

OFFICIAL LANGUAGES INSIDE AND OUTSIDE THE INSTITUTIONS: AN ANALYSIS OF RECENT CASES

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I. INTRODUCTION

Gabriel Wilner, in whose honored memory this article is written, asked me many years ago to contribute to the Brussels Seminar. The subject was Community Social Law, including free movement of workers. Gabriel would occasionally sit in on my lectures. Sometimes he would comment, sometimes he was content to listen, with that familiar look of intent benevolence which others will also remember with affection, and is captured in certain photographs which happily bring him back, for a moment.

One of the cases I referred to in my lectures was *Public Prosecutor v. Mutsch (Mutsch)*,¹ which illustrates how far the principle of non-discrimination can—or can't—take you. *Mutsch* was about a Belgian procedural rule whose origins go back to the 1930s, a time when Belgium was trying to consolidate its links with its then newly-acquired German-speaking region, which was transferred from Germany following a plebiscite after the First World War.² Stated briefly, the rule was that German-speaking inhabitants of this area could use German in certain local criminal courts, even if that court's usual language was French.³ The rule could only be invoked by Belgians; at that time, the Belgians understandably had no intention of allowing it to be used by anyone else. Many years later, with the European Community in place, including its rules about migrant workers, a Luxembourg resident in this Belgian region was charged with a minor offense in one of these courts.⁴ He invoked the rule, but its application was stayed by the *Cour d'Appel, Liège* (Court of Appeals, Liège), since, even though he met the residence condition, he was not Belgian.⁵ A preliminary question was referred to the European Court of Justice (ECJ or the Court), which ruled that this restriction on migrant workers was not permissible under Article 7(2) of Regulation 1612/68, which provides that all Community workers are to enjoy the same "social advantages" in the host

¹ Case 137/84, *Ministère Pub. v. Mutsch*, 1985 E.C.R. 2681.

² See Visuvanathan Rudrakumaran, *The "Requirement" of Plebiscite in Territorial Rapprochement*, 12 HOUS. J. INT'L L. 23, 28–29 (1989) (“[N]eutral and Prussian Moresnet, which had a predominantly German population, was ceded to Belgium . . .”).

³ *Mutsch*, 1985 E.C.R. 2681, para. 3. For the modern application of the Law of 15 June 1935 on the use of languages in the courts, see Jean Laenens & George Van Mellaert, *The Judicial System and Procedure* 93–94, in INTRODUCTION TO BELGIAN LAW (Hubert Bocken & Walter de Bondt eds., 2001).

⁴ *Mutsch*, 1985 E.C.R. 2681, para. 2.

⁵ *Id.* paras. 4–5.

state as national workers.⁶ While the expression “social advantages” was clearly intended to refer primarily to social security benefits, the Court interpreted it broadly, as referring to measures which could facilitate the exercise of the right of free movement, thus including procedural rules in criminal courts which were available to national workers.⁷ Therefore, even though there was no Community “competence” (i.e., no power to regulate) in respect of national criminal procedure, the Community rule forbidding discrimination against migrant workers applied.

On the other hand, *Mutsch* does not mean that any migrant worker can use his own language in the host state’s courts, whatever that language may be. An Italian migrant worker in Belgium cannot use Italian in a Belgian court, since a Belgian cannot use Italian in that court either. The *Mutsch* judgment only means that if a national worker living in a state (or jurisdiction) can use a particular language in its courts (or some of them), the migrant worker living in that state (or jurisdiction) can also use that particular language in its courts (or those particular courts).

This case intrigued Gabriel—an excellent linguist himself—and it is in memory of the interest he showed in it, and of the kindness he did me in asking me to contribute to his Brussels project, that I have chosen the subject of official languages for this Article. It is a matter of some contemporary interest: on the one hand, the number of official languages has more than doubled (from 11 to 23) since 2004, with the recent enlargements of the Community. On the other hand, the issue of official languages, and when the institutions can or must use particular languages, has been the subject of a large and increasing number of judgments in the last few years.

II. TREATY PROVISIONS ON LANGUAGES

Languages are an inescapable part of European Union affairs. While the European Coal & Steel Community Treaty of 1951 was only authentic in French,⁸ the *Official Journal of the European Coal and Steel Community* was

⁶ *Id.* paras. 15–18.

⁷ *Id.*; see also Annette Schrauwen, Essay, *Sink or Swim Together? Developments in European Citizenship*, 23 *FORDHAM INT’L L.J.* 778, 791 (2000) (“An argument against free movement without financial guarantees was the lack of harmonization of social security systems and the wish to avoid ‘benefits tourism.’”).

⁸ Compare Treaty Establishing the European Coal and Steel Community art. 100, Apr. 18, 1951, 261 *U.N.T.S.* 140 (stating that it was “drawn up in a single original,” and make no reference to which language was authentic), with Consolidated Version of the Treaty on European Union art. 53, Mar. 3, 2010, 2010 *O.J. (C 83)* 13 [hereinafter *TEU*]; *TEU* art. 55

also published in German, Italian, and Dutch. ECJ cases could be heard in any of the four languages, but of course these cases only concerned a few large coal and steel producers.⁹ However, things changed by 1957, when the European Economic Community and Euratom Treaties were signed—the former of which potentially applied to all economic operators, workers as much as employers.¹⁰ These 1957 Treaties and their successors are all authentic in all the official Union languages declared as such by the Member States. The matter is still governed by Regulation 1 of 1958 (Regulation 1/58), as amended.¹¹ It is important to emphasize the word *official*, which is used in Regulation 1/58. It is for each Member State to determine what language or languages are *official* in its territory or part of its territory.¹² Likewise, it is for each Member State to declare to the Union which language or languages are to be regarded as official for Union purposes, in dealings with that State and its residents. A language may be official throughout the territory of a Member State but not be an official *Union* language, because that Member State has not declared it official for this purpose.¹³ The same goes for regional languages in a Member State: even if they enjoy official recognition in a given region, these regional languages are not Union languages, even for the areas which the language in question is internally

(“This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic.”), and Consolidated Version of the Treaty on the Functioning of the European Union art. 358, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU] (applying art. 55 of the TEU).

⁹ D.G. VALENTINE, *THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY* 147, 181–92 (1955).

¹⁰ EUROPEAN UNION LAW: TEXT AND MATERIALS 509 (Damien Chalmers et al. eds., 2008).

¹¹ Council Regulation 1/58, Languages to be Used by the European Economic Community, Oct. 6, 1958, 1958 O.J. (17) 385 [hereinafter Regulation 1/58].

¹² See *id.* art. 8 (“If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.”).

¹³ For example, Turkish is not presently a Union language (see *Official EU Languages*, EUROPA, <http://ec.europa.eu/education/languages/languages-of-europe/doc135en.htm> (last updated Aug. 8, 2011)), even though it is an official language in Cyprus (see *Languages Across Europe: Cyprus*, BBC, http://www.bbc.co.uk/languages/European_languages/countries/Cyprus.shtml (last visited Aug. 20, 2011)). Cyprus did not, however, declare Turkish an official Union language in respect of Cyprus when it acceded in 2004. This conflict is the background to Case T-455/04, *Beyatli v. Comm’n*, 2007 E.C.R. I-0000, *aff’d*, Case C-238/07 P, *Beyatli v. Comm’n* 2007 E.C.R. I-140, which concerned Turkish Cypriots who challenged the fact that they could not choose Turkish as their primary language in a recruitment competition. However, the substantive issue was not decided, as the case was held inadmissible.

official, if they have not been so declared to the Union by that Member State.¹⁴ This rule is true even if the language concerned is an official Union language in another Member State.¹⁵

Paragraph (1) of Article 55 of the Treaty on European Union (TEU), as amended, lists the languages in which the TEU is authentic:

This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.¹⁶

Paragraph (2) of Article 55 concerns what are sometimes called the “additional” languages which, as we shall see, are not declared official Union languages under Regulation 1/58.¹⁷

This Treaty 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. A certified copy of such

¹⁴ NIAMH NIC SHUIBHNE, *EC LAW AND MINORITY LANGUAGE POLICY 6 (2007)*. Article 2 of Regulation 1/58, refers only to the right of a correspondent to address the institutions in any of the *official* languages, which are those listed in Article 1 of Regulation 1/58, not to “working” or “additional” languages. Regulation 1/58, *supra* note 11, arts. 1–2.

¹⁵ Regulation 1/58, *supra* note 11, art. 3. Thus, Member State *A* may internally recognize not only its national language *X*, but also language *Y*, in respect of region *Z* which forms part of *A*’s territory. However, if state *A* has only declared language *X* to be an official Union language in respect of itself, the consequence is that an institution may not address an official act to state *A* in any language other than *X*. Nor may the institution use language *Y* even to address such an act to a citizen of *A*, who lives in region *Z* and uses language *Y*. That is so even if language *Y* happens to be an official Union language (for example, because it has been so declared by Member State *B*). The contrary would apply only if state *A* has declared language *Y* to be an official Union language in respect of itself, or the relevant part of its territory.

¹⁶ TEU art. 55.

¹⁷ See Council Conclusion, *Official Use of Additional Languages*, 2005 O.J. (C 148) 1 (referring to the languages not mentioned as “official languages” in Regulation 1/58 as “additional languages”).

translations shall be provided by the Member States concerned to be deposited in the archives of the Council.¹⁸

Article 20 paragraph (2) of the Treaty on the Functioning of the European Union (TFEU) provides:

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in [the TEU and the TFEU]. They shall have, inter alia: . . . (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any *of the Treaty languages* and to obtain a reply in the same language.¹⁹

Further, per Article 24 of the TFEU, “[e]very citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the [TEU] in one of the languages mentioned in Article 55(1) of the [TEU] and have an answer in the same language.”²⁰

Article 21 of the Charter of Fundamental Rights of the European Union (CFR) provides: “[a]ny 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.”²¹

Article 41(4) of the CFR, on a citizen’s right to good administration, is similar to the TFEU’s Article 24: “Every person may write to the institutions of the Union in one of the languages of the [TEU and the TFEU] and must have an answer in the same language.”²²

The European Union recently adopted a general principle of protecting linguistic diversity in Article 22 of the CFR which states that “[t]he Union shall respect cultural, religious and *linguistic* diversity.”²³ The last paragraph of Article 3(3) of the TEU provides the same effect: “[The European Union] shall respect its rich cultural and linguistic diversity, and shall ensure that

¹⁸ TEU art. 55.

¹⁹ TFEU art. 20.

²⁰ *Id.* art. 24 (emphasis added).

²¹ Charter of Fundamental Rights of the European Union art. 21, Mar. 30, 2010, 2010 O.J. (C 83) 389 [hereinafter CFR] (emphasis added).

²² *Id.* art. 41(4) (emphasis added).

²³ *Id.* art. 22 (emphasis added).

Europe's cultural heritage is safeguarded and enhanced."²⁴ Linguistic diversity is also referred to in Articles 165 and 207 of the TFEU, concerning the European Union's contribution to education policy and international agreements on trade in cultural goods, respectively.²⁵ Article 4(2) of the TEU, which could be taken as a reference to linguistic equality, provides that "[t]he [European] Union shall respect the equality of Member States before the [TEU and the TFEU] as well as their national identities."²⁶

However, neither Article 3(3) nor Article 4(2) of the TEU is relevant to the question of what languages are official. Indeed, nothing in the TEU and the TFEU themselves determines that matter. While they contain provisions stating in which languages they are authentic, that is not the same thing as stating what languages are official for purposes of secondary legislation.²⁷ In fact, these two treaties leave it to the Council to decide, without imposing any limitations on its choices.²⁸

The role of the Council in relation to official languages reveals how the sensitivity of the official language issue can affect many matters, even an essential economic issue such as the creation of Union intellectual property rights:

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, *acting in accordance with the ordinary legislative procedure*, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The

²⁴ TEU art. 3(3).

²⁵ TFEU arts. 165, 207.

²⁶ TEU art. 4(2).

²⁷ Irish was not declared an official language by Ireland in 1973 for the purposes of Regulation 1/58, but the Treaties have always been authentic in Irish.

²⁸ TFEU art. 342 ("The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting *unanimously* by means of regulations." (emphasis added)).

Council shall act *unanimously* after consulting the European Parliament.²⁹

Thus a distinction is made between creating the substantive intellectual property regime itself (which only requires the ordinary legislative procedure—Parliament plus Council, the latter normally acting by qualified majority) and creating the linguistic rules of the regime (which requires unanimity, and the Parliament is merely consulted).³⁰ The existence of this separate legal basis for a language regime in a specialized context implies that the Council can adopt a regime for this purpose which differs from the general regime under Article 342, for example by adopting a regime using only some of the languages recognized as official under Regulation 1/58.³¹ Indeed, this has already been done for Union trademarks, where a regime of only five official languages (English, French, German, Italian and Spanish) has been created; this is the background to the *Kik*³² case discussed in Part IV.

The Commission made a proposal in 2000 for a Community patent.³³ Given that there already exists an autonomous (non-Community) European patent system run by the European Patent Office in Munich, which operates in three languages only (English, French and German),³⁴ the Commission likewise proposed a three-language system for the Community patent.³⁵ This proposal encountered the implacable opposition of some Member States (principally Italy and Spain).³⁶ It is mainly for this reason that the proposal

²⁹ *Id.* art. 118 (emphasis added).

³⁰ Compare *id.* art. 294, with *id.* art. 188.

³¹ See *id.* art. 342 (providing that the Council determines the rules governing languages).

