



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
BOT  
delivered on 11 December 2012<sup>1</sup>

**Joined Cases C-274/11 and C-295/11**

**Kingdom of Spain (C-274/11),  
Italian Republic (C-295/11)**  
v

**Council of the European Union**

(Actions for annulment — Authorisation of enhanced cooperation under Articles 20 TEU and 329 TFEU for the establishment of a ‘unitary patent’ — Actions for annulment on the grounds of lack of competence, misuse of powers and infringement of the Treaties — Creation of European intellectual property rights — Article 118 TFEU — Exclusive or shared competence)

1. By their applications, the Kingdom of Spain (Case C-274/11) and the Italian Republic (Case C-295/11) seek annulment of Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection.<sup>2</sup>

### **I – Legal framework**

#### *A – Primary law*

1. The Treaty on European Union
2. Article 20(1) and (2) TEU provides as follows:

‘1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

<sup>1</sup> — Original language: French

<sup>2</sup> — OJ 2011 L 76, p. 53; ‘the contested decision’.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.'

2. The Treaty on the Functioning of the European Union

3. Article 3(1) TFEU provides:

'The Union shall have exclusive competence in the following areas:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.'

4. Under Article 4(1) and (2) TFEU:

'1 The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;

...'

5. The contested decision was adopted on the basis of Article 329(1) TFEU, which provides:

'Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.'

6. Under Article 326 TFEU, any enhanced cooperation is to comply with the Treaties and EU law. Such cooperation is not to undermine the internal market or economic, social and territorial cohesion. It is not to constitute a barrier to or discrimination in trade between Member States, nor is it to distort competition between them.

7. In the words of Article 327 TFEU:

‘Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.’

8. Furthermore, Article 330 TFEU, still concerning enhanced cooperation, provides:

‘All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

Unanimity shall be constituted by the votes of the representatives of the participating Member States only.

A qualified majority shall be defined in accordance with Article 238(3).’

#### B – *The contested decision*

9. The contested decision authorises the establishment of enhanced cooperation in the area of the creation of unitary patent protection between 25 of the 27 Member States of the Union, the Kingdom of Spain and the Italian Republic having refused to participate.

10. Recital 4 in the preamble to the contested decision states the following:

‘At the Council meeting on 10 November 2010, it was recorded that there was no unanimity to go ahead with the proposed Regulation on the translation arrangements. It was confirmed on 10 December 2010 that insurmountable difficulties existed, making unanimity impossible at the time and in the foreseeable future. Since the agreement on the proposed Regulation on the translation arrangements is necessary for a final agreement on unitary patent protection in the Union, it is established that the objective to create unitary patent protection for the Union could not be attained within a reasonable period by applying the relevant provisions of the Treaties.’

11. In the words of recitals 6 to 16 to the contested decision:

- ‘(6) Enhanced cooperation should provide the necessary legal framework for the creation of unitary patent protection in participating Member States and ensure the possibility for undertakings throughout the Union to improve their competitiveness by having the choice of seeking uniform patent protection in participating Member States, as well as contributing to scientific and technological advance.
- (7) Enhanced cooperation should aim at creating a unitary patent, providing uniform protection throughout the territories of the participating Member States, which would be granted in respect of all those Member States by the European Patent Office ([the] EPO). As a necessary part of the unitary patent, the applicable translation arrangements should be simple and cost-effective and correspond to those provided for in the proposal for a Council Regulation [(EU)] on the translation arrangements for the European Union patent, presented by the Commission on 30 June 2010, [<sup>3</sup>] combined with the elements of compromise proposed by the Presidency in November 2010 that had wide support in Council. The translation arrangements would maintain the possibility of filing patent applications in any language of the Union at the EPO, and would ensure compensation of the costs related to the translation of applications filed in languages other than an official language of the EPO. The patent having unitary effect should

3 — COM(2010) 350 final.

be granted only in one of the official languages of the EPO as provided for in the ... European Patent Convention. [<sup>4</sup>] No further translations would be required without prejudice to transitional arrangements which would be proportionate and require additional translations on a temporary basis, without legal effect and purely for information purposes. In any case, transitional arrangements would terminate when high quality machine translations are made available, subject to an objective evaluation of their quality. In case of a dispute, mandatory translation obligations should apply to the patent proprietor.

- (8) The conditions laid down in Article 20 TEU and in Articles 326 [TFEU] and 329 TFEU are fulfilled.
- (9) The area within which enhanced cooperation would take place, the establishment of measures for the creation of a unitary patent providing protection throughout the Union and the setting up of centralised Union-wide authorisation, coordination and supervision arrangements, is identified by Article 118 TFEU as one of the areas covered by the Treaties.
- (10) It was recorded at the Council meeting on 10 November 2010 and confirmed on 10 December 2010 that the objective to establish unitary patent protection within the Union cannot be attained within a reasonable period by the Union as a whole, thus fulfilling the requirement in Article 20(2) TEU that enhanced cooperation be adopted only as a last resort.
- (11) Enhanced cooperation in the area of the creation of unitary patent protection aims at fostering scientific and technological advance and the functioning of the internal market. The creation of unitary patent protection for a group of Member States would improve the level of patent protection by providing the possibility to obtain uniform patent protection throughout the territories of the participating Member States and eliminate the costs and complexity for those territories. Thus, it furthers the objectives of the Union, protects its interests and reinforces its integration process in accordance with Article 20(1) TEU.
- (12) The creation of unitary patent protection is not included in the list of areas of exclusive competence of the Union set out in Article 3(1) TFEU. The legal basis for the creation of European intellectual property rights is Article 118 TFEU, which falls within Chapter 3 (Approximation of Laws) of Title VII (Common Rules on Competition, Taxation and Approximation of Laws), and makes a specific reference to the establishment and functioning of the internal market, which is one of the shared competences of the Union according to Article 4 TFEU. The creation of unitary patent protection, including applicable translation arrangements, therefore falls within the framework of the Union's non-exclusive competence.
- (13) Enhanced cooperation in the area of the creation of unitary patent protection complies with the Treaties and Union law, and does not undermine the internal market or economic, social or territorial cohesion. It does not constitute a barrier to, or discrimination in, trade between Member States and does not distort competition between them.
- (14) Enhanced cooperation in the area of the creation of unitary patent protection respects the competences, rights and obligations of non-participating Member States. The possibility of obtaining unitary patent protection on the territories of the Member States participating does not affect the availability or the conditions of patent protection on the territories of non-participating Member States. Moreover, undertakings from non-participating Member States should have the possibility to obtain unitary patent protection on the territories of the

4 — Convention signed at Munich on 5 October 1973 and entered into force on 7 October 1977 ('the EPC').

participating Member States under the same conditions as undertakings from participating Member States. Existing rules of non-participating Member States determining the conditions of obtaining patent protection on their territory remain unaffected.

- (15) In particular, enhanced cooperation in the area of the creation of unitary patent protection would comply with Union law on patents since enhanced cooperation would respect pre-existing *acquis*.
- (16) Subject to compliance with any conditions of participation laid down in this Decision, enhanced cooperation in the area of the creation of unitary patent protection is open at any time to all Member States willing to comply with the acts already adopted within this framework in accordance with Article 328 TFEU’.

## **II – Forms of order sought by the parties**

### *A – In Case C-274/11*

12. The Kingdom of Spain claims that the Court should:

- annul the contested decision; and
- order the Council to pay the costs.

13. The Council contends that the Court should:

- dismiss the action; and
- order the Kingdom of Spain to pay the costs.

### *B – In Case C-295/11*

14. The Italian Republic claims that the Court should:

- annul the contested decision; and
- order the Council to pay the costs.

15. The Council contends that the Court should:

- dismiss the action; and
- order the Italian Republic to pay the costs.

