



EUI Working Papers

LAW 2007/06

The Binding Force of Babel.
The Enforcement of EC Law Unpublished
in the Languages of the New Member States

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ISSN 1725-6739

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

<http://www.eui.eu/>
<http://cadmus.eui.eu/>

Abstract

This paper explores some of the issues raised by the absence of due publication of EC secondary legislation in the languages of the new Member States after the 2004 Accession. It first lays down general principles regarding the publication of legal acts in Community law, pertinent to the current situation. Secondly, it addresses specific derogations from this regime brought about by the Accession. With the help of some general principles governing the publication and a comparative analysis of communication of legal norms in the Member States, it tries to suggest a possible approach to the extraordinary situation following the 2004 enlargement. Finally, it takes into account the consequences of the proposed solution and their potential sequels on the national level, especially before the constitutional courts of the new Member States.

Keywords**Legal issues**

European law – publication of secondary legislation – languages – Accession – absence of publication – validity – enforceability

Disciplinary background of the paper

Law – European law – comparative law

***The Binding Force of Babel.
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Michal Bobek*

1. The nature and the scope of the problem

On 1st May 2004, ten new Member States joined the European Union. This meant *inter alia* that save for the express derogations provided for in the Act of Accession,¹ the entire mass of Community secondary legislation became binding in the new Member States. This principle of immediate effects of Community law² in the new Member States was provided for in Art. 2 AA:

“From the date of Accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before Accession shall be binding on the new Member States and **shall apply in those States under the conditions laid down in those Treaties and in this Act.**”³

The same also applied to the publication of EC legislation in the new languages: save for express derogations, the general regime applies. As will be argued further down, for legislation to be applied, it first has to be published. The Community legislation should have been translated and published in the respective languages of the Special Edition of the Official Journal of the European Union⁴ before its full application in the new Member States, i.e. on 1st May 2004 at the latest.

This did not happen.

At the moment of Accession, the printed version of the Special Edition of the OJ, the only legally binding and authentic source of Community legislation, literally did not exist. The

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¹ Hereinafter also “AA” or the “Act”.

² *Kaleda, S.L.* Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine? *European Law Journal*, Vol. 10, No. 1, January 2004, pp. 102–122.

³ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, O.J. L 236/33 of 23rd September 2003 [*highlighted by the author*].

⁴ Hereinafter also “OJ”.

first volumes of the Special Edition were published in summer 2004 and the entire process of publication was finished only in March 2006.⁵

It can only be speculated as to when each piece of EC secondary legislation was published fully. For two reasons: firstly, the volumes of Special Edition do not bear the date of their real publication. All that is indicated is the date of the first publication of the respective piece of EC legislation in the languages of the old Member States. Secondly, the legislation is published in its original, i.e. non-consolidated version, with all its amendments published separately. This has two consequences: firstly, should one need the date of real publication of a given document in the Special Edition, the only way is to address directly the Office for Official Publications of the European Union⁶ with a request for disclosure of the dates of real publication of the respective volumes of the Special Edition.⁷ Secondly, the date of the publication of an often amended piece of EC legislation is the date of the publication of all its amendments, more precisely, the date of the publication of the last applicable amendment.⁸

The Community institutions have attempted to replace the lack of publication of EC legislation in the printed form through the faculty of limited electronic access. Whether this is possible will be examined below. It was, however, only a question of time before the absence of publication of Community law would give rise to disputes in the national and Community courts.

The approach adopted so far by the courts of the Member States varies considerably. The first disputes in national courts, in which the issue of absent publication arose, are not surprisingly areas in which EC law is directly applied by domestic authorities and is likely to impose duties or sanctions: customs. The scenarios are very similar: national customs authorities applied, immediately after Accession, the Common Customs Tariff and/or the Commission Regulation (EEC) No 2454/93 of 2 July 1993, laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.⁹ These decisions imposed sanctions on the importer, which went on to attack the administrative decision before a domestic administrative court. One of the arguments put forward for the annulment of the decision was the fact that it was based on Community legislation which was not, at the decisive time when the decision was being adopted, duly published in the language of the new Member State.

A clear approach is discernable in the decisions of the Polish administrative courts: in one of the first decisions of this sort, the Polish regional administrative court in Bydgoszcz (*Wojewódzki Sąd Administracyjny*) did not hesitate to annul the decision of the Customs

⁵ Cf. a press release of the Office for Official Publications of the European Union of 22nd March 2006 indicating that the publication of Community legislation in the nine new languages has been completed - <http://publications.europa.eu>, section "press releases" [visited 1.1.2007].

⁶ Hereinafter also "OPOCE".

⁷ Procedure done by some Member States administrations and courts. For instance, in reply to the query by the president of the Czech Supreme Administrative Court of 10th November 2005, the Director-General of the OPOCE indicated, with respect to the state of publication of the Czech Special Edition, that so far, 171 volumes of the total 219 volumes had been published. It would appear that the majority of the then published volumes were published in the second half of the year 2004 (letter from director-general of the OPOCE, Mr. T.L.Cranfield, to Mr. Josef Baxa, president of the Supreme Administrative Court, of 28th November 2005, DIRGEN(05) D/15074, Ref: TLC/ma – d15074 j.baxa).

⁸ This is significant for a number of frequently applied pieces of Community legislation, such as the Common Custom Tariff, the Sixth VAT Directive etc.

⁹ O.J. [1993] L 253/1.

Authority in Torun adopted on the basis of EC customs legislation unpublished in Polish. The court reached the conclusion that to apply EC legislation that has not been published in the Polish language violates principles of legal certainty and foreseeability of the law.¹⁰

A contrasting approach can be found in a decision taken by the Estonian Supreme Court. Immediately after the date of Accession, a party represented by a professional customs agent filed an incorrect customs declaration. The question was whether or not the party was supposed to know the relevant customs regulations and act accordingly, even if the EC legislation was not available in Estonian. The Supreme Court adopted quite a firm stance, holding that whether the EC legislation was available in Estonian at the time of completing customs formalities is irrelevant, as the company had acted through a professional customs agent, who was supposed to know EC law.¹¹

The Czech Regional Administrative Court in Ostrava took a middle course: despite expressing serious doubts as to the legality of an administrative decision adopted on the basis of EC legislation unpublished in Czech, it decided to stay proceedings and submit a reference for preliminary ruling to the Court of Justice. The case is currently pending as Case C-161/06, *Skoma-Lux, s.r.o.*¹²

Besides the reference for a preliminary ruling in the *Skoma-Lux* case, the absence of due publication has also been raised in direct actions. For instance, in the pending Case C-273/04, *Polish Republic and others v. the Council and the Commission*, Poland is seeking the annulment of Article 1.5 of Council Decision 2004/281/EC of 22 March 2004 adapting the Act concerning the conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, following the reform of the Common Agricultural Policy.¹³ The Council argued that the action should be rejected as it was lodged on 28th July 2004, i.e. outside the two-month time limit set by Art. 230 ECT. Poland's counterclaim was that the time limit vis-à-vis the new Member States had started to run from the real publication of the Decision in their national version of the OJ, which happened much later than 30th March 2004. With an order of 15th November 2006, the Court of Justice issued a request to the director-general of the OPOCE as to when the Decision was genuinely published.¹⁴

This paper explores some of the issues raised by the absence of due publication of EC secondary legislation in the languages of the new Member States after the 2004 Accession. It first lays down some general principles regarding the publication of legal acts in

¹⁰ Decision of 20th July 2005, case no. I SA/Bd 275/05, unpublished. Cf. a disapproving case note by a Polish Supreme Court judge: *Wróbel, A.* Głosa do wyroku Wojewódzkiego Sądu Administracyjnego w Bydgoszczy z 20.07.2005 r. (SA/Bd 275/05), wyrok niepublikowany. Europejski Przegląd Sądowy styczeń 2006, pp. 48 – 53.

¹¹ Judgment No. 3-3-1-66-05 of the Administrative Law Chamber of the Supreme Court of 10th May 2006, summary of the case available in the JuriFast database, administered by the Association of the Council of States and Supreme Administrative Jurisdictions at http://www.juradmin.eu/fr/jurisprudence/jurifast/jurifast_fr.php [visited 1.1.2007].

¹² Case notice published in OJ C 121 of 20th May 2006 at p. 9.

¹³ OJ L 93 of 30th March 2004 at p. 1.

¹⁴ Order of the Court of Justice of 15th November 2006 in Case C-273/04, *The Polish Republic and others v. the Council and the Commission*, n.y.p., para. 5.

Community law, pertinent to the current situation. Secondly, it addresses specific derogations from this regime brought about by Accession. With the help of some general principles governing the publication and communication of legal norms in EC law and in the Member States, it tries to suggest a possible approach to the extraordinary situation following the 2004 enlargement. Finally, it takes into account the consequences of the proposed solution and their potential sequels on the national level, especially before the constitutional courts of the new Member States.

2. General publication requirements for EC secondary legislation

Art. 2 AA states that all the *acquis communautaire*, including the general requirements for the publication of secondary EC legislation¹⁵ “shall apply in those States under the conditions laid down in those Treaties and in this Act”. The Act makes two references:

- (i) to the general rules governing the publication of EC legislation;
- (ii) to express derogating provisions, contained in the Act of Accession.

Before dealing with the exceptions, the generally applicable regime and requirements for the publication of EC law will be examined.

2.1. What is to be published?

The basic requirements for publishing EC secondary legislation are set in primary law:

Article 254 ECT:

1. Regulations, directives and decisions adopted in accordance with the procedure referred to in Article 251 shall be signed by the President of the European Parliament and by the President of the Council and published in the Official Journal of the European Communities. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.
2. Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the Official Journal of the European Communities. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.
3. Other directives, and decisions, shall be notified to those to whom they are addressed and shall take effect upon such notification.

Art. 254 (1) and (2) ECT provides for a broad spectrum of EC legislative acts that are obligatorily published in the OJ. To list them all here goes beyond the scope and ambition of this paper. Various publication-related norms are not consistent as far as the nomenclature of the Community acts is concerned. For instance, Art. 4 of the Regulation 1/58/EEC, Regulation No 1 determining the languages to be used by the European

¹⁵ EC primary law and the case law of the Community courts are outside the scope of this paper. However, with respect to primary law, the issues addressed in this paper do not arise. Primary law (the Treaties) are by their nature international law treaties. If primary law is published in the Official Journal, it is only in the „C“ series as „information“. Their publication in the Official Journal is not a condition for their validity or entry into force. On the other hand, as all the Member States are members of Organisation of the United Nations, the Treaties and their modifications are to be notified to the Secretary General of the United Nations (cf. Art. 102 (1) Charter of the United Nations). The situation is slightly different from the point of view of domestic constitutional systems, where publication of an international treaty might be a precondition for its (direct) domestic application. The founding treaties and all primary law has however been, at least with respect to the Czech law, properly published in one “mammoth” volume (7.792 pages) of the Czech Collection of International Treaties (No. 44/2004 Sb. m. s. of 28th April 2004).

