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CONTRIBUTION BY THE LEGAL SERVICE*

Subject: Compatibility of possible enhanced cooperation in the field of patents with the internal market and the other provisions of the Treaties

At the Competitiveness Council on 25 November 2010 the Legal Service was asked about the compatibility of possible enhanced cooperation in the field of patents with the internal market and the other provisions of the Treaties. This contribution constitutes a written version, requested by the Council, of the statement made orally at that meeting.

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- I. This text does not address either the desirability of moving towards enhanced cooperation on the matter in question or the specific problems that implementing such cooperation might raise in the existing regulatory framework¹.

The issue this opinion deals with is whether implementing enhanced cooperation as regards the European Union patent is compatible *de jure* with the provisions of the Treaties, and in particular those that govern the internal market.

The hypothesis is that the subject of enhanced cooperation would be that formed by the two Regulations, the Regulation on the European Union patent and the Regulation on language arrangements. These two acts cannot be separated from each other and are only organised into two acts to reflect the division of Article 118 TFEU into two paragraphs, of which the first provides for the ordinary legislative procedure for creating the property rights and the second for a special legislative procedure (with the Council acting unanimously) to establish the language arrangements for them. The Regulation on patents cannot function without the provisions on translation; the fates of the two are linked.

¹ That framework consists of two Regulations and two international agreements to which the Union is expected to become a party, the agreement amending the European Patent Convention to allow for the accession of the European Union and the agreement on a unified judicial system for patents. Among the practical problems not addressed herein, some concern the inherent complexity of the arrangements envisaged, others the place occupied in those arrangements by international agreements to which the Union should be party but for which competence is mixed. Furthermore, the patent regulation would inevitably have to be adapted to take account of the options chosen regarding relations with the European Patent Office and the judicial system.

II. The institutional conditions for implementing enhanced cooperation are set out in Article 20 TEU and in Articles 326 to 334 TFEU. In accordance with those provisions, enhanced cooperation is possible only in the framework of the non-exclusive competences of the Union and must apply the appropriate Treaty provisions. It must aim to further the objectives of the Union and reinforce its integration process. It assumes that the objectives it is pursuing cannot be attained within a reasonable period by the Union as a whole; in other words, the Council can act in this context only as a last resort.

All these conditions are met in the present case.

This is the case for the following reasons:

1 - Article 118 TFEU provides an appropriate legal basis.

2 - The Union's competence is not exclusive, since the subject matter of Article 118 is not one of the fields listed in Article 3 TFEU and the proposed Regulation on the European Union patent has not been adopted.

3 - The adoption of the set of measures formed by the regulation on the European patent and the regulation on translation that will supplement it serves the objectives of establishing the internal market and promoting scientific and technical progress, which are goals of the Union (Article 3(3) TEU).

4 - The existence of a patent common to a number of Member States² would be a step in the direction of harmonised protection of intellectual property rights and could contribute to integration currently lacking in the area in question.

² There must be at least nine Member States when the Council adopts the authorisation. The number could rise, given the permanent openness of enhanced cooperation to Member States wishing to join in.

5 - The blocked situation due to the noted absence of unanimity in Council on the regulation on translations was formally noted on 10 November 2010, and there is no sign that this will change within a reasonable period. The Commission, requested by Member States that wish to establish enhanced cooperation between them, may still verify, before proposing that the Council authorise that cooperation under Article 329 TFEU, that the condition concerning the impossibility of achieving the objective within a reasonable period through an act involving the Union as a whole is met. It will be for the Council finally to confirm that the impasse is real before it authorises the enhanced cooperation.

III. Under the second paragraph of Article 326 TFEU, enhanced cooperation may not undermine the internal market or economic, social and territorial cohesion. It must not constitute a barrier to or discrimination in trade between Member States, nor may it distort competition between them.

1 - Since Article 326 prohibits undermining the market, it cannot be maintained that the rules governing the internal market are by their nature unsuitable for enhanced cooperation. The concept of undermining used in the Treaty covers only cases where action by States taking part in enhanced cooperation would compromise the smooth operation of the internal market and genuine freedom of movement in an area without internal borders by establishing obstacles to market access.

Where a field is not fully harmonised, as here, enhanced cooperation is possible, insofar as Member States retain regulatory competence in addition to or alongside rules adopted by the Union. The competences they possess at national level they may exercise equally in cooperation, provided that such pooling does not disturb the functioning of the market, and is not discriminatory or anti-competitive either in its purpose or in its effects.