16. As regards Case C-274/11, by a first order of the President of the Court of 27 October 2011 the Italian Republic was granted leave to intervene in support of the form of order sought by the Kingdom of Spain and the Polish Republic was granted leave to intervene in support of the form of order sought by the Council. By a second order of the President of the Court of the same date, the Republic of Latvia, Ireland, the Commission, the Federal Republic of Germany, the Parliament, the Kingdom of Belgium, the Kingdom of Sweden, the Kingdom of the Netherlands, the Czech Republic, Hungary, the French Republic and also the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council.

17. As regards Case C-295/11, by order of the President of the Court of 13 October 2011, the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Italian Republic, and the Republic of Latvia, Ireland, the Federal Republic of Germany, the Kingdom of the Netherlands, the Kingdom of Belgium, the Kingdom of Sweden, the Parliament, the Commission, the Czech Republic, the French Republic, Hungary, the United Kingdom of Great Britain and Northern Ireland and also the Republic of Poland were granted leave to intervene in support of the form of order sought by the Council.

18. By order of the President of the Court of 10 July 2012, Cases C-274/11 and C-295/11 were joined for the purposes of the oral procedure and judgment.

### **III – The actions**

19. In my view, the Kingdom of Spain and the Italian Republic raise six pleas in law in support of their actions.

20. By a first plea, the Kingdom of Spain and the Italian Republic claim that the Council was not competent to establish enhanced cooperation. In their submission, that competence belongs solely to the Union. Accordingly, in adopting the contested decision, the Council infringed Article 20(1) TEU, which provides that enhanced cooperation may be established solely in matters coming within the non-exclusive competences of the Union.

21. By a second plea, the Kingdom of Spain and the Italian Republic maintain that the adoption of the decision authorising enhanced cooperation in the area of the creation of unitary patent protection constitutes a misuse of powers. They maintain that, contrary to what is provided for in Article 20 TEU, the true objective of that decision was not to integrate all the Member States by means of a multi-speed integration, but to exclude the Kingdom of Spain and the Italian Republic from the negotiations on the issue of the language arrangements for the unitary patent.

22. By a third plea, the Kingdom of Spain takes issue with the Council for having failed to respect the judicial system of the Union by not specifying, in the contested decision, the judicial regime envisaged in unitary patent matters.

23. By a fourth plea, the Kingdom of Spain and the Italian Republic argue that, in adopting the contested decision, the Council failed to fulfil the ‘last resort’ condition stipulated in Article 20(2) TEU.

24. A fifth plea alleges infringement of the first paragraph of Article 118 TFEU, Article 326 TFEU and the first subparagraph of Article 20(1) TEU. In particular, the Kingdom of Spain and the Italian Republic maintain that the contested decision infringes Article 326 TFEU, in so far as it undermines the internal market and economic, social and territorial cohesion, constitutes a barrier to and discrimination in trade between Member States and distorts competition between them.

25. Last, by a sixth plea, the Kingdom of Spain maintains that the contested decision fails to comply with Articles 327 TFEU and 328 TFEU. First, the decision obliges the Kingdom of Spain to waive its right under Article 65 of the EPC to require a translation of the patent specification into Spanish in order for it to produce legal effects in Spain; and, second, the condition that enhanced cooperation be open to non-participating Member States, laid down in Article 328 TFEU, is not fulfilled, in so far as that cooperation makes provision for a language regime which the Kingdom of Spain cannot accept.



## A – Preliminary observations

26. For the first time since the enhanced cooperation mechanism was created by the Treaty of Amsterdam, the Court is called upon to consider the legality of a decision authorising such cooperation. In order to do so, the Court will have to define the parameters of the review of compliance with the conditions of authorisation, in order to ascertain whether that cooperation is lawful.

27. To my mind, that review must be a limited review. As Advocate General Jacobs observed, ‘it is important to bear in mind the limits of the Court’s power to review legislative measures adopted by the Council. Those limits arise from the fundamental principle of the separation of powers within the Communities. Where the Treaty has conferred wide legislative powers on the Council, it is not for the Court to substitute its own assessment of the economic situation or of the necessity or suitability of the measures adopted for those of the Council. By doing so it would usurp the legislative role of the Council by imposing its own views of the economic policies to be pursued by the Communities.’<sup>5</sup>

28. In the present instance the choice of establishing enhanced cooperation is made by the Council, which grants authorisation on a proposal from the Commission and after obtaining the consent of the Parliament.<sup>6</sup> In the context of that procedure, those institutions are required to assess, on the basis of numerous elements, the effects of the enhanced cooperation, to weigh up the various interests at stake and to make political choices on matters within their own area of responsibility. It is in the light of those elements that the Council will determine whether enhanced cooperation is the appropriate measure, in accordance with the second subparagraph of Article 20(1) TEU, to further the objectives of the Union, protect its interests and reinforce its integration process.

29. In that regard, the Court has always recognised that the EU legislature has a wide discretion as to the nature and scope of the measures to be taken in the areas of Union action. It thus confines itself to reviewing whether, in the exercise of that freedom of choice, the EU legislature has made a manifest error or misused its powers or has manifestly exceeded the bounds of its discretion.<sup>7</sup>

30. It is in the light of those considerations, therefore, that, in my view, the Court will have to review the legality of the contested decision.

## B – *The plea alleging lack of competence to establish enhanced cooperation with a view to the creation of the unitary patent*

### 1. Arguments of the parties

31. The Kingdom of Spain and the Italian Republic maintain that the contested decision infringes Article 20(1) TEU. They submit that the area within which enhanced cooperation is to be exercised and which, according to recital 9 to the contested decision, is identified by Article 118 TFEU, does not come within the competences shared between the Union and the Member States, as set out in Article 4 TFEU, but within the exclusive competences of the Union, under Article 3(1)(b) TFEU,

<sup>5</sup> — See point 23 of the Opinion in Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475.

<sup>6</sup> — See the second subparagraph of Article 329(1) TFEU.

<sup>7</sup> — See, in particular, Case 78/74 *Deuka* [1975] ECR 421, paragraph 9; Case 84/87 *Erpelding* [1988] ECR 2647, paragraph 27; Joined Cases C-254/94, C-255/94 and C-269/94 *Fattoria autonoma tabacchi and Others* [1996] ECR I-4235, paragraph 56; Case C-354/95 *National Farmers’ Union and Others* [1997] ECR I-4559, paragraph 50; and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 48 and the case-law cited. See also, to that effect, Case C-425/08 *Enviro Tech (Europe)* [2009] ECR I-10035, paragraph 47 and the case-law cited.

namely the establishing of the competition rules necessary for the functioning of the internal market. Consequently, as Article 20(1) TEU excludes any enhanced cooperation in the area of the exclusive competences of the Union, it is not possible to put in place enhanced cooperation relating to the creation of a unitary patent.

32. In the Italian Republic's submission, Articles 3 TFEU to 6 TFEU set out only an indicative classification of the areas of the Union's competence. The effective scope of each competence must be determined in the light of the provisions of the Treaties relating to each area, as stated in Article 2(6) TFEU.

33. Next, the Kingdom of Spain and the Italian Republic maintain that, although Article 118 TFEU refers to the establishment and functioning of the internal market and although it is inserted, as part of Title VII of Part Three – concerning common rules on competition, taxation and approximation of laws –, in Chapter 3 on approximation of laws, it does not confer on the Union a general power of harmonisation in respect of intellectual property rights for the purpose of ensuring uniform protection for such rights in the internal market, but confers a specific competence to create those rights and to set up centralised Union-wide authorisation, coordination and supervision arrangements. The matter referred to in Article 118 TFEU is therefore a rule of competition necessary for the functioning of the internal market and thus comes within the exclusive competence of the Union set out in Article 3(1)(b) TFEU.

34. The Kingdom of Spain further submits that, in view of their nature as rights of exclusivity and exclusion, patents give the holder a monopoly and thus restrict free competition and the free movement of goods and services. That tends to show that the creation of a unitary patent is connected with the establishment of competition rules necessary for the functioning of the internal market.

