CONTENTIONS OF LANGUAGE: MULTILINGALISM AND THE LANGUAGE REGIME OF THE EUROPEAN UNITARY PATENT SYSTEM

BY

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THESIS

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ABSTRACT

Supranational communication in the European Union would be impossible without languages of wider distribution that are used in written and oral communications between citizens and within European institutions. Although twenty-four languages that are official in at least one member state are also official in the European Union, 'working' or 'procedural' languages that are used in daily communication in EU institutions are few in number and based on selection criteria that are not well understood. This poses a problem because working languages with wide communicative reach can guarantee first-hand access to vital legal and administrative information to those who can speak, read, and write them over those who do not. Whether they are used in internal affairs or external communication with citizens, these languages can yield unfair advantage and lead to conflict between national interests and collective identities.

In this thesis, I analyze a controversy based on a court case regarding the working languages of the European Unitary Patent System (EUPS). Initially assumed to take effect in 2011, the EUPS was expected to provide patent protection for innovations in every state of the EU with the submission of a single request. Once accepted, the patents would have been published only in French, German, and English. I provide an analysis of court documents, public commentaries, and rules and regulations to show why Italy and Spain disagreed with the proposed language regime, took the Council to the Court of Justice in 2011 and 2015, and lost their case in 2013 and 2015, respectively. I conclude on the necessity for greater transparency in matters of procedural language use and the importance of cost-effective language regimes with a potential for the participation of smaller national communities in the everyday administrative dealings of the EU.

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CHAPTER 1

INTRODUCTION: MULTILINGUALISM IN THE EU

Multilingualism is a fact of life in the European Union comprised of 28 of member states and many more historical communities. In every member state, it is essential to learn multiple languages for various reasons. From waking up in the morning speaking French to your family to going to work and using English in front of your colleagues, multilingualism in the European Union is prevalent. Collectively, Europeans speak over a 170 different languages and dialects. The most common languages being English, French, German, Spanish and Russian in that order. Each person has their own first language (also known as a mother tongue) which is most likely "an official language of the country in which they reside" (Eurobarometer 2012). However, there are some exceptions of people having unofficial languages of their respective countries as their mother tongue. Such examples include "Latvia (71%) and Estonia (80%) are the least likely to use an official language. In both of these countries a significant proportion of respondents say that their first language is Russian (27% and 19% respectively), a reflection of the history and geography of the two countries." (Eurobarometer 2012). Another example is the United Kingdom where according to the same Eurobarometer study, 2% of participants claim that Polish is their mother tongue. In addition to speaking their mother tongue, about half of all Europeans claim to speak another language enough to hold a conversation. In short, obtain two lingua franca. In addition to this, there is a long- standing goal from the EU to have all of its citizens to have practical skills in at least two foreign languages- with an example of a person living in Germany, has German for their mother tongue and could also speak English and Polish. This is

goal is most likely achieved with younger people, those who are still at school, those holding management positions, use the internet daily, and want to learn new languages. Multiple languages in the same communicative domains, however, are both a source of strength and burden in the EU. As it is recognized in the EU's founding documents, multilingualism is a strength and a valuable asset for success in the labor market. According to Leech's 2017 article, "the period following the Maastricht Treaty began to put greater emphasis on language competence as an element of education policy within the Union… The recommendation of the European Council thus not only encouraged multilingualism as a key basic skill (on the level of literacy and arithmetic, it would seem) but also, importantly, wedded linguistic competence to economic growth within the overall framework of the push towards a "competitive economy based on knowledge" ("Presidency Conclusions", 2002:19). The founding principle of this second approach to multilingualism, then, sees competences in foreign languages not within the framework of the rights of the speaker but as part of a general strategy of economic growth through the development of the key immaterial infrastructure of education and knowledge."(4). Leech also stated that multilingualism does "reinforce an awareness that language competence is not only a right or a basic skill but an important factor in economic growth and labour mobility." (5). This statement alludes to the fact that learning multiple languages is not only something anybody can obtain, but it is your right as a citizen to learn different languages in order to improve not only your own standard of living, but also the rest of the EU.

During the preparation and implementation of the EU's Eastward Enlargement between 2001 and 2008, multilingualism became the focus of the EU's cultural policies. This was especially true in the Commission where – in 2004 – the portfolio of the European Commissionaire for Education and Culture was renamed to also include the words *Training and*

Multilingualism[1]. Many other policy initiatives followed after 2004 that stressed multilingualism as an important part of EU integration, which encourages citizens' greater participation in EU affairs. I believe one can say that in discourses about the EU – and especially in its motto 'Unity in diversity' – multilingualism is definitely the stand-in for diversity.

With a strong influence from the EU, multilingualism is an ideal that is pushed to all citizens such as being united through linguistic diversity and promoting economic growth in the European community. However, this neglects the difficult reality of making those ideals happen. Each language has its own subset of culture and traditions that cannot be ignored or melted down together in a perfect linguistic melting pot. It is nearly impossible to guarantee the use of 150 languages into daily use for all EU citizens due to the varied usage of such languages across the EU. In addition, when one considers the use of only using official languages, then how does one manage the usage of those and are any more languages included in usage as well? How is this multilingualism managed in various EU institutions and how did it lead to conflicts regarding the European Unified Patent System?

Throughout this document, I will first elaborate on policies and regulations about language use. There, I will expand on language arrangements in EU institutions, and first contentions over working languages. Next, I will explore the case of the European Unitary Patent System and the situation involving Spain and Italy in 2011. This section will use the previous section's framework to analyze the regulations and policies about language use in EU institutions and how those are interpreted and managed.

[1] Note that since then *Multilingualism* was replaced by *Citizenship* in the title, possibly signaling a change in focus from diversity to European integration and unity.

CHAPTER 2

POLICIES AND REGULATIONS ON LANGUAGE USE

While multilingualism is a precious cultural heritage for the twenty-eight member states of the EU, its active legal and political promotion has become increasingly difficult. As the number of member states grew from six states at the time of the signing the Treaty of Rome in 1957, to its current twenty-eight after the last enlargement in 2013 when Croatia joined the Union. One possible reason why is at the time of the EU's foundation, the legal and political frameworks that were available became difficult to sustain over time. In this chapter, I will argue that subsequent enlargements have led to an increase in linguistic complexity and associated costs of the management of multilingual communication (translation and interpretation), while regulations of language use have barely kept up with this complexity. Before I discuss issues of multilingualism in the case of the European Unified Patent System in chapter three, I will first introduce the general – and quite minimally defined - rules and regulations on language, present the language regimes of the main EU institutions, and conclude on the analysis of the current state of these policies in solving issues of multilateral communication between citizens and the EU institutions.

2.1. First regulations

The legal protection of linguistic diversity is codified in the foundational documents of the EU. The most general and wide-reaching statement in terms of legal rights can be found in Article 22 of the EU Charter of Fundamental Rights that states that "the Union shall respect cultural,

religious and linguistic diversity". Given the importance of communication – thus languages – for economic integration, it is not surprising to see that one of the very first regulatory documents adopted by the European Economic Community in 1958, *Regulation No 1 of the EEC Council determining the languages to be used by the European Economic Community* (see Appendix A), was dedicated to language use. Appended nine times following its initial signature as part of the Treaty of Rome (1957)[2], *Regulation No 1* defines essential matters of language use in eight consecutive articles and eight amendments. Each update occurred after subsequent enlargements: the first in 1972 when Denmark, Ireland, the UK, and Northern Ireland joined the EU and the last in 2006 as part of general regulatory measures preparing for the accession of Bulgaria and Romania on January 1, 2007[3].

The introductory paragraph puts all decisions concerning languages firmly in the hands of the Council of Europe, acting unanimously: "*the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the rules of procedure of the Court of Justice*[4]*, be determined by the Council, acting unanimously".* Article 1 contains the first legal mention of those languages of the founding members of the CEE that, under the newly negotiated treaty, have been selected by each member state to receive official status within the CEE. While listing all twenty-three languages as 'official' in the Union is, admittedly, a crucial step towards guaranteeing equal status for one language designated by each member state, Article 1 grants status to these language in two terms – that of 'official languages' and of 'working languages' – without explicitly defining any of these concepts (see Figure 1). Thus, in

[2] This treaty (effective January 1, 1958) marked the foundation of the customs union called the European Economic Community (EEC) between Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany.
[3] To the best of my knowledge, *Regulation No 1* has not been officially updated since Croatia's accession to the Union on July 1, 2013 (see Appendix A).
[4] The special mention of the Court of Justice is further clarified in Article 7 (infra).

principle, the coordinating syntactic structure ‘and’ between “official languages and working languages” could have multiple interpretations.

Figure 1. Text of Article 1 of *Regulation 1 determining the languages to be used by the European Economic Community* (see Appendix A).

Article 1

The official languages and the working languages of the institutions of the Union 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.

One interpretation would be that of perfect synonymy: all ‘official’ languages are also considered ‘working’ languages of the Union and, vice versa, all languages chosen for procedural purposes should also be official languages. The competing interpretation would be partial synonymy: one or several – at this point undefined – official languages are also considered working languages that can be selected for procedural purposes. This ambiguity is lifted, to some extent, in Articles 6 and 7 (Figure 2) that make it implicitly clear that official languages and working languages are not identical.

