

The Binding Force of Babel: the Enforcement of EC Law Unpublished in the Languages of the New Member States

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I. THE NATURE AND SCOPE OF THE PROBLEM

On 1 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 the immediate effects of Community law² in the new Member States was provided for in Article 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 was to apply. As will be argued below, 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, ie on 1 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 first volumes of the Special Edition were published in summer 2004 and the entire process of publication was finished only in March 2006.⁵

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¹ Hereinafter also “AA” or the “Act”.

² S. L. Kaleda, ‘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 of 23rd September 2003 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, [2003] OJ L 236/33 (emphasis added).

⁴ Hereinafter also “OJ”.

⁵ See a press release of the Office for Official Publications of the European Union of 22 March 2006 indicating that the publication of Community legislation in the nine new languages has been completed – <http://publications.europa.eu>, section “press releases”.

It can only be speculated as to when each piece of EC secondary legislation was published fully. This is for two reasons: first, the volumes of Special Edition do not bear the date of their actual 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. Second, the legislation is published in its original, ie non-consolidated version, with all its amendments published separately. This has two consequences: first, should one need the date of actual publication of a given document in the Special Edition, the only way is to address oneself directly to the Office for Official Publications of the European Union⁶ with a request for disclosure of the dates of the actual publication of the respective volumes of the Special Edition.⁷ Second, the date of the publication of a much 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 provision of limited electronic access. Whether this is possible will be examined below. It was, however, only a matter 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 has varied considerably. The first disputes in national courts in which the issue of absent publication arose were, unsurprisingly, areas in which EC law is directly applied by domestic authorities which are 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 adopted by the national authorities 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 such decisions was the fact that they were based on Community legislation which was not, at the decisive time when the decision was adopted, duly published in the language of the relevant 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 Authority in Torun, which decision had been 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

⁶ Hereinafter also “OPOCE”.

⁷ Procedure underdone 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 OJ [1993] L 253/1.

¹⁰ Decision of 20th July 2005, case No I SA/Bd 275/05, unpublished. See a disapproving case note by a Polish Supreme Court judge: A Wróbel, ‘Glosa 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. For the ensuing debate in Poland, see e.g. G. Wierczyński, ‘Konsekwencje braku urzędowego ogłoszenia aktów prawa wspólnotowego w języku polskim’. *Europejski Przegląd Sądowy*, styczeń 2007, pp. 51 – 52 and P

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 was 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 a preliminary ruling to the Court of Justice. The case is currently (March 2007) 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 28 July 2004, ie outside the two-month time limit set by Article 230 EC. Poland's counterclaim was that the time limit vis-à-vis the new Member States had started to run from the actual publication of the Decision in their national version of the OJ, which happened much later than 30 March 2004. In its Order of 15 November 2006, the Court of Justice issued a request to the Director-General of the OPOCE for clarification 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 Community law, pertinent to the current situation. Second, 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 address the extraordinary situation following the 2004 enlargement. Finally, it takes into account the consequences of the proposed solution and the potential sequels on the national level, especially before the constitutional courts of the new Member States.

Błędzki, 'Praktyczne problemy związane z publikacją prawa wspólnotowego w Polsce'. *Europejski Przegląd Sądowy*, styczeń 2007, pp. 53 – 56.

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.

¹² Case notice published in [2006] OJ C 121/9 (20 May 2006).

¹³ [2004] OJ L 93/1 (30th March 2004).

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

II. GENERAL PUBLICATION REQUIREMENTS FOR EC SECONDARY LEGISLATION

Article 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; and
- (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.

II.1 What is to be published?

The basic requirements for publishing EC secondary legislation are laid down in primary law. Article 254 EC provides:

‘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.’

Article 254 (1) and (2) EC provide for a broad spectrum of EC legislative acts that are obligatorily published in the Official Journal. To list them all here would go 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, Article 4 of Regulation 1/58/EEC, Regulation No 1 determining the languages to be used by the European Economic Community,¹⁶ provides for the translation of “regulations and other documents of general

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 (with regard to the treaties typically in a consolidated version), 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 (See 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, published in one “mammoth” volume (of 7,792 pages) of the Czech Collection of International Treaties (No 44/2004 Sb. m. s. of 28th April 2004).

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

application” into all the official and working languages of the European Communities and their publication in the Official Journal. The Czech and Slovak Special Editions of the Official Journal, on the other hand, indicate that it should contain the official translations of all the “binding Community acts with general application”. Article 2 AA quoted above refers to “acts adopted by the institutions and the European Central Bank”.

One can only speculate as to whether all of these definitions refer to the same set of Community acts. 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, ie regulations and now also the vast majority of directives and decisions, must be published either by virtue of Article 254(1) EC or Article 254(2) EC.

II.2 Where is it to be published?

Article 254 EC is implemented in secondary law by a Council Decision of 15 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 laws²⁰ 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.

II.3 Language of publication

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

¹⁷ It is questionable how much weight is to be given to the distinction of the respective series of the Official Journal, eg 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, leading to the annulment of the regulation under Art 230 EC? Or would that even amount to the automatic nullity of the regulation?

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

¹⁹ [2000] OJ L 183/12 (22 July 2000).

²⁰ Eg Austria, Belgium, Estonia or Cyprus. See 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 Eg 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 means of 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.

²⁴ With the exception of the “correspondence provision” in Art 21 (3) EC, which seems to leave the Court of Justice quite unsympathetic as a tool of deriving broader language principles from primary law – see Case C-361/01 P *Kik v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) [2003]

‘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 Article 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 January 2007, the number of official languages has risen to 23 – besides Bulgarian and Rumanian, the pool of official languages was enlarged by the addition of Irish (Gaelic). 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

II.4 Date of publication

The date of publication of the paper version of the relevant volume of the Official Journal is essential for two reasons: first, the date of publication is the latest conceivable date of validity of the legislation, ie the moment at which the legislative text becomes valid law.²⁷ Second, it is decisive for the determination of the entry into force of the measure. The legislation enters into force on the date determined in it, by default on the twentieth day following publication. The date of publication generally does 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 Official Journal;
- (ii) the entry into force is scheduled prior to the publication of the legislation. This may happen by accident (printing and distribution of the Official Journal 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, and even necessary, in cases of sudden changes and the need for speedy legislative amendment. The second scenario is more problematic: it entails that the newly adopted legislation will have retroactive effects. This does not mean that legislation can have some effects before its effective publication. This would be logically nonsensical; nobody is able to comply with non-existent or non-communicated legislation, as it does not exist. It simply means that past events are newly assessed under the new legislation and that

ECR I-8283, case note N Nic Shuibhne (2004) 41 *CMLRev* 1093 and the discussion of broader implications of this decision in RL Creech, *Law and Language in the European Union* (Europa Law Publishing: Groningen, 2005), 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 [2004] OJ L 169/1 (1 May 2004) 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 [2005] OJ L 156/3 (18 June 2005).

