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Multilingual Norms in European Criminal Law

Abstract:

European Union law is equally authentic in all official languages of the European Union. The European Court of Justice has reiterated this principle many times, although it is hardly practical. Noting that even the European Court of Justice struggles with the amount of authentic versions for a single legal instrument,[2] *we may doubt that the practitioners at the level of the member states possess the resources or the capabilities to actualize a truly multilingual legal system. The ordinary citizen with potentially less education than the judges at the European Court of Justice finds himself in an even worse position. While he may only understand a single version, he may nevertheless face criminal punishment for not abiding by European Union law as it is established on the basis of all official language versions.*

Multilingualism poses a problem for legal certainty, particularly but not only in the field of criminal law. The ordinary citizen should not be held responsible for violating a law that he does not understand. But the ECJ has yet to recognise such a right. I will argue in the following that minor adjustments to current legal doctrine suffice to rectify this problem, without abandoning equal authenticity of all official languages as the basis for European legal interpretation.

I. The Issue

1. Example

To illustrate the issue, let us briefly look at a criminal case before the German courts about the manufacturing of *methamphetamine*, a synthetic drug which can be produced from ordinary and commercially available pharmaceuticals.[3] The defendant Mr. Nguyen had purchased ordinary medication from which you can extract *pseu-*

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2 Even Advocate General *E. Sharpston* limits her comparison of language versions to the ones he has „been able to verify", see her opinion for European Court of Justice (ECJ), 18.9.2008, case C-391/07 (*Glencore Grain*) ECR I-09117, margin no. 51.

3 Bundesgerichtshof, 22.10.2013, case 3 StR 124/13.

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doephedrine, one of the base substances for making *methamphetamine*. The courts had no difficulty finding Mr. Nguyen guilty of violating the German Pharmaceuticals Act, but were wondering if he could also be punished under the Commodities Control Act[4]. The respective § 19 (1) no. 1 punishes trading with certain commodities which are defined in Article 2 of Regulation (EC) No. 273/2004[5] and Regulation (EC) No. 111/2005[6] and a certain Annex I. The definition expressly excludes

> *„[…] medicinal products as defined by Directive 2001/83/EC […], pharmaceutical preparations, mixtures, natural products and other preparations containing scheduled substances that are compounded in such a way that they cannot be easily used or extracted by readily applicable or economically viable means […]" (emphasis added)*

Since Mr. Nguyen's purchases easily qualified as „medicinal products", the court faced the legal question to what extent they were excluded from the scope of the regulation. The German criminal court of first instance found that medicinal products were only excluded to the extent they were subject to the qualification emphasized above. Medicinal products are therefore included unless compounded in such a way that they cannot be easily used or extracted directly or economically viable means. Under this interpretation, the court found Mr. Nguyen guilty.

Naturally, Mr. Nguyen saw this differently. He argued that all medicinal products should be excluded and that the qualifying relative clause emphasized above only applied to other "preparations containing scheduled substances".

To understand how this illustrates the problem of multilingualism, we need to turn to the French version, which reads:

> *„[…] à l'exclusion des médicaments, tels que définis par la directive 2001/83/CE […], des préparations pharmaceutiques, mélanges, produits naturels ou autres préparations contenant des substances classifiées qui sont composées de manière telle que ces substances ne peuvent pas être facilement utilisées, ni extraites par des moyens aisés à mettre en oeuvre ou économiquement viables."*

Under the French version it is clear that the relative clause emphasized above cannot refer to medicinal products. The French introduction to this relative clause „qui sont composées" („that are compounded") refers to a feminine plural word („substances classifiées" or „scheduled substances" respectively). If it were to point to „médicaments", it would have to use a masculine suffix („composés", rather than „composées"). Any judge to narrow the exception for medicine under the French language version would exceed the wording of the text. In the end, the European Court of Justice ruled in light of the French version, leading to an acquittal of Mr. Nguyen.[7] For our purposes, this example simply serves to illustrate the issue of multilingual indefiniteness and we will now turn to a more abstract analysis.

4 Gesetz zur Überwachung des Verkehrs mit Grundstoffen (…), BGBl. I 2008, 306.
5 OJ 2004 L 47/1.
6 OJ 2005 L 22/1.
7 ECJ, 5.2.2015, cases C-627/13 and C-2/14 (*Miguel M.* and *Nguyen/Schönherr*), passim.

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2. Deficits under the Principle of Legal Certainty

We will skip the question how and to what extent the European Union may itself enact supranational criminal laws and direct the member states to punish violations of European Union law under their national criminal law systems.[8] We will also leave aside the constitutional challenges that the referencing techniques present.[9] Instead, we will assume that the national criminal laws attaching to supranational norms are as such valid both under European Union and national constitutional law. From the individual's position, multilingual norms pose two related, but distinct problems.

(a) Abstract and General Deficit

Multilingual norms conflict with the principle of legality. They make it difficult, if not impossible for the individual to foresee what they actually mean. While the individual would, in an ideal world, understand and compare all authentic versions of a legal instrument, in reality, it seems cynical to assume this to be possible. The individual must rely on those languages that he can understand and hope they reflect what a court would later find to be the true content of a norm. But the individual can never be certain. He cannot even know whether these versions may be defective translations or perfect instances of a norm.

Even if we step away from the idealistic basis of the principle of legality and reduce this principle to a guarantee against arbitrary decisions by the judiciary,[10] we are still left with a problem. In a multilingual legal world, it will never be clear whether a certain language version provides any guidance and therefore an effective check against arbitrary decisions. After all, a particular language version might not have any effect on the interpretation of the norm and would then – at best – not mislead the individual. As was noted by Advocate General *Lagrange* in one of the first proceedings before the European Court of Justice,

> *„(since) all four languages are authentic, (…) no single one of them is authentic."*[11]

The problem we face is of an abstract and general nature. It is a general because it concerns the entire multilingual body of law. It is abstract because it does not depend on language skills of a particular citizen, but affects us all.

