

Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law

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Abstract: *This article deals with a problem created by the EU's multilingualism, the fallibility of translators and the ruses of politicians: for different reasons, it is quite common that equally authentic language versions of a Community law have different meanings if taken on their own. While the ECJ's uniform interpretation approach to this problem, which must be seen as required under the non-discrimination principle, has permitted equitable results in those cases decided by the ECJ, it would not be adequate for the simplest type of case, ie that a citizen has every reason to trust her own language version of a law. In such a case, her legitimate expectations in the equal authenticity of that version requires protection. De lege lata the article therefore proposes, in the interest of generally equitable solutions, a balancing, in the individual case, of the protection of legitimate expectations and the non-discrimination principle. De lege ferenda it proposes a more radical solution, ie that there be only one authentic version of every Community law.*

I Introduction

The destruction of the tower of Babylon led, or so we are told,¹ to the emergence of different linguistic groups. Meant to be a punishment for mankind for having had the audacity to try to erect that tower, mankind has fervently embraced that punishment, ie the resulting linguistic differences. Indeed, legal translation which is in part at the basis of the problem to be discussed must have started shortly thereafter: the ancient story of the goring ox and his different incarnations in different near-Eastern legal systems² would not have been possible without the translation of laws. At the same time, the example shows that a translation, for whatever reasons, may differ quite considerably from the original.

To return to the question of punishment, it may well be considered that not so much the linguistic differences as such but the fervency of their embrace by mankind has been

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¹ Genesis 11:7.

² Told eg by Alan Watson, *Legal Transplants* (Scottish Academic Press, 1974), 22–24.

the real punishment.³ The point is particularly relevant to the EU whose multilingualism⁴ has been described as part of its self-portrayal.⁵

Multilingualism has different levels which should be discussed applying different criteria.⁶ Among those levels are the respective language regimes applicable to administrative and court proceedings involving citizens and EU institutions, whose discussion should be guided by criteria taken from human and minority rights, as well as those applicable to parliamentary procedures and consultations between representatives of Member States whose discussion should be guided rather by aspects of the equality of states.⁷ This article will mainly discuss the multilingual publication of legal texts as it affects the citizen. In this context, the EU aims 'to give citizens access to European Union legislation, procedures and information in their own languages'.⁸ The question will be whether the very effort to legislate multilinguistically is self-defeating, by necessity or at least as practiced by the EU,⁹ more exactly, whether the multilingualism as practiced on this level by the EU is compatible with the rule of law requirements of accessibility of a law and foreseeability of its effects as developed by the Court of Human Rights under the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁰ This article will deal with those requirements, contrast them with certain countervailing aspects defined by the jurisprudence of the ECJ on the uniform interpretation of Community law which will be identified as requirements of the non-discrimination principle, and discuss how to balance those partly contradictory requirements. In conclusion, it will claim that multilingualism as

³ Indeed, this theme is clearly in sight in Genesis 11:6.

⁴ The EU's language regime is, from a comparative point of view, wholly exceptional. Among multilingual states, only the Republic of South Africa comes close, having 11 official languages. However, there the government is only obliged to use two of them; cf Constitution of the Republic of South Africa 1996, adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, Act 108 of 1996, ISBN 0-620-20214-9, available at <http://www.polity.org.za/html/govdocs/constitution/saconst.html>, Languages Sec 6. Further comparative references in T. Schilling, 'Eine neue Rahmenstrategie für die Mehrsprachigkeit. Rechtskulturelle Aspekte', (2007) *Zeitschrift für Europäisches Privatrecht* 754, 761 *et seq.*

⁵ A. von Bogdandy, 'Die Europäische Union und das Völkerrecht kultureller Vielfalt—Aspekte einer wunderbaren Freundschaft', in G. Nolte *et al* (eds), *Pluralistische Gesellschaften und Internationales Recht*, (2008) 43 *Berichte der Deutschen Gesellschaft für Völkerrecht* 69. According to C. von Bar *et al* (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Outline Edition* (Sellier, 2009) (DCFR), Intr § 19, 'the preservation of cultural and linguistic diversity is an all-important principle, vital to the very existence of the Union'. According to Intr § 16, it is one of the "'overriding principles" of a high political nature', on a par with, eg the protection of human rights and the promotion of the internal market. The exact meaning of this diversity however remains undefined.

⁶ Cf T. Oppermann, 'Das Sprachenregime der Europäischen Union—reformbedürftig? Ein Thema für den Post-Nizza-Prozeß', (2001) 4 *Zeitschrift für Europarechtliche Studien* 1, 17 *et seq.*

⁷ Some of those levels I have discussed in another article; cf T. Schilling, 'Language Rights in the EU', (2008) 9 *German Law Journal* 1219 *et seq.*

⁸ Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: A New Framework Strategy for Multilingualism, COM(2005) 596 final of 22.11.2005, available at <http://europa.eu/languages/servlets/Doc?id=913>, pt 1.2, 'What is Multilingualism?'.

⁹ Also cf Proposals from the Group of Intellectuals for Intercultural Dialogue set up at the initiative of the European Commission, A Rewarding Challenge. How the multiplicity of languages could strengthen Europe, 2008, available at http://ec.europa.eu/education/policies/lang/doc/maalouf/report_en.pdf, 3: '[I]n any human society linguistic . . . diversity has both advantages and drawbacks, and is a source of enrichment but also a source of tension'.

¹⁰ Of 4 November 1950, UNTS vol 213 221; ETS no 5.

practiced by the EU on the level discussed is problematic under rule-of-law aspects, and will plead for reducing the number not of the official languages of the EU but of the authentic languages versions of every EU legislative act to one.

II The Requirements the Rule of Law Posits for Legislation

According to Article 6(2) of the EU Treaty,¹¹ '[t]he Union shall respect fundamental rights as guaranteed by the [ECHR]'. According to Article 6(2) of the EU Treaty as to be amended by the Lisbon Treaty¹² the EU shall even accede to the ECHR. The human rights law as developed by the Court of Human Rights under the ECHR requires under two aspects a certain quality of a national law that interferes with a human right: such interference can only be considered as justified by a law if that law is accessible to the citizen and if its effects are foreseeable. Accessibility of a law generally requires its publication in an official journal or, in the case of jurisprudence, in law reports or a law review. Foreseeability of its effects requires that the law is sufficiently clear for the citizen to foresee, if need be with the assistance of a lawyer, its effects, ie what she must, or must not, do and what she may, or may not, expect or require from public authorities.¹³ As rule of law requirements, these aspects must apply also beyond human rights law.

A The Question of the Quality of Laws

On the face of it, EU laws clearly fulfil the requirement of accessibility: they generally are published in the *Official Journal*, and most Court decisions, including nearly all important ones, are published in the *European Court Reports*.¹⁴ Existing problems stem from the EU's multilingualism concept under which it has, as from 1 January 2007, 23 official languages.¹⁵ Legal texts of the EU are published in all those 23 official languages.¹⁶ Citizens can communicate with EU institutions in any one of these languages, and have the right to get an answer in the language chosen by them.¹⁷ While Court judgments and individual administrative decisions, even if published in the *Official Journal* in all official languages, are authentic only in their respective language of procedure,¹⁸ the other

¹¹ [2006] OJ C321, E/1.

¹² [2008] OJ C115/13.

¹³ Cf eg Court of Human Rights, *Landvreugd v The Netherlands*, Application no 37331/97, para 54 *et seq.*

¹⁴ For legislative matters cf Art 254(1), (2) EC; for the jurisprudence of Art 24 of the Instructions to the Registrar of the Court of Justice, [1974] OJ L350/33, as amended from time to time, and Art 18(3) of the Instructions to the Registrar of the Court of First Instance of the European Communities, [2007] OJ L232/1.

¹⁵ Luxembourgish being the only nationwide official language which is not, at the same time, an official language of the EU.

¹⁶ Cf for the treaties themselves Art 314 EC and 53 EU, for secondary legislation Art 1(1) of the very first Council Regulation, the 1958 Regulation No 1 determining the languages to be used by the European Economic Community (OJ, English special edition, Series 1 Chapter 1952–58, 59, with later amendments), as amended from time to time, and for the jurisprudence the Instructions to the Registrar, *op cit* n 14 *supra*, which refer to Art 1 of Regulation No 1. Secondary legislation not published in one of the official languages, ie in the official language of those to whom it applies ['*la langue officielle du destinataire*'] cannot be enforced against natural and legal persons in a Member State': ECJ, Case C-161/06, *Skoma-Lux sro v Celní reditelství Olomouc* [2007] ECR I-10841, paras 37–38.