³² Opinion of Advocate General Jacobs, Case C-361/01 P, *Kik v. Office for Harmonisation in the Internal Market (OHIM)*, 2003 E.C.R. I-08283.

³³ *Commission Proposal for a Council Regulation on the Community Patent*, COM (2000) 412 final (July 5, 2000) [hereinafter *Community Patent Proposal*].

³⁴ Convention on the Grant of European Patents art. 14(1), Oct. 5, 1973, 1065 U.N.T.S. 199 [hereinafter *European Patent Convention*].

³⁵ See *Community Patent Proposal*, *supra* note 33, at sec. 2.4.3.1 (referencing the “office’s three working languages”). See also Seth Cannon, Note, *Achieving the Benefits of a Centralized Community Patent System at Minimal Cost*, 35 CASE W. RES. J. INT’L L. 415, 425 (2003) (“Under this proposal, the inventor must translate the entire patent into one of the [European Patent Office] languages (i.e., English, French, and German) . . .”).

³⁶ See, e.g., Xavier Buffet-Delmas & Laura Morelli, *Modifications to the European Patent System*, 20 INTELL. PROP. & TECH. L.J. 18, 22 (2008) (indicating the disagreement among Member States and the lack of a Community Patent System to date); Judit Zegnal, *Talks Continue over EU-wide Patenting*, NEW WORLD PUB., Aug. 22, 2005, NEW WORLD PUBL’G (citing the “lack of agreement [on Community patent proposal issues] such as how to treat patent infringements which might arise as a result of mistranslations”).

has still not been adopted, more than ten years later.³⁷ The patent system may now become one of the first examples of “enhanced cooperation,” a new procedure under Article 20(2) of the TEU and Article 329 of the TFEU which allow those Member States that support a proposed measure to adopt it amongst themselves (if there are at least nine states) when the required majority cannot be found for a normal legislative act.³⁸

III. REGULATION 1/58 AND LANGUAGE PRACTICES IN THE INSTITUTIONS

Turning to the content of Regulation 1/58, it can be summarized by saying that it provides for two language regimes—one external and one internal. The external regime reflects the treaty provisions quoted above and is set out in Articles 1 through 5. Regulation 1/58 originally provided for four official languages (Dutch, French, German, and Italian). As amended following successive enlargements, Articles 1 through 5 now read:

Article 1

The official languages and the working languages of the institutions of the Community shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.³⁹

³⁷ See, e.g., Cannon, *supra* note 35, at 415 (“After more than 25 years of discussion, the European Community [] has not reached complete agreement on a proposed Community patent system which would create a ‘unified’ patent effective throughout the European Union [].”); Timo Minssen, *Meanwhile on the Other Side of the Pond: Why Biopharmaceutical Inventions That Were “Obvious to Try” Still Might Be Non-Obvious—Part I*, 9 CHI-KENT J. INTELL. PROP. 60, 69 n.30 (2010) (“Although a Community patent system has been debated for many years, there is still no [Community] patent available.”).

³⁸ TEU art. 20(2); TFEU art. 329(1).

³⁹ Regulation 1/58, *supra* note 11, art. 1, most recently amended by Council Regulation (EC) No. 1791/2006 of November 20, 2006, O.J. (L 363) 1, 12.20.2006), consolidated text at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1958R0001:20070101:EN:PDF>.

Article 2

Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.⁴⁰

Article 3

Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.⁴¹

Article 4

Regulations and other documents of general application shall be drafted in the [four] official languages.⁴²

Article 5

*The Official Journal of the Community shall be published in the [23] official languages.*⁴³

The requirements set forth in Articles 1 through 5 are strict. The ECJ recently held, for example, that a Community regulation—an act which by its nature is “directly applicable in all Member States” and can bind individuals in those states⁴⁴—cannot be enforced against a citizen in the courts of a

⁴⁰ Regulation 1/58, *supra* note 11, art. 2 (reflecting TFEU art. 20, 24 and CFR art. 41(4)). *See supra* Part II. In fact, it was Article 2 of Regulation 1/58 that came first, and these newer Treaty provisions have simply confirmed the established principle at a higher level in the hierarchy of norms. *See* Vienna Convention on the Law of Treaties art. 30(3), May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (“When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.”).

⁴¹ Regulation 1/58, *supra* note 11, art. 3.

⁴² *Id.* art. 4.

⁴³ *Id.* art. 5 (emphasis added).

⁴⁴ TFEU art. 288.

Member State if it has not yet been published in the *Official Journal of the European Union (Official Journal)* in the language concerned.⁴⁵ Under Article 297 of the TFEU, *publication* is a condition of the validity of a regulation.⁴⁶

The internal regime is not explicitly referred to in the TEU and the TFEU—it is more relaxed. Article 6 of Regulation 1/58 provides that “[t]he institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.”⁴⁷ However, the institutions have not made full use of this provision. For example, there is nothing about internal working languages in the Commission’s Rules of Procedure,⁴⁸ although there is an indirect reference to such a possibility in the provisions implementing those rules.⁴⁹ Of course, the internal workings of a relatively small body of appointed people (twenty-seven), whose meetings are not public, are different from those of an elected body of over 700 members, such as the Parliament, which meets in public session.⁵⁰ Similarly, the factual linguistic position for a person appointed to a Union mandate for several years, such as members of the Commission, is also different from the position of someone who attends meetings as a member of the Council intermittently as part of the job of being a national minister and for whom

⁴⁵ See Case C-161/06, *Skoma-Lux sro v. Celní ředitelství Olomouc*, 2007 E.C.R. I-10841 (regarding enforceability where there was no translation into the language of a Member State).

⁴⁶ TFEU art. 297(1).

⁴⁷ Regulation 1/58, *supra* note 11, art. 6 (emphasis added).

⁴⁸ EC Rules of Procedure of the Commission (EC) C (2000) 3614, 2000 O.J. (L 308) 26 [hereinafter EC Rules of Procedure].

⁴⁹ Commission Decision 138/10, amending its Rules of Procedure, art. 17, 2010 O.J. (L 55) 60 (EU) (referencing “the authentic language or languages” of the Commission). The implementing rules provide that the documents to be considered at the Commission’s meetings are to be communicated to the Members in the language determined by the President (and also in the language(s) appropriate to the act concerned, taking account of any requirements as to publication and as to the languages to be used in relation to any addressee). *Id.* art. 17. However, while no decision has been taken by the President concerning any such “internal” languages, this has not prevented a long-standing informal practice from arising, according to which, documents for the College of Commissioners are provided in English, French, and German. See Jacqueline Mowbray, *Language in the UN and EU: Linguistic Diversity As a Challenge for Multilateralism*, 8 N.Z. J. PUB. & INT’L L. 91, 98 (2010) (“[The] EU function[s] in a limited number of official languages, and with an even more limited number of de facto working languages. . . . [I]t seems that, in practice, offices within these organisations [sic] effectively function in one or two languages only.”).

⁵⁰ European Parliament Rules of Procedure, 16th ed., Rule 96(2), 2005 O.J. (L 44) 1 [hereinafter EP Rules of Procedure] (“Debates in Parliament shall be public.”).

knowledge of languages, or the ability to learn them, is not necessarily a part of that job.⁵¹

As will be seen, the Council and the Parliament do refer to languages in their rules, but only to repeat, in substance, the rules of Regulation 1/58. None of this is surprising, since it is clearly a delicate matter for an institution bound by principles, such as those laid down in the Treaty provisions just quoted, to take a formal stance which might be interpreted as meaning that some official languages were more “important” than others.⁵² On the other hand, and just as unsurprisingly, most institutions have certain internal practices on this matter, whose existence is clearly recorded in the case-law.⁵³ This is not the place for an exhaustive account of those practices, but it may be useful to give some general indications.

The Council’s internal rules provide, in relation to the Council itself, that it only deliberates and decides on the basis of texts in conformity with the language rules in force (i.e., Regulation 1/58), subject to exceptions in urgent cases if unanimously agreed.⁵⁴ However, working groups and the Committee of Permanent Representatives (COREPER), which do the preparatory work, have a pragmatic regime; COREPER operates only in English, French, and German,⁵⁵ and some groups only in English and French. The Parliament’s Rules of Procedure provide that all its documents are to be drafted in all the official languages and that any member may speak in any official language of his or her choice, and that interpretation will be provided into all the other

⁵¹ See Mowbray, *supra* note 49, at 101 (“While major decision-making within [EU] institutions takes place at the intergovernmental level, the daily decision-making and work of these organisations is carried out by their employees. As a result, language requirements for appointment dramatically influence who is able to participate.”).

⁵² See Jonathan Yim, Case Note, *Feasibility of the Language Policy of the European Union*, 41 INT’L LAW. 127, 132–33 (2007) (noting that the EU multilingual regime has been described as “politically explosive” and “highly sensitive”).

⁵³ See Stella Burch Elias, *Regional Minorities, Immigrants and Migrants: The Reframing of Minority Language Rights in Europe*, 28 BERKELEY J. INT’L L. 261, 297–99 (2010) (finding that the ECJ is disassociating linguistic rights with membership in particular linguistic groups and rather applying it to all individuals).

⁵⁴ Council Decision 2009/937, Adopting the Council’s Rules of Procedure, art. 14(1), O.J. (L 325) 44 (EU); Regulation 1/58, *supra* note 11.

⁵⁵ See *Coreper Paves the Way for Political Harmony*, EUR. VOICE (May 2, 1996), <http://www.europeanvoice.com/article/imported/coreper-paves-the-way-for-political-harmony/31173.aspx> (noting the “unwritten requirement for Coreper membership is proficiency in either English, French or German”).

official languages.⁵⁶ Applying this regime apparently accounts annually for more than a third of the Parliament's running costs, with over 1,000,000 pages translated per year.⁵⁷ The Parliament has virtually no simplified internal language rules amongst its members. On the other hand, Parliament's permanent officials tend to use a limited range of languages amongst themselves, for internal communication, essentially French and English.

The language situation is different in the Commission, given its more administrative character. The European Commission's Rules of Procedure are silent on languages so that, formally speaking, Regulation 1/58 applies.⁵⁸ Indeed it is that strict regime which applies in the Commission's external dealings. Moreover, it is even possible for citizens to deal with the Commission in the "additional" languages enjoying official status in Spain.⁵⁹ On the other hand, in its role as instigator of legislation, the Commission must prepare reports, proposals, or other documents, which must be drafted internally in a given language. It is apparent from the Commission's translation statistics that only two languages (French and English) are generally used for drafting texts.⁶⁰

The ECJ is a special case. Article 342 of the TFEU,⁶¹ as demonstrated earlier, is without prejudice to the Court's Rules of Procedure. Article 342

⁵⁶ EP Rules of Procedure, *supra* note 50, rule 138 (1)–(2). However, slightly more relaxed rules than those that govern the E.U. Parliament may apply by agreement to committee or delegation meetings. *Id.* rule 138(4).

⁵⁷ *The Budget of the European Parliament*, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=153&language=EN> (last visited Aug. 20, 2011) (“[I]n 2008 over 1.5 million pages of documents were translated.”).

⁵⁸ See EC Rules of Procedure, *supra* note 48 (lacking guidance on language rules throughout).

⁵⁹ Administrative Agreement Between the European Commission and the Kingdom of Spain, art. 1, 2006 O.J. (C 73) 14. For example, Spanish people can address written communications with the Commission in Basque or Catalan. See Robert F. Weber, *Individual Rights and Group Rights in the European Community's Approach to Minority Languages*, 17 DUKE J. COMP. & INT'L L. 361, 368–69 (2007).

⁶⁰ Seventy-five percent of texts are originally drafted in English and twenty-four percent in French, according to Ludwig Krämer in *LANGUES ET CONSTRUCTION EUROPÉENNE* 99 (Dominik Hanf et al. eds., 2010).

⁶¹ TFEU art. 342 (“The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations.”). There are now three separate Rules of Procedure, one for each Union jurisdiction: (i) the ECJ Rules of Procedure, (ii) the GC Rules of Procedure (formerly the Rules of Procedure of the Court of First Instance), and (iii) the CST Rules of Procedure. See

thus implicitly envisages the concept of “procedural languages” to be used in the Court, which could be different from those which the Council has designated as official for all other purposes.⁶² The Court is left free to determine for itself the procedural languages which may be used in cases before it.⁶³ In fact, however, the Court’s list is exactly the same as that provided in Regulation 1/58.⁶⁴ Therefore, cases may be brought or referred in any of the official languages. Article 64 of the Statute of the Court provides:

The rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously. This regulation shall be adopted either at the request of the Court of Justice and after consultation of the Commission and the European Parliament, or on a proposal from the Commission and after consultation of the Court of Justice and of the European Parliament.

Until those rules have been adopted, the provisions of the Rules of Procedure of the Court of Justice and of the Rules of Procedure of the General Court governing language arrangements shall continue to apply. By way of derogation from Articles 253 and 254 of the Treaty on the Functioning of the European Union, those provisions may only be amended or repealed with the unanimous consent of the Council.⁶⁵

Article 29(1) of the Court’s Rules of Procedure states: “[t]he language of a case shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or

Consolidated Version of the Rules of Procedure of the European Union Civil Service Tribunal art. 2(1), 2010 O.J. (C 177) 71 [hereinafter CST Rules of Procedure].

⁶² TFEU art. 342.

⁶³ Rules of Procedure of the Court of Justice, art. 29, 2010 O.J. (C 177) [hereinafter ECJ Rules of Procedure], available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-07/tp_cjue_en.pdf (including the updated, consolidated version that takes into account changes up to and including May 2011).

