



23.6.2011

NOTICE TO MEMBERS

(55/2011)

Subject: Reasoned opinion by the Cortes Generales of the Kingdom of Spain on 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)0215 – C7-0099/2011 – 2011/0093(COD))

and on the 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)0216 – C7-0145/2011 – 2011/0094(CNS))

Under Article 6 of the Protocol No 2 on the application of the principles of subsidiarity and proportionality, any national Parliament may, within eight weeks from the date of transmission of a draft legislative act, send the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Under Parliament's Rules of Procedure the Committee on Legal Affairs is responsible for compliance with the subsidiarity principle.

Please find attached, for information, a reasoned opinion by the Cortes Generales of the Kingdom of Spain on the above-mentioned proposals.

OPINION 2/2011 OF THE JOINT COMMITTEE ON THE EUROPEAN UNION ON THE APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY BY 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] [2011/0093 (COD)] {SEC (2011) 482 FINAL} {SEC (2011) 483 FINAL} AND BY THE 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 FINAL] [2011/0094 (CNS)] {COM (2011) 215 FINAL} {SEC(2011) 482 FINAL} {SEC(2011) 483 FINAL}

BACKGROUND

A. The Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty of Lisbon (2007), in force since 1 December 2009, has established a system allowing national Parliaments to monitor the application of the principle of subsidiarity by European legislative initiatives. The Protocol has been developed in Spain by Law 24/2009 22 December 2009, amending Law 8/1994 of 19 May 1994. The new Articles 3(j), (5) and (6) of Law 8/1994 in particular form the legal basis for this opinion.

B. 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 (hereinafter the Proposal for a Regulation on unitary protection) and the 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 (hereinafter the Proposal for a Regulation on translation) have been approved by the European Commission and referred to the national Parliaments, which have eight weeks in which to verify whether these initiatives comply with the principle of subsidiarity. This period concludes on the same date, 29 June 2011, for both initiatives.

C. On 10 May 2011, the Bureau and Spokespersons of the Joint Committee on the European Union agreed to examine the two European legislative initiatives concerned, nominating a member of the Spanish Parliament, Álex Sáez Jubero, as rapporteur and asking the Government for the report provided for in Article 3(j) of Law 8/1994.

D. A joint report on the two initiatives sent by the Spanish Secretary of State for Constitutional and Parliamentary Affairs and letters from the Basque Parliament have been received. The report sent by the Secretary of State, drawn up by the *Oficina Española de Patentes y Marcas* [Spanish Patent and Trade Marks Office], raises doubts as to whether the principle of subsidiarity has been correctly applied. Neither of the

Basque Parliament reports questions whether the European legislative initiative examined complies with the principle of subsidiarity.

E. In its meeting of 14 June 2011, the Joint Committee on the European Union approved this

OPINION

1.- Article 5(1) of the Treaty on European Union states that *‘the use of Union competences is governed by the principles of subsidiarity and proportionality’*. According to Article 5(3) of the Treaty, *‘under the principle of subsidiarity, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’*.

2. - The Proposal for a Regulation on unitary protection is based on Article 118(1) of the Treaty on the Functioning of the European Union, while the Proposal for a Regulation on translation is based on Article 118(2) of that Treaty.

Article 118 provides:

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.

3. - The object of the Proposal for a Regulation on unitary protection is to give unitary effect to European patents granted for the territories of the participating Member States. Such protection, which will be optional and will apply in the participating Member States, will be provided to proprietors of patents granted by the European Patent Office who apply for the required unitary protection from that Office.

Article 12 of the text of the Proposal for a Regulation on unitary protection gives a series of tasks to the European Patent Office, which it must carry out *‘in conformity with its internal rules’*. In particular, the second paragraph of Article 12 provides that *‘(...) the participating Member States shall ensure that requests by the patent proprietor for unitary effect are submitted in the language of the proceedings as defined in Article 14(3) of the EPC no later than one month after the mention of the grant is published in the European Patent Bulletin’*. That Article 14 of the European Patent Convention

(EPC) stipulates that the languages of the proceedings are exclusively English, French and German.

The Proposal for a Regulation on unitary protection consequently has a direct impact on the language arrangements for European intellectual property rights, which means that the legal basis must include Article 118(2) of the Treaty on the Functioning of the EU with respect to the language arrangements for patents.

Article 118(2) is nevertheless the legal basis for the Proposal for a Regulation on translation arrangements, which provides that where the specification of a European patent with unitary effect has been published in accordance with the European Patent Convention – which recognises only English, French and German as official languages – generally no further translations are required.

However, if the Proposal for a Regulation on unitary protection under the ordinary legislative procedure determined by Article 118(1) were to be approved, the language arrangements would already be determined by the reference made to the European Patent Convention in that Proposal for a Regulation, even if the Proposal for a Regulation on translation – which, unlike the provision in the first proposal, requires unanimity in the Council – were never to be approved.

This situation, which contradicts the letter and spirit of Article 118 of the Treaty on the Functioning of the EU, would be avoided if the legal basis for the Proposal for a Regulation on unitary protection were Article 118(2) with regard to language arrangements.

4.- In so far as the legal basis for the Proposal for a Regulation on unitary protection is erroneous, the other details enabling the principles of subsidiarity and proportionality to be assessed need not be examined.

CONCLUSION

For these reasons, the Joint Committee on the European Union believes that the legal basis for 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 suffers from a major shortcoming which prevents this Committee from taking the view that the European Commission has complied with the principle of subsidiarity laid down in the current Treaty on European Union.