35. Last, in the Italian Republic's submission, the creation of a new legal form at Union level, as provided for in Article 118 TFEU, does not come within the competence of the Member States. In support of that argument, the Italian Republic explains that, if it were considered that enhanced cooperation could be set up on the basis of Article 118 TFEU, that would amount to accepting the possibility that several European rights might coexist on the territory of the Union. That provision, the objective of which is to ensure the existence of a single right capable of guaranteeing uniform protection of intellectual property rights in the Union, would thus be deprived of all practical effect. That analysis shows that the matter referred to in Article 118 TFEU does indeed come within an area in which the Union has exclusive competence.

36. The Council observes that the rules on the protection of intellectual property rights relate to the internal market and that in that area the Union has shared competence, in accordance with Article 4(2)(a) TFEU. As Article 118 TFEU makes express reference to the establishment and functioning of the internal market, the subject-matter dealt with by the enhanced cooperation, under the contested decision, therefore comes within the ambit of the competence shared between the Union and the Member States.

37. The Council contends, moreover, that it is not the nature of the measures taken by the Union, namely a harmonisation measure, the creation of a European right or the conclusion of an international agreement, that determines the exclusive competence of the Union, but the area to which those measures belong.

38. The Council observes, in addition, that Title VII of Part Three of the FEU Treaty, entitled 'Common rules on competition, taxation and approximation of laws', contains three chapters, namely Chapter 1, entitled 'Rules on competition', Chapter 2, entitled 'Tax provisions', and Chapter 3, entitled 'Approximation of laws', Article 118 TFEU being in the last-mentioned chapter. In addition, the



Council asserts that Chapter 1, entitled ‘Rules on competition’, contains no legal basis for the establishment of intellectual property rights. Accordingly, the creation of those rights, as the enhanced cooperation provides, does indeed relate solely to the internal market, an area of competence shared between the Union and its Member States.

39. The parties intervening in support of the Council fully support the Council’s arguments. The Commission and the United Kingdom maintain, in particular, that the Italian Republic is confusing the *nature* of the competences conferred on the Union and the *instruments* envisaged for the exercise of those competences. The Commission maintains, in that regard, that the fact that a measure, such as the unitary patent, can be adopted only by the Union does not necessarily imply that the Union has exclusive competence. The only question is whether, in a specific area, the Member States have retained powers to act or rather whether they have conferred on the Union alone the power to legislate and to adopt binding measures.

## 2. My assessment

40. The Kingdom of Spain and the Italian Republic submit that there is no shared competence between the Union and the Member States for the purpose of setting up enhanced cooperation in the area of the unitary patent. They maintain, in essence, that the creation of such a patent comes within the exclusive competences of the Union, since it forms part of the competition rules necessary for the functioning of the internal market.

41. I do not agree with that analysis, for the following reasons.

42. Before the Treaty of Lisbon, those who drafted the earlier Treaties had not addressed the question of the sharing of competences between the Union and its Member States. At most, it was indicated that the Community was acting within the limits of the competences conferred on it, and the objectives assigned to it, by the Treaties and that, in the areas not within its exclusive competence, the Community would intervene, in accordance with the principle of subsidiarity, only where and in so far as the objectives of the proposed action could not be sufficiently attained by the Member States.

43. At the European Councils of Nice, in 2000, and Laeken, in 2001, the Member States clearly expressed their desire that the sharing of competence between the Union and the Member States be clarified.<sup>8</sup> Thus, in the Laeken declaration on the future of the European Union,<sup>9</sup> the European Council, taking that topic as one of the four broad topics for discussion, considered that it was necessary to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union. It went on to state that a first series of questions that needed to be put concerned how the division of competence could be made more transparent. To that end, it raised the question whether a clearer distinction could be drawn between three types of competence, namely the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States.<sup>10</sup>

8 — See, on that subject, Note from the Praesidium of 15 May 2002 on the ‘Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored’ (CONV 47/02). In particular, examination of the delimitation of that competence was required in order to respond to criticism from the Member States themselves, which were of the view that the Union should take less action in certain areas and more in others (point 1).

9 — Declaration adopted on 15 December 2001.

10 — See also Declaration No 23 on the future of the Union, annexed to the Treaty of Nice.

44. That desire subsequently took concrete form in the Treaty of Lisbon, which established a true categorisation of competence, clearly sharing competence between the Union and the Member States,<sup>11</sup> in accordance with the principle of conferral.<sup>12</sup> Thus, Article 1 TFEU states that '[t]his Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences'. In that regard, Title I of Part One of that Treaty is unambiguous, since it is entitled 'Categories and areas of Union competence'. Under that Title, Article 2(1) TFEU provides that, '[w]hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts'.

45. Those areas are listed in Article 3(1) TFEU, which covers, in particular, the establishing of the competition rules necessary for the functioning of the internal market.

46. Still under Title I of Part One of the FEU Treaty, Article 4(2) of that Treaty sets out the principal areas in which the Union and the Member States have shared competence. The internal market is one of those areas, pursuant to point (a) of that provision.

47. In the light of those factors, it is clear that, contrary to the arguments put forward by the Kingdom of Spain and the Italian Republic, what is decisive for the purpose of determining whether competence is exclusive or shared is not whether the Union alone is able to adopt a measure having effect throughout the territory of the Union, but the area to which the proposed measure belongs.

48. In that regard, I consider that, contrary to the contentions of the Kingdom of Spain and the Italian Republic, the FEU Treaty establishes an exhaustive, and not merely an indicative, list of the areas in which the Union has exclusive competence.

49. In effect, when compared with the wording of Article 4(2) TFEU, the wording of Article 3(1) TFEU shows that only the areas listed in that provision come within the exclusive competence of the Union. Thus, Article 3(1) TFEU states that '[t]he Union shall have exclusive competence *in the following areas* [<sup>13</sup>]' and Article 4(2) TFEU, which deals with the areas in which the Union and the Member States have shared competence, states that '[s]hared competence between the Union and the Member States applies in *the following principal areas* [<sup>14</sup>]'. It is clear from the latter sentence that those drafting the FEU Treaty did not include in the list in Article 4(2) TFEU all the areas concerned, but concentrated on the principal areas. Such an intention is not in evidence in Article 3(1) TFEU.

50. Article 4(1) TFEU also confirms that analysis, since it provides that '[t]he Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 [TFEU] and 6 [TFEU]'. As shared competences may be characterised as such so long as they are not exclusive competences, exclusive competences must be clearly defined.

51. Furthermore, the exhaustive nature of the list of areas in which the Union has exclusive competence seems to me to be consistent with the principle of conferral set out in Article 5 TEU. Under that principle, the Union is to act only within the limits of the competences which the Member States have conferred on it in the Treaties and competences not conferred on the Union belong to the Member States.

52. That analysis, moreover, is in keeping with the desire of those who drafted the Treaties to clarify the sharing of competence between the Union and the Member States, as I have explained at points 42 to 44 of this Opinion.

11 — See, on that subject, M. Blanquet, 'Compétences de l'Union', *Jurisclasseur Europe*, Vol. 170.

12 — See Article 5(1) TEU.

13 — Emphasis added.

14 — Emphasis added.

53. In view of the elements referred to above, in order to determine whether the creation of the unitary patent, as provided for in Article 118 TFEU, falls within the exclusive competence of the Union or the competence shared between the Union and the Member States, it is appropriate to ascertain the area in which the creation of such a right belongs.

54. On a mere reading of that provision, there is no doubt, to my mind, that the creation of a European intellectual property right relates to the internal market. Indeed, the wording of that provision seems to me to be unequivocal, since it provides that it is '[i]n the context of the establishment and functioning of the internal market' that that right must be created.

55. Next, it is undisputed that rendering intellectual property uniform plays an important role with regard to observance of the fundamental principles of the internal market. It is also clear that when adopting acts relating to intellectual property the EU legislature has always had as its objective the achievement and the smooth functioning of the internal market.<sup>15</sup> In that regard, the Court, in a judgment the facts of which related to the patentability of inventions using embryonic stem cells, emphasised that disparities in the definition of the concept would have the consequence of adversely affecting the smooth functioning of the internal market, at which Directive 98/44 aims.<sup>16</sup>

56. The establishment of a unitary patent therefore does indeed seem to me to seek to achieve the objectives of the Treaties as set out in Articles 3(3) TEU and 26 TFEU, namely the attainment and smooth functioning of the internal market.

