Research paper on Cross-task analysis: “The practical linguistic barriers faced by economically active EU citizens”

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List of abbreviations used

CJEU	Court of Justice of European Union
EU	European Union
IPR	Intellectual Property Right
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Multilingualism shapes the European cultural identity as well as its legal system. Nonetheless, some aspects of the EU's plurilingual character do not simply represent a cultural enrichment, but are also of crucial importance in dealing with the exercise of European citizenship rights and may turn into practical hindrances to their full enjoyment. At the same time linguistic diversity in Europe is constantly increasing due to mobility and new immigration phenomena, and to the strengthening of individual and collective language rights (also linked to the protection of national linguistic minorities, such as, for instance, parity of languages, right to use one's own language in oral and written relationships with the public administration and with judicial authorities, etc.).

This Deliverable aims to provide a systematic survey of the linguistic barriers arisen from the multilingual drafting of EU law, as well as from some national contexts with specific reference to the exercise of EU citizens' economic rights.

From the latter perspective, the research will describe how a lack of a clear linguistic policy might transform the regulations of language use into barriers to the effectiveness of EU citizens' rights. The analysis is carried out from a comparative and interdisciplinary perspective and deals with, on the one hand, the linguistic obstacles affecting the main fields of survey on economic rights chosen by the project (professionals, consumer rights and IPR) and, on the other hand, some specific linguistic barriers autonomously highlighted by national reports as particularly challenging in a given Member States.

1. INTRODUCTION

This Deliverable is based on a comparative research aimed to analyse the various barriers to the exercise of EU citizenship rights deriving from linguistic diversity within the European Union.

Although the main focus is on the obstacles to the enjoyment of economic rights, the complexity of functions performed by language, from both a private and public perspective, inevitably requires an interdisciplinary and comparative approach. Barriers deriving from EU linguistic diversity indeed affect the realization of a variety of EU citizenship rights, whose protection, mutual influence and even rivalries need to be properly considered.

Problems involved in the assessment of linguistic barriers are even more complex to deal with when the analysis is carried out at the EU level, due to the very nature of the European Union, to its multilingualism and to its peculiar context. The latter is indeed characterized by a multi-layered language regulation, where the impacts of national, supranational and regional linguistic rights, linguistic needs and language policies on EU citizens' rights are strongly interconnected.

From this perspective, multilingualism plays an important role in shaping the European cultural identity and the legal system of the European Union, also considering that language is a fundamental tool to foster citizens' participation in society. Linguistic rights and policies are therefore of crucial importance within the European Union as regards both its sources of law and the exercise of citizenships rights.

Moreover, a given linguistic barrier may be grounded – at the national as well as at the EU level – on the need to protect a given fundamental right or a specific public interest.

It is furthermore worth considering the increase of linguistic diversity, due to mobility and to new immigration phenomena within the EU, as well as the strengthening of individual and collective language rights, such as those of linguistic minorities.

Assuming that many linguistic obstacles, even though legally and politically addressed, are likely to continue to exist and should be properly managed rather than eliminated, this research will also show that the implementation of language policies and a balanced relationship among all the rights concerned need to be systematically assessed and

constantly adapted to new developments. Linguistic diversity indeed imposes new challenges to EU law in order to avoid disproportionate obstacles deriving from linguistic requirements.

Against this background, this Deliverable aims at describing how a lack of a clear linguistic policy might transform the regulations of language use in economic and social fields of the different Member States into barriers/limitations to the effectiveness of EU action. To properly outline the various issues raised by linguistic diversity the research addresses – through a bottom-up approach mainly based on national reports – a number of intricate and multi-faceted issues. It will separately analyse linguistic barriers deriving from EU multilingualism (i.e. the EU institutions perspective) and linguistic barriers deriving from EU mobility (i.e. differences among Member States language regulations affecting EU citizens' rights).

As far as economic freedoms are concerned, examples will be taken from the three main case studies adopted within the Project, and namely professional qualifications, consumer rights and IPR.

Aiming at reflecting upon the role of language policies, the research will assess the various linguistic obstacles through the distinction between legal and factual barriers. This peculiar distinction is meant as a tool to better understand the ground of a given barrier. Besides the analysis of the specific reasons behind a linguistic barrier, the abovementioned distinction is indeed aimed to understand which linguistic obstacles can – and should – be overridden, and those that can only be mitigated.

A methodology combining empirical and interdisciplinary research, together with the theoretical framework is therefore followed. One example of such a research method is the factual approach[1]. Unlike the traditional and positivist approach, which identifies law simply as the product of the official sources of the law of a given legal system, this methodology of comparative law science assumes the existence of a plurality of other legal rules and institutions, which are active components – "formants" - and contribute to the actual feature of this legal system. Among those components, praxis as well as other factual situations – having a political, sociological or cultural origin – are observed too.

[1] R. Michaels, The Functional Method of Comparative Law, http://www.academia.edu/413629/The_Functional_Method_of_Comparative_Law

The analysis will thus be able to suggest some policies that EU Institutions may consider in copying with different categories of linguistic barriers towards the exercise of EU citizens' rights.

2. LINGUISTIC DIVERSITY AND LANGUAGE POLICIES: AN OVERVIEW

Linguistic diversity is a fact of private and public life within Europe and therefore within the EU legal system.

Multilingualism as well as multiculturalism is nowadays more and more characterising social communities and is of particular relevance in the European Union, where a plurality of official languages coexists and are constantly confronted with other traditional, historical and local languages at the national level. Moreover, the phenomenon of "new" linguistic minorities is gaining social importance and legal attention.

Some features of the multilingual character of the European Union, while representing a cultural enrichment, are also of crucial importance in dealing with the exercise of the European citizenship rights and may turn into practical hindrances to their full enjoyment, if not properly managed.

The European Union is certainly not the first legal system that has had to deal with multilingualism. Nonetheless its linguistic diversity is highly peculiar from a comparative perspective.

First of all, linguistic diversity itself is a crucial aspect distinguishing the European Union experience from that of other federal States, such as, for instance, the United States of America or Germany. Multilingualism raises in fact potential obstacles unrelated to other federal legal systems. Furthermore, EU multilingualism is characterised by a larger amount of languages compared to other countries that have had to deal with linguistic diversity before (notably Canada, Switzerland, Belgium, and South Africa).

The models of managing social, economic, political, and legal multilingualism applied in these legal systems, although helpful from a comparative and theoretical perspective, need to be punctually adapted to the specific features of linguistic diversity in the European Union, as well as to the peculiar nature of its legal system and of its regulatory competences, which inevitably raise more intricate and multi-faceted challenges. The different aims and scope of EU language policies shall be considered too, despite some similarities with that of other multilingual legal systems.

From a strict linguistic perspective, while other States are characterised either by one widely shared dominant language or by a relatively limited number of official languages, the European Union lacks a broadly shared language and has to deal with 24 official EU languages, 6 semi-official ones, 39 minority languages, and at least 7 main immigrant languages such as Turkish, Arabic, Chinese, Hindi

and Russian. The languages to which, on a direct or indirect way, the EU legal system is confronted are therefore more than 75.

From a legal perspective, in the European Union the relationships between language (or languages) and institutions have autonomous and sometimes even unique features. The peculiarities of the EU legal system and its primacy over national law thus determine a peculiar interlace between the rules concerning official languages and those regarding competences. As far as the European Union is concerned, the regulation of linguistic issues is also a matter of balance (and even rivalries) of different levels of governance.

Under the principle of conferral, laid down in Article 5 of the Treaty on European Union, the EU can acts only within the limits of the competences that Member States have conferred upon it in the Treaties (notably in Articles 2-6 TFUE), whereas competences not conferred on the European Union remain with EU Member States. Within these limits, the use of competences is based on the principle of subsidiarity and proportionality. The first one is aimed at ensuring that decisions are taken as closely as possible to the citizen. Accordingly, except for areas falling within the EU exclusive competence, regulations and actions at EU level are justified only if more effective that those taken at the national, regional or local level. Moreover, according to the principle of proportionality, EU actions should not go beyond what is necessary to achieve the aims of the Treaties.

The abovementioned interlace between language(s) and competences is essential in shaping the background against which the rivalries between different levels of language policies, and between different rights and categories of EU citizens as potential sources of linguistic barriers shall be assessed.

According to the division laid down in the Treaties, the competences of the European Union – being limited by both the competences and possibilities available at the national, regional or local level – do not specifically cover all fields in which linguistic diversity may turn to be a concrete barrier for its citizens or for migrants.

Rules concerning the use of language, including the choice of one or more official languages (which has a direct influence on the status of that language also within the EU) and the legal tools protecting linguistic rights remain within competences of the Member States. In many cases linguistic and cultural issues are indeed linked to needs arising from the national context, concerning national identity or the protection of specific individual and collective rights, such as, for instance, the recognition, protection and promotion of national linguistic minorities.

2.1 OFFICIAL LANGUAGE POLICIES: SOME COMPARATIVE REMARKS AND POSSIBLE EFFECTS ON EU CITIZENS' RIGHTS.

From a comparative perspective, Member States differ not only in the choice as to the official status of one or more languages, but also with reference to the source of law in which that choice is embedded.

Some Member States apply a single official language policy without territorial exceptions, notably France, Greece, Bulgaria, Estonia, Latvia, Lithuania and Poland. Other Member States has instead a multiple official language policy, although in many cases only one language prevails.

In Ireland, for instance, English is the largely predominant language although under the Irish Constitution the first official language is Irish, which prevails in cases of conflicts between legal texts. Similarly in Malta, English in a co-official language but Maltese remains the predominant language (which also prevails in case of conflicts between linguistic versions). In the Republic of Cyprus, Greek is the only language used although also Turkish is an official language according to the Constitution. Also the Finnish Constitution provides for two official languages (Finnish and Swedish), but Finnish largely prevails.

Other Member States apply more complicated official language policies based on a single official language and on the recognition of territorial exceptions. This model characterizes Austria, Croatia, the Czech Republic, Germany, Hungary, Portugal, Romania, Slovakia, Slovenia, Sweden and the United Kingdom[1].

Within this broad category, some Member States show a peculiarly articulated linguistic regime, where the protection of minority languages leads to the status of co-official languages in certain regions and is generally linked to specific framework for local autonomy. Spain and Italy are a case in point, but this model characterizes – although with different intensity – also Denmark and the Netherlands[2].

[1] For a more detailed analysis on these models see, among others, S. van der Jeught, *EU Language Law*, Europa Law Publishing, Groningen, 2015, 36 ff.

[2] The specific protection of some national minorities as a source of, on the one side, differences between EU citizens' categories and levels of language protection and, on the other sides, possible linguistic barriers, will be further analyzed below. On the different models of minority protection see also R., TONIATTI, *Minorities and Protected Minorities: Constitutional Models Compared*, in M. Dunne and T. Bonazzi (eds), *Citizenship and Rights in Multicultural Societies*, Keele, Keele University Press, 1995, pp. 195-220.

Among these models Belgium and Luxembourg represent two unique experiences. In particular, Belgium is a State with three official languages, i.e., Dutch, French and German and four linguistic regions, although these languages are not formally co-official in the entire territory of the country. In the Dutch-speaking Region and in the French-speaking Region formally a sole language policy is applied. In Luxembourg French, German and Luxembourg have an official status but a hierarchy between these languages nevertheless exists[3].

National policies belonging to a common model however differ as to both the sources of law defining the language use and the level of protection of linguistic rights. In some countries the tenets of the language policy are protected on a constitutional basis, whereas in other legal systems the official status and the recognition of minority languages is grounded on statutory laws and on courts decisions. Conversely, Member States adopting opposite language policies do share a lack of constitutional provisions on the use of language.

The legal equality of the three Belgian official languages is for instance enshrined in the Constitution[4]. In Spain, Castilian is the only official language in the entire territory, while other three languages, namely Basque, Catalan and Galician are co-official languages in certain autonomous provinces. This framework is protected on a constitutional basis (Article 3 Spanish Constitution)[5]. In Italy, where some minority languages also have a co-official status linked to the peculiar autonomy

[3] On these models see again S. van der Jeught, op. cit., 42 ff.

[4] For a more detailed analysis on the Belgian legal system, see for instance, A. GERLACHE, J. VAN DE LANOTTE, M. UYTTENDAELE, S. BRACKE, G. GOEDERTIER AND COENEN A., *La Belgique pour Débutants. Le Labyrinth belge: guide pratique'*, La Charte: Brugge, 2014, pages 27-29, 31,38-40 ; DEJEMEPPE B., *'L'affaire Wesphael: lost in translation'*, 25 February 2016. The article is available on the website Justice en ligne at < http://www.lalibre.be/archive/la-justice-leve-les-conditions-de-liberte-de-bernard-wesphael-561e4e2c35700fb92fb41e23>; IRURITA DÍEZ DE ULZURRUN I., *La Compleja Realidad Lingüística Belga y la Organización del Estado*, University of Navarra, in *Revista Jurídica de Navarra* 2003 (35), pp. 173-193; DE WIT K., 'Regulatory frameworks in higher education governance policies, rights and responsibilities Belgium: Flemish Community', 11th November 2006, accessible at <http://www.ond.vlaanderen.be/eurydice/monographies/Flemish.htm>.

[5] On the Spanish legal system see for instance REVISTA LLENGUA I DRET, years 1983-2016 (Language and Law Journal). Available at http://revistes.eapc.gencat.cat/index.php/rld *ARZOZ*, XABIER (2009), "Language rights as legal norms", ... five normative models of language rights",*European Constitutional Law* Review, No.6, 2010; EDORTA COBREROS MENDAZONA La normativa sobre el euskera publicada en.. (1986 - 2015) (*Legal rules regarding euskera published in..1986-2015*), Revista Vasca de Administración Pública, 1987.-2015; LÓPEZ CASTILLA, A (DIR) (2013) Lenguas y Constitución Española (*Languages and Spanish Constitution*), Valencia: Tirant lo Blanch; FABEIRO FIDALGO, P. (2013) El derecho de usar y deber de conocer las lenguas en la Constitución española de 1978 (Right to use and duty to know the languages in the Spanish Constitution), Madrid: Iustel; MILIAN-MASSANA, A. (ed.) (2012), *Language law and legal challenges in medium-sized language communities: a comparative perspective*. Barcelona: Institut d'Estudis Autonòmics; MILIAN I MASSANA, A, (2016) Más sobre derechos lingüísticos, (More about linguistic rights), Valencia:Tirant lo Blanch; PLA BOIX, A. M. (2005), El règim jurídic de les llengües a l'Administració de Justicía (Languages' legal scheme and Judicial Power), Barcelona: Institut d'estudis autonòmics; TURELL, M. T. (ed.) (2007), *El plurilingüismo en España (The plurilinguism in Spain).* Barcelona: Institut Universitari de Lingüística Aplicada; VERNET, J. (ED.)2003 Dret lingüístic (Linguistic Law), Barcelona: Cossetània.

acknowledged to a specific region, neither the official status of Italian nor the rules concerning the use of language are enshrined in the national Constitution. Nonetheless, the official status of Italian can be gathered from the "basic law" of the Trentino-Alto Adige/*Südtirol* Region and the Provinces of Trento and Bolzano[6], which is the main source of South Tyrolean autonomy, as well as of the protection of the German minority and of the status of German as the co-official language (together with Italian and Ladin) in that Province. This statute has the same legal value as the Constitution. The same applies to the co-official status of French in the special autonomous Region Valle d'Aosta/ *Vallée d'Aoste*[7].

Denmark has only one official language (Danish), whose status is nevertheless not protected on a constitutional basis[8]. The same applies in the Netherland for Dutch. Also the Greek Constitution is silent as to the official status of Greek.

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[6] The so-called Autonomy Statute, "Statuto di autonomia" in Italian, "Autonomiestatut" in German. For a general overview of the case of South Tyrol, see for instance, J. WOELK, F. PALERMO, AND J. MARKO (EDS), *Tolerance through Law. Self Governance and Group Rights in South Tyrol*, Leiden and Boston MA, Martinus Nijhoff Publishers, 2008.

[7] The protection of other historical minorities is instead laid down in a statutory instrument: Framework Law no. 482 of December 15, 1999. See, for instance, F. PALERMO AND J. WOELK, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Cedam, Milano, 2011. From a more general perspective, on the various issues related to minority protection in Italy and from a comparative viewpoint, see for instance, TONIATTI R., *La democrazia costituzionale repubblicana*, in CASONATO C. (ED.), *Lezioni sui principi fondamentali della Costituzione*, Turin, Giappichelli, 2010, pp. 35-81; ID., *Il Trentino quale laboratorio del diritto delle diversità: Le «piccole minoranze» come minoranze garantite*, in J. WOELK, S. PENASA, F. GUELLA (a cura di), Minoranze linguistiche e pubblica amministrazione, Padova: CEDAM, 2014; J. Woelk, F. Palermo, and J. Marko (eds), Tolerance through Law. Self Governance and Group Rights in South Tyrol, Leiden and Boston MA, Martinus Nijhoff Publishers; Woelk J (2007), From Compromise to Process: The Implementation of the South Tyrolean Autonomy, in M. Boltjes, Implementing Negotiated Agreements: The Real Challenge to Intrastate Peace, Den Haag, T.M.C. Asser Press157-176; De Vergottini G., 1995, Legal Rights, the New Minorities and Multiculturalism in Contemporary Italy, in M. Dunne and T. Bonazzi (eds), op. cit., pp. 169-194; Pizzorusso A., 1967, Le minoranze nel diritto pubblico interno, 2 vols, Giuffré, Id., 1975, Il pluralismo linguistico in Italia fra Stato nazionale e autonomie regionali, Pacini; Id (2001), La politica linguistica in Italia, il caso della Provincia di Bolzano e la legge di attuazione generale dell'art. 6 della Costituzione, in J. Marko, S. Ortino, and F. Palermo (eds.), *L'ordinamento speciale della Provincia Autonoma di Bolzano*, Padova, CEDAM, pp. 101-138.

[8] On the Danish legal system, see for instance, HETMAR, T. AND NORMANN JØRGENSEN, J. (1993) Denmark, *Sociolinguistica*. Volume 7, Issue 1, Pages 79–89, NORMANN JØRGENSEN, J. (2009), Hvor slemt står det til med dansk sprog? [Is the Danish language having a bad time?] *Sproglæren* 3/2009, pp. 18-19, NORMANN JØRGENSEN, J. AND HOLMEN, A. (2005), Teaching Majority and Minority Mother Tongues in Denmark, in Tulasiewicz, W., Adams, A. and Tulasiewicz, W. (eds.) *Teaching the Mother Tongue in a Multilingual Europe*, Continuum, pp. 153-161, RITZAU, U., KIRILOVA, M. AND NORMANN JØRGENSEN, J. (2009), Danish as a Second Language: attitudes, accents, and variation, in Maegaard, M. et al. (Eds.*), Language Attitudes, Standardization and Language Change: perspectives on themes raised by Tore Kristiansen on the occasion of his 60th birthday*. Oslo: Novus forlag, pp. 255-271, SCHOVSBO, J., ROSENMEIER, M. AND PETERSEN, C. S. (2015), *Immaterialret* [Intellectual Property Law], 4. Udgave, Jurist- og Økonomforbundets Forlag, LINDGREEN, N., SCHOVSVO, J., AND THORSEN, J. (2012), *Patentloven med kommentarer* [Danish Patents Act with Commentaries], Jurist- og Økonomforbundets Forlag, SUNDHEDSSTYRELSEN (2013), Ansættelse af sundhedsfagligt personale – gode råd og præciseringer

The official status of a language or its importance at the national level have an impact also on the related status at the EU level.

While the Treaty languages are laid down in Article 55 (1) TEU, under Article 55 (2), the Treaties "may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory". Spain, for instance, used this possibility with reference to Catalan, Basque and Galician.

