rule CR does not exist, the normative situation as from the moment of promulgation of legal act A containing rule R_1 in 9 authentic versions is as follows:

$$(R_a, R_b, R_c) \rightarrow N_1$$

$$(R_d, R_e, R_f) \rightarrow N_2$$

$$(R_g, R_h, R_i) \rightarrow N_3$$

The coexistence of three different legal norms (N_1, N_2 and N_3) despite the existence of only one legal rule (R_1), which – however – is expressed in 9 authentic languages is a logical consequence of the equal authenticity of those languages. Even if the interpreter knows, for instance, that language A is the original, and languages B, C, D..., I are translations, this knowledge may not be taken into account when interpreting rule R_1 precisely due to the rule on equal authenticity.

If legal order LO_m is to achieve a state in which:

$$R = N$$

i.e. in which one legal rule produces one legal norm, there is a need for adding a rule allowing the removal of conflicts between linguistic versions. For instance, the Canadian Supreme Court, dealing with bilingualism of legislative acts, usually applies the ‘shared meaning rule’ (Solun, 2014: 12–13) which means that only the minimum common denominator of the French and English rules is taken into account when constructing the norm of Canadian law on the basis of rules expressed in two equally authentic languages.

However, no such rule operates in EU law. In fact, apart from the formal injunction to compare various language versions (Case 283/81, para. 18; cf. Doczekalska, 2006: 19), which the ECJ does not, as a matter of fact, follow in practice (see e.g. Case C-257/14 *Van der Lans*, para. 25), the Court does not have a normative theory of multilingual interpretation. Neither is there a legislative rule regarding that issue (Doczekalska, 2006: 18). What is more, according to Gerard Conway and Gunnar Beck, the ECJ does not even have *any* normative theory of interpretation, and instead picks and chooses arguments according to the needs of each case (Beck 2014; cf. Conway 2012: 147), following the so-called ‘cumulative approach to interpretation’ which – as Beck explains – ‘does not commit it to a literal interpretation of the relevant legal materials but affords it a considerable measure of discretion in the choice between literal, systemic, purposive and consequentialist interpretative criteria and, as a result, very considerable freedom in the relative weight and rank it accords to individual criteria or even specific arguments in individual cases’ (Beck, 2014: 237). This approach corresponds to the notion of ‘pragmatic adjudication’ as used by Richard Posner with regard to American courts (Posner, 2003; cfr. Mańko, 2015: 77).

Indeed, in the case of discrepancy between language versions of an EU legal text, ‘no one language version automatically trumps the others, no language version may simply be ignored; nor may the authoritative meaning simply be determined by reference to a particular combination or number of language versions’ (Beck, 2012: 174). Indeed, as Paweł Marcisz rightly points out, ‘[t]here is no theory of interpretation which would be capable of simultaneously explaining and predicting the decisions and interpretation of the Court’ (Marcisz, 2015: 139).

Therefore, taking into account that the ECJ does not have any hard-and-fast normative theory of interpretation suitable for discrepancies between various equally authentic language versions (such as the Canadian ‘shared meaning’ rule), and considering that within the EU legal order judgments of the ECJ count as sources of law (Sulikowski, 2005: 221–232; Marcisz, 2015: 157ff), it follows that the normative pluralism resulting from the discrepancy between the linguistic versions subsists between the time of promulgation (t_p) and the time of authoritative adjudication (t_a) on the normative meaning of rule R_1 by the ECJ. The time-span between t_p and t_a can involve even many years, and only at time t_a is the normative pluralism dissolved and replaced by a legal norm proclaimed by the Court of Justice. This can be formalised in the following way:

t_p	t_a
$(R_a, R_b, R_c) \rightarrow N_1$	$(R_a, R_b, R_c, R_d, R_e, R_f, R_g, R_h, R_i) \rightarrow N_E$
$(R_d, R_e, R_f) \rightarrow N_2$	
$(R_g, R_h, R_i) \rightarrow N_3$	

It is possible that the authentic norm of EU law as proclaimed authoritatively by the ECJ (N_E) is based on one of the norms inferred from one of the national language versions (N_1 , N_2 or N_3), but it is also equally possible that Court reads into rule R_1 a meaning which cannot be deduced from any of the linguistic versions, being the product of teleological or even metateological interpretation.