²⁷ On this issue, see below, point 4.

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 determination 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:²⁹

- (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.

In the *Racke* case, the Court of Justice went on 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 Official Journal is *genuinely* 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 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* of the official languages.

II.5 Failure to publish and its consequences

Despite the recent Community legislative frenzy and the ensuing mammoth translation 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:

- (i) failure to publish in one or more Community languages only; or

²⁸ See 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 F Lamoureux, ‘The Retroactivity of Community Acts in the Case Law of the Court of Justice’ (1983) 20 *CMLRev* 269-296; M Letemendia, ‘La retroactivité en droit communautaire. Comparaison avec le droit anglais’ (1977) *Cahiers de droit européen* 518-570

²⁹ Case 98/78 *A Racke v Hauptzollamt Mainz* [1979] ECR 69, para 15. See 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 See a comprehensive study on this subject in J-B Herzog and G Vlachos, *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’Epagne: Paris 1961).

(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 a 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 Official Journal 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 Official Journal 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 stated 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

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

³⁴ [1992] OJ L 208/1.

³⁵ See, however, the opposing view of the AG Alber. In quite a sweeping opinion, the AG held, to a large extent relying upon 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 Stres Ltd a Hygrade Foods Ltd* [2003] ECR I-5121, paras 89, 95, 96 and 99.

an act adopted on the basis of such legislation void, ie not valid? Or is it valid, but deficient and subject to annulment? Or is it valid, but not enforceable?

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 also says nothing about the validity or the entry into force of the measure.

Failure to publish at all appears to occur more often than 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 cover of the relevant issue of the Official Journal will normally be the date of the genuine publication of the respective volume. There are examples, nonetheless, in which the Community institutions appear to have disregarded this principle and have instead intentionally antedated volumes of the Official Journal, ie 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 were published in the Official Journal dated 31 December 1993, they were in fact genuinely published only on 11 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. The 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, ie it must have become valid law. The CFI did not proclaim the contested regulation void due to a failure to publish it, not even for the period before its delayed publication.

III. DEROGATIONS IN THE 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 1 May 2004;
- (ii) for Community acts adopted after 1 May 2004, which were and are being published in the “normal” publication mode as from the Accession in the respective language versions of the Official Journal.

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 legislation of the first category. The general principles, however, still apply absent specific

³⁷ See 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 SEEI clearly states that: “... the Council *deliberately* backdated the issue of the Official Journal in which the contested regulation was published” (emphasis added).

⁴⁰ *Ibid.*, para 130.

⁴¹ H. Schermers and D. Waelbroeck (HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* (6th ed., Kluwer Law International: The Hague 2001), at 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 31 December are in reality often published months later.

provisions to the contrary. There are specific derogating provisions contained in Title II of the Act of Accession. Of these, the most important is Article 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 Article 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 Article 58 AA refers were to be published in the OJ, at the latest by the moment of the Accession.

The entity whose duty it was to publish is, due to the passive form used in Article 58 AA, also unclear. The first logical answer would be that publication is the duty of the author of the respective act. This presumption, however, is eroded by two facts: first, the above-cited secondary legislation entrusts the publication to the OPOCE.⁴⁵ The OPOCE is, however, just an auxiliary body, not a proper institution within the meaning of Article 7 EC. It is managed and controlled by the Community institutions.⁴⁶ Second, Article 58 EC limits the number of translation bodies to the Commission, Council and the European Central Bank. Does this mean that these institutions are responsible for the translation of the acts of the other institutions and bodies that fall under the scope of Article 58 AA? Does the same also apply to the publication of these acts?

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 May 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 See eg always 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 (a distinction between the two types of drafting made by A Doczekalska, *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 Decision 2000/459/EC, cited above, n. 19.

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

A precise allocation of responsibility among 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 damage 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.⁴⁸

III.1 Contemporaneous 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: not a single volume of the printed Special Edition of the Official Journal was published at that time. In reaction to this, the Commission issued a document entitled “Commission Notice”, which was published in the Official Journal L 169 of 1 May 2004 and then reprinted in the following five issues of the Official Journal 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, to say 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 to the only authentic printed publication simply by the issue of a “Commission Notice”.

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.

⁴⁷ The greatest part of translation work was done on the national level: ie 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, see eg J Palivec, ‘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] (2005) 144(1) *Právník*, 29-66.

⁴⁸ See the discussion below, in section VI.

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*, Series 2, Episode 8. – The Tangled Web; first aired on the BBC: 28 January 1988).

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

Second, 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. Nowhere near all of 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 contained not only 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” in no way constituted the “publication” of binding legislation within the meaning of Article 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 were possible under Community law, the above-described style of document access would fail any reasonable standard required for the on-line publication of legislation.⁵³

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 Article 58 AA.

III.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 an 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

Member States by the end of 2004 (See eg a letter of 21 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 8 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 (see 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 an indication of when it was “first delivered” and “last uploaded”, and they were being continuously updated: ie 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. See eg the requirements for electronic publication of laws in Austria (*Kundmachungsgesetz 2004* BGBl. Teil I, Nr. 100 (Ausgegeben am 21. November 2003), pp. 1476 – 1480). Generally see R Walker, ‘Die amtliche elektronische Verkündung von Gesetzen’ (2005) *JurPC Web-Dok.* 155/2005, Abs. 1-62 or A Hietanen, ‘Electronic Publication of Legislation: methods of authentication of the texts’ and WR Svoboda, ‘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>.

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

quantities of rice. The company was badly 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 Official Journal. 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 that they nominally bore the date of publication 31 December 1980, were in reality not published before late summer 1981.⁵⁷ It also became clear that the Commission had provided 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 the Commission's authority and that the Commission could at any time have checked with the OPOCE on the actual state of publication of the Special Edition.⁵⁸

The Court of Justice itself remained silent on these issues. It summarily stated that there were "highly exceptional factors" that constituted "special circumstances" within the meaning of Article 13 of 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 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 adopted on its basis. That is, the administrative act is valid, but defective (imperfect) and may be annulled.

