

ATTACHMENT 2

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 final).

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

DOCUMENT APPROVED BY THE EUROPEAN POLICIES COMMITTEE OF ITALY'S CHAMBER OF DEPUTIES

The European Union Policies Committee;

Having examined the “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 final)” and the “Proposal for a Regulation of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (COM(2011)216 final)”;

Having regard to Council Decision 2011/167/EU of 10 March 2011, authorising enhanced cooperation in the area of the creation of unitary patent protection;

Considering that Italy and Spain are not parties to enhanced cooperation;

Noting that the Italian government has filed an appeal with the Court of Justice seeking to have the aforementioned decision 2011/167/EU annulled pursuant to article 263 of the Treaty on the Functioning of the European Union;

Considering that:

a) before the national Parliaments perform their subsidiarity checks pursuant to Protocol no. 2 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union it is necessary, firstly, to appraise the soundness of the legal basis for the European Union's draft legislation;

b) the legal basis for these proposals is article 118 (1) of the Treaty on the Functioning of the European Union, which provides that “the European Parliament and the Council [...] shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union”. This provision, consistently with its wording and its purposes, was designed to establish intellectual property rights specific to the European Union, able to guarantee the uniform protection of intellectual property rights throughout the whole of the European Union;

c) a common patent shared by a limited number of Member States could in no way be described as an intellectual property right specific to the European Union, because it would not create "uniform protection" of intellectual property rights but, on the contrary, it would give rise to a series of forms of protection "split" between the legal systems of the enhanced cooperation participating and non-participating States;

d) the adoption of measures in this area by one group of Member States, including the implementation of enhanced cooperation as envisaged by the proposals for Regulations examined here would therefore ultimately cancel out any useful effects of the provisions of article 118 TFEU, making it objectively impossible to establish uniform patent protection;

e) the competences provided by article 118 can therefore be effectively exercised only through the creation of European Union-wide intellectual property rights, not reserved to certain individual Member States, which must be deemed to have no competences in this regard;

f) in terms of their object and their purpose, the competences vested in the Union by article 118 must therefore be seen as falling within the exclusive competence of the European Union. According to ECJ case-law the nature of powers vested in the European Union and their relationship with the competences of the Member States must always be appraised in specific cases with regard to the relevant legal basis at issue. The fact that the sectors of EU exclusive competence envisaged by article 3 (1) TFEU do not encompass the competence provided by article 118 and that the same article specifically refers to the establishment and functioning of the internal market, which is one of the concurrent competences pursuant to article 4 TFEU, does not therefore preclude the fact that this competence falls exclusively to the European Union;

g) since the competence provided by article 118 is exclusive to the Union, any authorisation to proceed to enhanced cooperation and its implementation envisaged under the proposals for a Regulation at issue here would constitute an infringement of article 20 (1) TEU, which provides that enhanced cooperation between Member States may only be established “within the framework of the Union’s non-exclusive competences”.

h) since the competence provided by article 118 is exclusive to the Union, the proposals for a Regulation at issue here lose any sound legal basis such that it becomes unnecessary to ascertain the existence of the conditions required to exercise the competence in terms of subsidiarity checks;

i) the proposals for a Regulation at issue here also blatantly infringe article 326 (2) TFEU which provides that the conditions for authorising enhanced cooperation include the fact that it will not damage the internal market, and that it will not create an obstacle to, or discriminate against, trade between the Member States, or distort competition between them;

l) a unitary system of protection limited to the countries participating in enhanced cooperation, as envisaged in the proposals at issue here, would indeed raise obstacles to trade between the Member States, since an industrial product protected under that regime would not be able to circulate as such in the Member States which do not participate in enhanced cooperation; conversely, any product enjoying industrial property protection in non-participating States would not be protected in the former States. Account must be taken of the fact that Italy and Spain, both demographically, and by Gross Domestic Product in absolute terms are the fourth and the fifth largest countries in the European Union;

m) the language arrangements envisaged in the proposal for a Council Regulation regarding the system of translation applicable to the unitary patent would also create evident distortion to competition, giving the competitive edge to businesses in the countries whose official language is English, French or German;

n) the language arrangements for translating the unitary patent envisaged by the proposal for a Regulation would therefore be inconsistent with the principle of proportionality. For the use of three main languages alone would be intended to streamline and to economise on translation costs, which

would impose an excessive sacrifice on competitors. The proposal for a Regulation provides no detailed reasons or justification for this decision unlike the proposal made by the Italian government for a translation system based solely on the English language, which would place all companies on an equal footing, except for the United Kingdom and Ireland, while simultaneously ensuring a further reduction in costs;

Recalling art. 6 of Protocol no. 2 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, which requires reasoned opinions to be forwarded to the Presidents of the European Parliament, the Council and the Commission,

has hereby issued

THIS REASONED OPINION

in accordance with article 6 of Protocol no. 2 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.