57. However, the Kingdom of Spain and the Italian Republic assert that, if the creation of such a patent is in fact necessary for the smooth functioning of the internal market, it nevertheless remains the case that it relates in reality to the establishment of the competition rules and therefore comes within the exclusive competence of the Union, pursuant to Article 3(1)(b) TFEU. I cannot endorse that argument.

58. Pursuant to Article 2(6) TFEU, the scope of and arrangements for exercising the Union's competences are to be determined by the provisions of the Treaties relating to each area. In order to determine the precise content of an area, it is therefore appropriate to refer to the relevant provisions of the FEU Treaty. As regards the competition rules as referred to in Article 3(1)(b) TFEU, the relevant provisions are Articles 101 TFEU to 109 TFEU.

59. Those rules are defined in the FEU Treaty. Title VII of Part Three of that Treaty contains common rules on competition, taxation and approximation of laws. Chapter 1 of Title VII, entitled 'Rules on competition', is itself divided into two sections, the first on rules applying to undertakings and the second on aids granted by States. The rules on competition therefore cover rules as between undertakings and rules directed at the conduct of Member States favouring those undertakings by means of State aid. It must be noted that Articles 101 TFEU to 109 TFEU make no reference to the creation of an intellectual property right.

60. I do not dispute the fact, put forward by the Kingdom of Spain, that, in view of their nature, intellectual property in general and patents in particular give their owner a monopoly that affects competition. The Court has acknowledged, moreover, with respect to the Community trade mark, that it has an essential role in the system of undistorted competition which the FEU Treaty seeks to

15 — See, in particular, recital 5 in the preamble to Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 1998 L 213, p. 13); recital 4 in the preamble to Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1); and also recitals 1 and 3 in the preamble to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

16 — See Case C-34/10 *Brüstle* [2011] ECR-9821, paragraphs 27 and 28.

establish.<sup>17</sup> It is true that the rights which flow from ownership of a patent are capable of affecting trade in goods and services and competitive relationships within the internal market. However, the fact that a legal right, such as the unitary patent, may have an impact on the internal market does not suffice to make it a right relating to the competition rules within the meaning of primary law and, more specifically, within the meaning of Article 3(1)(b) TFEU.

61. Last, in the Italian Republic's submission, the creation of a unitary patent does not constitute the harmonisation or approximation of national laws, as the chapter containing Article 118 TFEU suggests, but the creation of a new European legal right in addition to the existing national rights. Thus, it argues, as the Union is really the only body able to adopt measures relating to the creation of a unitary patent producing effects throughout the territory of the Member States, the creation of such a right necessarily comes within the exclusive competence of the Union.

62. To my mind, that element is not relevant for the purpose of determining the competence of the Union. Article 5(3) TEU provides that, under the principle of subsidiarity, in areas which do not fall within its exclusive competence – therefore in areas of shared competence –, the Union is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level. The fact that the objectives pursued cannot be achieved by the Member States does not therefore mean that the Union has exclusive competence.

63. Admittedly, support for an argument to the contrary could be found in the judgment of 2 May 2006 in *Parliament v Council*,<sup>18</sup> in which the Court acknowledged that the creation of a new legal form at Union level does not constitute the approximation of national laws but is superimposed on those laws, thus precluding the use of Article 114 TFEU as a legal basis.<sup>19</sup>

64. It appears to me, however, that the Court's finding must be seen in the context of that judgment. The issue to be determined in that case was the appropriate legal basis on which a new form of European cooperative society could be adopted, as no provision of the Treaty conferred a specific legal basis for that purpose. The Court observed that, in Opinion 1/94,<sup>20</sup> it accepted that Article 352 TFEU might be used as the basis for creating new intellectual property rights, as Article 114 TFEU was not the appropriate provision, since it is aimed at the approximation of laws and therefore assumes not the creation of a new intellectual property right but harmonisation.<sup>21</sup> The Court inferred that Article 114 TFEU could not constitute an appropriate legal basis for the adoption of the regulation creating a new legal form of the European cooperative society, which was correctly adopted on the basis of Article 352 TFEU, since that regulation, which left unchanged the different national laws already in existence, could not be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but had as its purpose the creation of a new form of cooperative society in addition to the national forms.

65. To my mind, it cannot be inferred from *Parliament v Council* that the creation of intellectual property rights does not come within the competence shared between the Union and the Member States. The question to be determined in that case was whether, in the absence of a specific basis, Article 114 TFEU or Article 352 TFEU was the appropriate legal basis for the creation of a European cooperative society.

17 — See Case C-412/05 P *Alcon v OHIM* [2007] ECR I-3569, paragraph 54, and Case C-48/09 P *Lego Juris v OHIM* [2010] ECR I-8403, paragraph 38.

18 — Case C-436/03 [2006] ECR I-3733.

19 — Paragraphs 36 to 44.

20 — [1994] ECR I-5267.

21 — Paragraph 59.

66. That is not the issue to be determined in the present cases. Since the Treaty of Lisbon Article 118 TFEU has supplied an appropriate legal basis for the creation of intellectual property rights and that provision refers expressly to the establishment and functioning of the internal market, an area which comes within the competence shared between the Union and the Member States.

67. In the light of all the foregoing considerations, I propose that the Court should reject as unfounded the plea alleging lack of competence to set up enhanced cooperation with a view to the creation of the unitary patent.

### *C – The plea alleging misuse of powers*

#### 1. Arguments of the parties

68. The Kingdom of Spain and the Italian Republic maintain that the enhanced cooperation authorised by the contested decision was decided on in order to exclude them and to put an end to the negotiations on the unitary patent and its language arrangements. They submit that, far from achieving integration, which ought to be the objective of the enhanced cooperation mechanism, the Council chose a solution of exclusion.

69. The Italian Republic maintains, moreover, that the contested decision was adopted in order to circumvent the unanimity rule laid down in the second paragraph of Article 118 TFEU in relation to the language arrangements for European intellectual property rights. The enhanced cooperation authorised in that decision therefore has the effect of either excluding the possibility of creating a uniform European patent, as that patent will have effect only on the territory of the participating Member States, or forcing the Kingdom of Spain and Italian Republic to opt for a language arrangement which they do not want. In addition, the Italian Republic asserts that, by the effect of the misuse of powers of which it complains, the spirit of the second paragraph of Article 118 TFEU has not been observed, which constitutes an infringement of the first paragraph of Article 326 TFEU, which provides that any enhanced cooperation is to comply with the Treaties and EU law.

70. In addition, the Kingdom of Spain observes that, so far as it is concerned, there is neither insufficient preparation to assume the obligations and competence which the unitary patent regime entails nor a lack of political will to assume them. Only the language arrangements constituted an insurmountable difficulty for the Kingdom of Spain, since it was not prepared to accept the arrangement proposed by the Commission. The contested decision therefore has no effect other than to exclude the Kingdom of Spain from the negotiations on that topic and to circumvent that difficulty.

71. Last, the Kingdom of Spain submits that the enhanced cooperation authorised by the contested decision is in reality a special agreement within the meaning of Article 142 of the EPC. Under that provision, '[a]ny group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States'. In the Kingdom of Spain's submission, a mechanism provided for by international law, in this instance in the EPC, is introduced into EU law and presented as enhanced cooperation. Accordingly, EU law has been used for purposes other than those provided for by the Treaties.

72. The Council contends, first of all, that the Kingdom of Spain's non-participation in the enhanced cooperation is simply the consequence of its own decision and that the Council had no desire to exclude the Kingdom of Spain and the Italian Republic from that cooperation. It points out that that cooperation remains open to those two Member States at any time, as is stated in recital 16 to the contested decision.



