



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 11 February 2011
(OR. en)**

5538/11

**Interinstitutional File:
2010/0384 (NLE)**

PI 3

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: COUNCIL DECISION authorising enhanced cooperation in the area of
the creation of unitary patent protection

COUNCIL DECISION No .../2011/EU

of

**authorising enhanced cooperation in the area of
the creation of unitary patent protection**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 329(1) thereof,

Having regard to the requests made by the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament¹,

¹ OJ C , ... , p. .

Whereas:

- (1) In accordance with Article 3(3) of the Treaty on European Union (TEU), the Union shall establish an internal market, shall work for the sustainable development of Europe based on balanced economic growth and shall promote scientific and technological advance. The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products across national borders and providing companies with more choice and opportunities contributes to attaining this objective. A unitary patent which provides uniform effects throughout the Union should feature amongst the legal instruments which undertakings have at their disposal.
- (2) Pursuant to Article 118 of the Treaty on the Functioning of the European Union (TFEU) and in the context of the establishment and functioning of the internal market, measures should include the creation of uniform patent protection throughout the Union and the establishment of centralised Union-wide authorisation, coordination and supervision arrangements.
- (3) On 5 July 2000, the Commission adopted a proposal for a Council Regulation on the Community patent for the creation of a unitary patent providing uniform protection throughout the Union. On 30 June 2010, the Commission adopted a proposal for a Council Regulation on the translation arrangements for the European Union patent (hereinafter "the proposed Regulation on the translation arrangements") providing for the translation arrangements applicable to the European Union patent.

- (4) At the Council meeting on 10 November 2010, it was recorded that there was no unanimity to go ahead with the proposed Regulation on the translation arrangements. It was confirmed on 10 December 2010 that insurmountable difficulties existed, making unanimity impossible at the time and in the foreseeable future. Since the agreement on the proposed Regulation on the translation arrangements is necessary for a final agreement on unitary patent protection in the Union, it is established that the objective to create unitary patent protection for the Union could not be attained within a reasonable period by applying the relevant provisions of the Treaties.
- (5) In these circumstances, twelve Member States, namely Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom, addressed requests to the Commission by letters dated 7, 8 and 13 December 2010 indicating that they wished to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection on the basis of the existing proposals supported by these Member States during the negotiations and that the Commission should submit a proposal to the Council to that end. The requests were confirmed at the meeting of the Council on 10 December 2010. In the meantime, thirteen more Member States, namely Belgium, Bulgaria, the Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia have written to the Commission indicating that they also wish to participate in the envisaged enhanced cooperation. In total, twenty-five Member States have requested enhanced cooperation.

- (6) Enhanced cooperation should provide the necessary legal framework for the creation of unitary patent protection in participating Member States and ensure the possibility for undertakings throughout the Union to improve their competitiveness by having the choice of seeking uniform patent protection in participating Member States, as well as contributing to scientific and technological advance.
- (7) Enhanced cooperation should aim at creating a unitary patent, providing uniform protection throughout the territories of the participating Member States, which would be granted in respect of all those Member States by the European Patent Office (EPO). As a necessary part of the unitary patent, the applicable translation arrangements should be simple and cost-effective and correspond to those provided for in the proposal for a Council Regulation on the translation arrangements for the European Union patent, presented by the Commission on 30 June 2010, combined with the elements of compromise proposed by the Presidency in November 2010 that had wide support in Council. The translation arrangements would maintain the possibility of filing patent applications in any language of the Union at the EPO, and would ensure compensation of the costs related to the translation of applications filed in languages other than an official language of the EPO. The patent having unitary effect should be granted only in one of the official languages of the EPO as provided for in the Convention on the Grant of European Patents (European Patent Convention). No further translations would be required without prejudice to transitional arrangements which would be proportionate and require additional translations on a temporary basis, without legal effect and purely for information purposes. In any case, transitional arrangements would terminate when high quality machine translations are made available, subject to an objective evaluation of their quality. In case of a dispute, mandatory translation obligations should apply to the patent proprietor.

- (8) The conditions laid down in Article 20 TEU and in Articles 326 and 329 TFEU are fulfilled.
- (9) The area within which enhanced cooperation would take place, the establishment of measures for the creation of a unitary patent providing protection throughout the Union and the setting-up of centralised Union-wide authorisation, coordination and supervision arrangements, is identified by Article 118 TFEU as one of the areas covered by the Treaties.
- (10) It was recorded at the Council meeting on 10 November 2010 and confirmed on 10 December 2010 that the objective to establish unitary patent protection within the Union cannot be attained within a reasonable period by the Union as a whole, thus fulfilling the requirement in Article 20(2) TEU that enhanced cooperation be adopted only as a last resort.
- (11) Enhanced cooperation in the area of the creation of unitary patent protection aims at fostering scientific and technological advance and the functioning of the internal market. The creation of unitary patent protection for a group of Member States would improve the level of patent protection by providing the possibility to obtain uniform patent protection throughout the territories of the participating Member States and eliminate the costs and complexity for those territories. Thus, it furthers the objectives of the Union, protects its interests and reinforces its integration process in accordance with Article 20(1) TEU.

- (12) The creation of unitary patent protection is not included in the list of areas of exclusive competence of the Union set out in Article 3(1) TFEU. The legal basis for the creation of European intellectual property rights is Article 118 TFEU, which falls within Chapter 3 (Approximation of Laws) of Title VII (Common Rules on Competition, Taxation and Approximation of Laws), and makes a specific reference to the establishment and functioning of the internal market, which is one of the shared competences of the Union according to Article 4 TFEU. The creation of unitary patent protection, including applicable translation arrangements, therefore falls within the framework of the Union's non-exclusive competence.
- (13) Enhanced cooperation in the area of the creation of unitary patent protection complies with the Treaties and Union law, and does not undermine the internal market or economic, social or territorial cohesion. It does not constitute a barrier to, or discrimination in, trade between Member States and does not distort competition between them.

- (14) Enhanced cooperation in the area of the creation of unitary patent protection respects the competences, rights and obligations of non-participating Member States. The possibility of obtaining unitary patent protection on the territories of the Member States participating does not affect the availability or the conditions of patent protection on the territories of non-participating Member States. Moreover, undertakings from non-participating Member States should have the possibility to obtain unitary patent protection on the territories of the participating Member States under the same conditions as undertakings from participating Member States. Existing rules of non-participating Member States determining the conditions of obtaining patent protection on their territory remain unaffected.
- (15) In particular, enhanced cooperation in the area of the creation of unitary patent protection would comply with Union law on patents since enhanced cooperation would respect pre-existing *acquis*.
- (16) Subject to compliance with any conditions of participation laid down in this Decision, enhanced cooperation in the area of the creation of unitary patent protection is open at any time to all Member States willing to comply with the acts already adopted within this framework in accordance with Article 328 TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland are hereby authorised to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection, by applying the relevant provisions of the Treaties.

Article 2

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

For the Council

The President