Moreover, besides the EU official languages closely related to Member States' national language, some regional languages may gain a status as semi-official language of the European Union upon an administrative agreement between the Council and the requesting Member State. This has been the case of Catalan, Basque, Galician, Welsh and Scots Gaelic. According to these agreements, EU citizens speaking these languages have the right to use them in written communication with EU institutions.

The status of official language inevitably leads to some differences as to the exercise of linguistic rights for citizens' belonging to communities whose language is recognised at the national as well as at the EU level. Both the implementation and enforcement of language policies for non-official languages may be indeed more difficult if compared to those of languages having an EU language status. This difference therefore affects both the exercise of specific linguistic rights and the language requirements that can be imposed at the national or even at the European level to protect a given language[9].

The impact of these issues on minority protection and on cross-national matters will be further analysed below. With reference instead to the EU institutions, it can be first of all underlined the difference between Treaty language status and EU official and/or working language.

The declaration to the EU of which language or languages are to rise to the status of EU Treaty language depends on the Member State concerned. Nonetheless this discretionary power is not unlimited. It has been argued that from Article 55 (2) TEU can be gathered that the protection of the additional languages (which are not national official languages, enjoying official status only in the part of the national territory concerned) is lower. Indeed all Treaty languages are currently languages

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<stps.dk/en/sundhedsprofessionelle-og-myndigheder/autorisation,-anerkendelser-og-selvstaendigt-virke/soeg-autorisation-udenlandsk-uddannet/laege>.

[9] More specific examples will be given *below* with reference to the rivalries of rights and of levels of language protection within Europe.

used in the law-making processes and in the relationships with public authorities at the national level, throughout the whole national territory and not only on a regional or local level[10].

Moreover, as far as the EU citizens' rights are concerned, it is important to note that the official or working language status can be granted by the Council only to Treaty languages.

In this perspective, it is interesting to compare the Irish and Spanish experiences. While the request made by Ireland in 2004 as to the official and working status for Irish (at that time only Treaty language) has been accepted, a similar request made by Spain as to a limited recognition as EU languages of all the languages enjoying official status on some regions of its territory has been refused. The argument of the Presidency of the Council is telling about the practical effects of the abovementioned differences highlighted from a comparative perspective:

"When the Council makes use of the competence conferred upon it by [Article 342 TFEU], it must respect [Article 358 TFEU], which lays down the list of languages in which the Treaty is drawn up and is authentic. Thus, in the exercise of the remit conferred on it by [Article 342 TFEU], the Council may choose all or some of the languages mentioned in [Article 358 TFEU], but may not depart from the list and choose languages which are not mentioned in it. To do so, an amendment of the Treaty would be necessary"[11].

With specific reference to the relationship between EU law and national language competences or even linguistic national identity two examples from the National Reports are worth to be mentioned. On the one hand, in France the issue of the incorporation of a provision regarding the French language in the national Constitution arose from the public debate related to the entry into force of the Maastricht Treaty and to the need for protection of the French linguistic identity. Consequently, article 2 of the French Constitution has been emended adding the provision according to which "The language of the Republic shall be French"[12].

On the other hand, at the EU level a parliamentary question has been submitted in 2002 to the Commission concerning the proposal to amend the Constitution by declaring Italian the official

[10] S. van der Jeught, *op. cit*., p. 110 and fn. 6.
[11] Note 9506/2/05 from the Presidency to the Permanent Representatives Committee, also quoted by S. van der Jeught, *op. cit*., at 114.
[12] For more detailed see for instance the C. Lageot, *French language system: between protection and obstacles*, in S. De Vries, E. Ioriatti, P. Guarda, E. Pulice, *Legal and factual barriers to the exercise of EU citizens economic rights*, Elgar Publishing, fortcoming.

language of the Republic at that time discussed by the Italian Parliament[13]. Making specific reference to the amendment of the French Constitution, the question was framed from the standpoint of the protection of linguistic diversity: *"Does the Commission consider that this proposal is compatible with the recognition of cultural and linguistic diversity guaranteed by the Treaties? Does it not agree that the Europe of the citizen includes effective protection of all languages? Will it be asking the Italian Parliament and government for information?"*. The issue of incompatibility with EU law was mainly based on the fact that "a similar constitutional amendment in France has made it legally impossible to recognise what are known as "minority" or "regional" languages in the French Republic".

The European Commission, after having declared its awareness of the amendment of the Italian Constitution, is clear in clarifying that "Each Member State has sole competence to determine the provisions of its own constitution as regards the definition of its own official language(s)"[14].

2.2 Language policies between EU law and Member States.

The answers given by the Commission to parliamentary questions concerning the protection linguistic minorities are telling also about the balance between the two levels of competences for language policies.

A specific issue arose in 2011 from the teaching in Catalan/Balearic in the Balearic Islands. Starting from the fact that education in the Catalan/Balearic language appeared to be in retreat according to the statement made by the regional president of the Balearic Island, the question stressed that the Association Obra Cultural Balear had called on the government of that islands "to act 'responsibly' when adopting new laws on language or amending the existing ones, in line with the Law on Language Normalisation which was adopted unanimously" many years before by the regional parliament. The question made also reference to the 2007 Report of the Commission's High Level Group on Multilingualism according to which under the heading 'Bilingual communities as good practice laboratories': "Bilingual communities comprised of speakers of regional or minority languages and of majority languages are good practice laboratories relevant to the EU's aim of promoting multilingualism across the Union". In that case, reference was specifically made to the know-how acquired in bilingual schools in the Basque Country, Galicia, Catalonia, Balearic Islands and the Valencian Country "where sophisticated methods of language immersion and special teacher training programmes had been in place for decades". The question was then framed as follows:

[13] E-0887/02 - OJ C 205 E, 29/08/2002 (p. 232).
[14] Answer given by Mrs Reding on behalf of the Commission (7 May 2002): OJ C 205 E, 29/08/2002 (p. 233).

1. Does the Commission believe that a retreat of this kind is in keeping with the spirit of the European Charter for Regional or Minority Languages or the 2007 report of its own High Level Group on Multilingualism?

2. What measures will the Commission take to ensure that the inhabitants of the Balearic Islands continue to enjoy the same guarantees and facilities of access for minority languages as other European citizens?[15]

The answer of the Commission stresses the role played by the EU in developing a policy to support language learning and linguistic diversity. Since 2002 the Commission works indeed "in close cooperation with Member States" towards the aim of "enabling citizens to communicate in two languages in addition to their mother tongue". Accordingly, "Member States are invited to offer in their curricula the possibility to choose among a wide range of languages, including official, regional, minority and migrant languages".

The answer makes also reference to the communication of 2008 'Multilingualism: an asset for Europe and a shared commitment', in which the Commission while respecting the principle of subsidiarity "invites Member States to promote multilingualism ... as an effective means to bring the increasing variety of languages and cultures in the EU closer to the citizens and to overcome language barriers". Despite these policies and the structured dialogue pursued by the Commission to further promote multilingualism, the answer clearly stresses that "legal competences with regard to language policy and the use of languages remain under the sole responsibility of the Member States". Consequently also "the legal framework on linguistic diversity offered by the European Charter for Regional or Minority Languages falls under the responsibility of the Council of Europe"[16].

Also with reference to written question P-3875/09 by Edit Bauer (PPE) to the Commission on "restriction of the use of a national minority language in a Member State", the Commission (while underlining the respect for the rights of persons belonging to minorities, including the respect of the principle of non-discrimination, as one of the principles on which the EU is founded, and the respect for linguistic and cultural diversity enshrined in Charter of Fundamental Rights of the European Union) stressed that "There is no Community law regulating the use of languages within the Member States, nor does the Treaty provide powers for the adoption of such provisions. The Commission can only act if an issue is related to the application of EC law. This might be the case, for example, where a national provision on the use of languages constituted an unjustified barrier to the free movement

[15] OJ C 128 E, 03/05/2012.
[16] Ibid.

of workers or other citizens". Consequently "The Member States remain the decision-makers with respect to their internal language policy, including regional and minority languages, for which the Council of Europe's European Charter for Regional or Minority Languages provides a comprehensive framework"[17].

Within this division of competences, the analysis of linguistic barriers needs to consider that the concept itself of language policy is not a stable one since it very much depends on the social, linguistic, political and legal order in the relevant Member State and, related to this, on historical developments. The variety of approaches from which linguistic barriers may derive is therefore connected to the structural conflicts inherent in European legal pluralism.

From a comparative perspective, some features common to most Member States can nevertheless be discerned.

Language policies are first of all influenced by history[18]. In this context, the Italian model of linguistic protection in South Tyrol is a case in point. A full understanding of the deeply-rooted importance of language in the Bolzano Province requires reference to the historical origin of the need for such strong protection for language groups and, namely, to the "deep-rooted historical trauma"[19] suffered by the German-speaking people during the fascist period20. As a consequence, many provisions of the current framework for South Tyrolean autonomy, above all those regarding linguistic rights, may be considered a strong reaction to previous cultural and linguistic discriminations and were meant to counterbalance the deep disproportion between the two language groups generated by fascist policies[21].

[17] OJ L 180, 19.7.2000, p. 22.

[18] Also from the EU perspective, analysing the history of language fragmentation, linguistic identities and language regulations in Member States means to analyse the history of Europe itself. S. van der Jeught, *op. cit.*

[19] See J. Woelk, *From Compromise to Process: The Implementation of the South Tyrolean Autonomy*, in M. Boltjes, *Implementing Negotiated Agreements: The Real Challenge to Intrastate Peace*, Den Haag, T.M.C. Asser Press, 2007, 157-176.

[20] After the annexation of South Tyrol by Italy (1918), the fascist policy was indeed characterised by a total disregard for minority rights, a strict prohibition of schools, trade unions, political parties and even personal names in the German language and by a forced Italianisation of the whole population of the Province. Thus the German language was eliminated from the public administration and, more generally, from any official, political and even educational context.

[21] See for instance PULICE E., *South Tyrol's Autonomy after the Conflict Settlement. Compromise, Power Sharing, and the Rights of Language Groups*, in F. Andreatta ed E. Castelli (eds.), *Solutions and Failures in Identity-based Conflicts. The Autonomy of Trentino-South Tyrol in Comparative Perspective*, FBK Press, 2014, 75 ff.

The Belgian framework for the use of languages is another clear example of how a language policy can be shaped by history[22].

Furthermore, the protection of national minorities represents an international obligation to respect and guarantee fundamental rights. International law plays indeed an important role in defining the boundaries of a language policy. According to the main legal documents of the multilevel protection which, similarly to other fundamental rights, characterises minority linguistic rights language groups shall be granted rights in certain fields, such as the education system, the relations with judicial and administrative authorities, public services, media, cultural activities and facilities, economic and social life[23].

National language policies therefore regulate a wide range of issues protecting linguistic rights – although with an intensity which varies from one State to another – in both the public and private domain.

The principles that generally sketch the basic framework for national language policies in multilingual contexts are territoriality, equality of languages, private freedom and the already mentioned minority protection.

Freedom of use of language, the principle of (language-) territoriality and the principle of equality of languages are expressly embedded in the Belgian Constitution, in many Titles. Linguistic barriers and/or language facilities that national citizens as well as EU citizens might encounter in Belgium are therefore closely linked to how these principles are balanced.

Also in Italy, many language communities coexist since a long time, although with different dimensions, different territorial distribution, and different legal status. The principles of recognition and non-discrimination characterize the Italian framework for linguistic minorities protection, together with that of territoriality, although not expressly embedded as such in the Italian Constitution as in Belgium. The specific protection and promotion of a minority language is granted within the territories (Regions, provinces or municipalities) where the related language community is established.

[22] See above fn. 4.
[23] See, among others, F. Palermo and J. Woelk, *op. cit.*.

In some cases the protection of a national minority is the premise for territorial self-government. For instance, the main features of the current South Tyrol case are equality of all citizens irrespective of their language group and wide autonomy granted to the two Provinces (South Tyrol and Trentino): territorial self-government and protection of national minorities are therefore combined. The same applies to the bilingual Region Valle d'Aosta/Vallée d'Aoste.

Spain is another case in point. Its multilingual context is based on a dual structure made up of a monolingual centre and bilingual regions with their 'own language' that co-exists with Castilian[24]. Six out of 17 autonomous communities (Basque Autonomous Community and Navarre, Catalonia, Balearic Islands, the Valencian Community, and Galicia) have two official languages (their own language – Basque, Catalan or Galician – and Castilian) and autonomous law-making competences in this policy area. In bilingual regions, both languages are equally protected.

As this deliverable will further underline below, on the one hand, these principles play an essential role also at the European level and often affect the exercise of economic freedoms throughout Europe. On the other hand, EU integration and mobility policies may impact on the balance between them at the national level. This is mainly due to the complicated – and to some extent even paradoxical – relationship between the principle of language diversity and that of EU integration.

In the beginning, at the EU level, according to the pragmatic and economic aims of the founding fathers, European language policies were merely linked to Member States' identity and sovereignty. The ECSC Language Protocol of 1952 is still the basis of EU language policy.

Nevertheless and early on the European Union started to recognise and regulate linguistic diversity, especially through a policy of multilingualism based on the equal status of the European official languages (since article 217 of the E.C. Treaty and Council Regulation No 1 April 15, 1958 on the rules governing the languages to be used by the institutions, then amended according to the enlargement of the European Union).

The European Union also introduced the principle of respect for linguistic diversity, expressly embedded in the Charter of Fundamental Rights of the EU and now also in the Treaties. Moreover, EU law grants at least one specific linguistic right: the citizens' right to write to the EU institutions in each of the EU's official languages.

[24] See above fn. 5.

According to Article 24 TFEU: “Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language”

Other legal provisions protecting linguistic diversity as a fundamental EU value are:

Article 22 and 21 of the Charter of Fundamental Rights of the EU (proclaimed at the Nice European Council on 7 December 2000), that starting from the Lisbon Treaty enjoys the same legal status as the Treaties:

- Art. 21 (Non-discrimination) : “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

- Art. 22 (Cultural, religious and linguistic diversity): The Union shall respect cultural, religious and linguistic diversity.

Article 3 TUE: The Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced”.

The respect for minority rights as human rights is also enshrined in the Treaties, notably in Article 2 TUE: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”.

It is also emphasized that “These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

The principle for respect for the person and openness toward multiculturalism are also expressed in the Preamble to the TUE: “drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”.

Furthermore, according to Article 165(2) TFEU: "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity". Moreover Union action shall be aimed at "developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States".

Before turning to the rivalries characterizing some linguistic issues, the aims and basic tenets of the EU language policies will be briefly discussed first.

The EU grants first of all language equality and the principle of non-discrimination on linguistic grounds, as embedded in the mentioned Treaty provisions. All Member States' languages are equal as regards the authenticity of linguistic versions of EU sources of law, and as to the right of EU citizens' to choose the language for written and oral communication with the EU institutions.

At the same time, EU language policies are aimed at European integration, mobility and social cohesion. They are moreover market oriented. The aim of market integration requires indeed a plurilingual workforce to grant the effectiveness of the Single Market. Moreover, plurilingualism helps in strengthening the competitiveness of EU economy and is instrumental to promote and enlarge employment and business opportunities.

Just to give a few examples of the wide range of situations affected by language issues we may consider not only the free movement of workers, but also multilingual information for services providers and users, cross-border economic relationships and litigation, recognition of professional qualification and so on.

As already mentioned, precisely the difficult balance between these policy aims (language diversity and equality on the one hand, and integration and unity on the other hand) is a constant feature of the rivalries characterising the linguistic barriers that will be further analysed in specific field of citizens' economic life.

With reference to the case-law perspective, language equality as well as the comparison between different linguistic versions of a EU acts are clearly stated by the CJEU.

For instance, in the CILFIT case[25], the Court held that national courts must assess the possibility to refrain from submitting the question to the Court of Justice, taking upon themselves the responsibility for resolving it, based on the characteristic features of Community law and the particular difficulties to which its interpretation gives rise[26].

From this viewpoint "To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States".

In the KIK case[27] the Court also stressed that

"multilingualism is an indispensable component of the effective operation of the rule of law in the Community legal order, since many rules of primary and secondary law have direct application in the national legal systems of the Member States"(para 60 in the judgement).

Issues related to the multilingual drafting of EU law and to the related interpretative concerns will be further analysed below (Chapter 2).

With more specific reference to EU citizens' economic rights, it must be stressed that also the recruitment procedure must in principle be in all EU official languages.

Nonetheless, the principle of language equality is not absolute, nor a stable one. Two judgments of the CJEU are particularly telling about barriers deriving from linguistic diversity that are likely to continue to exist.

[25] Par. 8 of the CILFIT case - Case 283/81. Judgment of the Court of 6 October 1982. - Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. - Reference for a preliminary ruling: Corte suprema di Cassazione - Italy. - Obligation to request a preliminary ruling.
[26] On this issue see Chapter 2.
[27] C-361/01 P - Christina Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).

The already mentioned Kik v OHIM case is an appeal against the decision in which the Court of First Instance dismissed an action for annulment of a decision rejecting an application for registration of a Community trade mark on the ground that it did not indicate a choice of a "second language". The sources and principles at stake were the validity of Article 115 of Regulation No 40/94 on the Community trade mark, the rules governing languages of the Office for Harmonisation in the Internal Market and the principle of equal treatment. The CJEU, dismissing the appeal, emphasized that although the Treaty contains several references to the use of languages in the European Union, those references "cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances" (para 82 in the judgement). In that particular case the restricted language regime is held not to infringe the principle of equality of languages.

In a more recent case (Italy v. Commission (C‑566/10) - 27 November 2012) the Italian Republic sought to have set aside the judgement of the General Court of the European Union of 13 September 2010 in Joined Cases T-166/07 and T-285/07 by which the General Court dismissed the actions brought by the Italian Republic seeking annulment of the notices of open competitions to constitute a reserve pool of Administrators. As to the background of the dispute, it must be considered that on February 2007, EPSO, the European Personnel Selection Office, published notices of open competition only in the English, French and German editions of the *Official Journal of the European Union*.

Moreover candidates were obliged to have a thorough knowledge of one of the official languages of the European Union as the main language and a satisfactory knowledge of English, French or German as the second language, which had to be different from the main language. The written tests were to be taken in English, French or German.

As to the publication of the competition notice, the Court held that

"In any event, even if those amendments contained a certain amount of information concerning the competition, proceeding upon the assumption that citizens of the Union read the *Official Journal of the European Union* in their mother tongue and that that language is one of the official languages of the European Union, a potential candidate whose mother tongue was not one of the languages of full publication of the contested competition notices would have had to obtain that journal in one of those languages and read the notice in that language before deciding whether to apply to take part in one of the competitions" (para 73 in the judgement).

Such a candidate had therefore “a disadvantage compared to a candidate whose mother tongue was one of the three languages of full publication of the contested competition notices, both with regard to the correct understanding of those notices and concerning the period of time to prepare and send an application to take part in those competitions” (para 74 in the judgement).

That disadvantage is the “consequence of the difference in treatment on the ground of language, prohibited by Article 21 of the Charter and by Article 1d(1) of the Staff Regulations, which is caused by those publications” (para 75 in the judgement). Consequently, the practice of restricted publication “does not observe the principle of proportionality and amounts, therefore, to discrimination on the ground of language, prohibited by Article 1(d) of the Staff Regulations” (para 77 in the judgement).

As to the second language for participation in the competitions and tests, the Court stressed that “the rules limiting the choice of the second language must provide for clear, objective and foreseeable criteria so that the candidates may know, sufficiently in advance**,** what the language requirements are and can prepare to take part in the competitions in the best possible circumstances” (para 90 in the judgement).

Accordingly, the CJEU set aside the judgment of the General Court of the European Union of 13 September 2010 in Joined Cases T-166/07 and T-285/07 and annulled the notices of open competitions.

Besides the differences of the two situations brought in front of the Court, it is however worth underlining that by the latter judgment the CJEU, while admitting that specific language proficiency can be imposed, stressed the limits of a recruitment policy based on only three languages. From that decision an implicit suggestion to the EU institutions to take a formal decision also on the policies regulating working languages can be gathered.