Of course, from the internal point of EU law the view that norms N_1 , N_2 and N_3 are binding between t_p and t_a is unacceptable as it would trump the principle of uniform application of EU law. However, in that case it must be admitted that between t_p and t_a the actual normative content of rule R_1 is simply unknown and unpredictable, as there is no normative theory which could help individuals predict the content of norm N_E (cf. Marcisz, 2015: 139) which will be deemed binding upon them *ex post facto*, as the cases discussed above indicate. Such a situation, in turn, violates the principle of legal certainty, as it does not allow individuals to adapt their conduct to legal rules.

The role of epistemic communities

Apart from multilingualism, the European Union is characterised by the co-existence of 28 epistemic communities of lawyers within the Member States (cf. Marcisz, 2015: 56ff). Assuming that the linguistic lawyer of law as such cannot effectively limit the scope of possible interpretations of a legal rule (Kozak, 2002: 87), it is crucial to focus on the role of epistemic communities in the process of reconstructing norms of conduct on the basis of legal texts (Kozak, 2002: 122–123; Stawecki, 2005: 96–97; Łachacz & Mańko, 2013: 82). National epistemic communities bring with themselves values and presuppositions which they invest in a text of EU law drafted in their language, reflecting different socio-cultural backgrounds and identities of each Member State (Łachacz & Mańko, 2013: 85; cf. Gajda, 2013: 24). The fact that lawyers do not function in isolation, but belong to specific epistemic communities means that an individual, seeking advice on his situation under EU law from a national lawyer practising

in his Member State will inevitably receive and advice based not only on a reading of the national authentic version of the EU legal act, but also on its interpretation determined by the lawyer's membership in the relevant epistemic community. This factor only adds up to the subjective legal uncertainty regarding the individual's rights and duties under EU law in a situation of a linguistic discrepancy between the authentic versions of an EU legal act.

Need for protection of individuals' legitimate expectations created by an authentic version of an EU legal act

It is submitted that if the principle of equal authenticity of language versions and the principle of legal certainty and legitimate expectations are to be accorded due significance, individuals should be allowed to rely on their national language versions (i.e. on norms N_1 , N_2 or N_3 , respectively) until the Court of Justice retroactively determines the EU-wide normative significance of rule R_1 (cf. Schilling, 2010: 61). It is proposed to refer to this as the 'authentic version' defence, which individuals should be allowed to raise in certain situations.

However this right should be limited by the principle of proportionality and should not extend beyond what is necessary to attain its objective, i.e. the protection of legitimate expectations of parties acting in good faith. Therefore, first of all, the scope *ratione personae* of this 'authentic version' defence should be limited to those individuals which, on account of their status, are usually not in a position to seek complex, multilingual and plurijural legal advice, i.e. to natural persons, as well as – with regard to legal persons – small and medium enterprises as well as non-profit and not-for-profit legal persons, such as associations and foundations.

Secondly, the scope *ratione materiae* of the right to rely on the 'authentic version' defence should be limited to those situations, in which reliance on the defence would not affect in an adverse and unjustified way the counterparty of the legal relationship in question. Therefore, the 'authentic version' defence should apply above all to vertical legal relationships, i.e. relationships of public law, especially tax law, customs law, as well as other areas of administrative law. *A fortiori*, the privilege should apply, in a generous way, to criminal responsibility, and the 'authentic version' defence should always be treated as an exonerating factor in criminal law. As regards horizontal relationships, i.e. relationships of private law and similar ones, it is conceivable to propose the application of the 'authentic version' defence to relationships which, from a socio-economic point of view, are not balanced, and in which the legal framework in place provides for protective mea-

sures for one of the parties, such as in consumer contracts or employment contracts.