IV. GENERAL PRINCIPLES GOVERNING COMMUNICATION AND THE PUBLICATION OF LAW

Before discussing some possible approaches to the problem studied in this article, it is useful to highlight some additional principles which delimit the range and extent of possible

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 ([1979] OJ L 175/1), 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 (at 1647) of the decision; a detailed account of the facts is provided in the Opinion of the AG Mischo (at 1636).

⁵⁷ AG Mischo Opinion, at 1636.

⁵⁸ *Ibid*, at 1639 and 1640.

⁵⁹ Para 16 (at 1648) of the decision.

⁶⁰ In the sense of the German concept of "*Nichtigkeit*" or the French "*nul et non-avenu*": ie that the act could have never validly come into existence and it does not produce any legal effects whatsoever. See, with respect to absolute nullity in Community law, Joined Cases 1 and 14/57 *Société des Usines à Tubes de la Sarre v High Authority* [1957] ECR 105; Case 15/85 *Consorzio 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 C Annacker, 'Die Inexistenz als Angriffs- und Verteidigungsmittel vor dem EuGH und dem EuG' (1995) 22 EuZW 755-761, and W-G Schärf, 'Zur Frage der Inexistenz von Rechtsakten im Gemeinschaftsrecht (2004) 11 EuZW 333-334.

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: first, 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) comprehensibility and clarity of the law; and
- (iv) legality.

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

- (i) the principles upon 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; and
- (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 judgment quoted above,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 reasonably circumspect individual could expect that, as from 1 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, whereas 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 resolution to the problem, one way or the other.

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,

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

⁶² Generally see J Schwarze, *Droit administratif européen* (Bruylant: Bruxelles, 1994), Volume II, 1170-1232 (also available in English: *European Administrative Law* (2nd ed., Sweet & Maxwell: London, 2006)); HG Schermers and DF Waelbroeck, *Judicial Protection in the European Union* (6th ed., Kluwer Law International: The Hague 2001), 64-83; T Tridimas, *The General Principles of EC Law* (2nd ed., Oxford University Press: Oxford, 2007), ch 6.

⁶³ Cited above, n. 10.

⁶⁴ Cited above, n. 11.

⁶⁵ See above, text to n 24.

⁶⁶ Art 314 EC 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, [1994] OJ L 11/1, which limits languages of the OHIM to English, French, German, Italian and Spanish.

all languages are equal. This means 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 comprehensible 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 individuals, as broadly and as comprehensively as possible, of their duties to ensure a reasonable degree of compliance.⁶⁸ The Court of Justice went so far as to assert a right of the individual to be subject only to unequivocal, predictable and understandable “measures of general application”.⁶⁹ It is questionable how far legislation that is not accessible in the official language of the addressee 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 was, in a “Community based on the rule of law”,⁷⁰ to withhold information or to provide misleading information.

Important lessons can be learned by the EC from the national and historical practice of the publication of legislation.⁷¹ Two important principles can be deduced from historical and comparative analysis: first, all modern systems of the publication of laws are founded on the principle of the formal presumption of knowledge of the law (the principle of the ‘formal publicity’ of law),⁷² published either in the official gazettes (continental model) or approved in the representative forum of the country, ie in the Parliament (England). This is reflected in the old (interpolated) Roman adage “*ignorantia legis (iuris) non excusat*” or “*ignorantia iuris nocet*”.⁷³ 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,

⁶⁸ It may be perhaps somewhat surprising to a modern legal discourse that is centred around the individual rights and their protection, but at the heart of the creation of official (state) gazettes and official journals published exclusively by the state authority lie the interests of the absolutist, though enlightened, monarch or state: well-informed subjects are much better in complying with their duties towards the state and the administration can work more efficiently. Further see an excellent historical survey in A Wittling, *Die Publikation der Rechtsnormen einschliesslich der Verwaltungsvorschriften* (Nomos Verlag: Baden-Baden, 1990), part I (11-113).

⁶⁹ See eg 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.

⁷⁰ Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339, para 23.

⁷¹ The last (and perhaps the only) comprehensive study dealing with this topic in a comparative prospective remains: J-B Herzog and G Vlachos, *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, see eg A Wittling, *Die Publikation der Rechtsnormen einschliesslich der Verwaltungsvorschriften* (Nomos Verlag: Baden-Baden, 1990); T Holzborn, *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 Bonn: Bonn, 2003); J Bentham, ‘Essay on the Promulgation of Laws and the Reasons thereof with Specimen of a Penal Code’, in: J von Bowring, *The Works of Jeremy Bentham*, Vol 1 (New York 1962).

⁷² Which can be said to be accepted in EC law as well: see Case C-370/96 *Covita AVE v Greece* [1998] ECR I-7711 and Case 161/88 *Binder v Hauptzollamt Bad Reichenhall* [1989] ECR 2415.

⁷³ 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 iuris, sed facti*” (L. 11, fr. 4, D.) – See MG Dereux, Étude critique de l’adage “Nul n’est censé ignorer la loi” (1907) VI Revue de droit civil 513-554, at 517 n 1. See also Wittling, above, n. 71, at 28 and 29.

irrespective of her real diligence or capacity to acquaint herself with the content of the legal norm.⁷⁴

Second, there is a strong principle of formal/formalised equality; status, standing and ability to read or the knowledge of foreign languages are 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 cannot be required to 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 effectively to acquaint themselves with the content of a legal rule in a different language. Whatever solution might eventually be adopted to deal with 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: 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 provincially-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.⁷⁵ It would lead to a hardly imaginable particularisation of the legal order, where the extent of individual duties under the law would be dependent upon the individual's capacity to acquaint himself with the legal norm, and this would have to be established in every individual case. In an extreme scenario, this would also function as an incentive to be as poorly informed as possible about the legal rules, so as to avoid their application to oneself.

How would a similar problem – ie 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,⁷⁶ the European continent seems to be divided into two cultural and legal spheres: the Francophone and the Germanic. The division is due to a different conception of when a piece of legislation of general application⁷⁷ becomes valid law.