Article 6 is probably as broad as any regulation can be, allowing the institutions of the Community to stipulate “in their own rules of procedure which of the languages are to be used in specific cases”. By referring to ‘procedure’, however, Article 6 implicitly treats the status of the languages (‘official’) as separate – whether distinct or not remains undetermined – from their function. The implications of this vagueness in wording will be important for the purposes of this

thesis, arguing that the lack of more precise procedures in terms of language use ended up causing conflicts that could not be solved via regular means of problem solving in some of the institutions of an enlarged European Union. Article 7 provides no additional definitions, but it takes the important step of singling out one institution with its own power to define "its own rules of procedure": the Court of Justice.

Figure 2. Texts of Articles 6 and 7 of *Regulation 1 determining the languages to be used by the European Economic Community* (see Appendix A)

Article 6

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

Article 7

The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.

It should be noted that, in addition to these provisions, equal status is granted to all official languages in terms of communication with the Union (Article 2), drafting of "regulations and other documents of general application" (Article 3), and dissemination through the publication of the *Official Journal of the European Union.*

Regulations concerning institutional language use are also very general in the Treaty on the Functioning of the European Union or TFEU[5]. The general "rules governing the languages of

[5] The TFEU (2007) is one of two primary treatises of the EU, replacing the TEC or the Treaty establishing the European Community (1992). It defines the principles, powers, competencies, and general rules of functioning of the EU.

the institutions of the Union" defined in *Regulation No 1* are echoed verbatim in *Article 342* of the TFEU. These rules appear without any specifics at all, concerning the type or the name of any of the languages (see Appendix B).

Figure 3. Article 342 of the *Treaty on the Functioning of the European Union*.

Article 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.

Article 118, paragraph 2 provides more details on language arrangements regarding intellectual property rights.

Figure 4. Article 118 of the *Treaty on the Functioning of the European Union*.

Article 118

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 Council shall act unanimously after consulting the European Parliament.

As shown in the wording in Figure 4, while language arrangements continue to be defined as pending the unanimous approval of the Council, the Council can only act "after consulting the

European Parliament". This caveat will become important in the discussions of a Court case that did not seem to take these provisions into account. The TFEU mentions language arrangements in four other cases.

2. 2. Language arrangements in EU institutions

EU institutions are following the above regulations when defining their own rules of proceedings regarding 'working' or 'procedural' language use. Based on one of the possible interpretations of Article 1 of *Regulation No 1* (see above), all institutions observe a strict hierarchy of official languages of which, depending on the task at hand, they tend to select only a few – in some cases only one –working language(s). Generally speaking, the language regimes[6] of most EU institutions hinge on the medium: while translation (written language) regimes tend to be either *restricted*, i.e. operating with a few official languages, or *fully multilingual*, i.e. extending to all twenty-four official languages, interpretation (oral language) regimes tend to be *restricted* language arrangements.

The European Council and the Council of the EU

Two of the institutions that act together, in various capacities, with the European Parliament as the EU's legislative branches are the European Council (EC)[7] and the Council of the EU (CEU)[8]. For translation, provided by the *Language Service of the General Secretariat of*

[6] Following Liu's definition, I define language regimes as "rules that delineate which languages can be used when and where" (Liu 2015:4). Following Spolsky (2009), I also consider that language regimes represent only one – formal (institutional) – form of language management among other, for instance informal, structures such as the family.

[7] The European Council defines the general political direction and priorities of the EU. It consists of the heads of state or government of the member states, together with its President and the President of the Commission. https://www.consilium.europa.eu/en/european-council/

[8] The Council of the EU is the institution representing the member states' governments. Also known informally as the EU Council, it is where national ministers from each EU country meet to adopt laws and coordinate policies.

the Council of Europe[9] they use the *full multilingual* model, which provides translations into the twenty-four official languages of all major policy documents and of almost all other legislative documents at certain points in the legislative process. This is to make sure that all involved parties, including the general public, could have access to legislations. Full multilingual translation is costly, but necessary, since EU law states that publishing legislation in all the official languages should be strictly observed, with no exceptions granted: "publication in all EU languages is a prerequisite for enforceability of legislative acts" (Van de Jeught 2015:124). In other words, it would be impossible to enforce EU laws without making sure that citizens can be informed about them in their own languages[10]. As a cost-sharing measure, the EC and CEU also provide translations for a few other EU institutions. As far as oral proceedings are concerned, the EC and CEU align on the European Commission's trilingual – French. English, and German – interpretation services.

The European Commission

The EU's executive branch, the European Commission (henceforth, Commission), tends to coordinate its written and spoken communication networks in three languages: English, French, and German. While in preparation of important legislations, some of the core documents (see Figure 5) are translated in all twenty-four official languages, many minor written documents, such as financial statements, minutes of meetings, and follow-up reports remain primarily available in English, which is the most widely selected 'vehicular' (also called 'link' or 'bridge'). "Though comprehensive translation resources are available, more and more source documents are being written in English", report Ammon and Cruise (2013:18). Their observation

[9] https://www.consilium.europa.eu/en/documents-publications/publications/

[10] The legal case that now serves as a precedent for the application of this law is the Skoma-Lux Case (European Court of Justice, C-161/06, 11 December 2007), see footnotes below.

also supports Ban's (2013:208) survey of language use in the enlarged European Commission that showed that English has become the most widely used working language of the executive branch, due in part to the 2004 and 2007 eastward enlargements.

Figure 5. Types of documents that enjoy priority for full multilingual translation (Commission of the European Communities 2006:4, cited by Ammon and Cruse 2013:18).

Type 1: documents corresponding to political priorities and/or creating new legal obligations, in particular items included in the Commission's Legislative and Work Programme.

Type 2: documents resulting from existing legal obligations, including implementation measures and monitoring reports produced for the co-legislators.

Type 3: documents resulting from the Commission's communications priorities.

Type 4: non-core documents which could be translated depending on a series of factors (resources available, cost-efficiency, etc.) (Commission of the European Communities 2006: 8f.).

In other cases, translation is based on indirect sources, which means that some texts are not necessarily translated directly into all official languages from the same source, but rather via 'relay' (or 'pivot') languages: first translated into English, French and German, and then into other languages. This procedure is risky because ambiguity in wording can lead to misunderstandings, conflicts, and possible legal action. The Commission's answer to this

problem has been rigorous quality control (European Commission 2008: 14); once again, if quality translation is not available, then rules and regulations cannot be enforced towards individual citizens of different member states[11]. This communication scheme has been successful despite recurring complaints of the neglect of German as a procedural language (see Ammon 2006, Ammon and Cruse 2013).

The Commission is unique in its organized in multiple agencies and policy groups, called Directorate-Generals. Among them is the Directorate-General for Interpretation (henceforth DG-Interpretation), one of the largest interpretation services in the world. The DG-Interpretation is a full-service conference organizer that, in addition to coordinating the work of more than ten thousand freelance and staff interpreters in multiple institutions, also allocates meeting rooms and other conference support within the various DGs of the Commission. It possibly reveals the shifting language patterns within the organization, since these services were once coordinated predominantly in French, as indicated by the DGs former abbreviation and fill name: SCIC, that stands for *Service Commun Interprétation-Conférences*

As in most international organizations, the three procedural languages are used internally for meetings and for drafting documents. Their use is typically coordinated *ad hoc*, i.e., based on the language preferences of the participants who are present at the meeting. However, among the three languages English is clearly the most frequent choice. German speakers report that the trilingual language regime is no more than a convenient façade, or as Ammon (2006:15) puts it: "part of an ideology which serves to calm down concerns from traditional competitors of English as an international language". In reality, German is rarely spoken and the majority of written

[11] There is at least one precedent known as the Skoma-Lux Case (C-161/06, 11 December 2007), in which the European Court of Justice held that a regulation is only enforceable against individuals in a Member State if it has been published in the language of that State (Jeught 2019; Lasiński-Sulecki 2009).

reports that the Commission is obligated to transmit to the *Bundestag* (German Parliament) in German are transmitted in English without corresponding translations in German.

> "The complaints within the *Bundestag* are about the Commission only submitting important documents in English, while simultaneously spreading claims that they are providing more support to member states for education in foreign languages other than English" (Ammon and Cruse 2013:20).

The untranslated documents appear to include material for debate and, occasionally even impact assessments and reports regarding budgeting. Ban (2013) points, among other factors, to the destabilizing effect of the two eastward enlargements that, reportedly, introduced a more monolingual English-oriented communication culture in the Commission. External observers are not the only ones mentioning a 'façade' or 'pretenses' of multilingualism. As one of the civil servants interviewed in Ban's survey pointed it out:

> "For many people, multilingualism is one of the central manifestations of the cosmopolitan culture that characterizes the Commission, while for others the costs in efficiency outweigh the benefits. There is considerable support for maintaining a bilingual [French and English] regime, in part based on a recognition that a truly European institution should to some extent reflect the linguistic and cultural diversity of Europe." (Ban 2013:209).

Others working for the Commission appear to be much less sensitive to culture and appearances. Many voiced their concerns that even the further reduced – bilingual – oral communication scheme is a waste of time. For the sake of cost and efficiency, one language – regardless of which – would be a better solution:

> I think the dual language thing is very bad, to be honest, and I would prefer English to be chosen, but if it is French, I don't care either. Really, for efficiency, one language should be chosen ... Okay, the final documents are translated in all the possible languages ..., but for a working language why not make one of the two languages mandatory? ... There might be a slight advantage for the English people, but now you are just dividing your time between two languages, which is not helping the other countries that are not English or French either (Ban 2013:209).