¹⁷ Art 21(3) EC.

¹⁸ For the latter expressly so ECJ, Case C-361/01 *P, Kik v OHIM* [2003] ECR I-8283, para 87.

versions being clearly marked as translations, all 23 language versions of a legislative act are equally authentic.¹⁹

What are the problems? Quite generally, no two texts in different languages will ever have exactly the same meaning.²⁰ Beyond this truism lies the fact that even significant divergences between different language versions of a text cannot fully be avoided. In the EU context, there are two possible sources of this problem, which is clearly more acute regarding secondary legislation than regarding the Treaties: inadequate translation and political meddling. Inadequate translation is self-explanatory and to a certain degree inevitable; translators are fallible humans.²¹ Political meddling happens in the way that members of the different branches of the legislature sometimes develop an interest in the wording of specific language versions, which is motivated more politically than linguistically. An example of the distortion such an interest may create is the word 'spiritual' in the second paragraph of the preamble of the Charter of Fundamental Rights of the European Union²² (EU Human Rights Charter) and its German not-quite equivalent. 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.²³

It is true that there are techniques to minimise those problems. One such technique is to develop multilingual texts with all the relevant languages in mind.²⁴ But it is rather doubtful whether that technique is feasible in the case of 23 language versions which obviously cannot be drafted simultaneously. Another technique which the EU actually applies is to have in place a final control stage of the consistency of the 23 language versions, ie a procedure which comes at the very end of the legislative process²⁵ and provides for the editing of legal texts and their finalisation by legal/linguistic experts.²⁶

¹⁹ Cf for the founding treaties Art 314 EC and 53 EU, for secondary legislation, eg ECJ, Case 283/81, *CILFIT v Ministero della Sanità* [1982] ECR 3415, para 18.

²⁰ '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 H. von Kittel *et al* (eds), *Übersetzung—Translation—Traduction. An International Encyclopedia of Translation-Studies*, Vol 1 (Teilband Berlin, 2004), 301, 310.

²¹ Cf R. Streinz, 'Die Auslegung des Gemeinschaftsrechts durch den EuGH. Eine kritische Betrachtung', (2004) 7 *Zeitschrift für Europarechtliche Studien* 387, 402 *et seq*, with further references. The EFTA Court, Case E-9/97, *Erla María Sveinbjörnsdóttir v Government of Iceland* [1998] *EFTA Court Reports* 95, para 27, gives an interesting example for divergences emerging during the legislative process.

²² [2007] OJ C 303/1.

²³ On the relevant debates of the Convention cf M. Triebel, 'Religion und Religionsgemeinschaften im künftigen Europäischen Verfassungsvertrag. Die Debatten des Europäischen Konvents', available at www.nomokanon.de/abhandlungen/014.htm, paras 82–88.

²⁴ Cf Rainer J. Schweizer, 'Sprache als Kultur- und Rechtsgut', (2006) 65 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 371, 379. A good example of this approach is Gérard Caussignac, 'Empirische Aspekte der zweisprachigen Redaktion von Rechtserlassen', in F. Müller and I. Burr (eds), *Rechtssprache Europas. Reflexion der Praxis von Sprache und Mehrsprachigkeit im supranationalen Recht* (Duncker & Humblot, 2004), 173.

²⁵ The actual basis of the procedure appears to be the Joint Declaration on Practical Arrangements for the Codification Procedure, [2007] OJ C145/5. And cf Art 22 of the Council's Rules of Procedure (Council Decision of 22 March 2004 adopting the Council's Rules of Procedure, [2004] OJ L106/2): '[T]he Legal Service shall be responsible for checking the drafting quality of proposals and draft acts at the appropriate stage'.

²⁶ The Council's Legislative Quality directorate is staffed by some 70 experts, three for each official language; cf J.-P. Piris, 'The Council Legal Service', available at www.europeanlawyer.co.uk/yb_european councilllegalservice.html. The corresponding unit of the EP appears to be staffed by four experts for each official language.

A third technique is to try to standardise the legislative language by developing a common frame of reference and thereby creating a common (or 'new') legal language,²⁷ which is still expressed using the traditional national languages. Such a standardisation would allow for consistently used and autonomously construed concepts of Community law to get their proper Community-wide connotations, to this extent creating in a manner of speaking a Community-wide legal culture,²⁸ as it may already have been achieved, through the jurisprudence of the ECJ, in the case of at least some Treaty concepts.

This latter approach has sometimes been seen as having been taken in the Commission's 'Action Plan'²⁹ although the Commission has not clearly defined its plan in this way. Indeed, it has been said that 'the particular charm of this idea is that no one knows what lurks behind the concept'.³⁰ In any event, this plan to date has led to the publication of the DCFR³¹ which to a large extent gives the impression of being a codification of European contract law and which, importantly, exists to date only in English. It therefore appears that before this promised new and common legal language really can come into being it first must be created by, somehow counterintuitively, translations from English into the other official languages.

Whatever the possible future results of those minimising strategies which in any event appear to be potentially effective only against one of the two sources of diverging language versions, ie inadequate translation, at present it appears likely that significant divergences between different language versions of a Community law are the rule rather than the exception in the sense that, at least in extensive legal texts, there will be quite regularly at least one significant divergence between at least two language versions.³² As

²⁷ On the 'terminologisation' of Community law cf R. Christensen and F. Müller, 'Mehrsprachigkeit oder das eine Recht in vielen Sprachen', in Müller and Burr, *op cit* n 24 *supra*, at 9, 13 *et seq*; B. Pozzo, 'Multilingualism, Legal Terminology and the Problems of Harmonising European Private Law', in B. Pozzo and V. Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Kluwer Law International, 2006), 3, 18–19.

²⁸ This is considered as precondition of a greater uniformity of European law by G. Ajani and P. Rossi, 'Multilingualism and the Coherence of European Private Law', in Pozzo and Jacometti, *ibid*, at 79, 83–84, who however consider it a 'long term project', *ibid*, at 85.

²⁹ Communication from the Commission to the European Parliament and the Council. A More Coherent European Contract Law. An Action Plan, COM (2003) 68 final. Thus eg V. Heutger, 'A more coherent European [sic] wide legal language', (2004) 7 *European Integration online Papers* No 2, 3; H. Heisse, 'The Common Frame of Reference (CFR) of European Insurance Contract Law', (2008) 9 *ERA Forum* 95, 96: 'This instrument [the CFR] would, to some extent, provide Europe with a common legal language, as was the case with Latin until national codifications replaced the *ius commune*'. But it appears that while the CFR might provide us with a new *ius commune* it will certainly not provide us with a new Latin.

³⁰ Max Planck Institute for Comparative and International Private Law, 'Quo vadis Common Frame of Reference?', available at http://www.mpipriv.de/ww/en/pub/research/research_work/european_and_universal_private/contract_law/quo_vadis_cfr.cfm.

³¹ Cf *op cit* n 5 *supra*.

³² This estimate is my own, based on a quarter of a century of professional experience in the ECJ's linguistic service. A case of three different meanings of a provision of the Sixth Directive (Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes—Common system of value added tax: uniform basis of assessment [1977] OJ L145/1, amended on numerous occasions) is quoted by Advocate General Sharpston, Opinion in Case C-35/05, *Reemtsma Cigarettenfabriken v Ministero delle Finanze* [2007] ECR I-2425, para 8, n 7. A clear contradiction can be found in Art 7(5) of the Annex 'The European Union Civil Service Tribunal' to the Statute of the Court of Justice of the European Communities, inserted by Council Decision of 2 November 2004 establishing that Tribunal, [2004] OJ L333/7, between, on the one hand, among others, the English, Polish, Portuguese and Spanish versions and, on the other hand, the French, German, Italian and Dutch versions: according

all language versions of an EU law are equally authentic, such divergences are not a minor problem. Indeed, when all 23 language versions are equally authentic, and not all of them, considered in isolation, have the same meaning, it follows that different meanings—in the case of laws, this translates into different commands, or different legal consequences—are equally authentic, or equally binding. This legal conundrum has three possible solutions: either all the diverging versions are somehow interpreted uniformly, or every language version is treated on its own merits so that it depends on the citizen's language what version of the law is applied to her, or again the law is considered as null and void because it is self-contradictory so that the citizen who takes cognisance of all the language versions³³ is unable to foresee the consequences of her acts.

