THEMIS Competition – Semi Final A
International Cooperation in Criminal Matters
24 - 27 April 2018, Barcelona, Spain

Legal Certainty and Multilingualism in Criminal EU Law

Правна сигурност и многоезичие в наказателното право на ЕС · Právní jistota a mnohojazyčnost v trestním právu EU · Retlig sikkerhed og flersprogethed i strafferetlig EU-lov · Õiguskindlus ja mitmekeelsus ELi kriminaalõiguses · Oikeusvarmuus ja monikielisyys rikollisessa EU-oikeudessa · La sécurité juridique et le multilinguisme dans le droit pénal européen · Rechtssicherheit und Mehrsprachigkeit im EU-Strafrecht · Νομική βεβαιότητα και πολυγλωσσία στο ποινικό δίκαιο της ΕΕ · Jogbiztonság és többnyelvűség a büntetőjogi uniós jogban · Deimhneacht Dhlíthiúil agus Ilteangachas i Dlí Coiriúil an AE · Certezza legale e multilinguismo nel diritto comunitario penale · Juridiskā noteiktība un daudzvalodība ES krimināllietās · Teisinis tikrumas ir daugiakalbystė baudžiamojoje teisėje · Ċertezza Legali u Multilingwiżmu Fil-Liġi Kriminali ta 'l-UE · Pewność prawna i wielojęzyczność w karnym prawie UE · Segurança jurídica e multilinguismo no direito penal da UE · Certitudinea juridică şi multilingvismul în dreptul comunitar penal · Právna istota a viacjazyčnosť v trestnom práve EÚ · Pravna varnost in večjezičnost v kazenskem pravu EU Certeza legal y multilingüismo en la legislación penal de la UE · Rättssäkerhet och flerspråkighet i straffrättslig EU-lagstiftning

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Introduction

The motto of the European Union (EU) is *In Varietate Concordia* - "United in Diversity". This diversity is mirrored by the variety of languages spoken by the almost 512 Million EU citizens.[1] Besides the commonly known national languages there are about 150 regional and minority languages spoken.[2]

In order to be in a dialogue with all its citizens, the EU has to speak "their" language. The values and fundamental principles, but also the laws of the EU can only reach the people if they understand the language. To achieve this, the EU chose to adopt multilingualism, not only as a means of communication, but also to protect cultural diversity and identity.

The effective communication of shared values becomes even more important in times of rising nationalism and strongman leaders. These anti-EU movements can only be countered by taking the EU citizens along on the path of "unity in diversity". This is, however, a remarkable challenge since a multitude of languages can cause misunderstandings. It requires striking a balance between maintaining diversity and protecting individual autonomy by enacting clear, understandable guidelines for behaviour.

Focussing on the issues arising from multilingualism in the EU, the lack of legal certainty is one of particular importance. The interplay between EU and national law, the implementation of EU directives and the various authentic languages in the EU can pose serious threats to legal certainty, which is a fundamental pillar of a functioning society. Without unambiguous laws, it is impossible for individuals to take guidance from them. Especially in criminal law, clear rules are essential to foresee the potential consequences of a certain behaviour.

This article outlines the current approach of the EU and its organs in dealing with the issue of balancing multilingualism and legal certainty, the problems that multilingualism causes and possible solutions.

Multilinguistic legislation and legal certainty

Multilingualism is an integral part of the EU and of EU legislation. In the context of a growing corpus of substantive European criminal law in which the principle of legal certainty is particularly important, multilingualism can cause a multitude of conflicts. This is because linguistic plurality comes with unavoidable ambiguity and hence at the expense of clear rules. It should therefore be considered which solutions can effectively balance the principle of multilingualism and legal certainty.

[1] Eurostat – Population on 1 January 2017, European Commission.
[2] "Many tongues, one family. Languages in the European Union.", European Commission.

Multilingualism in the EU

Since its inception the EU has been a unique project and has constantly tested the limits of possible cooperation between nations. This is true for the principle of complete multilingualism which is without precedent in international law.[3] The United Nations, for example, only has six official languages.[4]

When the principle of multilingualism was laid down by the then European Economic Community and Euratom in 1958[5], only Dutch, French, German and Italian were official languages. Today, the EU encompasses 24 official languages.[6] The most popular mother tongues are German (16 %), English (13 %), Italian (13 %), French (12 %), Polish (8 %) and Spanish (8 %), while the most well-known foreign languages in the EU are English (38 %), French (12 %) and German (11 %).[7]

Multilingualism is codified in Article 22 of the Charter of Fundamental Rights of the European Union (subsequently "Charter") which protects linguistic diversity. Further, Art. 55 TEU stipulates that the Treaty is considered authentic in the 24 official languages, i.e. each version is equally authoritative for interpretation. Moreover, every citizen of the EU may communicate with any of its institutions or bodies in one of the 24 official languages (Article 24 TFEU).

