



16.6.2011

## **NOTICE TO MEMBERS**

**(53/2011)**

**Subject:** Reasoned opinion by the Chamber of Deputies of the Republic of Italy 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 Chamber of Deputies of the Republic of Italy on the above-mentioned proposals.

## THE SPEAKER OF THE CHAMBER OF DEPUTIES

I should like to inform you that on 8 June 2011, Committee XIV (European Union policies) of the Chamber of Deputies approved a document – which I attach – bearing a reasoned opinion in accordance with the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Lisbon, in respect of the following European Union legislative acts: ‘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 ‘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).

**Subject: ‘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 ‘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).**

#### **DOCUMENT APPROVED BY COMMITTEE XIV**

Committee XIV (European Union policies);

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 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);

having regard to Council Decision 2011/167/EU of 20 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection;

having regard to the fact that Italy and Spain oppose enhanced cooperation;

in view of the lodging by the Italian Government of an appeal to the Court of Justice for the annulment of the above-mentioned Decision 2011/167/EU in accordance with Article 263 of the Treaty on the Functioning of the European Union;

whereas:

a) before the national parliaments undertake the scrutiny of subsidiarity referred to in Protocol No 2 to the Treaty on European Union and the Treaty on the Functioning of the European Union, it is necessary to assess whether the legal basis of draft legislative acts of the European Union is correct;

b) the legal basis of the proposals is constituted by Article 118(1) of the Treaty on the Functioning of the European Union under which ‘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 is intended, in keeping with its wording and its purposes, to create European Union intellectual property rights able to provide uniform protection of intellectual property rights throughout the Union;

c) a patent common to a limited number of Member States would in no way be a Union-wide intellectual property right as it would not provide ‘uniform protection’ of intellectual

property rights, but would on the contrary provide protection ‘differing’ among the legal orders of those States participating and those States not participating in enhanced cooperation;

d) the adoption of measures in this respect by a group of Member States, including the implementation of the enhanced cooperation envisaged by the draft legislative acts in question, would ultimately deprive the terms of Article 118 TFEU of any useful effect as uniform patent protection would in practice be impossible to achieve;

e) the competence set out in Article 118 may therefore be exercised in practice only by the creation of a right at European Union level and is not a competence of individual Member States which must be deemed to have no competence in this respect;

f) the competence that Article 118 attributes to the Union is therefore, through its objective and its scope, an exclusive competence of the European Union. In accordance with the case-law of the Court of Justice, the nature of a competence of the European Union and its relationship with the competences of Member States must always be assessed in practice in relation to the specific legal basis relevant to the case in question. The fact that the competence referred to in Article 118 is not included among the exclusive competences of the Union laid down in Article 3(1) TFEU and that the same article refers specifically to the establishment and functioning of the internal market, which is one of the shared competences under Article 4 TFEU, does not preclude its exclusive nature;

g) as the competence of the Union referred to in Article 118 is exclusive in nature, the authorisation of enhanced cooperation and its implementation as envisaged by the draft legislative acts in question infringes Article 20(1) TFEU under which enhanced cooperation between Member States may be established only ‘in respect of the non-exclusive competences of the Union’;

h) the exclusive nature of the competence referred to in Article 118 therefore deprives the draft legislative acts in question of any valid legal basis and makes any assessment of the requirements for the exercise of the proposal from the point of view of subsidiarity unnecessary;

i) the draft legislative acts in question also clearly infringe Article 326(2) TFEU which envisages, as conditions for the authorisation of enhanced cooperation, the fact that such cooperation does not undermine the internal market and the fact that it does not constitute a barrier to or discrimination in trade between Member States or a distortion of competition between them;

j) a system of uniform protection limited to the States participating in enhanced cooperation, as envisaged by the draft legislative acts in question, would in practice constitute a barrier to trade between the Member States, given that an industrial product protected under this system would not circulate as such in those Member States not participating in the cooperation and, vice versa, a product covered by industrial property in the latter would be deprived of protection in the former. In this respect, it should be borne in mind that Italy and Spain are the fourth and fifth States of the European Union from the point of view of demographic profile and gross domestic product in absolute terms;

k) the language arrangements envisaged by the Council’s proposal in relation to the translation arrangements applicable to the single patent would also and evidently distort

competition, as it would give a competitive advantage to economic operators from those States whose official language is English, French or German;

1) the translation arrangements applicable to the single patent envisaged by the particular legislative proposal in question do not therefore comply with the principle of proportionality, the use of three main languages in practice pursuing the aim of simplification and lower translation costs and entailing an excessive sacrifice of competition. The draft proposal does not provide any detailed reasoning to support this legislative option in comparison with the Italian government's proposal of a translation system based only on English which would provide a level playing field for all enterprises, apart from those in the United Kingdom and Ireland, and would also achieve a further cost reduction;

having regard to Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty on the Functioning of the European Union, under which reasoned opinions may be sent to the European Parliament, the Council and the Commission,

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## REASONED OPINION

Under Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty on the Functioning of the European Union.