B Three Unappealing Solutions

Those three solutions are equally unappealing. The uniform interpretation solution necessarily implies that not all the language versions are equally respected, or 'authentic'. What I shall call the equal authenticity solution leads needs be to a splitting up of Community law along language lines. The avoidance solution really is no solution at all. *De lege lata*, however, this noxious combination of multilingualism and equal authenticity must be accepted. The question therefore is which of these unappealing solutions, or which combination of them, interferes the least with the requirements of the rule of law.

Under this aspect, there is much to be said for the avoidance solution. Nullity is a common fate for a law which is irredeemably self-contradictory.³⁴ In addition, this is the only solution which is apt to combine the equal authenticity of all the language versions of a Community law with the uniform interpretation of that law; when no uniform interpretation is possible without infringing the equal authenticity of all the language versions, then, according to this solution, the law in question is void.³⁵ However, this solution obviously is contrary to the legislative intention and leaves a field unregulated which the legislature saw fit to regulate. Also, in practical terms, there is no way to know to what extent Community law would be void.³⁶ For those reasons, the avoidance solution should be excluded regularly.³⁷

to the English version, 'the unsuccessful party shall be ordered to pay the costs *should the court so decide*', according to the French version, 'toute partie qui succombe est condamnée aux dépenses, *s'il est conclu en ce sens*' (ie if the other party requests it) (emphasis added). For further examples, cf eg L. Mulders, 'Translation at the Court of Justice', available at www.uvt.nl/faculteiten/frw/departementen/europeesrecht/budc-conference/papers/mulders/, 6–8.

³³ So apparently in ECJ, Case C-72/95, *Kraajveld and others* [1996] ECR I-5403, paras 22–23.

³⁴ Cf eg L. L. Fuller, *The Morality of Law* (Yale University Press, rev edn 1969), 67–68 quoting 344 U.S. 174 (1952).

³⁵ ECJ, Case C-64/95, *Konservenfabrik Lubella v Hauptzollamt Cottbus* [1996] ECR I-5105, para 18 *in fine* ('In those circumstances, the content of the contested regulation could not be regarded as uncertain'), appears to assume that diverging language versions may, in principle, lead to an uncertainty of the content of a regulation, without, however, spelling out the consequences of such uncertainty, if any.

³⁶ Cf n 32 *supra*.

³⁷ This does not apply to diverging language versions of a Community law that is to be implemented in the Member States' private law, on which cf Schilling, *op cit* n 4 *supra*, at 770 *et seq.* And cf text after n 102 *infra*.

As to the equal authenticity solution, while it does not allow for a uniform interpretation of a Community law the language versions of which diverge significantly, it takes seriously the claim that all language versions are equally authentic. It thus honours the promise made by the EU to all citizens, expressly for the founding treaties and by implication, as recognised by the ECJ, for acts of secondary legislation,³⁸ that their respective language version be authentic.³⁹ On the basis of this promise, the citizen may legitimately expect that the legal consequences brought about by her own language version of a Community law⁴⁰ are as foreseeable as those brought about by whatever national law. This implies that individual decisions that concern her must be based on that version and on that version alone, ie that the courts and administrative authorities on the national as well as on the EU level must, insofar as it concerns that citizen, interpret only that language version whose effects are foreseeable for her, and act only on its basis.⁴¹ Indeed, to decide otherwise would result, as the ECJ argued in the comparable case of the non-publication of a certain language version,⁴² 'in the individuals in the Member State concerned bearing the adverse effects of a failure by the Community' to provide non-divergent language versions of the legislation concerned. Therefore, the solution discussed here would raise, under the aspect of foreseeability, no questions specific to Community law. As in the case of a national law, while the citizen would quite often have to request the professional assistance of a lawyer fully to understand the meaning of a law, such assistance generally would be sufficient, ie no assistance by a translator would be required.

At this point, some remarks on interpretation are indicated. The first principle of the interpretation of a legal text is that it must not go beyond what is covered under its wording.⁴³ The Germans have a word for it '*Wortlautgrenze*', or the limit imposed by the wording of a law (to its interpretation) (hereinafter: the wording limit). The wording limit follows directly from the requirement of foreseeability and thereby from the rule of law:⁴⁴ the citizen can foresee the legal consequences of a law only by looking at its wording.

³⁸ See n 19 *supra*.

³⁹ In the case of secondary legislation not published in a certain official language, which does not appear to be decisively different from the case under discussion, this is the solution chosen by the ECJ: cf ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 51.

⁴⁰ ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 38 speaks of 'the official language of those to whom [legislation] applies'. As private persons do not have an official language, I would rather refer to the official language of the citizen's residence. To refer instead to the language chosen by the citizen (thus, in the very different context of the language of a murder trial, Supreme Court of Canada, *R v Beaulac* [1999] 1 SCR 768, para 34) is to allow the citizen to choose the language most advantageous to her which appears not adequate in the present context.

⁴¹ This indeed is the defendant's plea in ECJ, Case C-236/97, *Skatteministeriet v Aktieselskabet Forsikrings-selskabet Codan* [1998] ECR I-8679, para 24. And cf ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 38: 'Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them . . . '.

⁴² ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 42.

⁴³ This wording limit may be overcome, eg by the finding of an analogy, for special reasons only; cf eg K. Larenz, *Methodenlehre der Rechtswissenschaft* (Springer Verlag, 6th edn 1991), 322, referring to A. Meier-Hayoz, *Der Richter als Gesetzgeber* (Juris-Verlag Zürich, 1951), 42. Such a finding therefore necessitates an in-depth reasoning.

⁴⁴ The principles applicable to law-making by judges are somewhat different; cf eg Court of Human Rights, 22 November 1995, *S. W. v United Kingdom*, Application no 20166/92, Series A, 335 B, § 36.

Of course, this concept of the wording limit is one hornets' nest of linguistic and legal theory.⁴⁵ But it should be pointed out that the wording limit has constantly been applied by the courts.⁴⁶ Indeed, in all those cases in which a court polices the limits a hierarchically superior legal text sets for a subordinated system—be it constitutional or inter- or supranational limits—it has to compare the wording of those superior and inferior texts.⁴⁷ It is no objection that there is no clear wording⁴⁸ as such a claim is not made by the theory of the wording limit.⁴⁹ That theory only claims that there are clearly interpretations which are irreconcilable with a certain wording.⁵⁰ This is a basic postulate of every textual dealing with the law which suffices to draw a limit between acceptable and unacceptable interpretations. In this (negative) sense the binding nature of the wording limit should be accepted as flowing from the foreseeability principle.

For the equal authenticity solution, it follows that it is the wording of the version of a law in a citizen's language which must be respected by all public authorities insofar as that citizen is concerned. For this very reason, obviously, that solution has severe drawbacks. To interpret every single language version of a Community law on its own merits and within the limits posed by its wording would lead to a splitting up of

⁴⁵ *Contra* the theory of the wording limit eg B. Rüthers, *Rechtstheorie* (C. H. Beck, 1999), para 731 *et seq.* A nuanced and convincing defence of the concept of the wording limit is in M. Klatt, *Theorie der Wortlautgrenze* (Nomos Verlag, 2004); *idem*, 'Semantic Normativity and the Objectivity of Legal Argumentation', (2004) 90 *Archiv für Rechts- und Sozialphilosophie* 51. Also cf A. Merkl, 'Das doppelte Rechtsantlitz. Eine Betrachtung aus der Erkenntnistheorie des Rechtes', (1918) in *idem*, (1993) *Gesammelte Schriften III* 227, 249: 'Every word has a fixed core meaning and more or less fluctuating marginal meanings; but as certainly every word completely excludes certain meanings. So there are besides many things equivocal—which it is the prerogative of the legal practitioner to sort out—also many things unequivocal by the disregard of which the legal practitioner would get in conflict with the meaning and the laws of language' (my translation).