As we shall see in later chapters, these concerns will resurface with respect to the proposed language regime of the European Unified Patent System.

The European Parliament

The only directly elected institution of the EU, the European Parliament (henceforth, EP), is the most multilingual of all institutions. Similar to the two branches presented above, the EP makes sure that all the regulations and laws voted by the Parliament are published in all the official languages. When presenting and discussing legislation in a parliamentary session, Members of the European Parliament (MEPs) may use the official language that they know best. During the plenaries, their speech is interpreted directly into the other official languages, using six 'relay' (or 'pivot') languages: English, French, German, Spanish, Italian, and Polish. These six languages serve as input for interpretation into smaller official languages[12]. As a nod to direct representation and transparency, recorded segments of about 10-15 minutes of EP plenary sessions, together with the minutes of each plenary, are available on the website of the EPTV website of the Parliament[13]. It should be noted that one of the EU's twenty-four official

[12] http://www.europarl.europa.eu/ep-live/en
[13] http://www.europarl.europa.eu/ep-live/en/plenary/search-by-date

languages, Irish, is not used in direct, simultaneous interpretations, even though Irish citizens – who are all at least bilingual in English as well – can chose to communicate with EU institutions in Irish in writing[14]. The official status of Irish is largely symbolic. At the time of its accession to the EU in 1973, Ireland did not evoke its national language as, based on Bandov's (2013:68) analysis, "the Irish considered that the English language which was already the official language in the European Union and, at the same time one of the two official languages in Ireland, was fulfilling all language functions in a sufficient way." The inclusion of the language in 2007 was the result of minority language protection and promotion initiatives within Ireland that received considerable – although limited – cultural support in the EU. Today, the total number of people who could speak Irish was just a little over 1.7 million, which represents roughly 40% of the population[15].The fact that the symbolic function of Irish could lead to such an elevated status in the EU is quite noteworthy and will be of importance in the present thesis.

The EP's translation services are undoubtedly the largest in the European Union. According to the EP's own website dedicated to procedural languages, almost one third of the Parliament's employees work in language-related duties[16]. According to SLATOR, the web-based Language Industry Intelligence observer, by far the biggest portion of translation work originates from the European Parliament, with an estimated 445,000 pages annually. Since the EP – and most EU translation services now use sophisticated computer-assisted terminology

[14] The same applies to Basque, Catalan, and Galician, large regional and minority languages of Spain. According to EurActiv reports, the Grand Duchy of Luxembourg has opened negotiations in 2018 towards the recognition of the limited official status of Luxembourgish (Letzebuergesch), its endangered national language. https://www.euractiv.com/section/languages-culture/news/luxembourgish-makes-comeback-bid-for-eu-approval/

[15] Census of the Population: The Irish Language and the Gaeltacht. Central Statistics Office, Ireland. https://www.cso.ie/en/releasesandpublications/ep/p-cp10esil/p10esil/ilg/

[16] https://europarlamentti.info/en/European-parliament/working-languages/

tools and – increasingly also – machine translation, this type of content implies "an annual contract value in the double-digit EUR millions" for the translation industry[17].

The European Court of Justice

Among all other institutions, the Court of Justice of the European Union (CJEU) has the most interesting – composite – language regime. As we have seen, the legal framework of multilingualism in the EU is defined in very vague terms, probably because the goal of the EU is to reconcile the effects of European integration – in form of increasing central control – with the *de jure* equality of the member states. Regardless of the extent to which a recognized national or regional language is spoken in a member state, its language can enjoy some degree of protection and promotion.

The Statute of the CJEU is largely silent on the subject of languages, except its Article 64 that states that it is up to the Council to lay down the linguistic arrangements applicable at the Court. Since the Council, to date, has not accomplished this task, the language regime defined in the Rules of Procedure of the CJEU apply. Chapter 8, for instance, introduces the concept of "language of the case" – referring to language(s) used to present and argue a court case – and declares that it can be any one of the official languages of the EU. In practical terms, this means that all oral and written submissions should be prepared in "the language of the case". Translations into the "language of the case" should be provided in case any other languages are used. Exactly what language is used depends on the party bringing the case to court. If it is a Member State, the language designated by that state should be used. In case of an appeal, the Court must use the language of the original proceedings. The CJEU publishes its decisions in all the official languages, with the exception of Irish. In case of ambiguities, which can be a major

[17] https://slator.com/demand-drivers/just-released-the-mother-of-all-eu-translation-contracts/

issue in multilingual courts around the world (Lachacz and Manko 2013), only the Court's decision in the language of the Court proceedings can be considered authentic and binding. Just like in other EU institutions, "approximately 95% of legal texts adopted in co-decision procedures are drafted, scrutinized, and revised in English" (idem: 80). In the CJEU, however, the original founding language, French, continues to predominate. One interesting situation in this respect – that will also have bearing on the arguments of the present thesis – is that the majority of authentic versions of CJEU judgements are translations because there were first drafted in French and continue to be perceived as only authentic in French (McAuliffe 2009:101). What distinguishes the CJEU's translation regime from all the other institutions is that the translation of the Court's case-law is handled exclusively by lawyer linguists, who are not professional translators specializing in legal texts but trained lawyers whose command of other languages is sufficient to perform translations. "Legally conscious translation, aware of the interpretive habits of national legal communities, is preferred and in order to assure this goal, lawyer linguists are recruited with a full legal education and language diplomas obtained in the member state of the language of which they translate" (Lachacz and Manko 2013:86). As we shall see in Chapter 4, however, individual expertise in national legal cultures will be deemed controversial when it comes to patents, i.e., individual property and innovations.

2. 3. First contentions over working languages

As we have seen, despite stated goals of guaranteeing equal status to all official languages on the EU level, the same small subset of languages are used in most institutions. Nowadays, in committees engaged in preparatory work in multinational contexts, English clearly dominates. Although other languages are not excluded, and occasionally Italian and Spanish are

used, internal language preferences are typically undeclared[18] and restricted. Implicitly (see above), this small subset of languages have come to be referred to as the EU 'working' or 'procedural' languages. As Ammon (2006:321) rightly observes, this distinction means that "the remaining majority of the official EU languages are to be classified as *merely official* languages", which defines a covert hierarchy of status that, over the course of many decades, has caused more than just a few small frictions.

French

Until very recently, issues surrounding working languages in EU institutions have been successfully handled by oral agreements and compromise. In the early years, contentions typically arose from successive attempts by the French governments to establish the hegemony of French as the sole working language of the CEE. In the 1970s, France vetoed Britain's membership twice, citing among its reasons fears of cultural hegemony. In some cases, however, discourses of "plurilingualism" have been being hijacked to defend French. During the French presidency of the EU in 1995, France proposed to reduce the working languages in all contexts in the EU to five – English German, French, Spanish, and Italian – which speakers of other languages, particularly the Greeks, rejected this angrily (Wright 2006:47).

Whenever legislation or pressure didn't work, the French resorted to so-called 'handshake' or 'gentlemen' agreements and, at times, preventive measures. One of such examples is the reported handshake agreement on the knowledge of French by British EU representatives. Apparently, before he accepted the accession of Britain to the EU, French President Georges Pompidou (1911-1974) famously extracted the promise from then British Prime Minister Edward Heath (1916-2005) that officials delegated by Great Britain to work in

[18] As we have seen, the Commission is an exception: its rules of proceedings specify the internal use of three languages

the Union would always have at least conversational knowledge of French (Stark 2002: 53, cited by Ammon 2006:330). This unwritten convention has only been broken very recently by the nomination of Catherine Ashton – who does not speak French fluently – to the post of the High Representative of the Union for Foreign Affairs in the Barroso Commission (2009 to 2014). Despite all efforts, French has progressively receded in use, while English has expanded its reach as the predominant EU working language and the most widely studied foreign language in the EU (Eurobarometer, *Europeans and their languages* 2012). While French continues to be used as a working language, no amount of political maneuvering seems to have been able to resurrect the language to its old glory of the prime vehicular language in Europe:

> "if we accept the argument that *lingua franca* status is a direct result of what is happening in political, economic, cultural, ideological, and technological domains in the society that speaks the language, it is likely that this [promoting French as a lingua franca] will be a fruitless enterprise. In all the areas where the balance of power and influence caused French to be the obvious language of international communication, there have been developments which now make that choice of French highly unlikely (Drake 2004, cited in Wright 2006:38).

German

Germany accepted the predominance of French, and later English and French, as working languages of the CEE and the EU for a long time. After German unification, however, and thanks to the country's increasing economic and political autonomy, Germany began to assert itself culturally in Europe. In the early 1990s, German chancellor Helmut Kohl (1930-2017) achieved some improvements in the status of German. In 1993, German became an internal working language in the Commission, joining the ranks of French and English. However, it took

a long time for this recognition to become regular practice. Ammon reports, for instance, that when Finland took over the Council's Presidency in the fall of 1999, it refused to facilitate interpretation of German at the informal Council meetings. Germany and Austria boycotted the meetings until the language regime was changed. In other instances, the status of the German standard language became contentious. For instance, after the accession of Austria, there were uncertainties about the type of national standards to use for pan-German communication within the Union. With that respect, Germany – with the biggest economy in the EU – declared that it had always contributed more to the EU budget than any other member state. Therefore, its own German standard had to prevail. This has been the case ever since.