⁷⁴ In some jurisdictions, there is a limited exception to this strict requirement of knowledge in criminal cases, provided that the culprit had genuinely no opportunity to acquaint him/herself with the content of the criminal rule – see § 17 of the German Criminal Code (*Strafgesetzbuch*, consolidated version published in BGBl I 1998, 3322) which refers to “*Verbotsirrtum*” in the following way: “*Fehlt dem Täter bei Begehung der Tat die Einsicht, Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum nicht vermeiden konnte. Konnte der Täter den Irrtum vermeiden, so kann die Strafe nach § 49 Abs. 1 gemildert werden*” [If upon commission of the act the perpetrator lacks the appreciation that he is doing something wrong, he acts without guilt if he was unable to avoid this mistake. If the perpetrator could have avoided the mistake, the punishment may be mitigated pursuant to Section 49 subsection]. Similarly also in § 9 of the Austrian Criminal Code or § 20 of the Swiss Criminal Code, which use for the same situation of the lack of the knowledge about the content of the law the notion of “*Rechtsirrtum*”. I am indebted to Jens Scherpe for drawing my attention to the exceptions of *Verbotsirrtum* in this context.

⁷⁵ See Wittling, *op. cit.*, n. 71, at p. 29 or Holzborn, *op. cit.*, n. 71, at p. 149.

⁷⁶ 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), *R v Jefferies* (1721) 1 Stra 446 and *Price v Hollis* (1813) 1 M & S. 105. Quoted from N Brown, *La promulgation, la Signature et la Publication des Textes Législatifs en Grande-Bretagne* in J-B Herzog and G Vlachos, *op. cit.*, n. 71, 97-106.

⁷⁷ A normative act, typically an Act of Parliament (*la loi; das Gesetz*).

The French approach⁷⁸ 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 individual on the basis of the act (*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*).⁷⁹

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-existent legislation.⁸⁰

The German approach can be perceived as strongly protective of the rights of the individual. This 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.⁸¹ 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.⁸² In the Czech Republic,⁸³ the Slovak Republic⁸⁴ and Poland⁸⁵ the publication of legislation is a condition for its validity.

⁷⁸ Under the distinct French influence also Belgium – See P de Visscher, *La Promulgation, la Signature et la Publication des Lois en Droit Belge*. In: Herzog, J.-B., Vlachos, G., op. cit., n. 71, pp. 41 – 61; F Delpérée, *Le droit constitutionnel de la Belgique* (Bruylant: Bruxelles, 2000), 802-804.

⁷⁹ H Puget and J-C Séché, *La promulgation et la publication des actes législatifs en droit français* quoted in J-B Herzog and G Vlachos, op. cit., n. 71, pp. 71 – 95; F Terré, *Introduction générale au droit* (5e édition, Dalloz: Paris, 2000), 442-450; B Starck, H Roland, and L Boyer, *Introduction au droit* (5e édition, Litec: Paris, 2000), 194-199; DG Lavroff, *Le droit constitutionnel de la Ve République* (3e édition, Dalloz: Paris, 1999), 804-808.

⁸⁰ Art 82 of the Fundamental Law (Grundgesetz). For some of the standard commentaries, see eg I Von Münch and P Kunig (Hrsg.), *Grundgesetz – Kommentar*, Band 3 (Art 70 bis Art 146 und Gesamtregister) (3. Auflage, C.H.Beck'sche Verlagsbuchhandlung: München, 1996), 313-327; T Maunz and G Dürig, (Hrsg.), *Grundgesetz – Kommentar* Band V (Art 70 – 99) (Verlag C.H.Beck: München, 1998), point 82, 1-6; H Dreier (Hrsg.), *Grundgesetz Kommentar*, Band II (Artikel 20 – 82) (Mohr Siebeck: Tübingen, 1998), 1570-1585; B Schmidt-Bleibtreu and F Klein (Hrsg.), *Kommentar zum Grundgesetz* (10. Auflage, Luchterland: München, 2004), str. 1536-1547 and the case law quoted therein. For a detailed study, see H-J Hallier, *La Promulgation et la Publication des Lois et Règlements dans la République Fédérale d'Allemagne* in J-B Herzog and G Vlachos, op. cit., n. 71, 13-39 and Wittling, op. cit., n. 71, part II (114-299).

⁸¹ Wittling, op. cit., n. 71, at p. 90 and f.

⁸² In this perspective, the current practice of the Community institutions is rather perturbing – see the pending Case C-345/06, *Heinrich* (Reference for a preliminary ruling from the *Unabhängiger Verwaltungssenat im Land Niederösterreich* lodged on 10th August 2006), notice published in [2006] OJ 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 Official Journal.

⁸³ 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*].

⁸⁴ 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.).

⁸⁵ 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)].

What is crucial is the maximum 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.⁸⁶ The German solution would entail the absolute nullity of the act. Although 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: ie 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 to the Community level?

V. THE ENFORCEABILITY OF EC LEGISLATION WHICH HAS NOT BEEN PUBLISHED IN THE LANGUAGES OF THE NEW MEMBER STATES

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

- (i) from the moment of Accession, all Community secondary law becomes enforceable against individuals in the new Member States, irrespective of the actual status of its publication in the languages of the new Member States;
- (ii) 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*); or
- (iii) 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 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.

V.1 Valid, but not enforceable

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 could be published and become 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 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 the Community’s (alleged) multilingualism. First of all, failure to publish in one of the languages entails the sanction of non-enforceability against economic operators, not automatic

⁸⁶ 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 *Consorzio del Prosciutto di Parma and others v Asda Stres Ltd a Hygrade Foods Ltd* [2003] ECR I-5121, becomes evident (see the discussion of the case above, text to nn 33-37).

invalidity (*voidness*).⁸⁷ Second, 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 extant reality of various types of publication of generally binding Community acts, where not all acts of a genuinely general nature which are able to alter the legal situation of an individual are published in all of the official languages.⁸⁸ This does not, however, question their validity. Finally, if one still insists upon the frequently celebrated unity of the Community legal order, then an approach which would divide the Community into 23 language clusters,⁸⁹ with a different regime and entry into force of the Community legislation for each cluster, is difficult to accept.⁹⁰

The passage from the *Racke*⁹¹ judgment which was discussed above – which requires that the date of publication shown on each issue of the Official Journal should correspond to the date on which that issue was in fact available to the public in *all* of 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 Official Journal. 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,⁹² which did not impose the condition for the validity of Community legislation that it had to be published simultaneously in all of the official languages.