⁴⁶ Among others, the ECJ implicitly has accepted that limit; according to its jurisprudence, an interpretation of national law in conformity with Community law is required only within that limit: ECJ, Case C-106/89, *Marleasing v Comercial Internacional de Alimentación* [1990] ECR I-4135, para 8: 'as far as possible'. Advocate General Elmer, Opinion in Case C-168/95, *Criminal Proceedings against Luciano Arcaro* [1996] ECR I-4705, para 39, has stated in this context: 'That rule of interpretation cannot . . . be applied so as to undertake an actual redrafting of the provision of national law'. But cf also ECJ, Case C-403/01, *Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV* [2004] ECR I-8835, para 115, where the ECJ requires the national court to 'consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive'. And cf ECJ, *Codan*, *op cit* n 41 *supra*, para 29, quoted in n 89 *infra*.

⁴⁷ Cf Klatt, *Archiv*, *op cit* n 45 *supra*, at 61 for examples taken from the German constitution. To give a different example, without the assumption of a wording limit, there would be nothing in the Geneva Conventions to prohibit a Convention State from applying interrogating methods amounting to torture; indeed, the concept of torture, as any other concept, would be meaningless. Luckily, political efforts to empty this concept of any content appear ultimately to have foundered.

⁴⁸ Cf T. Groh, 'Methodenrelevante Normtexte im Gemeinschaftsrecht', in Müller and Burr, *op cit* n 24 *supra*, at 263, 268, n 27 according to whom the 'clear wording' is a phantom particularly apt to shift one's own responsibility for a decision on to someone else; Rüthers, *op cit* n 45 *supra*, para 732 *et seq.*

⁴⁹ It is made by the French *acte claire*-doctrine, received by the ECJ; cf eg ECJ, *CILFIT*, *op cit* n 19 *supra*, para 16. On the similar international law maxim by Vattel cf eg W. Heintschel von Heinegg, '§ 11: Auslegung völkerrechtlicher Verträge', in K. Ipsen, *Völkerrecht* (C. H. Beck, 4th edn 1998), 114, 117, para 7.

⁵⁰ Cf Merkl, *op cit* n 45 *supra*.

Community law along the lines between the different languages⁵¹ in all those—all too frequent—cases in which the different language versions have different meanings. This would be incompatible with the view of Community law as a uniform legal system. It would also lead to discriminations because of the language: a citizen's language would decide on the law applicable to her.

Not surprisingly, the ECJ, which has stressed from early on 'the object of ensuring that in all circumstances the law is the same in all States of the Community' and that the aim is 'to avoid divergences in the interpretation of Community law which the national courts have to apply',⁵² has opted throughout for the uniform interpretation solution.⁵³ In doing so, it has repeatedly decided against the wording of certain language versions.⁵⁴ It has decided that the term 'wife', employed in the Dutch version of a text, also covers the 'husband',⁵⁵ that the term 'taken out of the sea', employed in an English version, requires no more than 'the location of the fish and netting them so that they can no longer move freely in the sea',⁵⁶ that sweet cherries mentioned in a German version must be understood to mean sour cherries,⁵⁷ that an Institute of the Motor Industry may be an organisation with aims of a trade-union nature,⁵⁸ and that the term 'stock exchange turnover taxes', employed in a Danish (and a German) version of a directive, covers all 'duties on the transfer of securities'.⁵⁹ The uniform interpretation solution thereby obviously avoids the drawback of the different language versions drifting apart, and its consequences. On the other hand, by choosing a uniform interpretation, the ECJ necessarily privileges some language versions of a law over others. By thus disregarding the Community law principle of the equal authenticity of all language versions—which it, however, vindicates in the closely related case of the non-publication of a certain language version of a law⁶⁰—this jurisprudence fails to fulfill the corresponding promise made to the citizens, and, as concerns the language versions which do not contribute to the interpretation finally maintained, is apt to interfere with the principle of foreseeability of legal consequences, inasmuch as the citizen is entitled to rely on her own language version of the law interpreted.⁶¹

⁵¹ Such a splitting-up is accepted by the ECJ in the case of the non-publication of certain language versions; cf ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 40.

⁵² ECJ, Case 166/73, *Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33, para 2.

⁵³ Less decisive EFTA Court, *Sveinbjörnsdóttir*, *op cit* n 21 *supra*, para 28: '... a preferred starting point for the interpretation will be to choose one that has the broadest basis in the various language versions. This would imply that the provision, to the largest possible extent, acquires the same content in all Member States. With respect to a provision applicable in all Member States, this is a preferable situation'.

⁵⁴ This type of problem might become less common if and when the standardisation effort succeeds, cf text at n 28 *supra*.

⁵⁵ ECJ, Case 9/79, *Koschniske v Raad van Arbeid* [1979] ECR 2717, para 9.

⁵⁶ Cf ECJ, Case 100/84, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1985] ECR 1169, para 21.

⁵⁷ ECJ, *Lubella*, *op cit* n 35 *supra*, para 18.

⁵⁸ ECJ, Case C-149/97, *Institute of the Motor Industry v Commissioners of Customs and Excise* [1998] ECR I-7053, paras 14–21.

⁵⁹ ECJ, *Codan*, *op cit* n 41 *supra*, para 27.

⁶⁰ ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 51.

⁶¹ This principle is recognised by ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 38.

The requirement of a uniform interpretation has often been considered, by the ECJ as well as by others,⁶² as self-evident and not requiring any justification.⁶³ In view of the rule-of-law aspects militating for the equal authenticity solution, especially the protection of legitimate expectations, and thereby against the uniform interpretation solution, this is not good enough. Neither can the justification of the requirement of uniform interpretation be found in the obvious legislative intention to adopt a uniform provision, and not a varicoloured bouquet of different provisions. Even if that requirement can be seen as a special case of the interpretation according to legislative intention,⁶⁴ this intention can be decisive, under the wording limit of interpretation, only insofar as it has found expression in the text of the law to be interpreted.⁶⁵ When language versions of a law diverge, the intention to adopt a uniform provision obviously has not found adequate expression in the text adopted.

Rather, the justification of the requirement lies in the principle of non-discrimination.⁶⁶ This principle requires that one and the same legislature must not, without good reasons, adopt different provisions for similar sets of facts.⁶⁷ When, setting aside the requirement of uniform interpretation, one and the same Community law provision is construed differently according to its language version, by necessity the addressees of that provision are discriminated between according to their respective language, and, therefore, normally without good reason.⁶⁸ This is confirmed by Article 21(1) of the EU Human Rights Charter according to which any discrimination based on, among others, language shall be prohibited.

⁶² Cf eg F. Vismara, 'The Role of the Court of Justice of the European Communities in the Interpretation of Multilingual Texts', in B. Pozzi and V. Jacometti (eds), *Multilingualism and the Harmonisation of European Law* (Kluwer Law International, 2006), 61, 64. More explicit D. Cao, 'Inter-lingual uncertainty in bilingual and multi-lingual law', (2007) 39 *Journal of Pragmatics* 69, 73: 'necessary for legal certainty and consistency'. As argued in the text above, this is debatable.

⁶³ Cf especially ECJ, *Kraajveld*, *op cit* n 33 *supra*, para 28, where the ECJ chose to ignore this plea which was based on ECJ, Case 80/76, *North Kerry Milk Products v Minister for Agriculture* [1977] ECR 425, paras 11–12: '[The Member State] cites the Court's case-law to the effect that the elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the principle of legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words' (Case C-72/95, para 25), and apodictically states: 'the need for a uniform interpretation of those versions requires, in the case of divergence between them . . . '.

⁶⁴ In this very particular case, it is submitted, it must be permissible to speak of legislative intention without being encumbered by all the doubts connected with that concept in more typical cases, on which cf eg D. Greenberg, 'The Nature of Legislative Intention and its Implications for Legislative Drafting', (2006) 27 *Statute Law Review* 15.

⁶⁵ Apparently, at least formerly this was also the opinion of the ECJ; cf ECJ, *Kerry Milk*, *op cit* n 63 *supra*, paras 11–12. This is also a point raised by the defendant in ECJ, *Codan*, *op cit* n 41 *supra*, para 24, but which the ECJ omits to answer specifically.