8 See the detailed discussion by *P. Asp*, The Substantive Criminal Law Competence of the EU, passim (available through SSRN); *H. Satzger*, International and European Criminal Law, 2012, pp. 48 et seqq.

9 *H. Satzger/G. Langheld*, Höchstrichterliche Rechtsprechung in Strafsachen (HRRS) 2011, pp. 460 et seqq.

10 *G. Grünwald*, Zeitschrift für die gesamten Strafrechtswissenschaften (ZStW) 76 (1964), pp. 1 et seqq.

11 ECR, 27.2.1962, case 13/61 (*Robert Bosch GmbH*), [1962] ECR 70.

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(b) Concrete and Individual Deficit

As we have seen, this abstract and general problem potentially turns into concrete and individual problems where language versions for a particular legal instrument actually differ in practice. The general problem described above, then turns into a concrete problem with that particular legal instrument. The question if this discrepancy materializes depends on the language skills of the individual concerned. In the example above, an English speaker might never have wondered about the true scope of the term "medicinal products". But for a French speaker, the discrepancy between the English and French may become an issue where a court decides to base a narrow notion of the exception on the English version.

(c) Assumptions Going Forward

In the course of the following analysis, we will assume that European norms are definite despite their multilingual sources. We will leave aside concerns raised by scholarship that assume multilingual texts to be indefinite at all times.[12] This scepticism may be interesting from the perspective of linguistics or language philosophy, but has neither practical relevance, nor relevance for legal scholarship. The principle of legality divides legal norms into two classes: the ones that are definite and others that are indefinite. It is not for a lawyer to blur this distinction by considering all legal norms to be indefinite. Instead, lawyers have to work with the distinction by giving it a meaning. Objections from linguistics or language philosophy are therefore a way to understand the problem, but not an approach to solve it.

Like any norm, a European norm can also be indefinite. Then, the legislator will have to clarify the meaning in all language versions. In most instances, the European norm will however meet the test of definiteness under the principle of legality. This leaves the individual with the abstract and general problem for assessing the true content of a norm (irrespective of whether language versions actually differ). This problem roots in the individual's uncertainty whether a language version he can understand has any effective meaning at all. Where, in a particular instance, a language version of the norm does not correctly reflect the content of the norm, we are faced with a concrete and individual deficit in definiteness.

12 *A. L. Kjaer*, H. Koch et al. (eds.), Europe. The New Legal Realism, 2010, pp. 297 et seqq.

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<table>
<tr><td colspan="2" rowspan="2"></td><td colspan="3">European norm as such is …</td></tr>
<tr><td colspan="2">… definite</td><td>… indefinite</td></tr>
<tr><td rowspan="4">All language versions</td><td>… state the same</td><td colspan="2">Abstract deficit of legal certainty</td><td rowspan="4">General problem of definiteness. The European legislator must rephrase the norm in all language versions.</td></tr>
<tr><td rowspan="3">… do not state the same</td><td colspan="2">Concrete deficite of legal certainty. We need to distinguish: Does a language version which the individual can understand reflect the content of the norm?</td></tr>
<tr><td>Yes</td><td>No</td></tr>
<tr><td colspan="2"></td><td>The norm is foreseeable in that particular case.</td><td>The norm is not foreseeable in that particular case (concrete and individual deficit).</td></tr>
</table>

II. Interpreting European Union law

To understand the magnitude of the problem, let us take a step back and look at the two principles of interpretation which the European Court of Justice has developed over the years for working with multilingual legal texts: the principle of uniform interpretation and principle of equal authenticity of all language versions.

1. Uniform Interpretation

European Union law must be interpreted uniformly across all member states of the European Union and across all areas of law.

(a) Territorial Uniformity

There are two approaches for interpreting a European legal term. The term can either refer to the legal concepts that already exist in the national legal systems. Alternatively, the European Union can introduce its own distinct legal concept for that term. The advantages of one approach are the disadvantages of the other. Reference to national legal concepts provides clarity and legal certainty as it attaches to what is already known from the national legal system. At the same time, the European Union turns control of the scope of integration over to national judges and may entrench the legal differences

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between the member states it sought to bridge.[13] To strengthen the harmonising effect of European Union law, the European Court of Justice constantly presumes a European legal term to have a uniform meaning across all member states that is autonomous from existing national legal concepts, unless the European legal instrument explicitly provides otherwise.[14]

(b) Substantive Uniformity: Carve Out for Criminal Laws?

Territorial uniformity, which is the general rule, makes any steps taken towards integration more effective, but leaves the question unanswered to what extent European Union law needs to be effective. We may feel the immediate intuition that any legal provision should have the same meaning regardless of its field of application. But this intuition is not justified by the need to overcome national obstacles to European integration because it is for the European legislator to decide the scope of its desired integration.

First, we need to decide whether criminal blanket laws like the one described in the example above follow national or European standards of interpretation. We do not need to explain in great lengths that a European norm remains a European norm whether a national criminal law provision attaches to it or not. Its interpretation will always be governed by European standards of interpretation. But what happens under national law? Does the criminal blanket law reference the European norm as such or does it establish a twin norm in the national legal system governed by national standards of interpretation? Both approaches are feasible for the national legislator, but only the former, i.e. referencing the identical European norm, makes sense under both European and national law. By referencing the European norm, the national legislator makes clear that the purpose of this blanket criminal law is to enforce that particular European norm (and no other).[15] Additionally, European Union law requires national legislators to protect European norms through their legal systems. Although this does not technically prevent a member state from ignoring its obligations under European Union law, it seems more plausible to assume that the national legislator wanted to discharge these obligations by enforcing that European norm as interpreted under European standards of interpretation.[16]

Second, having established that European standards of interpretation apply, we need to discuss whether criminal legal doctrine requires a restrictive interpretation of that

13 *R. Streinz*, Europarecht, 9th ed., 2012, margin no. 616. These are standard arguments in the context of harmonisation, cf. Advocate General *A. Tizzano*, ECJ, 30.9.2004, case C-188/03 (*Junk*), [2004] ECR I-887, margin no. 41.