Economic Community,¹⁶ provides for the translation of “*regulations and other documents of general application*” into all the official and working languages of the European Communities and their publication in the OJ. The Czech and Slovak Special Edition of the OJ indicate, on the other hand, that it should contain the official translations of all the “*binding Community acts with general application*”. Art. 2 AA quoted above refers to “*acts adopted by the institutions and the European Central Bank*”.

Whether all these definitions refer to the same set of Community acts can only be guessed. It seems that the most reliable indicator as to which Community acts are to be published in the OJ (in the “L” series) and consequently published in the Special Edition is that of “reasoning backwards”: only those generally binding acts that have been published in the Official Journal can be enforced against an individual.¹⁷ Generally speaking, typical Community legislative acts, i.e. regulations and now also the vast majority of directives and decisions, must be published either by virtue of Art. 254 (1) ECT or Art. 254 (2) ECT.

2.2. Where?

Art. 254 ECT is implemented in secondary law by a Council Decision of 15th September 1958 establishing the Official Journal of the European Communities¹⁸ and by the Decision 2000/459/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions of 20 July 2000 on the organisation and operation of the Office for Official Publications of the European Communities.¹⁹

The only currently authentic form of publication of EC secondary legislation is the printed version of the Official Journal of the European Union. Unlike many national legal systems that have either switched entirely to the electronic publication of laws,²⁰ or have parallel authenticity of printed and electronic versions,²¹ the Community legal order recognises only the publication of legislation in the printed form. Online access to Community legislation²² is thus not authentic and has, at least formally,²³ no legal effects.

¹⁶ *Journal officiel* no 17 du 6. 10. 1958, p. 390, English special edition: Series I, Chapter 1952-1958, p. 59.

¹⁷ It is questionable how much weight is to be given to the distinction of the respective series of the Official Journal, e.g. the „L“, „C“, „C E“ and „S“(or TED) series. Can legislation be only validly published in the „L“ series? Assume, for instance, that a regulation had mistakenly been published in the „C“ series and not in the „L“ series of the OJ. Would that be an infringement of an essential procedural requirement, sanctionable by the annulment of the regulation under Art. 230 ECT?

¹⁸ *Journal officiel* no 17 du 6. 10. 1958, p. 419.

¹⁹ O.J. L 183 of 22nd July 2000 at p. 12.

²⁰ E.g. Austria, Belgium, Estonia or Cyprus. Cf. the section “Legal gazettes in Europe” on the web site of the European Forum of Official Gazettes (<http://forum.europa.eu.int>), which contains an overview of the manner of law publication in the respective Member States.

²¹ E.g. France, Slovenia, United Kingdom (<http://forum.europa.eu.int>).

²² Most notably via the EUR-Lex site (<http://eur-lex.europa.eu/en/index.htm>).

²³ In EC law, similarly to other legal systems which have not yet adopted rules providing for the authenticity of the electronic version of their official journals/bulletins, there is a considerable gap between formal requirements of publication of legal norms and the genuine way of the cognition of the content of a legal norm by its day-to-day users. To put it more bluntly, the vast majority of practitioners applying EC law on a daily basis have never seen a printed version of the Official Journal. However, unless one is ready to re-examine the epistemological foundations of the modern (positivist) law, this empirical observation cannot invalidate a clear normative answer as to what the source of law is.

2.3. Language of publication

Primary law leaves the question of the publication of EC secondary legislation and the issue of languages generally open.²⁴ Article 290 provides that

“The rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Rules of Procedure of the Court of Justice, be determined by the Council, acting unanimously.”

Rules governing the languages of publication of secondary legislation, or more precisely of “*regulations and other documents of general application*”, are laid down by Regulation 1/58/EEC determining the languages to be used by the European Economic Community.²⁵ Art. 1 of the Regulation in the 1958 version provided for four official and working languages of the Community, in which all documents of general application were to be published. After the 2004 enlargement, the number of languages rose to twenty. As from 1.1.2007, the number of official languages has risen to 23 – besides Bulgarian and Rumanian, the pool of official languages was enlarged by Irish. However, there are temporal derogations for two of the official languages, Irish (*Gaelic*) and Maltese, which provide for transition periods of three and five years respectively, during which the institutions are not obliged to publish all the legislation in these two languages.²⁶

2.4. Date of publication

The date of publication of the paper version of the respective volume of the OJ is essential for two reasons: firstly, the date of publication is the latest conceivable date of validity of the legislation, i.e. the moment at which the legislative text becomes valid law.²⁷ Secondly, it is decisive for the determination of entry into force. The legislation enters into force on the date determined in it, by default on the twentieth day following publication. The date of publication does generally not pose any problems, save for two possible scenarios:

- (i) the entry into force is scheduled for the same day as the publication in the OJ;
- (ii) the entry into force is scheduled prior to the publication of the legislation. This may happen by accident (printing and distribution of the OJ is delayed but the entry into force provisions remains the same) or intentionally (the author of the act deliberately antedates the entry into force before its genuine publication).

The first scenario is possible, even necessary in cases of sudden changes and speedy need for legislative amendment. The second scenario is more problematic: it entails the retroactive effects of newly adopted legislation. This does not mean that legislation can

²⁴ With the exception of the “correspondence provision” in Art. 21 (3) ECT, which seems to leave the Court of Justice quite unsympathetic as a tool of deriving broader language principles from primary law – cf. Case C-361/01 P, *Kik v. Office for Harmonization in the Internal Market (Trade Marks and Designs)*, ECR [2003] I-8283, case note *Shuibhne, N. N.* [2004] C. M. L. Rev. 41, pp. 1093–1111 and the discussion of broader implications of this decision in *Creech, R. L.* *Law and Language in the European Union*. Europa Law Publishing: Groningen, 2005, pp. 32 – 38.

²⁵ Cited above, n. 16.

²⁶ Council Regulation (EC) No 930/2004 of 1 May 2004 on temporary derogation measures relating to the drafting in Maltese of the acts of the institutions of the European Union, O. J. L 169 of 1st May 2004 at p.1 and Council Regulation (EC) No 920/2005 of 13 June 2005 amending Regulation No 1 of 15 April 1958 determining the language to be used by the European Economic Community and Regulation No 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community and introducing temporary derogation measures from those Regulations, O.J. L 156 of 18th June 2005 at p. 3.

²⁷ On this issue, see below, point 4.

have some effects before its effective publication. This would be logically nonsensical; nobody is able to comply with non-existing or non-communicated legislation, as it does not exist. It simply means that past events are newly assessed under the new legislation and that the legal consequences might be altered. Retroactive effects of Community law are discouraged, although they are possible. They must, however, be clearly stated and justified.²⁸

The determining of the date of the genuine publication of EC legislation is governed by two basic principles, established by the Court of Justice in the *Racke* case:

- (i) The starting presumption is that the date of publication is the date appearing on the cover of each issue of the OJ;
- (ii) However, should evidence be produced showing that the date on which an issue was really available does not correspond to the date which appears on that issue, it is the date of actual publication that must be taken as binding.²⁹

In the *Racke* case, the Court of Justice went on as to state that

“A fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it.

[...] the date on which a regulation is to be regarded as published should not vary according to the availability of the Official Journal of the Communities in the territory of each Member State.

The unity and uniform application of Community law require that, save as otherwise expressly provided, a regulation should enter into force on the same date in all the Member States, regardless of any delays which may arise in spite of efforts to ensure rapid distribution of the Official Journal throughout the Community.”³⁰

The decisive moment of publication is the date on which an issue of the OJ is really available to the public in all the languages at the OPOCE office in Luxembourg.³¹ This solution can have some quite extreme consequences and does not correspond to the solutions accepted in some of the Member States.³² On the other hand, it is perhaps the only way to secure genuine unity and one single date of publication for the entire European Union. The second significant point about the *Racke* decision is that the date of genuine publication is the date when the legislative act is available in **all** the official languages.

2.5. Failure to publish and its consequences

Despite the recent Community legislative frenzy and the ensuing mammoth translating task carried out by the Community institutions, instances of failures to publish were, until the 2004 enlargement, relatively rare. Two types of failure to publish can be identified:

²⁸ Cf. Case 7/76, *IRCA v. Amministrazione delle finanze dello Stato* [1976] ECR 1213 and the Opinion of AG Warner in that case (p. 1234 af.). Generally see *Lamoureux, F.* The Retroactivity of Community Acts in the Case Law of the Court of Justice [1983] 20 C.M.L.Rev., pp. 269 – 296; *Letemendia, M.* La retroactivité en droit communautaire. Comparaison avec le droit anglais. Cahiers de droit européen 1977, pp. 518 – 570

²⁹ Case 98/78, *A. Racke v. Hauptzollamt Mainz* [1979] ECR 69, para. 15. Cf. also Case 88/76, *Société pour l'exportation des sucres SA v. the Commission* [1977] ECR 70.

³⁰ Case 98/78, *A. Racke v. Hauptzollamt Mainz* [1979] ECR 69, paras 15 and 16.

³¹ *Ibid.*, para 15.

³² Cf. a comprehensive study on this subject in *Herzog, J.-B., Vlachos, G.* La promulgation, la signature et la publication des textes législatifs en droit comparé. Travaux et recherches de l'Institut de droit comparé de l'Université de Paris. Les Éditions de l'Épargne : Paris 1961.

- (i) failure to publish in one or more Community languages only;
- (ii) failure to publish at all.

The *Prosciutto di Parma* case³³ is an instance of the first category. The well-known product Parma Ham enjoys an Europe-wide protected designation of origin (PDO), awarded under the Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.³⁴ The PDO specification for Parma Ham required not only that the ham be produced in the Parma region, but also that it be sliced and packaged in that region. The UK supermarket chain Asda Stores sold a product in the UK under the name of Parma Ham. This was genuine Parma Ham: however, it was imported into the UK as a whole and sliced and packaged there. The *Consorzio del Prosciutto di Parma*, holder of the PDO, brought proceedings in the English courts against Asda, seeking an injunction preventing Asda from selling Parma Ham in violation of the PDO specification.

One of the points that Asda raised in its defence was that the detailed specification of the PDO was not published in English; all that was available in the OJ was a brief original application for the PDO, stating the general characteristics of the product. However, the detailed and complete specification of the PDO, also containing the slicing and packaging requirement, was available only in the Italian national Gazette, to which the OJ made reference. Asda argued that this specification, which was not available in English, could not be legally binding on it.