There have also been instances of mutual cooperation in favor of EU working languages. In in June 2000, following the sidelining of German in informal expert meetings at the Council, the French and German foreign ministers signed an explicit agreement of linguistic cooperation. In this agreement, both member states pledged to support each other whenever the status or function of the other language is overlooked. Generally handled in one-on-one arrangements, this act was clearly a strong statement of explicit coordinated action in favor of multilingualism. The opportunity to enforce this agreement came a year later, in 2001, when Neil Kinnock, the Commission's Deputy President, proposed to draft preparatory papers for the Commission to function only in English in future. Hubert Védrine and Joshka Fischer, France's and Germany's foreign ministers, protested against this proposal in a joint letter, whereupon the proposal was withdrawn (Hoheisel 2004: 77 cited by Ammon 2006:331).

English

There is a long history of support for a single institutional working language within the EU. At one time, candidate languages included Latin and Esperanto, but the only language that

could legitimately pretend to hold this single most important status has been English (Van Els 2005). The primary reason to support institutional monolingualism is communicative costs and efficiency; multilingualism is not seen as helping ng any of the two: “The negative effects of ethnolinguistic heterogeneity are arguably "one of the most powerful hypotheses in political economy" (Liu 2015:4). The smaller language communities in the EU are not entirely opposed to the predominance of a single language, much along the lines of these arguments, because a single language could ‘denationalize’ language use and depoliticize some of the cultural issues tied to language use, altogether. Applied linguists studying ‘Euro-Englishes’, i.e., varieties of English that developed as the results of sustained institutional language use in Europe (Kirkpatrick 2007), have argued for the recognition of these varieties as the future ‘link language’ or lingua franca of the Union. Some experts published passionate analyses on the structure of these new varieties, while recognizing their economic and federating values:

> “Bearing the fact that ‘wasting money’ is the fourth most popular answer to the question “What does the European Union mean to you personally” in Eurobarometer 73, coupled with the crisis looming over Europe, we might need a more cost-efficient solution than plurilingualism. […] English is spoken by 43.1 % of Europeans (both native and non-native speakers), by 51.9 % of EU15. Additionally, research, technology, business and higher education all benefit from using one language. It seems unreasonable to insist on not announcing English the official language of the European Union.” (Klimczak-Pawlak 2014:14).

However, as Ban (2013:203) points out in her analysis of the linguistic components of the conflict over the Kinnock reforms during the Prodi Commission in the early 2000s, the shifting linguistics culture – out of French and into English – was perceived by many as both the

consequence of the eastwards enlargements and a "managerial culture shift imposed by the reforms" (idem) of the administrative functioning of the EU.

The large language communities in the EU tend to be more concerned by the hegemonic position of English than smaller ones, very likely because the greater diffusion of English represents a direct competition with their own national languages of wider diffusion. As in the case of the French, the real concern was not about 'language death', as some politicians tended to argue (for instance Jacques Chirac, as reported by Wright 2006), but rather the decline of smaller national languages in supranational political arenas. This "fear of loss of function remains widespread among the large language communities and their linguistically sensitive citizens and is not based on mere imagination" (Ammon 2006:323).

More recently, the prospects of Brexit seem to have altered the perception of English as a possible candidate single lingua franca status in the EU. In-depth analyses have not yet seen the light, but linguistic historians seem to agree that English still stands a chance – perhaps even a greater chance – to serve as a 'neutralized' communicative language in the Union. Interestingly, however, some of the reasons that they evoke have nothing to do with less tensions, but rather a news technological landscape on the horizon. Ostler, for instance, mentions "evolving translation technologies" that may render native linguistic expertise less important in the production of quality translations and, thus, "may make languages largely interchangeable, pushing national cultures into the background"[19]. He, on the other hand, also warns the native English-speaking international business community against overconfidence. While, he says, it is "good for having an inside track on "news we can use", lingua franca enacted for the purposes of business deals is nobody's intellectual property and can be "undermined or overwhelmed relatively easily, either

[19] "Have we reached the peak of English in the world?", The Guardian, 27 February 2018, https://www.theguardian.com/commentisfree/2018/feb/27/reached-peak-english-britain-china

by political regulations or by changing market relations".[20] As we will see in this thesis, both the technological and regulatory aspects of language use – at least when it comes to translation – played a decisive role in a major contention about working language use in a new EU policy initiative: the Unified European Patent System.

Italian and Spanish

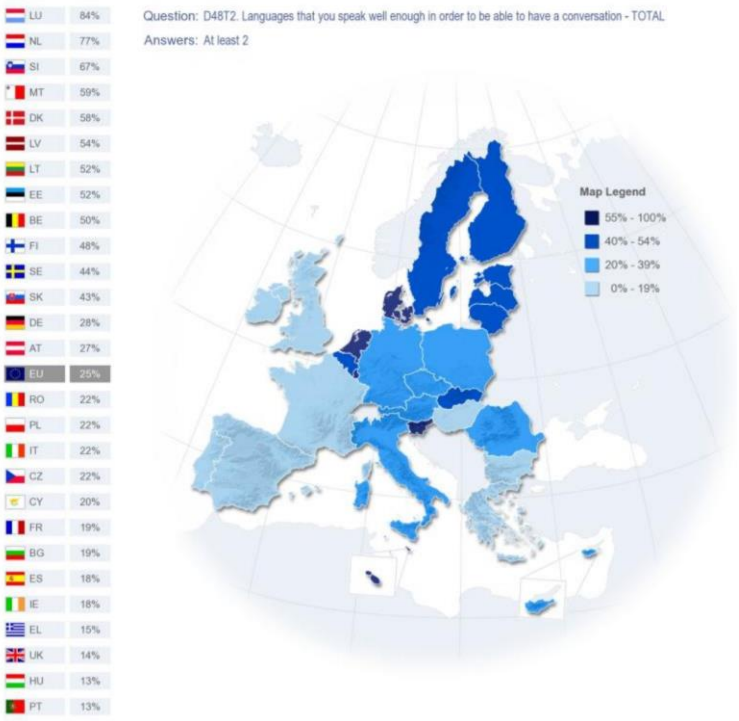
Closer to the topic of this thesis are language regimes involving Italian and Spanish. To date, the Office for Harmonization in the Internal Market (OHIM), which is the Agency responsible for the registration of the European Union trade mark (EUTM) and the registered Community design (RCD), is the only EU institution that uses five working languages: English, French, German, Italian and Spanish. The Office is based in Alicante, Spain, and is part of the EU's extended legal and administrative structure dealing with intellectual property rights. While other languages could, in principle, pretend to play a greater role in EU procedures. With only very few exceptions, the tendency has been to rally around reduced multilingualism. One noticeable exception has been documented in the early 1990s when Spanish and Italian were accepted as working languages in the OHIM. At that time, some floated the idea that Dutch should join the rank of OIHM languages, as well:

> "claims for Dutch, at that time next in size in the EU behind Italian and Spanish (today Polish would be next) were raised by the lawyer Christina Kik (perhaps encouraged by the Dutch government), who fought an extensive if ultimately unsuccessful legal battle to include Dutch" Ammon (2006:331).

[20] "English is about to lose its crown in Europe: A business lingua franca can be undermined by political regulation, writes Nicholas Ostler", Financial Times, June 29, 2016, https://www.ft.com/content/c78cea82-3dff-11e6-8716-a4a71e8140b0

Nowadays, there seems to be little, if any, political will to promote Dutch to working language status in international organizations. One possible reason why could be that the level of bilingualism, especially with English, is particularly high among Dutch citizens. According to the 2012 Eurobarometer *Europeans and their Languages* survey (Figure 6), 77% of Dutch citizens are at least bilingual, which the second highest rate in the Union behind multilingual Luxembourg (84%) and more than three times the European average (25%).

Figure 6. Answers to the question "*Languages (at least two) that you speak well enough in order to be able have a conversation"*, Eurobarometer survey, 2012:14-15).



In this respect, the heavily multilingual northern European countries surpass nearly every member state in southern and eastern Europe. This pattern seems to be reflected in the declining

order of importance of the working languages of EU institutions, as well: English, French, German, and then, on an equal footing, Italian and Spanish (Ammon 2006:331-332). As we will see in the next chapters, Italy and Spain was more motivated in the representation of their national languages in U proceedings than anyone could have previously predicted.

CHAPTER 3

WHAT LANGUAGE REGIME FOR THE EUROPEAN UNITARY PATENT SYSTEM?

3. 1 Language regimes: what languages, when, and where?

The vagueness of the legal framework surrounding procedural languages, presented in the previous chapter, can be a serious problem for institutions that wish to put in practice the principled equality of official languages. With the substantial increase from eleven languages in 1995 to twenty-four starting from 2013, the number of official languages has more than doubled as a result of successive enlargements while the intention of the EU to guarantee the unimpeded use of its official languages has not changed. Most institutions have accommodated the increase by enlarging the scope of their language offerings (adding incoming languages), but most of them have not come up with a systemic approach to multilingual communication. In many cases, rules and regulations targeting increased demands of oral and written translation and expectations and complex multilingual communication patterns with citizens and private stakeholders remained unstated and, thus, overlooked. The institutional transformations of the new member states have made this problem particularly acute:

> as "EU politics and policy-making have become characterized by the process of so-called '*Europeanization'* […] whereby diverse national policy fields underwent a substantial change in their adjustment to the respective areas of EU policies […] EU multilingualism [was] faced the challenge of becoming part of the intensified communication between the EU core and the many national (political and policy) milieus of the Union's member states (Krzyianowski 2014:108).

