



ASSEMBLEIA DA REPÚBLICA  
EUROPEAN AFFAIRS COMMITTEE

**Written Opinion**

**COM(2011) 215** – *Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection*

**COM(2011) 216** – *Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements*

**1. Introductory Note**

In accordance with the terms of Article 7(1) of Law 43/2006 of 25 August, governing the process of monitoring, assessment and pronouncement by the Assembleia da República in the context of the construction of the European Union, the European Affairs Committee has drafted this written opinion on the following matters:

*Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection – **COM(2011) 215.***

*Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements – **COM(2011) 216.***



**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

## **2. Analysis of the Initiatives**

The objective of creating a European Union Patent – previously called the Community Patent – is a positive aim which we fully support. It would help to stimulate and promote innovation in Europe, and would further the policy objectives and targets of the Europe 2020 Strategy for Growth and Jobs.

However, that objective should not be pursued at the expense of the fundamental rules of the European Union, in violation of the basic principles of European citizenship, destroying European cohesion and fracturing the internal market or introducing new factors of discrimination, inequality and imbalance.

In the process of negotiations and discussions between Member States, it has become clear that the language arrangements for the EU Patent are the matter on which it has been most difficult to find the consensus needed to proceed under the rules as they exist at present in Article 118 of the TFEU.

The language arrangements are the crux to achieving a fair and effective EU Patent regime that, firstly, respects the cultural and linguistic diversity of the European Union; secondly, provides the legal certainty necessary for protecting innovation in Europe; thirdly, contributes to developing and deepening the internal market; and fourthly, respects the principle of territorial cohesion stipulated in the Treaty.

The immediate origin of these latest political moves in the European institutions is the fact that in the second half of 2010, under the Belgian Presidency of the Council, the proposal for a Council Regulation on the translation arrangements for the EU Patent was not approved. In reaction to this, twelve Member States,



**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

rather than persisting with negotiations, all the more so since we were dealing with a new Commission proposal introduced only in June 2010, decided to break away in an isolated and strong move to a so-called "enhanced cooperation". Enhanced cooperation, introduced by the Treaty of Amsterdam and provided for in the Treaties, is a serious provision and not just an expedient device.

Although limited to only some Member States, it is nevertheless a way of structuring the EU, not of breaking it up. For this reason, it is regulated by the Treaties – and also for this reason, it should only be used in the service of the Treaties and in their spirit. It is a way of constructing Europe, not of dismantling it. Enhanced cooperation should not in any circumstances serve to set Member States against Member States, nor should it be an opportunistic device for circumventing rules and decision-making mechanisms that are clearly stipulated in the Treaty – in this case, Article 118 of the TFEU. We note, for example, that both Spain and Italy have already ruled out any participation in this enhanced cooperation.

Put another way, what this is about is granting, or not, in the context of the European Union, privileged three-language arrangements for the registration and validity of patents, with corresponding consequences for the related private jurisdictional regime. We should also draw attention here to the fact that these kinds of fragmented and discriminatory language arrangements would certainly lead, for the majority of Member States, to a worsening of the legal uncertainty of the patents so registered. We would consequently see a very significant potential increase in infringements and in related litigation, which would also be counterproductive in terms of economic dynamism and innovation. The Commission has made no serious impact assessment of any of this.



**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

In view of the fact that in matters of language arrangements the European Treaties have always provided for absolute parity of all the official languages, it would not seem difficult rapidly to reach a consensus on the language arrangements for patents: any interested person could apply for an EU patent in any of the official languages and its registration would result in its translation and publication in all the others. In this scenario, the Commission has not even made a serious estimate of the costs involved to give us an accurate idea of what we are talking about. The “cost” argument is regularly advanced without any reliable basis and in a superficial way.

Irrespective of the political debate, the decision on this matter cannot ignore the provisions of the Treaty of Lisbon, the last and most recent statement of European primary law. Article 2 of the TEU states that *“the Union is founded on the values of (...) the rule of law”*, while Article 3 of the TEU states that *“the Union’s aim is to promote (...) its values”* (paragraph 1) and that *“the Union shall establish an internal market”; “combat discrimination”; “promote economic, social and territorial cohesion, and solidarity among Member States”* and *“respect its rich cultural and linguistic diversity”* (paragraph 3).

In turn, Article 20 of the TFEU states that *“citizenship of the Union is hereby established”* (paragraph 1), with all citizens of the Union enjoying the *“right to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language”* (paragraph 2 d)) – the institutions are listed in Article 13 of the TEU and the Treaty languages are the 23 official languages mentioned in Article 55 of the TEU. The same right of citizenship is restated in the final paragraph of Article 24 of the TFEU. And Article 342 of the TFEU adds that *“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”*.



**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

This matter is also governed by Regulation (EEC) 1/58, published in OJ 17 of 6.10.1958, p. 385, most recently amended by Council Regulation (CE) 1791/2006 of 20 November 2006, adopted at the time of the accession of Bulgaria and Romania, which sets out the 23 official languages and working languages of the EU without any exclusion, discrimination or privilege. For its part, an EU patents regime should be adopted in application of Article 118 of the TFEU. That article begins by setting out in general terms the ordinary legislative procedure between the European Parliament and the Council for establishing *“measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union”*; but, specifically in relation to the *“language arrangements for the European intellectual property rights”*, it establishes a *“special legislative procedure”* in which *“the Council shall act unanimously after consulting the European Parliament”*.