⁶⁴ Regulation 1/58, *supra* note 11, art. 1.

⁶⁵ TEU, Protocol (No 3) on the Statute of the Court of Justice of the European Union art. 64, May 9, 2008, 2008 O.J. (C 115) 210 [hereinafter Statute of the European Court of Justice].

Swedish.”⁶⁶ Article 35(1) of the General Court’s Rules of Procedure is identical, and Article 29 of the Civil Service Tribunal’s Rules of Procedure makes that Article applicable to the Civil Service Tribunal (CST).⁶⁷ However, these provisions are manifestations of the external regime—the Court allows all Member States and their citizens to use their official Union languages in cases before it.⁶⁸ Internally, however, the case must be deliberated, and at an early stage, the Court adopted the practice of using French for the deliberations amongst the judges. French remains the dominant language within the institution.⁶⁹ The Rules of Procedure of all three courts provide that the court may request any institution which is party to a case to provide “translations” of its pleadings into other official languages.⁷⁰ In practice, however, no translation is requested if the procedural language is French.

IV. CASES ON THE EXTERNAL LANGUAGE REGIME

Many of the cases examined in this Article concern recruitment of staff by the institutions. Nevertheless, some of the most important judicial statements on this matter were made by the ECJ in *Kik v. Office for Harmonisation in the Internal Market (OHIM) (Kik)*.⁷¹ This case concerned the external regime; in other words, dealings between the Office and a Community citizen. In *Kik*, a citizen applied to OHIM for a mark to be registered under the Community trademark legislation.⁷² The trademark legislation lays down a very specific language regime. The applicant can file in any official language, but must indicate a second language for possible

⁶⁶ ECJ Rules of Procedure, *supra* note 63, art. 29(1). Consolidated Version of the Rules of Procedure of the General Court of 2 May 1991, 2010 (C 177) 37 [hereinafter GC Rules of Procedure].

⁶⁷ GC Rules of Procedure, *supra* note 66, art. 35(1); CST Rules of Procedure, *supra* note 61, art. 29.

⁶⁸ ECJ Rules of Procedure, *supra* note 63, art. 29(2)

⁶⁹ Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT’L & COMP. L. REV. 611, 618 (1997) (noting that all of the Court’s documents are written in French, and then translated into other languages).

⁷⁰ ECJ Rules of Procedure, *supra* note 63, art. 37(2); GC Rules of Procedure, *supra* note 66, art. 43(2); CST Rules of Procedure, *supra* note 61, art. 34(2).

⁷¹ Case C-361/01 P, *Kik v. OHIM*, 2003 E.C.R. I-8283.

⁷² Council Regulation 40/94, Community Trademark, art. 115, 1994 O.J. (L 11) 1 [hereinafter OHIM Trademark Legislation] (providing guidance as to the use of languages in an application for a Community trademark).

use in opposition proceedings.⁷³ This secondary language must be one of the five languages of OHIM (English, French, German, Spanish, and Italian).⁷⁴ Moreover, if the application is not in one of these languages, OHIM may communicate with the applicant in the second language that he or she indicated.⁷⁵ In *Kik*, a Dutch national submitted an application in Dutch but indicated Dutch as the second language.⁷⁶ She contested a decision dismissing the application for not complying with the obligation to indicate one of the five OHIM languages as a second language.⁷⁷ The case was dismissed by the Court of First Instance (CFI) and her heirs appealed to the ECJ.⁷⁸ They argued in particular that the restriction of the number of possible second languages was contrary to what is now Article 18 of the TFEU, which prohibits discrimination on grounds of nationality.⁷⁹ The Court rejected this submission, observing:

[T]he Treaty contains several references to the use of languages in the European Union. None the less, 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.⁸⁰

The Court considered the particular circumstances of the Community trademark regime, especially noting that the regime was voluntary and one in which competing interests with different language preferences (for example, the applicant for registration and a third party opposing registration) could be involved.⁸¹ The Court referred to the interest of economic operators in having access to a common regime which would reduce the cost and effort,

⁷³ *Id.* art. 115(3) (“The applicant must indicate a second language which shall be a language of the [OHIM] the use of which he accepts as possible language of proceedings for opposition, revocation or validity proceedings.”).

⁷⁴ *Id.* art. 115(2).

⁷⁵ *Id.* art. 115(6).

⁷⁶ *Kik*, 2003 E.C.R. I-8283, para. 9(6).

⁷⁷ *Id.* paras. 9(7)–(8).

⁷⁸ *Id.* paras. 18–20.

⁷⁹ *Id.* paras. 26–28.

⁸⁰ *Id.* para. 82.

⁸¹ *Id.* paras. 86, 88.

particularly in the form of translation costs, of applying for individual national registrations.⁸² It concluded:

[T]he 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.⁸³

The Court of First Instance was therefore right to find . . . that, in determining the official languages of the Community which may be used as languages of proceedings in opposition, revocation and invalidity proceedings . . . where the parties cannot agree on which language to use, the Council was pursuing the legitimate aim of seeking an appropriate linguistic solution to the difficulties arising from such a failure to agree.⁸⁴

Similarly, the Court of First Instance was right to hold . . . that, even if the Council did treat official languages of the Community differently, *its choice to limit the languages to those which are most widely known in the European Community is appropriate and proportionate.*⁸⁵

The reference to “the most widely known languages” is naturally problematic—“most” is a word capable of qualification, and the question can thus arise as to what legal consequences follow when the word is qualified by inserting a number before it. *Kik* concerned a rule adopted by the Council, for a specific purpose, which referred to the *five* most widely-known languages.⁸⁶ But what if the number were four? Which language drops out, and why? Three—but which three? Two, or . . . one? Which—and why? As pointed out above, it was when a three-language regime was proposed for the future Union patent that there was opposition. And who

⁸² *Id.* para. 91.

⁸³ *Id.* para. 92.

⁸⁴ *Id.* para. 93.

⁸⁵ *Id.* para. 94 (emphasis added).

⁸⁶ *Id.* para 12.

decides? Is it the Council, unanimously under Article 342 of the TFEU or Article 118 of the TFEU? Or can each institution decide for itself, for its own internal purposes? As we shall see, the answer is that sometimes it is one, sometimes the other, according to the nature of the act in issue. If the question is limiting the number of languages in which the institutions communicate with citizens, only a unanimous Council act can provide the basis.⁸⁷ If the question is how the institutions, or a newly-created Union body, communicate with those who want a service from them, such as a property right, the Council again must act unanimously.⁸⁸ However, the fact that the requirement of unanimity appears in a different legal basis (Article 118 of the TFEU) from the basis for the general language regime (Article 342 of the TFEU) is a clear sign that the language regime may be different from the general regime.

Based on these principles, the Court upheld the judgment of the lower court and declared that Regulation 1/58 does not contain a general principle of Community law:⁸⁹

Regulation No 1 is merely an act of secondary law, whose legal base is Article 217⁹⁰ of the Treaty. To claim, as the applicant does, that Regulation No 1 sets out a specific Community law principle of equality between languages, which may not be derogated from even by a subsequent regulation of the Council, is tantamount to disregarding its character as secondary law. Secondly, the Member States did not lay down rules governing languages in the Treaty for the institutions and bodies of the Community; rather, Article 217 of the Treaty enables the Council, acting unanimously, to define and amend the rules governing the languages of the institutions and to establish different language rules. That Article does not provide that once the Council has established such rules they cannot subsequently be altered. It follows that *the rules governing*

⁸⁷ TFEU art. 342.

⁸⁸ *Id.* art. 118.

⁸⁹ See generally Antoni Milian-Massana, *Droit Linguistique Compare: Le Régime Juridique du Multilinguisme dans l'Union Européenne. Le Mythe ou la Réalité du Principe d'Égalité des Langues*, 38 REVUE JURIDIQUE THEMIS 1 (2004), available at <http://www.editionsthemis.com/uploaded/revue/article/rjtv0138num1/05-Milian-Massana.pdf>.

⁹⁰ TFEU art. 324 (e.g., EC Treaty art. 217).

*languages laid down by Regulation No 1 cannot be deemed to amount to a principle of Community law.*⁹¹

There is no inconsistency between this position, in *Kik*, and that taken by the Court in the *Skoma-Lux (Skoma-Lux)* case.⁹² *Skoma-Lux* concerned the question of whether a Community regulation could apply to a person, possibly to his detriment, if it had not been published in the relevant official language.⁹³ While a person must be presumed to know the law, this presupposes that it is available to him in his own language.⁹⁴ *Kik*, on the other hand, concerns a customer for a service.⁹⁵ *Kik* is not a case of unilaterally applying a rule against a person's will, on pain of criminal penalties. Moreover, in *Kik*, it was the legislature which laid down the restricted language regime,⁹⁶ *inter alia*, to take account of the fact that other parties (whose language preferences might be different from the applicant's) might also be involved, for example, by opposing the application. This was not a case of a mere administrative act or practice concerning choice of language. The courts naturally recognize that the legislature has wide discretion in such matters, much wider than would necessarily be recognized in the case of a purely decisional act.⁹⁷

V. THE UNION STAFF REGULATIONS

In a number of cases brought by Union officials, or by candidates for recruitment as officials, the courts have been pragmatic about the use of particular official languages inside the institutions, notwithstanding the

⁹¹ Case C-361/01 P, *Kik v. OHIM*, 2003 E.C.R. I-8283, para. 16 (emphasis added).

⁹² Case C-161/06, *Skoma-Lux v. Celní ředitelství Olomouc*, 2007 E.C.R. I-10841.

⁹³ *Id.* para. 1.

⁹⁴ *Id.* para. 41 (“[I]t would be *contra legem* . . . to require [Member States] to impose on individuals obligations contained in legislation of general application which is not published . . . in the official language of those States.”).

⁹⁵ *Kik*, 2003 E.C.R. I-8283. In arguments, OHIM suggested that by making the application, the applicant was implicitly consenting to the language regime. *Id.* para. 36. The Court confirmed this view: “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.” *Id.* para. 88.

⁹⁶ *Id.* para. 94.

⁹⁷ See Case C-443/07 P, *Centeno Mediavilla v. Comm’n*, 2008 E.C.R. I-10945 (confirming legislative discretion in relation to the choice of transitional provisions).

absence of any formal legal basis for such practices, such as a decision under Article 6 of Regulation 1/58.⁹⁸

To assist in understanding these cases, it is perhaps useful to begin by indicating what rules govern the employment of Union staff. For permanent officials, the relevant rules are set out in the Staff Regulations of Officials of the European Union (SR or Staff Regulations).⁹⁹ The Conditions of Employment of Other Servants (CEOS or Conditions of Employment), which are part of the Staff Regulations, lay down the rules applicable to temporary staff and contract agents.¹⁰⁰ These categories of staff are employed on contracts, which may be for a fixed term or indefinite.¹⁰¹

The SR/CEOS apply to the vast majority of Union staff. They apply to those employed by the “historic” institutions (i.e., the Parliament, the ECJ, the Council, the Commission, and the Court of Auditors), those employed by Community organizations, (i.e., the Economic and Social Committee and the Committee of the Regions), and those who work for more recently created organizations (i.e., the European Ombudsman and the European Data Protection Supervisor). The Lisbon Treaty and a consequential amendment of the SR/CEOS have added a new organization to those covered by the SR/CEOS, namely the new European External Action Service, which is under the authority of the High Representative for Foreign Affairs and Security Policy.¹⁰² Article 1 of the Staff Regulations makes them applicable to “officials”, which, in the absence of qualification would mean “officials” of the institutions as defined in the TEU and TFEU; however, Article 1b extends their scope, by deeming the newer bodies just mentioned to be institutions for the purposes of the Staff Regulations, so that these

⁹⁸ Regulation 1/58, *supra* note 11, art. 6.

⁹⁹ European Commission: “Legal Issues and Questions Relating to the Staff Regulations” Unit, COMPENDIUM OF THE STAFF REGULATIONS OF OFFICIALS OF THE EUROPEAN COMMUNITIES & THE CONDITIONS OF EMPLOYMENT OF OTHER SERVANTS OF THE EUROPEAN COMMUNITIES II-3 (2004) [hereinafter STAFF REGULATIONS], available at http://ec.europa.eu/civil_service/docs/to c100_en.pdf.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at I-4, II-3. The Staff Regulations apply to “officials” of the European Communities, while the Conditions of Employment apply to temporary, auxiliary, contract, and local staff.

Id.

¹⁰² About the EEAS, EUROPEAN EXTERNAL ACTION SERVICE, http://eeas.europa.eu/background/index_en.htm (last visited Aug. 20, 2011); European Parliament and Council Regulation 1080/2010, Amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities, 2010 O.J. (L 311) 1.

Regulations can apply to bodies which are not “institutions” under the Treaties.¹⁰³

The final category is Union agencies: small bodies that carry out specialized functions which either result from a new Union “competence” or which have been devolved from the Commission.¹⁰⁴ There are currently over thirty agencies dealing with matters as diverse as coordinating the fight against organized crime, promotion of vocational training, air transport safety, food safety, and registration of chemicals.¹⁰⁵ Article 1a(2) of the SR provides that, where the founding act of the agency so provides, the SR/CEOS also apply to agencies, which are also assimilated to institutions for the purposes of the SR/CEOS.¹⁰⁶

The only significant exceptions to these rules are the two banking institutions—the European Investment Bank and the European Central Bank. Given their specialized functions, and since they must compete on the employment market with commercial banks, each of these bodies has its own Staff Regulations, which differ in several respects from the SR/CEOS.¹⁰⁷

The cases discussed below concern the extent to which the language rules in the Treaty and in Regulation 1/58 apply or do not apply inside the institutions and other bodies whose staff are governed by the SR/CEOS. This case law is not directly transposable to bodies which apply other rules, such as the two banks, which have their own internal language practices.¹⁰⁸

The basic language requirements for officials are set out in Article 28 of the SR: “An official may be appointed only on condition that . . . (f) he produces evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the

¹⁰³ STAFF REGULATIONS, *supra* note 99, at I-4.