Indeed from a factual standpoint, restricted internal language regimes characterize the working within EU institutions, bodies and agencies. Although this may be considered as a legitimate need deriving from the difficult balance between diversity and unity, a case-by-case approach is anyway not sufficient to ensure legal certainty. This is therefore likely to turn into further barriers to EU citizenship rights.

The principle of non-discrimination as closely linked to language equality also raises conflicts between EU law and national provisions. With specific reference to the language regime protecting

national linguistic minorities, analysed in this Deliverable, the Bickel and Franz judgment as well as the Grauel Rüffer are worth to be mentioned [28]. Both cases dealt with the rules granting the right to have criminal (the former) and civil (the latter) proceedings conducted in German in the Province of Bolzano/Bozen (South Tyrol, Italy).

Since this possibility is granted only to Italian citizens residing in South Tyrol, the provisions turn to measures treating German-speaking citizens of other EU Member States less favourably. Consequently, they infringe the principle of non-discrimination protected by EU law.

From the legal pluralism and multilevel governance inherent in the EU legal system derives therefore: on the one hand, that language policies pursued by national or regional authorities may infringe EU economic freedoms; on the other hand, that the complicated balance between diversity and integration at the EU level affects the already sensitive balance between the variety of needs, interests and actors shaping national language policies.

The following paragraph is focused on some cross-cutting themes that, while characterizing all kinds of barriers analyzed during the project, can be specifically highlighted also with specific reference to language issues, and namely: the coexistence of different concepts of citizenship and rivaling categories of citizens, levels of rivalries deriving from the multilevel language regulation, and rivaling rights resulting from or imposing linguistic requirements.

[28] CJEU Judgment of 24 November 1998, Bickel and Franz, case C-274/96 and CJEU judgment of 27 March 2014, Grauel Rüffer, case C-322/13.

3. EUROPEAN RIGHTS AND MULTILINGUAL LEGAL DRAFTING.

3.1 LEGAL TRANSLATION: A BRIEF INTRODUCTION.

If the relation between language and law is studied within a multilingual context such as the European Union, the connection between the formulation and then translation of law appears to be unshakeable.

Although translation analysis has gained dignity as a scientific discipline within the field of legal studies, the history of legal translation is still not a systematic or thorough area of investigation. Scholars of legal translation feel that the incomplete information that is usually contained in the initial chapters of their works is due to the lack of an in-depth historic analysis of the discipline[29]. The absence of historic notions does not necessarily mean that translation was not used in the past in the legal field[30]. Translation was in fact quite often employed, for various reasons, going from cultural to practical, as well as in commercial agreements. Nevertheless, until the end of the 1800s translating law was still considered a rather secondary form of activity in systems where there was actually only one main language, like in the United States, or even in Europe where many cultures and legal jargon coexisted[31].

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[29] An example is the introduction in chapter two of the work of S. ŠARČEVIĆ, *New Approach to Legal Translation,* Kluwer Law International, 2000, p. 23. Furthermore, among the few sources available: J. DELISLE, *Les traducteurs dans l'histoire* (dir.), préface par Jean-François Joly, 2e éd., Ottawa, Les Presses de l'Université d'Ottawa, 2007.
Within this rather unexplored scientific panorama we must highlight the volume published by G. L. BASTIN, P.F., BANDIA, *Charting the Future of Translation History*, University of Ottawa Press, 2006, which aims to elevate the history of translation as an independent discipline. Contra: Harvey, according to whom legal translation cannot be considered independent from the scientific field of specialized translation: M. HARVEY, *What's so Special about Legal Translation*?, in *Meta: Journal des traducteurs / Meta: Translators' Journal,* vol. 47, n° 2, 2002, p. 177.

[30] Nevertheless, some experiences are unanimously considered to be the first examples of legal translation that we have notion of today.
The *Hammurabi Code*, which took its name from the Babylonian King who ruled from 1792 to 1750 B.C, was found in Ancient Mesopotamia. It was written in Akkadian and gathered a whole range of laws that were partly the translation of the Ur-Nammu code which was written in Sumerian about three hundred years before[30]. Another example is the well-known peace treaty stipulated between the Egyptians and Hittites around mid 1200 B.C. The two versions of this document were written using hieroglyphics and cuneiform and were found in different parts of Egypt, as well as in Hattusa, the Hittite capital. The documents were then translated in various other languages.
A further example of old translation models is Martin Luther's *Sendbrief vom Dolmetschen*, 1530, a signed letter in which Luther explains his approach to his famous translation of the Bible in German; moreover, the work of Pierre-Daniel Huet, *De optimo genere interpretandi* ("*On the best kind of translating"*), which dates back to 1683.

[31] For an outlook on the main legal languages: B. POZZO, M. TIMOTEO M., *Europa e linguaggi giuridici,* Giuffrè, 2008.

Thus, in the XIX century, when legal concepts and systems were being drafted on the European continent, most laws came from Roman law and although expressed in various languages, they still maintained a universal character. Concepts were meta-juridical and always remained the same across borders[32], although passing through different cultural and linguistic barriers. Translation was thus considered a simple instrumental activity, since it was a means to clarify one unique concept in different languages. Law was translated in a sort of "objective" manner in which the text had only one meaning that was guaranteed by the value of the concept expressed by words, although in different languages.

The fact that legal experts have now abandoned this idea has given translation the chance to enter the legal world as an activity which involves a great degree of thinking and consideration, and not just as the act of finding the already existing word in a different language. This happened through time as concepts were no longer considered to be unique and objective due to the fact that the meaning of law also depends on who interprets it and on the cultural background a certain taxonomy belongs to[33].

If the whole cultural context between the XIX and XX centuries has strongly affected the role of legal translation, other phenomena have also contributed to enhancing its visibility and importance not only for jurists but also for non-experts: we here refer to globalization, as well as to the participation of States in supranational legal organizations and to projects for the creation of a single legal language common to a number of legal systems[34]. If it is true that legal translation dates a great deal back in history, it is also true that scholars' attention to this discipline has been attracted, due to the fact that around the world there are contexts in which law is drafted in more than one language. Legal multilingualism has in fact contributed to the visibility legal translation techniques, particularly as the choices of a bilingual or multilingual legislator are not a simple act of translation but actually have legal effects, since the laws produced are enforced and effective.

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[32] R. SACCO , *Dall'interpretazione alla traduzione*, in E. IORIATTI FERRARI, *Interpretazione e traduzione del diritto,* Cedam, 2008.

[33] Among the elements that concurred in abandoning the idea that a text has only one meaning, it is important to remember the structural linguistics of Ferdinand De Saussurre and the hermeneutics of Gadamer and Esser, *Ibidem.*

[34] This project in particular was the object of special attention for the European Commission and resulted in the Common Frame of Reference (CFR), but it is also matter of discussion in the Asian area where considerations regarding the unification of Asian languages is also becoming more important and valid. See the forthcoming proceedings of the meeting held in Bologna (Alma Mater Studiorum, Faculty of Law) on18th February 2016, "*Comparing Legal Languages and Creating Common/Uniform Terminologies*", organized by the Confucian Institute.

In general, legal scholars tend to emphasize the role of translation, that is considered not only as an essential technique integrated in the drafting process[35], but also a tool to harmonize and reduce multi-language complexity to a common meaning[36]. However, it is well known that the multilingual normative process in the EU is so specific that it cannot be sufficiently explained by the traditional criteria for legal translation theory, such as the function of legal texts[37]. As we will see, the EU of rules in all the official languages – which is to guarantee full equality for all of the official national languages of the European Member States [38] - are composed by terms and texts which are standardized and repeated in each language [39]. Such a technique may be applied in a fairly repetitive way, but it is also reasonably flexible; this allows the EU terminology to be extended to potential new languages, as well as to accumulate standard groups of terms and blocks of texts.

As based on such a pragmatic technique of EU law formulation, it is worth considering whether or not the European Union is also favouring the proper formulation of *rights* at the European level, as well as providing practical solutions[40]. Particularly, the core of the question is whether the EU is able, through the multilingual drafting to extend the same rights to all EU citizens, to formulate, enforce and even communicate the same rule to all EU citizens. Thus, does multilingualism really favour the integration of EU citizens in the European Union by giving to all of them - regardless of the national origin and language - the same concrete capacity of being aware and possibly of enforcing their EU *rights*?

3.2 LEGAL DRAFTING AND MULTILINGUALISM.

The choice of multilingualism[41] in legal drafting is not new: nowadays, more and more laws are being made by international or supranational institutions and are therefore increasingly produced in

[35] C. ROBERTSON, EU Legislative texts and Translation, in CHENG L., SIN K.K., WAGNER A. (eds.), The Ashgate handbook on legal translation, Ashgate, 2014, p. 155.
[36] S.E. POMMER, *Interpreting Multilingual EU Law: What the Role of Legal Translation*? in *European Review of Private Law*, 2012, p. 1245.
[37] ŠARČEVIĆ, *New Approach to Legal Translation, cit.,* p. 5.
[38] A. MILAN- MASSANA, *Le régime linguistique de l'Union Européenne: le régime des institutions et l'incidence du droit communautaire sur le mosaïque linguistique européenne*, in *Riv. Dir. Europeo*, 1995, p. 487.
[39] ROBERTSON, *EU Legislative texts and Translation*, cit., p. 155.
[40] Since the very beginning of the European Economic Community the EU has regulated the European linguistic diversity through a policy of multilingualism (Art. 217 of the E.C. Treaty and Council Regulation No 1 April 15, 1958). Within this policy, the legislator introduced the right of EU citizens to communicate with the EU institutions in each of the official languages. The possibility of multilingual communication with the EU institutions is not only a practical solution, but a real "core" *right*, recognized even recently in the Lisbon Treaty (consolidated version of the Treaty on the Functioning of the European Union, arts 20, 24, 342).
[41] The reasons underpinning multilingualism are the principle of equality of the languages and the exigency of ensuring democratic participation within the process of European integration. On a practical level, both these

several languages. The methods of drafting multilingual law can be quite varied[42], as well as the ways in which familiar problems of bilingualism or multilingualism have been managed by different experiences of normative pluralism around the world[43].

The norm formulation in more than one language needs the application of specific drafting techniques, in order to grant the transmission of the same legal concepts and legal effect in the different language versions.

Indeed, the main side back of multilingual law is that of the interpretation and application of the norm by the courts. As the law is drafted in different languages, the content of the norm might be interpreted in various ways, according to the different language versions.

When it comes to legal words, it is easy to understand that the problem is even more complicated and difficult to be solved than the ones occurring in the ordinary language. Legal terms are not related to an object, to a material referent, but are cultural concepts. Their meaning largely depend on the context in which there are supposed to produce their legal effect, as the interpreter – namely the judge – will attach to the concept a meaning that is compatible to his/her own legal culture and education.

The level of the difficulties of interpretation and application of multilingual law by the courts varies according to the number of languages involved, as well as to the characteristic of the legal system involved (bilingual, multilingual as well as bi - jural or multi - jural).

Canada, for instance, consists of five English speaking common law provinces, one bilingual civil law province (Quebec) and four common law provinces, that are bilingual to varying degrees (New Brunswick, Manitoba, Ottawa and Saskatchewan)[44]. At the federal level legislation is based on the common law tradition and officially bilingual, as being that of the two territories under the federal jurisdiction (Yukon and the Northwest Territories)[45]. Therefore, Canada not only is bilingual (French, English), but also a bi-jural (or bi – legal) legal system, as it has two different jurisdictions, the common law and the civil law one.

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needs are expressed in the duty to draft the community acts – particularly directives and regulations – in all the official languages of the Union. See R. CRAUFURD SMITH (ED.), *Culture and European Law*, Oxford, Oxford University Press, 2004.

[42] See ŠARČEVIĆ, *New approach to legal translation,* cit. On the difference among co - drafting, parallel drafting and bilingual drafting see P. A. CRÉPEAU, *La transposition linguistique*, in G. SNOW, G. J VANDERLINDEN (DIR.) *Français juridique et science de droit*, Bruxelles, Bruylant, 1995.

[43] S. FERRERI, Law, *Language and Translation in a Multilingual Context*, in *King's Law Journal,* vol. 25, issue 2, 2014, p. 271.

[44] ŠARČEVIĆ, *New approach to legal translation,* cit., p. 41.

[45] *Idem.*

Under the pressure to improve the quality of legislation and favour the harmonized and correct application of its law, the Canadian legal system has become highly specialised in the techniques of multilingual drafting at both the academic and practical levels[46].

However, also in Europe there are several examples of bilingual or multilingual legal systems. Of course, Switzerland is a well-known multilingual legal system, but within the EU Member States, three very interesting examples are Italy, Belgium and Spain.

3.3 TRANSLATION AND NATIONAL BILINGUAL LEGAL DRAFTING: THE CASE OF ITALY.

The legal regime for bilingualism (*bilinguismo normativo*) in Italy, which refers to the duty to draft the law in two languages, concerns two Italian regions: the Alto Adige/South Tyrol and the Valle d'Aosta.

The legislative procedure in the Province of Bolzano and the South Tyrol Region is a bilingual, Italian/German one; Ladin does not enjoy the special status reserved for the German language, and therefore the duty to draft the Provincial and Regional laws in that language is confined to those acts which are of relevance to the Ladin community[47] . In Valle d'Aosta the legislative procedure is Italian andFrench.

In both Regions, the drafting process regarding bilingual law involves institutions and experts who can guarantee the quality of the drafting, the translation and the correspondence of legal terminology adopted in both languages.

So far as the legislative procedure is concerned, the texts of laws and regulations in Valle d'Aosta are drafted predominantly in Italian and subsequently translated into French by translators working within the *Service de promotion de la langue française* [48].

In the South Tyrol, a key role in the legislative procedure is assigned to the *Ufficio Questioni Linguistiche* of the Province of Bolzano (Provincial office for languages), which represents an important step in the legislative process: this office not only deals with the translation of texts into

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[46] See A. LABELLE, *What ever happend to Legislative Translation in Canada?* in Statute Law Review, 2016, p. 133-143. F. OST, *Le droit comme traduction*, Québec, 2010. M. BASTARACHE, *Bilingual interpretation rules as a component of language rights in Canada*, in P. TIERSMA, L. SOLAN, *The Oxford Handbook of Language and law,* Oxford University Press, 2012, p. 159 ff.

[47] Translation is the competence of the Ufficio Questioni Linguistiche della Provincia di Bolzano (Provincial office for language). It is interesting to note that Ladin does not possess a legal language of its own: this is formed by the creation of numerous neologisms, which are often calques of Italian. The concepts of "contract" and "regulation", for instance, are translated by "contrat" e "regëlamont". Ladin terminology is collected in the BISTRO data bank.

[48] Regional Law (Legge regionale) no. 62 of 24 August 1982.

German or Italian – in the past the majority of acts were drafted in Italian and then translated, but nowadays the two languages are used in the draft – but also of the legal/linguistic correspondence between the two texts. Translation takes place before transmission to the *Consiglio Provinciale*, which has the competence to approve and enact statutes. The translation process is difficult and causes significant delay in the legislative process. Also because of these difficulties the *Ufficio Questioni Linguistiche* works in close cooperation with the *Commissione Paritetica di Terminologia* (Terminology Commission), set up under article 6 of Presidential Decree no. 574 of 1988[49].

According to its own internal regulations (art.1) the Commission has a duty to establish, in binding form, German equivalents for legal, administrative and technical terminology of every kind, where it already exists in Italian, as well as defining, in the case of adoption of new terms, the corresponding expressions in both languages.

The Commission therefore has a double function; on the one had it fixes "in binding form" [50] the corresponding German terminology for Italian legal, administrative and technical terms. On the other hand, its work involves the creation of neologisms.

In both cases it substantially involves guaranteeing the reliability of the translation. Lawmakers can impose a new concept through a neologism, without having to develop a definition setting out all aspects of the type; at the same time, it is in a position to guarantee that the legal sense of the two terms is equivalent, leaving aside their correspondence from a linguistic point of view [51].

In coining neologisms, the Commission adopts two techniques: forming calques and making paraphrases. The first involves creating a calque from a term in the original language, translating a simple lexical item literally or a phrase formulated originally in Italian. For instance, the term "*decreto ministeriale*" (ministerial decree) was translated as "*Miniserialdekret*". It is interesting to note that the creation of neologisms is often preferred to using a corresponding concept which already exists in the German, Austrian or Swiss German variants of specialized legal language. This is the case with the Italian expression "*decorrenza del termine*", which is translated with the neologism "*Ablauf del*

[49] Under article 6, the Commission is made up of 6 experts, three are mother-tongue German and two Italian

[50] The terminology approved by the Commission has the force of law, under art 6 (3) & (37) of DPR 574: "Legal acts must be drafted adopting the terminology set out by the Commission (art. 6); failure to do so constitutes an infringement of law (art. 37)".

[51] R. SACCO, P. Rossi, *Introduzione al diritto comparato*, Utet, Torino, 2015. The institution of trusts is a well-known example, governed by the 1992 Quebec Civil Code; the bi-lingual French/English code identifies the institution as "trust" in the English version and "fiducie" in the French version. In the form of legal French used in Quebec, a trust is a "fiducie", despite the fact that the concept "fiducie" in the legal French used in France refers to an institution which is different from a trust

First", despite the fact that German civil law has the concept of "*Firstablauf*". Conversely paraphrases involve composing a new term using several words: an example would be the translation of the Italian expression "*atto conservativo*" as "*Rechtshandlung der Wahrung*" [52].

This method of drafting law in the South Tyrol often results in the creation of a neologism in German, in order to transpose concepts belonging to the Italian legal tradition into German. In this way a South Tyrol–German legal language is created, which is partially different to the other systems using the German language (Germany, Austria, Switzerland)[53].

The context in which the Italian courts operate, where legal bilingualism applies, is quite different if compared to Canada or, as we will see, to the European Union.

In the first place, in the South Tyrol as well as the Valle d'Aosta, bilingual drafting concerns institutions – and therefore concepts – of Italian law, which will be applied within one single legal system, namely the Italian one, and are merely expressed in legal language which is not only Italian, but German and French respectively.

In addition, the issue of divergent interpretation between the two language versions in the South Tyrol has been addressed at the legal level. Art. 99 of the above mentioned regulation provides that the Italian text prevail over the German one. That is, in case of doubt over interpretation, the Italian text is the authentic one. Art. 76, Abs Gemeindeordnung, provides an example, where the term "*legge provinciale*" (Provincial Law) has been translated using the German term "Regionalgestetz" (Regional Law).

Conversely in the Valle d'Aosta, the original, authentic text is the one in which the law was drafted, and this is the language version to which the court must refer for the purposes of interpretation.

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[52] See for these examples A. MATTUZZI, *Tecnica legislativa: esperienze nazionali e regionali*, Dissertation, Trento, a.a. 2006/2007, p. 43. The authors of the deliverable would like to thank Mrs. Mattuzzi for having authorized the citation of the examples.

[53] The South Tyrolean legal terminology is collected in a specific database, BISTRO http://www.eurac.edu/en/research/projects/ProjectDetails.html?pid=1757 established at EURAC the European Academy of Bolzano/Bozen http://www.eurac.edu/en/eurac/welcome /default.html , working in close collaboration with the Terminology Commission (Commissione Paritetica di Terminologia). EURAC develops tables of legal terminology– http://dev.eurac.edu:8080/index/31_TerKom_en.html

In the South Tyrol as well as the Valle d'Aosta, differently from what happens for example in Canada[54], there is no legal norm imposing to the court to take into account both the linguistic versions for interpretation. The meaning of the norm does not have to be discovered on the basis of both languages and as a consequence it will not necessary coincide with the "common meaning" of the two versions; as a consequence, in Valle d'Aosta the court will be inclined to consider one version of the original text and the other one a simple translation, and to think that the first one would reflect more precisely the legislator's line of reasoning.