14 ECJ, 18.10.2011, case C-34/10 (*Brüstle v. Greenpeace*), [2011] ECR I-9849, margin no. 25; ECJ, 19.9.2000, case C-287/98 (*Linster*), [2000] ECR I-6917, margin no. 43; ECJ, 18.1.1984, case 327/82 (*Ekro*), [1984] ECR 108, margin no. 11; each with further references.

15 *H. Satzger*, Die Europäisierung des Strafrechts, 2001, p. 225.

16 Cf. View of Advocate General P. Mengozzi, ECJ, 17.5.2010, case no. C-550/09 (*E, F*), [2010] ECR, I-6216, margin no. 54.

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European law. The German Supreme Court has held that the wording of ordinary civil law provisions is strict irrespective of the field of application, if such provisions are enforced through criminal laws.[17] But this is not true. A criminal law may be unconstitutional, if it is based on a norm that is interpreted too broadly (for the purpose of defining criminal liability). But this does not mean that the norm as such is unconstitutional as well. The principle of legality does not apply to norms, but to sanctioning provisions.[18] Since there may be a perfectly good use for a norm in administrative or civil law, there is no general need to extend this principle to the underlying norm itself. The German court presumably feared confusion over the true content of a norm in the alternative in which the norm would be interpreted narrowly solely for criminal cases and extensively in all other cases. But this fear is not justified because, as described, the content of a norm is always the same. It simply remains to be seen what consequences derive from its violation. Therefore, criminal legal doctrine does not require a restrictive (or even a split) interpretation of a norm.

Third, in line with these general remarks to criminal legal doctrine, the European Court of Justice has explicitly held that the European Union law

> *"draws no distinction according to the nature, criminal or otherwise, of the national proceedings within the framework of which the preliminary questions have been formulated since the effectiveness of Community law cannot vary according to the various branches of national law which it may affect."*[19]

If the court were to carve out criminal laws referencing European norms from the principle of uniform application (across all legal fields), the member states might take advantage of such a loophole by disguising implementing measures as criminal laws to keep the mandate for their interpretation within their national legal system.

Fourth, a distinct standard of interpretation for criminal laws does not derive from the European Court of Justice's established case law which refuses to base criminal liability exclusively on a European directive.[20] In these cases, the European Court of Justice did not call for a restrictive interpretation, but instead for a correct implementation by the member states. There, the individual should not bear the (criminal) consequences where a member state has failed to correctly implement a directive. The European standards of interpretation do not change when European norms form the bases of criminal liability.

17 Bundesgerichtshof, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2007, p. 945, margin no. 17.

18 Schürnbrand, NZG 2011, p. 1215; confer the wording of Article 7 of the European Convention of Human Rights: „No one shall be held guilty of any criminal offence …".

19 ECJ, 27.2.1986, case 238/84 (*Röser*), [1986] ECR 802, margin no. 15.

20 ECJ, 26.9.2013, case C-471/11 (*HK Danmark v. Experian*), margin no. 18; ECJ, 13.11.1990, case C-106/89 (*Marleasing*), [1990] ECR I-4156, margin no. 6; ECJ, 8.10.1987, case 80/86 (*Kolpinghus Nijmegen*), [1987] ECR 3982, margin no. 9.

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2. Equal Authenticity of all Language Versions

The second principle for interpreting European Union law is the equal authenticity of all language versions. With the exception of the European treaties (and other instruments of primary European law), there is no underlying principle that all official languages must be equal. To the contrary, the European Court of Justice has rejected the idea that the individual has the right to have European legislation drafted in a particular language.[21] Instead, with regard to secondary European law (particularly regulations and directives), the European Court of Justice has based the principle of equal authenticity on the fact that the European legislator enacts legal instruments in all official languages.[22] But it is and remains for the European legislator to decide whether to continue this practice or whether to opt for a different language regime. Scholars have picked up this idea and discussed options like introducing a single authentic language or reducing the number to just a few authentic languages. For the sake of brevity, we will skip these discussions here.[23]

Instead, we will work with the current and established principle that all language versions are equally authentic. From a formal perspective, all language versions equally reflect the true content of a norm. In theory, it should not matter whether you consider the English, the Spanish, the French, or the German version to learn about what the law requires you to do. In practice, interpretation of European norms is a little more complicated. Two scenarios are possible: In the first, all language versions actually give the same answer to a legal question. Then it truly does not matter which language version you read. In the other scenario, the language versions differ *de facto*. In order to uphold the ideal that all language versions are equally authentic (and that they actually say the same), we must choose the more convincing language versions and give them preference over the others which we will then interpret in light of the former. In this scenario, the principle of equal authenticity means nothing beyond the chance for a particular language version to influence the true content of a norm. While legal scholarship has gone to great lengths to identify criteria for overcoming differences between language versions, the court seems to have settled with identifying the context and the purpose of the norm.[24] From a criminal law perspective and for our purposes, the key issue is not how discrepancies between language versions should be resolved, but rather that they seem inevitable in any multilingual regime.