The Court of Justice agreed.³⁵ It stated, that

“[...] the requirement of legal certainty means that Community rules must enable those concerned to know precisely the extent of the obligations which they impose on them [...]”
“[...] the principle of legal certainty required that the condition in question be brought to the knowledge of third parties by adequate publicity in Community legislation [...] As it was not brought to the knowledge of third parties, that condition cannot be relied on against them before a national court, whether for the purposes of criminal penalties or in civil proceedings.”
“[...] It must therefore be concluded that the condition that the product must be sliced and packaged in the region of production cannot be relied on against economic operators, as it was not brought to their attention by adequate publicity in Community legislation.”³⁶

Without making an in-depth analysis as to what the status of non-published legislation is, the Court of Justice simply states the “sanction”: the legal provision cannot be “*relied on against economic operators*” to whose notice it has not been brought. What does this mean? Is an act adopted on the basis of such legislation void, i.e. not valid? Or is it valid, but deficient and may be annulled? Or is it valid, but not enforceable?

³³ Case C-108/01, *Consorzio del Prosciutto di Parma and others v. Asda Stores Ltd. a Hygrade Foods Ltd.* [2003] ECR I-5121.

³⁴ OJ [1992] L 208, p. 1

³⁵ See, however, the opposing view of the AG Alber. In quite a sweeping opinion, the AG held, to a large extent relying on the CFI's decision in Case T-120/99, *Kik v OHIM* [2001] ECR II-2235, that there is no principle in EC law which would require all Community legal acts to be published in every official language. The AG held that the publication on the national level was sufficient and that a major undertaking like Asda Stores was able (and expected) to procure itself with a translation of the Italian official gazette or request one directly from the Commission.

³⁶ Case C-108/01, *Consorzio del Prosciutto di Parma and others v. Asda Stores Ltd. a Hygrade Foods Ltd.* [2003] ECR I-5121, paras 89, 95, 96, 99.

To some legal cultures within Europe, the consequence foreseen by the Court of Justice does seem somewhat peculiar. On the other hand, as will be argued further below, the approach adopted by the Court of Justice appears much clearer when placed within the French legal context: „*n'est pas opposable aux opérateurs économiques*“.³⁷ At this stage, it is only useful to point out that this consequence does not say anything either about the validity or about the entry into force of the measure.

Failure to publish at all appears to occur more often than the non-publication in one or more Community languages. It is most often caused by the sometimes dubious publication practice of the Community institutions. As stated above in relation to the *Racke* case, the date on the issue cover of the OJ should be the date of the genuine publication of the respective volume. There are examples, nonetheless, in which the Community institutions appear to disregard this principle and intentionally antedate volumes of the OJ, i.e. the date on the cover is anterior to the date on which the issue is actually published. In *Opel Austria*,³⁸ for instance, the claim was made that albeit certain measures published in the OJ dated 31st December 1993, they were genuinely published only on 11th January 1994. The CFI, leaving to one side the intentional violation of EC law by the Council³⁹ and “*without ruling on the legality of that practice, which must be regarded as dubious at the very least*”,⁴⁰ annulled the contested regulation. Antedating of legislation appears to be a common vice within the institutions.⁴¹

It is important to note that in *Opel Austria*, the CFI *annulled* the contested regulation. To annul something implies that it had to exist first, i.e. it must have become valid law. The CFI did not proclaim the contested regulation void due to failing publication, not even for the period before its delayed publication.

3. Derogations in case of Accession

From the moment of Accession of the new Member States, there were two regimes of publication of EC legislation:

- (i) for Community acts adopted before the 1st May 2004;
- (ii) for Community acts adopted after the 1st May 2004, which were and are being published in the “normal” publication mode as from the Accession in the respective language mutations of the OJ.

The Act of Accession introduced, in derogation from the general principles applicable to the publication of secondary EC legislation, a different publication regime for the

³⁷ Cf. also other language versions: „*kann den Wirtschaftsteilnehmern jedoch nicht entgegengehalten werden*“ (De), „*non è opponibile agli operatori economici*“ (It), „*no puede oponerse a los operadores económicos*“ (Es).

³⁸ Case T-115/94, *Opel Austria GmbH v. Council* [1997] ECR II-39

³⁹ *Ibid.*, para 131, where the CFI clearly states that: „[...] *the Council deliberately backdated the issue of the Official Journal in which the contested regulation was published.*”

⁴⁰ *Ibid.*, para 130.

⁴¹ H. Schermers and D. Waelbroeck (*Schermers, H.G., Waelbroeck, D.F.* Judicial Protection in the European Union. 6th Ed. Kluwer Law International : The Hague 2001, at p. 393) claim that this is especially true of the legislation which needs to be published (or needs to appear to be published) within a given calendar year. Volumes of OJ nominally bearing the date of the 31st December are in reality often published months later.

legislation of the first category. The general principles, however, still apply absent specific provisions to the contrary. There are specific derogatory provisions contained in Title II of the Act of Accession. Out of these, the most important is Art. 58 AA:⁴²

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

Articles 2 and 58 AA adopt the same solution as was adopted in the cases of previous accessions to the E(E)C.⁴³ It is based on a certain type of cross-reference to the general regime: the acts of institutions would be published in the new languages, provided that they were published in the old ones.

There are two areas that are unclear in the wording of Art. 58 AA: **when** precisely the acts are to be translated⁴⁴ and published and by **whom**. When exactly the publication is to take place cannot be discerned by a literal interpretation of the text; “*shall be published*” (“*ils sont publiés*”; “*sie werden veröffentlicht*”) does not indicate, due to its construction as a conditional sentence (... *if ... so published.*), any precise moment. This lack of clarity can be eliminated by logical and systematic interpretation: if a legal provision is to be authentic in the new Community languages from the date of the Accession, one can reasonably assume that it must be translated and published first. Otherwise, there is nothing to which authenticity can be given. The conclusion is thus that the “acts of institutions” to which Art. 58 AA refers were to be published in the OJ at the latest stage in the moment of the Accession.

The entity whose duty it was to publish is, due to the passive form used in Art. 58 AA, also unclear. The first logical answer would be that publishing is the duty of the author of the respective act. This presumption is, however, eroded by two facts: firstly, the above-cited secondary legislation entrusts the publication to the OPOCE.⁴⁵ The OPOCE is, however, just an auxiliary body, not a proper institution in the meaning of Art. 7 ECT. It is managed and controlled by the Community institutions.⁴⁶ Secondly, Art. 58 ECT limits the number of translation bodies to the Commission, Council and the Central Bank. Does this mean

⁴² Of importance is also Art. 53 AA, which creates an en bloc presumption of notification, upon the Accession, for all the directive and decisions addressed to the old Member States and adopted before the 1.5.2004. This means, by implication, that the new Member States accepted, under international law, notification (and thus also assumed the duty to implement) in other than their official language for all the directives and decisions (but not regulations and other sources of EC law).

⁴³ Cf. e.g. always the Art. 2 of the Act of Accession for the 1973 enlargement, the 1979 or the 1995 enlargement.

⁴⁴ The exact wording of Art. 58 AA refers to the „drafting“ of the legislative texts in the languages of the new Member States, not to their translation („*texts of the acts [...] drawn up [...]*“; „*les textes des actes [...] qui ont été établis*“, „*die abgefassten Rechtsakte*“). However, for all practical purposes, there is no doubt that the drafting activity was no (parallel) „co-drafting“ of legislation in different languages, but a simple subsequent translation of already existing text(s) into the languages of the new Member States (distinction between the two types of drafting made by Doczekalska, A. Production and Application Of Multilingual Law. The Principle of Equality of Authentic Texts and the Value of Subsequent Translation, not yet published). Subsequent use of the notion of “translation” of EC legislation in this paper thus stands for the “drafting” in the languages of the new Member States in the meaning of Art. 58 AA.

⁴⁵ Art. 1 of the Decision 2000/459/EC, cited above, n. 19.

⁴⁶ Art. 4 and Art. 5 (2) of the Decision 2000/459/EC.

that these institutions are responsible for the translation of the acts of the other institutions and bodies that fall under the scope of Art. 58 AA? Does the same also apply to the publication of these acts?

A precise allocation of responsibility within the EC institutions does not need to concern us at this stage. What is clear, however, is that the responsibility rested with the European Communities as a legal entity. What follows is that, excepting other contractual obligations or inter-institutional arrangements to the contrary,⁴⁷ the legal duty to translate and publish lies with the European Communities, not the Member States. This seemingly banal observation is of crucial importance at the later stage of allocation of liability for damages caused to individuals, and perhaps also to the Member States as such, which was the result of enforcing non-translated and not properly published legislation against them as well.⁴⁸

3.1. Temporal electronic publication?

Considered from the formal publication requirements point of view, secondary law did not exist in the new official languages at the moment of Accession, i.e. not a single volume of the printed Special Edition of the OJ was published at that time. In reaction to this, the Commission issued a document entitled “Commission Notice”, which was published in the OJ L 169 of 1st May 2004 and then reprinted in following five issues of the OJ as a “notice to readers”. It stated:

“A special edition of the Official Journal of the European Union containing the texts of the Acts of the institutions and of the European Central Bank adopted before Accession will be published in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovene languages. The volumes of this edition will be issued gradually between 1 May and the end of 2004.

Pending publication, the electronic version of the texts is available on EUR-Lex and will in the meantime constitute publication in the Official Journal of the European Union for the purposes of Article 58 of the 2003 Act of Accession.

The EUR-Lex site is at: <http://europa.eu.int/eur-lex/en/accession.html>”

This notice is problematic – at the very least. Leaving aside the fact that it contains statements that are incorrect,⁴⁹ some of which the Commission might not have known at the time, it opens up the broader question of whether or not “electronic” access can be made equal by a “Commission notice” to the only authentic printed publication.

⁴⁷ The greatest part of translation work was done on the national level, i.e. within specialised translation agencies set up by the governments. Some of the work was also contracted out. Translation drafts were subsequently sent back to the Linguistic Service of the Council, which acted as the final revision and unification body for translation. This could mean that, if, on contractual or other institutional type of agreement, a Member States was delayed in translating the necessary legislation and sending it to the Council, the EC institutions (the Council) might try to raise this as a type of defence against liability claims. On the amount of translation and the activity done on the national level in the case of the Czech Republic, cf. e.g. *Palivec, J. Kvantifikační analýza procesu aproximace práva České republiky s právem Evropských společenství* [Quantitative Analysis of the process of approximation of the Czech law with EC law]. *Právník*, vol. 144 (2005), issue 1, pp. 29-66.