In South Tyrol despite the recent shift from Italian also to German as a drafting language, Italian remains dominant. A hierarchy between the two versions is provided by the law, as the only authentic text for interpretation is the Italian version. When the terminology in the two languages diverges, the Italian version prevails. The provision concerning interpretation in South Tyrol is certainly consistent with the fact that provisions are expressed also in German, but are part of the Italian legal system. As a consequence, in general, the "other version" is not taken into consideration, but the judge will refer to it for example in case of doubt, as in most part of the cases the second version will confirms the meaning of the norm based on the Italian text.

Therefore, even if the legislation if drafted in more than one language, the judge, in case of doubt, is required to refer to one of the two language versions, in the case at issue, the Italian language version. As a consequence, any possible conflict within two language versions is solved at the origin, not only because the Italian version will always take precedence on the German (or French one) one, but also because the Italian concepts are part of a traditional taxonomy and legal tradition – the Italian legal system – and therefore the judge will have a consolidated legal culture as a background, supporting him in his interpretation activity. Even if not officially regulated, the situation is similar in Valle d'Aosta, where the justice is not required to make reference to both the language versions.

3.4 Translation and national bilingual legal drafting: Belgium and Spain.

Language rights in Belgium are based on the territorial principle adopted in the linguistic legislation of 1931[55] and enshrined in the Constitution of 1970. Belgium is therefore divided into four linguistic regions: the French-speaking region, the Dutch-speaking region, the German – speaking one and the bilingual regions of Bruxelles.

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[54] See P. A. COTE, *L'interprétation des teste législatifs bilingue au Canada*, in R. SACCO (ed.), *L'interprétation des texts juridiques rédigés dans plus d'une langue*, cit., p. 7 ff

[55] ŠARCEVIC, *New Approach to Legal Translation*, cit., p. 49.

As to the technique and quality of legislation, originally Dutch was a language of translation; as a consequence, style, syntax and terminology of legal Dutch were more French than Dutch for many years. However, according to the opinions of translators and expert at the Court de Cassation, the quality of legal translation in Dutch has improved over the time[56].

The German translation of the Law is also published in the Moniteur Belge/Belgisch Staatblad in a reasonable period of time after the publication of the Law in French and Dutch[57]. According to Šarcevic, having learned from the experience of the Flemish colleagues, German speaking translators of Belgium try to produce German translation that read like German, even if this language of the law is still in the phase of development[58].

As noted in the Belgian report, two important federal laws regulate the duty of Belgian judges to take into account the plurality of languages when interpreting and applying the law: the Law of 15 June 1935 on the use of language in judicial matters[59] and the Belgian Judicial Code of 10 October 1967 in its second part regarding the judicial organization[60] in Belgium (articles 58 to 555*quinquies*).

The legislation, and thus the regulation in Belgium of the use of language in judicial matters is based on the following main principles[61]: unilingualism of the judicial actions and proceedings[62], the territoriality principle for procedures in the Dutch-French-speaking region, the personality principle for procedures in Brussels and peripheral communities, the principle of freedom of the use of language for the citizens and the mandatory nature of the language legislation.

In Belgium the duty of judges when interpreting and applying the law in a context of plurality of languages is closely related to the knowledge of languages that is asked from judges[63]. According to Law of 15 June 1935 in Chapter VI on the judicial organization and the knowledge of language by the judges/magistrates, juries and judicial clerks all judicial actors must have a perfect knowledge of the language of the place where they are appointed: as a consequence the unilingualism and the

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[56] *Idem*, p. 51.

[57] The publication of laws in German is governed by the law of 21 April 2007 governing the publication in German laws and royal decrees and ministerial orders of Federal origin..

[58] ŠARCEVIC, *New Approach to Legal Translation*, cit, p. 53.

[59] Loi du 15 Juin 1935 concernant l'emploi des langues en matière judiciaire / Wet op het gebruik der talen in gerechtszaken. Moniteur Belge / Belgisch Staatblad of 22 June 1935. The Law entered into force on 15 September 1935.

[60] Code Judiciaire du 10 Octobre 1967 - Deuxième partie: L'organisation judiciaire (article 58 à 555quinquies) / Gerechtelijk Wetboek - Deel II: Rechterlijke organisatie (art. 58 tot 555quinquies). Moniteur Belge / Belgisch Staatblad of 31 October 1967. The Law entered into force on 1 November 1970.

[61] Thus listed on the website 'de Vlaamse Rand' at < http://www.docu.vlaamserand.be/ned/webpage.asp?WebpageId=538>.

[62] This means that every trial, from the start to the execution of the judicial decision is conducted in (only) one language. It is the language of the seat of the Tribunal the one which determines the language to be used in the proceedings. See website 'de Vlaamse Rand' at < http://www.docu.vlaamserand.be/ned/webpage.asp?WebpageId=538>.

[63] See above fn 4..

principle of territoriality also apply to this fact. In addition, they must demonstrate knowledge of the other language of the country. The level of knowledge is tested in an exam[64].

In case of divergences between the French and the Dutch version of the law, the judge is invited to resolve the conflict applying the "will of the legislator", determined according to the ordinary rules of construction without the pre-eminence of one of the text on the other[65]. Therefore, linguistic divergences between the French and the Dutch version of the law are normally resolved by taking into account the rule expressed by the legislator, determined according to the ordinary rules of construction.

The solution applied in Belgium seems to be similar to that of Spain, where there are four official languages (Basque, Catalan, Galician and Castilian) even if only Castilian is the official language in the entire territory[66]. The other languages are co- official in certain regions, like the autonomous communities and as a consequence they are subject to a specific legal framework (art. 3 of the Spanish Constitution). In bilingual regions the two languages are equally official and law must be published in both Spanish and the respectively regional official languages. Both versions are official and equal; in case of discrepancy, there is no clear rule according to which the judge should interpret the words of the legal text. According to the Spanish report, it seems that if there were a discrepancy among different language versions, both should be taken into consideration by the judge and there is no a prevailing one[67].

Differently from Italy, courts in Belgium and Spain are supposed to preserving the unity of bilingual norms by comparing the parallel texts in both the language versions and finding which interpretation best achieves what the court imagines to have been the intent of the legislator.

3.5 EU MULTILINGUAL LEGAL DRAFTING.

It is a well-known fact that, unlike any other of the world's legal systems, as well as anyother international organizations, the European Union does not use only a few official languages, but all the – currently 24 – languages of its Member States.

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[64] An exam taken by SELOR, the selection office of the Federal Administration. See article 43*quinquies* of the Law of 15 June 1935 on the use of language in administrative matters.

[65] See article 7 of the Law of 31 May 1961 on the use of language in legislative matters, presentation, publication and entry into force of the laws and regulations.

[66] See above fn. 5.

[67] However, the Constitutional court has once taken into consideration the version in Euskera language, in order to clarify the Spanish one (Const. Court judgement, ES:TC 1988: 76).

As the European Union is a multilingual entity which relies principally on written sources for the production of its rules, EU primary and secondary law is always drafted and enforced in all the official languages too.

Thus, the ordeal of the European Union is certainly the most important global effort to create a common legal means of expression for a single legal system. Besides the political and democratic reasons which lead the Union to opt for a theoretical absolute multilingualism [68] on a purely technical basis, the core of the matter is how to take on the huge burden of mitigating and solving the tension surrounding the institutional translation of normative acts, in all of the 24 official languages of the EU, as well as its technical complexity.

Ever since the beginning the legal terminology of the European Union came into being through a specific mechanism of lexical creation, which chiefly consists of coining neologisms. Such coinages may be entirely new terms, or words which are already pre-existent in one of the languages and are adapted for use in EU law; from a semantic point of view, the terms remain in their original form, but acquire a new, European meaning. With this method, terms such as "directive", "regulation", "recommendation" and "subsidiarity" have first been coined in English - collectively referred to as "semantic neologisms"[69] - and later transposed to all the EC official languages. Common meaning, which is equally expressed in each of them[70] and derives from the fact of their simultaneous enactment and identical contents[71].

Thus, EU terminology is made of numerous neologisms, whose purpose, ideally, is to ensure that all the official languages have equivalent legal concepts available to them[72]: it is up to the judiciary to ensure that each text is interpreted and applied in accordance with the EU norm.

This aspect is shared by all the multilingual legal systems analyzed in this deliverable. However, the ways of resolving the most substantial problem faced by multilingual systems – application and interpretation of the law by the courts – are rather different.

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[68] S. VAN DER JEUGHT, *EU Language Law*, Europa Law Publishing, 2015.
[69] D. COSMAI, *Tradurre per l'Unione europea*, Hoepli, 2007, p. 30.
[70] This method is clearly based on a finction. According to Derlén's research, (M. DERLÉN, *A Castle in the air, The Complexity of the Multilingual Interpretation of European Community Law*, Umeå Studies in Law, 2007, p. 593), national judges almost mostly read the English and French versions only, together with their mother tongue one
[71] Starting from 1969 (Stauder case), the CJEU has repeated its call for a comparison of all language versions in over 30 years of judgment (see C.J.W. Baaij, Fifty Years of Multilingual interpretation in the European Union, in TIERSMA, SOLAN, *The Oxford Handbook of Language and law*, cit., p. 217 ff.
[72] F. BONN, *Les problèmes juridico-linguistiques dans les Communautés européennes,* in *Revue Générale de Droit International Public,* 1964, p. 708 ff.

From the very beginning of the story of the European institutions, discrepancies among language versions and doubts relating to interpretation have come up in the case law of the European Court of Justice, which has elaborated specific interpretative methods. The necessity of developing rules of interpretation respectful to all language versions is at the same time political and technical. It is a political necessity since the CJEU, by establishing the duty to look to all language versions in order to properly understand the EU rule, reinforces the principle of equal authenticity of all the languages, which is tied to the notion of the EU as a new legal systems under creation. It is also a technical necessity, as the CJEU has the task of ensuring the correct interpretation and application of primary and secondary Union law in the EU: difficulties of interpretation or discrepancies among language versions, which may impair the uniform application of EU law in the Member States, have to be solved through specific interpretation methods. Yet, the CJEU's choice is neither that of making reference to a sort of "original" language version (as in Italy), nor that of searching from the intent of the legislator (as in Belgium and Spain). Differently, the solution of the CJEU derives from the principle that language versions are meant to embody the original text and all of them contribute equally to a coherent and correct interpretation of the European law. Therefore, the national judge is required, in theory, to read all the language versions and to uncover the inteded meaning of the EU law concept.

In case of discrepancies among language versions, the CJEU has chosen different approaches. As noted by Ainsworth[73] the predominant interpretative strategy adopted by the EU court to solve case of divergences is a purposive approach, which most of the time is based on a teleological approach to discrepancies.

Moreover, language discrepancies are not the only barriers to the EU interpretation in the Member States. As noted above, the terminology of EU acts is largely composed by neologisms, as to say, new legal terms coined in all the 24 languages, which are not part of the legal terminologies of each Member States, or are somehow known by the national justices, as part of their legal culture and education.

National Courts must apply European Law, as expressed in the official legal language and which becomes the subject-matter of the interpretive process. So far as the national judges are concerned, the language of the law is viewed in isolation, with the result that to a certain extent the court takes a leap in the dark, since contextual referents for the interpretation of the terminology are lacking: legal language is inserted into a system of references and referents, which are recognizable by the

[73] J. AINSWOTH, *Lost in Translation? Linguistic Diversity and the Elusive Quest for Plain Meaning in the Law*, in L. CHENG, L. CHENG, K. K. SIN, A. WAGNER (eds.), *The Ashgate handbook on legal translation*, Ashgate, 2014.

legal community which the specialized language serves. The legal language of the European Union has a new lexis, still at the formation stage and unconsolidated. In thiscontext, which is both linguistic as well as legal, lies a recognized truth that the European Union is preparing the way for a new language, a specialized legal meta-language, which is not the expression of a pre-existing, common European legal culture. National courts cannot therefore rely on a legal cultural context for reference purposes and will therefore tend to refer to their own national context as a result.

The consequence of this mechanism is twofold.

On one side, EU legal terms lead rarely to the same legal result – in term of legal effects - in all the different EU legal systems. As concepts are interpreted and applied by national justices according to their own, national and cultural perception of the norm, EU law is not enforced uniformly in the Member States. This shortcoming is at the basis of a risk of failure of the European harmonization process.

Even more serious is the problem of how EU rules are drafted in different languages. As noted above, the EU legal terminology providing rights comes into being through coining semantic neologisms. Moreover, all legal texts must be written in accordance with EU drafting guidelines, prescribing that "rules have to be drafted bearing in mind their translation in all the official languages".

The consequence of these drafting techniques is that multilingualism influences not only the translation, but the actual structure and content of the rule: very often the result of this praxis is a pragmatic, detailed, concrete regulation of legal instruments, rather than a system of rights. A clear example is given by the directives on consumer protection – nowadays "Directive on Consumer Rights" – and particularly the well known "right of withdrawal"; a consumer opportunity to withdraw from a contract within seven (now fourteen) days is undeniably a proper "right". However, the regulation provided in the directives is more focused on the procedure of withdrawal (the instrument) than on the effect of the withdrawal from the contract (the right).

In general, the multilingual drafting of EU norms – and consequently of EU *rights* – is not automatically functional to the effective transposition of rights in the Member States and to the substantive equality of EU citizens before European law.

This problem is particularly serious in regard to economic rights, because at the European Union level those rights are extensively regulated as substantive ones for European Union citizens. The

implementation of rights such as the right to property, the freedom to conduct a business, the freedom of movement and residence and so on, by means of secondary legislation and their enforcement in the National states by courts might be prevented by a drafting technique not able to describe EU rights as binding rights.

Thus, language barriers conflict with citizenship rights in another manner since an EU citizen could be prevented from exercising some rights linked to her EU citizenship status because of the way in which those rights are drafted and formulated in the EU multilingual context.

A further clear example is the rule drafted in the Directive on Consumer Rights providing the consumer of the right to obtain the transfer of property, after the conclusion of a contract of sale.

The Italian version is different from all the other versions, as instead of transferring the physical possession or control of the goods the key sentence provides "transferring of possession" or "physical control of the goods".

The Italian version seems the only one admitting that the delivery may be replaced by a legal relationship being agreed between the owner and the acquirer by which the acquirer obtains indirect possession. This is the so called "constructive delivery"[74] (costituto possessorio, Besitzkonstitut).

Therefore, according to Italian law the delivery of the goods involves both the concrete transfer of the goods (*physical control of goods*), as well as the legitimate possession (*transfer of possession*). The English, German and French versions are apparently different as the literal meaning seems to leave no space to any concept of delivery besides that of an actual material disposition[75].

However, when the other versions are read in the light of the Italian one it is crystal clear that the "constructive delivery" is simply implicit: see for example the German version, where the constructive delivery (Besitzkonstitut[76]) is contained in the concept "die Kontrolleüber die Waren".

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[74] *Constructive delivery.* If the owner is in possession of the object, the delivery may be replaced by a legal relationship being agreed between the owner and the acquirer, by which the latter obtains indirect possession.

[75] English version: «transferring the physical possession or control». French version «en transférant la possession physique ou le contrôle».

[76] § 930 BGB *Besitzkonstitut*. Ist der Eigentümerim Besitz der Sache, so kann die Übergabe dadurch ersetzt werden, dass zwischen ihm und dem Erwerberein Rechtsverhältnis vereinbart wird, vermögedessen der Erwerber den mittelbaren Besitzerlangt.

Thus, as in the Italian version text regarding the right to have property transfer by constructive delivery is explicit; in the other versions (German) on the other hand, it is implicit and not clear because of the drafting technique formulation. The consequence is that the very moment in which the consumer/owner is entitled of his property *right* is different in some language versions and, as a consequence, in some of the Member States.

Similar problems occur in many other EU acts[77]: as a further example, the Council directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC) should be mentioned. According to the directive, the agent, once the contract relation with the principal is concluded, has a right of "indemnity". This right and its amount is due "ex lege", regardless any negligent behavior of the principal or any actual damage suffered by the agent. However, as the right of indemnity was not clearly formulated in the directive, it has been interpreted in different ways in various legal systems. In England, particularly, the judges have superimposed on the EU term "indemnity", the previous case law on the so called "right of compensation", which was much more convenient for the principal, both in term of burden of proof on the agent, as well as in term of amount of the sum recognized by the courts.

In this framework, several proposals have been constructed in European legal theory in order to support the national judges in the interpretation and application of EU law. According to Derlén, the interpretation of EU law should be based on the core meaning of all or some linguistic versions. This author also suggestsa reform of the multilingual interpretation of EU law where preferably English and French should be appointed mandatory as consultation languages, so as to help the national courts to reach a uniform interpretation and application of EU law[78].

Other authors propose different approaches, such as Engberg, whose suggestions focus on the importance of maintaining a constant dialogue among the different actors involved in this process[79].

Of particular interest is Pommer, who proposes to include translation among the criteria for legal interpretation. Although difficult to be traced within the process of EU legal drafting, translation should be a necessary stage of the work of a judge who applies EU law. Pommer defines translation

[77] See E. IORIATTI, *Interpretazione comparante e multilinguismo europeo*, Cedam, 2013.
[78] M. DERLÉN , *A Castle in the air, The Complexity of the Multilingual Interpretation of European Community Law,* Umeå Studies in Law, 2007, p. 594.
[79] J. ENGBERG, *Autonomous EU Concepts – Fact or Finction*? in S. ŠARČEVIĆ (ed.), *Language and Culture in EU Law: Multidisciplinary Perspectives*, Ashgate, 2015, 169 ff.

as the method according to which reconciliation is undertaken as a way of expressing the thought that can be faithful to a text without being entirely literal[80].

Recently, Van der Yeught has suggested a modernisation of Regulation n. 1 on multilingualism and a policy of use of a restricted number of languages in legal drafting and legal interpretation.

Particularly, according to the Author, a single reference language for legislation should be established, in order to increase legal certainty in application of EU rules in the Member States[81].

In general, it is clear by the results of the present studies that the European Union should furthermore foster a linguistic policy drafting in order to prevent disproportionate national regulations on the exercise of economic rights of European Union citizens.

[80] POMMER, *Interpreting Multilingual EU Law: What the Role of Legal Translation*? cit., p. 1241
[81] VAN DER JEUGHT, *EU Language Law, Europa Law Publishing*, cit.

4. ROLES OF LANGUAGE, RIVALLING RIGHTS AND LEVELS OF RIVALRIES

Linguistic diversity – and linguistic barriers themselves – can be analysed from a multiplicity of perspectives, due to the different roles language plays in public as well as in private life, and to the great variety of scopes and aims of linguistic policies.

In Europe this multiplicity of competing or mutually interrelated perspectives is increased by the multilevel governance addressing linguistic issues in the national, European and regional polity-building and rule-making processes. The analysis on linguistic barriers proves therefore to be a crucial perspective in dealing with various types of hindrances that EU citizens face in exercising their rights. Their study also allows considering the specific functions that language and linguistic issues may perform in shaping EU citizenship.

First of all linguistic barriers may be analysed on an interdisciplinary basis, taking into consideration most of the issues analysed in other WPs of the Project. This will also help in stressing the different categories of citizens' rights.

In this perspective, language knowledge imposed to professionals is an interesting example of a possible barrier towards the exercise of a given right (economic in this case, WP5), which is based on the protection of another specific category of EU citizens' rights (social right to health for instance, WP6).

Furthermore, linguistic issues and language requirements are strongly linked to the concept of identity which is of fundamental importance in shaping a community from both an European and national perspective, also considering, on the one hand, EU multilingualism and, on the other hand, the specific cultural and linguistic protection acknowledged to certain local communities (see WP4). Linguistic rights may also directly affect the state protection (and therefore the individual exercise) of a specific social right, which proves to play a significant role in shaping the cultural identity, namely the right to education, as regards both the access to the host country's language knowledge and the right to be educated in one's own mother tongue (WP 4 – WP6).