21 ECJ, 9.9.2003, case C-361/01 (*Kik./. HABM*), [2003] ECR I-8309, margin nos. 82 et seqq. The negotiations for a European Patent revolved around the official languages (with Italy and Spain eventually withdrawing).
22 As prescribed by Regulation No. 1/1958, OJ 1958 L 17/401.
23 See, i.a. *T. Schilling*, European Law Journal 16 (2010), p. 64.
24 See references in footnote 14 .

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III. Consequences for Criminal Punishment

1. Position of the European Court of Justice

(a) Principle of legal certainty

Legal certainty is an established principle of European law.[25] Although this is not self-evident from the text, this principle is now embodied in Article 49 of the Charter of Fundamental Rights. Article 49 does not mention the principle of legal certainty at all. Instead, it reads:

> *„No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable."*

Although the text does not mention the principle of legal certainty, it does describe other aspects of legality and criminal matters and uses the exact wording of Art. 7 (1) of the European Convention on Human Rights. The European Court of Justice has also adopted Article 49 of the Charter of Fundamental Rights as a codified basis for the principle of legal certainty.[26] But even without codification, the principle of legal certainty existed as a general principle of European Union law not just for criminal cases, but for all legal matters. According to this principle,

> *"[Union] rules [must] enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly."*[27]

The principle of European Union law does not only apply to sanctions imposed by the European Union, notably the Commission, but also to those imposed by the member states when enforcing European Union law. Irrespective of any national standards that may prohibit sanctions on an uncertain legal basis, the European Court of Justice explicitly requires member states to apply the European standard for legal certainty when enforcing European norms.[28] While we may suspect this as an attempt to secure its mandate as the ultimate judicial instance for the interpretation and enforcement of European norms, the European Court of Justice extends the European principle of legal certainty to all European norms, regardless of whether they are enforced through national or union sanctions.

25 See references in footnotes 26 and 27.
26 ECJ, 10.11.2011, case C-405/10 (*Garenfeld*), [2011] ECR I-11051, margin no. 48.
27 ECJ, 21.6.2007, case C-158/06 (*ROM-projecten*), [2007] ECR I-5103, margin no. 25.
28 ECJ, *Garenfeld* (fn. 26), margin no. 48.

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(b) Multilingual Norms

Cases are rare in which the European Court of Justice has explicitly discussed whether multilingual norms conform to the principle of legal certainty. This is no surprise. Any attempt to weaken multilingualism must appear as an attack on the established principle that all language versions are equally authentic. However, some cases exist.

In the criminal case of *Röser*,[29] the defendant was accused of violating the European norms for producing wine. Under then-existing rules, winemakers were prohibited to artificially sweeten wine by adding sugar to the grapes, unless

> *„[…] carried out as a single operation at the time when the […] grape must in fermentation [is] being turned into wine suitable for yielding table wine or into table wine, and in the wine-growing zone where the fresh grapes used been harvested. " (emphasis added)*

The German version read:

> *„[Adding sugar to the grapes] darf bei der Verarbeitung von […] teilweise gegorenem Traubenmost […] zu für die Gewinnung von Tafelwein geeignetem Wein oder zu Tafelwein in derjenigen Weinbauzone, in der die verwendeten frischen Weintrauben geerntet wurden, nur einmal durchgeführt werden." (emphasis added)*

Röser was a winemaker from Bavaria who had imported grapes from Italy to make so-called "*Federweißer*" and added sugar to the grapes in Germany. The prosecution (and later the courts) found this a violation of the rules described above claiming they allowed the sweetening in Italy only, where the grapes were from. Röser did not deny this. Supported by the Commission and based on the wording of the German text, Röser argued that the norm cited above only applied to table wine or table wine suitable for making table wine and not to the beverage he was making. Röser read the emphasised part as limiting the scope of application to products which were intended to be table wines, instead, as the English language version suggests, as a temporal qualification when the sweetening of the wine could take place. If Röser's interpretation was correct, he would have to be acquitted. *Federweißer* as such is not a wine, but partially fermented must and as such sold in the process of fermentation. *Federweißer* would only turn into table wine, if one were to let it sit. Since *Federweißer* was to be consumed before complete fermentation, this was never intended. The European Court of Justice opted for the albeit clearer English version and disregarded the ambiguity in the German version.

It is striking that the European Court of Justice did not devote any word to the defendant in this (and other[30]) cases. We may doubt that the defendant really acted in good faith when conducting his business. But this does not justify ignoring the question whether the legal basis for their convictions phrase the norm in a sufficiently

29 ECJ, Röser (fn. 19), passim.
30 ECJ, 27.10.1981, case 250/80 (*Töpfer*), [1981] ECR 2465.

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clear way. Although the judges and the advocate general saw the linguistic discrepancies, they viewed them primarily as a problem for the authorities, rather than for the individual. The advocate general (in the case of *Töpfer*) went so far as to explain that

> *"[the individual's] intention to obtain a profit from technical defects in the system [through discrepancies between language versions], when such an intention is realised, without doubt offends against the general principle of good faith and constitutes an unlawful abuse."*[31]

It did not seem to occur to the European Court of Justice that the linguistic deficiencies of the European Union should go to the Union's disadvantage, not to the individual's.

(c) Particular Language Versions

(aa) Missing Language Version (Skoma-Lux)

Although the European Court of Justice had never given much consideration to legal uncertainties of multilingual norms, the court has been very critical where particular language versions have been missing. When new member states acceded to the European Union in recent years, the European Union did not always manage in time to translate all of its existing legislation, the so-called *acquis communautaire*. For example, although the Czech Republic had already joined the European Union in May 2004, several legal instruments were not available in Czech until several months later. When *Skoma-Lux*, a Czech wine company, was fined for violating such a regulation, the European Court of Justice did not follow for several reasons.