Finally, as regards the types of EU legal acts which should be covered by the possibility of raising the ‘authentic version’ defence, it is submitted that it should apply above all to regulations, which – being directly applicable – directly and immediately modify the individual’s legal situation, but also to directives to the extent that they determine the correct interpretation of national implementing provisions, as illustrated by Case C-428/02 *Fonden Marselisborg* discussed above.

The ECJ’s decision in *Skoma-Lux*

The proposal put forward here finds considerable support not so much in the actual practice of the ECJ (where a uniform interpretation of EU law trumps citizens’ legitimate expectations, as was shown above), but in its judgment in Case C-161/06 *Skoma-Lux* regarding the requirement of publication of EU law in all official languages. The Skoma-Lux company was a Czech importer of wines and wine merchant. It was fined by the Czech customs authorities for violating an EU regulation, which – at the material time – was not yet available in an official translation into the Czech language. When the case was referred to the ECJ, the customs authorities argued that Skoma-Lux could access the unofficial translation text of the regulation *inter alia* through the EUR-LEX website. However, the Court rejected that argument and insisted that only properly promulgated EU legal acts, i.e. published in a given language in the *Official Journal*, may be enforced against individuals.

The Court pointed to the principles of legal certainty and non-discrimination (C-161/06, para. 36), and ruled that an EU regulation ‘cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves acquainted with it by its proper publication in the *Official Journal of the European Union*’ (C-161/06, para. 37). It went further to emphasise that ‘the principle of legal certainty requires that [individuals have the opportunity] to acquaint themselves with the precise extent of the obligations [that EU legislation] imposes upon them, which may be guaranteed only by *proper publication* of that legislation *in the official language* of those to whom it applies’ (C-161/06, para. 38, emphasis added).

Furthermore, the Court invoked the principle of equal treatment which, in its view, would be violated if individuals in certain Member States could not acquaint themselves with EU legislation imposing duties upon them because of its late publication (C-161/06, para. 39). Even the principle of

effectiveness of EU law did not bar the Court from reaching its conclusion, since ‘the latter principle cannot apply to rules which are not yet enforceable against individuals’ (C-161/06, para. 40).

It is submitted that the ECJ’s reasoning in *Skoma-Lux*, regarding the requirement for *timely* publication of an EU legal act for it to become enforceable against individuals of a given Member State, may be applied *mutatis mutandis* to the *correct* publication of an EU legal act in a given language. This is because the underlying *ratio*, i.e. the opportunity for individuals to acquaint themselves with the content of the legal act in the *Official Journal* is exactly the same. A publication with errors assists individuals in taking cognisance of their rights and duties no more than a late publication. Even more so, a publication with errors is actually less favourable to individuals, as it creates the illusion of access to the law, whereas in fact, due to the errors in translation, it has a misleading character. Finally, a more general rule which can be distilled from *Skoma-Lux* is that individuals in the EU enjoy, by virtue of the principles of legal certainty and non-discrimination, the right to access EU legislation in the language of their Member State, duly published in the Union’s *Official Journal* (cf. Kuzelewska, 2015: 152). *A contrario*, the Court does not – at least in *Skoma-Lux* – impose upon them the duty to consult other linguistic versions of the *OJ*. It is therefore submitted that the *ratio* underlying the *Skoma-Lux* decision militates in favour of the solution proposed above, namely that individuals should be allowed to rely on their national versions, especially in vertical legal relationships, as long as the error has not been rectified through an authoritative interpretation by the ECJ.