In principle, of course, there is nothing wrong with broad guidelines and general provisions of language use. Leaving it to individual institutions to come up with mutual arrangements regarding their own internal communicative arrangements – including language use – does allow greater flexibility and communicative efficiency. In situations of open-ended communication, for instance when dealing with individuals, groups, or private institutions, it can be difficult to predict with precision what language(s) will be used and in what contexts. This means that variations in language use are probably best managed at the micro-level, i.e., among 'interactants'. The concept of *simple language management*[21] (also called 'discourse-based' or 'online language management') is particularly appropriate for this type of intervention, as it is based on "everyday linguistic behavior accompanying the ordinary use of language in concrete interactions" (Nekvapil and Sherman 2015:6-7), even if these interactions take place in highly regimented, official settings.

However, if we think of language regimes as "rules that delineate which languages can be used when and where" (Liu 2015:4), lack of specificity on procedural languages can lead to complete lack of transparency and contentions. One would wonder, for instance, how EU institutions that must guarantee their citizens' rights to access the European Single Market can fulfill their obligations without any word on ways and means of (languages) of communication. Also, it is unclear how can these citizens even consider challenging any decision or policy action involving language use if those rules remain largely unwritten and vague. In short, lack of transparency in matters of communication can – and does – increase the EU's *democratic deficit*, as member states called to make substantial adjustments to many of their national policy fields in

[21] Simple management is contrasted with *organized managemen*t (so-called 'institutional' or 'off-line management') based primarily on rules and regulations issued by the institutions.

order to harmonize with new EU policies seem to have less and less access and understanding of these processes.

Informal language arrangements, on the other hand, remain essential when managing internal communication. As Carolyn Ban explains in her 2013 book on *Management and Culture in an Enlarged European Commission*, informal language arrangements between negotiating parties at various sub-committee meetings in the Commission are efficient and – although increasingly monolingual and centered on English – they are part of institutional traditions that pre-date the EU. However, nowadays, when up to twenty-eight state parties can sit around the table in a single meeting, one would probably be hard-pressed to rely on personal knowledge of each other's language preferences or long-established conventions that have become mutually shared etiquette. The EU's growth from a regional economic agreement between six neighboring states speaking four official languages in 1951 into today's supranational organization of twenty-eight countries speaking twenty-four official languages represents a six-fold increase. I suggest that this complexity has seriously impacted communication and resulted in an unprecedented complexity that now requires precise management strategies defined at the macro-level – that is at the level of the institutions (Dovalil 2015:366).

Putting in place such strategies, however, requires a delicate balancing act because languages are not just means of communication; they can also be endorsed as strong symbols of collective identity. Regimes of language – aggregate rules and regulations that define when, where, and how languages can be used – are in the same time also political institutions As Liu (2015:23) reminds us, "language regimes are also political [institutions] because they determine which – if any – linguistic group shares in the "authoritative allocation of values" (Easton 1953: 129) that defines a political system".

As I intend to show in the remaining sections of this chapter, a relatively recent court case that involves one of the EU's longest and most contentious legal and political ambitions – the foundation of a single European patent – is particularly revealing of these communicative complexities. Before I get to these language contentions, however, a brief introduction to the legal and political framework surrounding the languages used in the protection of intellectual property in Europe is in order.

3. 2 **Protecting and diffusing innovations: languages and patents**

Patents are official licenses granted by the government – or a supranational institution – that give the right to inventors to make, use, or sell inventions as the sole proprietors of those innovations. By the same act, patents give the right to inventors to stop others – for the limited time period of validity of the patents – from making, using or selling the invention without their permission[22]. Patents are measures of scientific, industrial, and artistic well-being of nations, states, and communities. They are applied to discoveries, methods, and artistic creations that are not only brand new, but also creative in that they "involve an inventive step", i.e., something new and unexpected even to those who have good knowledge and experience with the subject. In addition, the invention must take some sort of a practical form as it must be able to be integrated into some new material, industrial process or method of operation. Why is the language of patents important? Since "an innovation is protected, thus, 'privatized', through the patent system" (Gazzola 2014:157) - making it exclusive for a single innovator for the short time of the validity of the patent - the language in which the patent is filed and granted becomes part of the legally binding license and is tied to the innovation: "the effectiveness of a patent, both in terms

[22] https://www.bl.uk/business-and-ip-centre/articles/what-is-a-patent

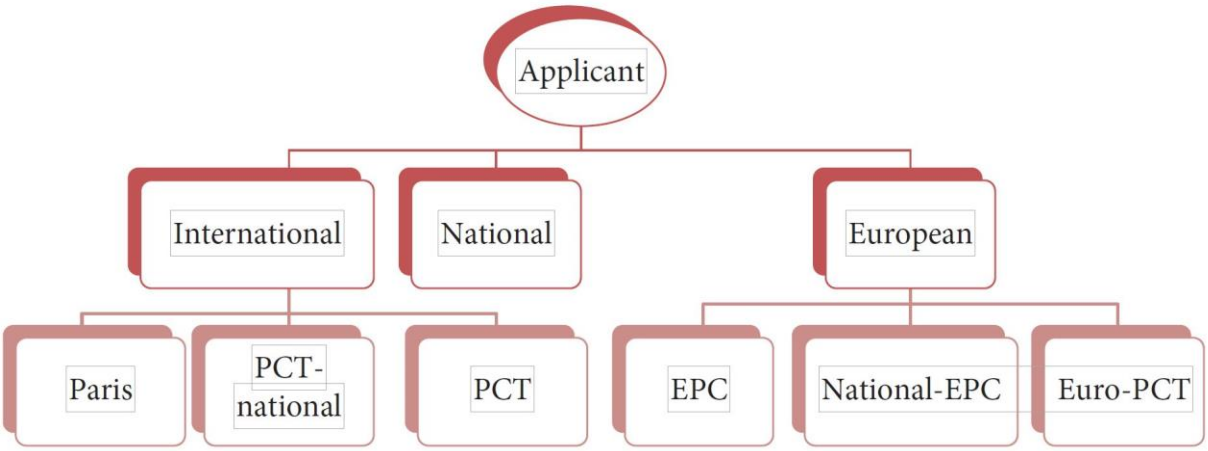
of innovation produced and of knowledge disclosed" (idem) is assessed in the language in which the patent has been produced. In other words, the owners of property rights, including industrial property to which patents typically apply, are protected against those who may copy or use their innovations in the language used to lay out their protection. Therefore, understanding the rules and procedures that mandated the use of that language is of outmost importance.

In 2013, the majority of the EU Member States and the European Parliament have agreed to create – what is known today as – the European Unitary Patent System (EUPS) that includes the Unitary Patent (UP) and the Unified Patent Court (UPC). As they are intended today, Unitary Patents make it possible for any inventor in any of the member states of the EU to get patent protection for their innovations in any other member state of the EU by submitting a single request to the European Patent Office (EPO). After a currently existing European patent is granted, the patent proprietor will be able to request so-called unitary effect – thereby obtaining a Unitary Patent – which provides uniform protection of the patented innovation in all the participating member states. The Unitary Patent System includes the Unitary Patent (UP) itself and the Unified Patent Court (UPC) that deliberates on extensions and possible infringements.

The achievement of creating this system cannot be overstated. If innovators in Europe would like to file for a patent to protect their Intellectual Property, they can take many routes, but each of them involves some undesirable compromises (Gazzola 2014). The three currently available routes are depicted in Figure 7. The first and so-called *International Route* is valid nearly everywhere around the world, but it can be long and costly to obtain and to sustain for a longer time period. The *National Route* that is cheaper, yet it is limited to the market of a single member state. The *European Route* – called *Old European Route* since the creation of the Unitary Patent – is currently favored by many European inventors due to its broad validity, but

its three possible subtypes (EPC, National-EPC, and Euro-PCT) are also complex and necessitate individual legal actions in each EU country where they take effect.

Figure 7. Traditional routes for patenting innovations in the European Union (Gazzola 2014:152).