First, the European Court of Justice considered such a fine a violation of the principle of legal certainty which

> *"requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies."*[32]

While this sounds like good news for facing the issue described in this article, note, however, that the court limits the scope of the principle of legal certainty to the text as it was published in the official journal. The court evades the question if that text is actually capable of conveying the true meaning of the norm to someone who spoke the language of the missing version.

Second, the European Court of Justice feared unequal treatment of the citizens across the European Union. Whereas individuals in the old member states "[…] have the opportunity to acquaint themselves with those obligations in the Official Journal

31 Opinion of Advocate General *F. Capotorti*, ECJ, 29.9.1981, case 250/80 (*Töpfer*), [1981] ECR 2481, p. 2488.

32 ECJ, 11.12.2007, case C-161/06 (*Skoma-Lux*), [2007] ECR I-10841, margin no. 38.

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of the European Union in the languages of those States," those in the new member states find it "impossible to learn of those obligations because of late publication."[33] Since the European Court of Justice calls for the equal treatment of the individuals, rather than just the Member States, the court must presuppose that all official versions are by themselves capable to convey the true content of the norm to any individual. The potential disadvantage for the individual would diminish gradually, if the individual were required to consult all official versions. Out of 24 official languages, a missing Czech version would probably have no tangible effect, particular in the case of *Skoma-Lux*, where the norm in question had already been in existence for many years, but had simply not been translated in time. Under the principle of equal authenticity, we may doubt that this understanding was the basis for the court's argument. Instead of granting the individual a right to understand a norm in its own language, the court continued to uphold its dogma of true equality between all language versions.

Third, the court ruled in favour of *Skoma-Lux* because it saw the European Union responsible for the missing Czech version of the regulation in question. Not even the principle of effectiveness required otherwise, "since this principle cannot apply to rules which are not yet enforceable against individuals." The court went on to explain that it would be contrary to this principle to have the individual bear the costs of the European Union's failure to make its law available in all official languages. [34]

For these three reasons, the European Court of Justice established a formal notion of the principle of legal certainty. Until a European norm has not been published in a particular language version, this norm may not be applied against an individual of the "corresponding" member states. For now, we will leave the question what individuals are actually protected as a consequence of this decision. Instead, we will turn to the conclusions the court subsequently drew from *Skoma-Lux*.

(bb) Differing Language Version (Kurcums Metal)

In the case of *Kurcums Metal*, the European Court of Justice faced the question whether an individual may invoke a particular language version against the content of a norm.[35] Kurcums Metal, a Latvian company, argued about the customs classification of certain cables made from a mix of polypropylene and steel. Kurcums Metal invoked the Latvian version of the underlying norm, which differed from all other official language versions to its benefit. Although all official language versions, including the Latvian one, had been properly published, Kurcums Metal turned to *Skoma-Lux* to argue that any language version must truthfully convey the content of the norm. The European Court of Justice rejected this idea. Instead, the court reiterated that "the wording used in one language version of a provision of European Union law cannot serve as the

33 ECJ, *Skoma-Lux* (fn. 32), margin no. 39.
34 ECJ, *Skoma-Lux* (fn. 32), margin no. 42.
35 ECJ, 15.11.2012, case C-558/11 (*Kurcums Metal*), passim.

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sole basis for the interpretation of that provision, or be made to override the other language versions in that regard".[36]

Before we jump to conclusions, let us keep in mind that the case of *Kurcums Metal* was not a criminal one. Nevertheless, we have to ask what role particular language versions actually play. As the case of *Skoma-Lux* illustrated, the European Court of Justice regards any language version capable of conveying the true meaning of a norm. If the court did not follow this assumption, the court would seriously threaten acceptance of European Union law all across Europe. But as we have seen, this assumption is hardly justified. The formal understanding of legal certainty, as it has been established by the European Court of Justice, serves well in all those cases in which all official language versions answer the legal question in exactly the same way. This formal understanding fails where language versions differ. The European Court of Justice seems ready to sacrifice legal certainty in these cases to preserve unity. In *Kurcums Metal*, the court leaves open how the individual should be protected against language versions he does not understand. Whereas in *Skoma-Lux*, the court found that it was the European Union's, not the individual's responsibility to bear the costs of a missing language version, the court decided differently where all language versions had been properly published, but did not say the same.

Although the European Court of Justice confirmed this view in the case of *GSV Kft.*,[37] we cannot be certain that the court intended this consequence. In the case of *Kurcums Metal*, the court decided without hearing the opinion of the advocate general, which the court usually does only in cases that do not involve new questions of law. Still, the European Court of Justice lacks the proper model to reconcile equal authenticity with legal certainty. In the following section, we will see how such a model could look like.

2. Modification: A Separate Standard for Legal Certainty

(a) Model

Legal uncertainty of multilingual norms is rooted in the principle of equal authenticity of all language versions. Realistically, the individual cannot be expected to understand all of these versions. Even a fairly educated citizen will only have linguistic access to some. No matter how the courts resolve differences between the language versions, the individual will always be left wondering what possible meanings operate in the language versions he does not understand. In the following, we will not question the established principle of equal authenticity. Instead, we will vary the approach towards measuring legal certainty of the norm.

When determining whether a defendant is guilty, a judge in criminal matters will always need to establish the concrete content of a norm after the fact. For European

36 ECJ, *Kurcums Metal* (fn. 35), margin nos. 46 et seqq.
37 ECJ, 9.4.2014, case C-74/13 (*GSV Kft.*), margin nos. 27 and 42.