In practice, certain procedures have emerged to deal with multilingualism. French and English have become the main procedural languages in which the Commission conducts its day-to-day business. The drafting of legislative source texts most commonly occurs in English, and is then translated by the Commission's Directorate General for Translation (DGT), the largest translation service in the world, into the official EU languages.[8] The actual translation is done by linguists, so-called "laywer-linguists" who have a legal background and high proficiency in several languages, technical experts and politicians.[9] When the final versions of text are approved by the Commission, the legislation is sent to the Council and Parliament, where amendments must again be translated.

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[3] *Mańko*, Legal aspects of EU multilingualism, European Parliamentary Research Service, p. 1; *Šarčević*, Multilingual Lawmaking and Legal (Un)Certainty in the European Union, Int. Journal of Law, Language & Discourse, 2013, p. 1 et seq.

[4] http://www.un.org/en/sections/about-un/official-languages/.

[5] Council Regulation No 1 of 15.4.1958.

[6] Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

[7] Special Eurobarometer 386, Europeans and their Languages, 2012, found at: http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_386_en.pdf.

[8] *Šarčević*, p. 8 et seq.

[9] *Šarčević*, p. 8 et seq.

This procedure and multilingualism in general is considered "essential for the proper functioning of the European Union" by the Commission.[10] It is also reflected in Article 3 paragraph 3 TEU which states the EU "shall respect its rich cultural and linguistic diversity" and has been confirmed by the ECJ.[11]

However, the multilingualism of the EU is facing growing opposition.[12] As far back as 2001 the European Commission has admitted that "linguistic inconsistency and incoherence in directives and their national transposing instruments pose a threat to cross-border transactions".[13] As will be shown, this issue is especially urgent in the growing criminal law corpus in the EU.

European Criminal Law

Before addressing the issues multilingualism brings for EU criminal law, the meaning of the term "European criminal law" must be clarified.

In the most common sense of the term, "criminal law" is understood as a set of rules comprehensively regulating individual behaviour by prohibiting certain actions and imposing sanctions in cases of breach. Applying this sense of the term, there is no European criminal law at the moment. EU law does not contain a comprehensive collection of punitive norms directly applicable to EU citizens yet, although there are some ambitions to create more comprehensive European criminal law in the future.[14]

However, EU law has a growing influence on national criminal law through harmonizing directives. Thus, the blend of harmonizing European directives and implementation through national legislation is one form of European criminal law.[15]

The competence of the European Union to enact substantive criminal law mainly stems from Article 83 TFEU. According to Art. 83 paragraph 1 TFEU, the EU has a shared competence to enact directives in cases of particularly serious offenses which typically have a cross-border relevance. As examples of such offenses, Art. 83 TFEU lists drug trafficking, terrorism, money laundering, computer and organised crime. The list of criminal offenses for

[10] COM (2005) 596 final, 3, 15.
[11] Judgment of 06.10.1982, C-283/81
[12] *Šarčević*, p. 2 et seq.; *Kjær* / *Adamo*, Linguistic Diversity and European Democracy: Introduction and Overview, 2011, p. 2.
[13] Communication from the Commission to the Council and the European Parliament on European Contract Law (OJ C 255 of 13.9.2001).
[14] See e.g. *European Criminal Policy Initiative*, A Manifesto on European Criminal Policy, ZIS 2009, p. 697, http://www.crimpol.eu and Tiedemann's Research Group Concerning the Alignment of Criminal Law in Europe, Freiburg-Symposium.
[15] *Klip*, European Criminal Law: An Integrative Approach, Intersentia, 2012, p.1; *Peristeridou*, The Principle of Legality in European Criminal Law, p. 7.

which the EU has competence can be extended by a decision of the European Council as long as they concern particularly serious crime with a cross-border dimension (Article 83 paragraph 1 TFEU). Further, pursuant to Article 83 paragraph 2 TFEU the EU may enact directives regulating minimum requirements for criminal law in all other areas it has competence in if this is necessary to ensure the effectiveness of these instruments. Such areas of competence include a wide spectrum of topics, such as the harmonization of the internal market, environmental matters, agriculture and transportation, to name a few. Thus, Article 83 TFEU already gives the EU broad possibilities to regulate criminal matters. When considering the potential to extend the scope of competence in paragraph 1 and the competence to utilize criminal law to bolster other EU policies in paragraph 2, the potentially regulateable matter is unpredictably broad. Further, the EU has a competence to enact criminal law concerning financial crimes against the Union stemming from Article 325 paragraph 4 TFEU.[16] So far, the EU has made broad use of these competences and enacted a wide range of directives.