Linguistic skills prove to affect also political rights (WP8), as well as gender and generational citizenship (WP9) and the balance between EU citizens and immigrants (WP10).

Moreover, the great variety of roles language may perform allows the study of different levels of realisation of EU citizenships rights, and to take into consideration the conflicts between different types of rights, as well as the conflicts among the rights of different categories of citizens. Linguistic

barriers offer therefore a challenging standpoint from which to study some of the cross-cutting themes chosen by the project.

With reference to citizenship as a selective concept – under which some people are entitled to enjoy certain rights (connected to duties) that remain instead precluded to non-citizens – also plurilingualism and linguistic rights are granted in a selective way. This aspect can be assessed from at least two viewpoints.

On the one hand, linguistic rights are granted/ or language requirements are imposed to EU citizens and to non-EU citizens in a different way.

The differences between the various linguistic requirements imposed by Denmark are a case in point[82], since they clearly show how linguistic obstacles differently affect people belonging to different categories. Indeed, as stated in the national report, EU citizens are in many cases not required to prove that they have passed a Danish language test in order to be employed. An example is the employment of healthcare professionals, which are nevertheless expected to speak and understand Danish. On the contrary, third-country nationals have to pass a Danish proficiency test in order to find employment and a language requirement may also be imposed to them in a number of instances potentially affecting the outcome for their application for family reunification, permanent residence permit, and naturalisation.

On the other hand, peculiar differences characterize the enjoyment of rights by EU citizens belonging to the national linguistic majority from that of EU citizens belonging to linguistic minorities.

In this context, also the different protection of linguistic minorities leads to rivalling categories of citizens. The impact of the variety of scopes of national minority protection policies is twofold. On the one side, EU citizens enjoy different protection and promotion of their rights at both the national and European level. On the other side, cultural and linguistic promotion may justify restriction of economic freedoms, through language requirements that, even if legally legitimate, are still likely to hinder other EU citizens' rights.

Some Member States simply recognise linguistic minorities without acknowledging specific rights to them. Among the countries analysed in the present research, France is a case in point. Individuals may not invoke, in their relations with public authority, the right to use another language other than

[82] See the above fn. 8.

French, nor can they be forced into such a use. Some openness towards the use of minority languages in education in specific regions (e.g. in Corsica) has been shown in certain decisions of the *Conseil Constitutionnel*. The latter has nevertheless hardened its position on local languages, especially after the inclusion of the official status of French in the Constitution. Despite the recognition of regional languages, the French report clearly stresses that "The Council does not accept that the regional or minority language might intervene in 'public life', but above all that the promotion of these languages could amount to a recognition within the Republic of a plurality of distinct territorial areas which would only be defined by the specific language spoken within it. By refuting any idea of 'specific rights' bestowed upon 'groups of speakers', the Council also attempts to avoid recognizing 'minorities' within the Republic"[83].

Also in Greece, despite the coexistence of a variety of linguistic minorities, the only one officially recognized is the Turkish minority, protected under the Treaty of Lausanne of 1923 but as Muslim community, not as language group. Few other minorities enjoy some kind of rights in education but on a case-by-case basis[84].

In other countries, linguistic minorities are legally protected (Belgium, Denmark, Italy, Spain, the Netherlands). The scope of that protection varies from one State to another and even from a minority group to another within the same country.

As to the first point, only in some Member State the model of protection of national minorities is linked to self-government (e.g. Belgium, Spain, South Tyrol and Valle d'Aosta in Italy). Sometimes, the scope of public policies on minority protection may go beyond the relationship between citizens and public institutions, affecting also the private sector. Spain is a case in point since under certain circumstances also private players must assist citizens in the language chosen by the consumer[85].

As to the second point, the protection of minorities in a given State, although based on the same basic tenets presents nevertheless differentiations and asymmetries. In Italy, certain minorities are indeed "super-protected" through territorial self-government (Alto Adige/Südtirol, Valle d'Aosta/Vallée d'Aoste) granted on a constitutional basis. Other language groups, the so-called

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[83] See C. Lageot, op. cit.

[84] See Greek legal system see for instance Clogg, Richard (ed.), *Minorities in Greece – Aspects of a Plural Society* (Hurst & Company London 2002); Gordon, Raymond G., Jr. (ed.), *Ethnologue: Languages of the World*, 15th ed. (SIL International 2005). Online version: http://www.ethnologue.com/15; Karakostas, Ioannis, *Dikaio Prostasias Katanaloti – N.2251/1994 [Consumer Protection Law – N.2251/1994],* (Nomiki Vivliohiki 2008); Kallinikou, Dionysia, *Pneumatiki Idioktisia & Syggenika Dikaiomata [Copyright and related rights],* 3rd ed., (Dikaio & Ikonomia P.N. Sakkoulas 2008).

[85] See above fn. 5.

"historical linguistic minorities" benefit instead for a potential protection only. According to the Framework Law 482/1999, their protection requires indeed a "bottom-up" activation[86]. Asymmetry strongly characterizes also the Spain framework for minority protection, where Catalan is the most protected minority (specially within Catalonia), while Basque and Galicia enjoy a lower status. A great variety of set of rights and facilities (especially for border linguistic municipalities) characterizes also the Belgian multilingual regime[87].

The different access to linguistic education is also an example of issue leading to differences among EU citizens, potentially affecting the ability to overcome linguistic barriers. This may furthermore be analysed from a gender perspective since some women (especially those belonging to certain religious minorities) may be confronted with more obstacles in gaining access to linguistic education, which is essential for achieving the necessary language knowledge to overcome many linguistic barriers.

Another factor closely connected to rivalling categories of citizens in enjoying EU citizenship rights derives indeed from the levels of language knowledge achieved. Related to this, also the improvement of plurilingualism, and the opportunity to learn other languages different from English (or from the EU official languages) is likely to draw substantial differences among EU citizens in the enjoyment of their rights from a practical viewpoint.

The linguistic issues, which may affect the European Citizens' Initiative (ECI) introduced by the Lisbon Treaty as a new democratic tool, are an example of this factual barrier. The mentioned democratic tool allows EU citizens to directly participate in the development of EU policies, by launching an invitation to the EU Commission to propose legislation in any field where the Commission has the power to make a legislative proposal.

The cross-border debate, which is at the basis of this tool, is inevitably affected by the lack of a shared language or of language knowledge able to overcome the obstacles raised by linguistic diversity. According to the related regulation "prior to initiating the collection of statements of support from signatories for a proposed citizens' initiative, the organisers shall be required to register it with the Commission" providing a variety of information (notably on the subject matter and aims of the initiative). That information shall be provided in one of the official languages of the Union. After the registration is confirmed "the organisers may provide the proposed citizens' initiative in other official languages of the Union for inclusion in the register" and "The translation of

[86] See above fn. 7.
[87] See above fn. 4.

the proposed citizens' initiative into other official languages of the Union shall be the responsibility of the organisers"[88]. The Regulation also provide that signatories for the initiative must come from a minimum of seven out of the 28 Member States.

It follows that citizens must agree on a common registration language, which will often be English. From a more general perspective, since according to the Eurobarometer "Europeans and their Languages" only the 54% (about the half) of EU citizens is able to hold a conversation in at least one language different from the mother tongue, this democratic tool will properly be used only by those EU citizens which have sufficient language knowledge (and financial instruments) to actively participate in a cross-border debate[89].

The lack of language knowledge can therefore be a factual barrier to the exercise of EU citizens' (political) rights.

Language is indeed the prerequisite for political communication and participation, as well as for mutual understanding in public debate, thus performing a crucial function in granting democracy and the rule of law itself. Linguistic diversity has indeed a remarkable impact on public-life interactions and EU democracy is strongly connected also to how EU citizens are able to communicate and use their rights across linguistic barriers.

As to EU democracy, the abovementioned factual barrier may also affect the top-down communication of the EU Parliament with EU citizens, which do not share a common language and whose mutual understanding and political participation therefore depend on other actors responsible for political information and debate, and namely national politicians and press, alongside with the EU Parliament itself[90].

Rivalries between rights are another perspective from which to consider the central question of this research, and namely whether and how linguistic barriers can be overcome or at least mitigated.

This theme is connected to the reasons behind a given linguistic barrier, which can be grounded on the need to protect a specific right or public interest. As far as linguistic barriers are concerned, it must be in fact considered that hindrances to the exercise of a given EU citizenship right can derive

[88] Regulation of the European Parliament and of the Council on the citizens' initiative. No 211/2011, Article 4.
[89] For a more detailed analysis of democracy issues, see A. Lise Kjaer and S. Adamo (eds.), Linguistic Diversity and European Democracy, Ashgate, 2011. On the citizens' initiative see particularly p. 3 ff.
[90] Ibid.

from the imposition of linguistic requirements, translations and language skills as well as from the lack of these elements.

The regulation of the doctor-patient relationship and the linguistic requirement in cross-border care are a case in point.

Under Article 53 of Directive 2013/55/EU on knowledge of language “Professionals benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State. Controls may be imposed if the profession to be practised has patient safety implications”.

On the one hand, the language knowledge imposed to physicians affects their economic rights. On the other hand, this language requirement is aimed at protecting the fundamental rights to health of the patient. In this case, a lack of language skills can turn into a barrier towards the enjoyment of a social right.

Also with reference to consumer protection, the setting of specific language requirements can be an indirect obstacle to the free movement of goods. At the same time a fundamental principle of consumer protection is the right to information on properties and functions of products.

As to the rivalries between rights and the plural functions of a linguistic barrier, it is interesting to note that in the abovementioned KIK case the CJEU, in considering the restricted language regime of the Office for Harmonisation in the Internal Market compatible with the EU principle of language equality, stressed that

“Account must also be taken of the fact that the Community trade mark was created for the benefit not of all citizens, but of economic operators, and that economic operators are not under any obligation to make use of it”.

From the fact analysed by the Court, it follows that “the language regime of a body such as the Office is the result of a difficult process which seeks to achieve the necessary balance between the interests of economic operators and the public interest in terms of the cost of proceedings, but also between the interests of applicants for Community trade marks and those of other economic operators in regard to access to translations of documents which confer rights, or proceedings involving more than one economic operator, such as opposition, revocation and invalidity proceedings”.

According to the CJEU case-law, language requirements imposed by Member State are assessed in their justification and proportionality. In some cases, legitimate interests may in principle justify a restriction on economic freedoms, provided that they do not go beyond what is necessary to achieve their objectives.

As to professionals, in the Haim case for instance, the compatibility of a language requirement imposed by Germany to a dentist with the freedom of establishment was at stake. The communication with the patient and with the professional association has been considered as a legitimate aim by the CJEU. The Court expressly stressed that:

"the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making the appointment as a dental practitioner under a social security scheme subject to language requirements. Dialogue with patients, compliance with rules of professional conduct and law specific to dentistry in the Member State of establishment and performance of administrative tasks require an appropriate knowledge of the language of that State".

The Court also emphasized that however "it is important that language requirements designed to ensure that the dental practitioner will be able to communicate effectively with his patients, whose mother tongue is that of the Member State concerned, and with the administrative authorities and the professional bodies of that State do not go beyond what is necessary to attain that objective. In this respect, it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language"[91].

As to consumer protection, in the Colim case the CJEU stated that[92]:

"Language requirements laid down by national legislation and applying to information appearing on imported products constitute a barrier to intra-Community trade in so far as products coming from other Member States have to be given different labelling involving additional packaging costs". However, the Court stressed that "in the absence of full harmonisation of language requirements applicable to information appearing on imported products, the Member States may adopt national measures requiring such information to be given in the language of the area in which the products

[91] Judgment of the Court of 4 July 2000. - Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein. Case C-424/97 (p.to 59 and 60).
[92] Judgment of the Court (Fifth Chamber) of 3 June 1999. Colim NV v Bigg's Continent Noord NV. Case C-33/97.

are sold or in another language which may be readily understood by consumers in that area provided that those national measures apply without distinction to all national and imported products and are proportionate to the objective of consumer protection which they pursue". In particular these measures must be "restricted to information which the Member State makes mandatory and which cannot be appropriately conveyed to consumers by means other than translation".

Therefore, within the respect of the principles of non-discrimination, restriction, justification, and proportionality, language requirements protecting a legitimate interest can limit the realization of an economic freedom.

This also applies to the national aim to protect and promote language diversity and linguistic rights.

Due to its symbolic value as a tool for group identification, language remains indeed a crucial social issue and therefore a political aim that is strategic from at least two points of view. Language has always been one of the fundamental factors in achieving and safeguarding national unity and identity and – in the modern perspective – social cohesion. At the same time, the identification of national minorities – whose protection and even promotion is gaining growing importance in modern societies – is often based on language. As already seen, linguistic rights are considered, protected and promoted as fundamental rights of minority groups.

In certain contexts, the rights of language groups have historically represented and still represent the main requisite for peaceful coexistence. In Italy, the South Tyrolean historic, social and legal background is a case in point.

With reference to the possible rivalries between competing interests, linguistic rights are therefore crucial tools in the difficult, but nevertheless necessary, balance between safeguarding and developing minority culture and identity, on the one hand, and social integration and interaction with the other groups, on the other. Similarly, at the European level, language issues play an essential role in copying with the multifaceted problems resulting from the intersection between linguistic diversity and EU integration. Also in this context territoriality and freedom of language need to be constantly balanced. According to the former, EU Member States have discretionary power on the language used on their territory. Indeed, similarly to the abovementioned provisions laid down in the Charter of Fundamental Rights of the EU, under Article 3.3 TUE: "the Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". Following the principle of language freedom, Member States shall instead accept the use of other languages, different from their own.

This multilevel protection of linguistic rights leads to different kinds of linguistic barriers and therefore represents a telling example of levels of rivalries.

Multilevel governance and the related variety of sources of law inevitably affect the operational aspects of citizens' rights. Language policies present different standards in protecting linguistic rights or in imposing language knowledge at different levels (European, national and local). Parity of languages or bottom-up approaches, linguistic rights in the relationships with the administrative, and judiciary institutions, linguistic rights in education are just a few examples of the tools applied at different levels. Furthermore, some local autonomous communities may impose an even higher protection for linguistic rights, which can hamper EU economic freedoms more then national provisions.

Moreover, the great variety of sources of law concerns both the legal and administrative field and involves not only laws or regulations passed by public institutions but also professional rules. Rivalries can therefore derive also from the relationships between state (top-down) and professional (bottom-up) levels.

In this complex picture, as already seen, the protection of linguistic rights may lead to linguistic barriers towards economic rights but also linguistic requirements (which can be perceived as barriers and which therefore need to be proportionally and reasonably balanced with other rights) are based on the need to protect a specific citizenship right.

In the end, also the way in which rivalries of rights are dealt with may differ among different levels.

Generally, local and national framework for minority protection had to comply with directly applicable EU law, namely with the principles of non-discrimination and free movement of people.

The Angonese case [93]clearly shows how the rivalries resulting from these issues are dealt with in the CJEU case law. The judgment concerned the freedom of movement for persons. The CJEU found that requiring a particular certificate issued only in the Province of Bolzano as the only means of proof of language knowledge constitutes discrimination on grounds of nationality, contrary to EU law. Specifically, Roman Angonese, a German-speaking Italian citizen resident in the Province of Bolzano, after a study period in Austria, applied to participate in a competition for a position with Cassa di

[93] C-281/98 – Angonese. Judgment of the Court of 6 June 2000. Roman Angonese v Cassa di Risparmio di Bolzano SpA.

Risparmio, a private bank in Bolzano. The issue at stake was the requirement imposed by the bank for admission to the competition, namely possession of the specific certificate of bilingualism issued only in the Province of Bolzano. Angonese was perfectly bilingual but he did not have the certificate in question. He submitted certificates attesting to his studies of languages at the University of Vienna; nevertheless the Cassa di Risparmio informed him that he could not be admitted to the competition because he had not produced the "Patentino/Zweisprachigkeitsnachweis"[94].

According to the European Court of Justice "even though requiring an applicant for a post to have a certain level of linguistic knowledge may be legitimate and possession of a diploma such as the Certificate may constitute a criterion for assessing that knowledge, the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, must be considered disproportionate in relation to the aim" legitimately pursued (para 44 in the judgement).

Consequently "where an employer makes a person's admission to a recruitment competition subject to a requirement to provide evidence of his linguistic knowledge exclusively by means of one particular diploma, such as the Certificate, issued only in one particular province of a Member State, that requirement constitutes discrimination on grounds of nationality" contrary to EU law (para 45 in the judgement).

The European Court of Justice held indeed that EU law "precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State" (para. 46 in the judgement), since it inevitably lead to a disadvantage for citizens of other Member States.

Similarly, in a more recent case (Commission vs. Belgium - Case C-317/14) on the relation between freedom of movement for workers and linguistic knowledge, the Court declares that

"by requiring candidates for posts in the local services established in the French-speaking or German-speaking regions, whose diplomas or certificates do not show that they were educated in the language concerned, to provide evidence of their linguistic knowledge by means of one particular type of certificate, issued only by one particular Belgian body following an examination conducted by

[94] See E. Pulice, South Tyrol's Autonomy after the Conflict Settlement. Compromise, Power Sharing, and the Rights of Language Groups", in F. Andreatta ed E. Castelli (eds.), Solutions and Failures in Identity-based Conflicts. The Autonomy of Trentino-South Tyrol in Comparative Perspective, FBK Press, 2014, 75 ff.

that body in Belgium, the Kingdom of Belgium has failed to fulfil its obligations" under EU law (namely Article 45 TFEU and Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union)[95].

In another case (*Las* case) concerning the freedom of movement of workers and the obligation imposed by the Belgian Dutch-speaking region to draft employment contracts in Dutch, the Court confronted with a cross-border relationships, held that

"Article 45 TFEU must be interpreted as precluding legislation of a federated entity of a Member State, such as that in issue in the main proceedings, which requires all employers whose established place of business is located in that entity's territory to draft cross-border employment contracts exclusively in the official language of that federated entity, failing which the contracts are to be declared null and void by the national courts of their own motion"[96]. Also in this case the language measure was therefore considered to be disproportionate.

Despite the leading role of the CJEU case law, some conflicting and still grey zones remain. The demarcation between EU and national (or even local) language competences is not always clear. Moreover, while the EU language policies in the public field, although not comprehensive, are at least partly embedded in explicit legal provisions, private language policies have not been addressed in a coherent way by the European Union. Language policies can be implicitly gathered from the general framework for EU market integration and mobility. Nevertheless the solution of linguistic issues and of rivalries of rights deriving from linguistic diversity is based on a case-by-case approach mainly entrusted to the CJEU. The comparative analysis reveals that this approach is not sufficient, and that the exercise of EU citizens' economic rights continues to be hindered by linguistic barriers.

The following chapters therefore focus on language issues deriving from national policies (or lack of policies) in the private sector.

[95] Judgment of the Court (Sixth Chamber) of 5 February 2015 European Commission v Kingdom of Belgium - Case C-317/14.
[96] Judgment of the Court (Grand Chamber) of 16 April 2013 - Anton Las v PSA Antwerp NV - Case C-202/11.

5. General overview on linguistic barriers

Considering the plurality of roles language may play and the specific features inherent to any legal system as to national and minorities linguistic identity, as well as to the legal sources and tools adopted to address linguistic needs and to protect public interests, the bottom-up approach chosen in this survey allowed to highlight some further linguistic barriers (other than those closely related to the main case-studies analysed in the following chapters) that are considered to be relevant at each national level.

A legal barrier common to many countries is related to the language knowledge imposed to enter schools and university. In Denmark, for instance, applicants have to provide specific certificates after attending classes, assessment and passing obligatory exams in designated and approved Danish language schools.

In France, several national diplomas are specifically intended for non-French citizens and provide official certification of proficiency, practice and mastery of the French language. Their regulation is articulated according to different purposes. Some diplomas are required for the enrolment in Universities, while others are provided for business French.

Language proficiency can be required to apply for citizenship/nationality. France is again a case in point.