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norms, the judge will have to base her decision on all authentic language versions. To protect the individual, the principle of legal certainty requires that the meaning of the norm is foreseeable from an individual's position. Since an individual can hardly take all official languages into account, we should not determine legal certainty based on the same standards we use for finding the content of a norm. Instead, we should allow the individual to invoke the text of a language version he can understand. This results in a two-step procedure. First, the judge has to establish the norm based on all authentic language versions. Second, the judge has to determine whether this norm (as so established) is foreseeable from the individual's perspective based on a language version he can understand. To be clear, we should not grant the individual more protection than he would have under the national unilingual legal system. Therefore, it does not matter if he personally, but rather an average citizen in his position could have foreseen the content of the norm.

If the judge concludes that the content of the norm is not reflected by the standard for foreseeability, the norm as such will not be void, but instead merely not applicable in that particular case. This reduces the threat to the integrity of European Union law to a minimum. This solution is sufficient for protecting the individual in cases where he cannot understand a multilingual norm. At the same time, the norm may continue to be enforced under different circumstances involving people with different language skills. There is no need to protect a native speaker of German against inconsistencies in the Bulgarian language version the German cannot understand. The alternative solution, to render such a norm void in all cases, would structurally inhibit the effectiveness of European Union law as conflicting language versions will be more likely the more authentic language versions exist. Also, it would threaten the norm's effectiveness in legal areas where legal certainty may be set off against competing interests (as in civil and to some extent administrative law).

(b) Legal Arguments

(aa) A Right to a Particular Language Version?

Under European Union law, there is no established right to a particular language version, although its many references to its cultural and linguistic diversity could serve as anchors to make such a case:[38] the national identities of its member states include the linguistic heritage. The Charter of Fundamental Rights prohibits any discrimination based on language and grants any citizen of the EU the right to communicate with European institutions in one of the official languages of the treaties (cf. Article 41 (4) of the Charter of Fundamental Rights). If the individual may require informal communication to be held in an official language of his choosing, one may argue that this must more than ever be true for the formal language of the European legislator. However,

38 In favour of such a right, *F. Mayer*, in: *E. Grabitz/M. Hilf/M. Nettesheim* (eds.), EUV/AEUV, 41th ed., Art. 342 TFEU margin no. 21 with further references.

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the European treaties have explicitly entrusted the Council with choosing an appropriate language regime by unanimous decision. The respective Article 342 TFEU would be superfluous, if there were a general principle requiring the equal authenticity of all the official languages in which the treaties were drafted. In line with this, Irish and Maltese were added to the list of official languages long after they had been established as authentic languages for the treaties.[39] The language rights established by the Charter of Fundamental Rights do not make a convincing case for an individual right to a particular language version, either. It is not clear how reading the law and making one's case in a particular language are related or equally important activities. To give an example from Germany: just because certain Sorbian minorities in Germany have a statutory right to speak Sorbian in front of German courts in typically Sorbian areas around Cottbus,[40] they do not have the right to have the entire body of German law translated into Sorbian for them. This is not a contradiction. Because of the „rhetorical power of language"[41], it is perfectly plausible to assume it much more important and effective for an individual to communicate in his language than to be able to read the law in that language. We may disagree. But there is no clear logical connection between the right to read the law in a particular language and the right to state one's case in that language. Consequently, the European Court of Justice does not find a right embodied in European Union law for

> *„every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances."*[42]

The most promising path to a European language right lies embodied in the principle of legal certainty. Since this principle requires an individual to take notice of applicable legal norms in a language he can understand, we should think that European norms must be equally comprehensible for Europe's citizens, at least in the authentic languages for the European treaties. Although it sounds convincing to facilitate the individual's access to European legislation by granting him the right to a particular language version, this conclusion is far from obvious. We cannot be certain that a multilingual legal system leads to a higher degree of legal certainty. We should also be cautious not to establish as a legal prerequisite what we intend to prove. The principle of legal certainty, by itself, does not guarantee particular language versions. Despite a large Turkish speaking minority in Germany, it has yet to be argued that German law should be equally authentic in Turkish, although this would presumably help to convey German law to that part of the population. As we have seen, not even those minorities with historic roots in Germany (but much smaller in numbers) have such a right. Therefore, the principle of legal certainty, by itself, does not establish a right to a particular language version under European Union law.

39 *I. Schübel-Pfister*, Sprache und Gemeinschaftsrecht, 2004, p. 380.
40 § 184 of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*).
41 *R. Macdonald*, McGill Law Journal 42 (1997), p. 139.
42 ECJ, *Kik vs. HABM* (fn. 21), margin no. 82.

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This analysis changes when we combine the principle of legal certainty with the language regime of the European Union. This language regime, by itself, does not establish an individual right to a particular language version. European legislation had for a long time not been available in Maltese and in Irish, after Malta and Ireland joined the European Union. However, where the European Union itself selects its language regime, the principle of legal certainty attaches to it. If and to the extent the Council declares certain language versions as the official versions of a legal instrument, the European Union must be bound by that decision and make the content of its norms clear in all language versions equally. In line with this, the Turkish speaking population in Germany has no right to demand that all legislation be enacted in Turkish. However, if Germany chose to do so, its Turkish speaking population could demand that these official versions reflect the content of a norm. In the same way, where the European Union chooses a multilingual regime, it is his responsibility to ensure a harmonious sound, rather than a disconcert.

(bb) Legal Certainty: Resolving Incoherence in European Jurisprudence

As we have seen above, the judgments handed down by the European Court of Justice are incoherent with respect to the role of a particular language version in the multilingual European legal system. No European citizen may be subject to a norm that has not been published in his official language (*Skoma-Lux*). But this does not apply where a language version has been published, but does not state what the other language versions do (*Kurcums Metal*). Assuming that all language versions *de jure* state the same, this very formal approach to legal certainty may be theoretically plausible. However, it reveals incoherence at the level of the member states where the missing language version has no influence on the validity of the legal instrument. Instead, the member states remain bound by the legal instruments as determined by all the published language versions. The content of the norm must then be determined according to the language versions which are available at the time excluding the one which is missing. The missing version has therefore no influence and can only be regarded as a translation, rather than an authentic version of that legal instrument. If this is true, we must ask why a language version that has no bearing on the content of a norm should be relevant for the application of the norm, even if this irrelevant version is missing. The only way to give any relevance to the missing language version, which can at the most be marginal, is to assume that a new norm is created by the publication of the missing language version.