⁴⁸ See below, point 6.

⁴⁹ Or, as Sir Humphrey Appleby might have put it: „[...] *the precise correlation between the information [...] communicated and the facts insofar as they can be determined and demonstrated is such as to cause epistemological problems of sufficient magnitude to lay upon the logical and semantic resources of the English language a heavier burden than they can reasonably be expected to bear.*” (Yes Prime Minister, Episode 2.8. – The Tangled Web, First airtime BBC: 28 January 1988)

First of all, it must be pointed out that the genuine publication actually took much longer than was announced by the Commission:⁵⁰ publication was finished only in early 2006. Secondly, the notice gives the false impression that all the texts of the (then only) unpublished legislation were accessible online. This is also incorrect: online accessibility was in many instances not much better than accessibility to the printed version. By far not all the applicable legislation was accessible online, especially in the period immediately after Accession. The EUR-Lex site to which the notice referred was a temporary site, which no longer exists. It contained provisional translations of the then available translated secondary legislation.⁵¹ Moreover, the site did not only contain final versions of translated texts, but also provisional versions, which were being amended.⁵² The documents were in a non-signed and non-secured Microsoft Word format (“doc”), which meant that the entire database and its alterations were at the disposal of the site administrator.

It is thus to be submitted that the above-described partial “access” constituted in no way the “publication” of binding legislation within the meaning of Art. 58 AA. First of all, as already argued above, general Community law does not recognise the electronic publication of legislation. Moreover, there are no express derogations allowing for electronic publication in the Act of Accession. Under these circumstances, the Commission had no power to alter, by its “notice”, which does not even exist in the EC Treaty as a type of a binding legal act, the legal regime for the publication of legislation foreseen in the primary and secondary law. Finally, even if the electronic publication was possible under Community law, the above-described style of document access would fail any reasonable standard required for the online publication of legislation.⁵³

⁵⁰ There is a clear and gradual sliding in the schedule of publications: shortly after the Accession, the official position taken by the Commission was that all the legislation will be published in the languages of the new Member States by the end of 2004 (cf. e.g. a letter of 21st June 2004 by the president of the European Commission, Mr. Romano Prodi, to Ms Vineta Muižniece, Minister of Justice of the Republic of Latvia, in reply to the minister’s query about the status of publication of the *acquis* in Latvian, reference PRODI(2004)A/3397). In a later note by the Director-General of the OPOCE of 8th July 2004 to the Steering Committee of the OPOCE (ref. TLC/vh/gpa DIRGEN(04)D 9677), it is already admitted that publication of all the legislation before the end of year 2004 might be possible only in 3 languages. The publication in all languages was in fact finished in March 2006 (cf. the press release of the OPOCE referred to above, n. 5).

⁵¹ Speaking only of the bare text of the legislation, not about the research environment: it is symptomatic that the Commission Notice in the new official languages did not refer to the respective language versions of the EUR-Lex searching environment (these did not exist), but to the French one (<http://europa.eu.int/eur-lex/fr/accession.html>). Leaving aside the question whether or not there was anything to be found, a Hungarian person, for instance, would have quite some difficulties in navigating in a purely French database environment, provided she did not speak French.

⁵² Every document contained indication „*first delivered*“ and „*last uploaded*“ and were being continuously updated, i.e. the content of the database was being changed.

⁵³ Including, *inter alia*, secured, „locked“ and signed format of the legislation (typically signed „*portable document format*“ – pdf), which is downloadable and cannot be altered and other tools ensuring verification of the content of the legal norm. Cf. e.g. the requirements for electronic publication of laws in Austria (*Kundmachungreformgesetz 2004* BGBl. Teil I, Nr. 100 (Ausgegeben am 21. November 2003), pp. 1476 – 1480). Generally see *Walker*, R. Die amtliche elektronische Verkündung von Gesetzen. JurPC Web-Dok. 155/2005, Abs. 1 – 62 or *Hietanen*, A. Electronic Publication of Legislation: methods of authentication of the texts and Svoboda, W.R. Current State of Publication of Legislation in the EU Member States, both articles accessible at <http://forum.europa.eu.int/irc/opoce/ojf/info/data/prod/html/act12.htm> [last visited 1. 1. 2007].

The only conclusion to be drawn here is that a limited and unsecured electronic access to the working translations of Community legislation in no way constituted the publication of legally binding legislation in the sense of Art. 58 AA.

3.2. Failure to publish the Special Edition of the Official Journal

There appears to be only one case in which the failure to translate and publish secondary law following accession has been brought before the Court of Justice. This is the *Oryzomyli Kavallas*⁵⁴ case. Oryzomyli was a Greek company. Shortly after the Greek accession to the then EEC, it applied with the Greek Ministry of Agriculture for permission to import quantities of rice. The company was ill-advised by the officials of the Ministry and applied for the wrong type of permission. When it realised the mistake, it sought the remission of the import duties paid from the Commission. The Commission refused, stating that the conditions for repayment or remission of import duties⁵⁵ had not been met. The company then sought the annulment of the Commission's decision.

Oryzomyli (the claimants) put forward a series of arguments concerning the reasons why the duties should be repaid. One of these arguments included the assertion that the applicable regulations were not duly published at the decisive time when it applied for the importation permission in the Greek Special Edition of the OJ. The Commission rejected this argument stating that all the 40 volumes of the Greek Special Edition were duly published and available from the very first day of the Greek membership.⁵⁶ The Court of Justice issued letters rogatory for the hearing by the Greek courts of witnesses as to when the special edition was really received by the Greek authorities. It also requested relevant information from the OPOCE. On the basis of the evidence heard, it became evident that the relevant regulations applicable for the importation, albeit they nominally bore the date of publication 31st December 1980, were in reality not published before late summer 1981.⁵⁷ It became also clear that the Commission was providing misleading information to the Court of Justice, which is, as the AG Mischo pointed out in his Opinion, rather surprising if one takes into account that the OPOCE is subject to Commission's authority and that the Commission could have at any time checked with the OPOCE on the state of real publication of the Special Edition.⁵⁸

The Court of Justice is itself silent on these issues. It summarily states that there were „highly exceptional factors“ that constituted „special circumstances“ within the meaning of Art. 13 of the Regulation No 1430/79 and the Commission's decision was therefore annulled.⁵⁹ Again, the reasoning of the Court of Justice does not contain any doctrinal assessment as to what is the status of non-translated legislation in the new Member States. Implicitly, however, it allows the conclusion that the Court might not see the failure to publish in one or more of the official languages as causing the absolute nullity⁶⁰ of administrative acts

⁵⁴ Case 160/84, *Oryzomyli Kavallas OEE a Others v. Commission* [1986] ECR 1643.

⁵⁵ As set out in Art. 13 of Council Regulation No. 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ [1979] L 175, p. 1), which made the repayment conditional upon the fact that they „[...] result from special circumstances in which no negligence or deception may be attributed to the person concerned.“

⁵⁶ Para. 12 (p. 1647) of the decision, detailed account of facts at p. 1636 of the Opinion of the AG Mischo.

⁵⁷ AG Mischo Opinion, p. 1636.

⁵⁸ Ibid., pp. 1639 and 1640.

⁵⁹ Para 16 (p. 1648) of the decision.

⁶⁰ In the sense of the German concept of „Nichtigkeit“ or the French „nul et non-avenu“, i.e. that the act could have never validly come into existence and it does not produce any legal effects whatsoever. Cf., with respect to absolute nullity in Community law, Joined Cases 1 and 14/57, *Société des Usines à Tubes de la Sarre v*

adopted on its basis. That is, the administrative act is valid, but defective (imperfect) and may be annulled.

4. General principles governing communication and the publication of law

Before discussing some possible approaches to the problem studied in this paper, it is useful to highlight some additional principles which delimit the scale of possible solutions. These could be broadly referred to as general principles of law governing the publication of legislation in modern legal systems based on the rule of law. Their origin is twofold: firstly, there are some principles which could be said to be principles that already form part of the Community legal order as such. Of these, following will be briefly assessed:

- (i) legal certainty (foreseeability of the law)
- (ii) language equality
- (iii) understandability and clarity of the law
- (iv) legality

The second source of general principles of Community law are the principles common to the constitutional traditions of the Member States.⁶¹ The inquiry into the legal systems of some of the Member States might be instructive in assessing:

- (i) the principles on which modern systems of communication of law are based, especially the principles of the formal publicity of law and formal equality in access to the law;
- (ii) the status of unpublished or not duly published legislation under national legal systems.

The principle of legal certainty⁶² is, however, despite the fact that it is commonly invoked, not decisive for the problem at hand. To a large degree, the principle is just an empty shell that needs substantive underpinning to or connection with a different principle. The best illustration of this lies in the fact that it can be effectively used both for and against the conclusion of the enforceability of non-translated legislation: in the above quoted decision,⁶³ the Polish regional administrative court used the argument of legal certainty to preclude the application of EC legislation that was not published in Polish. Thus, individuals can legitimately expect that only legislation that has been duly published in Polish can be held against them. Conversely, the Estonian Supreme Court⁶⁴ held that every

High Authority [1957] ECR 105; Case 15/85, *Consortio Cooperative d' Abruzzo v Commission* [1987] ECR 1005 and Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89, *BASF AG and Others v. Commission* [1992] ECR II-315. Generally see *Annacker, C.* Die Inexistenz als Angriffs- und Verteidigungsmittel vor dem EuGH und dem EuG. *EuZW*, Heft 22/1995, pp. 755 – 761, at pp. 755 – 761 and *Schärf, W.-G.* Zur Frage der Inexistenz von Rechtsakten im Gemeinschaftsrecht. *EuZW*, Heft 11/2004, pp. 333 -334.

⁶¹ Art. 6 (2) TEU confirming established case-law of the Court of Justice.

⁶² Generally see *Schwarze, J.* *Droit administratif européen*. Volume II. Bruylant: Bruxelles, 1994, pp. 1170 – 1232; *Schermers, H.G., Waelbroeck, D.F.* *Judicial Protection in the European Union*. 6th Ed. Kluwer Law International : The Hague 2001, pp. 64 – 83; *Tridimas, T.* *The General Principles of EC Law*. Oxford University Press: Oxford, 1999, chapter 5 (pp. 163 – 201).

⁶³ Cited above, n. 10.

⁶⁴ Cited above, n. 11.

reasonably circumspect individual could expect that as from 1st May 2004 onwards, new EC legislation would enter into force. To question this would threaten the principle of legal certainty and the foreseeability of the law. The difference in approach is the value underlying the principle of legal certainty: in the Polish case, it was the value of legality, in the Estonian case, it was instead the stability of already created legal relationships. A free standing principle of legal certainty is thus not able to deliver a conclusive argument.