⁶⁶ Similar Cao, *op cit* n 62 *supra*, at 73. But cf n 51 *supra*.

⁶⁷ Cf eg ECJ, Case 117/76 and 17/77, *Ruckdeschel and others v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, para 7; Court of Human Rights, *D.H. and others v Czech Republic*, Application no 57325/00, para 196.

⁶⁸ ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 39, turns the equal-treatment argument on its head: it argues that the equal treatment principle requires to differentiate between citizens who could acquaint themselves with Community law obligations and those who could not.

C Combining the Equal Authenticity and Uniform Interpretation Solutions

As shown above, both the equal authenticity and the uniform interpretation solutions have their strong and their weak points. It therefore appears worthwhile to investigate whether a combination of the two solutions might remedy their respective weak points and maintain their strong ones. To do so it is necessary to consider the relationship between, on the one hand, the requirement of uniform interpretation, seen as an expression of the non-discrimination principle, and, on the other hand, the principle of equal authenticity which follows from the protection of legitimate expectations and thereby from the rule of law and entails the principle of foreseeability of the legal consequences flowing from one's own language version of a law as interpreted under the wording limit. Two different aspects are apt to come into play when considering this relationship: the hierarchy of norms, and the type of norms the two concepts represent, ie whether they are rules or principles. The former could possibly define which one of the two concepts takes precedence over the other in all cases. The result could be the same if one of the two concepts was a rule and the other a principle: generally, rules take precedence over principles.⁶⁹ Should both concepts be principles, however, the relationship between them must be seen as a question of balancing them in the individual case; none of them must take precedence over the other on a general level.

Considering the relationship first under the aspects of the hierarchy of norms, both legal concepts—the non-discrimination principle and the protection of legitimate expectations—are on the level of primary law.⁷⁰ Both concepts being thus placed on the same level, considerations of hierarchy cannot justify the general primacy of one concept over the other. Considering the relationship under the rule/principle dichotomy, the protection of legitimate expectations is clearly a principle: it cannot be said that it must be respected under all circumstances (subject only to well-defined exceptions). While the same applies to the non-discrimination principle, the ECJ appears to consider the uniform interpretation requirement as an absolute rule that admits of no exception.⁷¹ This view must be analysed.

Seen as a rule, the requirement of uniform interpretation would take precedence over the equal authenticity principle and all it entails, especially the principle of foreseeability, in each and every case of conflict, irrespective of the circumstances of the individual case. Within its field of application, it would thereby, in case of conflict, nullify that principle. Such a result would be incompatible with the ECHR which exactly requires, as one of the central tenets of the rule of law that, in the case of laws interfering with liberties, their legal consequences be foreseeable. This tends to show that the requirement of uniform interpretation must not be seen, contrary to the ECJ's jurisprudence, as a rule, as such a view would fail to distinguish between different constellations which merit to be treated differently. Rather, just as the principle of non-discrimination of which the requirement of uniform interpretation is an expression, the latter is a principle and need not be respected under all circumstances (subject only to well-defined exceptions). Therefore, when the principle of non-discrimination is confronted with the protection of legitimate expectations in the authenticity of the citizen's own language

⁶⁹ Rules are definitive reasons for a decision, principles are *prima facie* reasons. cf R. Alexy, *Theorie der Grundrechte* (Suhrkamp Verlag, 1986), 87 *et seq.*

⁷⁰ Cf eg T. Schilling, 'Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts', (2000) *Europäische GrundrechteZeitschrift* 3, 30.

⁷¹ Cf eg ECJ, *Kraajeveld*, *op cit* n 33 *supra*, para 28, as quoted in n 63 *supra*.

version of a law, the latter cannot simply be set aside;⁷² rather, both have to be balanced in the individual case. This balancing should permit to give the conflicting principles the weight they are due in that case. In view of the promise made to all citizens of the EU that their respective language version of a law be authentic, it appears to be in the interest of equitable solutions to measure the respective weight of both principles in the individual case first and foremost by reference to the confidence a citizen was entitled to have in the actual wording of her own language version of a law.

D Balancing the Protection of Legitimate Expectations and the Non-discrimination Principle in the Individual Case

When a citizen's own language version of a Community law having direct effect is formulated in such a way that she has no reason to doubt its meaning or its validity, she may legitimately expect that the legal consequences foreseeable under the wording of that version of a law are also the consequences foreseeable under its other versions and therefore under the law in its entirety. This expectation should be protected in principle. The first reason is exactly that the citizen may rely on the promise of her language version being authentic. An additional reason is that she herself regularly will not be in a position to determine whether the different language versions of a law diverge significantly. Without being prompted by some pointer in her own language version to do so, the citizen cannot be expected to require the professional assistance of a posse of translators to answer the question, Are there substantive divergences between the 23 language versions of that law?, which for her simply does not, and need not, arise.

The opposite position would have to be that the citizen is required to raise such a question without exception because otherwise she cannot correctly gather the meaning of a law. Such a claim not only would be incompatible with the equal authenticity of all language versions⁷³ and run counter to the declared goal of the EU 'to give citizens access to European Union legislation, procedures and information in their own languages',⁷⁴ it would also be at variance with the two aspects of the required quality of a law. It would unacceptably affect its accessibility: 'To hang up the laws so high, as did Dionysius the tyrant, that no citizen could read them, or to bury them in . . . a foreign language so that the knowledge of the law in force is accessible only to those learned in it, is one and the same injustice'.⁷⁵ To require the citizen to look at all 23 language versions of a Community law would considerably diminish the accessibility of that law. Indeed, multilingualism enhances the accessibility of laws only if the citizen can rely on her own language version without further investigation and is in no way required or even expected to take cognisance of the other versions. Generally, to assume that the citizen must always look at all the language versions of a Community law to find out its meaning⁷⁶ would imply Community law has lost that quality of accessibility which under the rule of law is required of laws.

⁷² *Contra* ECJ, *Codan*, *op cit* n 41 *supra*, para 39–40.

⁷³ ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 43 *et seq* does not even consider a possible obligation to consult other language versions than one's own.

⁷⁴ Commission Communication, *op cit* n 8 *supra*, pt I.2 'What is Multilingualism?'.

⁷⁵ G. F. W. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* (Reclam, 1986), § 215 (my translation).

⁷⁶ The ECJ's jurisprudence contains some indications going in that direction; cf the references in n 19 *supra*.

The position discussed would also affect the foreseeability of the consequences of a law. While it is true, under the conditions of multilingualism and the uniform interpretation principle, that foreseeability can be enhanced by looking at more than one, ideally at all 23 language versions, this is true only in the Holmesian sense of a prophesy of what the courts will actually do.⁷⁷ In this sense, it is a truism: to do what the courts are supposed to do⁷⁸ obviously will make a prediction of what they will do more likely to be correct. The real question is rather whether, given what the ECJ actually does, the consequences of a law are foreseeable. It will be argued that, in the case of diverging language versions, that is quite often not the case because of the great and apparently irreducible uncertainty of the outcome of uniform interpretation.

The ECJ appears to use different approaches to uniform interpretation of legislation at different times. Quite often, it simply does not realise, or chooses to ignore,⁷⁹ that other language versions of a law diverge, in a significant way, from the version in its working language, which is at present the French version.⁸⁰ In cases in which the ECJ is not alerted to the fact that other language versions of a law diverge from the French one in a significant way, either by the parties⁸¹ or the Advocate General,⁸² or again by its own staff, in particular the linguistic service, a judge and her collaborators are rather unlikely, if simply for reasons of efficiency, to consult a version different from the one in the working language, and that quite independent of the actual language of procedure and the respective judge's mother tongue.

In cases in which the ECJ does realise that language versions of a Community legal text diverge significantly, it occasionally appears to require all citizens and all national courts to compare all the language versions in order to interpret that text.⁸³ But it is not clear how such a comparison is supposed to render a uniform interpretation, notably as in the case of diverging language versions 'no legal consequences can be based on the terminology used'.⁸⁴ In addition, this requirement is impossible to fulfill; no citizen, and scarcely any national court, will be able to look at 23 language versions to check

⁷⁷ O.W. Holmes, Jr., 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

⁷⁸ But cf text at n 86 *infra*.