¹⁰⁴ See Alexandra Gatto, *Governance in the European Union: A Legal Perspective*, 12 COLUM. J. EUR. L. 487, 505 (2006) (describing the function of agencies as a response to regulatory needs).

¹⁰⁵ *Id.*, at 505 nn.87–90.

¹⁰⁶ STAFF REGULATIONS, *supra* note 99, at I-4.

¹⁰⁷ See, e.g., EUROPEAN CENT. BANK, CONDITIONS OF EMPLOYMENT FOR STAFF OF THE EUROPEAN CENTRAL BANK (2011), available at http://www.ecb.int/ecb/jobs/pdf/conditions_of_employment.pdf?4f202f4b95e1c0504e114c2abf3b994a; EUROPEAN INV. BANK, STAFF REGULATIONS OF THE EUROPEAN INVESTMENT BANK (2009), available at http://www.eib.org/attachments/general/eib_staff_regulations_2009_en.pdf.

¹⁰⁸ See, e.g., EUROPEAN INV. BANK, CONDITIONS OF EMPLOYMENT FOR STAFF OF THE EUROPEAN CENTRAL BANK, *supra* note 107 (stating that the two banks do not contain explicit language requirements, but in practice most published vacancy notices require a high standard in English).

Communities to the extent necessary for the performance of his duties.”¹⁰⁹
The rules in the CEOS on this matter are the same.¹¹⁰

The context of these requirements is given by both Article 27 of the SR and Article 12 of the CEOS: “Recruitment shall be directed to securing for the institution the services of persons of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Member States of the Communities.”¹¹¹

It is important to note, however, that like the other conditions for recruitment (e.g., educational qualifications and professional experience), these are only minimum requirements and the institutions may always impose more severe requirements “in the interest of the service” (i.e., where it is objectively justified by the nature of the post or posts to be filled, or more generally by the factual circumstances within the institution).¹¹² So far as languages are concerned, an institution is free to require, for example, a satisfactory knowledge of not just one other Community language, but of two or three others, or even more.¹¹³ Likewise, it may impose a higher standard for the second language than just a satisfactory knowledge.¹¹⁴ It may require that the “primary” language be a particular language, or it may require satisfactory (or greater) knowledge of a particular language as a second, third, etc., so long as this is objectively necessary “in the interest of the service.”¹¹⁵ Sometimes a certain condition has the effect that those recruited are primarily or exclusively speakers of a particular language. If, for example, there is a need for Dutch lawyers in particular, a condition requiring a qualification in Dutch law is legitimate, despite its exclusionary

¹⁰⁹ STAFF REGULATIONS, *supra* note 99, art. 28, I-14.

¹¹⁰ *Id.* art. 12(2)(e), I-6; *id.* art. 82(3)(e), II-26.

¹¹¹ *Id.* art. 27, I-14. For the CEOS version, see *id.* art. 12, II-6.

¹¹² This right for institutions has been confirmed in many staff cases, in particular as to language requirements, for example, Case 108/88, Jaenicke Cendoya v. Comm'n, 1989 E.C.R. 2711, para. 24; Case T-73/01, Pappas v. Comm. of the Regions, 2003 E.C.R. II-1011, para. 85; Case T-376/03, Hendrickx v. Council, 2005 E.C.R. II-379, paras. 36–39.

¹¹³ Competitions for translators normally require knowledge of two or three official languages in addition to one's primary language, and sometimes knowledge of certain specified languages.

¹¹⁴ Thus, for example, if Italian interpreters or translators are needed, it is not merely legitimate, but rather essential to require that the language of which one has “thorough” knowledge be Italian and no other. In practice, interpreters' competitions normally require not only mother-tongue standard in one language, but a similar level in at least one other.

¹¹⁵ For example, the requirement cannot simply be an artifice to reduce the numbers of applicants, still less can the intention be to give an arbitrary advantage to particular languages or nationalities (which would be unlawful).

effects.¹¹⁶ It will be readily appreciated that this concept of the “interest of the service,” which is peculiar to the SR and CEOS, allows a different and far more flexible approach to language rules than is possible under the strict external regime described above.¹¹⁷ This case law has grown independently of Article 6 of Regulation 1/58, which only refers to the potential content of the institutions’ internal rules. Those rules do not, in any case, provide for any particular internal language regime. The following cases involve the recognition of the primacy of the SR/CEOS, as *lex specialis*, over the external rules. Thus, they make a clear distinction between internal and external situations.

Save perhaps for certain specialist jobs, the linguistic “interest of the service” evidenced in the recruitment process is twofold and, in fact, reflects the internal/external distinction within Regulation 1/58. On the one hand, the institutions aim, as far as is practicable, to have staff members representative of every Member State nationality to comply with their employment obligations under Article 27 of the SR and their linguistic obligations under the TEU and the TFEU and Regulation 1/58. To communicate externally in every official language at a mother-tongue standard, a mix of staff is a necessity. On the other hand, these staff members must also communicate effectively with each other within the institution. For this purpose, there is an inevitable factual convergence on certain widely-known languages, which are used as “vehicular languages,” because they are the most widely-taught second languages throughout the Union. The existence of this factual situation makes it necessary, particularly at a time when the number of official languages has virtually doubled,¹¹⁸ to make a satisfactory knowledge

¹¹⁶ This example is especially significant: first, there is no prohibited indirect discrimination in favor of Dutch Nationals or Dutch-speakers, since the requirement is objectively justified by the need to recruit people qualified in Dutch law; any exclusionary effect is the inevitable secondary consequence of a legitimate need, which must be accepted. Second, the difference is not based on language, since Dutch-speaking Belgians would not qualify either (unless their qualification happened to be in Dutch rather than Belgian law).

¹¹⁷ See *supra* Part III (discussing Regulation 1/58 and language practices in the institutions).

¹¹⁸ *Official EU Languages*, *supra* note 13. From 1958–1972, there were four official languages: French, German, Dutch, and Italian. The first enlargement added English and Danish (and nearly added Norwegian). The next brought Greek, in 1981. Then came Spanish and Portuguese, in 1986. The 1995 enlargement added Finnish and Swedish (and once more nearly added Norwegian). These eleven languages were official until 2004, when ten Member States joined, all but one of which brought a new official language. The 2007 accession, and the declaration by Ireland of Irish as an official Union language, brought the number of official languages to 23. See 1958 O.J. (17) 385; 1972 O.J. (L 73) 14; 1979 O.J. (L 291) 17; 1985 O.J. (L 302) 23; 1994 O.J. (C 241) 21; 2003 O.J. (L 236) 33; 2006 O.J. (L 363) 1.

of one or more of these common languages a condition of recruitment. It is precisely this kind of recruitment condition which has led to many of the cases we shall now consider.

VI. CASES ON THE INTERNAL LANGUAGE REGIME

When we refer to an internal regime, we are discussing only how the institutions organize their everyday work. Nevertheless, it is clear from the cases brought in the last ten years that this is perceived as institutionally significant, at least when it results in something being written down and published officially. In the past, when there were fewer Member States and fewer official languages, there was no perceived need to specify knowledge of particular languages as a requirement for recruitment of officials. The question tended to resolve itself as candidates for recruitment almost always had as their second or third language at least one of the languages used as a *de facto* working language in the institutions. The sudden and enormous increase in the number of Member States and of official languages in 2004 changed all that.

The case law concerning vacancy notices, competition notices (for recruitment of officials), and notices of selection procedures (for temporary agents and contract agents) rightly requires that the notice state, with the greatest possible precision, all the essential conditions for admission to the particular competition or selection/vacancy procedure.¹¹⁹ It thus became inevitable that what is necessary for effective communication, especially internal communication, had to be set out, so that potential candidates could know, in light of their own linguistic abilities, if there was any point in applying. What had until then been an open secret became an official policy, set out in official publications such as competition notices. While the purpose of such a notice is purely internal—to recruit candidates who have the qualifications the institutions need—setting out such matters officially for the first time cannot pass unnoticed. It was not long before some Member States, feeling that certain fundamental principles and assumptions were at stake, reacted.

¹¹⁹ See, e.g., Case T-146/99, *Teixeira Neves v. Court of Justice*, 2000 E.C.R. II-731, paras. 34–36.

A. *Court of First Instance Cases 2000–2005*

The first four cases considered in this Article are direct actions brought, not by Member States, but by officials or candidates, who took issue with the communication of documents in an official language other than the language they wished to see used.

In *Rudolph v. Commission*, the CFI was faced with the question of whether an official could impose the use of a particular language on the institution, by making a complaint in that language.¹²⁰ Was the institution then required to reply in that language? The answer is no: the institution may reply in any appropriate official language, provided the official has sufficient knowledge of it to understand the reply.¹²¹ In the event of a dispute, the burden of proof as to this degree of knowledge is on the institution.¹²² It thus appears that Article 2 of Regulation 1/58,¹²³ Article 41(4) of the CFR,¹²⁴ and Article 24 of the TFEU¹²⁵ do not apply to internal communications between the institution and its officials. This flexible rule applies not only to existing staff, but to candidates for recruitment. In *Bonaiti Brighina v. Commission*, the CFI held that a candidate could not oblige the institution to conduct correspondence in his or her mother tongue if the institution preferred to use another official language known to the candidate.¹²⁶ Interestingly, the CFI referred to Article 6 of Regulation 1/58 in this case. Even though the Commission had not (and still has not) adopted an internal decision applying it, the mere existence of Article 6 confirms that the institutions can lawfully have internal linguistic practices, such as using certain widely-known languages for internal communication.

In *Hendrickx v. Council*, the CFI accepted as self-evident that it was justifiable for the General Secretariat of the Council to require, in an internal competition notice, that candidates have a satisfactory knowledge of French and English “for functional reasons.”¹²⁷ This is a reference to the long-

¹²⁰ See Case T-197/98, *Rudolph v. Comm’n*, 2000 E.C.R. II-241, paras. 34–47. This question is repeated in subsequent cases, not only those discussed below, e.g., Case T-95/04, *Lavagnoli v. Comm’n*, 2004 E.C.R. II-A-2-569, para. 48.

¹²¹ *Rudolph*, 2000 E.C.R. II-241, para. 46.

¹²² *Id.*

¹²³ Regulation 1/58, *supra* note 11, art. 2.

¹²⁴ CFR art. 41(4).

¹²⁵ TFEU art. 24.

¹²⁶ Case T-118/99, *Bonaiti Brighina v. Comm’n*, 2001 E.C.R. II-97, paras. 12–17.

¹²⁷ Case T-376/03, *Hendrickx v. Council*, 2005 E.C.R. II-379, para 33.

standing internal practice of the Council, in which internal communication is in one or another of these languages.

In *Rasmussen v. Commission*, the CFI applied *Rudolph* and confirmed explicitly that Regulation 1/58 does not apply in relations between officials and their institution.¹²⁸ The institution may use other official languages, provided they allow the official to readily understand the communications in question, which in *Rasmussen* was material in a disciplinary procedure.¹²⁹

B. *The Opinion in Eurojust*

The most exhaustive discussion of language requirements so far attempted is to be found in the Opinion of Advocate-General Poiares Maduro in *Spain v. Eurojust (Eurojust)*.¹³⁰ This case concerned a number of notices calling for expressions of interest which were published in the *Official Journal* by a new Union body set up to promote judicial cooperation.¹³¹ This would create reserve lists for the hiring of temporary staff to fill certain posts.¹³² For all but one of these posts, the notices required either a satisfactory or excellent knowledge of English, and some positions also required French to the same standard.¹³³ For certain posts, knowledge of other official languages as well was an advantage, but not a condition.¹³⁴ There were also procedural linguistic requirements: while the application form could be submitted in any official language, it also had to be submitted in English, and the accompanying curriculum vitae/resume and “motivation letter” (explaining why they wanted the job and why they thought they were qualified for it) also had to be in English.¹³⁵ Spain attacked both the substantive and the procedural conditions, asking for the notices to be annulled to the extent that they: (a) imposed a requirement to know English (and in some cases French) and (b) required the use of English in the application.¹³⁶ It put forward three grounds of annulment: (i) infringement of Article 12 of the CEOS, because the requirements supposedly went beyond

¹²⁸ Case T-203/03, *Rasmussen v. Comm'n*, 2005 E.C.R. II-1287, para 60.

¹²⁹ *Id.*

¹³⁰ Case C-160/03, *Spain v. Eurojust*, 2005 E.C.R. I-2077.

¹³¹ Council Decision 2002/187/JHA, *Setting Up Eurojust with a View to Reinforcing the Fight Against Serious Crime*, 2002 O.J. (L 63) 1 (EU).

¹³² *Id.*

¹³³ *Eurojust*, 2005 E.C.R. I-2077, paras. 19–20.

¹³⁴ *Id.*

¹³⁵ *Id.* para. 20.