A slightly different situation is, moreover, that of the cases of Accession. It is obvious that, in cases of Accession, the validity of the pre-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 the unity of the EC legal order is present. It must, however, be weighed against other values, especially the legal protection of individuals and the legality of Community actions.

The last assertion leads into what is perhaps the 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 (ie “all void”), 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 what were (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 first argue that, following the due publication of the secondary law in the languages of the new Member States, imperfect administrative acts have been perfected, ie the initial publication vices have been removed and the acts

⁸⁷ See above the text to nn 33-37.

⁸⁸ See eg 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 *Kik v OHIM* [2003] ECR I-8283, paras 88-94.

⁸⁹ Or, after the last accession into at least 9 clusters (the 15 “old” Member States and Malta and Cyprus on the one hand and the remaining eight Member States with the eight new official languages on the other).

⁹⁰ 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 (see above, n. 26), in reality currently not used as official languages for the purposes of the publication of legislation. This does not, however, seem to affect the validity of Community law on the territory of Malta and Ireland.

⁹¹ Analysed above, text to nn 29-32, para 15 of the judgment.

⁹² 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 Stres Ltd a Hygrade Foods Ltd* [2003] ECR I-5121.

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 provided.

It is suggested that the latter approach to this first practical question should prevail. The first option, ie 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-retroactive application of laws. Moreover, it finds no support in the above-discussed case law of the Court of Justice (in particular, it would not sit well with the *Oryzomyli* case).⁹³

In practical terms, the possibility of a judicial review of administrative decisions adopted on the basis of non-translated EC legislation will, on the Community as well as the national level, be limited in time. After the lapse of the time period within which the defective decisions can be attacked,⁹⁴ 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: ie as one of a line of possible defences in cases arising out of breach of contract,⁹⁵ tort etc. In these types of cases, no times limits apply per se. Nonetheless, it is clear that, even in these disputes, legal certainty would eventually prevail over legality.

V.2 In what type of legal relationship?

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, ie relationships between a Member State and an individual. Regulations are, however, measures of general application that are also capable of application in horizontal relationships.⁹⁶ The non-imposition of an obligation on party A in a horizontal relationship automatically means the correlative absence of a right in party B.⁹⁷ For example, the non-imposition of the duty to respect the Italian specification of the Parma Ham upon Asda Stores meant the deprivation of the right of the *Consorzio del Prosciutto di Parma*. There is thus always a losing private party who will suffer from the lack of publication. A *de facto* imposition of an obligation upon 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 result

⁹³ See above, text to nn 54-59.

⁹⁴ Typically two months following the publication or notification of the measure – See Art 230 EC or, for instance in the Czech law, Art 72(1) of the law no 150/2002 Coll., the Code of Administrative Justice [*Soudní řád správní*], as amended.

⁹⁵ For instance, imagine that 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 company B for the payment of outstanding purchase price, but company B refuses to pay, stating the goods were not compliant with Community standards, which were applicable from the date of the accession (1 May 2004).

⁹⁶ Art 249 EC. See 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. Another notable example of “private” horizontal enforcement of regulations might be Case C-253/00 *Antonio Muñoz y Cia SA and Superior Fruticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd* [2002] ECR I-7289.

⁹⁷ In Hohfeldian terms, the granting of a privilege to party A correlates with the absence of right (no-right) of party B. See WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press: New Haven and London, 1919), at 36.

is frequent practice. This difference is most visible in the type of horizontal (triangular) application of non-notified domestic law.⁹⁸ It should nonetheless be 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 notified en bloc by Article 53 AA. The new Member States are thus bound by them and those States have the duty to transpose those measures into national law irrespective of their translation and publication in the new official languages. What arises, either in the context of late implementation or the non-transposition of 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,⁹⁹ be directly effective if they are not translated into the official language of the respective Member State?

5.3 Direct effect of legislation which is not translated?

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 overreaching quality of legislative text, which is independent of the respective language? That would amount to an “objective” test of direct effect, the question of direct effect being a question of legislative drafting, which should be independent of the language in question and the same for the entire Community. Or would the test of the direct effect necessarily involve a “subjective”, ie country- and language-related, evaluation of the clarity of the text for an average addressee in the given jurisdiction?

The latter approach is suggested. First, the reference standard for direct effect is the average addressee in a given jurisdiction, interpreting Community legislation (primarily) in her own official language. The knowledge of the official language of the respective Member State, together with the above-discussed principles of the 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.¹⁰⁰ For an average addressee, any EC legislation which 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.

⁹⁸ See eg 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 S Weatherill, ‘Breach of directives and breach of contract’ (2001) 26 *ELRev* 177; K Lackhoff and K Nyssens, ‘Direct Effect of Directives in Triangular Situations’ (1998) 23 *ELRev* 397; Karase, H. D., Beljin, S., ‘Grenzen der Privatbelastung durch unmittelbar wirkende Richtlinien’ (2004) 5 *Europarecht* 714-737.

⁹⁹ See, eg Case 148/78 *Ratti* [1979] ECR 1629 or Case 41/74 *Van Duyn* [1974] ECR 1337 (directives) and Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825 (decisions).

¹⁰⁰ Different question would be 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 (presumably all?) the different language versions (Case 283/81 *Srl CILFIT and others and Lanificio di Gavardo SpA v Ministero della Sanità* [1982] ECR 3415, para 18). However, this is Community fiction and not reality: Member States courts (of last instance) only very rarely engage in a comparative linguistic exercise. It is noteworthy, however, that the Court of Justice itself also does so only rarely (See 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 noted that it is somehow exaggerated to require from Member States courts something that even the Court of Justice does not normally do).

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 effectively to safeguard the rights which an individual could derive from Community law. This estoppel 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.¹⁰¹ So why should the individuals not be able to derive any directly effective rights from the provisions of these directives or decisions 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 upon the individual’s 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 case of directives and decisions is “no”, for whatever type of legal relationship.¹⁰² 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 upon 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 second is the need (described above) for the protection of third parties in a triangular type of legal relationship.

