

**Proposal for a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection**

The IP Federation represents IP-intensive companies in the United Kingdom (see list of members attached). All our members are extensive users of the patent system in Europe, both as applicants and litigators (either plaintiffs or defendants in patent actions), and employ their own in-house patent professionals.

In our [policy paper 09/10](#), we commented on the principles expressed in the proposal for a Council Regulation (EU) on the translation arrangements for the European Union patent as they then stood. We were concerned that Council's failure at the end of 2010 to reach unanimity on the translation arrangements could have put the whole EU patent project in jeopardy.

The members of the Federation thus welcome the Commission's recent proposal to invoke enhanced cooperation in order to move forward with the creation of a unitary patent in Europe, as a further option for obtaining patent protection. In particular, we are fully in support of the request for enhanced cooperation dated 8 December 2010 from Baroness Wilcox on behalf of the UK Government. We share concerns about any extension of the EU Court of Justice's role in interpreting substantive patent law.

The proposal was approved by the Legal Affairs Committee on 27 January 2011. Although there is an understandable desire not to lose the momentum of the progress that has already been achieved, it is important not to rush proposals through without due care and full consultation.

The proposal to invoke enhanced cooperation says very little about the litigation arrangements for EU patents. The Federation feels it is unthinkable to create an EU patent without a very clear idea of how such patents will be enforced and challenged. To this end, the Federation urges that both aspects of the EU patent reform project continue to be given at least equal priority.

In order to simplify the litigation arrangements for EU patents, the Federation suggests that, instead of a unified patent litigation system dealing with both EU patents and existing patents granted under the European Patent Convention (EPC), the new Court should - at least at the outset - restrict itself to EU patents granted under the provisions resulting from enhanced cooperation. There are legitimate reasons why the proprietor of a patent under the EPC, or indeed the other party in infringement or other legal proceedings, may prefer to litigate the patent under the existing national provisions. Once the EU patent court has a proven track record of reliable

judgements and efficiency, extension of its jurisdiction to patents granted under the EPC could be considered.

However, we accept that the new Court may need to handle existing patents granted under the European Patent Convention from the outset in order to generate the number of cases that would enable the Court to be viable. Even so, the proprietor of a European patent covering both EU and non-EU designated states should be able to choose whether to submit its patent to the jurisdiction of the new Court.

The Federation is concerned that the draft EU Patent Regulation includes provisions relating to infringement and validity of EU patents. This would give the Court of Justice a role in interpreting substantive patent law which, as a non-specialised court, would be undesirable. The Federation proposes that the text establishing a unitary patent should not include substantive patent law provisions. A declaratory provision would be desirable, expressly stating that the competence of the Court of Justice does not extend to issues of substantive patent law.

Finally, the Federation is very wary of the proposed subsidy arrangements for translations. We are not convinced they are helpful, and if subsidies are to remain we would prefer that they are borne fully by the EU, not by the EPO, as that would in essence lead to increased fees for applicants.

We are pleased that steps are being taken to give innovators the option to protect their inventions at an affordable cost with a single patent covering a number of states within the EU territory with minimum translation costs and without needing to validate that patent at a national level as they currently have to do. We hope that a decision may be reached on this issue soon, contributing to the Federation's wishes to make patents available in Europe to all at drastically reduced costs.

IP Federation  
31 January 2011

**IP Federation members 2011**

The IP Federation (formerly TMPDF), represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. It is listed on the European Commission's register of interest representatives with identity no: 83549331760-12.

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