¹³⁶ *Id.* para. 1.

the minimum required; (ii) infringement of *Eurojust*'s language rules which were those of Regulation 1/58; and (iii) infringement of Article 12 of the EC (now Article 18 of the TFEU), prohibiting discrimination on grounds of nationality, since the conditions allegedly favored those whose primary language was English or French.¹³⁷

The Advocate-General begins, in paragraphs 34–37, by putting language requirements in context:

the question of linguistic requirements does not fall solely within the scope of regulations or specific Treaty provisions. This question must be linked with rights, with a principle and with an objective which are fundamental to the European Union. It is important to bear in mind in that connection that respect for and promotion of linguistic diversity are not in any way incompatible with the objective of the common market. On the contrary, against the background of a Community based on the free movement of persons, 'the protection of the linguistic rights and privileges of individuals is of particular importance.'¹³⁸ It is common ground that the right of a national of the Union to use his own language is conducive to his exercise of the right of free movement and his integration into the host state. In those circumstances, the Court condemns all forms of indirect discrimination based on knowledge of languages.

In a Union intended to be an area of freedom, security and justice, in which it is sought to establish a society characterised by pluralism, respect for linguistic diversity is of fundamental importance. That is an aspect of the respect which the Union owes, in the terms of Article 6(3) EU, to the national identities of the Member States. The principle of respect for linguistic diversity has also been expressly upheld by the Charter of Fundamental Rights of the European Union and by the Treaty establishing a Constitution for Europe. That principle is a specific expression of the plurality inherent in the European Union.

¹³⁷ *Id.* paras. 21–24.

¹³⁸ This statement references Case C-137/84, *Ministère Pub. v. Mutsch*, 1985 E.C.R. 2681, para. 11.

.....
 Language is not merely a functional means of social communication. It is an essential attribute of personal identity and, at the same time, a fundamental component of national identity.

In my opinion, the language regime of the Union institutions must not be severed from that context or from that principle. That regime guarantees that the linguistic rights of those individuals who have *direct* access to the Union institutions will be recognised. It stems from the special nature of the relationship between the Union and its citizens. It must therefore be regarded as a direct expression of the linguistic diversity inherent in the European Union. It thus constitutes a fundamental institutional rule of the European Union.¹³⁹

The Advocate-General recognized that this rule must be qualified because of *Kik*. However, any such exceptions to “fundamental institutional rules” must be narrow and subject to an obligation of express justification in every case.¹⁴⁰ The principle of linguistic diversity cannot be regarded as absolute: “it is necessary to accept restrictions in practice, in order to reconcile observance of that principle with the imperatives of institutional and administrative life.”¹⁴¹ The Advocate-General then makes the crucial distinction between the internal and the external regimes.¹⁴² He sees three situations—two external, one internal.¹⁴³ The first external situation is communication between an institution and citizens.¹⁴⁴ This deserves the “highest level of protection” since it is linked to democratic participation in the Union.¹⁴⁵ The strict regime of Regulation 1/58 applies. The second external situation is “relations between citizens and the administration,”

¹³⁹ Opinion of Advocate General Poiares Maduro, Case C-160/03, *Spain v. Eurojust* 2005 ECR I-2077, paras. 34–37 [hereinafter Opinion of AG Poiares Maduro] (citations omitted), available at <http://curia.europa.eu/juris/document/document.jsf?docid=49769&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&cid=278038>.

¹⁴⁰ *Id.* para. 50 (“[I]t is not sufficient to seek to justify an internal language regime by reference to ‘the nature of things,’ as Eurojust saw fit to do before the Court.”). Despite these strictures, it seems as if that was exactly what the GC is prepared to accept. See Case T-376/03, *Hendrickx v. Council*, 2005 E.C.R. II-379, para. 33.

¹⁴¹ Opinion of AG Poiares Maduro, *supra* note 139, para. 40.

¹⁴² *Id.* paras. 40–49.

¹⁴³ *Id.*

¹⁴⁴ *Id.* para. 43.

¹⁴⁵ *Id.*

which refers to participation in administrative procedures.¹⁴⁶ Here, the Advocate-General suggests that it may be possible if circumstances so require to derogate from the rule that everything happens in the citizen's own language, but any such derogation requires a legal basis adopted by the Council under what is now Article 342 of the TFEU (or Article 118 of the TFEU).¹⁴⁷ This is a reference to the situation in cases such as *Kik*. On the other hand, the first external situation corresponds to that in the subsequent *Skoma-Lux* case.

The internal situation is quite different. Referring to Article 6 of Regulation 1/58, the Advocate-General states:

Whilst linguistic diversity is the fundamental rule in the context of outside contacts, that is because it is necessary to respect the linguistic rights of persons having access to Union institutions and bodies. The Treaty and the case-law are based on the understanding that the choice of the language of communication is a matter for the Member State or the person who has a relationship with the institutions. On the other hand, in the context of the internal functioning of Union institutions, the choice of the language to be used for internal communications is the responsibility of those institutions, which are entitled to impose that choice on their employees.

... .
 However, that autonomy must be strictly circumscribed. It can be exercised only within the limits allowed by the Treaty [which] entrusts principally to the Council the responsibility of *defining* the language regime of the Union institutions. That responsibility implies a considerable degree of latitude, provided that it does not in any way undermine the essence of the principle of linguistic diversity. In contrast, the Union institutions and bodies enjoy only a limited discretion for *implementation* of that regime. They must not be allowed to use it otherwise than for the purposes of their internal operational needs.

In those circumstances, the choice of one or more Union languages for internal purposes can be allowed only if it is

¹⁴⁶ *Id.* para. 44.

¹⁴⁷ *Id.*

based on objective considerations relating to the functional needs of the body concerned and if it does not give rise to unjustified differences of treatment as between Union citizens. It is important to make certain, first, that the regime chosen reflects the specific needs of the body concerned, having regard, for example, to the history of its coming into being, the location of its seat, its internal communication needs and the nature of the functions which it must discharge. It is necessary to verify, secondly, that the choice made does not compromise equal access for Union citizens to the jobs offered by Union institutions and bodies.¹⁴⁸

The Advocate-General then applies these principles to the two issues before the Court; first the legality of the substantive conditions requiring knowledge of certain specified languages, then the procedural requirement to submit the application and supporting documents in English.¹⁴⁹ Concerning the substantive requirements, in the light of his conclusion that a limited internal language regime requires specific justification, the Advocate-General considers the justifications put forward by *Eurojust*: (a) the need to know *Eurojust*'s working languages (or more generally, the need for effective internal communication), and (b) the nature of the duties of the particular posts.¹⁵⁰

As to (a), "it is beyond doubt . . . that it may be necessary to choose an internal working language in order to ensure the proper functioning of Union institutions and bodies. Such a choice is particularly legitimate where the body in question is a specialised organisation with limited resources."¹⁵¹ The Advocate-General doubted, however, that this could justify the need to know *two* working languages, since "to ensure good communication within the organisation, command of a single common language would appear sufficient. As long as all Eurojust's employees are fluent in that language, it is clear that the requirement of a second working language cannot be justified for reasons of internal communications."¹⁵² This did not preclude an institution from having more than one working language if its nature justified it, but even then it should be enough to require knowledge of just

¹⁴⁸ *Id.* para. 46, 48–49.

¹⁴⁹ *Id.* para. 52.

¹⁵⁰ *Id.* paras. 53–67.

¹⁵¹ *Id.* para. 55.

¹⁵² *Id.*

one of them: “the cumulative requirement of knowledge of *several* languages cannot be justified by internal communication needs and can only be indicative of a wish to afford a privileged status to certain Union languages.”¹⁵³ On the facts of the case, justification (a) did not appear to have been made out, since it was not clear whether any one or more particular languages had actually been chosen as the means of internal communication, and Eurojust’s Rules of Procedure did not shed any light on the matter.¹⁵⁴

As to (b), the Advocate-General is more receptive to *Eurojust’s* arguments:

[T]he nature of the proposed duties may justify requiring the command of a language other than the one used for internal communications within the organisation. However, a measure laying down wider-ranging linguistic requirements than those appearing in the Conditions of Employment must not run counter to a fundamental principle such as the principle of non-discrimination. Accordingly, linguistic requirements imposed by reason of the nature of the work to be undertaken must be strictly linked with the posts to be filled and they must not result in any dilution of the requirement of geographical diversity of Union staff.¹⁵⁵

It was thus necessary to see whether “the prescribed linguistic requirements display a necessary and direct connection with the proposed duties”¹⁵⁶ and whether “the requirements decided upon do not excessively undermine the objective of ensuring a geographical balance within the Union institutions and the bodies.”¹⁵⁷ The burden of proof was, however, on the

¹⁵³ *Id.* para. 56. *But see id.* para. 44.

¹⁵⁴ *See id.* para. 58 (confirming what the CFI had already held in *Bonaiti Brighina*, that notwithstanding the terms of Article 6 of Regulation 1/58, an internal working language regime can be validly established by some other decision or by mere practice, even if there is nothing in the Rules of Procedure).

¹⁵⁵ *Id.* para. 61.

¹⁵⁶ *Id.* para. 62 (“Should that link not be established, such requirements must be regarded as involving discrimination detrimental to Union nationals who have the necessary skills, within the meaning of Article 12 of the Conditions of Employment, to be appointed to the posts to be filled.”).

¹⁵⁷ *Id.* para. 63 (“It is clear that preference for certain languages by way of professional requirements gives an advantage to those European citizens who have those languages as their mother tongues. However, such an advantage is liable to give rise to indirect discrimination

party alleging that the conditions were indirectly discriminatory.¹⁵⁸ Spain had not discharged its burden in this case, since (a) the evidence showed that in fact there was a balanced representation of nationalities in the selection procedures and in *Eurojust* generally, and (b) even if *Eurojust*'s explanations of the link between the language requirements and the duties of each post were not always clear, it was only where the condition was manifestly inappropriate that the courts should intervene, and this was not the case here.¹⁵⁹

Finally, there was the question of the procedural requirement: here, the Advocate-General seems once again to reason differently from the CFI.¹⁶⁰ In *Hendrickx*, and in the recent Italian cases, the CFI holds to the line already taken in *Bonaiti Brighina*, that candidates in competitions are covered exclusively by the SR/CEOS.¹⁶¹ The rules in Regulation 1/58 (and even those in the TEU and the TFEU) concerning the "external" language regime simply do not apply. The Advocate-General, on the other hand, assumes that Article 2 of Regulation 1/58 applies.¹⁶² Requiring candidates to submit an English version of their application form, and to submit supporting documents in English, is a derogation from the rule that citizens may address the institutions in any language.¹⁶³ He looks for a justification for the exception.¹⁶⁴ He recognizes that candidates in a selection procedure are not in the same position as citizens in general.¹⁶⁵ This difference may justify treating the case differently, so long as the contested procedure is itself objective. This will be the case if the requirement to use a given language in the procedure is "directly linked with the skills necessary for performance of the duties . . . and . . . does not have an excessive adverse impact on the legal interests of potential candidates."¹⁶⁶ The institution cannot therefore invoke mere organizational convenience, unless the requirement forces candidates

adversely affecting other Union citizens. By virtue of the principle of non-discrimination on grounds of nationality, therefore, a linguistic requirement imposed in connection with the needs of the service must not result in a vacant post being reserved for one or more specified nationalities.").

¹⁵⁸ *Id.* para. 64.

¹⁵⁹ *Id.* paras. 65–67.

¹⁶⁰ *Id.* paras. 68–73.

¹⁶¹ See *supra* Part VI.A (discussing the cases on the internal language regime in the Court of First Instance from 2000–2005).

¹⁶² Opinion of AG Poiares Maduro, *supra* note 139, para. 68.

¹⁶³ *Id.*

¹⁶⁴ *Id.* para. 69.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

into a practical demonstration of language skills that they would need for the post.¹⁶⁷ This requirement can be justified because there is a link with the objective requirements of the post.¹⁶⁸ In this case, the candidates could check for themselves exactly what the requirements of the job were, since all of the notices had been published in all the Union languages in the *Official Journal*.¹⁶⁹

The Advocate-General concluded that Spain's application should be rejected, save as to one of the posts, for a librarian/archivist, where no clear link between the duties of the post and the requirement to submit the application documents in English were provided.¹⁷⁰ Given the completeness of this analysis, it is regrettable that the Court did not, in the end, decide on these matters at all. Instead, contrary to the Advocate-General's suggestion, it rejected Spain's application for annulment as inadmissible, holding that a Member State could not attack a selection notice published by *Eurojust*.¹⁷¹ Only the candidates themselves had such a right.¹⁷² This may be thought surprising, since Member States, like institutions, are "privileged" applicants and interveners; they do not have to demonstrate an interest in their action or intervention¹⁷³ as they are presumed to have an interest in the legality of any act of the institutions. The Court was perhaps unenthusiastic about dealing with these sensitive questions, if it did not have to. However, it was likely even at the time that they would come before the Court in any case, as a result of an appeal against a judgment of the CFI in some future case, and that is indeed what has happened, in one of the subsequent Member State cases which form the third act of the story. The Court's reasons were specific to the position of *Eurojust*, whose "competences" were, at least at that time, outside those of the Community. Those reasons did not apply to acts of Community institutions over which the Court had jurisdiction under what was then Article 230 of the EC (now Article 263 of the TFEU). This

¹⁶⁷ *Id.* para. 70.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* para. 71. There was a different method of publication for the notices attacked in Cases T-185/05, *Italy v. Comm'n* [2008] ECR II-3207 and in Joined Cases, T-156 and 232/07, *Spain v. Comm'n* (judgment of 13 September 2010, not yet reported) and Joined Cases T-166 and 285/07, *Italy v. Comm'n* (also judgment of 13 September 2010, not yet reported).

¹⁷⁰ Opinion of AG Poiares Maduro, *supra* note 139, paras. 77, 72.