In the light of this, it seems clear that it is totally unlawful – and cannot be accepted – for a group of Member States to seek to put into practice the “enhanced cooperation” provided for in Article 20 of the TEU and Articles 326ff. of the TFEU for a purpose and in a spirit totally at variance with those for which the Article was framed. It is totally unreasonable and improper to seek to push forward a form of “enhanced cooperation” which in practice is solely aimed at imposing the establishment of private language arrangements that are completely contrary to the Treaties and their framework of fundamental values and rights, as well as breaching the unanimity rule that is enshrined in them as the universal guarantee of all Member States.

In addition, there is no way in which this enhanced cooperation can be viewed as a *“last resort”*, as Article 20(2) of the TEU insists, since: a) on 10 and 14 December, not even six months had elapsed since the presentation of a



**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

proposal for a Commission Regulation on 30 June 2010, about which a judgement as to the impossibility of its adoption in the Council led to this precipitate breakaway move; b) the European Parliament had not yet even been consulted on this proposal for a Regulation as is specifically required in the final sentence of Article 118 of the TFEU; c) it is common knowledge that there are alternative language and translation arrangements for a single EU patent regime that have never even been discussed, let alone analysed, in relation to that proposal for a Regulation of 30 June 2010.

For Portugal, apart from the specific interests of the Portuguese economy, the interests of the Portuguese language policy also predominate, in relation to which we need to bear in mind these basic principles: Portugal has no interest in, and must therefore strongly oppose in Europe any language arrangements in whatever field that exclude the Portuguese language and discriminate against it.

In Europe, Portugal is not simply defending the interests of a language like that of any other Member State. Rather, Portugal is defending the special interest of a global European language which is spoken internationally, which is the case with only a few European languages, of which Portuguese is the third most important – Portuguese, a language of Europe. Anything that diminishes the internal status of the Portuguese language also weakens it as a global European language and weakens its importance, influence and perception in Europe and the rest of the world. A global European language that allows itself to be devalued in Europe risks ending up being of little utility elsewhere in the world.

### **3. Conclusions**



**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

The present written opinion has been drawn up in accordance with the terms of Law 43/2006 of 25 August, which determines the Portuguese Parliament's powers of *monitoring, assessment and pronouncement in the context of the construction of the European Union*.

The matters in question do not fall within the scope of the reserved legislative responsibility of the Assembleia da República; accordingly, Article 2 of Law 43/2006 of 25 August does not apply.

These initiatives were sent by the European Commission after the dissolution of the Assembleia da República. The European Affairs Committee therefore assumed responsibility for scrutiny of the initiatives as it was not possible to distribute them to the parliamentary committee responsible for these matters.

With regard to the context and specific situation of these initiatives, we would comment, to repeat a paragraph from the written opinion of the European Affairs Committee of 28 February 2011, "that in the variety of different positions taken by the various parliamentary groups in the Assembleia da República there is a manifest lack of satisfaction with the way in which the European Institutions currently envisage how this enhanced cooperation will be used, in essence believing that its use will not be sufficiently judicious, since this mechanism is supported for other issues of institutional and European importance. Similarly, we emphasise the fact that this initiative appears to create distinct and differentiating arrangements, which disrespect the multilingualism that is the bedrock of the EU. In particular, it is detrimental to the use of some languages and lacks clarity in the criteria and values behind the choice of English, French and German. We also stress the exceptional nature of this initiative and our desire and commitment for it to not be repeated in other matters of a European nature."



**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

In accordance with the Proposal for a Regulation of the European Parliament and of the Council COM(2011) 215 and the Proposal for a Council Regulation COM(2011) 216, the provisions of Article 5, paragraphs 1, 2 and 4 of the Treaty on European Union (TEU) and of Article 69 of the Treaty on the Functioning of the European Union (TFEU) and of Protocol 2 thereto, there is no breach of the principle of subsidiarity nor of the principle of proportionality, without prejudice to the reservations set out in this Written Opinion on the content of the initiative.

#### **4. Rapporteur's Opinion**

The matters contained in the Proposals for a Regulation are too sensitive to be dealt with by some obscure technicality and the present “enhanced cooperation” process is characterised by enormous and unaccustomed haste. In addition, we are of the view that it conflicts directly with the fundamental interests of Portugal and the Portuguese language. The lack of regard for the fundamental interests of Portugal, the Portuguese language and the Portuguese economy means that Portugal should have strongly opposed to these moves towards discriminatory EU regulation and the attempt to introduce so-called “enhanced cooperation” for this purpose.

#### **5. Opinion**

In relation to the initiatives which are the subject of this Written Opinion, there is no breach of the principle of subsidiarity, nor of the principle of proportionality, without prejudice to the reservations set out in this Written Opinion on the content of the initiative.





**ASSEMBLEIA DA REPÚBLICA**  
**EUROPEAN AFFAIRS COMMITTEE**

The process of scrutiny by the Assembleia da República is completed.

São Bento Palace, 16 May 2011

MP ACTING AS RAPPORTEUR

CHAIRMAN OF THE COMMITTEE

(Pedro Brandão Rodrigues)

(Vitalino Canas)