Conclusions

The multilingualism of the EU legal order should be viewed not only from the point of view of the Member States, wishing to guarantee the use of their official languages for the promulgation of EU legal acts, but also from the point of view of citizens, who – by virtue of the principles of legal certainty and non-discrimination – have the right to acquaint themselves with their rights and duties under EU law in the official language of their Member State. However, due to inherent features of language and translation, discrepancies between the 24 official versions of EU legal acts are inevitable. The Court of Justice, in adjudicating disputes involving such discrepancies, usually pays little attention to the literal interpretation and imposes a uniform, EU-wide interpretation of the diverging authentic versions on the basis

of systemic and teleological arguments. Without questioning the need for such an authentic interpretation nor the methodology deployed in order to attain it, this paper argues that the ECJ's approach does not pay sufficient heed to the legitimate expectations of individuals who have relied on the authentic text of an EU legal act in the official language of their Member State. The paper proposes that in 'vertical' legal relationships, especially where the responsibility of an individual under tax, customs or criminal law is concerned, an individual should have the possibility to rely on an 'authentic version' defence *vis-à-vis* the public authorities in order to avoid fiscal or criminal responsibility. The same could apply also to certain 'horizontal' relationships, but only for the benefit of weaker parties, such as consumer or employees.

R E F E R E N C E S

- Alter, K. (2001). *Establishing the Supremacy of European Union Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press.
- Arnulf, A. (2006). *The European Union and Its Court of Justice*. 2nd ed. Oxford: EC Law Library.
- Baaij, C.J. (2012). The EU Policy on Institutional Multilingualism: Between Principles and Practicality. *Language and Law*, 1. Retrieved from: <https://www.languageandlaw.de/volume-1/3338>.
- Beck, G. (2012). *The Legal Reasoning of the Court of Justice of the EU*. Oxford–Portland: Hart Publishing.
- Beck, G. (2014). The Court of Justice, legal reasoning, and the Pringle case-law as the continuation of politics by other means. *European Law Review*, 39.2, 234–250.
- Biernat, S. (2006). Prawo Unii Europejskiej a prawo państw członkowskich [European Union Law and the Law of the Member States]. In J. Barcz (Ed), *Prawo Unii Europejskiej. Zagadnienia systemowe* [European Union Law: Systemic Issues] (pp. 229–262). Warszawa: Wyd. Prawo i Praktyka Gospodarcza.
- Conway, G. (2012). *The Limits of Legal Reasoning of the European Court of Justice*. Cambridge: Cambridge University Press.
- Doczekalska, A. (2006). Interpretacja wielojęzycznego prawa Unii Europejskiej. [The Interpretation of Multilingual European Union Law]. *Europejski Przegląd Sądowy*, 5, 14–21.
- Doczekalska, A. (2013). „Zjednoczona w różnorodności” – wyzwanie dla europejskiej tożsamości prawnej na przykładzie różnorodności językowej. [‘United in Diversity’: Linguistic Diversity as an Example of a Challenge for European Legal Identity]. *Filozofia Publiczna i Edukacja Demokratyczna*, 2.2, 233–243.
- Gajda, A. (2013). Wielojęzyczność Unii Europejskiej [The Multilingualism of the European Union]. *Socjolingwistyka*, 27, 7–29.