VI. LIABILITY

Legal responsibility for the failure to publish, and especially possible claims for damages, poses an intriguing set of questions. The starting assumption is that failure to translate and publish is the fault of the European Communities.¹⁰³ However, the vast majority of EC law is directly applied by the authorities of the Member States. If one assumes that there is generally

¹⁰¹ As is evidenced by the tens of Art 226 EC 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 18 January 2007 in Case C-203/06 *Commission v the Czech Republic*, nyr, and in Case C-204/06, *Commission v the Czech Republic*, nyr) and Slovakia (judgment of the Court of Justice of 8 February 2007, Case C-114/06, *Commission v Slovakia*, nyr)

¹⁰² 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 “conforming” interpretation of national legislation, as the line between direct and indirect effect of directives can be very thin – see eg Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135 and Case C-168/95 *Criminal proceedings against Luciano Arcaro* [1996] ECR I-04705. See, generally, S Prechal, *Directives in EC Law* (2nd ed., Oxford University Press: Oxford, 2005), sections 8.5 and 9.5.

¹⁰³ 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 “contracted-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.

the possibility to claim damages caused by the enforcement of unpublished EC legislation,¹⁰⁴ 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; and
- (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 rules. In this latter function, there is no difference between a Member State and an individual: both are subjects of external regulation.

Are Member States bound by non-translated EC legislation? If they are only the subjects of EC regulation – ie if their role is limited to the latter, passive recipient, 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 States¹⁰⁵ are bound by the principle of loyal and sincere cooperation of Article 10 EC and the jurisprudential extensions made to it by the Court of Justice.¹⁰⁶ At the same time, the EC is bound by the principle of the legality (lawfulness) of their actions. Article 10 EC 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, using this reasoning, Member States could have refused to carry out and enforce EC legislation¹⁰⁷ due to the Community’s failure to publish it in their official language. None of them has done so.¹⁰⁸ On the contrary, national administrations have striven 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.¹⁰⁹ This would mean that the Member States have, even if to a lesser degree, contributed to the eventual damage caused to individuals.

¹⁰⁴ See 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] ECR I-1131, para 42 and Case C-352/98 *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission* [2000] ECR I-5291, para 41.

¹⁰⁵ 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: R. Procházka, “K publicite 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.

¹⁰⁶ Generally see J Temple Lang, ‘The Duties of National Authorities under Community Constitutional Law’ (1998) 23 *ELRev* 109; J Temple Lang, ‘The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.: Two More Reflections’ (2001) 26 *ELRev* 84; L Constantinesco, ‘L’article 5 CEE, de la bonne foi à la loyauté communautaire’ in F Capotorti, C-D Ehlermann, Frowein, F Jacobs, R Joliet, T Koopmans and Kovar (eds.), *Du droit international au droit de l’integration; Liber Amicorum Pierre Pescatore* (Nomos Verlag: Baden-Baden, 1987), 97ff.

¹⁰⁷ Especially directly applicable regulations. As outlined above, the situation in respect of directives and decisions is different.

¹⁰⁸ 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 EC. These suggestions were not pursued – See *Prochazka*, cited above, n. 105, at p. 864.

¹⁰⁹ 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.

Allocation of responsibility is self-evident in the cases of claims for damage caused by an administrative act adopted by Community institutions: the forum is the Court of First Instance or the Court of Justice, and the legal basis for any claim Article 288 (2) EC. In cases involving 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 the current state of EC law, hard to conceive.¹¹⁰ On the other hand, should a claim in national court against a Member State be successful, the possibility remains open for a Member State to bring a claim for recovery of at least part of the damages paid to individuals, arguing that the Communities' failure to publish in the relevant official language was partly (even mainly) the reason for the damage caused to the individual.¹¹¹

VII. LANGUAGE AS THE LIMIT OF NATIONAL CONSTITUTIONAL OBEDIENCE?

So far, the discussion has focused upon the analysis of the EC legal order. In a constitutionally pluralistic Community, however, this is not the only approach. Considerable differences would be found in the answers to the same question if the reasoning were to proceed upon the basis of national constitutional law provisions.

After the 2004 enlargement, the constitutional courts of the Central and Eastern European ("CEE") Member States started to position themselves with respect to the Community legal order. They mostly adopted slightly modified varieties of the German *Bundesverfassungsgericht* "Solange"¹¹² doctrine: there is a conditional and limited transfer of powers from the national level onto the supranational, so 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.'¹¹³

¹¹⁰ 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. See Joined Cases 5, 7, 13 to 24/66 *Kampffmeyer* [1967] ECR 266 and Case 101/78 *Granaria* [1979] ECR 637. Generally see H-W Rengeling, A Middeke and M Gellermann, *Handbuch des Rechtsschutzes in der Europäischen Union* (2. Auflage, C. H. Beck: München, 2003), 188.

¹¹¹ Good overviews of the issues concerning joint/concurrent liability of the EC and the Member States offer P Oliver, 'Joint Liability of the Community and the Member States' in HG Schermers, T Heukels, and P Mead (eds.), *Non-Contractual Liability of the European Communities* (Martinus Nijhoff Publishers: Dordrecht, 1988), 125-147 and W Wils, 'Concurrent Liability of the Community and a Member State' (1992) 17 *ELRev* 101.

¹¹² BVerfGE 37, 271 (*Solange I*); BVerfGE 73, 339 (*Solange II*); BVerfGE 89, 155 (*Maastricht*), for an overview of the case law, see eg J Kokott, 'Report on Germany' in A-M Slaughter, A Stone Sweet, and JHH Weiler (eds.), *The European Court and National Court – Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart Publishing: Oxford, 2000).

¹¹³ 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).

Potential lines of reasoning flowing from similar types of reservations are twofold, focusing upon procedural and substantive or, put alternatively, internal and external limits to 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, ie lawfully. Member States did not agree to a transfer of powers that starts with those powers being disregarded, ie by unlawful behaviour on the part of the European Union.

Second, the substantive argument concerns the external limits of 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 the Czech case, for instance, the “essential attributes of a democratic state”.¹¹⁴ These cannot be, at least in the constitutional theory as interpreted by the CEE Member States’ constitutional courts, transferred to the European level: they form an unalterable core of the domestic constitutional system.¹¹⁵

Could the “right to language” and the right of an individual to communicate in her mother tongue 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 substantive element of the notion of democracy.¹¹⁶ It is quite likely that some of the CEE Member States’ 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 grant of rights and imposition of obligations.¹¹⁷

Taking into account the outlines of the 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, nor a dominant idea, in the laws of the Member States, but rather a contradiction¹¹⁸ 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

¹¹⁴ Based on the wording of Art 9 (2) of the Czech Constitution: “[a]ny changes in the essential requirements for a democratic state governed by the rule of law are impermissible”.