Additionally, one could also consider criminal law as any legislation with incisive punitive consequences for individuals.[17] For the European Union, one well known example would be antitrust law in which individuals can be subjected to severe fines. One seminal case was the *Vitamin Cartel* case, in which the commission fined Hoffman-La Roche 462 million euros.[18] Subsequently, the commission imposed fines of 899 million euros to Microsoft in 2004, 1.35 billion euros to car glass producers in 2008, 2.93 billion euros to truck producers MAN, Volvo/Renault, Daimler, Iveco, and DAF in 2016 and 2,42 billion euros to Google in 2017.[19] Due to the severity of the imposed fines, the ECJ has applied criminal law concepts such as *ne bis in idem* to antitrust cases.[20] Accordingly, this type of legislation is often considered to be substantive criminal law in a wider sense.[21]

Legal Certainty and Legality in EU Law

Considering the wide range of existing and possible European criminal legislation, it is necessary to consider the characteristics of that area of law.

[16] *Satzger*, Internationales und Europäisches Strafrecht, 2016, § 8 Rn. 25.
[17] *Afrosheh*, Die Mehrsprachigkeit in der Europäischen Union und daraus resultierende Probleme für ein Europäisches Strafrecht, ZEuS 1/2017, p. 95.
[18] Press release, 21.11.2001, IP/01/1625.
[19] https://www.cnbc.com/2017/06/27/the-largest-fines-dished-out-by-the-eu-commission- facebook-google.html; European Commission, press release of http://europa.eu/rapid/ press-release_IP-17-1784_en.htm.
[20] See e.g. Judgement of 15. 10. 2002– C-238/99 P and others., Slg. 2002, I-8375 - *Limburgse Vinyl Maatschappij u. a./Kommission („PVC II")*.
[21] *Schutte*, The European Market of 1993: A Test for a Regional Model of Supranational Criminal Justice or of Inter-Regional Cooperation, in: Principles and procedures for a new transnational criminal law, 1992, S. 391.

Criminal law is the state's ultima ratio, the most severe encroachment on individual freedom possible in democratic societies. Consequently, it is traditionally associated with stricter controls of state measures. This control is achieved in general law by such doctrines as the rule of law or legal certainty, and by the principle of legality in criminal law.

Legal Certainty in General

The principle of legal certainty is a vital part of the rule of law, which permeates all European jurisdictions.[22] In a broad way, it ensures that no one is subjected to arbitrary measures by the state.[23] In a national context, it is also often understood as requiring formal legislation by a democratic legislator.[24]

Legal certainty has two main aspects, a formal and a substantive one.[25] Formal legal certainty sets out certain requirements to make law predictable, clear and stable.[26] Legal norms have to be described in a way that enables the subject to understand and recognize the scope of application and the consequences of breach, even if only by an act of interpretation.[27] The concept further requires that law be applied in a systematic and uniform manner.[28] Lastly, legal rules must be accessible to the population.[29] This formal legal certainty enables individuals to calculate and predict the consequences of certain behaviour and the outcome of legal proceedings. It thereby safeguards the autonomy of the subjects addressed who can adapt their conduct to existing rules.[30]

Substantive legal certainty requires legislation to be fair and morally good.[31] Legal rules and decisions must be acceptable to the population.[32]

Finally, legal certainty has a legitimizing function.[33] It strengthens the legitimacy of state acts by allowing citizens to trust state institutions. At the same time, the requirements of written

[22] Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final.
[23] *Peristeridou*, p. 58 et seq.; *Suominen*, What Role for Legal Certainty in Criminal Law Within the Area of Freedom, Security and Justice in the EU, in: Bergen Journal of Criminal Law and Criminal Justice, 2014, p. 10.
[24] *Suominen*, p. 6.
[25] *Paunio*, Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice, ch. 2.
[26] *Paunio*, Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice, ch. 2.
[27] *Schilling*, Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law, European Law Journal, 2010, p. 49; German Constitutional Court, NJW 1969, 1059, 1059.
[28] *Suominen*, p. 6.
[29] *Sarcevic*, p. 4 et. seq.
[30] *Peristeridou*, p. 59 et seq.
[31] *Peczenik*, On law and reason, p. 24-27; *Suominen*, p. 6.
[32] *Paunio*, Beyond Predictability - Reflections on legal Certainty and the Discourse Theory of Law in the EU Legal Order, German Law Journal, p. 1469.
[33] *Besselink* / *Pennings* / *Prechal*, Introduction: Legality in Multiple Legal Orders, 2011, p. 7.

law by a democratically elected legislator along with the prohibition of customary law in particularly sensitive areas allows for a greater control of citizens against arbitrary acts of the state.

The Principle of Legality

A subpart of the principle of legal certainty is the principle of legality prevalent in criminal law.[34] It delineates more precise, strict requirements for legislation where criminal liability is concerned. While it can be traced back to the 14th century, it gained significance during the French Revolution[35] and was further developed by the scholar Anselm von Feuerbach who crafted it into a legal doctrine.[36] Commonly known by the latin dogma *nulla poena sine lege*[37], the principle of legality contains four major rules which aim to safeguard the predictability and clarity of criminal law.