- Hart, H.L.A. (1997). *The Concept of Law*. 2nd ed. Oxford: Clarendon Press.
- Itzkovich, G. (2009). The Interpretation of Community Law by the European Court of Justice. *German Law Journal*, 10.5, 537–559.
- Kalisz, A. (2014). Wykładnia prawa Unii Europejskiej [The Interpretation of European Union Law]. In A. Zawadzka-Łojek et al. (Eds.). *Prawo Unii Europejskiej. Instytucje i porządek prawny. Prawo materialne* [European Union Law: Institutions and the Legal Order; Substantive Law]. Warszawa: Euro-Prawo.
- Konieczna, N. (2013). Unia Europejska – wielojęzyczny problem? [The European Union: A Multilingual Problem?]. *Przegląd Prawniczy, Ekonomiczny i Społeczny*, 2, 45–52.
- Kozak, A. (2002). *Granice prawniczej władzy dyskrecjonalnej* [The Limits' of Lawyers' Discretionary Power]. Wrocław: Kolonia Limited.
- Křepelka, F. (2014). Dominance of English in the European Union and in European Law. *Studies in Logic, Grammar and Rhetoric*, 38(51), 137–150.
- Kuźelewska, E. (2014). Unity in Diversity. The Language Policy of the European Union. *Studies in Logic, Grammar and Rhetoric*, 38(51), 151–165.
- Lenaerts, K. & Gutiérrez-Fons, A. (2013). To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice. *EUI Working Papers – Academy of European Law – Distinguished Lectures of the Academy*, 9. Retrieved from: <http://cadmus.eui.eu/handle/1814/28339>.
- Lindroos-Hovinheimo, S. (2007). On the Indeterminacy of Legal Translation. In T. Wilhelmsson et al. (Eds.). *Private Law and the Many Cultures of Europe* (pp. 367–384). Alphen a/d Rijn: Kluwer Law International.
- Lachacz, O. & Mańko, R. (2013). Multilingualism at the Court of Justice of the European Union: Theoretical and Practical Aspects. *Studies in Logic, Grammar and Rhetoric*. 34 (47), 75–92.
- Mańko, R. (2015). The Impact of EU Membership on Private Law Adjudication in Poland: A Case Study of the Polish Supreme Court's Case Law on Unfair Terms in Consumer Contracts. In M. Bobek (ed.), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (pp. 73–97). Oxford: Hart Publishing.
- Marcisz, P. (2015). *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*. Warszawa: LEX a Wolters Kluwer business.
- Paunio, E. (2007). The Tower of Babel and the Interpretation of EU Law: Implications for Equality of Languages and Legal Certainty. In T. Wilhelmsson et al. (Eds.), *Private Law and the Many Cultures of Europe* (pp. 385–402). Alphen a/d Rijn: Kluwer Law International.
- Paunio, E. & Lindroos-Hovinheimo, S. (2010). Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law. *European Law Journal*, 16.4, 395–416.

- Poiares Maduro, M. (2007). Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism. *European Journal of Legal Studies*, 1.2, 1–21. Retrieved from: <http://cadmus.eui.eu/handle/1814/7707>.
- Posner, R. (2003). Pragmatism, law, democracy.
- Schilling, T. (2010). Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law. *European Law Journal*, 16.1, 47–66.
- Schilling, T. (2011). Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication? *German Law Journal*, 12.7, 1460–1491.
- Sierocka, H. (2014). Cultural Dimensions of Legal Discourse. *Studies in Logic, Grammar and Rhetoric*, 38(51), 189–196.
- Solan, L.M. (2014). Multilingualism and morality in statutory interpretation. *Language and Law = Linguagem e Direito*, 1.1, 5–21. Retrieved from: <http://ler.lettras.up.pt/uploads/ficheiros/12682.pdf>.
- Stawecki, T. (2005). O praktycznym zastosowaniu hermeneutyki w wykładni prawa [On the Practical Application of Hermeneutics to Legal Interpretation]. In P. Winczorek (Ed.), *Teoria i praktyka wykładni prawa* [Theory and Practice of Legal Interpretation] (pp. 89–116). Warszawa: Liber.
- Stone Sweet, A. (2007). The Juridical *Coup d'Etat* and the Problem of Authority. *German Law Journal*, 8, 915–928.
- Sulikowski, A. (2005). Tworzenie prawa przez Europejski Trybunał Sprawiedliwości. Wybrane problemy [The Creation of Law by the European Court of Justice: Selected Aspects]. In J. Kaczor (Ed.), *Teoria prawa europejskiego* [Theory of European Law] (pp. 221–232). Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.
- Zerka, P. (2013). Jednolitość prawa Unii Europejskiej a jego wielojęzyczność. Przypadek języka hiszpańskiego. [The Uniformity of European Union Law and Its Multilingualism. The Case of the Spanish Language]. *Kwartalnik Kolegium Ekonomiczno-Społeczne. Studia i Prace [Szkoła Główna Handlowa]*, 2, 59–76.