The EPO's main website give a succinct reasoning behind Unitary Patent process in clear monetary terms:

> "European patents must be validated and maintained individually in each country where they take effect. This can be a complex and potentially very costly process: validation requirements differ between countries and can lead to high direct and indirect costs, including translation costs, validation fees (i.e. fees due in some member states for publication of the translations) and associated representation costs, such as the attorney fees charged for the administration of the patent (i.e. payment of national renewal fees). These costs can be considerable and depend on the number of countries where the patent proprietor wishes to validate the

European patent. Unitary Patents will remove the need for complex and costly national validation procedures" (Unitary Patent, EPO).[23]

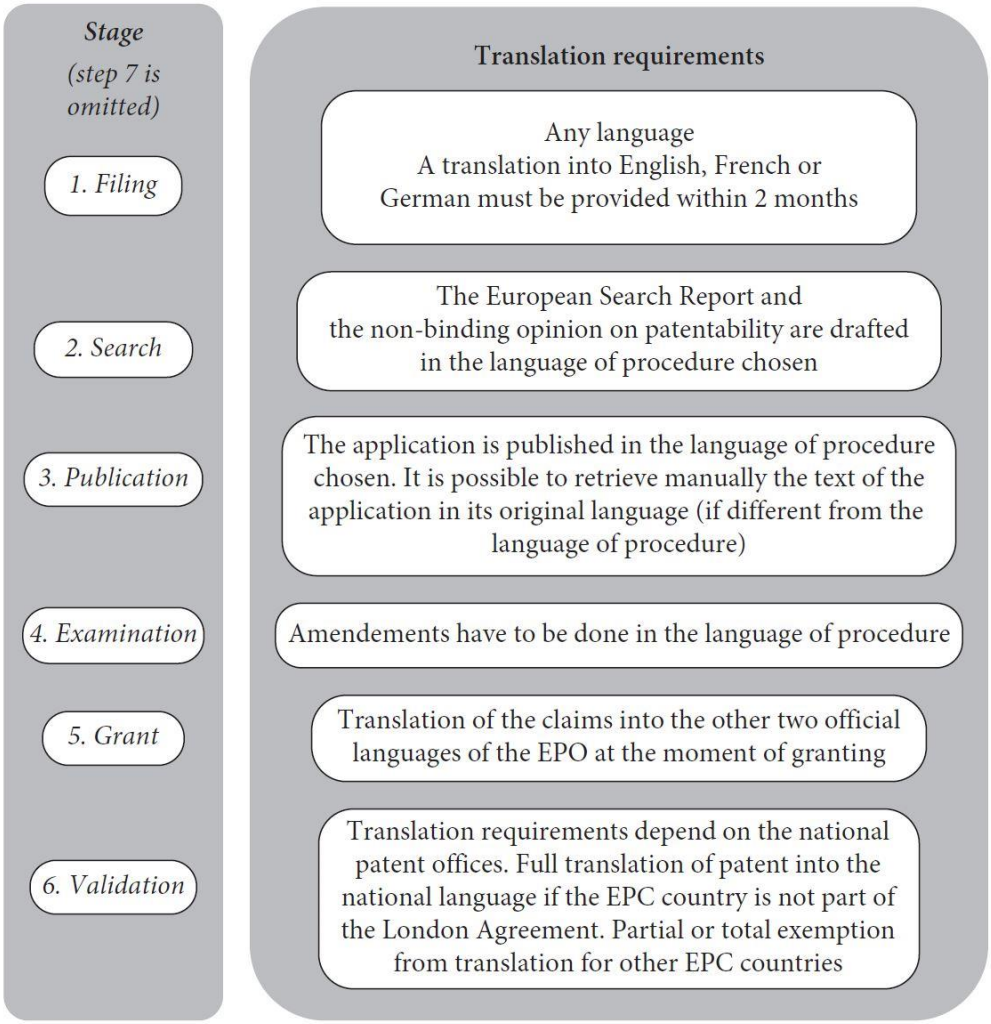
The trick of the new standardized procedure is to give each patent a European title using the *European Route* while granting additional general validity to them and extending it to all the signatory states of the Unitary Patent System. The result is a "one-stop-shop" that has many advantages, most of which are beyond the scope of this thesis and, thus, cannot be explained here. A few important features, however, are relevant. Firstly, the UP involves a simple registration, with no fees associated with the filing and examination of requests for unitary effect. This is important because fees – application, renewal, and translation – associated with European patents have been judged to be too high compared to global competition, such as the United States, Japan, and increasingly China. Second, the current convoluted system of renewal fees are streamlined into a single procedure (including a single currency and a deadline) and the fees are highly competitive for the first ten years, which is the average lifetime of a European patent[24].

Closer to our topic is the third feature, which is the translation regime of the new unitary patent scheme. The visual example in Figure 8, depicting the complexities of translation requirements associated with the old Euro-PCT route, makes us appreciate the translation regime of the new scheme. As shown in Figure 8, the typical Euro-PCT procedure can be divided into at least six phrases, not counting any "opposition by third parties and appeal" (Gazzola 2014:279) at the endpoint of this process, each of which involves translation or interpretation costs. For instance, at the moment of filing – phase 1 – applicants for a European patent must pay filing fees that range between €115-200 euros, depending on how the application was filed

[23] https://www.epo.org/law-practice/unitary/unitary-patent.html
[24] idem

(electronically or on paper), and fees for a European search – phase 2 – which costs a little over €1,000. European patent applications can be filed in any language.

Figure 8. Translation requirements at the EPO per stage for a hypothetical patent obtained through Euro-PCT route (Gazzola 2014:284).



The translation requirements are stringent: if the filing language is not one of the three procedural languages of the EP – English, French or German – the applicants must file with the

EPO a valid translation into one of the official languages within two months of filing the application. If the translation is not filed in time, the applicant will be given an extension and if the translation is still not filed within the second time limit, then the application is deemed to be withdrawn. Crucially, the language in which the application is filed – or its translation, if not filed in one of the EPO's official languages – becomes the language of the proceedings. This means that any and all discussions and amendments made to the application must be drawn up in the procedural language: English, French, or German depending on what procedural language was chosen for translation of a non-EPO language. In the early 2000s, around the time negotiations of a single European patent have been revived in light of the upcoming eastward extensions, the total cost of a European patent was over thirty thousand euros. As shown in Figure 9, more than the third of the total costs were associated with translation requirements.

These costs and complexities are largely offset by the new unified patent scheme passed in 2013. Contrary to the other routes typically taken by European investors, the new unitary patent requires no translations for a six-year transitional period after having been granted. During this period, only a single translation to any of the official languages of the EOP – English, French, or German – will be required for information purposes only, i.e., with no legal effect and no binding deadlines. To further offset translation costs when the patent application is filed in an official EU language other than English, French or German, EU-based innovators can take advantage of a compensation scheme: they receive a lump sum of five hundred euros[25] upon the registration of their Unitary Patent. Thus, in addition to providing automatic validity and legal protection for inventions in up to twenty-six states of the EU[26] with the submission of a single

[25] https://www.epo.org/law-practice/unitary/unitary-patent.html
[26] At the time of writing, Spain, Croatia, and Poland are not parties to the convention.

request, the new patent scheme is also simpler and possibly even faster than any of the current European routes.

Figure 9. Cost of an average European patent valid in 8 States for a 10-year term in the early 2000s (quoted in Davis 2005:6).

	Costs	Percentage of total
EPO fees	EUR 4,300	13%
Professional representation	EUR 6,100	20%
Translations of the patent	EUR 11,800	38%
National renewal fees	EUR 8,900	29%
Total	EUR 31,100	100%

Source: EPO

And yet, after more than four decades of negotiations, this attractive patent scheme has still not taken effect. According to its most well-qualified analysts and strongest proponents, "one of the most important obstacles to the adoption of the Unitary – or formerly called 'Community' Patent System (EUPS) was the proposed language regime" (Gazzola 2014:278). In the next section, the subtle distinction pointed out at the beginning of this thesis between 'official' languages – as a type of **status** – and 'procedural' languages – as a type of **function** – will become important. One will be reminded of the hidden hierarchies – and thus political advantages – of large language communities of northern Europe when considering why the translation scheme involving the three most common official languages – English, French, and German – has met vigorous objections when these languages have also become procedural languages imposed on "any other language" used to file a patent.

3. 3 Politics of language and the 'Community Patent'

To measure the importance of the Unitary Patent System for the European Union's Single Market, it must be pointed out that the intergovernmental organization set up to coordinate European patents was first agreed on in 1977 by seven signatory state – Belgium, France, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom – after the first Community Patent Convention of 1975. However, neither the results of the negotiations in the 1970s, nor the *Agreement on the Community Patent* of 1989 have been ratified by a sufficient number of the signatory states to come into force then and in the following decade.

Throughout the 1990s, the Commission continued to advocate for a 'Community' patent system that could suite all involved parties. Despite its best efforts, disagreements among EU Member States regarding language translations and the judicial arrangements and powers in the planned Patent Court continued to block the establishment of a single patent (Seville and Newman 1999). In the early 2000s, the Commission initiated several actions, including a Proposal for a Parliament and Council Regulation on the Community Patent.

Initially, the Commission's proposal stated that once a patent was granted, the patent claims only had to be translated into the official languages of the European Patent Office: English, French and German. This language scheme was strongly supported by European industry due to its cost-effective nature but was politically unacceptable. Therefore, the new proposal included a compromise: the language requirements would be the same as for the European patent. The applicant would complete the application in one of the official languages, and when the patent was granted the applicant had to file a translation of the claims only in all 20 languages with the cost borne by the applicant. Needless to say, that the amended proposal has

immediately lost industry support and continued to struggle for political support for yet another decade.