In this case, Member States retain competence for legislating, be it nationally or in cooperation. The existence of intellectual property rights common to some of them in no way undermines the market, since the procedure for issuing the European Union patent is open to any operator, regardless of its country of origin. It simply adds a further facility to the European and national patent systems, which the EU patent does not replace. Furthermore, there are precedents for such a multinational grouping, with the Benelux system of property rights, which also does not undermine the market.

Nor is there any undermining of economic cohesion, given that, starting from a situation of patent protection at national level, the setting up between some Member States of enhanced cooperation in this area can only help strengthen economic cohesion over at least part of the Union's territory, rather than the reverse.

2 - Lastly, could the measure in question be discriminatory or distort competition? It has been suggested in some quarters that since the internal market is based on equal access to the market (a "level playing-field"), any geographical segmentation that could make conditions of access more attractive in some Member States would constitute a distortion to the detriment of the others. However, it is clear that competition is not envisaged by the treaties as competition between States but between businesses, for the purposes of their "inter-State" (i.e. cross-border) operations. All that is prohibited, then, is for enhanced cooperation to favour some operators and disadvantage others. Such could be the case if tighter requirements than the minima imposed by the Union were imposed on access to certain markets and if those conditions affected different operators unequally.

In the present case, in the absence of any legislation on patents in the Union, to jointly set up such an intellectual property right in the Member States taking part in enhanced cooperation, alongside national patents and the European patent issued by the European Patent Office, could undoubtedly make the systems offered by participating States more attractive. But, even if it proved to be the case, such a "forum shopping" effect, which exists in company law for instance, would not constitute a barrier or distortion, and still less would it be discriminatory.

In reality, the market is at present fragmented.

The new rights resulting from enhanced cooperation would be a new facility offered to businesses regardless of their geographical origin, and would in no way limit their capacity to act in order to protect their inventions. This new facility would not lead to any worsening of the competitive situation of businesses located in non-participating Member States since, in their States of origin they, like any other business, would have to have their inventions protected by a national patent or a European patent under the EPO system, and in the States participating in the European Union patent they would have access, like businesses originating in those States, to the protection that patent affords.

It follows that enhanced cooperation on the Union patent would not be incompatible with the functioning of the internal market³.

³ The limits set by the second paragraph of Article 326 TFEU will be applied in the context of enhanced cooperation. The issue of the language arrangements that might be adopted in this context therefore need not be addressed when discussing the compatibility in principle of enhanced cooperation with the treaties. We shall merely point out that the Court has judged, in relation to the language arrangements applicable to the Community trade mark, that the interests of economic operators in terms of the costs of proceedings could justify restricting the choice of languages available for the purposes of an intellectual property protection system (9 September 2003, Kik, Case C-361/01P, paragraphs 92 and 93).

IV. Moreover, enhanced cooperation would also have to meet the other requirements imposed by Article 20 TEU and by Articles 326 to 334 TFEU. These procedural conditions are in essence as follows:

1 - it is used only as a last resort⁴;

2 - an application submitted to the Commission by Member States wishing to pursue among themselves an initiative blocked at the level of the Union as a whole; no specific number of signatories is formally required by the Treaties for sending such a letter, it being understood however that there must be at least nine States wishing to participate in order for the Council to be able to adopt the authorisation decision; the request must be relatively precise as regards the subject and scope of the envisaged cooperation; it does not however need to establish the detailed mechanisms, which must be developed in the Commission proposal;

3 - examination of the request by the Commission, which assesses whether the request should be accepted; if not, the Commission explains why not; otherwise, it sends the Council a proposal for an authorisation, which defines the framework in which the enhanced cooperation will be possible; the proposal forwarded to that end is essential so that the Council can follow up the Member States' initiative, just as a proposal is required for the adoption of a legislative act; without a proposal, and outside of the proposal, no referral has been made to the Council and it can do nothing; therefore, the proposal cannot be limited to asking the Council to approve the request – on the contrary, it must spell out the arrangements so as to present a viable, complete and coherent whole for the Council to decide on: the delimitation and potential content of the enhanced cooperation;

4 - an authorisation granted by the Council, acting by qualified majority, after obtaining the consent of the European Parliament and after it has confirmed that at least nine States have declared that they wish to take part;

⁴ See point II.5 above.

5 - once the cooperation has been authorised, all members of the Council may participate in its deliberations, but only members representing the participating States take part in the votes; finally

6 - enhanced cooperation is open at any time to Member States wishing to join in, by a procedure requiring no formalities other than an expression of intention, provided the Commission confirms that the Member State concerned meets the conditions for participation.

To conclude: the Legal Service takes the view that, provided the conditions and restrictions noted above are observed, enhanced cooperation on the European Union patent would not be contrary to the internal market, nor to any other provisions of the Treaties.

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