First, it prohibits the use of unwritten, customary law to justify punishment (*nulla poena sine lege scripta*). By requiring written law, the *lex scripta* rule creates a sense of stability and objectivity by ruling out real or contrived current beliefs and sentimentalities of the public. It also entails that criminal law can only be created by the democratically elected parliament, as opposed to criminal rules being created by the executive.[38]

Second, the principle of legality prohibits the extensive application of existing criminal law as well as unfavorable analogy (*nulla poena sine lege stricta*). This principle protects the individual from arbitrary judicial decisions. It shackles the interpreting judge to the letter of the law and prevents the extensive use of teleological considerations. It thus ensures that only the democratically legitimized legislator decides which behaviour is punishable and which behaviour is allowed.

Third, it prohibits the retroactive application of criminal norms (*nulla poena sine lege praevia*). This rule aims to make criminal law just by abolishing the unfair practice of retroactively punishing a behaviour which was legal at the time of action.

Fourth, legality prohibits vague, ambiguous and unclear norms (*nulla poena sine lege certa*). This rule outlines certain qualitative standards for criminal law. It requires criminal law to be published in a way that makes it accessible to all citizens. It also places great emphasis on linguistic precision. Any norm regulating criminal liability must enable the addressee to

[34] *Peristeridou*, p. 60 et seq; ECJ, judgement of 12.12.1996, C–74/95 and C–129/95, para. 25.
[35] *Peristeridou*, pp. 33, 79.
[36] *Feuerbach*, Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts, p. 1801; *Roxin*, Strafrecht: Allgemeiner Teil Band I, 2006, para. 5 Mn. 22.
[37] *Eser/Hecker* in Schönke/Schröder, StGB para. 1, Mn. 1.
[38] *Peristeridou*, p. 79 et seq.

distinguish clearly between forbidden and allowed actions. The *lex certa* requirement also prohibits the legislator from criminalising behaviour in broad, generalising strokes, for example by declaring each impairment of a certain interest such as the public order as punishable.[39]

The Principles of Legal Certainty and Legality in the EU

In the EU, both the principle of legal certainty and legality have found their way into EU law, albeit in partly different form than in some national jurisdictions.

As outlined above, the concept of legal certainty in general and the principle of legality in particular have a long history in (continental) Europe.[40] Both have since been adopted by all member states in some form or another, although with variations in emphasis on formalistic or substantive requirements.[41] They have also been recognized by the European Court of Human Rights and codified in Article 7 of the European Convention on Human Rights (subsequently "EHRC").[42]

In the EU, the concept of legal certainty has been recognized as a general principle by the ECJ in numerous decisions since the 1980s.[43] Furthermore, the ECJ has found in 1983 that the principle of legality forms part of the general principles of EU law, declaring that "non-retroactivity of penal provisions is common to all the Member States and enshrined in Article 7 of the ECHR. It is one of the general principles of EC law".[44] One year later, the ECJ found in the *Könecke* case that a sanction is only allowed if it is based on a clear and unambiguous norm.[45] The endorsement of the principle of legality was reinforced in 1987 in the criminal case *Kolpinghuis Nijmegen* where the Court additionally held that unimplemented directives will not have direct effect on criminal liability since they do not form a proper legal basis for punishment.[46]

Today, the EU's commitment to legal certainty can be derived from Article 2 TEU, which lists common values such as "human dignity, freedom, democracy, equality, the rule of law

[39] *Eser/Hecker* in Schönke/Schröder, StGB para. 1, Mn. 17.
[40] *Peristeridou*, p. 33, referring to the Constitutio Criminalis Carolina (1532) as an early example for the establishment of certain aspects of the legality principle.
[41] *Peristeridou*, pp. 14, 21, 23 et seq.
[42] See e.g. *Peristeridou*, p. 65 et seq for a comparison between the concept of legality in English, Dutch and German law.
[43] See e.g. ECJ, judgement of 21.06.1988, C-257/86; judgement of 3.12.1998, C-381/97 - *Belgocodex SA v. Belgium*; judgement of 14.03.2000, C-54/99 - *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v. The Prime Minister*; judgement of 3.6.2008, C-308/06 - *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*; judgement of 7.10.2010, C–224/09 - *Martha Nussbaumer*.
[44] ECJ, judgement of 20.04.1983, C-63/83 - *Regina/Kent Kirk*.
[45] ECJ, judgement of 25.09.1984, C-117/83 - *Könecke.*
[46] ECJ, judgement of 8.10.1987, C-80/86 - *Kolpinghuis Nijmegen BV*.

and respect for human rights". Since the principle of legality is an essential feature of the rule of law, it is thereby also included into the European legal framework.

The concept has also been codified in Article 49 of the Charter. This article is almost identical to Article 7 of the EHRC. Both provisions prohibit retroactivity and punishment without law. Article 49 of the Charter contains an additional third paragraph stipulating that the severity of penalties must not be disproportionate to the criminal offence.