⁷⁹ The present author once was told by the legal secretary of the judge rapporteur that in a case the language of procedure of which was French there was no reason to look into any other language version, indeed, that to discuss those other versions in the judgment would be inappropriate.

⁸⁰ This follows clearly from the 'Notes for the Guidance of Counsel', issued by the ECJ and available at www.curia.europa.eu/en/instit/txtodocfr/autrestxts/txt9.pdf. According to the fifth paragraph of point A.3, Use of languages, '[a]t present, the working language is French'.

⁸¹ I. Schübel-Pfister, *Sprache und Gemeinschaftsrecht. Die Auslegung der mehrsprachig verbindlichen Rechtstexte durch den Europäischen Gerichtshof* (Duncker & Humblot, 2004), 223 *et seq*, gives examples of cases in which the ECJ did *not* discuss such pleas by the parties.

⁸² Cf eg Advocate General Tizzano, Case C-1/02, *Privat-Molkerei Borgmann GmbH & Co KG v Hauptzollamt Dortmund* [2004] ECR I-3221, paras 43–44. Schübel-Pfister, *ibid*, at 222–223 mentions that the ECJ quite often does *not* adopt a language comparison made by the Advocate General.

⁸³ For the national courts cf ECJ, *CILFIT*, *op cit* n 19 *supra*, para 16 *et seq*, on the rather narrower question of the national courts' duty when deciding whether the contents of a Community law are clear, confirmed in ECJ, *Codan*, *op cit* n 41 *supra*, para 25, making short shrift of the defendants plea without really answering it; the human rights aspects of the plea are not considered at all; for the citizens ECJ, *Lubella*, *op cit* n 35 *supra*, para 18.

⁸⁴ ECJ, Case 30/77, *Regina v Bouchereau* [1977] ECR 1999, para 13; ECJ, *Commission v United Kingdom*, *op cit* n 56 *supra*, para 16.

whether there are relevant divergences between them.⁸⁵ It is worth adding that the ECJ itself, which institutionally is in the best position to act in the way it requires citizens and national courts to act, regularly does not so act.⁸⁶

However, the injunction to compare all language versions may also be understood in another way. It could mean that the ECJ ascribes the quality of a law only to the lot of all the language versions of a law taken together, not to any single version (so that the meaning of a law that is authentic in many languages does not depend on language at all).⁸⁷ Such an understanding may appear attractive in theory as it reflects the presumable legislative intent, ie to issue one single and uniform law.⁸⁸ Thus understood, the approach discussed above comes close to this seemingly completely different approach by the ECJ: in cases in which it does realise that there are divergences between the language versions, while it occasionally appears to take the numerical distribution of the different versions into consideration,⁸⁹ it normally⁹⁰ holds that ‘the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part’.⁹¹ In those cases it would be helpful if the ECJ would make clear, in general terms, how it ascertains that purpose. In some cases, it appears simply to accept the Commission’s plea.⁹² In other cases, it refers very generally to the recitals of a law.⁹³ A detailed reasoning is generally missing,⁹⁴ as is an effort to demonstrate that ‘the purpose and the general scheme of the rules of which it forms part’ can be deduced from all the language versions, or why it can be deduced, with confidence, from only some of them.

A comparison of this type of interpretation with the systemic and teleological interpretations, both of which are time-honoured methods of interpretation at least in

⁸⁵ A purportedly practical way out of that impossibility has been proposed by an author: every interpretation of a Community legal text should be based not only on the proper language version of the interpreter but also on at least two further versions taken from different legal and linguistic families; cf *Groh, op cit* n 48 *supra*, at 269 *et seq*. But that proposal, while it falls far short of the ECJ’s requirements, still appears to require too much.

⁸⁶ According to Advocate General Jacobs’ Opinion in Case C-338/95, *S.I. Wiener v Hauptzollamt Emmerich* [1997] ECR 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’.

⁸⁷ Cf eg ECJ, *Commission v United Kingdom, op cit* n 56 *supra*, para 16, quoted at n 64 *supra*.

⁸⁸ It may also explain this argument in ECJ, *Skoma-Lux, op cit* n 16 *supra*, para 59: ‘the fact that [a] regulation is not enforceable against individuals in a Member State in the language of which it has not been published has no bearing on the fact that, as part of the *acquis communautaire*, its provisions are binding on the Member State concerned as from its accession’.

⁸⁹ ‘To disregard the clear wording of the great majority of the language versions . . . , would . . . run counter to the requirement that the Directive be interpreted uniformly’: ECJ, *Codan, op cit* n 41 *supra*, para 29. But would it really?

⁹⁰ In cases in which one language version of a law is the result of a ‘material [ie clerical] error’ which is recognisable from data within the law and from a comparison with other language versions, only those other versions are decisive: cf ECJ, *Lubella, op cit* n 35 *supra*, para 18.

⁹¹ Cf eg ECJ, *Bouchereau, op cit* n 84 *supra*, para 14; ECJ, *Commission v United Kingdom, op cit* n 56 *supra*, para 17. In some judgments, this approach is also applied without even considering whether there are divergent language versions; cf eg ECJ, Case C-428/02, *Fonden Marselisborg Lystbådehavn v Skatteministeriet and Skatteministeriet v Fonden Marselisborg Lystbådehavn* [2005] ECR I-1527, para 28.

⁹² ECJ, *Commission v United Kingdom, op cit* n 56 *supra*, para 18.

⁹³ ECJ, *Codan, op cit* n 41 *supra*, para 27.

⁹⁴ ECJ, *Bouchereau, op cit* n 84 *supra*, paras 15–18 is a positive exception.

continental legal systems,⁹⁵ while *prima facie* showing a certain similarity, at a closer look reveals a striking difference. For national courts, the express wording of a law is generally the limit of permissible interpretation. In clear contrast, it is the hallmark of the interpretation by reference to the purpose and general scheme of a law as applied by the ECJ, in the case of diverging language versions, that the wording at least of some of the versions simply is set aside; as the ECJ explicitly has held, ‘a comparative examination of the various language versions . . . does not enable a conclusion to be reached in favour of any of the arguments put forward and so *no legal consequences can be based on the terminology used*’.⁹⁶ This setting aside of the wording of a law and the fact that generally no detailed reasoning for the interpretation maintained is given, leave (not only) this author with the impression of a certain arbitrariness as to the outcome of uniform interpretation⁹⁷ and is quite problematic under the aspect of the foreseeability of the legal consequences flowing from a law.

As shown, the position here opposed would affect both sides of the quality of a Community law, making it rather inaccessible and its consequences quite unforeseeable. To avoid such a result, it is necessary that in those cases in which the citizen, on the basis of her own language version, has no reason to doubt the meaning or the validity of a law, the protection of legitimate expectations based on that language version generally must take precedence over the non-discrimination principle.⁹⁸ Still, a proper balancing of the conflicting principles requires also respect of, if secondarily, the latter principle.

Discriminations between citizens because of their language, which are obviously unavoidable when one and the same Community law is interpreted differently according to the language version applied, must be minimised. If the divergence between the language versions which is the source of those discriminations is uncovered by the administration it must try as soon as possible either to amend the law in question or to publish a corrigendum.⁹⁹ If discriminations have already occurred, they generally need not go beyond an acceptable level if the effects of the judgment by which the ECJ construes, in the individual case, one language version different from (the) other ones are restricted to past cases. The publication of a judgment determining that because of the principle of non-discrimination nobody will be permitted to rely in future on a given language version will not only greatly reduce the extent of the discrimination but should also meet the accessibility requirement as posited by the Court of Human Rights.¹⁰⁰

It was the premiss of the above discussion that the citizen had no reason to doubt the meaning of her language version. But there are situations in which there are such reasons. They are the same type of situations in which a citizen would have to doubt the meaning or the validity of a national law. Prominently among them are the cases of (irredeemably) self-contradictory laws and of laws incompatible with a superior law. In

⁹⁵ Cf eg *Larenz*, *op cit* n 43 *supra*, at 324 *et seq.*, 328 *et seq.*; *Rüthers*, *op cit* n 45 *supra*, para 143 *et seq.*, 276 *et seq.*; 717 *et seq.*

⁹⁶ ECJ, *Bouchereau*, *op cit* n 84 *supra*, para 13; ECJ, *Commission v United Kingdom*, *op cit* n 56 *supra*, para 16 (emphasis added).