73. The Council observes, next, that enhanced cooperation is correctly put in place where agreement cannot be reached with all the Member States. Its objective is therefore not to exclude certain Member States. Furthermore, the establishment of enhanced cooperation is not subject to the agreement of all the Member States, unless an express exception is laid down in the Treaties, notably where the enhanced cooperation concerns the area of the common foreign and security policy, as provided for in Article 329(2) TFEU.

74. As regards the argument that the contested decision has the effect of circumventing the unanimity rule laid down in the second paragraph of Article 118 TFEU, the Council contends that the fact that only the unanimity of the Member States participating in the enhanced cooperation is required is the necessary consequence provided for by the Treaties when such cooperation is established, specifically by Article 330 TFEU, which provides that unanimity is to be constituted by the votes of the representatives of the participating Member States only.

75. As regards the argument that the contested decision would have the effect of circumventing the provisions of Article 142 of the EPC, the Council submits first of all that the contested decision does not mention that provision. The validity of the contested decision cannot therefore be called into question by that argument. In any event, the Council submits that there is no indication that the contested decision was adopted with the exclusive or, at least, the main purpose of achieving ends other than those stated, within the meaning of the Court's case-law on the misuse of powers.

76. The Member States, and also the Commission and the Parliament, intervening in support of the Council, also support those arguments. In particular, the Kingdom of the Netherlands and the Kingdom of Sweden recall the length and the failure of the negotiations held in order to arrive at a final agreement on the unitary patent. Since such agreement proved impossible to reach, the use of enhanced cooperation was envisaged. The intention was therefore not to exclude the Kingdom of Spain and the Italian Republic but to make progress in integration in that area.

77. In addition, the French Republic observes that the possibility of putting in place enhanced cooperation in an area in which the Council is to act unanimously follows clearly from Article 333(1) TFEU, which states that, '[w]here a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council is to act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority'.

78. In addition, the Czech Republic emphasises that enhanced cooperation enables the Member States concerned to cooperate in a specific area, in spite of being blocked by a minority. Enhanced cooperation is, in that Member State's submission, an equitable solution to the problem of being unable to reach agreement in a specific area. In that regard, the Kingdom of the Netherlands explains that the purpose of the enhanced cooperation mechanism is not ultimately to achieve cooperation between all the Member States but to implement greater integration and cooperation between the Member States that desire it.

79. Last, in response to the Italian Republic's argument that enhanced cooperation cannot be established where the Member States which decide not to take part are, in principle, interested and wish to participate in the legislative process in the area concerned, the Commission contends that, if mere declarations of a desire to participate in an integration project were deemed sufficient to prevent the use of enhanced cooperation, that would amount, in essence, to recognising a right of veto to all Member States.



## 2. My assessment

80. According to settled case-law, an act is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been adopted with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.<sup>22</sup>

81. I agree with the Council, and also the Member States, the Commission and the Parliament intervening in its support, that the contested decision does not constitute a misuse of powers.

82. In accordance with Article 20(1) TEU, enhanced cooperation is to aim to further the objectives of the Union, protect its interests and reinforce its integration process. The establishment of an enhanced cooperation mechanism was inspired by the growing heterogeneity of the Member States and their respective interests or specific needs.<sup>23</sup> That mechanism aims to enable and encourage a group of Member States to cooperate inside rather than outside the Union,<sup>24</sup> where it is established that the objectives pursued by that cooperation cannot be achieved by the Union as a whole. In other words, enhanced cooperation is a means whereby a group of Member States wishing to make progress in a specific matter can deal with a deadlock while remaining within the institutional framework of the Union, in compliance with the conditions laid down in the Treaties.

83. Accordingly, the very fact that, owing to the establishment of enhanced cooperation in the area of the creation of a unitary patent, certain Member States are 'excluded' because they did not wish to participate in that cooperation does not show that the Council misused its powers by authorising that cooperation. That 'exclusion' is the essential feature of the enhanced cooperation mechanism but it is not irreversible, since, under the first subparagraph of Article 328(1) TFEU, enhanced cooperation is to be open to all Member States at any time and it must even be open to participation by as many Member States as possible.<sup>25</sup>

84. Nor do I think that the Council's objective in establishing enhanced cooperation was to circumvent the unanimity rule laid down in the second paragraph of Article 118 TFEU.

85. First, it will be recalled that the enhanced cooperation mechanism was established in order to enable a group of Member States to deal with a deadlock in a specific matter. It is self-evident that deadlock is especially likely to occur in matters which require unanimity in the Council. Accordingly, by first noting the absence of unanimity with respect to the language arrangements for the unitary patent and then deciding to deal with that deadlock by establishing enhanced cooperation, the Council merely made use of a tool available to it, in accordance with the provisions of the Treaties.

86. Second, it should be observed that the FEU Treaty expressly provides that the rules on the vote are to be transferred and applied to all the Member States participating in the enhanced cooperation. Thus, the first and second paragraphs of Article 330 TFEU state that all members of the Council may participate in its deliberations, but that only members of the Council representing the Member States participating in enhanced cooperation are to take part in the vote, and that unanimity is to be constituted by the votes of the representatives of the participating Member States only. The

22 — See, in particular, Case C-310/04 *Spain v Council* [2006] ECR I-7285, paragraph 69 and the case-law cited, and Case C-442/04 *Spain v Council* [2008] ECR I-3517, paragraph 49 and the case-law cited.

23 — See p. 10 of the Note of the Praesidium of 14 May 2003 on enhanced cooperation (CONV 723/03), available at the following internet address: [http://www.europarl.europa.eu/meetdocs\\_all/committees/conv/20030520/723000en.pdf](http://www.europarl.europa.eu/meetdocs_all/committees/conv/20030520/723000en.pdf).

24 — *Ibid.*

25 — Second subparagraph of Article 328(1) TFEU.

decision-making process and the rules on the vote will therefore depend on the matter concerned by the enhanced cooperation. In this case, the language arrangements for the unitary patent will, in accordance with the second paragraph of Article 118 TFEU, have to be determined by the unanimous vote of the participating Member States.<sup>26</sup>

87. Last, the Kingdom of Spain submits that the contested decision is vitiated by misuse of powers on the ground that the use of enhanced cooperation seeks in reality to adopt, in the form of an act of the Union, an instrument which relates to international law, since, in its submission, the contested decision has the effect of circumventing the provisions of Article 142 of the EPC. In that respect, it cites Article 1 of the Commission's proposal of 13 April 2011 for a regulation implementing enhanced cooperation in the area of the creation of unitary patent protection, which provides that that regulation is to constitute a special agreement within the meaning of Article 142 of the EPC.

88. As the French Republic has observed, that argument is in actual fact seeking to cast doubt on the legality of the future regulation implementing enhanced cooperation and not on the legality of the contested decision.

89. In any event, I am unable to see how that argument would show that the Council pursued objectives other than those referred to in the contested decision.

90. In the light of the foregoing considerations, I am of the view that there is no objective, relevant and consistent evidence which proves that the contested decision was adopted with the purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaties.

91. Consequently, I consider that the plea alleging misuse of powers must be rejected as unfounded.

#### *D – The plea alleging failure to respect the judicial system of the Union*

##### *1. Arguments of the parties*

92. The Kingdom of Spain contends that the contested decision ought to have provided for the creation of a judicial regime to which the unitary patent must be subject. It points out, in that regard, that the Court observed, in Opinion 1/09 of 8 March 2011,<sup>27</sup> that the judicial system of the Union is a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions.<sup>28</sup> The Kingdom of Spain maintains, accordingly, that the establishment of new instruments in the context of EU law, without any provision being made for the remedies and procedures that ensure review of the legality of those instruments, is contrary to the judicial system of the Union as conceived by the authors of the Treaties and as established in the case-law.

93. The Council, first, agrees that there will in fact have to be remedies and procedures ensuring review of the legality of intellectual property rights, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union and the case-law of the Court of Justice.