The European Court of Human Rights has mainly interpreted the provision to contain two requirements: accessibility of the legislation to citizens and predictability of legal outcomes.[47] This understanding of legal certainty has been adopted by the ECJ.[48]

Conflicts between Multilingualism and Legal Certainty

As has been shown, the EU has committed itself both to legal certainty and to multilingualism. However, upholding both concepts at the same time is difficult and can lead to trade-offs. This is because multilingualism complicates the process of legal interpretation and thereby negatively impacts the principle of legality.

Mistakes in Translation and Divergence of Meaning

For a start, and most obviously, the immense effort of translating each legal document of the EU into all official languages carries the risk of inaccurate translation. This is not only because of human mistakes which invariably occur, but also because it requires translating the text into 24 different languages as well as 28 different legal systems with potentially diverging uses of legal terms.[49] According to some scholars, significant divergences occur regularly, with some scholars estimating that at least one significant divergence occurs between two or more language versions in long legal texts.[50]

This would not be an issue if each citizen could rely on their - potentially imperfect - version of legislation. However, despite factually diverging meanings, all terms in legal texts are considered to have the same meaning.[51] Accordingly, the ECJ jurisdiction attempts to preserve a uniform interpretation of Union law to ensure that EU provisions produce "the same legal effects" in all language versions.[52]

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[47] *Šarčević*, p. 4.

[48] *Peristeridou*, p. 96 et seq., p. 178 et seq; see e.g. judgement of 11.12.2007, C-161/06 - *Skoma-Lux*, para. 36.

[49] *Afrosheh*, p. 97; *Šarčević*, p. 9 et seq.; *Matulewska*, Legilinguistic Translatology – A Parametric Approach to Legal Translation, 2013, p. 202.

[50] *Schilling*, 2010, p. 51.

[51] For the treaties, this is derived from Art. 33 (3) of the Vienna Convention on the Law of Treaties, for secondary EU law see ECJ, judgement of 06.10.1982, C-283/81 - *CILFIT*.

[52] Opinion of Advocate General Tizzano of 21.02.2002, para. 75.

However, the authenticity of all language versions and a uniform interpretation of EU law cannot be reconciled because of the outlined unavoidable linguistic differences. This is exemplified by the *Joint Fishing Operations* case of 1985.[53] In that case, the issue was whether certain fish catching activities were duty-free or not. According to regulation No. 802/68 of 27th June 1968, the origin of the goods was decisive for that question. Whereas most language versions used terms such as "caught", the English language version used the phrase "taken from the sea". In that case, the ECJ ruled that "in case of divergence between the language versions of a community instrument the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part". Even though it would have been possible to reconcile all language versions by applying the most specific, i.e. the English language version, the Court chose to give priority to effectiveness of EU law instead of authenticity of languages.

The result is paradoxically that practitioners and EU citizens cannot rely on their own language version despite the principle of linguistic equality even if their language version is unambiguous.[54] Instead, they are expected to consider all language versions in order to ensure that they correctly understand the meaning of a provision. This leads not only to legal uncertainty, but also to a situation in which speakers of certain languages may end up with a less clear version of legislation than speakers of more common languages such as English or French, disadvantaging the former group.

The example of the *Kettingen* Case

The problem of ensuring legal certainty in the fragmented, multilingual and partly confusing EU law is further exemplified by the *Kettingen* case.[55] The *Kettingen* case also illustrates the dire consequences this can have for individuals in criminal proceedings.

In this case, a Dutch stock-breeder was accused of breaching a national provision on the tethering of calves which was based on the EU Directive 91/629. The stock-breeder admitted that he had in fact tethered 25 calves in boxes, argued, however, that he did not breach the Dutch legislation as the calves were only tied with a rope and not with chains.

The background of his argumentation was that according to the Dutch "Decree on calves", calves shall be kept only in conditions which comply with the first sentence of point 8 of the Annex to Amended Directive 91/629. This section of the Directive seeks to prevent injury to calves through tethering. While the English version of the Directive uses the word tether,

[53] ECJ, judgment of 28.03.1985, C-100/84.
[54] *Sarcevic*, p. 13.
[55] Judgement of the ECJ of 3.4.2008, C-187/07 - *Kettingen*.

which would cleary cover the use of a rope, the Dutch version uses the word "kettingen", which means chain. Therefore, the stock-breeder argued that he could not have known the use of a rope would be punishable since the Dutch version of the Directive clearly indicates that the tether must be of metallic nature.

In line with the *CILFIT* decision, the ECJ reiterated that the word in question cannot be determined solely by one language version as EU provisions must be interpreted and applied uniformly in light of all existing language versions. The Court held that the wording used in one language version of a Community provision cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions in that regard. In the judges' view, such an approach would be incompatible with the requirement of the uniform application of Community law.

The court then analysed other language versions of the Amended Directive 91/629 and concluded that they use rather general terms which do not indicate a metallic nature of the tether. For example, the German-language version uses the word 'Anbindevorrichtung' (tethering device), the French-language version the word 'attache' ('tether'), while the Italian-language version uses the word 'attacco'. On the basis of this analysis, the Court rejected the interpretation of the stock-breeder and ruled against the defendant.