Although the most prominent cases we have looked at concern the accession of new member states from Central and Eastern Europe, the European Court of Justice has based its judgments expressly on an individual right based on the principle of legal certainty and non-discrimination. The particular circumstances of the cases gave the court an opportunity to discuss this legal question, but did not set the boundaries for its decisions. We may therefore use these decisions as a basis for a more general analysis. The remaining incoherence, as described above, may only be resolved, if the European

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Court of Justice follows through on the individual's right to invoke a particular language version against the content of a norm.

(cc) Compliance with European Standards of Interpretation

The model complies with European standards of interpretation. The model keeps the principle of equal authenticity of all official versions. It does not give one particular language version preference over the others, which is what the European Court of Justice always seemed to have feared. For interpreting the norm, i.e. for establishing content, all official languages remain equally authentic. It is only in a subsequent step that the national judge must assess whether the norm so established is reflected in a language version invoked by the defendant. A language version with no actual bearing on the content of the norm may at the second step actually have a protective effect for the individual. The language versions known by an individual set the boundaries for that individual's criminal punishment in his particular case.

The uniform application of European union law is not at risk, either. It is only in particular cases where the application of the European norm is inhibited by a more restrictive language version. However, let us be clear: individual cases can in the aggregate severely affect uniform application across Europe. Judges might also be tempted to skip the first step, i.e. establishing the content of the norm based on all official languages, and dispose of such cases easily by assessing legal certainty solely on the basis of the language versions that the judge can understand. Nevertheless, we should note that the proposed model does not change the interplay of the European Court of Justice with the national courts. The European Court of Justice would retain its mandate to determine the content of European norms, while the national courts remain responsible for applying these norms. The differences brought about by the model lie within the delicate relationship between interpretation and application of the law. In the past, the European Court of Justice has at times used a very broad notion of interpretation which was largely oriented at the circumstances of the particular case.[43] Going forward, the model would not stop the European Court of Justice from continuing to tighten its grip on European interpretation in the same way. But let us not forget that the European Court of Justice has also acknowledged the duty of national courts to assess the legal certainty of European norms for the purposes of criminal punishment. The uniform application of European union law, also as it embodies the institutional interests of the European Court of Justice, is therefore not at risk.

3. Determining the Appropriate Standard

Adopting the model leads to the follow-up question which language versions should really matter.

43 For a recent example see the case of ECJ, 18.6.2013, case C-681/11 (*Schenker*), margin no. 43.

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(a) Skoma-Lux: Native vs. Official Language of the Member State

As a starting point, let us look at the judgment in the case of *Skoma-Lux*:

> *"(38) The Court has held that the principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies (…).*
> *(39) In addition, it would be contrary to the principle of equal treatment to apply obligations imposed by Community legislation in the same way in the old Member States, where individuals have the opportunity to acquaint themselves with those obligations in the Official Journal of the European Union in the languages of those States, and in the new Member States, where it was impossible to learn of those obligations because of late publication."*[44]

Suppose we accept the reasoning of the European Court of Justice, which language version really matters? In paragraph 38, the court perplexingly combines the term "official language" with the notion of "those to whom it applies". It is difficult to make sense of this statement because an official version rarely concerns individuals, but rather a member state or at least a public authority. Even the term "to whom it applies" seems odd since the legal instrument in question was a regulation not directed at an individual, but rather at the general public all across Europe. This imprecision is exacerbated in other language versions of this judgment.[45] To give sense to this paragraph, we should assume that the court referred to those individuals to which the regulation was to be applied in the case at hand.

This plausible interpretation of the judgment is put into question by the following paragraph. There, the European Court of Justice abandons the perspective of the individual by not referring to his native language, but to the languages of the member states instead. Presumably, the court means languages which are at the same time official languages of a member state and of the European Union. The argument of equal treatment also supports the view that it is the official language of a member state that matters because the court seems to be concerned with the different application in different member states. A Czech company operating in Germany will therefore be required to take notice of the German language of a European legal instrument, rather than the Czech language.

The ambiguous wording by the European Court of Justice allows for both interpretations. In the case of *Skoma-Lux*, it was obvious that this would be the Czech version because it involved a Czech company in the Czech Republic and a Czech proceeding. This may explain why the language of the court is far from clear.

44 ECJ, *Skoma-Lux* (fn. 32), margin nos. 38 et seq.

45 The German language version refers to the „Adressat" of the Regulation, thereby strongly suggesting that it is directed at a particular individual. For a Dutch view, cf. *H. van Eijken/M. Verhoeven*, Nederlands tijgschrtift voor Europees recht 2008, p. 171.

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(b) Language of the Criminal Proceeding

As a first point of reference, it seems obvious to look at the official language of the member state conducting a criminal proceeding. The criminal court, the prosecution and the criminal defence will find it easy to assess whether the content of a norm is foreseeable under the principle of legal certainty because the standard is the language with which they work on a daily basis. Any other standard would severely inhibit the efficiency of criminal justice. It will be much harder for a German criminal court to determine whether the Romanian language appropriately reflects the content of the norm. The court would have to hear legal and linguistic experts and would incur seemingly unjustified costs in the process of criminal adjudication. The European Court of Justice recognizes that judicial efficiency may be severely inhibited by a duty to assess legal certainty in all official languages.[46]

There is also a risk of allowing national courts to use their own official language as the basis for assessing legal certainty. As described above, judges may find it more convenient to simply apply the language version they can understand before going through the trouble of looking at all official language versions. But this issue ties in with the general dilemma of enforcing multilingual norms. The judgment in *Skoma-Lux* proves that the European Court of Justice is ready to accept this at least in certain cases.