26 — Incidentally, the argument which the Italian Republic raises against the Council is rather surprising, since it does not appear that unanimity was a problem at the time of the authorisation of enhanced cooperation in the context of the law applicable to divorce and legal separation, in which, inter alia, both the Italian Republic and the Kingdom of Spain participated, although one of the matters to which that cooperation relates is that referred to in Article 81(3) TFEU, which also requires unanimity within the Council (see recital 8 in the preamble to Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of law applicable to divorce and legal separation (OJ 2010 L 189, p. 12)).

27 — ECR I-1137.

28 — Paragraph 70.

94. However, it then proceeds to observe that there is no need to create a specific judicial system or specific provisions for the judicial review of every act of secondary law and that it is premature to require provision to be made, in the contested decision, for a specific judicial framework before which the legality of certain acts that have not yet been adopted could be challenged.

95. In any event, the Council submits that the absence of such provisions does not mean the absence of judicial review, since it is for the national authorities to organise that review for all disputes which the Court of Justice has not been given jurisdiction to determine.

96. The Member States and the Commission and the Parliament, intervening on behalf of the Council, support the Council's arguments. The Commission, in particular, adds that the question of the settlement of disputes relating to the unitary patent will be resolved at the time when the acts implementing the enhanced cooperation provided for in the contested decision are adopted and the Kingdom of Sweden submits that the absence of provisions relating to judicial review does not affect the validity of the contested decision.

## 2. My assessment

97. The Kingdom of Spain has brought its action, on the basis of Article 263 TFEU, against a decision adopted by the Council authorising enhanced cooperation on the basis of Article 329 TFEU.

98. The Court must therefore determine whether the conditions that determine the validity of the enhanced cooperation have been satisfied. Accordingly, its review must be limited in this instance to the question whether that decision of the Council fulfils the conditions necessary for the implementation of enhanced cooperation by virtue of Article 20 TEU and Article 326 TFEU et seq.

99. In that regard, the question of the creation of a specific judicial system for unitary patents is not among the conditions required by the relevant articles of the Treaties for the implementation of enhanced cooperation. The authorisation granted by the Council for the setting-up of enhanced cooperation is merely the premiss for the adoption of other legislative acts which will then have to give specific effect to that enhanced cooperation. Furthermore, in its proposal of 13 April 2011 for a regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection,<sup>29</sup> the Council addressed the question of jurisdictional protection of that patent.<sup>30</sup>

100. In the light of the foregoing, therefore, I consider that the plea alleging failure to respect the judicial system of the Union must be rejected as inadmissible.

## E – *The plea alleging breach of the 'last resort' condition*

### 1. Arguments of the parties

101. The Kingdom of Spain and the Italian Republic maintain that, in authorising enhanced cooperation by adopting the contested decision, the Council breached the 'last resort' condition laid down in Article 20(2) TEU. It will be recalled that, under that provision, the decision authorising enhanced cooperation is to be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole.

<sup>29</sup> — COM(2011) 215 final.

<sup>30</sup> — See Article 10 of that proposal (p. 8).

102. In particular, the Kingdom of Spain submits that, while the concept of 'last resort' is, admittedly, not defined, it must none the less be given a strict interpretation. In that regard, that concept implies, in the present case, that the legislative proposal under discussion must have been reasonable and not abusive or discriminatory, failing which disagreement between the Member States would be inevitable.

103. The Italian Republic acknowledges, in that regard, that the declaration of compliance with the 'last resort' condition can be reviewed by the Court only to a limited degree, since it is a matter for the discretion of the Council alone, while the role of the EU judicature is limited to finding whether there has been a manifest error of assessment. However, the error in the present case is a manifest error, in view of the fact that the legislative package on the European patent was from the start to a large extent incomplete and also in view of the brevity of the negotiations devoted to the language arrangements.

104. In that regard, the Kingdom of Spain and the Italian Republic maintain that not all the possibilities of negotiation between the 27 Member States were exhausted and that other solutions relating to the language arrangements could have been proposed. In their submission, the time that elapsed between the abovementioned proposal for a Council regulation, relating to the language arrangements and submitted by the Commission on 30 June 2010, and the proposal for enhanced cooperation also submitted by the Commission, on 14 December 2010,<sup>31</sup> was not sufficient to support the conclusion that enhanced cooperation was decided upon as a last resort and that the objectives of such cooperation could not be attained within a reasonable period. The Kingdom of Spain and the Italian Republic submit that that six-month period could not ensure calm and frank discussion of the various possible options for the language arrangements. By way of comparison with the enhanced cooperation introduced in the context of the law on divorce and legal separation, they note that four years passed before the Commission submitted a legislative proposal and that the possibility of establishing enhanced cooperation was first discussed two years after that proposal had been submitted.

105. In the Council's submission, the Court's review must be limited in this case to examining whether the contested decision is vitiated by a manifest error of assessment. The Council is in fact particularly well placed to assess whether or not agreement on the EU patent within a reasonable period can be envisaged. In that regard, the Council observes that the provisions of the Treaties do not require that a given period of time should elapse between the date of submission of a proposal and the date of authorisation of enhanced cooperation. The important factors to be taken into account, for the purpose of determining whether or not it is likely that the objectives pursued will be attained within a reasonable period, are the intensity and the content of the negotiations and not their duration.

106. The Council notes that, in any event, more than 10 years passed between the submission of the abovementioned proposal for a regulation on the EU patent and the adoption of the contested decision.

107. The Member States and the Commission and the Parliament, intervening in support of the Council, are agreed that negotiations on the language arrangements had reached an impasse. The Commission, in particular, adds that, according to settled case-law, where a party maintains that the competent institution has made a manifest error of assessment, the Courts of the Union must appraise whether that institution carefully and impartially examined all the elements of the case on which its conclusions are based.<sup>32</sup> The Commission observes that the Kingdom of Spain and the Italian Republic do not explain what factual or substantive elements the Council failed to take into consideration or examined without the requisite precision and impartiality.

31 — Proposal for a Council decision authorising enhanced cooperation in the area of the creation of unitary patent protection (COM(2010) 790 final).

32 — See, in particular, Case C-326/05 P *Industrias Químicas del Vallés v Commission* [2007] ECR I-6557, paragraph 77 and the case-law cited.

## 2. My assessment

108. As we have seen, enhanced cooperation is a tool made available to a group of Member States which wish to proceed when an action cannot succeed with the participation of the Union as a whole. In no case must that tool be used in order to avoid compromise, which must be sought above all. To my mind, that is why cooperation must come into play as a *last resort*, when it is established that the objectives pursued by that cooperation cannot be attained within a *reasonable period* by the Union as a whole.

109. Neither the ‘last resort’ condition nor the concept of a reasonable period has been defined in the text of the Treaties.

110. As regards the concept of ‘last resort’, it should be noted that, following adoption of the Treaty of Amsterdam, Article 43(1)(c) EU, as worded prior to the Treaty of Lisbon, provided that closer cooperation could be established only ‘where the objectives of the ... Treaties could not be attained by applying the relevant procedures laid down therein’. That choice of words tended to demonstrate that the Council had to follow the legislative process to its conclusion and that it was only where the proposed measure was rejected that enhanced cooperation could be envisaged.<sup>33</sup>

111. With the Treaty of Nice and, above all, the Treaty of Lisbon, it would appear that the authors of the Treaties wished to relax that condition, since there is no longer any reference to the ‘relevant procedures [laid down in the Treaties]’. It can be seen from the negotiations on the Treaty of Nice, moreover, that the ‘last resort’ condition was regarded as a major obstacle to the introduction of enhanced cooperation.<sup>34</sup> Accordingly, it is clear that that condition is not necessarily the fact that a legislative proposal has been rejected by a vote, but rather the fact that there is a genuine deadlock, which could arise at all levels of the legislative process and which demonstrates that it is impossible to arrive at a compromise.<sup>35</sup> Enhanced cooperation would thus be the tool used as a last resort, where it is established that no compromise will be found by means of the normal legislative procedure. In that regard, the Parliament has used the expression ‘option of last resort in cases of political emergency’.<sup>36</sup>

112. Of course, in order to maintain and encourage compromise solutions, the Council must ascertain that it is clear that that compromise cannot be found within a reasonable period.