This case shows the the linguistic equality and the multiple official language versions of legal statutes in the EU can create tremendous legal uncertainty. This is especially true for cases which concern criminal proceedings. By rejecting the defendant's interpretation of the Dutch language version, the Court not only undermined the principle of equal authenticity, but also infringed the principle of legality. Contrary to the *nulla poena sine lege* doctrine, the linguistic divergences were ultimately detrimental for the accused.

This approach of the ECJ could be considered as arbitrary and discriminating.

Preference of the Teleological Approach to Interpretation

The European Court of Justice has recognized the conflict between legal certainty and multilingualism early on.

In the *North Kerry Milk Products* case of 1977, the Court stated that the "elimination of linguistic discrepancies by way of interpreting may in certain circumstances run counter to the concern for legal certainty inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words".[56]

[56] ECJ, judgement of 03.03.1977, C-80/76, para. 11.

However, the Court's answer has been to devalue the literal meaning of texts and instead turn to a teleological approach to interpretation.[57] This, however, further impairs the principle of legality and the rule *nulla poena sine lege stricta* which prohibits the extensive use of teleological considerations in criminal law.

So far it is uncertain whether the Court return to a more literal approach in criminal proceedings or not. As the *Kettingen* case illustrates, the Court may give preference to interpretations which make EU law most effective even in criminal cases. In the *Privat-Molkerei Borgmann*[58] case of 2004, the Court adopted an interpretation which favoured the defendant and argued with the concept of legal certainty. However, the court also stated that "preference should as far as possible be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law"[59], which simply happened to be the interpretation favouring the defendant. It is unsure which consideration was the overriding one.

Problematic National Implementation of EU Criminal Law

The problems multilingualism brings regarding legal certainty are exacerbated by the way EU law is implemented by national legislators.

Since the EU can only enact criminal law in form of directives, it is up to national legislators to transpose criminal norms into national legislations. Generally, member states have four options for the implementation of EU directives. They can copy EU legislation verbatim into national law, they can adapt the legislation more specifically to their national legal system, they can leave the task of implementation to courts interpreting pre-existing norms or they can create national legislation which references the relevant EU provision ("blanket norms")[60]. One of the more popular approaches is the method of referencing EU legislation since it requires little effort and can even circumvent the necessity of adapting national regulations to quickly changing EU legislation.[61] While this method already has dubious effects regarding the principle of legality in a national context, it raises nearly unsurmountable issues when it is employed regarding multilingual EU legislation.

When using the referencing method, the legislator does not specify the requirements for criminal liability in the regulation itself, but instead refers to a different statute. For example, the legislator could stipulate that „The breach of Art. X of Regulation Y shall be punished

[57] *Sarcevic*, p. 12 et seq.
[58] ECJ, judgement of 01.04.2004, C-1/02.
[59] ECJ, judgement of 01.04.2004, C-1/02, para. 30.
[60] *Peristeridou*, p. 207 et seq.
[61] *Peristeridou*, p. 207 et seq.

by…“. Further, the legislator can opt to use a static reference to a particular statute in effect at a certain time, thereby excluding amendments to the legislation from the scope of the norm. Alternatively, the legislator can use a dynamic reference and refer to legislation „in its current form“ or „as currently in effect“.

Static Referencing

Both forms of referencing can cause issues. When a static reference is used to implement EU law, the addressee is burdened with the challenging task of interpreting EU regulations. First, the citizen would have to compare the 24 authentic language versions of the regulation and find elements common to all language versions. If there are any irreconcilable differences between the different versions, the addressee would have to utilize interpretation methods which might differ widely from the nationally employed methods of interpretation. Not only does the ECJ place different emphasis on certain interpretation methods such as teleological interpretation, it also employs certain methods of interpretation completely unknown to national law such as the „effet utile“ principle. The addressee would further have to keep in mind the autonomy of EU legislation and leave out potential linguistic biases existing in his or her language. Finally, the addressee would also have to anticipate discretionary decisions such as whether to give one possible interpretation priority over language authenticity or not.

Dynamic Referencing

Even more problematic are dynamic references. When confronted with a dynamic reference, the subject must first find the relevant legislation in its current form out of a plethora of often fast paced EU legislation, which can by itself be a daunting task. Added to this are the linguistic and interpretative difficulties outlined. Further, by using a dynamic reference the legislator sacrifices democratic control for convenience. Future changes of EU law implicitly and directly become part of the national law, without any prior control by the legislator.

Codification outside the Penal Codex

Furthermore, the codification of law transposing EU directives is often hard to keep track of. In many cases, referencing norms are codified outside of the classic national penal code. This is because many EU norms imposing criminal liability concern rather specialised areas of law - a good example is the regulation of agricultural requirements in the *Kettingen* case. The

addressees of these norms are often specialists in the field they operate in. However, just because they are professional experts, they are not automatically legal experts as well[62].