There is no principle of language equality in primary EC law.⁶⁵ Primary law only provides for the authenticity of its various language versions,⁶⁶ not for linguistic equality. However, in secondary law, save for (later) secondary law provisions to the contrary,⁶⁷ the general regime of Regulation 1/1958 applies. It lays down that, with respect to secondary law, all languages are equal. This means, on the other hand, that any of the official and working Community languages can be the medium of communication of the content of a legal rule.

The principle that legislation is to be drafted in such a way as to be understandable to its addressee is a very basic constitutional requirement that does not need to be explained any further. Its respect assures not only the basic standard of protection of the individual, but it also realises the broader aims of any reasonable government, whose natural interest it is to inform the individuals as broadly and as comprehensively of their duties to ensure a reasonable degree of compliance. The Court of Justice went as far as to assert a right of the individual to be subject only to unequivocal, predictable and understandable “*measures of general application*”.⁶⁸ It is questionable how far the legislation that is not accessible in the official language of the addressees meets this requirement.

A point that should not be neglected in the debate is the issue of legality, which is commonly considered as given and unnecessary to repeat. It is, however, hard to reconcile with the problematic publication practice of the Community institutions following the 2004 enlargement. It is clear that the translation task faced on the eve of the 2004 enlargement was huge; on the other hand, it is questionable whether the most suitable way of facing the failure to meet this task is, in a “*Community based on the rule of law*”,⁶⁹ to withhold information or to provide misleading information.

An important lesson can be learnt from the national and historical practice of the publication of legislation.⁷⁰ Two important principles can be deduced from historical and

⁶⁵ Cf. above, text to the note no 24.

⁶⁶ Art. 314 ECT as amended by Art. 61 AA.

⁶⁷ Such as, for instance, Art. 115 of the Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ [1994] L 11 at p. 1., which limits languages of the OHIM to English, French, German, Italian and Spanish.

⁶⁸ Cf. e.g. Case 70/83, *Gerda Kloppenburg v. Finanzamt Leer* [1984] ECR 1075, para. 11 or Case 169/80, *Administration des Douanes v Société anonyme Gondrand Frères a Société anonyme Garancini* [1981] ECR 1931, para. 17.

⁶⁹ Case 294/83, *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para 23.

⁷⁰ The last (and perhaps the only) comprehensive study dealing with this topic in a comparative prospective remains: *Herzog, J.-B., Vlachos, G. La promulgation, la signature et la publication des textes législatifs en droit comparé. Travaux et recherches de l'Institut de droit comparé de l'Université de Paris. Les Éditions de l'Épargne : Paris 1961.* For historical overview of publication of law in Europe, cf. e.g. *Wittling, A. Die Publikation der Rechtsnormen einschliesslich der Verwaltungsvorschriften. Nomos Verlag : Baden – Baden, 1990; Holzborn, T. Die Geschichte der Gesetzespublikation – insbesondere von den Anfängen des Buchdrucks um 1450 bis zur Einführung von Gesetzesblättern im 19. Jahrhundert. Dissertation vorgelegt and der Rechts- und Staatswissenschaftlichen Fakultät der Rheinischen Friedrich-Wilhelms-Universität*

comparative analysis: firstly, all modern systems of the publication of laws are founded on the principle of the formal presumption of knowledge of the law (principle of formal publicity of the law),⁷¹ published either in the official gazettes (continental model) or approved in the representative forum of the country, i.e. in the Parliament (England). This is reflected in the old (interpolated) Roman adage “*ignorantia legis (iuris) non excusat*” or “*ignorantia iuris nocet*”.⁷²

The principle of the formal publicity of law means that once a piece of legislation is duly published in the official gazette or journal, everybody is presumed to know it, irrespective of her real diligence or capacity to acquaint herself with the content of the legal norm. Secondly, there is a strong principle of formal/formalised equality; status, standing, ability to read or the knowledge of foreign languages is irrelevant, personal capacity is entirely detached from the obligation to know. Once published in the official gazette, everyone is deemed to know. By the same token, if not published, no one is supposed to know and obey.

The existence of a strict and formalised equality in access to law and the presumption of its knowledge are also instructive for the EC level. These principles prevent the particularisation of the legal order and a differentiation in the extent of legal obligations according to the capacity of addressees to effectively acquaint themselves with the content of a legal rule in a different language. Whatever solution might eventually be adopted to the problems presented in this paper, it should respect these two basic rules providing for unity and coherence in modern legal systems. No distinction can be made between the addressees of legal regulation domiciled in a Member State, i.e. the fact that, for instance, one addressee is a big multinational company that has the people and/or resources to acquaint itself with the content of a regulation available only in English and another addressee is a province-based one-man company, is of no relevance to the enforceability of this regulation vis-à-vis both of them. A different solution would in fact represent a return to a legal Middle Ages, where the applicable law and the degree of its knowledge were to be proven before the judge as well.⁷³ It would lead to a hardly imaginable particularisation of the legal order, where the extent of individual duties under the law would be dependent on the individual capacity to acquaint oneself with the legal norm, and this would have to be established in every individual case.

How would a similar problem, i.e. failure to publish, be solved in some of the major national legal systems within the European Union? If we leave aside the somewhat particular situation in England, where the publication of legislation is governed by centuries-old rules and practice and does not appear to be of much inspiration for a modern society,⁷⁴ the European continent seems to be divided into two cultural and legal

Bonn: Bonn, 2003; *Bentham, J. Essay on the Promulgation of Laws and the Reasons thereof with Specimen of a Penal Code*. In: von Bowring, J. *The Works of Jeremy Bentham*. Volume 1, New York 1962.

⁷¹ Which can be said to be accepted in EC law as well: cf. Case C-370/96, *Covita AVE v. Greece* [1998] ECR I-7711 and Case 161/88, *Binder v. Hauptzollamt Bad Reichenhall* [1989] ECR 2415.

⁷² The origin of the adage is said to be the distinction between errors in law and errors in facts. M. Dereux makes the reference to Ulpianus’ „*Ignorantia enim excusatur non juris, sed facti*“ (L. 11, fr. 4, D.) – cf. *Dereux, M.G. Étude critique de l’adage „Nul n’est censé ignorer la loi“*. *Revue de droit civil*, 1907, vol. VI, pp. 513 – 554, at p. 517, note no 1. Cf. also *Wittling*, op. cit. above, n. 70, at pp. 28 and 29.

⁷³ Cf. *Wittling*, op. cit, n. 70, at p. 29 or *Holzborn*, op. cit, n. 70, at p. 149.

⁷⁴ The applicable law, which only requires the Royal Assent as the condition for validity of legislation, but not its publication in any sort of official journal, goes back to ancient case law of *R. v. Bishop of Chichester* (1365),

spheres: the Francophone and the Germanic. The division is due to a different conception as to when a piece of legislation of general application⁷⁵ becomes valid law.

The French approach⁷⁶ distinguishes four distinct qualities of an act: *promulgation*, *publication*, *l'entrée en vigueur* and the ensuing *opposabilité* of the act against an individual. The condition for the validity of an act is its promulgation by the president of the republic, not its publication. The publication is simply a necessary condition for the later imposition of an obligation on the basis of the act on the individual (*opposabilité*). Even if not published in the *Journal officiel*, the act is valid by virtue of its promulgation. It is binding upon the public administration and administrative acts adopted on its basis are lawful, albeit they cannot be enforced against individuals (*ne sont pas opposables*).⁷⁷

The German approach is different: in the German constitutional system, the publication of an act in the *Bundesgesetzblatt* is a necessary condition for its validity. The publication of an act is seen as the last step in the legislative process of the adoption of the act; without due publication, no act comes into existence. Thus, any administrative act adopted on the basis of an act that has not been duly published is by definition void *ab initio* (*nichtig*), because no administrative act can validly be adopted on the basis of non-existing legislation.⁷⁸

The German approach can be perceived as strongly protective of the rights of the individual. The enhanced degree of legal protection has historical roots; it attempts to prevent a recurrence of the historical experience of the secret collection of laws and the imposition of duties a priori unknown to the individual, a practice which took place under the Nazi rule.⁷⁹ For similar (historical) reasons, the same solution has been adopted in the Central European post-communist countries, which have also experienced the practice of the secret collection of laws or instructions, accessible only to the members of the Communist Party.⁸⁰ In the Czech Republic,⁸¹ the Slovak Republic⁸² as well as in Poland,⁸³ the publication of legislation is a condition for its validity.

R v. *Jefferies* (1721) 1 Stra 446 and *Price v. Hollis* (1813) 1 M & S. 105. Quoted from *Brown, N.* La promulgation, la Signature et la Publication des Textes Législatifs en Grande-Bretagne. In: *Herzog, J.-B., Vlachos, G.* op. cit., n. 70, pp. 97 – 106.

⁷⁵ A normative act, typically an Act of Parliament (*la loi; das Gesetz*).

⁷⁶ Under the distinct French influence also Belgium – cf. *de Visser, P.* La Promulgation, la Signature et la Publication des Lois en Droit Belge. In: *Herzog, J.-B., Vlachos, G.*, op. cit., n. 70, pp. 41 – 61; *Delpérée, F.* Le droit constitutionnel de la Belgique. Bruylant: Bruxelles, 2000, pp. 802 – 804.

⁷⁷ *Puget, H., Séché, J.-C.* La promulgation et la publication des actes législatifs en droit français. In: *Herzog, J.-B., Vlachos, G.*, op. cit., n. 70, pp. 71 – 95; *Terré, F.* Introduction générale au droit. 5e édition, Dalloz : Paris, 2000, pp. 442 – 450; *Starck, B., Roland, H., Boyer, L.* Introduction au droit. 5e édition. Litec : Paris, 2000, pp. 194 – 199; *Lavroff, D. G.* Le droit constitutionnel de la Ve République. 3e édition. Dalloz: Paris, 1999, pp. 804 – 808.