In all countries legal barriers affect professional activities since a level of language proficiency is often required and is generally higher when the language is a tool for the professional activity itself.

In this context it is worth noting that language requirements may act as a direct barrier preventing a professional from exercising in the host Member State, but also as a deterrent for the employer to hire a person that does not meet the required language proficiency.

This is particularly true in Spain where the protection for linguistic minorities can lead to a fine for the employer if the employees do not answer in the specific language required by the customers.

Language knowledge can nevertheless act as a deterrent from a factual perspective also without legal provisions imposing sanctions. In the private economic sector this is mainly due to business reasons. In the bilingual province of South Tyrol, for instance, although the language certificate is formally imposed only for posts in the public administrations, the great majority of private companies or shops require bilingual employees.

A factual barrier that has been highlighted is the difficulty inherent to the study of some languages, as it is the case of Danish. The variety of accents can further worsen that difficulty. In this perspective, education policies, including labour market-related courses for international university staff and knowledge workers, and policies aiming at boosting mutual interactions between native speakers and foreigners are of crucial importance.

Factual barriers may indeed arise from a sociolinguistic perspective, notably from the specific view held by native speakers population as regards language. The Danish national report gives an interesting example of this factual barrier, which is nevertheless common also to other experiences.

From a more general perspective, contexts where the protection of a linguistic minority is rooted in historical conflicts or is still characterised by political and social conflicts (which need to be constantly managed), the attitude of a minority language group toward its linguistic identity may lead to factual barriers closely linked to social and working life.

The Austro-Bavarian dialect spoken by the German language group in South Tyrol (Italy) is another case in point. It is indeed considered as a fundamental element of the cultural identity of that language group. The dialect is so culturally-rooted as to be almost the only real vehicular language among people belonging to it, also in working contexts. Standard German, the language studied by Italian speakers, is spoken only in official contexts, and hardly ever in daily life. This linguistic difference, plus strict separation in the educational and, more generally, in the cultural environment, make it difficult to cross linguistic and cultural boundaries. Again education policies granting the possibility to speak and share experiences and leisure time, also beyond the strict linguistic separation model, may facilitate mutual understanding, and even spontaneous use, of the German dialect in certain shared context.

Factual barriers can also be intrinsic to a multilingual country, especially where language policies are highly differentiated among language communities and language regions, which moreover enjoy specific autonomy. Difficulties can arise for foreign people, as well as in border linguistic municipalities. Belgium is a case in point.

Nonetheless, the Belgian language regime also proves to be an example of how facilities, i.e. tools and policies aimed to cope with linguistic diversity, can help in overcoming barriers. Furthermore, also in this country language education is used as a tool for integration. Particularly useful is, from this perspective, the effort made by the Dutch-speaking Community to remove the possible linguistic barriers, through a Dutch language course (the so-called *Inburgering programme*), which is offered to

both third-country nationals and EU citizens. It also includes information about life in Belgium and is a completely subsidized and free of charge course.

Further barriers derive from the relationships with administrative authorities in cases where institutions only use the national languages for communications and documents, without providing for a coherent policy of translation and language proficiency of the public servants.

This can lead to further costs for foreigners, which may need to be assisted by attorneys or interpreters also for simple affairs.

The Greek Report has specifically stressed this kind of barrier. Nevertheless, the lack of language proficiency in public offices can hinder the exercise of EU citizens' rights in many national realities.

Indeed, according to the Special Eurobarometer 386 – "Europeans and their Languages" (2012): "The majority of Europeans (54%) are able to hold a conversation in at least one additional language, a quarter (25%) are able to speak at least two additional languages and one in ten (10%) are conversant in at least three". Consequently "just under half of all Europeans (46%) are not able to speak any foreign language well enough to hold a conversation".

Moreover, English is the most widely spoken second language in 19 of the 25 Member States where it is not an official language, whereas the knowledge of other European language is still lower.

Another barrier deriving from language issues concern the translation of documents. In many cases a sworn translation is required. This makes the exercise of certain an economic rights more costly and time consuming.

6. CASE-STUDIES ON LINGUISTIC BARRIERS TO THE EXERCISE OF ECONOMIC RIGHTS

6.1 LINGUISTIC BARRIERS AFFECTING PROFESSIONALS.

6.1.1 SCOPE OF THE ANALYSIS.

This chapter deals with specific linguistic barriers deriving from national regulations that professionals may face in exercising their activity. In particular, the analysis follows two main lines of enquire.

The first one concerns the professionals analysed in the case-studies chosen by the project in the field of economic rights, and namely lawyers, healthcare professionals and tourist guides. By this means the research is aimed at completing the analysis carried so far with further and more specific issues related to linguistic barriers.

The second one deals with people working as public officers, with specific reference to civil servants and judges. The contribution of the research in this field is twofold. On the one hand, linguistic issues concerning the public administration are closely related to the level of protection of linguistic rights provided for at the national level. The use of the mother tongue in the communication with the public administration, including courts, is indeed at the cornerstone of language minorities' protection. This level of protection and the related imposition of language proficiency to public officers directly affect the rights of (national or foreign) citizens willing to work in the public sector. While the protection of linguistic identity is generally considered as a legitimate aim to restrict economic rights by both national and EU case-law, the tools and procedures aimed at implementing this principle may turn into unreasonable linguistic barriers if not proportionally applied. Judges represent moreover a function strongly related to national unity, but at the same time in charge of ensuring the uniform application and effectiveness of EU law. As already stressed, the latter function is affected by EU linguistic diversity in legal drafting and legal interpretation.

On the other hand, language proficiency of public officers is a crucial element in enabling EU citizens coming from other Member States to fully exercise their rights in all those cases where relations with public authorities, public procedures and public documents are necessary.

Without aiming at a comprehensive analysis of all the linguistic barriers hindering the exercise of economic rights in these two fields, the research follows a bottom-up approach to provide a systematic survey of the linguistic barriers arisen from some national contexts. Being the expression of widespread (public and private) interests and rivalries of rights, the following barriers can be telling about the fields in which a more systematic and harmonised language policies at the EU level is needed.

6.1.2 LEGAL AND FACTUAL LINGUISTIC BARRIERS AFFECTING PROFESSIONAL ACTIVITIES: A COMPARATIVE ANALYSIS.

The study of the barriers that professionals face in gaining access to the services market has been extensively addressed in Deliverable 5.3[97]. While referring to that *Report* for the general framework at both the EU and national level, the focus of this section is therefore only on the possible further barriers deriving from linguistic issues. From this perspective, some preliminary remarks on the EU framework for language requirements on free movement of workers is anyway needed, also in connection to the basic tenets of the main professional qualifications' recognition regimes.

EU legal framework

As to language knowledge, besides the EU provisions forbidding discrimination and Article 45 TEU, among secondary regulation the following provisions must be taken into account.

Regulation (EU) No. 492/2011 and in particular Article 3, according to which: "provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

(a) where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals;

(b) or where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

The first subparagraph shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled".

There is therefore a presumption of indirect discrimination of workers from other Member States also in cases where Member States provide for rules making the access to employment subject to linguistic proficiency, if despite the applicability of these rules irrespective of nationality their exclusive or principal aim or effect is to keep nationals of other Member States away from the

[97] bEUcitizen Report *The barriers that professionals face in gaining access to the services market*, D. 5.3, by Adamo, S., Jacqueson, C., Neergaard, U., Hatzopoulis, V., González Pascual, M., de Vries, S., and Ioriatti, E., 2016, https://doi.org/10.5281/zenodo.209578.

employment offered. Nevertheless the nature of the post to be filled justifies the imposition of the required linguistic knowledge.

While this Regulation applies to all workers, the so-called regulated professions are governed by the Professional Qualifications Directive 2005/36/EC on the recognition of professional qualifications[98]. In the EU, regulated professions imply that the access to them "is subject to a person holding a specific qualification, such as a diploma from a university"[99].

The obligation for professionals to have the necessary language skills wad already provided for at the time of the introduction of the Professional Qualifications Directive[100]. According to the original Article 53 (Knowledge of languages):

"Persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State".

With reference to the assessment of language skills, no specific provision regulated instead the way in which the host EU Member State could verify the required language knowledge. Par. 3.5. "language requirement" of the *Commission Green Paper "Modernising the Professional Qualification Directive"* [101] as well as the *Commission Staff Working Document* on the transposition and implementation of the Professional Qualifications Directive [102] are however telling about, on the one hand, the basic tenets of the EU framework for language requirements and, on the other hand, the public debate on language requirements for health professionals that nevertheless arose in some member States.

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[98] Consolidated version of Directive 2005/36/EC of 20.11.2013 of the European Parliament and of the Council of 7 September 2005on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

[99] Modernisation of the Professional Qualifications Directive - frequently asked questions, para no. 3 3. "Which professions are regulated in the EU?"Available at http://europa.eu/rapid/press-release_MEMO-11-923_en.htm?locale=en. The Regulated Professions Database, (i.e. the compiled from information made available by Member States) contains sbout 800 categories of regulated professions in EU Member States and is available at http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?fuseaction=home.home

[100] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

[101] Commission Green Paper Modernising the Professional Qualification Directive, Brussels, 22.6.2011 – COM (2011) 367 final.
Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0367:FIN:en:PDF

[102] Commission Staff Working Document on the transposition and implementation of the Professional Qualifications Directive (2005/36/EC), SEC(2010) 1292, Brussels, 22/10/2010, European Commission, para. 2.3.

As to the first point the Commission pointed out that:"Any language requirement should be justified and proportionate in view of the activity a professional actually wishes to carry out"[103] and that "Member States must take due account of the principle of proportionality which excludes systematic language tests. Testing the language knowledge of EU citizens interested in professional mobility on a case- by-case basis may be a legitimate way of safeguarding the interests of consumers and patients"[104]. In the Commission's opinion "Recognized professionals are entitled to attest their language knowledge through any means of proof. However, the Directive should not be construed as imposing a blanket ban on language testing; it does allow for language testing in exceptional cases"[105] , whereas "systematic language testing can become a means of unfairly preventing foreign professionals from accessing the right to perform a professional activity, if applied disproportionately"[106]. Moreover "The main responsibility to ensure that all necessary professional language skills are acquired lies with the employers"[107].

As to the second point, the issue of language skills of health professionals gained more importance as migration of health professionals increased, also due to some controversial cases of medical malpractice connected to a lack of local language knowledge. According to the Commission the issue of language skills is "particularly acute in the case of health professionals benefiting from automatic recognition who come into direct contact with patients". The amendment of the Directive currently gives to Member States the possibility to impose language tests only in the latter case.

A provision specifically applicable to health professionals with direct contact with patients has therefore been introduced in the Professional Qualifications Directive in 2013 (by means of Directive 2013/55/EU). In the Commission's words "this provision would allow a one-off control of the necessary language skills before the health professional first comes into direct contact with patients"[108]. As stated also in the Preamble to the new Directive "The review of the application of that obligation has shown a need to clarify the role of competent authorities and employers, in particular in the interest of better ensuring patient safety".

In this context, the following principles have been expressly embedded in the Directive:

[103] Ibid.
[104] Commission Green Paper Modernising the Professional Qualification Directive, cit., para 3.5.
[105] Commission Staff Working Document, cit., para 2.3.
[106] Commission Green Paper Modernising the Professional Qualification Directive, cit., para 3.5.
[107] Ibid.
[108] Ibid.

- Competent authorities should be able to apply language controls after recognition of professional qualifications;

- It is important for professions that have patient safety implications in particular that language controls under Directive 2005/36/EC be applied before the professional accesses the profession in the host Member State;

- Language controls should however be reasonable and necessary for the professions in question and should not aim at excluding professionals from other Member States from the labour market in the host Member State;

- In order to ensure respect of the principle of proportionality, and in the interests of enhancing the mobility of professionals in the Union, the controls carried out by, or under the supervision of, a competent authority should be limited to the knowledge of one official language of the host Member State, or one administrative language of the host Member State, provided that it is also an official language of the Union;

- This should not preclude host Member States from encouraging professionals to acquire another language at a later stage if necessary for the professional activity to be pursued;

- Employers should also continue to play an important role in ascertaining the knowledge of languages necessary to carry out professional activities in their workplaces.

Accordingly besides the provision already provided for in 2015, under the new wording of Article 53:

"2. A Member State shall ensure that any controls carried out by, or under the supervision of, the competent authority for controlling compliance with the obligation under paragraph 1 shall be limited to the knowledge of one official language of the host Member State, or one administrative language of the host Member State provided that it is also an official language of the Union.

3. Controls carried out in accordance with paragraph 2 may be imposed if the profession to be practised has patient safety implications. Controls may be imposed in respect of other professions in cases where there is a serious and concrete doubt about the sufficiency of the professional's language knowledge in respect of the professional activities that that professional intends to pursue.

Controls may be carried out only after the issuance of a European Professional Card in accordance with Article 4d or after the recognition of a professional qualification, as the case may be.

4. Any language controls shall be proportionate to the activity to be pursued. The professional concerned shall be allowed to appeal such controls under national law".

As to the abovementioned multilevel governance, a regulated profession also implies that in many Member States Professional Associations or other bodies may be in charge of assessing the possession of the prerequisites necessary to the pursuit of the given professional activity, including that of language knowledge.

Professional rules, disciplinary responsibility, rules of professional ethics and Professional Associations perform indeed a specific role in the access and in the pursuit of a regulated profession in many Member States. While acting as an important guarantee of professional competences justified on the basis of public interests, these bodies may impose further requirements, also from a linguistic perspective, which may turn into barriers towards the mobility of EU citizens. These further regulations must also comply with the EU principles regulating the internal market as interpreted by the CJEU[109].

As to the variety of EU citizens' categories, the EU system of recognition of professional qualifications depends on a variety of issues, such as whether the citizen has used his/her mobility rights, whether the profession is regulated or not, and moreover the type of profession itself. This is particularly true with regard to the freedom of establishment. In this context, EU law provides for the regulation of three different qualifications recognition regimes.

According to the so-called *"automatic recognition"* some professional categories can benefit from the previous harmonisation of minimum training conditions for their professions which have agreed by EU Member State, and therefore from automatic recognition of their qualifications throughout the EU. This profession are: doctors with basic training and specialised doctor, nurses responsible for general care, dental practitioners, specialised dental practitioner, veterinary surgeons, pharmacists

[109] As to the role that professional rules are likely to perform in the European context, see for instance, the Van Binsbergen judgment (C - 33/74 [1974] ECR 1299) and the Gebhard case (C 55/94 [1995] ECR I 4165). For a general analysis of the European framework see, among others, P. Craig, G. de Burca, *EU law*, VI ed., Oxford, 2015, L. Nogler (ed.), *Le attività autonome. Trattato di diritto privato dell'Unione europea*, vol. VI, Torino, 2006. On the role of professional ethics and Professional Associations from a comparative and European perspective see, for example, S. Patuzzo, E. Pulice, *Towards a European Code of Medical Ethics. Ethical and Legal issues*, in J Med Ethics 2016; 0:1–6; E. Pulice*, Deontologia e diritto. Modelli comparati, criticità e prospettive in ambito biomedico*, Napoli, 2017, forthcoming.

and architects. According to the recognition regime on the basis of coordination of minimum training conditions and principle of automatic recognition, Member States shall not impose compensation measures on EU citizens that are holders of the professional titles listed in Annex V of Directive 2005/36/EC Directive (as amended by Directive 2013/55/EU).

The *recognition based on professional experience* is another regime applied to activities in the craft, commerce and industrial sectors (such as for instance electricians, beauticians or hairdressers). These professions can benefit from the recognition of professional experience: their qualifications can be recognised automatically on the basis of previous work experience.

Other professionals can benefit instead for the so-called General System for the recognition of evidence of training. This regime is based on mutual recognition and qualifications are recognised not automatically but on a case-by-case basis through the comparison of the applicant's training conditions and qualifications with those required in the host Member State. Recognition is generally granted if the worker's level of professional qualification is at least equivalent to the level immediately below the level required in the host country. Indeed, in compliance with the EU Directive, in cases of substantial differences compensation measures can be imposed (for instance an aptitude test or an adaptation period). This system also applies for those professions theoretically included in the principle of automatic recognition in cases where the migrant does not meet all the requirements for it. Recognition may also be granted to workers whose profession is not regulated in the country of origin but who have worked full-time in that profession for two years.

Besides these regimes, for some professions the recognition of professional qualifications is governed by specific legislation. Lawyers are a case in point. Apart form the already mentioned Directive on the recognition of the concerning qualification, Directive 98/5/EC aimed at facilitating the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. Other professions whose recognition is based on specific legislation are commercial agents, insurance intermediaries, sailors and seafarers, statutory auditors, some transport operators, some professions handling toxic products.

With reference to linguistic requirements, the Directive on the profession of lawyer does not provide any linguistic requirement, except for the rules concerning titles.

In the *Wilson case*[110] the CJEU stated that the Directive "must be interpreted as meaning that the registration of a lawyer with the competent authority of a Member State other than the State where he obtained his qualification in order to practise there under his home-country professional title cannot be made subject to a prior examination of his proficiency in the languages of the host Member State" (para 77 in the judgement).

More specifically in *Commission of the European Communities vs. Grand Duchy of Luxembourg*[111], the CJEU considered in contrast with EU law "[...] making registration with the competent national authorities subject to a prior language test for lawyers who have obtained their qualification" in another Member State "by prohibiting those lawyers from being persons authorised to accept service on behalf of companies, and by requiring them to produce each year a certificate of registration with the competent authority of their home Member State [...]" (para 73 in the judgement).

In the Wilson case, the preliminary reference was made in the course of proceedings arising from the refusal of the Luxembourg Bar Council to register Mr Wilson, a British national, in the Bar Register of the Luxembourg Bar Association. According to the national framework the registration was subject also to the following condition: "'be proficient in the language of statutory provisions as well as the administrative and court languages", notably French, German and Luxembourgish. The national requirements also applied to lawyers already registered in another Member State Bar. Mr Wilson was therefore requested to attend a hearing to verify his language skills, and he refused.

The Court stated that the Directive "does not allow the registration of a European lawyer with the competent authority of the host Member State to be conditional on a hearing designed to enable that authority to determine whether the person concerned is proficient in the languages of that Member State" (para 70 in the judgement).

With reference to the protection of the clients' rights, the Court also stressed that "the purpose of the obligation ... to practise under their home-country professional title in the host Member State is ... to make clear the distinction between such lawyers and lawyers from the host Member State, so that clients are aware that the professional to whom they entrust the defence of their interests has not obtained his qualification in that Member State ... and does not necessarily have the knowledge, in particular of languages, which is adequate to deal with the case" (para 72 in the judgement).

[110] Case C-506/04, Graham J. Wilson v Ordre des avocats du barreau de Luxembourg.
[111] Commission of the European Communities vs. Grand Duchy of Luxembourg (C-193/05), judgment of 19 September 2006, point 74.

As to activities relating to representation and defence of a client in legal proceedings Member States are permitted to require EU lawyers practising under their home-country professional title "to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority or with an 'avoué' practising before it". According to the Court "that option compensates for any lack of proficiency on the part of the European lawyer in the court languages of the host Member State" (para 73 in the judgement). Furthermore, the Court also observed that under the Directive the lawyer concerned must prove that he/she has effectively and regularly pursued for a period of at least three years an activity in the law of that State or, where the period is shorter, that he/she has other knowledge, training or professional experience relating to that law. According to the Court "Such a measure enables European lawyers wishing to integrate into the profession of the host Member State to become familiar with the language(s) of that Member State" (para 76 in the judgement).

In cases of temporary or occasional nature of activities of a self-employed or an employed person, according to rules for temporary mobility (set out in Directive 2005/36/EC as amended by Directive 2013/55/EU), the host EU country accesses the temporary mobility on a case-by-case basis, considering the duration of activity, frequency, regularity, continuity and may require a written declaration in advance.

When the profession has public health or safety recognition and the citizen does not benefit from automatic recognition the host country may check the professional qualification before the professional can provide services for the first time.