¹⁷¹ Case C-160/03, *Spain v. Eurojust*, 2005 E.C.R. I-2077.

¹⁷² *Id.* paras. 42–43.

¹⁷³ See TFEU art. 263 (*compare* para. 2, *with* para. 4); Statute of the European Court of Justice, *supra* note 65, art. 40, paras. 1–2.

has since been expressly confirmed by the CFI in Case T-185/05, *Italy v. Commission* (Case T-185/05).¹⁷⁴

C. Judgments of the Court of First Instance/General Court and the Civil Service Tribunal Since 2006

The jurisdiction previously exercised by the ECJ over direct actions by Member States against acts of the institutions—of which *Eurojust* is an example—is now exercised by the General Court (GC) (formerly the CFI).¹⁷⁵ Thus, the most recent actions by Member States against language requirements in recruitment procedures have been brought in the CFI/ GC. This means that, as in *Kik*, the question can be taken to the ECJ on appeal. At the same time, the CFI's former jurisdiction over staff cases (including those brought by candidates for recruitment) has been transferred to the European Union Civil Service Tribunal (CST).¹⁷⁶

We have already seen, in Part A of this Chapter, that by 2004 the CFI already had established a number of principles which diverge from the Opinion of the Advocate-General in *Eurojust*. Thus:

- (a) officials are entirely subject to the SR/CEOS and therefore the institutions do not have to apply Article 2 or 3 of Regulation 1/58 in dealings with them. Institutions can use whatever Union language suits them, so long as the official has sufficient knowledge of it to understand these communications;¹⁷⁷
- (b) candidates in recruitment procedures are also subject to the internal language regime;¹⁷⁸
- (c) in the case of one of the historic institutions, a requirement to know a particular language, or indeed two particular

¹⁷⁴ Case T-185/05, *Italy v Comm'n* [2008] ECR II-3207.

¹⁷⁵ TFEU art. 256(1) (e.g., EC Treaty art. 225(1)); Statute of the European Court of Justice, *supra* note 65, art. 51 (stating that acts of the Commission are not excepted from this change, unlike certain acts of the Council and the Parliament, for which jurisdiction remains with the Court).

¹⁷⁶ Council Decision 2004/752, establishing the European Union Civil Service Tribunal, 2004 O.J. (L 333) 7 (EC).

¹⁷⁷ See *supra* text accompanying note 120 (discussing *Rudolph*).

¹⁷⁸ See *supra* text accompanying note 126 (discussing *Bonaiti Brighina*).

languages, can be justified “for functional reasons” with no need for specific justification.¹⁷⁹

Principles (a) and (b) demonstrate that it is not necessary, in relation to recruitment procedures, to give any specific justification, e.g., for derogating from Regulation 1/58 or from the Treaty principle of linguistic diversity. This is contrary to what the Advocate-General suggested in *Eurojust*. Instead, the relevant criterion is simply “the interest of the service.” Only if an applicant shows that a language condition is not justified by reference to the needs of the service can there be any question of annulment. Even a requirement to know two particular languages can be justified by principle (c), again contrary to the Advocate-General’s view.¹⁸⁰ These principles have been further confirmed and developed in the most recent CFI/GC judgments, in particular, the following three cases.

1. Italy v. Commission¹⁸¹

This case concerned a vacancy notice for the recruitment of the Director-General of the European Anti-Fraud Office (OLAF), which was published in full the *Official Journal*, but only in English, French, and German.¹⁸² A short notice referring candidates to this full publication also appeared in some international publications and in the main daily newspapers in all the Member States, including two of the main Italian papers.¹⁸³ These short-form publications were in the language of the newspaper or periodical.¹⁸⁴ This method of publication was pursuant to an internal Commission Decision of 2004 on recruitment procedures for senior staff.¹⁸⁵ Because of a lack of translation capacity, for a two-year period vacancy notices would be published only in three languages.¹⁸⁶

¹⁷⁹ See *supra* text accompanying note 127 (discussing *Hendrickx*).

¹⁸⁰ But see *infra* note 200. The GC seems to have retreated from this position in the most recent cases. It remains to be seen, in the light of future judgments, whether this is temporary.

¹⁸¹ Case T-185/05, *Italy v. Comm’n*, 2008 E.C.R. II-3207, paras. 29–32.

¹⁸² *Id.* para. 5.

¹⁸³ *Id.* paras. 8–9.

¹⁸⁴ *Id.* para. 9.

¹⁸⁵ *Id.* para. 5.

¹⁸⁶ *Id.*

The notice thus published only referred to the minimum language requirements under Article 28 of the SR.¹⁸⁷ However, it also required candidates to submit a curriculum vitae/resume and a “letter of motivation” in English, French, or German.¹⁸⁸ Italy sought the annulment of the notice and of the internal decision on publication of senior posts.¹⁸⁹ The application succeeded, but only in relation to the method of publication.¹⁹⁰

The CFI held the action admissible, both in respect of the notice and the internal decision, unlike what happened in *Eurojust*,¹⁹¹ where the ECJ held Article 230 of the EC (now Article 263 of the TFEU) inapplicable to acts of bodies which do not exercise Community “competence.”¹⁹² In this case, the contested act was of the Commission.

As to substance, two issues arose: the method of publication and the language conditions in the application procedure.¹⁹³ Concerning publication, the CFI first repeats the *Kik* principle, that there is no general right for every citizen to receive everything from the institutions in his or her Union language.¹⁹⁴ Then, not following the *Eurojust* opinion, it repeats instead its own rule, that Regulation 1/58 does not apply to existing staff or to candidates for recruitment.¹⁹⁵ Nor do the SR require vacancies to be published in all official languages.¹⁹⁶ It followed that the Commission was entitled to adopt an internal decision restricting the languages of publication.¹⁹⁷ As to the substantive language requirements in the notice, the CFI points out that the conditions in the SR/CEOS are only a minimum, and the institution may always lay down stricter conditions, including knowledge of certain languages, “where the requirements of the service or those of the post so require.”¹⁹⁸ The reference to “requirements of the service” as an alternative to the requirements of the post clearly means that there is no need to justify the condition post by post, and that a general situation within the

¹⁸⁷ *Id.* para. 8. For the relevant Staff Regulation, see STAFF REGULATIONS, *supra* note 99, art. 28, at I-14 (requiring a thorough knowledge of one Union language and satisfactory knowledge of another).

¹⁸⁸ Case T-185/05, *Italy v. Comm’n*, 2008 E.C.R. II-3207, para. 8.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* paras. 83–153.

¹⁹¹ *Id.* paras. 19–82.

¹⁹² Case C-160/03, *Spain v. Eurojust*, 2005 E.C.R. I-2077, paras. 35–44.

¹⁹³ T-185/05, *Italy v. Comm’n*, 2008 E.C.R. II-3207, para. 116.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* paras. 117–119 (referring to *Bonaiti Brighina* and *Rasmussen*).

¹⁹⁶ *Id.* para. 121.

¹⁹⁷ *Id.* para. 122.

¹⁹⁸ *Id.* para. 134.

service is enough (such as the two-language regime in the Council in *Hendrickx*). This is confirmation of the difference between the GC (the old CFI) and the ideas of Advocate-General Poiares Maduro. The CFI could have limited itself to the requirements of the post since this case, like *Eurojust*, concerned a vacancy notice for a specific post. The fact that the CFI nevertheless referred also to the “requirements of the service” is therefore significant. Even if it is technically an *obiter dictum* in *Italy v. Commission*, we shall see that it has become a rule in later cases. Later cases concern competitions creating reserve lists to fill possible future vacancies, so that it is not known at the time of publication which posts the successful candidates may be offered. The requirements of the service are what matters in respect of competitions of this kind.

There is a connection between the publication regime and the language conditions. If the latter are justified by the needs of the service or of the post, then publication only in the languages concerned is also justified: “The fact that the text of the vacancy notice concerned is only available in [certain] languages does not result in discrimination between candidates, since they must all have an understanding of at least one of those languages.”¹⁹⁹ However, there is a difference between only publishing in certain languages and only publishing in certain language versions of the *Official Journal*. The latter practice is likely to lead to discrimination between readers of that Journal, since even readers who meet the language conditions will not be informed of the existence of the competition, unless other measures are taken to ensure that all potential candidates are informed.²⁰⁰ The Commission’s decision to post the notices had not provided for such alternative measures and was thus unlawful, as was the notice itself, as likely to lead to discrimination between candidates on grounds of language.²⁰¹ The fact that the three languages concerned were “fairly widely spoken in Europe” was not enough to justify the potential discrimination.²⁰²

¹⁹⁹ *Id.*

²⁰⁰ *Id.* paras. 135–138. However, the Court introduces ambiguity in 152 by suggesting that alternative measures should have been taken to inform those who did not have sufficient knowledge of English, French, or German to discover the content of the notice. This is contrary to the Court’s acceptance of the trilingual publishing framework as justifiable in para. 134, so long as the post possesses and the notice communicates a substantive requirement to know one or more of the three languages.

²⁰¹ *Id.* paras. 141–142, 151.

²⁰² *Id.* para. 147. The CFI only refers to three languages as “fairly widely spoken in Europe,” whereas the ECJ was more forthright. *Id.*

2. *Joined Cases Spain v. Commission and Italy v. Commission*²⁰³

These cases concerned not a vacancy notice for a particular job, but notices for three open competitions to establish reserve lists for possible future recruitment. The notices were published in the *Official Journal* pursuant to Annex III SR by the European Personnel Selection Office, the inter-institutional recruitment office (to which the Commission answers in court).²⁰⁴ They were published in full in English, French, and German only.²⁰⁵ A summary notice appeared in other language versions of the *Official Journal*, referring candidates to the full version.²⁰⁶ The notices also indicated that candidates had to choose a second language for certain tests, and that the language had to be English, French, or German.²⁰⁷ To ensure equal treatment, all candidates had to do these tests in their second language, including those whose first language was one of the three.²⁰⁸ The Spanish cases concern only the publication regime, whereas the Italian government also attacked the substantive language requirements.²⁰⁹ In particular, Italy and Spain alleged infringement of Articles 12, 253, and 290 of the EC (now 18, 296, and 340 TFEU), of Regulation 1/58, and of the principles of non-discrimination and multilingualism.²¹⁰ All of these arguments were rejected by the CFI.²¹¹ However, Italy has now appealed to the ECJ.²¹² The CFI's judgments are in many respects similar to that in Case T-185/05, *Italy v.*

²⁰³ Joined Cases T-156/07 & T-232/07, *Spain v. Comm'n*, judgment of 13 September 2010, not yet reported [hereinafter *Spain v. Comm'n*]; Joined Cases T-166/07 & T-285/07, *Italy v. Comm'n*, judgment of 13 September 2010, not yet reported [hereinafter *Italy v. Comm'n*].

²⁰⁴ *Spain v. Comm'n*, *supra* note 203, para. 6; *Italy v. Comm'n*, *supra* note 203, para. 6.

²⁰⁵ *Spain v. Comm'n*, *supra* note 203, paras. 6–9; *Italy v. Comm'n*, *supra* note 203, paras. 6–9.

²⁰⁶ *Spain v. Comm'n*, *supra* note 203, para. 9; *Italy v. Comm'n*, *supra* note 203, para. 9.

²⁰⁷ *Spain v. Comm'n*, *supra* note 203, para. 9; *Italy v. Comm'n*, *supra* note 203, para. 9. This choice reflected two considerations: on the one hand, the Commission has a long-standing internal practice that documents for decision must be submitted to the Commission itself in these three languages. On the other hand, EPSO's own observations of the last competitions carried out under the previous language regime (in which candidates could have any official languages as their "first" language and a satisfactory knowledge of any other) were that, despite the free choice of second language, over 90% of candidates from the fifteen pre-2004 Member States had chosen either English, French, or German.

²⁰⁸ *Spain v. Comm'n*, *supra* note 203, para. 9; *Italy v. Comm'n*, *supra* note 203, para. 9.

²⁰⁹ See generally *Spain v. Comm'n*, *supra* note 203; *Italy v. Comm'n*, *supra* note 203.

²¹⁰ See *Spain v. Comm'n*, *supra* note 203; *Italy v. Comm'n*, *supra* note 203.

²¹¹ See *Spain v. Comm'n*, *supra* note 203; *Italy v. Comm'n*, *supra* note 203.

²¹² Case C-566/10 P, *Italy v. Comm'n*, 2011 O.J. (C 63) 21.

Commission, to which the CFI makes frequent reference.²¹³ It dismisses the argument based on Article 290 EC (Article 342 TFEU) and Regulation 1/58, citing *Kik, Bonaiti Brighina*, and Case T-185/05, *Italy v. Commission*.²¹⁴ The cases confirm: (i) that there is no rule or principle of Community law requiring competition notices to be published in the *Official Journal* in all languages;²¹⁵ (ii) that there is no principle that all citizens must always receive all communications from the institutions in their official language;²¹⁶ (iii) that relations between the institutions and their staff (and candidates²¹⁷) fall exclusively under the SR;²¹⁸ (iv) that in any case, Article 290 EC (Article 342 TFEU) is not an autonomous rule, but is merely the legal basis for Article 6 of Regulation 1/58 which expressly permits internal language regimes.²¹⁹ The GC then removes the ambiguity left by Case T-185/05, *Italy v. Commission*, by making it quite clear that it is acceptable in a competition like this one to publish a notice in full only in some languages, with a short-form notice in others.²²⁰ This does not lead to any discrimination concerning the opportunity to take part, since everyone has the same possibility of being informed about the *existence* of the competition.²²¹ In any case, the method of publication was justified by the link with the content of the competition: there would be no point in requiring publication in full in all the languages, since candidates who did not have sufficient knowledge of English, French, or German to understand the notice would not meet the conditions for admission.²²² The CFI repeats the formula used in Case T-185/05, *Italy v. Commission*, that the institutions are free to impose stricter language

²¹³ Spain v. Comm'n, *supra* note 203, para. 50; Italy v. Comm'n, *supra* note 203, para. 52.