(c) Language Skills of the Defendant

(aa) Native Language

While resorting to the official language of the member state conducting a criminal proceeding may be efficient, it does not necessarily serve the interests of the individual. Let us suppose a Danish is tried in France. He would suffer two disadvantages. First, he would be confronted with a different standard of legal certainty compared to a trial in Denmark. But why should the legal certainty of a European norm depend on where criminal trials are conducted and therefore on a certain element of chance?[47] Second, the Danish would also be at a disadvantage compared to a French standing trial under the same circumstances because for the latter, legal certainty would actually be assessed based on the language that he can understand. If European law accepts an individual right to invoke a particular language version, it must be the one the individual can understand. This solution also embraces free movement of European citizens across all European countries. Figuratively speaking, the individual could take a particular language version with him regardless of where he goes in Europe.

46 Opinion of Advocate General *Kokott* v. 18.9.2007, case C-161/06 (*Skoma-Lux*), [2007] ECR I-10841, margin no. 82.

47 See *Zimmermann*, Strafgewaltkonflikte in der Europäischen Union, 2014, pp. 70 et seqq.

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(bb) Additional Languages

Additional languages may play a role in two ways. First, it may extend the individual's right by allowing him to invoke more than one language version. Second, it may limit the individual's right if we regard him as obliged to take notice of language versions he can understand.

To put the first question in other words, may the Danish in our example invoke the English version of a legal instrument in a criminal proceeding in France? Maybe he is for professional reasons more familiar with the English version, rather than the Danish one. With each additional language version of which the individual takes notice, the individual actualizes this European principle of equal authenticity of all language versions. The English version is not just directed at individuals who speak English as their native language, but instead to all European citizens. Against this background, it makes no sense to limit the right to invoke a particular language version. This idea finds further support in the right to communicate with the European institutions in any of the official languages. Note that this right does not restrict the individual to use his native language, but instead allows him to choose really any of the official languages. The right to invoke a particular language version does not stop at an individual's mother tongue.

However, procedural efficiency would severely suffer, if we allowed the individual to invoke just any language version. He would then pre-emptively just claim a violation of all language versions, regardless of whether there was any merit to this claim. The courts would easily be overwhelmed with the amount of linguistic issues that they would need to establish before they could convict a defendant. In the aggregate, such a right may therefore threaten the efficient application of European law. Such a broad notion of this right is not necessary to protect the individual from discrepancies between language versions. The individual should only be allowed to invoke those language versions which the individual may legitimately claim to have understood. We should not expect him to prove a business fluent command of that language, but we certainly do not have to check the norm against a language of which he has no knowledge. Any discrepancy in these language versions remain uncharted territory from his perspective and they do not need to be explored in his particular case.

Having established that the right to invoke a particular language version is limited in scope to those language versions the individual can understand, should we hold it against him if he understands a language version that truly reflects the content of a norm? Turning again to our example, may the Danish still invoke the English version, if the Danish version reflects the norm correctly? The principle of legal certainty, by itself, would not require to grant the individual more than one language version to learn the true content of the norm. In a domestic context, we also merely require that the language version enable the individual to take notice of the norm and we do not ask for the purposes of legal certainty whether the individual actually does. In the European context, however, we should not forget that it is the European legislator's responsibility to ensure precise drafting in all official versions. In the spirit of Euro-

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pean integration, we should not remove incentives for learning additional languages by holding official versions against the individual.

(d) Burden of Proof for the Defendant?

It will be up to the national rules of criminal procedure to decide how the individual will invoke a right to a particular language version. From the European perspective we take here, a few general observations should suffice. The term "invoke" must not mislead. Generally speaking, the defendant is not responsible for presenting certain facts to the court's attention or for invoking certain rights. It remains for the prosecution and the courts to find the truth and to take notice in their own motion of all facts that prove the defendant's guilt or innocence. This includes the question whether the principle of legal certainty prevents the application of a European norm in the defendant's particular case.

The model described above does not impose a duty on the defendant. Rather, it charges the defendant with taking responsibility in his own case to a certain degree. The court's duty to establish the truth cannot go beyond the facts that present themselves. While it is obvious to check the European norm against the language in which the criminal proceedings are conducted or which a citizen of the defendant's nationality and origin speaks, the court will not necessarily have knowledge to establish whether the defendant speaks more languages. It is his responsibility to claim the principle of legal certainty in these circumstances and the court would have to follow such a lead. This approach protects the court's efficiency and the individual's rights at the same time.

IV. Conclusion and Outlook

Under European Union law, as established by the European Court of Justice, the individual does not have the right to invoke the wording of a particular language version, if that language version does not reflect the content of the norm. By separating the standard of interpretation for assessing legal certainty from establishing the content of a norm, one may sufficiently protect the individual without touching the accepted standards of interpretation for European Union law.

Some follow-up questions remain which exceed the scope of this article. In particular, we will need to look at how differing language versions should be treated under the principles of guilt and *mens rea*. It also requires further analysis how the criminal law systems of the member states address the issues presented in this paper.[48] In cooperation with the European Court of Justice, they will have to reconcile their domestic legal principles with the need to integrate on a multilingual basis.

48 The author has addressed these issues in *Langheld*, Vielsprachige Normenverbindlichkeit im Europäischen Strafrecht, 2016, passim (accepted by the publisher).

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