113. The EU Treaty does not define the concept of a ‘reasonable period’ either. I would observe, however, that Article 20(2) TEU makes clear that it is for the Council to establish whether the objectives of cooperation cannot be attained within a reasonable period by the Union as a whole. That, to my mind, may be explained by the fact that the Council is still best placed to assess whether, in time, an agreement might be reached within it. The Council is the only one to know all the ins and outs of the legislative process, the terms of the discussions and the situations in which it may be faced with deadlock.

114. In the light of those factors, and also of the factors set out at points 27 to 29 of this Opinion, I believe that the Council has a wide discretion to determine whether enhanced cooperation is indeed adopted as a last resort and to establish that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole.

33 — See, on that topic, H. Bribosia, ‘Les coopérations renforcées: quel modèle d’intégration différenciée pour l’Union européenne? – Analyse comparative du mécanisme général de la coopération renforcée, du projet de coopération structure permanente en matière de défense, et de la pratique d’autres coopérations renforcées “prédéterminées” en matière sociale, au sein de l’Espace de liberté, sécurité et justice, et dans l’Union économique et monétaire’, Thesis of 26 June 2007, European University Institute, Florence, p. 97.

34 — See Conference of the Representatives of the Governments of the Member States on the Position Paper from Germany and Italy, 4 October 2000 (CONFER 4783/00), p. 4.

35 — See, to that effect, p. 18 of the note cited in footnote 23.

36 — See point 10 of the Resolution on the implementation of the Amsterdam Treaty: implications of closer cooperation (OJ 1998 C 292, p. 143).



115. Furthermore, that desire on the part of the authors of the Treaties to leave a wide discretion to the Council when appraising the last resort and the reasonable period is in my view confirmed by the fact that they did, however, take care to lay down time-limits in the specific enhanced cooperation procedures for the establishment of a European Public Prosecutor's Office and in police cooperation. As regards the former, the second and third subparagraphs of Article 86(1) TFEU provide that, in the absence of unanimity concerning the establishment of a European Public Prosecutor's Office, a group of at least nine Member States may request that the draft regulation be referred to the European Council. Within four months, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of that draft regulation, they are to notify the Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation is to be deemed to be granted. The same procedure applies with respect to police cooperation.<sup>37</sup>

116. Consequently, as the Council has a wide discretion when assessing whether the objectives of enhanced cooperation cannot be attained within a reasonable period by the Union as a whole, within the meaning of Article 20(2) TEU, the Court's review must be limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether the Council has manifestly exceeded the bounds of its discretion.<sup>38</sup>

117. In particular, the Union judicature must review whether the Council has examined, carefully and impartially, all the relevant elements of the individual case, elements which support the conclusions reached.<sup>39</sup>

118. I would observe at the outset that, in the light of the relevant elements put forward by the Kingdom of Spain and the Italian Republic, by the Council and also by the parties intervening in support of the Council and in the light of the various acts which ultimately led to the adoption of the contested decision, the Council has not in my view made a manifest error of assessment.

119. In its Proposal of 14 December 2010 for a Council decision, referred to above, the Commission set out the successive stages of the legislative process undertaken for that purpose, which are described more succinctly at recitals 3 and 4 to the contested decision and which justify recourse to enhanced cooperation.

120. Thus, a first Proposal for a Council regulation on the Community patent was submitted by the Commission on 1 August 2000.<sup>40</sup> The purpose of that proposal was, in particular, to propose simple and affordable translation arrangements by enabling the patent to be issued in one of the official languages of the EPO and the claims to be translated into the other two languages. However, it is apparent from a press release of 26 November 2001 that '[t]he Council held a long discussion on the different aspects of the draft Community patent, in particular the language arrangements and the role of national patent offices in relation to [the EPO, but that, in spite of] all efforts, it was not possible to reach agreement at this Council meeting'.<sup>41</sup>

37 — See the second and third subparagraphs of Article 87(3) TFEU.

38 — See, in particular, *Enviro Tech (Europe)*, paragraph 47 and the case-law cited.

39 — See *Industrias Químicas del Vallés v Commission*, paragraph 77 and the case-law cited.

40 — COM(2000) 412 final.

41 — See p. 19 of Press Release 14400/01 (Presse 440) on the 2389th Council meeting Internal Market, Consumer Affairs and Tourism, available at the following internet address: [www.europa.eu/rapid/press-release\\_PRE-01-440\\_en.htm](http://www.europa.eu/rapid/press-release_PRE-01-440_en.htm).



121. It follows, moreover, from a press release of 20 December 2001 that the Council continued to discuss the creation of a Community patent, focusing in particular on the language arrangements, but without reaching unanimous agreement.<sup>42</sup> The discussions continued until 11 March 2004,<sup>43</sup> when the Council concluded that it was impossible to reach a political agreement, owing to the question of the language arrangements.<sup>44</sup>

122. The discussions were then resumed in 2008 under the Slovenian presidency. In particular, the Slovenian presidency submitted a revised proposal for a Council regulation on the Community patent, on 23 May 2008.<sup>45</sup> The Commission explains in its abovementioned proposal for a Council decision of 14 December 2010 that that revised proposal for a regulation was discussed at length within the Council under the successive presidencies of 2008 and 2009.<sup>46</sup>

123. Finally, with the entry into force of the Treaty of Lisbon and the new legal basis for the creation of an intellectual property right, namely Article 118 TFEU, the Commission adopted on 30 June 2010 the Proposal for a Council regulation on the translation arrangements for the European Union patent, referred to above. That proposal was the subject of much discussion<sup>47</sup> and it was eventually at the Council meeting of 10 November 2010 that note was taken of the absence of unanimity concerning that proposal.<sup>48</sup> The Council confirmed on 10 December 2010 that insurmountable difficulties existed, making unanimity impossible at the time and in the foreseeable future.<sup>49</sup>

124. In my view, on the basis of the circumstances of the present case, the Council was correct to conclude that, after years of discussions, which always ended in failure, it was unable to secure a unanimous vote and thus to be successful in an action with the participation of all the Member States.

125. It does not therefore appear that the Council made a manifest error in its overall assessment of the situation. It is clear that no instrument of normal legislative procedure made it possible to break the deadlock at that time and for the future. Enhanced cooperation thus appeared to be the last resort in order to attain the objectives pursued.

126. Consequently, in the light of the foregoing considerations, I consider that the plea alleging breach of the 'last resort' condition must be rejected as unfounded.

42 — See p. 4 of Press Release 15489/01 (Presse 489) on the 2403<sup>rd</sup> Council meeting – Internal Market, Consumer Affairs and Tourism, available at the following internet address: [www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/intm/DOC.69297.htm](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/DOC.69297.htm).

43 — See p. 15 of Press Release 6874/03 (Presse 59) on the 2490th Council meeting (Internal Market, Industry and Research), 3 March 2003, available at the following internet address: <http://register.consilium.europa.eu/pdf/en/03/st06/st06874.en03.pdf>, and p. 11 of Press Release 15141/03 (Presse 337) on the 2547th Council meeting – Competitiveness (Internal Market, Industry and Research), 26 and 27 November 2003, available at the following internet address: <http://register.consilium.europa.eu/pdf/en/03/st15/st15141.en03.pdf>.

44 — See p. 15 of Press Release 6648/04 (Presse 62) on the 2570th Council meeting – Competitiveness (Internal market, Industry and Research), 11 March 2004, available at the following internet address: <http://register.consilium.europa.eu/pdf/en/04/st06/st06648.en04.pdf>.

45 — Proposal available on the Council's internet site, serial number 9465/08.

46 — P. 4.

47 — See, in particular, Council documents serial numbers 13031/10, 14377/10 and 15395/10.

48 — See Press Release 16041/10 (Presse 297) on the Extraordinary Council meeting 'Competitiveness (Internal Market, Industry, Research and Space)' of 10 November 2010.