⁹⁷ Cf also *Streinz*, *op cit* n 21 *supra*, at 404 *et seq.*

⁹⁸ Conceivably, there may be cases in which the discrimination thus created is so outrageous as to require a different outcome of the balancing act.

⁹⁹ The latter actually was done, four days after the law itself had been published, in the case of the law at the basis of the *Lubella* case; cf ECJ, *Lubella*, *op cit* n 35 *supra*, para 5.

¹⁰⁰ Court of Human Rights, *Landvreugd*, *op cit* n 13 *supra*, para 58.

the national context, while the exact legal reasoning will differ from one legal system to another, generally those laws cannot be applied. One reason (among others) not to apply self-contradictory laws is that they make it *per se* impossible to foresee their consequences or to foresee what is expected of the citizen. The same applies in the case of a law incompatible with a superior law as the citizen does not know on which of those two laws she should rely.

This reasoning can be transposed to a citizen confronted with a self-contradictory or incompatible language version of a Community law.¹⁰¹ As such a law, in the citizen's language version, does not have the required quality, it cannot justify any interference with her liberties including the right to privacy, ie the right to be let alone.¹⁰² The citizen, at least in her private capacity, cannot be expected to compensate, by her own efforts, the Community legislature's poor work,¹⁰³ ie to try to resolve the contradictions in her language version, or its incompatibility with a superior law, by looking into the other versions. This applies especially as the success of such efforts—to find exactly the uniform interpretation which the ECJ may maintain eventually—would be highly uncertain. Rather, such a law which in the citizen's language version is self-contradictory or incompatible with a superior law simply must not be applied to her because it infringes the principle of foreseeability. She therefore may rely on her liberties not being interfered with on the basis of a uniform interpretation. In contrast, while she cannot rely on any benefit such a self-contradictory language version of a law might conceivably provide for her, she might be granted such benefits on the basis of a uniform interpretation.

This last point appears to apply also to a citizen affected by a law in her economic capacity. However, insofar as interferences with her liberties are concerned, it appears permitted to assume that she profits from the EU's economic integration, and that she therefore may be expected to accept certain disadvantages concerning legal certainty which follow from the EU's multilingualism. She may be expected to find out, if necessary with the assistance of translators, whether the contradiction or incompatibility is also found in other language versions.¹⁰⁴ If not, in the case of a self-contradictory law, a look into the other versions regularly will suffice to solve the contradiction. When, for instance, the contradiction between the name of a good and its CN Code exists only in the citizen's own language version,¹⁰⁵ it is clearly indicated for her to rely on the other versions. The same applies in the case of a language version that infringes a superior law while (the) other versions do not. If, however, contradictions or incompatibilities are also found in other language versions, she can be expected to try to foresee, if need be with the assistance of a lawyer, the result of a uniform interpretation, just as in national cases of imprecise or contradictory laws.¹⁰⁶ In both types of cases, as the citizen affected in her economic capacity could not put any trust in her own

¹⁰¹ ECJ, *Lubella*, *op cit* n 35 *supra*, para 18, is an example of a self-contradictory language version: contradiction between the name and the CN Code of a good.

¹⁰² Cf T. Schilling, *Internationaler Menschenrechtsschutz* (Mohr Siebeck, 2004), 87–88, with further references.

¹⁰³ Cf also ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 42.

¹⁰⁴ In this sense ECJ, *Lubella*, *op cit* n 35 *supra*, para 18. But cf n 73 *supra*.

¹⁰⁵ Thus the facts in ECJ, *Lubella*, *op cit* n 35 *supra*.

¹⁰⁶ Cf Court of Human Rights, *Landyreugd*, *op cit* n 13 *supra*, para 54.

language version, in principle¹⁰⁷ uniform interpretation can be applied without any balancing being necessary.

E The Special Case of Directives

There remains the question of directives. For a directive that becomes directly applicable because, contrary to the EC Treaty, it has not been implemented (in time) at the national level,¹⁰⁸ the same reasoning should apply as for laws having direct effect as such. This holds good also for implemented directives when the national implementing law conforms to the relevant language version. However, if there is a divergence between that version and the national implementing law, any confidence the citizen may have had in her own language version of the directive must be badly shaken. There can be no legitimate expectation that that version will take precedence over the diverging national implementing law. In this context, it cannot matter whether the directive was so precise that it could have been applied directly if not implemented.¹⁰⁹

F The Member State as Addressee of a Community Law

All the above considerations assume that the addressee of a law was a citizen protected, as such, by the ECHR. Quite different considerations are in place when the addressee of a Community law is a Member State. In this case Article 33(4) of the Vienna Convention on the Law of Treaties¹¹⁰ appears to be applicable *mutatis mutandis*. According to that provision, when there is an unremovable difference of meaning between different language versions of a treaty, 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'. As all the authentic versions of a treaty taken together form that treaty as it has been negotiated and concluded by the treaty states, those states are themselves responsible for, and must be deemed to be knowledgeable of, divergences which might exist between the different versions.¹¹¹ It follows that expectations a treaty state might have based on its own language version do not merit any protection; rather, it has to bear any legal consequences which possibly might be deduced from 'the meaning which best reconciles the texts' but not from its own version. For the same reasons, a Member State may not rely, in a Treaty infringement procedure under Article 226 of the EC Treaty, on its own language version of the EC Treaty or a law issued by the Council with or without the collaboration of the European Parliament.¹¹²

¹⁰⁷ It is arguable that the above solution does not apply if the inferior law infringes the principle of equality, especially of equal treatment of women and men. In those cases, the ECJ's jurisprudence provides that the unequally favourable solution must be extended to the disadvantaged group of persons, because it is 'the only valid point of reference' (cf eg ECJ, Case C-408/92, *Constance Christina Ellen Smith and others v Avdel Systems Ltd* [1994] ECR I-4436, para 16). This jurisprudence does not provide exactly for the voidness of the inferior law but corrects the latter in the sense of an alignment at the more favourable level. If that is so, expectations set by a citizen in her language version having those characteristics must be similarly protected. This question was raised in ECJ, *Koschniske*, *op cit* n 55 *supra*, para 8, but answered by applying uniform interpretation.

¹⁰⁸ Settled case-law since ECJ, Case 9/70, *Grad v Finanzamt Traunstein* [1970] ECR 825, para 5 *et seq.*

¹⁰⁹ *Contra* the private party in ECJ, *Codan*, *op cit* n 41 *supra*, para 24.

¹¹⁰ Of 23 May 1969, UNTS vol 1155, 331.

¹¹¹ Indeed, ECJ, *Skoma-Lux*, *op cit* n 16 *supra*, para 59 declares binding on a Member State a provision which has not been published in the language of that State.

¹¹² Thus the result in ECJ, *Commission v United Kingdom*, *op cit* n 56 *supra*.

G Conclusion

In conclusion, it can be said that the balancing between the protection of legitimate expectations and the non-discrimination principle in the cases decided by the ECJ has turned out preponderantly in favour of the latter and thereby of uniform interpretation, as indeed the ECJ has held.¹¹³ However, these cases were all exceptions from the general rule which is different: in those cases in which the citizen may legitimately rely on her own language version of a Community law, her expectations must be protected as a matter of the rule of law. In those cases, therefore, the principle of non-discrimination because of language and thereby the requirement of uniform interpretation generally must take second place to the protection of legitimate expectations.¹¹⁴ In the individual case, this result is required by the rule of law.¹¹⁵

III Proposal De Lege Ferenda

This conclusion is less than satisfactory as the balancing proposed permits only to choose, in the individual case, the lesser of two evils, the still more appealing of two unappealing solutions: either legitimate expectations are frustrated, or there are discriminations because of language. In any event, the equal authenticity of 23 language versions has proved illusory in the one case where it would matter, ie when language versions diverge. As the law now stands, the citizen, in the case of divergent language versions, can foresee the legal consequences of a Community law only vaguely as even clarifications by a lawyer of a possible uniform interpretation by the ECJ will be tentative at best.