⁷⁸ Art. 82 of the Fundamental Law (Grundgesetz). Cf. e.g. *Von Münch, I., Kunig, P.* (Hrsg.) Grundgesetz – Kommentar. Band 3 (Art. 70 bis Art. 146 und Gesamtregister). 3. Auflage. C.H.Beck'sche Verlagsbuchhandlung : München, 1996, pp. 313 – 327; *Maunz, T., Dürig, G.* (Hrsg.) Grundgesetz – Kommentar. Band V (Art. 70 – 99), Verlag C.H.Beck: München, 1998, point 82, pp. 1 – 6; *Dreier, H.* (Hrsg.) Grundgesetz Kommentar. Band II (Artikel 20 – 82). Mohr Siebeck : Tübingen, 1998, pp. 1570 -1585; *Schmidt-Bleibtreu, B., Klein, F.* (Hrsg.) Kommentar zum Grundgesetz. 10. Auflage. Luchterland: München, 2004, str. 1536 -1547 and the case law quoted therein. For a detailed study, see *Hallier, H.-J.* La Promulgation et la Publication des Lois et Règlements dans la République Fédérale d'Allemagne. In: *Herzog, J.-B., Vlachos, G.*, op. cit., n. 70, pp. 13 – 39 and *Wittling*, op. cit., n. 70, part II (pp. 114 – 299).

⁷⁹ *Wittling*, op. cit., n. 70, at p. 90 and f.

⁸⁰ In this perspective, the current practice of the Community institutions is rather perturbing – cf. the pending Case C-345/06, *Heinrich* (Reference for a preliminary ruling from the Unabhängiger

What is crucial is the maximal common denominator of both systems: neither of them allows for the enforcement of unpublished legislation. The French solution would be to claim that unpublished legislation which exists (was promulgated) is valid, but not enforceable against individuals.⁸⁴ The German solution would entail the absolute nullity of the act. Albeit both approaches might appear similar as far as the final consequence is concerned (no obligation can be imposed on the basis of unpublished legislation), they greatly differ as far as the procedural consequences are concerned. The German approach would mean that all the administrative acts adopted on the basis of unpublished legislation are automatically void, i.e. the addressee of the act does not even have to bring an action for annulment before a court. If one nonetheless does bring an action for annulment, the decision of the court would be declaratory only. The French approach would mean that the administrative decisions are valid, but can be annulled following an action for judicial review by the addressee. How far is either of these approaches transferable onto the Community level?

5. The enforceability of EC legislation unpublished in the languages of the new Member States

At least three approaches could be conceived in relation to the problem raised in this paper:

- 1) From the moment of Accession, all Community secondary law becomes enforceable against individuals in the new Member States, irrespective of the status of its real publication in the languages of the new Member States.
- 2) Community law not duly published in the official language of the respective new Member State cannot be considered valid law on the territory of that state. Accordingly, administrative acts adopted on basis of “non-valid law” are absolutely void (*void ab initio*).
- 3) Community law that is unpublished in the language of one Member State but is, at the same time, published in at least one of the other official languages, is valid and enters into force under the conditions specified in it. It (or administrative acts adopted on its basis) cannot, however, impose any obligations on its addressees

Verwaltungssenat im Land Niederösterreich lodged on 10th August 2006), notice published in OJ 2006 C 281/30, from which it appears that as a part of the EU participation in the world-wide “war against terrorism”, the European Union has also started adopting secret regulations, which are not being published in the OJ.

⁸¹ Art. 52 (1) of the Constitution of the Czech Republic in connection with § 3 (1) of the law no 309/1999 Coll., on Collection of Laws and Collection of International Treaties, as amended [zákon o Sbírce zákonů a Sbírce mezinárodních smluv].

⁸² Art. 87 (4) of the Constitution of the Slovak Republic (constitutional law no. 460/1992 Coll., as amended, consolidated version in no 135/2001 Z.z.).

⁸³ Art. 88 (1) of the Constitution of the Polish Republic in connection with Art. 2 (1) of the law on the publication of normative acts and some other legal acts [Ustawa z dnia 20 lipca 2000 r. o ogłaszaniu aktów normatywnych i niektórych innych aktów prawnych (Dziennik Ustaw z 2005 Nr 190 poz. 1606)].

⁸⁴ It is here where the French inspiration of legal consequences of unpublished acts (*„n'est pas opposable aux opérateurs économiques”*), adopted by the Court of Justice in the Case C-108/01, *Conorzio del Prosciutto di Parma and others v. Asda Stres Ltd. a Hygrade Foods Ltd.* [2003] ECR I-5121, becomes evident (cf. the discussion of the case above, text to notes no. 33 – 37).

unless it has been duly translated and published in the official language of the respective Member State, on the territory of which it is to be applied.

The solution put forward in this paper is the third one. The European Union has (currently) 23 official languages. All of them are the official languages of the EU. A legal rule can be validly published in any of them. This would mean, in an extreme scenario, that a regulation is published and becomes valid law even if it were to be published only in, for instance, French. A legal rule contained in this regulation could, however, be applied against individuals domiciled in a Member States where the official language is other than French if and only if after it has been published in the official language of that Member State.

The opposite conclusion, namely that an EC normative act is valid and enters into force only after being published in all the official languages, is incompatible with the above-discussed case-law of the Court of Justice, Community practice and, in the end, the real limits of Community alleged multilingualism. First of all, failure to publish in one of the languages entails the sanction of non-enforceability against economic operators, not automatic invalidity (*voidness*).⁸⁵ Secondly, if one strives for an overreaching principle for the requirements of a linguistic regime of Community acts, which is absent in primary law, it is necessary to take into account the already existing reality of various types of publication of generally binding Community acts, where not all acts of a genuinely general nature that are able to alter the legal situation of an individual are published in all the official languages.⁸⁶ This does not, however, question their validity. Finally, if one still insists on the frequently celebrated unity of the Community legal order, then the approach which would divide the Community into 23 language clusters,⁸⁷ with a different regime and entry into force of the Community legislation, is difficult to accept.⁸⁸

The above-discussed passage from the *Racke*⁸⁹ decision, which requires that the date of publication shown on each issue of the OJ should correspond to the date on which that issue was in fact available to the public in *all* the languages at the Office of the OPOCE, must be distinguished in this respect. This was, in fact, only a passing remark that related to the way in which OPOCE should determine the date of publication of each issue of the OJ. It should not be stretched so far as to constitute a general condition for the validity and entry into force of Community legislation. Moreover, *Racke* must be read in the light of the later case-law,⁹⁰ which did not place the condition of the validity of Community legislation with its simultaneous publication in all the official languages.

⁸⁵ Cf. above the text to the n. 33 – 37.

⁸⁶ Cf. e.g. the effects that a trade mark registration with the Office of Harmonisation in the Internal Market, done in only 5 languages, has on the rights and duties of other economic operators and the discussion of balancing of the competing interests in the Case C-361/01 P, *Christina Kik v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, ECR [2003] I-8283, paras 88 – 94.

⁸⁷ Or, after the last accession in at least 9 clusters (the old 15 MS and Malta and Cyprus on the one hand and the remaining eight Member States with the eight new official languages on the other).

⁸⁸ Moreover, two of the current „official and working“ languages of the European Union, Gaelic and Maltese, provided for in primary law, are, on the basis of temporal derogation contained in secondary law (cf. above, n. 26), in reality used as official languages for the purposes of legislation publication. This does however not seem to affect the validity of Community law on the territory of Malta and Ireland.

⁸⁹ Analysed above, text to the n. 29 – 31, para 15 of the decision.

⁹⁰ Especially the above discussed Case 160/84, *Oryzomyli Kavallas OEE a Others v. Commission* [1986] ECR 1643 and Case C-108/01, *Consorzio del Prosciutto di Parma and others v. Asda Stores Ltd. a Hygrade Foods Ltd.* [2003] ECR I-5121.

A slightly different situation is, moreover, that of the cases of Accession. It is obvious that in cases of Accession, the validity of the already existing EC law is not called into question. What is, however, called into question is the extension of the territorial application of EC law into the territory of the new Member States. Here again, the requirement of unity of the EC legal order is present. It must, however, be weighted against other values, especially the legal protection of individuals and the legality of Community actions.

The last assertion leads into the perhaps strongest argument in favour of the third solution: that is the consequentialist argument of the type of solution that one is trying to avoid. The third solution is a compromise position between two extreme ways of approaching the problem: all valid and perfect on the one side and all absolutely void on the other. It is submitted that neither of these extremes is compatible with Community law. A different answer, especially in respect of the latter option, which might be reached on the basis of domestic constitutional laws, is discussed briefly below.

Few practical implications and refinements need to be added with respect to the third solution. First of all, the administrative acts adopted in the new Member States after the Accession on the basis of (then) non-translated and unpublished legislation are valid. They are, therefore, not void, but imperfect (defective). Two approaches to imperfect administrative acts are possible here: one could firstly argue that following the due publication of the secondary law in the languages of the new Member States, imperfect administrative acts have been perfected, i.e. the initial publication vices have been removed and the acts regained a proper legal basis. The second approach would claim that imperfect administrative acts remain defective even after the proper publication of the piece of legislation on which they were (allegedly) based. They can thus be challenged by an action for annulment/judicial review in domestic/Community courts within the time limits foreseen.

It is suggested that the latter approach should prevail. The first option, i.e. an ex-post type of convalidation of defective administrative decision, in many cases to the detriment of an individual, is difficult to reconcile with the principles discussed above, especially with legality, legal certainty/protection of legitimate interests and partially also with the non-retroactivity of the laws. Moreover, it finds no support in the above-discussed case-law of the Court of Justice, in particular with the *Oryzomyli* case.⁹¹

In practical terms, the possibility of a judicial review of administrative decisions adopted on the basis of non-translated EC legislation will be, on the Community as well as the national level, limited in time. After the lapse of the time period within which the defective decisions can be attacked,⁹² even defective acts can no longer be questioned. More problematic issues may arise in cases where the absence of publication would be invoked only incidentally, i.e. as one of a line of possible defences, for instance, in cases arising out of breach of contract,⁹³ tort etc. In these types of cases, no time limits apply *per se*.

⁹¹ See above, text to the n. 54 – 59.

⁹² Typically two months following the publication or notification of the measure – cf. Art. 230 ECT or, for instance in the Czech law, Art. 72 (1) of the law no 150/2002 Coll., the Code of Administrative Justice, as amended.

⁹³ For instance, company A delivered certain goods to company B in June 2004 in accordance with domestic law but not with a non-translated and unpublished Community regulation. In 2009, company A sues

Nonetheless, it is clear that even in these disputes, legal certainty would eventually prevail over legality.

Another refinement is necessary in respect of various types of Community legislation. The “no-obligation-imposition” model outlined above is in fact applicable only partially and only to regulations. A few further considerations should be added concerning regulations, on the one hand, and directives/decisions, on the other.

As far as regulations are concerned, the no-obligation-imposition model is fully operational only in vertical types of legal relationships, i.e. relationships between a Member State and an individual. Regulations are, however, measures of general application that also apply in horizontal relationships.⁹⁴ The non-imposition of an obligation on party A in a horizontal relationship automatically means the correlating absence of a right of party B.⁹⁵ For example, the non-imposition of the duty to respect the Italian specification of the Parma Ham onto Asda Stores meant the deprivation of the right of the *Consorzio del Prosciutto di Parma*. There is thus always a losing private party, which suffers from the lack of publication. A *de facto* imposition of an obligation onto an innocent party occurs.