²¹⁴ Spain v. Comm'n, *supra* note 203, para. 89; Italy v. Comm'n, *supra* note 203, para. 136.

²¹⁵ Spain v. Comm'n, *supra* note 203, paras. 86–89; Italy v. Comm'n, *supra* note 203, paras. 91–92.

²¹⁶ Spain v. Comm'n, *supra* note 203, paras. 86–89; Italy v. Comm'n, *supra* note 203, paras. 91–92.

²¹⁷ Spain v. Comm'n, *supra* note 203, para. 56; Italy v. Comm'n, *supra* note 203, para. 54. The justification being that they are not communicating with the Institution like other citizens, but exclusively in order to obtain a post as an official, which presupposes certain language skills which may thus be required in the notice.

²¹⁸ Spain v. Comm'n, *supra* note 203, para. 56; Italy v. Comm'n, *supra* note 203, para. 54.

²¹⁹ Spain v. Comm'n, *supra* note 203, paras. 52–56; Italy v. Comm'n, *supra* note 203, paras. 41, 52–57, 72–73.

²²⁰ See *supra* note 174.

²²¹ Spain v. Comm'n, *supra* note 203, paras. 61–62; Italy v. Comm'n, *supra* note 203, paras. 77–78. However, the GC seems to have abandoned this particular element of its reasoning in Case T-117/08, discussed *infra* Part VI.C.5.

²²² Spain v. Comm'n, *supra* note 203, paras. 65, 74; Italy v. Comm'n, *supra* note 203, para. 81.

requirements than the minima referred to in Article 28(f) whenever the needs of the post so require or simply those “of the service,” thus exempting the institution from any obligation to justify the requirements post by post.²²³ This would be difficult for a reserve list competition because, unlike a vacancy notice, it is not directed at particular posts but to those that might become vacant over a given period. The GC also repeats and develops the *Bonaiti Brighina* ruling.²²⁴ It seems to be simply part of the inherent power to organize the work of the institution:

It is true, as the Kingdom of Spain argues, that there is no written rule of Community law indicating that German, English and French are the internal languages of the Commission and of other Community Institutions or bodies. However, a Community Institution or body can choose one or more languages for internal purposes, provided that that choice is based on objective considerations, related to the specific functional requirements of the Institution or body concerned, taking account, in particular, of the diversity of the staff it recruits. The use of several languages inside the services of the institution or body concerned can indeed require knowledge of one of these working languages. In such a case, however, it would appear to be sufficient to require knowledge of only one of these languages. A requirement to have a cumulative knowledge of various languages cannot be justified by the need for internal communication²²⁵

²²³ Spain v. Comm'n, *supra* note 203, para. 65; Italy v. Comm'n, *supra* note 203, para. 81.

²²⁴ See Case T-118/99, *Bonaiti Brighina v. Comm'n*, 2001 E.C.R. II-97 (noting that the institutions are free to determine their own internal language regime even without adopting a formal act for this purpose).

²²⁵ See Opinion of AG Póiaras Maduro, *supra* note 139. Spain v. Comm'n, *supra* note 203, para. 75; Italy v. Comm'n, *supra* note 203, paras. 56, 93–94, 102. This seems to be a retreat from its position in *Hendrickx v. Council*, where it accepted a requirement to know two internal languages. See Case T-376/03, *Hendrickx v. Council*, 2005 E.C.R. II-379, para. 44. This might simply reflect the fact that in these competitions, the requirement was to take exams in one of the second languages (English, French, or German) but not to know two of the languages. In Italy v. Comm'n, *supra* note 203, para. 94. The Court gives greater emphasis than in Spain v. Comm'n, *supra* note 203, to the need to avoid any factual discrimination among Union citizens in access to Union jobs. On the other hand, the Court adds a reference to criteria which might help determine what the objective needs of the

This seems to be confirmed by the rejection of the argument that the choice of the three languages required to be reasoned in the competition notice. No such reasoning is required, the CFI says, where it is clear that the choice reflects the institution's internal needs.²²⁶ In the judgment in Case T-166/07, the GC also confirms what it already said in Case T-185/05 *Italy v. Commission* that the applicant must demonstrate that the choice of languages was not proportionate or appropriate. Here, Italy had not done so.²²⁷ The CFI also emphasized the lack of discriminatory effect, since (a) the requirement was only to know one of the three second languages and (b) the fact that the "first" language could be any official Union language guaranteed appropriate diversity of access.²²⁸

3. *Marcuccio v. Commission*²²⁹

This case is essentially a repetition, first by the CST, then by the GC, of the principles confirmed in *Rudolph, Rasmussen*, and Case T-185/05, *Italy v. Commission*: unlike other Union citizens, an official (or former official, in this case) cannot write to an institution, in a matter connected with his or her employment, in his or her own language and insist on a reply in that language. Relations between institutions and officials or agents are not covered by the language rules in the TEU and the TFEU, the CFR, or by Regulation 1/58.²³⁰ Indeed, to require the institutions to apply these rules in relations with officials would impose an intolerable burden on them.²³¹ If an institution sends an official a document in one of its working languages, it is only required to provide a translation if the official does not have sufficient knowledge of the language to take note of the document's contents.²³² Interestingly, the CST, influenced by the applicant's record of ill-considered litigation, held that these matters were so obvious that the case was

institution might be, such as its history, where it has its seat, the nature of its duties, and the needs of internal communication. *Id.*

²²⁶ *Spain v. Comm'n*, *supra* note 203, para. 88; *Italy v. Comm'n*, *supra* note 203, para. 126.

²²⁷ *Italy v. Comm'n*, *supra* note 203, para. 99.

²²⁸ *Id.* paras. 97, 101.

²²⁹ Cases F-3/08 and T-515/09 P, *Marcuccio v. Comm'n*, Orders of the CST of 7 October 2009 and of the General Court of 18 October 2010, not yet reported.

²³⁰ *Id.* paras. 45–54.

²³¹ *Id.* para. 31, *quoting* Joined Cases F-51/05 and F-18/06, *Duyster v. Comm'n*, paras. 58–59, not yet reported.

²³² *Id.* paras. 45–47.

vexatious.²³³ Thus, the applicant should be ordered to pay certain court costs as well as the Commission's costs.²³⁴

4. Italy v. Commission²³⁵

This case concerned not a competition for recruitment of officials (for which there is an obligation under Annex III of the Staff Regulations to publish the competition notice in the *Official Journal*), but a “call for expressions of interest” (CEI) for a selection procedure for contract agents, a new category of temporary staff employed under contracts. Articles 79 and following of the Conditions of Employment of Other Servants (CEOS) do not lay down any requirements as to publication. Italy attacked two aspects of the CEI: (i) the fact that it was only published in three languages (English, French, and German) and (ii) the fact that while candidates could have any Union language as their “main” language, they had to undergo part of the tests in a second language, which had to be different from their main language²³⁶ and had to be chosen from among the three languages just mentioned.

In this case, the information about the selection procedure was published on the website of the European Personnel Selection Office (EPSO), which only functioned in three languages. The Commission, which defends EPSO's decisions in court, argued that the situation was not the same as that which had led to the annulment of the vacancy notice in Case T-185/05. In that case, the notice had been published in the Official Journal, but only in three language versions, so that a reader whose own language was not one of these three, but who did meet the language conditions for the job might nevertheless miss the notice if he or she read the Official Journal in his or her own language. In the present case, the Commission argued, there was no discrimination in access to the information, since it was only available on the website. Everyone thus had the same chance of discovering it, whatever their own language.

²³³ Case F-3/08, paras. 41–44.

²³⁴ *Id.*

²³⁵ Case T-205/07, Italy v. Comm'n, Judgment of the General Court of 3 February 2011, not yet reported.

²³⁶ This requirement ensured that there was no discrimination in favor of those whose main language was one of the three. These candidates had to choose one or the other two languages as their second language to ensure that all candidates were in the same position (i.e., all had to do the tests in their declared second language, chosen from among the three).

The Court did not agree however, and annulled the notice. It was careful to limit the ground of annulment to the question of publication; it expressly confirmed its decision in Case T-185/05 that knowledge of particular languages can always legitimately be required in the interest of the service.²³⁷ On the other hand, there was a risk of unequal treatment arising from the fact that the notice was only available in full in three languages, and that no other measures had been adopted to ensure that candidates whose main language was not one of the three had an equal chance of discovering the notice.²³⁸

The case thus shows the General Court maintaining the distinction between a pragmatic approach to language conditions for recruitment (as in Cases T-185/05 and T-166/07) and a strict approach to the manner of publishing notices of competitions and selection procedures (as in T-185/05).

5. Italy v. ESC²³⁹

This case is similar in certain respects to Case T-185/07: it also concerned a vacancy notice for a specific job (in this case an internal notice addressed only to candidates who were already officials or other servants of the Union), not a competition to draw up a reserve list for jobs which might become vacant in the future. As in Case T-185/07, the GC annuls the vacancy notice for reasons exclusively connected with the publication.

The form of publication was similar to that in Cases T-166 and T-285/07, described above in relation to that case. The notice was thus published in full in only three language editions of the Official Journal (English, French, and German), with a short-form publication in other language versions referring readers to this full publication. However, there was a small but significant difference between the facts of that case and those of this one, and the judgment turned on it.

The difference was that in Cases T-166 and T-285/07, the method of publication reflected the language conditions for taking part in the competition, in which candidates had to do certain tests in their declared “second language,” which had to be one of these three languages. As explained above, the GC concluded that there was no risk of discrimination among candidates since: (a) everyone had the same opportunity to discover the existence of the competition and (b) in any case, anyone who could not

²³⁷ T-117/08, Italy v. ESC, Judgment of the General Court of 31 March 2011, not yet reported, para. 57.

²³⁸ *Id.* paras. 58–63.

²³⁹ *Id.*

understand the notice in one of these languages was not eligible to apply in any case.

In Case T-117/08, there was no absolute requirement to undergo tests in a particular language. Instead:

Under the heading “Qualifications and skills”, the contested vacancy notice stated, *inter alia*, the requirement of “[being an e]stablished official or temporary member of the staff of a European institution, body, office or agency” and of having a “[t]horough knowledge of an official language of the European Union and [an] excellent knowledge of at least two other official languages of the European Union”, specifying that “[f]or operational reasons, a good knowledge of English and/or French [was] highly desirable.”²⁴⁰

The GC confirmed its statements in earlier cases that Regulation 1/58 does not apply to vacancy notices,²⁴¹ which concern the requirements institutions impose on their own staff. Those are internal matters, to which a more flexible linguistic regime applies, the criterion being the interest of the service.²⁴² The GC even confirmed that there was no requirement to publish vacancy notices systematically in all languages. Notices could be published only in certain languages if appropriate steps were taken to inform all potentially interested parties of the existence of the vacancy.²⁴³ However, confirming earlier statements to the same effect: “although the administration is entitled to adopt measures which appear to it to be appropriate in order to govern certain aspects of the procedure for recruiting staff, those measures must not result in discrimination on grounds of language between the candidates for a specific post.”²⁴⁴

In this particular case, there was a risk of such discrimination because:

publication of the text of the contested vacancy notice in the Official Journal in only some official languages, when persons who have a knowledge only of other official languages are entitled to submit an application, is likely, in the absence of

²⁴⁰ *Id.* para. 7.

²⁴¹ *Id.* para. 41.

²⁴² *Id.* paras. 52–56.

²⁴³ *Id.* paras. 70, 74.

²⁴⁴ *Id.* para. 72.

other measures to enable that category of potential candidates duly to acquaint themselves with the content of that notice, to result in discrimination against them.

In that situation, the candidates in question would be in a less advantageous position in relation to the other candidates, since they would not be in a position duly to acquaint themselves with the qualifications required by the vacancy notice and the conditions and procedural rules for recruitment. That is a prerequisite for submitting an application in the best way, to maximise their chances of being accepted for the post concerned [*see, by analogy, Italy v. Commission*, paragraph 136].

In the present case, it is apparent from the provisions of point 3 of the contested vacancy notice, as cited in paragraph 7 above, that knowledge of English and/or French is only “highly desirable” and not required. Potential candidates for the post of Secretary-General of the EESC, having a thorough knowledge of one official language and an excellent knowledge of at least two other official languages, other than one of the three languages of publication, were therefore eligible to apply and could thus have applied for that post if the vacancy notice had been published in a language which they knew and if they had thus been informed that the vacancy existed.

Moreover, even candidates who have a satisfactory knowledge of English, French or German do not necessarily look at the editions of the Official Journal in one of those three languages, but consult the edition in their own language [*Italy v. Commission*, paragraph 148].

There is therefore a significant risk that candidates potentially interested in the contested vacancy notice consulted only the notices published in all official languages, that is to say, the shortened notice of 28 December 2007, merely referring to the publication in the Official Journal of the contested vacancy notice²⁴⁵

This reasoning is narrower than that in Cases T-166 and T-285/07. In that case, the GC accepted the same publication regime for *two* reasons,

²⁴⁵ *Id.* paras. 78–82.

summarised at (a) and (b) above. Under the reasoning in Case T-117/08, it is not accepted that this form of publication allows everyone the same access to the information as to the existence of the notice, which was reason (a) in the earlier case. Instead, only reason (b) can now justify this form of publication, i.e., there is a link between the method of publication and the language *requirements* of the post.