There is instead no general EU system of qualifications for EU citizens obtained outside the EU. In this case the recognition depends on national law.

With reference to the CJEU case-law on language requirements, decisions concerning the assessment of language proficiency have already be mentioned in relation to local regimes protecting linguistic rights of specific linguistic minorities in Italy and Belgium (see above the *Angonese* case and *Commission v Kingdom of Belgium*).

The *Las* and *Haim* cases have been also mentioned with reference: on the one hand, to the obligation imposed by the language policies of a specific region in the multilingual context of Belgium, and namely the duty to draft on pain of nullity all documents relating to the employment in Dutch (i.e. the official language of the concerned region); and on the other hand to the reasons justifying the imposition of language proficiency to health professionals.

As to teachers, the balance between the free movement of workers and the knowledge of an official language of the host country has been dealt with in the *Groener case*[112]. The CJEU stated that "a permanent full-time post of lecturer in public vocational education institutions is a post of such a nature as to justify the requirement of linguistic knowledge, within the meaning of "EU law, but provided that "the linguistic requirement in question is imposed as part of a policy for the promotion of the national language which is, at the same time, the first official language and provided that that requirement is applied in a proportionate and non-discriminatory manner" (para 24 in the judgement).

From a general perspective, as already stressed, a linguistic requirement can be legitimate if it is not discriminatory and disproportionate. In particular if:

- It is not applied in a discriminatory way;
- It pursues a legitimate objective in the public interest;
- It is appropriate to ensuring the achievement of that objective;
- It does not go beyond what is necessary to achieve the objective pursued.

a) Focus on the professions analysed in the case-studies

Against this background, the linguistic barriers still existing at the national level may be summarized as follows.

First of all, as a common trend, linguistic requirements implicitly necessary to the professional activity must be underlined.

Specific linguistic needs related to the touristic sector and the peculiarity of legal knowledge and legal language are two telling examples. Irrespective of the formal requirement imposed, in all Member States professions in this sector inevitably require a cultural and professional background that is connected also to linguistic issues.

The Greek case of the voluntary veterinaries from other EU countries to whom the certificate to provide services on a temporary basis was denied on language grounds is another case in point of

[112] Judgment of the Court of 28 November 1989. Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee - Case C-379/87.

how this criterion is applied with reference to both the right to establishment and the freedom to provide services. According to the Opinion of the Greek Council of State, although in that particular case the administrative decision was considered to be disproportionate and therefore illegitimate, from a general viewpoint regardless of whether the EU principle at stake is the right to establishment or the freedom to provide services, the host Member State may require the knowledge of the language it deems necessary[113].

In some cases the reference to the language proficiency necessary for a given profession can lead to justify a broad discretionary power of the employer in assessing whether an employee has the necessary language proficiency. This discretionary power can bring about barriers against foreign workers, also beyond those provided for as legal prerequisites.

The case of the Dutch citizen moved to Denmark and laid off after a department re-organization because, although fluent in Danish, he was not able to speak it "flawless" is a case in point. According to the employer, the requirement to speak perfectly at the phone was justified to sell product via phone marketing on the Danish market and does not constitute an indirect discrimination on the basis of nationality. The Danish Supreme Court confirmed that the linguistic requirement was justified and proportionated[114].

From an even more general perspective, language proficiency is an implicit requirement to attend University or professional courses in a given Member State to obtain the needed professional qualification. At the University level, joint and exchange programmes are available, but there are a huge number of compulsory professional courses in different fields delivered only in the official language of the Member States. This may be an inevitable factual linguistic barrier that can be overcome only by strengthening the language education at the national as well as at the European level to increase the number of EU citizens able to fully exploit the opportunities given by EU mobility.

Coming back to linguistic knowledge necessary to a given profession, **tourist guides** are generally required to be proficient in the official language of the host Member State and in at least another foreign language.

Sometimes linguistic issues may be formally connected to the access to the profession itself, whereas in other Member States linguistic requirements derive from the participation in the necessary

[113] See above fn. 84.
[114] See above fn. 8.

training programmes. In Greece, for instance, according to a Ministry Decision (n. 9/2014) EU citizens must have a Certificate of Attainment in Greek (level B2 at leas) to participate in the training programme for the exercise of the profession of tourist guide in Greece[115]. Also in Italy, the access to the profession and especially the training programmes provided for at the regional or local level require the knowledge of at least one foreign language and level C2 of proficiency is generally required. The exam on the other professional knowledge legally imposed is in Italian and therefore requires adequate language proficiency. The same applies to the oral and written examination (in Italian) provided for the special qualifying examination under Ministry Decree of 11 December 2015[116]. Training programmes aimed at guaranteeing "scientific, linguistic and professional requirement"[117] are also compulsory to obtain the necessary professional card for the profession of tourist guide in France, which is strictly defined by the law. Citizens of other EU Member States may show equivalent training level and qualifications. Nevertheless the failure to properly provide for a clear regulation as to the procedure and requirements necessary to obtain the recognition of professional training and the related national licence can lead to EU infringement procedure. France is a case in point of this kind of further obstacles deriving from a lack in the correct implementation of EU law, which may also involve linguistic requirements[118].

In some cases, the profession is mainly regulated at the national level, whereas in other Member States regional and local policies perform an essential role, also with reference to linguistic requirements. Although the enforcement of EU law is provided at the national level, some differences may indeed result from the special legal framework granted to some autonomous regions or provinces. This is particularly true with where linguistic minorities are highly protected on a territoriality basis.

In Belgium, Spain and Italy, for instance, there are different regimes according to the articulated administrative and linguistic framework. In Spain, for instance, tourist guides must speak at least three languages, one of them being Spanish. Further linguistic requirements are anyway provided by autonomous regions according to special status of their co-official languages. To be accredited as touristic guide in Galicia or Catalonia proficiency in the related languages is also required. Furthermore, Catalonia requires the knowledge of Catalan in any cases, even if touris guides obtained the accreditation by another Spanish authority[119]. Also in Italy, the special autonomy of some regions can affect the conditions required. As far as linguistic knowledge is concerned, the special language regime of South Tyrol has for instance an influence also on the assessment of

[115] See above fn. 84.
[116] See above fn. 7.
[117] See C. Legeot, op. cit..
[118] Ibid.
[119] See above fn.5.

language proficiency requirements, which include Italian and German as compulsory languages (i.e. the co-official languages of the two main linguistic communities in South Tyrol)[120]. Belgium is another case in point since the administrative procedure for accreditation of a tourist guide, and the use of a given language (that although not formally certificated, must in any case be mastered) depend on the speaking region concerned[121].

With reference to **lawyers**, the knowledge of the official language of the Member State in which the activity is pursued can be explicitly laid down in legal provisions or implicitly result from the nature of the activity to be exercised. For EU lawyers, the knowledge of the Danish language is for instance explicitly required, especially in connection with the trial period before authorization (Administration of Justice Act)[122]. Similarly in Greece, the necessary knowledge of Greek is required[123]. Language examinations for lawyers are also imposed under some conditions in France[124]. Language requirements are instead implicitly present in the laws regulating the access to the profession of lawyer in Belgium.

From this perspective, two more issues are worth to be pointed out with reference to lawyers, which prove to represent further types of linguistic barriers specifically related to regulated professions.

First of all, the bar examination or the aptitude test (i.e. the exams compulsory either for obtaining the title directly in a given Member State or to exercise in a Member State different from the one in which the title has been obtained) are in the official language of the Member State. Adequate proficiency of that language is therefore necessary to register to the Bar Association and to access to the profession. In some very specific cases the exam can be taken in another co-official language. Such linguistic exceptions are usually territorially bounded (South Tyrol in Italy is a case in point).

The registration itself to the Bar Association requires fulfilling procedures and documents in the national language. This can lead to further practical linguistic obstacles[125]. The above-mentioned linguistic exceptions apply also in this case. At a more general stage, as already mentioned, in the case of regulated professions, Professional Associations perform a crucial function in regulating the

[120] See above fn. 7.
[121] See above fn. 4.
[122] See above fn. 8. See also the Danish National Report attached to Deliverable 5.3.
[123] See above fn. 84.
[124] On the articulated French legal framework see C. Lageot, op. cit.
[125] For more details on the French legal system, see C. Lageot, *French language system: between protection and obstacles*, in S. De Vries, E. Ioriatti, P. Guarda, E. Pulice, *Legal and factual barriers to the exercise of EU citizens economic rights*, Elgar Publishing, fortcoming.

access to the profession and its exercise. Their rules may turn into further barriers, also from a linguistic perspective, also in cases where language proficiency is not legally imposed.

For the purposes of this research, these further obstacles characterize also **health professionals.**

With reference to Article 53 of Directive 2013/55/EU, no specific issue arose and no specific measures have been adopted so far for health professionals, either because of the delay in the implemention process(e.g. Greece ad Spain still have to transpose it) or because the need to protect the patient through doctors' language proficiency can be considered as already addressed by national regulations.

Also when the prerequisite of the knowledge of the national language is not expressly laid down in legal provisions, language proficiency can be considered as an implicit requirement[126]. Generally the responsibility for checking that health professionals have the necessary qualifications for properly pursuing their activity relies on Professional Associations or on hiring institutions and central authorities. These bodies must ensure, on the one hand, a good routine during the hiring process to hire the most qualified professionals and, on the other hand, to acquaint these professionals with the national regulations in the healthcare system. While these principles are common in all Member States, the Danish Report gives a telling example. In Denmark the guidelines of the Danish Health Authority inform that the authorization cannot be submitted to a certificate of Danish language proficiency. At the same time the guidelines also stress the importance of trust in the healthcare field and of the responsibility in hiring professionals. Therefore it has been argued "it is thus expected that the employer makes sure before hiring EU/EEA health professionals that they are in possession of the Danish proficiency and communication competences required by the job they are applying for"[127]. Professional Associations, acting as public bodies, may provide for further regulations and procedures to assess professional skills, including the necessary language proficiency. The French Professional Council, for instance, organizes specific measures concerning language tests[128].

In some cases, health professionals working in the public sector can be subject to the same rules as public officers with reference to linguistic requirements (e.g. autonomous communities in Spain and South Tyrol in Italy).

[126] See above fn. 4.
[127] See above fn. 8.
[128] See C. Lageot, op. cit.

At a broader level, further linguistic barriers, which may practically hinder the free choice of employers or the access to a given profession, also on an indirect basis, derive from linguistic rules or linguistic limits concerning other certificates, which may be needed for working reasons. For instance, the fact that in Denmark the driving licence in order to become bus driver can be obtained by means of a Danish exam can be considered as a real barrier to the possibility to hire non-Danish speaking workers[129]. In cases of a lack of manpower the need to hire non-national people can thus be hindered by these kinds of legal barriers, which prove to be common to many EU Member States.

Factual barriers may indeed derive from the difficulties of employers in hiring foreigners who do not speak the national language, due to the necessary relationships with costumers speaking that language, or to the availability of materials and working tools in the national language. Collegiality in the mother tongue on working spaces may turn to be another factor hampering the hiring of workers that do not know the national language. These issues have been particularly stressed by the Danish report and to some extent also by the Italian one, but can be considered as factual barriers potentially characterising all EU Member States.

As already stressed, the social attitude towards the use of a language can turn into factual barriers also in the working spaces, together with a proper knowledge of European languages.

b) Focus on linguistic issues concerning the public administration

Linguistic issues concerning public posts are related to the protection of the right to use one's own mother tongue in oral and written communication with the public administration and to the official language policy adopted. As clearly shown by the national reports, this issue is addressed in different ways within Europe and the solutions adopted my Member States are rather heterogeneous[130]. Consequently, the language proficiency requirements imposed to civil servants are different.

While in all Member States the knowledge of the national language is a prerequisite to have access to public posts, in some countries also proficiency in other co-official languages can be required and language arrangements can significantly vary on a territoriality basis. The knowledge of the other co-official language can be treated as a prerequisite or as a preferential condition according to the peculiar administrative and language framework of the territory concerned.

[129] See above fn. 8.
[130] See above §2.

The multilingual context of Belgium is a case in point. The language of the region (Dutch, French or German) is a prerequisite for appointment and promotion, and a basic knowledge, as the case may be, of French or Dutch is also needed. In the bilingual Brussels-Capital region instead, the first language is that defined by the University degree and the proof of the second language (either French or Dutch) is also required. Moreover municipalities' special language requirements are imposed to some civil servants in the linguistic borders. In the municipalities with facilities, i.e. tools to manage difficulties deriving from linguistic dversities, and in the German-speaking region the services are organized in a way that allows people to use both French and German.

Also in Italy the Italian language is compulsory to work in the public administration but in some local realities, especially in the bilingual areas (e.g. South Tyrol, Valle d'Aosta, municipalities where the Slovenian language is co-official), the knowledge of other languages may be considered either a prerequisite or a preferential condition. Due to its high level of protection of linguistic rights, South Tyrol is again a sensitive example, whose linguistic requirements have also been challenged at the European level. In this autonomous province a language certification is mandatory for all applicants to the public service. Access to public posts is subordinate to certification of knowledge of both co-official languages (Italian and German). Moreover one of the main features of South Tyrol autonomy is the so-called proportional principle, according to which, in specific fields (including public employment), access to public posts and social services by citizens belonging to the three linguistic groups — German, Italian, and Ladin — is considered and guaranteed in direct proportion to their numerical strengths within the population[131]. As to the level of proficiency required, the language knowledge should be adapted to the need for efficiency of the service. In particular, there are different linguistic levels (D-C-B-A), the level required being determined according to the applicant's education degree.

In Spain linguistic arrangements are quite intricate since they depend on the administration empowered to rule on a given filed. Public servants must have a deep knowledge of the official-language(s) but the manner in which the citizens' right to choose their language in communication with the public administration is protected varies from an autonomous community to another. In some cases the language knowledge is a prerequisite and a specific level of proficiency is imposed. The administrations of Catalonia and Balearic Islands are a case in point. Level C1 or C2 is required. In the Basque country, while public servants must master both Euskera and Spanish, the proficiency level required depends on the position and on the locality. Sometimes the language knowledge can be considered as a merit rather than a prerequisite or a period of time can be given to the public servant to achieve the required language proficiency. In Galicia the level of knowledge of Galician

[131] See above fn. 7.

required is in many cases lower than in other autonomous communities. With reference to the General Public administration, the knowledge of languages other than Castilian is considered as a merit rather then a prerequisite to be hired. Nonetheless there is a growing attention to language training in the other co-official languages since their are gaining importance also within the General Public Administration.

The knowledge of other European languages, while generally included as a test in the examination or awarded with extra points in the hiring procedure, does not reach a high and systematic level of protection in the various Member States. The abovementioned linguistic barriers deriving from the difficulties in dealing with public offices is connected to the possible lack of adequate proficiency in languages different from the national official one. Sometimes also institutional website are not properly translated in English or in the most used European languages.

Another linguistic barrier that have been stressed for civil servants is related to the language of the selection procedure, which can be taken only in the official language of the Member State, thus making the knowledge of that language a factual linguistic obstacle also beyond the proficiency level formally required[132]. This type of linguistic barrier is anyway likely to characterize a huge number of working realities in the public as well as in the private sector in many Member States.

With reference to **judges**, the knowledge of the official language is closely linked to the (constitutional) principles governing the judicial function at the national level and to the high level of professional qualification required. In some very specific cases the examination, while remaining organized and regulated at the national level, can be taken in another co-official language. Also in this case the exception is territorially bounded. In Italy, for instance, a special state exam is organized for the qualification of judge in the Bolzano province and the exam can be taken either in Italian or in German. The language certification of proficiency in both Italian and German (at the highest level) is compulsory. Moreover, the posts are divided into the three main official language groups according to the abovementioned proportionality principle[133].

Also for judges, the knowledge of a foreign language is instead generally included as a test in the qualifying examination process and promoted in training courses. However this knowledge is not required on a high language proficiency level, nor does it turn into a formal prerequisite to have access to the exam or into a barrier practically preventing a person to become a judge. From the EU

[132] Greece is a case in point. See above fn. 84.
[133] See above fn. 7.

perspective, the knowledge of other European legal languages deserves more attention and could be further strengthened especially through training courses.

With reference to professionals the lack of a unique EU language certificate may also lead to clashes among national – regional language requirements and freedom of movement. Indeed, although the Common European Framework of reference for language is recognised and applied in all Member States, differences still remain as to the type of certification imposed or the language tests required to obtain it.

6.2 LINGUISTIC BARRIERS AFFECTING CONSUMER PROTECTION

Consumer protection and barriers affecting consumers' rights have been extensively addressed in Deliverable 5.4. This paragraph therefore refers to that Report as to the general framework and will focus only on language issues.

From this perspective, it must be first of all pointed out that linguistic diversity itself, while being a potential competitive advantage for EU, represents a factual barrier to the aim of market integration.

In this context different criteria have been adopted in balancing two quite opposite perspectives: the territorially-grounded national language policies – i.e. the possibility for EU Member States to impose the use of their official languages on their territory – and the EU principle of freedom of language, according to which Member States must allow for the use of different languages within their territory.

Besides the linguistic proficiency requirements for workers and the recognition of professional qualifications, consumer protection and labelling of products are two of the most controversial fields in which rivalries of regulation levels and rivalling rights continue to be addressed in a rather eclectic way.

Language arrangements resulting from the variety of regulations and directives governing consumer protection and labelling of products are rather heterogeneous in dealing with the possibility for the EU Member State to impose the national official language(s) to protect consumers within its territory.

While some directives and regulations explicitly impose the use of the official language of the Member State where a given product is placed on the market, other EU directives and regulations simply leave to the Member States the choice as to determine the language to be use. Another solution adopted at the EU level is to allow the Member States to forbid only information that are not given in a language easily understood if the purchase is not provided with the information by other means[134].

The first solution includes, for instance, the labelling of medical products for human use (Directive 2001/83 EC), instructions warning notices of appliances burning gaseous fuels, tabacco products as to information concerning the levels of tar and nicotine, insurance mediation, etc. In some cases a free choice by customers is also admitted by adding the possibility that information and conditions must be provided in the official language of the Member State of destination of the product or where the service is offered or in "any other language agreed between the parties" (For instance: Article 13 of Directive 2002/92/EC on insurance intermediary and Articles 36 and 41 of Directive 2007/64/EC on payment services in the internal market).

As to the category of directives and regulations leaving the choice to Member States, the Directive on consumer rights is a case in point.

According to Recital no. 15 the concerned Directive "should not harmonise language requirements applicable to consumer contracts. Therefore, Member States may maintain or introduce in their national law language requirements regarding contractual information and contractual terms".

Under Article 6(7) Member States may maintain or introduce language requirement concerning contractual information "so as to ensure that such information is easily understood by the consumer".

The requirement of "a language easily understood" is relevant to Member States' authorities, which in some cases must accept this criterion in their communications (see, for instance, Directive 2013/29/EC on the harmonization of the laws of the Member States relating to the making available on the market pyrotechnic articles and Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electronic equipment). In other cases that criterion is an alternative only in

[134] For a more detailed analysis of these different models see, among others, S. van der Jeught, op. cit., at 204 ff.

cases where the Member States do not pass regulations requiring the use of the national language(s)[135].

According to the Foodstuffs Regulation[136], for instance, "mandatory food information shall appear in a language easily understood by the consumers of the Member States where a food is marketed". Nonetheless "Within their own territory, the Member States in which a food is marketed may stipulate that the particulars shall be given in one or more languages from among the official languages of the Union". These two provisions "shall not preclude the particulars from being indicated in several languages".

As to the labelling of product, the "impossibility for practical reason" of using all languages has been addressed by the CJEU case law.