This situation is regrettable, although under Community law, it is acceptable. There is a (more theoretical than practical) difference between the imposition of an obligation and the worsening of the legal position of an individual. The first is not allowed, while the latter one is current practice. This difference is most visible in the type of horizontal (triangular) application of non-notified domestic law.⁹⁶ It should be nonetheless pointed out that even in cases of a worsening of the legal situation of an individual, the possibility of a claim for extra-contractual liability caused by a breach of Community law (failure to translate and publish), either against the Member State, or against the Communities, remains open.

Directives and decisions adopted prior to Accession were en bloc notified by Art. 53 AA. The new Member States are thus bound by them and it has the transposition duty irrespective of their translation and publication in the new official languages. What arises, either in the context of late or non-transposed directives or, in the improbable case of non-translated directives after Accession, is the question of direct effect. Can directives or decisions, which are both normally capable of producing direct effect,⁹⁷ be directly effective if they are not translated into the official language of the respective Member State?

company B for the payment of outstanding purchase price, company B refuses stating the goods were not complying with Community standards, which were applicable from the date of the accession (1st May 2004).

⁹⁴ Art. 249 ECT. Cf. as a typical example of horizontal application, the above described Case C-108/01, *Consorzio del Prosciutto di Parma and others v. Asda Stores Ltd. a Hygrade Foods Ltd.* [2003] ECR I-5121.

⁹⁵ In Hohlfeldian terms, the granting of a privilege to party A correlating to the absence of right (no-right) of party B. See *Hohfeld, W. N. Fundamental Legal Conceptions as Applied in Judicial Reasoning* Yale University Press : New Haven and London, 1919, at p. 36.

⁹⁶ Cf. e.g. Case C-194/94, *CIA Security International SA v. Signalson SA and Securitel SPRL* [1996] ECR I-2201; Case C-443/98, *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7535; Case C-159/00, *Sapod Audic* [2002] ECR I-5031. Generally on this issue, see *Weatherill, S. Breach of directives and breach of contract.* [2001] 26 E. L. Rev. 177; *Lackhoff, K., Nysens, K. Direct Effect of Directives in Triangular Situations.* [1998] 23 E. L. Rev. 397; *Karase, H. D., Beljin, S. Grenzen der Privatbelastung durch unmittelbar wirkende Richtlinien.* *Europarech – Heft 5 – 2004*, pp. 714 – 737.

⁹⁷ Cf., e.g. Case 148/78, *Ratti* [1979] ECR 1629 or Case 41/74, *Van Duyn* [1974] ECR 1337 (directives) and Case 9/70, *Franz Grad v. Finanzamt Traunstein* [1970] ECR 825 (decisions).

The crucial point is how to interpret the first of the conditions of direct effect, the condition of sufficient “clarity” of the provision in question. Does it refer to an overarching quality of legislative text, which is independent of the respective language (“objective” test of direct effect), or does it necessarily involve the (“subjective”) evaluation of the individual linguistic capacity of an average addressee in the given jurisdiction?

The latter approach is suggested. Firstly, the standard for direct effect is the average addressee in a given jurisdiction, interpreting Community legislation (primarily) in her official language. The knowledge of the official language of the respective Member State, together with the above-discussed principles of formal publicity of law are the only obligations imposed upon an individual. These do not contain the obligation to read EC legislation in other official languages.⁹⁸ For an average addressee, the EC law legislation that is not published in the official language of that addressee is absolutely unclear. This conclusion, together with the above-discussed principles of equality in access to law and the principle of formal publicity, which prevent taking the capacity of a given addressee to understand any of the other official languages into account, exclude any direct effect of non-translated directives and decisions.

This conclusion is of course problematic. It basically denies the estoppel-like rationale for which the direct effect of directives was introduced in the first place: to “punish” the Member State which is defaulting in the fulfilment of its obligation and to effectively safeguard the rights an individual could derive from Community law. This reasoning fully applies to all directives and decisions adopted before the Accession, which the new Member States have not yet implemented. The new Member States are failing to fulfil their obligations under the Treaty.⁹⁹ So why should the individuals not be able to derive any directly effective rights from the provisions of these directives or decision only because they were not translated and duly published in the languages of their Member States? The key reason is the above-discussed principle of formal equality of the subjects of legal regulation and equality in access to the law, which yet again cannot be made dependent on the individual capacity to understand a foreign language. The fact that the directive/decision was not available in the official language of the Member State is a distinguishing factor that prevents any sort of direct effect.

The denial of the direct effect of non-translated directives begs one further general question: can any rights be derived from non-translated legislation at all? The answer in the

⁹⁸ Different question would the extent of the obligation to consult other language versions for the authorities of the Member States, especially the courts. There the “clarity” test for the purpose of establishing whether or not a question of Community law is self-evident, set out in the *CILFIT* ruling. Its application would mean that the national court must compare the different language versions (Case 283/81, *Srl CILFIT and others and Lanificio di Gavardo SpA v Ministero della sanita* [1982] ECR 3415, para. 18). However, this is Community fiction and not reality: Member States courts (of last instance) only very rarely engage in the comparative linguistic exercise, as does, by the way, the Court of Justice itself (cf. a surprisingly frank remark by AG Jacobs in Case C-338/95, *Wiener v. Hauptzollamt Emmerich* [1997] ECR I-6518 (para 65 of the opinion), in which he notes that it is somehow exaggerated to require from Member States courts something that even the Court of Justice does not normally do.

⁹⁹ As is evidenced by the tens of Art. 226 ECT proceedings launched by the Commission against the new Member States and the first judgments already delivered against the Czech Republic (judgments of the Court of Justice of 18th January 2007 in Case C-203/06, *Commission v. the Czech Republic*, n. y. r. and in Case C-204/06, *Commission v. the Czech Republic*, n. y. r.) and Slovakia (judgment of the Court of Justice of 8th February 2007, Case C-114/06, *Commission vs. Slovakia*, n. y. p.)

case of directives and decisions is no, for whatever type of legal relationship.¹⁰⁰ The answer in the case of regulations has limited itself so far only to an imposition of obligations. But could a non-translated regulation be applied to bestow rights on an individual?

With two reservations, there are no strong reasons why this possibility should be rejected. The first is the observation of the principle of equality in access to law and equal benefits under the law. Again, access to goods and burdens cannot be (formally) made subject to the individual capacity to understand law in other than the official language. The other is the already above-described need for the protection of third parties in a triangular type of legal relationship.

6. Liability

Legal responsibility for the failure to publish, and especially possible claims for damages pose an intriguing sets of questions. The starting assumption is that failure to translate and publish is the fault of the European Communities.¹⁰¹ However, the vast majority of EC law is directly applied by the authorities of the Member States. If one assumes that there is generally the possibility to claim damages caused by the enforcement of unpublished EC legislation,¹⁰² three sets of complex questions arise:

- (i) the legal position of a Member State as such;
- (ii) the possibility of the joint liability of the EC and a Member State;
- (iii) action for the recovery of damage paid (regress) of a Member State against the EC.

Member States of the EU are in a dual position. In many cases, their institutions are “Community” institutions; that is they form part of the Community institutional structure. On the other hand, there are also instances in which Member States are only the passive addressees of EC regulation. In this latter function, there is no difference between a Member State and an individual: both are subjects of external regulation.

¹⁰⁰ However, if one accepts that even non-translated directives and decision are capable of indirect effect, which is very likely, then a right not granted on the basis of direct effect might return through the back-door of indirect effect and the “conform” interpretation of national legislation, as the line between direct and indirect effect of directives is very thin – cf., e.g., Case C-168/95, *Criminal proceedings against Luciano Arcaro*, ECR [1996] I-04705. Generally see *Prechal, S. Directives in EC Law. 2nd Edition*. Oxford University Press : Oxford, 2005, points 8.5 and 9.5.

¹⁰¹ In the form of primarily responsibility to „draft“ and to „publish“ in the languages of the new Member States. As has already been addressed above, the most of the translation work has been „commissioned-out“ to specialised (governmental) translation centres in the new Member States. Possible delays or failures to translate and submit draft translations to the Council for final revision and publishing on time from the side of some of the Member States might be relevant for allocating liability between the Communities and the respective Member State or used as a defence in case of regressive claims against the Communities by a Member State. They do not, however, alter the conclusion that the primary responsibility for timely publication rests with the European Communities.

¹⁰² Cf. the general conditions for extra-contractual of the Member States and Community institutions, which should now be, at least in theory, the same: Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport ex parte Factortame (III)* [1996] E.C.R. I-1131, para 42 and Case C-352/98, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission* [2000] E.C.R. I-5291, para 41.

Are Member States bound by non-translated EC legislation? If they are only subject of EC regulation, i.e. their role is limited to the latter function, it is difficult to see why their position should differ from that of all the other “normal” addressees of EC legislation. When Member States apply and enforce EC law, however, the issue becomes more complex. On the one hand, the Member States¹⁰³ are bound by the principle of loyal and sincere cooperation of Art. 10 ECT and its jurisprudential extensions done by the Court of Justice.¹⁰⁴ At the same time, the EC is bound by the principle of legality (lawfulness) of their actions. Art. 10 ECT cannot be interpreted so as to mean that the duty of the Member States extends to cooperating with the EC in violating the law. It is suggested that with this reasoning, Member States could have refused to carry out and enforce EC legislation¹⁰⁵ due to failure to publish it in their official language. None of them has done so.¹⁰⁶ On the contrary, national administrations have strived to apply EC law fully immediately after the Accession, even if that has meant that they have had to do so on the basis of “home-made” unofficial translations of EC legal texts.¹⁰⁷ This would mean that the Member States have, even if to a lesser degree, contributed to the eventual damage caused to individuals.

Allocation of responsibility is self-evident in the cases of claims for damages caused by an administrative adopted by Community institutions; the forum is the Court of First Instance or the Court of Justice, legal basis Art. 288 (2) ECT. In cases of acts adopted by the institutions of Member States, the forum is presumably the national one; the Member State is at least partly at fault. Any type of action for the joint liability of the EC as well as the Member State is, under current EC law, hard to conceive.¹⁰⁸ On the other hand, should a claim in national court against a Member State be successful, the possibility of a Member

¹⁰³ The more detailed issue whether all the branches of government are bound by non-translated EC law to the same extent will not be addressed here. For a discussion on this point, see: *Procházka*, R. K publicité prameňov komunitárneho práva [On Publicity of Sources of Community Law]. *Justičná revue*, vol. 56, 2004, issue 8 – 9, pp. 856 – 866. The en bloc assumed duty to transpose directive and decisions in Art. 53 AA from other language versions would mean that at least the Member States’ legislatures are bound to apply (transpose) directives and decisions unpublished in the languages of the new Member States.