A reader might wonder about the practical consequences of the annulments in some of the cases brought by Member States. If the vacancy notice or the call for expressions of interest was annulled, what about the people who had been appointed on the basis of the procedure which had been advertised? The correct view is that their rights are not affected: they are innocent third parties who are not responsible for the illegality of the notice, which moreover has only been revealed months or years after the recruitment procedure has been completed. In such a situation it would be excessive to consider that the illegality attaching to the notice fed through to the individual appointments, which are independent decisions.²⁴⁶

6. *Angioi v. Commission*²⁴⁷

In this case, an individual candidate attacked the three-language regime described above, in connection with her exclusion from a selection procedure for contract agents. She did not put forward the argument about the manner of publication of the notice which succeeded in Case T-205/07.²⁴⁸ Instead, she argued about the justification of the language conditions of the tests themselves. She put forward a number of arguments, of which only one was of general importance. She argued that (a) a requirement to know a particular language can only be justified in relation to a specific post, and

²⁴⁶ This is exactly the reasoning followed by the Union courts in relation to other cases where individual decisions rejecting candidates were based on a condition in a competition notice late found to be unlawful. The Courts consider that the appointments of other candidates based on the notice should not be disturbed since they may have occurred some considerable time before the finding of illegality and in any case, the persons concerned are innocent bystanders, who are not responsible for the illegality of the notice, whereas all that is required is to find an appropriate way of giving effect to the annulment for the benefit of those who have obtained it. *See e.g.* Case C-242/90, *Commission v Albani*, 1991 E.C.R. I-3839, paras. 13–17 (determining that the proportionate solution is thus to allow the applicants who have obtained the annulment to sit new tests of comparable difficulty to those in the original competition).

²⁴⁷ Case F-7/07, *Angioi v. Comm'n*, Judgment of 29 June 2011, not yet reported.

²⁴⁸ The notice was not the same as Case T-205/07, though the method of publication was the same. *See supra* note 235.

cannot be imposed generally in a procedure designed only to draw up a reserve list and that there was no evidence that a knowledge of English, French, or German was essential for all contract agent posts; and (b) that Regulation 1/58 applied, and that even if Article 6 allowed the institutions to adopt simplified language practices for internal purposes, there was no evidence any of them had adopted any decision to that effect, or indeed that these three languages were the most commonly used in the institutions.²⁴⁹

This is a judgment of the full CST, which has not been appealed. The CST essentially follows the reasoning of the GC in Cases T-166 and T-285/07. In particular, it accepts that specific language requirements can be justified not only in relation to particular posts, but can be imposed more generally, given:

the existence, within the institution, of one or more languages of internal communication. Since an institution has the right, even without taking a formal decision to that effect, to choose a limited number of languages of internal communication, provided that that choice is based on objective considerations relating to its operational needs [*see, to that effect, Opinion of Advocate General Poiares Maduro in Case C-160/03 Spain v. Eurojust, points 49 and 56; Spain v. Commission, paragraph 75; and Italy v. Commission, paragraph 93*]. It follows that that institution may legitimately impose on contract staff whom it intends to recruit a knowledge of languages matching those languages of internal communication. Otherwise it would be exposed to the risk of employing a staff member who was unable adequately to perform his duties within the institution, since that staff member would be put in a position, in some circumstances, where he was unable, or found it extremely difficult, to communicate with his work colleagues and to understand the instructions issued by his hierarchical superiors. In that regard, it must be pointed out that, in the judgment in *Italy v. Commission*, given in a case where EPSO had published competition notices for the purpose of establishing reserve lists intended to fill vacancies for administrators and assistants within the European institutions, the General Court

²⁴⁹ See summary of arguments Case F-7/07, *Angioi v. Comm'n*, paras. 78–80.

accepted not only that the choice of English, French and German corresponded to the operational needs of the institutions and bodies of the European Union, but also that EPSO had been properly entitled to require the candidates in those competitions to have a knowledge, as their second language, of one of those three languages [*Italy v. Commission*, paragraph 103].²⁵⁰

The CST, like the GC, recognizes that language requirements must avoid creating discrimination between candidates. It therefore subjects the requirements in the instant case to a double test—they must pursue a legitimate objective and there must be a “reasonable relationship of proportionality” between the requirements and that objective.²⁵¹

The requirements in this case passed these tests, since there was evidence in the file that “English, French and German are, in varying degrees, used as the languages of internal communication within the institutions which are likely to recruit a significant proportion of the candidates who pass the selection tests, namely the Commission and the Council.”²⁵² Therefore: “the language requirements set out in the [notice] pursued a legitimate objective in the general interest in the framework of staff policy, namely to ensure that those members of staff had a knowledge of languages matching those languages of internal communication.”²⁵³

The proportionality test was also met, since the notice only required candidates to know one of the three languages as a second language, which is all that is required to ensure internal communication inside an institution which uses any of two or three languages internally (a requirement to know two, or all three, would be disproportionate in such a case and would amount to granting a privileged status to certain languages).²⁵⁴

Nor did the regime chosen involve discrimination. It was true that candidates who had one of the three languages as their main language then found their choice of a second language limited to two, whereas other candidates, whose main language was not one of the three, had a choice from

²⁵⁰ *Id.* para. 91.

²⁵¹ *Id.* para. 93.

²⁵² *Id.* paras. 94–95.

²⁵³ *Id.*

²⁵⁴ *Id.* paras. 98–99.

three. However, this could not be criticised since it was simply a matter of personal circumstances.²⁵⁵

The CST concludes on this point with certain general remarks:

Moreover, in the context of the internal functioning of the European Union institutions, the choice of language of internal communication is the responsibility of those institutions which have the power to impose it on their staff. As provided in Article 6 of Regulation No 1 – which was adopted by the Council under the Treaty provisions conferring on it competence to adopt the rules governing the languages of the institutions of the European Union –, the “institutions . . . may stipulate in their rules of procedure which of the languages are to be used in specific cases.” Accordingly, contrary to what the Kingdom of Spain and the Italian Republic maintain, EPSO was properly entitled to limit the choice of second language to English, French or German, as it did in the CEI, which had been launched “on behalf of the European Institutions and of the Commission and the Council in particular.”

The argument that EPSO should, in the CEI, have justified the choice of the three languages to be used in order to participate in the pre-selection tests must also be rejected, since it is common ground that that choice reflected the internal requirements of the institutions.²⁵⁶

A concluding point concerns the possible relevance of statistics in order to verify the supposed discriminatory effects of a system in which candidates are required to have knowledge of certain official languages. In *Eurojust*, the Advocate-General looked at the statistical evidence and it helped him conclude that there was no reason to criticize what had been done, save as to one post.²⁵⁷ However, the Courts have not yet found it necessary to pronounce on the point, although such evidence was available in Case T-156/07, *Spain v. Commission*, concerning the number of applications broken down by nationality.²⁵⁸ This evidence appeared to confirm that there had been no effect of favoring native speakers of English, French, or German.

²⁵⁵ *Id.* paras. 100–102.

²⁵⁶ *Id.* paras. 106–107.

²⁵⁷ Opinion of AG Poiares Maduro, *supra* note 139, para. 65.

²⁵⁸ *Spain v. Comm'n*, *supra* note 203.

D. Pending Cases

It remains to mention the cases still pending. In the GC there are:

(1) Case T-142/08, *Italy v. Commission*, concerns Open Competitions EPSO/AD/116 and 117/08;²⁵⁹

(2) Case T-164/08, *Italy v. Commission*, is about Open Competition EPSO/AD/125/08;²⁶⁰

(3) Case T-126/09, *Italy v. Commission*, concerns Open Competitions EPSO/AD/144/09, EPSO/AD/145/09 and EPSO/AD/146/09, which are special post-enlargement competitions for junior administrators exclusively from the Member States which joined in 2004 and 2007;²⁶¹

(4) Case T-218/09, *Italy v. Commission*, relates to Open Competitions EPSO/AST/91/09 and EPSO/AST/92/09 for the recruitment of specialist assistant staff;²⁶²

(5) Case T-248/10, *Italy v. Commission*, is about Open Competition EPSO/AD/177/10, for junior administrators.²⁶³

The most important pending case however is Case C-566/10 P, *Italy v. Commission*,²⁶⁴ which is Italy's appeal to the ECJ against the judgment of the GC in Joined Cases T-166 and T-285/07 (above). The abovementioned GC cases have been suspended pending judgment on this appeal.

VII. SUMMARY AND CONCLUSION

The case law of the GC and the CST reflects the clear distinction made in Regulation 1/58 between the external and internal language regimes. The former concerns communication between the institutions and Member States or between the institutions and citizens, formal acts in particular. This regime is strict: the institutions must use specific official languages appropriate to that state or that citizen.

²⁵⁹ Case T-142/08, *Italy v. Comm'n*, 2008 O.J. (C 142) 35.

²⁶⁰ Case T-164/07, *Italy v. Comm'n*, 2008 O.J. (C 158) 22.

²⁶¹ Case T-126/09, *Italy v. Comm'n*, 2009 O.J. (C 129) 18, *corrected by* Corrigenda, 2009 O.J. (C 153) 53.

²⁶² Case T-218/09, *Italy v. Comm'n*, 2009 O.J. (C 180) 59.

²⁶³ Case T-248/10, *Italy v. Comm'n*, 2010 O.J. (C 209) 49.

²⁶⁴ Case C-566/10 P, *Italy v. Comm'n*, 2011 O.J. (C 63) 21.

The institutions, however, recognized from the outset that a different and more flexible regime was needed for informal internal communication inside the institutions. Article 6 of Regulation 1/58 thus allows for an internal language regime to be laid down in each institution's rules of procedure.²⁶⁵ The institutions have hesitated to make full use of this possibility, no doubt because formally recognizing that certain official languages are more widely used than others is seen as problematic. Some institutions, for example, have adopted rules, but this adoption is only a formality, since the rules are more or less copies of the external rules of Regulation 1/58 (e.g., Council and Parliament). On the other hand, regardless of which approach is taken in the rules of procedure, each institution has certain purely factual language practices.²⁶⁶ These practices tend to be more visible when the institutions publish a vacancy notice or a competition notice to recruit staff. The doubling of the number of official languages since 2004 has made it necessary to impose knowledge of particular language requirements to ensure that internal communication is maintained. At the same time, candidates can have any official language as their first language, which ensures geographical balance and the possibility of communicating externally to native-speaker standard in all languages. Publications in the *Official Journal* which require candidates to have particular languages and to pass certain tests in a second language, are chosen from the three languages considered to be the most widely-spoken. As a result, what could be tolerated so long as it was simply an internal practice, became intolerable for some. Once the internal practices became visible in *official* publications, certain Member States brought actions against the institutions.

The ECJ has yet to pronounce on these matters—hence the considerable importance of the future judgment in Case C-566/10 P, *Italy v. Commission*. The Court has upheld the need to observe the strict linguistic regime of Regulation 1/58 in *Skoma-Lux*.²⁶⁷ Legislation is only enforceable against citizens in a given Member State when it is published in the language which the Union recognizes as official with respect to that state.²⁶⁸ The Court has also dealt with an intermediate situation in *Kik*, namely where the relationship between the institution and the citizen is of what may be called a

²⁶⁵ See Regulation 1/58, *supra* note 11, art. 6 (referencing implicitly the possibility of using one or more widely spoken language as a “vehicular language”).

²⁶⁶ For example, the near-exclusive use of French for deliberations in the Court of Justice, or the use of English and French for internal purposes in the General Secretariat of the Council.

²⁶⁷ Case C-161/06, *Skoma-Lux v. Celní ředitelství Olomouc*, 2007 E.C.R. I-10841.

²⁶⁸ *Id.*

commercial nature, such as granting an intellectual property right against payment.²⁶⁹ Here, it recognizes that the Union legislature may validly adopt a limited language regime, to take account of the various interests potentially involved.²⁷⁰ Only now, however, is the Court confronted with the question already considered several times by the CFI/GC and the CST, of whether internal language practices of an institution can justify the published requirement to know particular official languages.²⁷¹ The requirement appears not in a binding legislative text but in a purely informative text, namely a competition notice, which is simply an invitation to apply if one so wishes.²⁷² *Eurojust* seemed to provide the opportunity for dealing with the point, and the Advocate-General was prepared to recognize that such requirements can be justified, but the institution must be prepared (he says) to provide a concrete justification—a requirement, by the way, which the CFI/GC case law has not expressly imposed.²⁷³ The Court did not answer the question in *Eurojust*, given the particular features of that organization which, the Court held, meant that vacancy notices could not be attacked by a Member State.²⁷⁴ These features are not present in Case C-566/10 P, *Italy v. Commission*.²⁷⁵ The judgment is thus awaited with considerable interest.

²⁶⁹ Case C-361/01 P, *Kik v. OHIM*, 2003 E.C.R. I-08283.

²⁷⁰ *Id.*

²⁷¹ *See supra* Part VI.

²⁷² *See supra* Part VI.

²⁷³ *See supra* Part VI.B.

²⁷⁴ Case C-160/03, *Spain v. Eurojust*, 2005 E.C.R. I-2077, paras. 41–44.

²⁷⁵ Case C-556/10 P, *Italy v. Comm'n*, 2011 O.J. (C 63) 21.