Even if it could be supposed that those "experts" are generally able to understand and interpret blanket norms in the area of their profession, problems concerning the principle of certainty would occur. However, others who are not "experts" would be unreasonably discriminated, if the principle of certainty would be relativised by the usage of references.[63] This becomes even more critical if this uncertainty created through referencing norms is exponentiated through linguistic uncertainty and teleological interpretation of the ECJ.

Acte Clair-Doctrine

By recognising the Acte-Clair-Doctrine the ECJ opened up another problem concerning legal uncertainty. The Acte-Clair-Doctrine exempts member states of their obligation to submit cases to the ECJ where there is no remedy against their decision under national law (Article 267 TFEU). However, this is only the case if the right interpretation of EU law is so obvious that there is no room for reasonable doubt[64].

The requirements set out by the ECJ for application of the Acte-Clair-Doctrine are high. The court must consider the characteristics of EU law and especially the danger of diverging interpretations by other courts due to linguistic differences[65]. These high requirements are supposed to point out the difficulty of comparing all wordings of a norm[66].

However, in practice the doctrine is often abused by national courts to circumvent the obligation to consult the ECJ even though the wording of the norm is objectively unclear, i.e. in comparison to other wordings.[67] In these instances there is no possibility for the individual to directly appeal to the ECJ, leaving the individual stuck within the national jurisdiction[68]. Furthermore, the harmonisation of criminal law within the EU might be endangered by differing interpretations.

As a conclusion, the Acte-Clair-Doctrine further undermines the equal authenticity of all official languages by effectively allowing courts to ignore linguistic differences. The result is

[62] *Moll*, Europäisches Strafrecht durch nationale Blankettstrafgesetzgebung?, 1998, p. 276.
[63] *Moll*, p. 276.
[64] ECJ, judgement of 06.10.1982, C-283/81 - *CILFIT*, para. 21.
[65] ECJ, judgement of 06.10.1982, C-283/81 - *CILFIT*, para. 18 et seq.
[66] *Ćapeta*, Multilingual Law and Judicial Interpretation in the EU, Croatian Yearbook of European Law and Policy, 2009, p. 14.
[67] *Armbrüster*, Rechtliche Folgen von Übersetzungsfehlern oder Unrichtigkeiten in EG-Dokumenten, EuZW, 1990, p. 246.
[68] *Armbrüster*, p. 246.

that EU norms can have different effects in different Member States. This is contrary to the desired legal certainty[69].

Preliminary result

As shown, the principle of multilingualism of the EU has detrimental effects on the principles of legal certainty and legality. This is due to potential errors in translation, inconsistent application of the principle of multilingualism by the ECJ and resulting unpredictability, adopting the Acte-Clair-Doctrine, problematic implementation by member states and the virtual impossibility of comparing 24 versions of a legal norm.

Possible solutions

The outlined state of affairs raises the question how the issue of multilingualism can be addressed.

Limiting the Number of Authentic Languages

One proposed solution to the issues with multilingualism is to limit the number of authentic language versions of European legislation to one or a few languages.[70] These languages could be English as the most spoken second language alone, or the three most commonly spoken languages. The legislation would then have to be translated into the remaining EU languages to ensure the accessibility of EU law. These translations would, however, not not be relevant for the interpretation of the law. This practice is widely used in international treaties.[71]

Limiting the number of authentic languages would reduce or completely eliminate the risk of diverging translations, and greatly ease the task of comparing language versions. Although citizens would have to perhaps consult legal or linguistic specialists if the authentic version(s) are not in their native language, this would be less burdensome than comparing all existing language versions. Thus, this solution would maximise legal certainty. The drawback would be that this solution is difficult to achieve politically. Previous suggestions in this direction have been rejected.[72]

[69] *Afrosheh,* p. 102.
[70] See e.g. *Schilling*, The Role of English Language in the European Union - English versus Multilingualism, Le Multilinguisme dans L'Union Européenne, Cahiers Europeens No. 9, Editions Pedone, 2015.
[71] *Afrosheh*, p. 107.
[72] *Saracevic*, p. 2; *Afrosheh*, p. 105.

Mandatory Consultation Languages

Another option would be to have a few mandatory consultation languages.[73]

This proposal leaves the equal authenticity of all languages intact and merely requires courts to consult certain languages (for example French and English) when interpreting EU law. However, this consultation would be mandatory not only in cases of doubt, but at all times. Further, the consultation languages would carry no more weight than all other languages in cases of divergence.

This proposal takes into account that currently most courts capitulate when tasked with comparing 24 languages. By requiring consultation of at least two languages, it endows courts with a practical guideline with which to approach EU law. It thereby hopes to achieve greater uniformity in interpretation. However, while this approach should be easy to implement politically and in practice, it does not actually help with the issue of legal certainty in EU criminal law.

Stricter Rules in Criminal Law

Another possibility would be to apply the principle of legality more strictly and consistently.