According to Schmiemann and Lockner (2005), the International Chamber of Commerce[27] had warned the European community that the cost of obtaining and maintaining a Community patent should be the same as, or even less than, that of obtaining and maintaining a US patent, or else small businesses and individual inventors with limited financial resources would not be able to apply for it. The main problem with achieving a comparable cost is the extensive translation process and the renewal fees to maintain the patent. In 2003, the Council of the European Union reached an agreement on the main principles and features of the so-called 'Community Patent', breaking through the issues of translation requirements. However, later in the same year, a new issue popped up with respect the Patent Court. Yet again, most objections focused on the issue of language translation. One judge, an expert in intellectual property litigations, argued that plans allowing defendants to have cases heard in their own language would invite uncertainty and delays, while other judges made that case that simultaneous translations planned in complicated patent cases would be problematic, if only seven court specialists would be available to guide the non-technical judges through the proceedings. In 2004 the Competitiveness Council[28] gave up trying to overcome disagreements on costs and translation requirements of the Community Patent when another disagreement surfaced on how to cases of patent infringements that might occur as a result of ambiguity, lack of precision, or mistranslations of a patent. The Netherlands, incoming Presidents of the European Council 2004 declared that it did not think it would be possible to reach an acceptable compromise and

[27] International Chamber of Commerce Policy Statement: Proposal for a Council Regulation on the Community Patent, June 6, 2001, https://iccwbo.org/.
[28] One of the EU Council of Ministers formations; it deals with Industry, Internal Market, Research, and Space. https://dbei.gov.ie/en/What-We-Do/EU-Internal-Market/EU-Competitiveness-Council-/

declared that it does not plan to resume work on the proposal. Then Commissioner Bolkestein, responsible for Internal Market affairs, expressed his "bitter disappointment" at the Council's failure to ratify the proposal, challenging arguments by Spain and Germany that the 'Community Patent' fails to bring any added value. With France and Portugal also voicing opposition to the final proposal and all other conceivable compromises having been tried, the Council declared failure and the Community patent has, yet again, been placed on hold.

In the following decade, following the second eastward enlargement when applications for European patents with validity in multiple new member countries had reached new highs, the EU member states seem to have found the political will to ratify the long-standing agreement *London Agreement*, an inter-governmental patent agreement passed in 2000 that aimed to reduce the translation requirements for patent validation procedures in 15 out of 34 national patent offices. France that had previously blocked the Community Pattern Protocol fearing that it could represent a threat to the French language, had gotten over its objections and the eight member states needed to ratify the agreement have come together to bring the treaty to bear[29].

Subsequently, intellectual property experts reported that the cost of patenting an innovation in Europe has been reduced by 20 to 30% as a result of the enforcement of the agreement: "with an average translation cost saving of €3,600 per patent, the total savings for the business sector amounted to about €220 millions" (Van Pottelsberghe and Mejer 2008:211). Despite the translation cost savings, however, the relative cost of a European patent validated in six to thirteen countries remained still at least five to seven times higher than in the United

[29] In addition to France, Germany, and the UK, Slovenia, Iceland, Monaco, Germany, and Denmark came together to ratify the *London Agreement* in 2008. The scope of the agreement extended beyond the EU (e.g. Iceland is not a member state of the EU, but it is part of the European Economic Area (EEA) and the European Free Trade Association (EFTA) that includes four non-EU European countries.

States. Thus, cost-benefit analyses suggested that gains from the new patent arrangement remained insufficient to convince the skeptics.

Curiously enough, "although the Member States seemingly [could] not bridge their cultural differences and agree on an affordable language translation system that is acceptable to all parties, this political status quo has [had] no effect on innovation" (Schmiemann and Lockner 2005:7). In the next few years, the EPO continued to provide contracting states with high-quality patents that could be validated in most European countries. To offset the negative effects of the political stalemate, it increased its competitiveness on the international level by repeatedly lowering fees for patents at all stages, although this price cut could not, of course, affect the overall translation costs, regulated by inter-governmental agreements.

Despite the 2008 financial crisis, the sustained pace of innovations in the EU had no doubt helped to resurrect the Community Patent under a new name and in a brand-new era of machine translation technologies.

3. 4 From the translation question to translation technologies

In her plenary talk at the 2005 ATRIP Congress[30], Gillian Davis, former Chairperson of the Board of Appeal of the European Patent Office stated one of the basic tenets of economic approaches to institutional multilingualism, which is that the use of more than one language is an obstacle to trade:

> "For over thirty years, the language question has been one of the two major impediments to the adoption of the Community patent, the other being jurisdiction over patent litigation. The additional cost imposed by translations on the

[30] International Association for the Advancement of Teaching and Research in Intellectual Property, http://atrip.org/.

> European patent system is criticised for imposing undue burdens on European industry. European industry would prefer to switch to an English-only system or at least to stick with the system of the EPO, with its three official languages. Politicians tend to support the use of their national languages and the European Parliament has been pressing for the Community Patent to follow the example of OHIM, the Community trademark office, which works in five languages, those of the EPO plus Spanish and Italian. […] At present, it looks as if this impasse is not likely to be resolved quickly (Davis 2005:11-12).

Few suspected at the time of the delivery of this plenary address that the grim outlook for Europeans to ever have a unified patent scheme was about to change. Although more research is needed to establish the exact timeline of events, it is certain that in 2010, i.e., a little more than five years after the Community Patent Protocol fiasco, machine translation technology and computer-assisted terminology tools seem to have helped unblocking the situation. Next to the *Financial Times* headline – "Google to translate European patent claims" – the impressive sub-heading must have read as breaking the news to most sceptics:

> Technology could help unblock one of Europe's oldest political impasses when Google unveils a deal on Tuesday to do computer-based translations of patent material submitted to the European Patent Office. Under the memorandum of understanding […] "Google Translate", the US company's on line mechanised translation service, will be applied to all patent applications flowing into the EPO,

both from the office's 38 member countries and from companies and inventors outside Europe" (*Financial Times*, 11.29.2010).[31]

Despite the celebratory headlines, the translation engine destined to perform this complex task was not identical to the merchandised Google Translate engine integrated in every browser. Still in their beginnings at that time, the computer-assisted translation and terminology tools still needed substantial training, calibration, and further refinement. The EPO's rich archival database containing millions of manually translated patent material has helped this process, while regulatory work has also picked up speed. As a safety measure, one of the first ideas concerned the quality of translations and consisted in requiring manual translation of so-called 'core patent claims' first into the three official EPO languages – English, French, and German – and increase available material by machine translation of peripheral texts.

The news spread quickly as businesses celebrated the dawn of a new era of translation and search of intellectual property claims around the world. In the same year, smaller information technology companies deployed translation application in other languages as well. One of them was the first ever English-Portuguese translation and search tool[32] that was incorporated into the EOP's *Espacenet* search tool, a free web-based online service for searching patents and patent applications, that existed since 1998, but was plagued by primitive search engines and a cumbersome interface[33]. In 2012, the EPO launched yet another computer-aided translation tool: *Patent Translate*. *Patent Translate* is a free online automatic translation service for patents that was created in partnership with Google and was specifically built to handle large and complex patent vocabulary. In 2015, the *Espacenet* database claimed to have records on

[31] https://www.ft.com/content/02f71b76-fbce-11df-b79a-00144feab49a
[32] by Iconic Machine Translation Solutions, Inc. https://iconictranslation.com/industries/ip-patents/
[33] https://worldwide.espacenet.com/

more than 90 million patent publications and at the time of writing this thesis, the EPO claims to grant access to over 110 million patent documents. In 2018 *Espacenet* celebrated its 30th anniversary. There is no doubt among experts that "machine translation represents a revolution in the patent system" by facilitating access to a vast amount of patent information during the different stages of patenting process (Larroyed 2018:763).

Although machine translation is still far from being perfect, its higher quality and fast availability helped make this option much more attractive the regulators and state parties. As a result, of these gains in the 2010s, political pressure grew in Brussels to revive the idea of the single EU-wide patent. It looked like "the patent quest, one of the bloc's longest-running and embarrassing failures" (*Financial Times,* 11.29.2010) was finally coming to completion. In the Council's new proposals in matters of patent protection, the old Community Pattern was replaced by the Unitary Patent scheme.

3. 5 Council vs. Italy and Spain

As we have seen earlier, however, language matters are highly political and unanimous agreement on the advantages of the newly proposed Unitary Patent scheme ended up, yet again, mired in controversy.

This time, the contentions centered on the selection of procedural languages from the six possible official languages typically involved in matters of intellectual property. Selecting only three procedural languages – English, French, and German – for the newly proposed patent scheme despite the fact that the Office for Harmonization in the Internal Market (OHIM), the Agency responsible for the registration of the European Union trade mark (EUTM) uses five working languages – English, French, German, Italian and Spanish – did not sit well with Italy

and Spain who refused to join the new patent scheme. Their protest was disregarded, and the Council of the European Union decided to pass the Unified Patent scheme anyway, leaving both states out of the agreement.

The Council used a special legal measure to break the new deadlock. It has engaged a special procedure called 'enhanced cooperation' where a minimum of nine EU member states are needed to establish cooperation without requiring other members to be involved. EUR-Lex[34] specifies that:

> "this allows [member states] to move at different speeds and towards different goals than those outside the enhanced cooperation areas. The procedure is designed to overcome paralysis, where a proposal is blocked by an individual country or a small group of countries who do not wish to be part of the initiative. It does not, however, allow for an extension of powers outside those permitted by the EU Treaties. Authorization to proceed with the enhanced cooperation is granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament. As of February 2013, this procedure was being used in the fields of divorce law, and patents, and is approved for the field of a financial transaction tax."