¹¹⁵ This line of reasoning can again be traced back to the German “*Solange*”-line of case law, especially the “*Maastricht-Urteil*”, (BVerfGE 89, 155; reported in English as *Brunner v European Union Treaty* [1994] 1 CMLR 57), 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, See the discussion of the decision by the reporting judge, Paul Kirchhof, writing extra-judicially in P Kirchhof, ‘Das Maastricht-Urteil des Bundesverfassungsgerichts’ in P Hommelhoff and P Kirchhof (Hrsg), *Der Staatenverbund der Europäischen Union: Beiträge und Diskussion des Symposiums am 21. und 22. Januar 1994 in Heidelberg* (C.F. Müller: Heidelberg, 1994).

¹¹⁶ “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); *Brunner v European Union Treaty* [1994] 1 CMLR 57.

¹¹⁷ 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.

¹¹⁸ See typology of the use of comparative legal arguments by the Court of Justice made by K Lenaerts, ‘Interlocking Legal Orders in the European Union and Comparative Law’ (2003) 52 *ICLQ* 873, at 883-894.

variation of the French approach: publication is a precondition for enforcement, not for validity. It would serve us well to be mindful, however, that this approach is not the one taken by the new Member States, ie by the States that will be directly affected by the decision. As has already been mentioned above,¹¹⁹ the new Member States' rules on the publication of laws follow the German "post-totalitarian" model, not the French one. What follows is that the Court of Justice may be forced to adopt a solution, which is perhaps shared only by a minority of the current Member States and which is likely to be scrutinised with a great degree of suspicion on the part of the guardians of divergent national constitutional rights and values (and not only in the CEE Member States).

The Court of Justice's judgment in *Skoma-Lux* and other possible cases dealing with the failure to translate and publish Community legislation after the Accession will most probably be made subject to subsequent national constitutional scrutiny.¹²⁰ So far, the constitutional courts of the new Member States have showed themselves to be quite "pro-European",¹²¹ sometimes even to a surprising extent pro-European.¹²² It remains to be seen whether or not the issue of language may impose limits upon the new Member States' constitutional obedience.¹²³

VII. OUTLOOK: THE LINGUISTIC REALITY IN AN ENLARGED EUROPEAN UNION

There are two main themes that run throughout this article: the publication of binding legislation and the issue of languages. Both are discussed within an extreme scenario, which is an exceptional situation unlikely to be repeated in the future.¹²⁴ It is true that hard cases make bad law. Some concluding general observations should, nonetheless, be made with respect to both of the main themes.

The first theme is perhaps not that contentious. It is evident that the system of publication of the Community legislation is in need of reform. There is a radical gap between the formal sources of the law and the way in which the addressees of legal regulation genuinely acquaint themselves with the content of the applicable norms. Today, only a tiny minority of practising lawyers and judges ever sees a printed edition of the Official Journal – which in law is still the only authentic and binding formal source of EC legislation.¹²⁵ Apart

¹¹⁹ See above, nn 83 – 85.

¹²⁰ 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).

¹²¹ See an overview of the major cases by W Sadurski, "Solange, chapter 3": Constitutional Courts in Central Europe – Democracy – European Union', EUI Working Paper LAW No 2006/40, available at <http://cadmus.eui.eu>.

¹²² See eg 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 is offered by J Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) 44 *CMLRev* 9.

¹²³ Which is not granted in the old Member States either, at least in the rhetoric of the old Member States' constitutional and/or supreme courts. Further see eg KJ Alter, *Establishing the supremacy of European Law: the making of an international rule of law in Europe*. (Oxford; New York : Oxford University Press, 2001) or A-M Slaughter, A Stone Sweet, and JHH Weiler (eds.), *The European Court and National Court – Doctrine and Jurisprudence. Legal Change in its Social Context* (Hart Publishing: Oxford, 2000).

¹²⁴ It appears, however, that the publication of the EC legislation following the Rumanian and Bulgarian accessions in January 2007 follows a similar pattern, including the lack of translations in the printed version of the Special Edition of the Official Journal.

¹²⁵ When lecturing in Central Europe (the Czech Republic, Slovakia, Poland) after the 2004 Accession and before discussing the issue of lacking publication, I used to ask the audience (practising lawyers, judges, tax

from some technical issues to be resolved, there is no legal reason why the European Union could not switch either to exclusive¹²⁶ or parallel¹²⁷ publication of the legislation in electronic form. The formal source of law should be brought into line with that which applies in the real world.

Moreover, it may be suggested that, in today's world, electronic publication actually guarantees the values which a formalised system of publication of laws is designed to safeguard – most notably legal certainty, foreseeability of the law and equality in access to it – in a more efficient way than does the paper publication.¹²⁸ It serves to be mindful that, even today, the applicable law as far as the publication of EC legislation is concerned is still the above-described *Racke* decision,¹²⁹ which held that a piece of EC legislation is validly published once it is displayed in all the languages of the Community in the Office of the Official Publications in Luxembourg. It is hard to imagine any less “user-friendly” way of publishing binding legislation: is an individual, who needs to verify whether or not a piece of legislation has really been published on a given date, supposed to travel to Luxembourg to verify that fact? Or must he or she exclusively “rely” upon what the OPOCE states with respect to the genuine publication, even though he or she might have serious doubts as to the correctness of that information? Or would the individual's legal certainty perhaps be better served if he or she could download an electronically-signed image of a piece of legislation and store it locally, thus avoiding later disputes¹³⁰ concerning in which volumes of the Official Journal, and in which languages, the relevant EC rules were really displayed in the OPOCE in Luxembourg on a given date?¹³¹

advisors, academic lawyers, students) how many of them had ever held a printed version of the Official Journal in their hands. The number of positive replies used to cover less than one third of the audience. Only about *one out of thirty* or so lawyers, who commonly applied EC law, would claim that he or she regularly works with the printed version of the Official Journal.