¹⁰⁴ Generally see *Lang, J.T.* The Duties of National Authorities under Community Constitutional Law [1998] 23 E.L.Rev. 109; *Lang, J.T.* The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.: Two More Reflections. [2001] 26 E.L.Rev. 84; *Constantinesco, L.* L’article 5 CEE, de la bonne foi à la loyauté communautaire. In: *Capotorti, Ehlermann, Frowein, Jacobs, Joliet, Koopmans and Kovar (eds.): Du droit international au droit de l’integration; Liber Amicorum Pierre Pescatore.* Nomos Verlag : Baden – Baden, 1987, p 97 and f.

¹⁰⁵ Especially directly applicable regulations; as outlined above, the situation in respect of directives and decisions is different.

¹⁰⁶ There were academic suggestions soon after the Accession (even from such high-ranking civil servants as the Slovak Agent representing the Slovak Republic before the Court of Justice) that the Member State could sue the European Communities for failure to translated and publish as a failure to act under Art. 232 ECT. These suggestions were not pursued – cf. *Procházka*, cited above, n. 103, at p. 864.

¹⁰⁷ It has been for instance established, in the proceedings before the Czech regional administrative court (*Krajský soud v Ostravě*) that eventually submitted the reference for preliminary ruling in the Case C-161/06, *Skoma-Lux, s.r.o.*, that the Czech customs administration applied and enforced the Common Customs Tariff and related EC law on the basis of working translations provided by the Ministry of Finance.

¹⁰⁸ The current position of the Court of Justice appears to be that priority is to be given to a claim for damages before a court of the Member State and only subsequently claims might be brought before the Community courts in Luxembourg. Cf. Joined Cases 5, 7, 13 to 24/66, *Kampffmeyer* [1967] ECR 266 and Case 101/78, *Granaria* [1979] ECR 637. Generally see *Rengeling, H.-W., Middeke, A., Gellermann, M.* *Handbuch des Rechtsschutzes in der Europäischen Union.* 2. Auflage. C. H. Beck : München, 2003, p. 188.

State claim for recovery of at least part of the damages paid to individuals for the Communities' failure to publish remains open.¹⁰⁹

7. Language as the Limit of National Constitutional Obedience?

So far, the discussion has focused on the analysis of the EC legal order. In a constitutionally pluralistic Community, however, this is not the only approach. Considerably different answers to the same question might be given if reasoning on the basis of national constitutional law provisions.

After the 2004 enlargement, the CEE constitutional courts started to position themselves with respect to the Community legal order. They mostly adopted slightly modified varieties of the German *Bundesverfassungsgericht* "Solange"¹¹⁰ doctrine: there is a conditional and limited transfer of powers from the national level onto the supranational, as long as (*solange*) certain conditions of the transfer are observed. As aptly summarised by the Czech Constitutional Court:

"In the Constitutional Court's view, this conferral of a part of its powers is naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty is still founded upon Art. 1 para. 1 of the Constitution of the Czech Republic [...] the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state [...] According to Art. 9 para. 2 of the Constitution of the Czech Republic, the essential attributes of a democratic state governed by the rule of law, remain beyond the reach of the Constituent Assembly itself."¹¹¹

Potential lines of reasoning flowing from similar types of reservations are twofold, focusing on procedural and substantive, or, put alternatively, internal and external limits to the European integration. Procedural (or internal) reservation would mean that Member States have agreed to a limited transfer of powers on the condition that these powers would be exercised in accordance with the Treaties, i.e. lawfully. Member States did not agree to a transfer of powers that starts with their disregard, i.e. unlawful behaviour on the part of the European Union.

Secondly, the substantive argument concerns the external limits of the European integration. These are the "untouchable" or essential attributes of the national constitutional order that are beyond even the scope of the Constituent Assembly itself, in

¹⁰⁹ Good overviews of the issues concerning joint/concurrent liability of the EC and the Member States offer *Oliver, P.* Joint Liability of the Community and the Member States. In: *Schermers, H. G., Henkels, T., Mead, P.* (eds.) *Non-Contractual Liability of the European Communities*. Martinus Nijhoff Publishers : Dordrecht, 1988, pp. 125 – 147 or *Wils, W.* Concurrent Liability of the Community and a Member State [1992] *ELRev.* 101.

¹¹⁰ BVerfGE 37, 271 (*Solange I*); BVerfGE 73, 339 (*Solange II*); BVerfGE 89, 155 (*Maastricht*), for an overview of the case law, see e.g. *Kokott, J.* Report on Germany. In: *Slaughter, A.-M., Stone Sweet, A., Weiler, J. H. H.* (eds.) *The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context*, Hart Publishing : Oxford, 2000.

¹¹¹ Decision of the Czech Constitutional Court (plenary court) of 8th March 2006, case no. Pl. US 50/04, published as no. 154/2006 Coll. (English translation available at http://test.concourt.cz/angl_verze/doc/p-50-04.html).

the Czech case, for instance, the “*essential attributes of a democratic state*”.¹¹² These cannot be, at least in the constitutional theory as interpreted by CEE constitutional courts, transferred onto the European level; they form an unalterable core of the domestic constitutional system.¹¹³

Could the “right to language” and the right of an individual to communicate in her mother language with the government and the public administration be conceived as an essential attribute of a democratic state? In a passing remark in its (in)famous Maastricht decision, the *Bundesverfassungsgericht* held that the possibility for a citizen to communicate with a power-exercising public authority in her language is a substantial element of the notion of democracy.¹¹⁴ It is quite likely that some of the CEE constitutional courts might assess this question along similar lines: if there is a right to communicate with the public authority in one’s own language, there must be, *a fortiori*, a right to have the same (if not higher) standard of communication for the communication of legislation, which is in fact an unilateral imposition of rights and obligations.¹¹⁵

Taking into account the outlines of a comparative argument about possible approaches to the problem of unpublished EC legislation made above, the task of the Court of Justice will not be an easy one. There is no convergence or a dominant idea in the laws of the Member States, but rather a clear contradiction¹¹⁶ between the “Germanic” and the “French” approaches as to the validity of administrative decisions adopted on the basis of unpublished legislation. The difference is not marginal: it has profound procedural implications. It is hard to conceive that the Court of Justice would have any other possibility than to opt for a variation of the French approach: Publication is a precondition for enforcement, not for validity. It serves to be mindful, however, that this approach is not the one of the new Member States, i.e. of the states that will be directly affected by the decision. As has already been mentioned above,¹¹⁷ the new Member States’ rules on publication of laws follow the German “post-totalitarian” model, not the French one. What

¹¹² Based on the wording of Art. 9 (2) of the Czech Constitution: “*Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.*”

¹¹³ This line of reasoning can again be traced back to the German “*Solange*”-line of case law, especially the “*Maastricht-Urteil*”, (BVerfGE 89, 155), which addressed the question what constitutes the untouchable constitutional core (*jeder Verfassungsänderung entzogener Verfassungskern* – Art. 79 (3) GG), which is even beyond the disposition of the constitution maker. For a good analysis, cf. the discussion of the decision by the reporting judge, P. Kirchhof, writing extra-judicially in *Kirchhof, P. Das Maastricht-Urteil des Bundesverfassungsgerichts*. In: *Hommelhoff, P., Kirchhof, P. (Hrsg) Der Staatenverbund der Europäischen Union: Beiträge und Diskussion des Symposiums am 21. und 22. Januar 1994 in Heidelberg*. C.F. Müller : Heidelberg, 1994.

¹¹⁴ „*Demokratie, soll sie nicht lediglich formales Zurechnungsprinzip bleiben, ist vom Vorhandensein bestimmter vorrechtlicher Voraussetzungen abhängig [...] Dazu gehört auch, daß die Entscheidungsverfahren der Hoheitsgewalt ausübenden Organe und die jeweils verfolgten politischen Zielvorstellungen allgemein sichtbar und verstehbar sind, und ebenso, daß der wahlberechtigte Bürger mit der Hoheitsgewalt, der er unterworfen ist, in seiner Sprache kommunizieren kann.*“ In: BVerfGE 89, 155 (185).

¹¹⁵ Coming back on the Community level, this calls into question the opinions expressed in the *Kik* ruling (above, n. 24). By the argument of legal force (*a fortiori*), it does not give much sense of having a primary-law guaranteed right to petition the Community institutions and receive the answer in the same language (Art. 21 (3) ECT) and not to have the same right in cases of much greater incursion into the rights of an individual, namely for binding Community legislation.

¹¹⁶ Cf. typology of the use of comparative legal arguments by the Court of Justice made by *Lenaerts, K. Interlocking Legal Orders in the European Union and Comparative Law* [2003] 52 ICLQ 873, at p. 883 – 894.

¹¹⁷ Cf. above, notes no 81 – 83.

follows is that the Court of Justice would be forced to adopt a solution, which is perhaps shared only by a minority of the current Member States and is likely to be scrutinised with a great degree of suspicion on the part of the guardians of divergent national constitutional rights and values.

Court of Justice's decision in *Skoma-Lux* and other possible cases dealing with the failure to translate and publish Community legislation after the Accession will be most probably made subject to subsequent national constitutional scrutiny.¹¹⁸ So far, the constitutional courts of the new Member States have showed themselves to be quite "pro-European",¹¹⁹ sometimes even surprisingly "pro-European".¹²⁰ It remains to be seen whether or not the issue of language may pose limits to the new Member States' constitutional obedience.

¹¹⁸ In the Czech Republic, for instance, there is already a constitutional complaint pending before the Constitutional Court in the *Skoma-Lux* case (constitutional complaint of 27th February 2006, case no. II. ÚS 110/06, pending).

¹¹⁹ Cf. an overview of the major cases by *Sadurski, W.* "Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union. EUI Working Paper LAW No 2006/40, available at <http://cadmus.eui.eu>.

¹²⁰ Cf. e.g. the judgment of the Czech Constitutional (full court) of 3rd May 2006, case no. Pl. ÚS. 66/04, published as no 434/2006 Coll., declaring the Czech domestic implementation of the European Arrest Warrant compatible with the Czech Constitution. The "Euro-friendliness" of the decision is obvious when compared to similar decision in Germany and Poland. An analysis of these decisions offers *Komárek, J.* European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles" [2007] 44 C. M. L. Review 9.