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

2011/0093(COD) - 13/04/2011 - Legislative proposal

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

PROPOSED ACT: Council Regulation.

BACKGROUND: the current patent system in the EU, in particular in terms of translation requirements, involves very high costs and complexity. The overall cost of validation of an average European patent reaches 12 500 EUR if validated only in 13 Member States and over 32 000 EUR if validated in the whole EU. It is estimated that the actual validation costs are around 193 million EUR per year in the EU.

Despite broad recognition of the competitive disadvantage European business faces in the absence of unitary patent protection, the Union has not been able to establish unitary patent protection.

The Commission first proposed a Council Regulation on the Community patentin August 2000. On 30 June 2010 the Commission adopted a proposal for a Council Regulation on the translation arrangements for the EU patent.

It was confirmed at the Competitiveness Council meeting on 10 December 2010 that insurmountable difficulties existed, making a decision requiring unanimity impossible now and in the foreseeable future.

25 Member States then asked for recourse enhanced cooperation in the area of unitary patent protection (all Member States except Italy and Spain) in the area of the creation of unitary patent protection.

The proposal for the authorising decision was adopted by the Council, after obtaining the consent of the European Parliament, on 10 March 2011. The present regulation implements the enhanced cooperation in the area of the creation of unitary patent protection as authorised by Council Decision 2011/167/EU..

IMPACT ASSESSMENT : the proposal is accompanied by an impact assessment which analyses the impacts of the following options:

Option 1 **(base-line scenario):** the Commission takes no action;

Option 2**:** the Commission continues to work with the other institutions towards an EU patent covering 27 Member States;

Option 3**:** the Commission presents proposals for regulations implementing enhanced cooperation:

- ***Sub-option 3.1*** - the Commission proposes translation arrangements applicable in the area of unitary patent protection that correspond to its proposal of 30 June 2010, or
- ***Sub-option 3.2*** - the Commission proposes translation arrangements applicable in the area of unitary patent protection based on its proposal of 30 June 2010 and incorporating elements of a compromise proposal discussed by the Council.

The analysis carried out in the impact assessment has demonstrated that **option 3 with sub-option 3.2 is the preferred option**.

LEGAL BASIS: Article 118 (1) TFEU provides for the legal basis for creating European intellectual property rights providing uniform protection throughout the Union by means of a regulation adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure.

CONTENT: the proposal aims to implement enhanced cooperation in the area of the creation of unitary patent protection authorised by Council Decision No 2011/167/EU. The main provisions are as follows :

European patent with unitary effect: in comparison to the Commission's proposal in 2000, this proposal builds on the existing system of European patents by providing unitary effect to European patents granted for the territories of the participating Member States. The unitary patent protection will be optional and co-exist with national and European patents. The proprietors of European patents granted by the EPO, may submit a request to the EPO within one month after the publication of the mention of the grant of the European patent, asking for the registration of the unitary effect. Once it is registered, the unitary effect will provide uniform protection and will have equal effect throughout the territories of all participating Member States. European patents with unitary effect may only be granted, transferred, revoked or may lapse in respect of those territories as a whole. The participating Member States shall give the task of administrating European patents with unitary effect to the EPO.

Rights and limitations: the rights conferred by the European patent with unitary effect should enable the patent proprietor to prevent any third party not having his consent from the direct and indirect use of the invention on the territories of the participating Member States. However, a number of limitations of the patent proprietor's rights should enable third parties to use the invention, for instance for private and for non-commercial purposes, for experimental purposes, for acts allowed specifically under Union law (in the area of veterinary medicinal products, medicinal products for human use, plant variety rights, the legal protection of computer programs by copyright and the legal protection of biotechnological inventions) under international law and for the use by a farmer of protected livestock for farming purposes.

Treating a European patent with unitary effect as a national patent: a European patent with unitary effect shall be dealt with in its entirety, and in all the participating Member States, as a national patent of the participating Member State in which, according to the European Patent Register, the proprietor of the patent had his residence or principal place of business on the date of filing of the application for the patent. Where no proprietor has his residence or a place of business in a participating Member State, the European patent with unitary effect as an object of property shall be dealt with as a national patent of the State where the European Patent Organisation has its seat.

Licenses of right: the draft regulation enables the proprietor of a European patent with unitary effect to file a statement with the EPO that he is prepared to allow any person to use the invention as a licensee in return for appropriate compensation (contractual license).

Renewal fees: renewal fees in respect of European patents with unitary effect shall be paid to the European Patent Organisation. If a renewal fee is not been paid in due time, the European patent with unitary effect shall lapse. The proposal provides that renewal fees for European patents with unitary effect shall be progressive throughout the term of the patent and shall be sufficient not only to cover all costs associated with the grant and administration of the unitary patent protection but also, together with the fees to be paid to the European Patent Organisation during the pre-grant stage, to ensure a balanced budget for the Organisation.

The share for distributing 50% of the amount of the renewal fees paid for European patents with unitary effect minus the costs associated with the administration of the unitary patent protection among the participating Member States shall be set by the Commission on the basis of fair, equitable and relevant criteria, i.e the number of patent applications and the size of the market. Participating Member States shall use the amount of the renewal fees allocated to them for patent-related purposes.

BUDGETARY IMPLICATIONS: the proposal has no impact on the Union budget.

DELEGATED ACTS: the proposal contains provisions delegating to the Commission the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union in respect of the level of the renewal fees for European patents with unitary effect and the distribution of such fees between the European Patent Organisation and the participating Member States.