¹²⁶ See, eg the Austrian *Kundmachungsreformgesetz 2004*, BGBl. Teil I, Nr. 100 (Ausgegeben am 21. November 2003), 1476-1480, which, as from 1 January 2004, introduced electronically signed “pdf” (Adobe Acrobat's “Portable Document Format”) images of the *Bundesgesetzblatt* as the only exclusively authentic source of legislation. Paper copies, which are still available upon subscription or request, are no longer deemed to be authentic.

¹²⁷ Parallel publication means that both versions of the official gazette, ie electronic as well as no the paper one, are authentic. This is the situation in France (See Art 3 of the Ordonnance no 2004-164 du 20 février 2004 *relative aux modalités et effets de la publication des lois et de certains actes administratifs*. Journal officiel du 21-02-2004, p. 3514) or in Slovenia (See the Slovenian Law on the Collection of Laws, [*Zakon uradnem listu Republike Slovenije*], Uradni list Republike Slovenije Št. 112 z 12. 15. 2005, stran 12023). Art 4 of the Slovenian Law provides that, in the case of a conflict between the printed and the electronic text, the latter shall prevail.

¹²⁸ Generally see R Walker, ‘Die amtliche elektronische Verkündung von Gesetzen’ (2005) JurPC Web-Dok. 155/2005, Abs. 1-62, M Herberger, ‘Elektronische Publikation von Gesetzen – Eine Chance für die Gerechtigkeit?’ (2003) JurPC Web-Dok. 340/2003, Abs. 1-58, both articles accessible at <http://www.jurpc.de>.

¹²⁹ See above, text to the notes No 29 – 32.

¹³⁰ The standard praxis of the Court of Justice in similar cases is to ask the OPOCE as to when a given volume was available in its seat in Luxembourg. However, this information is completely „one-sided“, ie the opposing party, be it an individual or a Member State, has no chance to verify, retrospectively, whether the information is correct. I am grateful to Maciej Szpunar for this point. As he observed in the course of the conference “*The Treaty of Rome – 50 Years On!*”, held in March 2007 in Warsaw, the very same problem was encountered by Poland and the other new Member States who are the applicants in an action for annulment against the Council and the Commission (Case C-273/04 *The Polish Republic and Others v the Council and the Commission*, pending, cited above, text to n 14). The date of the publication of the contested regulation in Polish and other languages of the new Member States is of crucial importance for the observance of the 2 months time limit for an annulment action foreseen in Art 230 EC. The OPOCE stated that the regulation was available in Luxembourg on the date stated on issue of the Official Journal, the Member States claim that it was not. They are, however, not in the position to prove that it was not and, on the other hand, the OPOCE has, apart from its own statement, no proof of the fact that it actually was.

¹³¹ In this respect, it is somewhat striking that the objections the OPOCE puts forward against future publication of the EC legislation in the electronic form are that it would be “questionable in terms of democracy” and a “threat to legal certainty”. See the OPOCE's answer to the questionnaire of the European Forum of Official

Electronic publication may just be a technical question. The other theme of this paper, the issue of languages, plainly is not. The equality of languages in the European Union is a myth. It has always been, be it in a Europe of six or in one of twenty-seven. It has been a noble dream, though: a political vision of Europe in which everyone speaks their own language but, at the same time, they are able to understand each other. Unfortunately, that dream already proved to be infeasible within the First Book of Moses.¹³² It has now arrived at its clear end in the contemporary European Union too.

This paper has dealt with only a segment of a broader problem, which is by now apparent in the new Member States: the language of the Union to which the new European citizens acceded is not their own. The lacking publication of binding EC legislation is, in a way, just the proverbial tip of the iceberg. It is the tip with the sharpest edges, though, where any collision is the most damaging. One should, however, realise the true size of the iceberg, which is composed of all EC documents, not just the binding legislation. The greatest part of the iceberg, which is not visible from the surface at first sight, includes considerable quantities of various position documents, green, white, yellow or other papers, communications, recommendations, etc, etc, and, eventually, also the case law of the Court of Justice, which is so far as good as non-existent in the languages of the new Member States.¹³³

This is not just a set of post-Accession problems that will be resolved with time. The same situation is well known to the “old” smaller Community languages, such as Finnish, Portuguese or Greek. Access to the Community documents in these languages is far from the same as in English or French: lots of “soft” law instruments, political documents and information are often simply not accessible in these languages. With the last enlargement and the accession of seven “small” languages, followed by another two in January 2007,¹³⁴ the problem, which has been lurking within the Community for decades, has clearly surfaced. What shall be the status of “smaller” languages? Should one strive for full translation of every document? Should one openly acknowledge that everything is not accessible in all languages and make only “binding” legislation accessible in all languages? Should one openly part from the myth of the European Union respecting the languages of all of its members in equal fashion?

This paper has no answer to these questions. For the new Member States which joined the European Union in 2004 the national language is a precious good, which they may not hesitate to associate with the foundations of their constitutional systems. On the other hand, therein lies perhaps the historical irony: for most of the thousand year history of statehood in Central Europe, the language of the law was different from the language of the common people. First it was Latin and later, especially with respect to the areas of the then Austrian Monarchy, the language of the law was German. Having to apply law on the national territory in a language other than the language of the land should thus be, in a cynical manner of speaking, no more than life going “back to normal”.

Gazettes, “Questionnaire on the organisation and operation of official gazettes in the EU”, point 4.5, accessible online at <http://forum.europa.eu.int/irc/opoce/ojif/info/data/prod/html/eu.pdf>.

¹³² The First Book of Moses (Genesis), Chapter 11. To complete the parallel made in the title of this article, was the rush and perhaps somewhat premature enlargement of the European Union the construction of a presumptuous Tower (Gn, ch. 11, v 4.) for which the punishment came (Gn, ch. 11, v 7)?

¹³³ Further on these issues, see M Bobek, ‘A New or a Non-Existent Legal Order? Some (Early) Experience in the Application of EU Law in Central Europe’ (2006) 2 Croatian Yearbook of European Law & Policy 265- 298, at 295-296.

¹³⁴ Czech, Slovak, Hungarian, Lithuanian, Latvian, Estonian, Maltese, Slovenian, Bulgarian are not spoken by more than 10 million people, the largest ones in this group being the Czech and the Bulgarian. The Romanian language is spoken by about 22 million people. The Polish language represents, with about 39 million people, the only “larger” language in the 2004 and 2007 enlargements, in size comparable to the Spanish.