In cases concerning criminal proceedings where diverging language versions play a role, the ECJ would have to give preference to the language version which favours the defendant. In cases where the diverging meaning stems from a sloppy implementation of a directive, the EU could take recourse to the member state instead of the aggrieved individual.

This proposal would uphold equal authenticity while at the same time protecting the principle of legality in the particularly sensitive area of criminal law. It would be easy to implement and comes at little political or financial cost. However, it would do nothing to alleviate the problems of multilingualism in other areas.

Harmonization of Criminal Law

Another option to alleviate the problem of multilingualism in European criminal law could be a greater harmonisation in criminal law and criminal procedure law. This would ease translation as the differences in legal systems would decrease.

Calls for greater harmonization of EU criminal law have come from several sides. One example is the previously mentioned European Criminal Policy Initiative with its two Manifestos. Another example is the "Green Paper on criminal-law protection of the financial

[73] *Derlén*, In defence of (limited) multilingualism, in: Linguistic Diversity and European Democracy, 2011, p. 143-166.

interests of the Community and the establishment of a European Prosecutor" published by the Commission.[74] In this paper the Commission suggests not only the establishment of a European Prosecutor and measures for improving the effect of cross-border criminal prosecution, but also the creation of a unitary substantive criminal law codex in the member states.

Moreover, there are more ambitious harmonization projects such as the work of Klaus Tiedemann and his colleagues from the "Research Group Concerning the Alignment of Criminal Law in Europe".[75] By means of comparative law methods, the group established criminal offences for areas closely connected to the European Union, so-called "European Offences". Their idea was that these European Offences could lead the way to a future European Economic Criminal Law. The work contains offences such as manipulation of stock prices, insider trading, collusion, restraining competition in tendering procedures and environmental offences.[76]

Going forward, the work of this group could eventually become a precursor for the harmonization of other areas of European criminal law as well[77]. By means of comparative law methods, a harmonised and coherent European Criminal Law and a European Criminal Procedure Law could be developed.

Evaluation

When evaluating the presented solutions, one must balance the protection of linguistic diversity and the associated accessibility of EU law to its citizens with the need for legal certainty in criminal proceedings. Neither aspect should be sacrificed for the other. At the same time, the chosen solution should not be so politically controversial or difficult as to be realistically impossible. While a mandatory consultation of certain languages would enhance uniformity in interpretation, might eventually lead to a factual shift away from multilingualism, and is the easiest option to implement, it is the least effective method for ensuring legal certainty in criminal proceedings. It thus must be rejected a suitable solution to the problem presented.

A limitation of authentic languages would not only be economic but would also greatly diminish legal uncertainty caused by multilingualism. However, it would require overcoming a lot of political opposition and seems to be out of reach at the moment.

[74] COM (2001) 715 final, p.75.
[75] *Tiedemann*, Freiburg-Symposium.
[76] *Satzger*, International and European Criminal Law, 1st edition, 2012, p.58.
[77] *Satzger*, p.59.

The same seems true for a complete harmonization of criminal law. In light of the recent wave of anti-EU-sentiment, it seems unlikely that member states would give the EU the necessary broad competence to codify criminal law. It would also require overcoming a lot of still existing differences in the legal systems of the different member states. However, as criminal law is a particularly sensitive area, member states are particularly protective of their competence in that area. Additionally, with the somewhat unpredictable and outcome-oriented jurisdiction of the ECJ, it is uncertain whether sweeping harmonization would be desirable.

Therefore, it seems that the easiest and most effective solution out of the outlined proposals would be to apply the principle of legality strictly in cases concerning criminal proceedings. This solution could also be combined with a continuing, careful harmonization and the adoption of mandatory consultation language to ultimately achieve greater legal certainty in all areas of EU law. However, ultimately only the reduction of authentic languages could effectively protect legal certainty.

Conclusion

On the one hand, the protection of cultural diversity of the European Union as enshrined in the TEU and as a fundamental idea of the community must be respected. Of equal importance is the possibility of EU citizens to address organs of the EU in their native tongue and to understand legal acts of the EU. On the other hand, legal certainty should not be sacrificed on the altar of cultural and linguistic diversity, especially where criminal liability is concerned. In cases of collision, both elements must be balanced.

As it stands, neither legal certainty nor multilingualism are consistently protected in EU criminal law, although both concepts are embedded into EU law. This state of affairs makes the interpretation and application of EU law complicated, tedious and unpredictable. It thus cuts into the individual autonomy of EU citizens who on the one hand cannot trust their language version of legal texts, and at the same time cannot predict which consequences their actions will have even if they consult all language versions.

There is no quick fix for the issue of multilingualism. At the moment, the only available option seems to be a plea for a more rigorous application of the principle of legality. In the *Kettingen* case, the stock-breeder should not have been held liable since his behaviour was in line with the authentic language version he relied on. Although this plea comes to late for the defendant in the *Kettingen* case, we hope that it will have a positive influence on future deliberations on multilingualism and legal certainty.

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