The Schwarzkopf case deals with the packaging and labelling of cosmetic products, and in particular with linguistic requirements as measures justified to protect public health. Article 7(2) of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products authorized the Member States to "require that the particulars provided for in Article 6 (1) (b), (c) and (d) be expressed at least in their own national or official language or languages". Under Article 6(1)"Member States shall take all measures necessary to ensure that cosmetic products may be marketed only if their packaging, containers or labels bear the following information in indelible, easily legible and visible lettering: ... d) particular precautions to be observed in use". The provision then added that "where this is impossible for practical reasons, this information must appear on the packaging or on an enclosed leaflet, but in the latter case an abbreviated external indication must appear on the container, referring the consumer to the information specified".

According to the CJEU "National linguistic requirements such as those authorised by Article 7(2) of Directive 76/768 ... constitute an obstacle to intra-Community trade in that the products concerned must be given different labelling according to the language or languages prescribed in the Member State in which the products are marketed, thus entailing supplementary packaging costs".

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[135] Ibid.

[136] Article 15 (Language requirements), Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004.

However these obstacles are "justified by the public interest objective of protecting public health". The information which producers or distributors of cosmetic products are obliged to put on the product's container and packaging "save where it can be effectively conveyed by the use of pictogrammes or signs other than words, will be of no practical use unless it is given in a language which can be understood by the persons for whom it is intended".

As to the concept of practical impossibility the Court stressed that this notion "must have a *broader meaning* covering, in particular, cases where it would be objectively possible to provide the prescribed warnings in full but only at the price of using characters so small that they would be almost illegible and where full warnings, printed in legible characters, would cover almost all the product so that the producer could no longer put the product's name and other relevant information on the product in a useful way". However "the producer's or distributor's wish to facilitate the movement of his product within the Community is not sufficient in itself to justify omitting the full obligatory warnings". According to the Court "impossibility refers generally to a factual circumstance over which the person invoking it has no control". Consequently "it is not impossible for practical reasons, within the meaning of the last sentence of Article 6(1)(d) of the amended Directive 76/768, to set out the obligatory warnings in full on the container and packaging of a cosmetic product in the language or languages prescribed in the Member State in which it is to be marketed, where the producer or distributor wishes to label the product in nine languages, including eight official languages of the Community, for economic considerations and in order to facilitate the movement of the product within the Community, and this entails abbreviating those warnings on the container and packaging"[137].

With reference to e-commerce and cross-border commerce, Article 10 of Directive 2000/31/EC on e-commerce provides that "In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service: ... d) the languages offered for the conclusion of the contract". Furthermore both the Member States and the Commission shall encourage the accessibility of the codes of conduct "in the Community languages by electronic means" (Art.16, letter d).

It must also be pointed out that language issue may be taken in consideration and acquire legal importance from the viewpoint of misleading commercial practices. For instance, Directive 2005/29/EC concerning unfair business-to-commercial practices in the internal market, lists among

[137] Judgment of the Court (Fifth Chamber) of 13 September 2001. Hans Schwarzkopf GmbH & Co. KG v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV. Case C-169/99, points 32 ff.

the “commercial practices which are in all circumstances considered unfair” (Annex I) also “Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction”.

Against this background, and taken into account the great variety of situations in which consumers may encounter linguistic obstacles, the comparative analysis is based on the tools adopted at the national level to help consumers in complying with language barriers.

The survey has shown the following linguistic issues that are likely to impact on consumers’ rights.

Fist of all, the use of the national language is highly protected through explicit provisions and authorities, although in a rather eclectic way depending on the single field concerned. The same applies to the translation of the most important information or contract procedures in the main language.

In some cases, there are also bodies and associations specifically aimed at protecting the national language, enjoying the right to engage in judicial proceedings and in charge of assessing the evaluation of the actions undertaken to protect the use of the national language also by report to the Parliament. France is a case in point.

Besides these general rules, Member States generally do not adopt specific legal tools protecting or helping consumers with language difficulties. This role is however entrusted in several institutions and associations protecting consumers’ rights.

Moreover consumers can activate judicial remedies (both judicial and extrajudicial mechanisms) to protect and fully realize their rights. These remedies have been already addressed in *Deliverable 5.4* with specific reference to the capacity of consumers to process information and make informed choice.

As far as linguistic issues are concerned, at least two issues are worth to be stressed.

First of all, the national language framework may also influence these remedies. For instance, according to the abovementioned linguistic territoriality principle, the language policies applied to

this field varies from a linguistic region to another and from a border municipality to another in the Belgian multilingual context[138]. From a more general viewpoint, in all Member States the language of the legal proceedings before a national court can also make the use of a given remedy more difficult for foreign consumers.

Moreover, in some cases factual linguistic barriers may act as obstacles also to tools legally provided to help EU citizens in exercising their consumer rights by overcoming some barriers deriving from language issues. The lack of translation of the websites of consumer associations and even of the Consumer Ombudsman's website stressed by the Greek Report is a case in point, since it makes practically useless the various remedies for (also foreign) consumers formally available in that country. This lack of translation prevents indeed EU consumers (not able to understand the national language) to be informed about their rights and the remedies to be used and is a barrier still widespread throughout Europe.

Conversely, precisely websites can be a power tool in helping national consumers in online activities in other countries as well as foreign consumers in the National territory or on national website. The website of the European Consumer Centre Denmark is a case in point and offers also electronic complaint that can be filled out in any European language although the use of English is encouraged where possible[139].

Different social and legal attention inevitably characterizes the linguistic issues concerning consumers in bilingual or multilingual realities throughout Europe. Again, the protection of linguistic rights is a case in point and Spain offers a very telling example of how this protection can directly affect also the private sector.

In Spain, the scope of consumers' linguistic rights differs among the various Autonomous Communities, although the common aim of the regulations of the regional legal system in Basque Country, Catalonia and Galicia is to allow consumer to be attended in the official language that they choose. While in Galicia consumers' linguistic rights are framed as a recommendation, in Basque Country and above all in Catalonia a higher level of protection is imposed. In the first case, the scope of consumers' linguistic rights depends on whether the specific place is bilingual since the linguistic duties are higher in areas where Euskera is intensively used. Moreover the protection of consumers'

[138] See above fn. 4
[139] See above fn. 8.

linguistic rights also depend on the fact that a given establishment has a large size or if it provides essential services (e.g energy, banking sector or telecommunication)[140].

Catalonia offers the highest – and to some extent controversial[141] – protection of consumers' linguistic rights. According to the Catalan Consumer Code consumers have the right to be attended in Catalan in any establishment located in the Autonomous Community if they ask for it. Moreover, any consumer information, trade names, purchases offers and advertising, sales agreement must be provided at the very least in Catalan regardless of the establishment size or location.

What is more important from the viewpoint of possible barriers to the exercise of economic rights is that failure in fulfilling these duties could lead to a fine between 10.000 and 100.000 Euros to be paid by the owner of the store or enterprise[142].

As to remedies, consumers can bring before the Regional Consumers' Protection Agencies any complaint related to their linguistic rights. These agencies are entitled to mediate and, in Catalonia, to fine the establishment.

With reference to cross-border online purchase of goods and services it has been stressed that the principle of freedom of language (usually applied in all Member Stated except for some linguistic requirements concerning specific information) can turn into a barrier if connected to the difficulties in understanding in which country the provider is established[143].

Finally the "Nordic Consumer Ombudsmen's Position on Internet Commerce and Marketing" offered by the Danish Consumer Ombudsman is worth to be mentioned. The Position highlights regulations and principles to be followed by businesses dealing with consumers to grant a sound marketing practice. With reference to language, the Position (which is a supplement to national regulations) states that "The language alternatives for entering into a contract shall be stated on the website; all contractual terms shall at least be found in the language used in connection with the entering into a contract; and after entering into a contract, the consumer should be able to communicate with the business in the same language in which the contract is entered"[144].

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[140] See above fn.5.
[141] These provisions of the Catalan Consumer Code have been challenged before the Constitutional Court but the case is still pending.
[142] See above fn. 5.
[143] This obstacle characterizes for instance the Belgian reality, but this anyway widespread.
[144] See above fn. 8.

6.3 LANGUAGE ISSUES AFFECTING IPRS

Intellectual Property Rights (IPRs) have been extensively discussed and analysed in Deliverable 5.5. This paragraph concerns therefore only language issues. These latter can derive, for instance, from rules imposing the translation of titles or exploitation tools (i.e. contract) related to IPRs (copyright, patent, etc.).

From a general perspective, matters related to IPRs are largely harmonized, due to the pivotal role of the European Union with regard to uniformity in this field, which also involves language issues. Barriers deriving from linguistic diversity do not seem, therefore, to be that crucial in hampering IPRs. Nevertheless, at a more operational stage and focusing on specific aspects, some language issues, which are sometimes likely to make the exercise of these rights more difficult, can be outlined.

With reference to the European Patent Convention (EPC) context, we may find some interesting examples. While the request can be introduced in any language, a translation into German, English or French must be provided to the European Patent Office (EPO). Also the claims have to be translated into the three official languages, namely German, English and French before publication. European patents are available in all official languages of the Member States part of the EPC. Its software automatically makes the translation, which anyway has no legal value being provided only for information purposes. “Patent Translate” is indeed a machine translation service providing translations from and into English, French and German (for a total of 29 different languages). Thanks to a collaboration of EPO with Google this service has been made specifically suitable for patent documents, being able to handle elaborate patent vocabulary and grammar.

However, under the procedure for filing and granting a European patent by the EPO, after the patent is granted, the applicant has to move to the so-called national stage in order to translate the granted patent into the language of the country in which he/she intends to extend the patent protection. This activity is likely to lead to supporting costs and, hypothetically, to committing translation errors.

From a linguistic viewpoint, it must first of all be underlined that under Article 1(1), (2) and (3) of the so called London Agreement (i.e. an optional agreement aiming at reducing the costs relating to the translation of European patents):

- “a state which has an official language in common with one of the official languages of the EPO shall dispense entirely with the translation requirements provided for in Article 65(1) EPC”. This applies in the cases of English, French and German.

- "a state which does not have an official language in common with one of the official languages of the EPO shall dispense with the translation requirements provided for in Article 65(1) EPC if the European patent has been granted in the official language of the EPO prescribed by that State, or translated into that language and supplied under the conditions provided for in Article 65(1) EPC. These states may however require that a translation of the claims into one of their official languages be supplied".

  Member States keep therefore the right to require translation in one of their official languages and, in case of a dispute relating to a European patent, to require the patentee to provide a translation in one of the official languages of the state[145].

  As to the status of accession and ratification of this Agreement, among the Member States analysed in this Deliverable, Belgium, Greece, Italy, and Spain have not yet ratified it.

  A translation into the national language, or into one of the co-official languages, is therefore still needed in these countries, and this requirement makes the patent more costly. In Belgium, for instance, the principle of linguistic territoriality applies also in this case. Accordingly, if the European patent is issued in English, a translation into French, Dutch or German has to be provided or established by the Belgian Patent Office. For European patent issued in French or German, a translation is instead not necessary, and the patent is automatically validated. When required, the translation must be submitted to the Belgian Patent Office within the imposed delay, otherwise the European patent is deemed to be ineffective on the national territory[146].

  Conversely, for instance in Denmark only the part of the patent which contains the patent claims is supposed to be translated into Danish, thanks to the amendment introduced since 2008 in compliance with the London Agreement. As a consequence, it is no longer the entire text of the patent, which has to be translated. This led to a relevant reduction of the translation costs for patents.

  Nevertheless, a further possible linguistic barrier – which is likely to characterize many Member States – has been stressed despite this language arrangement. In particular, in cases of proceedings for breach of a patent, the translation of the entire text of the patent in the language of the court (i.e. the national official language) can be required. The Danish Administration of Justice Act is a case

[145] For more details on all these issues see Deliverable 5.5 "Research paper on Case Study (iii): Barriers that citizens face regarding their intellectual property rights" by P. Guarda.
[146] See the above fn. 4.

in point since its Article 149 (2) requires a translation verified by an authorised translator of all documents written in a foreign language[147]. This applies also if a supposed counterfeiter asks for it[148].

Furthermore, a strong debate arose with reference to the definition of various legislative proposals addressing the language regime of the patent system. In December 2012 the European Parliament approved a Regulation on the European patent with unitary effect[149] and an Agreement on a Unified Patent Court for litigation[150]: the so-called "Unitary Patent". Also this tool has been addressed in Deliverable 5.5. As far as language issues are concerned, it must be pointed out that in the beginning Spain and Italy refused to take part to the Unitary Patent because of the proposed language arrangements. In particular, they brought an action for annulment of Council Decision 2011/167 authorising enhanced cooperation in the area of the creation of Unitary Patent protection between 25 Member States. In the joined Cases C-274/11 and C-295/11 *Spain and Italy v. Council* (judgment of 16 April 2013), the CJEU was therefore called upon to examine the lawfulness of such cooperation.

With specific reference to language issues, Italy and Spain observed for instance that "the true object of the contested decision was not to achieve integration but to exclude the Kingdom of Spain and the Italian Republic from the negotiations about the issue of the language arrangements for the unitary patent and so to deprive those Member States of their right, conferred by the second paragraph of Article 118 TFEU, to oppose language arrangements they cannot approve".

They also claim that "the enhanced cooperation in question would be the source of distortion of competition and of discrimination between undertakings by reason of the fact that trade in innovatory products will be, according to the language arrangements provided for" in the contested decision "made easier for undertakings working in English, French or German". Moreover the enhanced cooperation contemplated would "reduce the mobility of researchers from Member States not taking part in this cooperation or from Member States whose official language is not English, French or German, for the language arrangements provided for by the decision will make access to information on the scope of the patents difficult for those researchers".

The European Court of Justice rejected all the arguments of the parties and dismissed the action.

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[147] See above fn. 8.
[148] See for instance C. Lageot, op. cit.
[149] Regulation (EU) no 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection. See also the Council Regulation (EU) no. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.
[150] Agreement on a Unified Patent Court, (2013/C 175/01).

Differently from Spain, in 2015 Italy decided to officially join the Unitary Patent system, thus becoming the 26th state of the Union to be part of enhanced cooperation. The Italian entry was formalized with a EU Commission's Decision ((UE) 2015/1753).

No specific measures have been taken so far by the Member States analysed. Anyway, from a more general perspective, some tools can help in dealing with language issues, such as databases on the translation and other documents related to European patents or funds to reimburse translation. The Belgian EPATRAS database and the Spanish fund established in 2013 to reimburse translation from Spanish into English, French or German to get a European Patent are two cases in point. Nevertheless, in the latter case the translation into Spanish is instead not reimbursed.

A more systematic establishment of these tools throughout Europe could therefore help in better addressing language difficulties related to patents.

CONCLUSIONS

The variety of barriers resulting from linguistic diversity is closely linked to a number of intricate and multi-faceted issues, due to the role language may perform at both the European and national level. In this perspective, linguistic barriers may derive from a variety of reasons, at both the legal and factual level and some of them are based on the need to protect a given fundamental right or a specific public interest.

The main problem is that neither the institutions of the European Union nor the Member States have dealt with the issue of multilingualism in a comprehensive and satisfactory manner.

Therefore, first of all European institutions should boost a critical and comprehensive understanding of the reasons behind specific language regulations, as an essential tool to arrange the strategy needed to properly balance all the rights concerned and, therefore, mitigate a given linguistic barrier.

With reference to the drafting of EU law, according to the abovementioned regulation on multilingualism, the rules enacted at the EU level must be drafted in 24 different languages too. This institutional duty must go through a specific mechanism of drafting formulation and it is not an easy task,also because the EU drafting technique originates in the provisions prescribing how EU acts have to be written from a stylistic point of view. Moreover, in order to grant that the same term acquires the same meaning in all the 28 legal systems, the EU legislator goes through a specific mechanism of lexical creation, which chiefly consists of coining neologisms.

Hence, multilingualism influences not only the translation, but the actual structure and content of the rule. The result of this process is clearly visible in the style of the directives and regulations: a pragmatic, detailed, concrete regulation of legal instruments, rather than a system of rights.

In many cases, the result of this multilingual drafting technique is not adequate to transfer the same right, formulated at the EU level, in all the 28 Member states. This is clear in the European Court of Justice case law, where it is not rare to find inconsistencies in the different language formulations and the consequence is such that only in some languages (and Member states) a specific right is fully recognized.

Secondly, the final result of these drafting techniques is the creation of instruments rather than rights. Clear examples are the directives on consumer protection – nowadays “Directive on

Consumer Rights" – and particularly the well known "right of withdrawal": a consumer opportunity to withdraw from a contract within seven (now fourteen) days is undeniably a proper "right". However, the regulation provided in the directive is more focused on the procedure of withdrawal (the instrument) than on the effect of the withdrawal from the contract (the right).

In general, the multilingual drafting of EU norms – and consequently of EU rights – is not automatically functional to the effective transposition of rights in the Member States and to the substantive equality of EU citizens before European law. What is already clear,is that the formulation of the EU terminology might cause a lack of communication among the EU institutions and the EU citizens with regard to the rights which are recognized to EU citizens at the European level.

The problem ranges as to whether and to what extent the multilingual formulation of the law at EU level is adequate to express and communicate the system of rights, elaborated at the European level, which are part of the EU citizenship too.

In this last development the emphasis at the debating table should be placed on the insufficient amount of attention paid to the impact of the principle of multilingualism on the recognition of the EU rights at the national level.

The EU's implicit attitude is to regulate language issues as a mere economic affair. EU citizenship is related to the extension to all citizens of the same rights, through a proper formulation of multilingual EU norms.

With more specific reference to barriers toward economic rights, as the research has clearly shown, linguistic obstacle may indeed derive from the imposition of language requirements but also from inadequate language knowledge.

The policies enacting the public protection of language rights and addressing multilingual realities thus play an essential role in coping with the variety of linguistic issues and needs within the European context.

Given this complexity, if not properly addressed by the law, substantial differences or a lack of coordination among EU, State and regional regulations on language issues, as well as factual situations concerning languages (e.g. the coexistence of different linguistic groups) might be the origin of specific linguistic obstacles.

The European Commission should therefore foster a EU general linguistic policy in order to prevent the Member States' regulations on language to turn into barriers and disproportionate limitations to the effectiveness of EU action and to citizenship rights, while at the same time properly addressing the choices concerning the balance of all the rights concerned.

The scenarios that open up to the European Union involve the identification of the best balance between the linguistic diversity and integration.

In many cases, educational policies aimed to foster language knowledge and mutual understanding prove to be the most important tools. In other words, a solution to many of the language issues analysed is not to be found in law but in educational policies, which produce a plurilingual environment able to favor interaction among European citizens.

In this sense, Europe is already focused on the promotion of plurilingualism through policies for language learning.

The European Union develops indeed policies to protect and promote languages because a multilingual society is not only more liable but also richer both socially and economically. For this reason, the Union approved the Common European Framework of Reference for Languages (CEFR), which defines plurilingual skills in tight relation with pluri-cultural skills. The CEFR promotes "the ability to use languages for the purpose of communication and to take part in intercultural interaction, where a person, viewed as a social agent, has proficiency of varying degrees, in several languages, and experience of several cultures".

This scenario becomes particularly important in the field of economic rights. By leaving the conservation or reduction of plurilingualism to competitiveness or to the market, the outcome risks being different from the one declared and wanted by the Union, which aims to multilingualism. Having created a single market could bring the risk of economic forces imposing the use of just one language. This is not an objective of the Union, neither at the institutional nor socio-cultural level. The Union must therefore choose whether to enforce specific interventions in favour of "plurilingualism" in the business world or whether to let this important aspect of European citizenship move towards a natural linguistic unity. This process is caused on one side by the cost and lack of economic convenience of conserving so many different languages. On the other hand, it is due to the unstoppable role of English as lingua franca. This is a rather common phenomenon that cannot (or maybe should not) be fought but counterbalanced by specific linguistic policies.

In this sense, the European Union should strengthen its policies for plurilingualism to preserve the identity of its citizens also in those fields in which market dynamics make plurilingualism anything but economic. This must not be done by opposing to the decisions of private citizens, nor to the role of English as “lingua franca” in business and economics, but by preserving linguistic production and language education.

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