Disagreeing not only with the proposed language regime of the Unified Patent scheme, but also with the measure engaged by the Council to pass it, in 2011 Italy and Spain took the Council of the European Union to the European Court of Justice[35]. This act alone shows that 'the working language issue' mattered to such an extent for member states that they were ready to litigate an EU institution rather accepting to be felt left behind.

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[34] https://eur-lex.europa.eu/summary/glossary/enhanced_cooperation.html
[35] Joined Cases C-274/11 and C–295/11, Spain and Italy v Council, Court of Justice of the European Union PRESS RELEASE No 47/13 Luxembourg, 16 April 2013

First, the two plaintiffs have filed their complaints separately, but the Count joined their cases, as their complaints were the same. The Defendant was the Council of Europe as per Article 342 of the TFEU Treaty on the Functioning of the EU (see Chapter 1) that puts working languages within the competence of the Council of Europe acting unanimously.

Italy and Spain's objections were both procedural and content related. First and foremost, of all, they objected to the Council's competence to establish enhanced cooperation. They claimed that the Council has misused its powers because enhanced cooperation cannot apply to unitary patent matters due to the violation of Article 326, a non-language-specific clause of the TFEU. Article 326 specifies that "enhanced cooperation shall not undermine the internal market or economic, social and territorial cohesion" and "[it] shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them". Italy and Spain claimed that barring them from access to the new patent scheme by not selecting their official languages as procedural languages – not putting 'function' next to 'status' as explained in the previous chapter – the Council has put Italy and Spain to unfair disadvantage and impeded on their participation in the Single Market. They also noted the Council's failure to comply with the patent translation and language regime requirements set out in Paragraph 2 of Article 118 of the TFEU (see chapter 1):

> "The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language requirements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament."

On the ground of these objections, it looked like Italy and Spain should win the case. They did not. As it turns out, the Advocate General (AG) – a legal expert called in customarily to review cases before they proceed to the Court – wrote a 50 page-long opinion[36] recommending the dismissal of the case purely on procedural grounds. The AG claimed that, given the decade long controversy surrounding the EUPS, the Council had the right to resort to enhanced cooperation. Even though the AG also specified that his review was a limited one and more research was needed, the Court did not conduct additional research and rejected Italy and Spain's claim on the same procedural grounds as suggested by the AG.

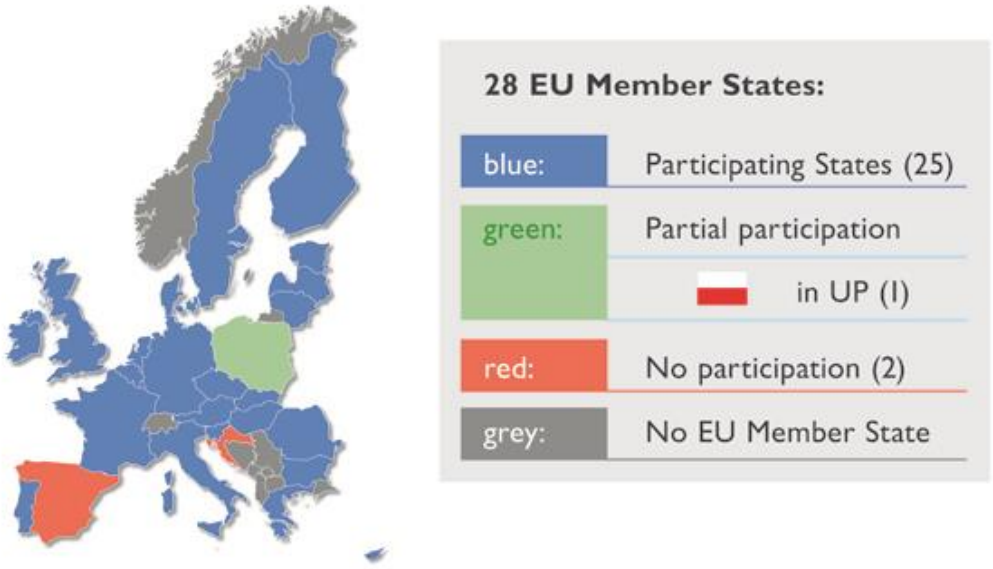
Intellectual Property experts explained that the AG has trimmed down the scope of the dispute to a minimum by removing all aspects related to the substance of the cooperation and its effects. By focusing only on the procedural prerequisites for enhanced cooperation, such as the Council's competence and whether the 25 states' action was really a last resort (as it was required by law), all arguments were disregarded related to the alleged negative effects of the language regime that Spain – even today – cites as the main reason for not joining the EUPS. Objections to discrimination and lack of internal economic competition were not addressed. The Court found no manifest misuse of powers by the Council and rejected the claim.

In May 2015, the CJEU dismissed a second legal challenge by Spain, this time against Regulation (EU) 1260/2012 which established the actual language regime of the EUPS that – as mentioned above – imposed the mandatory use of only three official languages as procedural languages, regardless of what other (national or regional) language was used to file the patent. This document is very specific about procedural languages, but it still does not allow for more than three official languages to fulfill the function of procedural languages. The second dismissal

[36] For commentaries, see among others https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=320#_edn1

has also taken the IP world by surprise because several studies conducted by internal and external experts (see Gazzola 2010, Gazzola and Volpe 2010) indicated that a five-language arrangement, i.e. one that would have included both Italian and Spanish, would not have represented a more costs than the proposed three-language regime and would have had the added benefit of seeing two additional member states join the agreement.

Figure 10. Member states of the EU (25/28) who have signed the Unified Patent System as of 2017[37].



Although Italy has ended up joining the patent agreement in 2017, Spain continues to be one of the member states that refuses to join. When asked, in 2017, why Spain continues to resist the EUPS, Alvaro Nadal, then Spanish Minister for Energy, Tourism and Digital Agenda and also responsible for matters of intellectual property in the central government, referred to the potential additional burden of translation on Spanish companies imposed by the EUPS. in his

[37] https://www.epo.org/law-practice/unitary.html

response, he tied national sovereignty to the lack of representation of Spain's national language. Contrary to the 'classical' Euro-route patent, he argued, the new unitary patent would not need to be translated into Spanish at all to be valid in Spain, which would be a violation of Spain's sovereignty.

It seems that the supreme power that Spain claimed over its languages in proceedings with the EPO, voiced by Minister Nadal, must be understood here as control over linguistic expressions of national identity. In the wake of the Catalan crisis, it seems likely that the refusal to accept any other official language as a functional equivalent of Spanish in Spain – in addition to economic considerations – is also a way of resisting further fragmentation of national identities.

CHAPTER 4

CONCLUSION

Considering this case, one is tempted to say that multilingualism in EU institutions appears to be more of a matter of procedure than of substance. The EU Court of Justice having failed to consider the arguments about the intangible value of the national languages as soft assets in the internal market is quite sobering especially because it contradicts so many EU discourses about the cultural and economic significance of European languages.

For the applied linguist, there might be room here for a better analytical approach to language use …. or more like language order (to use Joshua Fishman's words) …. within the European Union.

For instance, Guus Extra and Dork Gorter's (2008) 'descending hierarchy of languages'' could be a good candidate for a revised and extended model of the language order in Europe – for instance – stipulating less uniformity between working languages because, as the outcome of this case indicates, all working languages are more definitely not created equal and cannot be modeled as such. With English, the global lingua franca, solidly anchored on the top of the language order and immigrant languages with no ancestral homelands in Europe relegated to the bottom, we believe that there are considerable clashes, conflicts, and fights for status between languages in the middle that need to be uncovered.

This language order heavily contradicts the EU's 'unity in diversity' campaign of considering all languages of equal status where in reality, they are not. Not every language is of the same status as each other just like how not every language is equally of different status from each other. In addition, the reasons why people are/are not multilingual vary and language use

has such significance and personal meaning to the individual that it is honestly impossible to accommodate everybody/ every member state's preferences for language use in EU institutions.

In conclusion, it seems that national interests and considerations of collective identity can – and did – in some cases override supranational economic interests and cooperation. It remains to be seen whether continued European integration will produce more language contentions of this type. If it does, then it will probably be time to revise and extend obsolete language legislations to give the Union the procedural means to face the challenges of its growing and evermore integrated institutions.

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APPENDIX A

Articles 1-7 of Regulation No 1 of the EEC Council determining the languages to be used by the European Economic Community

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31958R0001&from=EN

THE COUNCIL

REGULATION No 1

determining the languages to be used by the European Economic Community

THE COU CIL OF THE EUROPEAN ECONOMIC COMMUNITY,

Having regard to Article 217 of the Treaty which provides that the rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the rules of procedure of the Court of Justice, be determined by the Council, acting unanimously;

Whereas each of the four languages in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community;

HAS ADOPTED *THI5* REGULATION:

Article 1

The official languages and the ·working languages of the institutions of the Community shall be Dutch, French, German and Italian.

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.

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.

Article 4

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

Article 5

The Official Journal of the Community shall be published in the four official languages.

Article 6

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

Article 7

The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.

Article 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.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15 April 1958.

For the Council

The President

V. LAROCK

APPENDIX B

Articles 118 and 342 related to language I the TFEU (Treaty on the Functioning of the European Union)

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN

Article 118

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 Council shall act unanimously after consulting the European Parliament.

Article 342

(ex Article 290 TEC)

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.