Enhanced cooperation in the area of the creation of unitary patent protection

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PURPOSE: the authorisation of enhanced cooperation in the area of the creation of unitary patent protection.

PROPOSED ACT: Council Decision.

BACKGROUND: on **1 August 2000**, the Commission adopted a proposal for a Council Regulation on the Community patent. It proposed the creation of a unitary Community patent which would co-exist with national patents granted by national patent offices of the Member States and European patents granted under the European Patent Convention (EPC) by the European Patent Office (EPO). The proposal was extensively discussed in the meetings of the Council, but failed to reach the required unanimity in particular because of the language arrangements.

On **3 March 2003**, the Council adopted a **common political approach** on the Community patent. This provided that patent proprietors would have to supply translations of the claims into all the official languages of the Member States. This arrangement was rejected by all users of the patent system as too costly and too risky. The Council concluded that due to the issue of the translation regime it was unable to reach a political agreement on the proposed Regulation on the Community Patent.

Discussions in the Council were re-launched after adoption of the Commission Communication " Enhancing the patent system in Europe" in **April 2007**.

In **December 2009**, the Council adopted conclusions on an "Enhanced patent system for Europe" and a general approach on the proposal for a Regulation on the EU Patent. However, the translation arrangements for the EU patent remained out of the scope of these Council conclusions due to the change of the legal basis for the creation of the EU patent under the Lisbon Treaty.

On this basis, on **30 June 2010,** the Commission adopted a proposal for a Council Regulation on the translation arrangements for the EU patent without obtaining the required unanimity of the Council of Ministers of the EU.

On **10 December 2010**, the Council that insurmountable difficulties existed, making a decision requiring unanimity impossible now and in the foreseeable future. It follows that the objectives of the proposed Regulations to establish unitary patent protection in the entire European Union can not be attained within a reasonable period by applying the relevant provisions of the Treaties.

Twelve Member States (Denmark, Estonia, Finland, France, Germany, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Sweden and the United Kingdom) have addressed formal requests to the Commission indicating that they wish to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection and that the Commission should submit a proposal to the Council to that end.

This proposal is the Commission's response to those requests.

ASSESSMENT OF THE LEGAL CONDITIONS FOR ENHANCED COOPERATION: the current national patent systems of Member States and the European patent system only provide territorially-

limited protection. This resulted in 'gaps' that gave rise to the following undesirable effects: i) lost business opportunities; ii) innovative firms are at a disadvantage; iii) the value of patents is weakened, given that patent holders cannot count on Regulation (EC) No 1383/2003 (the EU Customs Border Regulation) to prevent infringing goods and products from third countries from entering the internal market through Member States in which there is no patent protection.

The creation of a unitary patent title for a group of Member States would entail **immediate tangible advantages** for users of the patent system in Europe:

- **improved access to patent protection**: the unitary patent for the area covered by enhanced cooperation would ensure easier access to patent protection for all users of the patent system in Europe both for applicants from participating Member States and from non-participating Member States. The area for enhanced cooperation would cover a market that is much larger than any market of a single Member State, resulting in reduced costs of protection relative to the size of the economy.
- **cost reduction and simplification**: unitary patent protection created under enhanced cooperation would result in significant cost reduction and simplification of the system for the users due to the central administration of the unitary patent and the simplified translation requirements. Today, the validation costs would be more than EUR 12 000 when protection in thirteen selected Member States is sought, Union-wide coverage would cost between EUR 22 000 to EUR 26 000 in validation costs. The translation costs under the simplified translation arrangements of enhanced cooperation would amount to approximately **EUR 680 per patent**.

LEGAL BASE: enhanced cooperation is regulated by Article 20 of the Treaty on European Union (TEU) and Articles 326 to 334 of the Treaty on the Functioning of the European Union (TFEU). This proposal is based on Article 329(1) TFEU.

CONTENT: following the request of the twelve Member States, the purpose of this proposal is to authorise enhanced cooperation in the area of the creation of unitary patent protection. Once this enhanced cooperation has been authorised by the Council, specific measures will be proposed for its implementation.

It is, however, appropriate to outline some key elements of the envisaged implementing measures. Since the creation of unitary patent protection is not possible without an agreement on the applicable translation arrangements, both the substantive provisions applicable to the unitary patent and the translation arrangements should be part of the envisaged implementing measures.

The **envisaged implementing measures** should, therefore, include the following elements:

1) a proposal for a Regulation of the European Parliament and the Council creating unitary patent protection. That proposal could be based on the text agreed (general approach) in the Council in December 2009, as well as certain elements of the draft political orientation proposed by the Belgian Presidency, in particular:

- the unitary patent protection should be **optional** to the users of the patent system and should co-exist with national and European patents. The unitary patent should be a specific category of a European patent, granted by the European Patent Office, designating the Member States participating in enhanced cooperation on unitary basis;
- consequently, a **single procedure in accordance with the EPC would apply to unitary patents and to all other European patents**. Until the moment of grant, applicants would have the choice between i) a European patent valid in the territories of the participating Member States for which this patent would have unitary character, ii) a European patent valid in the territories of the

participating Member States for which this patent would have unitary character but also designating selected other Contracting States of the EPC, or iii) a European patent designating only selected Contracting States of the EPC;
- the unitary patent should be of **autonomous nature** and provide equal protection throughout the territories of the participating Member States. It may only be granted, transferred, revoked or may lapse in respect of those territories as a whole.

2) a proposal for a Council Regulation on the translation arrangements for the unitary patent. This proposal would take over the main elements of the Commission's proposal for a Council Regulation on the translation arrangements for the EU patent, as well as certain elements of the draft political orientation proposed by the Belgian Presidency, in particular:

- it is envisaged that the **specification** of the unitary patent be published by the EPO in accordance with Article 14(6) EPC. Without prejudice to any transitional arrangements deemed necessary, no further translations would be required. Any additional translation requirements under such transitional arrangements would be proportionate and required only on a temporary basis and not have legal value thus ensuring legal certainty for the users of the patent system. In any case, transitional arrangements would terminate when high quality machine translations are made available, subject to an objective evaluation of the quality;
- **translations should not have legal value**, thus ensuring legal certainty for the users of the patent system;
- **in case of a dispute** relating to a unitary patent, a full manual translation of the patent specification would have to be provided by the patent proprietor at his expense a) into an official language of the Member State in which either the alleged infringement took place or in which the alleged infringer is domiciled (at the choice of the alleged infringer); and b) into the language of proceedings of the court hearing the dispute (at the request of the court).

3) a scheme for compensating the costs of translating patent applications filed in an official language of the Union into an official language of the EPO at the beginning of the procedure for applicants based in the Member States which have an official language other than one of the official languages of the EPO, should be set up in addition to what is currently in place for other European patents, **including financial and technical assistance** for preparing those translations.