As the equal authenticity of all 23 language versions is at the basis of the whole problem, a satisfactory solution which, however, would be open, in view of the law currently in force, only to the Community legislature, for secondary law by amendment of Regulation No 1,¹¹⁶ would have to dispense with it and to withdraw the corresponding promise made to the citizens. Instead, there should be only one authentic version of every Community law¹¹⁷ while those language versions not chosen to be the authentic version should be published as official translations.¹¹⁸ Such a solution would considerably enhance the 'quality' of Community laws under both its aspects, and that quite irrespective of how the authentic version would be chosen.

At least three possible ways to choose the authentic version of a Community law come to mind. One could think of choosing the version in the language of the original draft, which, perhaps, would maximise the chances that the authentic text reflect the

¹¹³ Cf references in nn 55–59 *supra*.

¹¹⁴ An example would be the case of the Polish EU civil servant who brings an action before the Public Service Tribunal, relying on the Polish language version of the rule quoted n 32 *supra* according to which she will regularly not have to pay the other party's costs even if her action fails.

¹¹⁵ In this vein, J. C. Wichard, in C. Calliess and M. Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (C. H. Beck, 2nd edn, 2002), Art 290 EC, para 13.

¹¹⁶ See n 16 *supra*. It would suffice to add a second sentence to Art 4 of Regulation no 1, eg: 'Only the Maltese version of the act shall be authentic'. The other provisions, especially those concerning the languages of publication and the languages to be used in communications between the Community and the citizens, need not be changed.

¹¹⁷ To restrict the number of authentic language versions to, eg five (cf eg the rules governing the procedure before the Office for Harmonisation in the Internal Market (Trade Marks and Designs) on which cf ECJ, *Kik*, *op cit* n 18 *supra*, paras 86, 96, would be better than the present state of the law but would still be suboptimal and will not be discussed in the reminder of this article.

¹¹⁸ If the EU should develop a *lingua franca*, they would no longer be needed. Cf Schilling, *op cit* n 4 *supra*, at 782 *et seq*.

actual legislative intention;¹¹⁹ this solution would also adhere, at least formally,¹²⁰ to the equal treatment of all languages if not to their equal authenticity. One could also think of a rotation of the authentic language between all the official languages, which would effectively guarantee an equal treatment of all of them but might be rather impractical under other aspects. Or one could think of choosing one and the same authentic language for all legislative acts which, in practical terms, would be the most simple solution but probably also the most difficult one politically to achieve.¹²¹

Any solution providing for only one authentic version of a Community law would be optimal under the rule-of-law aspect of foreseeability of the legal consequences of a law which is the second aspect of its 'quality': when there is only one authentic version, there cannot be any linguistic divergences; the specific problem of Community law would simply disappear.¹²² It might, however, be claimed that this enhanced foreseeability could be achieved only at the cost of a diminished accessibility of a law as the speakers of 22 out of 23 languages would lose their direct access to an authentic version of that law. But such a claim would be quite wrong. On the contrary: any solution providing for only one authentic version of a Community law would make that law more accessible than it is under the present state of the law. A comparison with the practice of publishing treaty-based national law may help elucidate this point.

In many national legal systems legal texts which are authentic only in one or more foreign languages are regularly published, together with an official translation¹²³ into the

¹¹⁹ This is the solution chosen in two Hong Kong cases; cf *Cao, op cit* n 62 *supra*, at 80. Somehow similar considerations are in EFTA Court, *Sveinbjörnsdóttir, op cit* n 21 *supra*, para 25. Cf also DCFR, *op cit* n 5 *supra*, § III-8:107: 'Where a contract document is in two or more language versions none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the version in which the contract was originally drawn up'.

¹²⁰ But only formally: at the Commission, legal texts are drafted in roughly similar numbers in French and English, while a very small part is drafted in German. According to P. Berteloot, 'Die Europäische Union und ihre mehrsprachigen Rechtstexte', in Müller and Burr, *op cit* n 4 *supra*, at 179, 188, n 11, the most recent numbers are: English 55%, French 42%, German 3%.

¹²¹ First attempts at a development in that direction can be found in the EU; cf von Bogdandy, *op cit* n 5 *supra*, at 79, and n 62 on Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), [2006] OJ L412/1. The Group of Intellectuals, *op cit* n 9 *supra*, at 11, appears to accept English as the language of international communication.

¹²² However, it has been claimed that 'the looked for gain in legal certainty would be outweighed by far by a concomitant loss of culture'; cf 'Ansprache von Prof. Martin Schubarth', 4, available at <http://www.juristentag.ch/pdf/schubarth.pdf> (my translation). While this appears convincing for the discussion of an eventual replacement, by English, of the respective national language in the issuance of national law, which subject Schubarth appears centrally to have had in mind, it seems rather far-fetched in the context of Community law which is not widely conceived of as being part, in its respective language version, of the culture of a Member State.

¹²³ This translation should take into account all the authentic language versions of the international source which are, according to Art 33 of the Vienna Convention on the Law of Treaties, equally binding. In the case of divergences between the authentic versions, the official translation should indicate them (this was done for example in the case of the German translation of the 'chapeau' of Art 6(3) of the ECHR as published in Bundesgesetzblatt 1952 II 686); on the one hand, it cannot be the translator's job to adopt 'the meaning which best reconciles the [authentic] texts, having regard to the object and purpose of the treaty' (Art 33(4) *in fine* of the Vienna Convention on the Law of Treaties) and, on the other hand, this translation is of importance on the national level where it represents the international regulation in question (cf Heintschel von Heinegg, *op cit* n 49 *supra*, para 23), and therefore should faithfully represent the latter, that is including, and indicating, possible inconsistencies between the authentic versions.

national language, in an official journal or a gazette. This is especially true in the case of a national law incorporating treaty law where the national language is not one of the authentic treaty languages¹²⁴ although for directly applicable international law measures, especially certain Security Council resolutions, the same must apply.¹²⁵ While this practice is without incidence on the foreseeability of the consequences of a treaty law or a directly applicable international law measure, it is required by rule-of-law aspects concerning the publication of laws in such a way that they are accessible to the citizen, and thereby satisfies *Hegel's* desire.¹²⁶ It is also quite simply the only possibility to ensure a uniform application of treaty-based national law throughout the national territory.

Those accessibility requirements would be respected also in the case of the publication of the one authentic version, and the 22 official translations, of a Community law. Such an arrangement would guarantee that the citizen has access to a Community law in her own language, even if this language version is identified as an official translation. It would also guarantee, should she doubt the reliability of that translation into her own language, that she can find out, by looking in only one more place and if need be with the assistance of only one translator, the real state of the law (which of course may still need clarification by a lawyer). Indeed, it would be perfectly clear that in the end only the authentic version could be decisive.

In contrast, as the law now stands, while every language version of a law is declared to be authentic, in legal reality, ie under the ECJ's uniform interpretation approach, none of them truly is. Indeed, at present, while in theory no assistance of a translator is required to understand the meaning of a Community law, all language versions being equally authentic, for this very reason the assistance of even a posse of translators will not be able to resolve divergences between language versions but only to state them. Such a law, which must be looked for in 23 different places, the true importance of none of which is really clear, cannot be deemed easily or even truly accessible.

The consequences of the present state of the law are thus at variance with both the quality requirements a law that interferes with liberties has to fulfill under the ECHR. Under both aspects the 'quality' of a Community law would be enhanced considerably if that law was authentic in one language only. There is no doubt in my mind that such a state of affairs would come much closer to the goal of permitting the citizen, in her own language, easy access to a Community law, and to foresee its effects, than the present one. The ECHR is all about protecting rights 'that are not theoretical or illusory but practical and effective'.¹²⁷ The equal authenticity of 23 language versions is illusory, the authenticity of only one version, accompanied by 22 official translations, is effective. Now that the EU has 23 official languages, for rule-of-law reasons a reform of its linguistic system is past due.

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¹²⁴ One arbitrarily chosen example is the Agreement Establishing the World Trade Organization, published in (German) *Bundesgesetzblatt* 1999, II 1625.

¹²⁵ One example is Security Council Resolution 1021 (1995), published in (Austrian) *Bundesgesetzblatt* 1996, 227.

¹²⁶ Cf text at n 75 *supra*.

¹²⁷ Settled case-law of the Court of Human Rights, cf eg Court of Human Rights, *Artico v Italy*, Application no 6694/74, Series A no 37, 15–16, § 33.