49 — See recital 4 to the contested decision.

*F – The plea alleging infringement of the first paragraph of Article 118 TFEU, Article 326 TFEU and the first subparagraph of Article 20(1) TEU*

1. Arguments of the parties

127. The Kingdom of Spain and the Italian Republic submit that the contested decision infringes Article 326 TFEU, which provides that enhanced cooperation is not to undermine the internal market or economic, social and territorial cohesion and is not to constitute a barrier to or discrimination in trade between Member States, nor is it to distort competition between them.

128. The Kingdom of Spain and the Italian Republic maintain that the enhanced cooperation authorised by the contested decision favours the absorption of the economic and commercial activity relating to innovative products to the detriment of the non-participating Member States. In addition, they take the view that that enhanced cooperation undermines the internal market, free competition and the free movement of goods since unitary patents produce effects on only a part of the territory of the Union.

129. The Kingdom of Spain and the Italian Republic assert that the contested decision would give rise to discrimination between undertakings as, under the language arrangements envisaged at recital 7 to that decision, commercial trade in innovative products will be favoured for undertakings which work in German, English or French, while the trade of undertakings which do not use those languages will be limited. That also amounts to an infringement of Article 326 TFEU.

130. The Italian Republic further submits that, in accordance with the first paragraph of Article 118 TFEU, either the European intellectual property right is uniform and produces effects throughout the territory of the Union or it cannot be attained. In the present case enhanced cooperation does not fulfil that obligation, as it will have the consequence of fragmenting the internal market.

131. Furthermore, that enhanced cooperation would prevent the coherent development of industrial policy and would contribute to increasing the differences between the Member States from a technological viewpoint, thereby undermining economic, social and territorial cohesion. The objective of the patents system is to define clearly the limits of property rights in an innovation, to sustain incentives to invest in research and development and to create the basis of a technology market. Accordingly, the system put in place by enhanced cooperation would secure an important advantage for the participating Member States to the detriment of the non-participating Member States. The Kingdom of Spain adds that the language arrangements that the Council wishes to put in place will decisively limit the transfer of knowledge and hence innovation and also economic and technological development in certain Member States, since the undertakings of the Member States which have a command of the official languages of the unitary patent will have more direct access to the knowledge contained in the patent documents. The Member States concerned will therefore be more inclined to generate innovation and to have greater and more rapid economic growth than the other Member States, whose access to that information will be limited or denied.

132. Last, the Kingdom of Spain contends that the contested decision authorising enhanced cooperation does not meet the objective of strengthening the process of the integration of the Union, contrary to the second subparagraph of Article 20(1) TEU. It takes the view that, far from strengthening the process of integration, that enhanced cooperation causes it to slow down, since its sole purpose, in reality, is to exclude Member States which have raised serious problems relating to the proposed language arrangements for the unitary patent. In imposing a specific language model, the Council is imposing a political choice which has a divisive effect within the Union and which is far from presenting the integrative nature which the enhanced cooperation method must assume.

133. The Council is unable to see how enhanced cooperation, and in particular the language arrangements which it will establish, undermines economic, social and territorial cohesion. It maintains that there is no reason to assume that there will be fewer requests for the validation of patents for the Kingdom of Spain and the Italian Republic.

134. The Council observes that at present undertakings can choose between requesting a European patent in all the Member States or requesting protection in certain Member States, which leads to the fragmentation of the market. The new protection provided by the unitary patent constitutes an additional possibility offered to undertakings, whatever their geographic origin, which would reduce that fragmentation of the market, since those undertakings will be able to benefit from unitary patent protection for the territory of the 25 participating Member States. In reality, the origin of the fragmentation to which the Kingdom of Spain and the Italian Republic refer does not lie in the contested decision, but in the existing situation.

135. As regards the Kingdom of Spain's argument that the contested decision constitutes discrimination owing to the language arrangements which it establishes, the Council contends that that argument is premature and inadmissible, in so far as the final details of those arrangements are not yet known, since the language arrangements have not yet been adopted.

136. The Member States and also the Commission and the Parliament, intervening in support of the Council, support the Council's arguments. In particular, the Commission emphasises that the contested decision is a purely procedural decision, which defines the scope and objectives of enhanced cooperation which has yet to assume a definitive form. The adverse effect, if any, on the internal market would arise solely from the substantive provisions which have not yet been approved, in particular those relating to the language arrangements. The Court should examine solely whether the contested decision necessarily gives rise to enhanced cooperation which would infringe the provisions of the Treaties. The Commission refers, in that regard, to the judgment in *Vodafone and Others*,<sup>50</sup> where it is stated that the Court has acknowledged that the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.<sup>51</sup>

## 2. My assessment

137. The decision authorising the setting-up of enhanced cooperation defines the procedural framework within which other acts will subsequently be adopted in order to give concrete effect to that cooperation. Accordingly, judicial review of the authorisation decision must not be confused with judicial review of the acts subsequently adopted within the context of the enhanced cooperation.

138. Although the Council did indeed refer in the contested decision to what the language arrangements for the unitary patent might be, the question of those language arrangements is not a condition that determines the validity of the decision authorising enhanced cooperation. That question must be addressed at a later stage and form the subject-matter of a separate act adopted unanimously by the participating Member States, in accordance with the procedure laid down in the second paragraph of Article 118 TFEU. It is only in the context of any other action that might be brought against that act that the Court will be able to undertake a judicial review of that act.

<sup>50</sup> — Case C-58/08 [2010] ECR I-4999.

<sup>51</sup> — Paragraph 52 of the judgment.

139. The Court's review is limited to the question whether the contested decision satisfies the conditions necessary for the implementation of enhanced cooperation, in accordance with Article 20 TEU and Article 326 TFEU et seq.<sup>52</sup>

140. I therefore believe that the arguments of the Kingdom of Spain and the Italian Republic relating to the language arrangements for the unitary patent and also those relating to the first paragraph of Article 118 TFEU must be rejected as inadmissible.

141. It is therefore appropriate to consider at this point whether the contested decision satisfies the conditions laid down in Article 326 TFEU. The Kingdom of Spain and the Italian Republic maintain that the contested decision does not satisfy those conditions, as the enhanced cooperation thus authorised would undermine the internal market and also economic, social and territorial cohesion. Furthermore, they argue that that cooperation would constitute a barrier to and discrimination in trade between Member States and would distort competition between them.

142. For the reasons to which I referred at points 27 to 29 of this Opinion, the Court's review must be limited to examining whether the Council manifestly made an error of assessment. More specifically, the Court must ascertain whether the establishment of enhanced cooperation in the area of the creation of the unitary patent is manifestly inappropriate<sup>53</sup> because that cooperation would undermine the internal market and also economic, social and territorial cohesion, would constitute a barrier to and discrimination in trade between Member States and would distort competition.

143. To my mind there is no evidence that it would do so: indeed, it would do precisely the opposite.

144. The contested decision was adopted by the Council on a proposal from the Commission. In that proposal, the Commission carried out an examination in order to ascertain whether the enhanced cooperation envisaged complied with the conditions specified by the relevant provisions of the Treaties. To that end, it referred to the coexistence of the different national patent systems and the European system established within the framework of the EPC. Such diversity of the patent systems gives rise, in the Commission's view, to a fragmentation of the legal protection of patents.<sup>54</sup> The Commission relied, in particular, on an impact assessment, produced in 2010,<sup>55</sup> in which it studied the problems associated with the diversity of the patents systems and the solutions that might be supplied. It found, in particular, that in practice patent owners are at present content to have their inventions protected in a restricted number of Member States, owing, in particular, to the high costs and the complexity which are associated with translation, validation requirements, official fees and the requirement to appoint an approved agent.<sup>56</sup>

145. Relying, in particular, on that proposal,<sup>57</sup> the Council considered that enhanced cooperation on the unitary patent seeks to stimulate scientific and technical progress and also the functioning of the internal market. The creation of protection by a unitary patent for an entire group of Member States would improve the level of protection by giving the possibility to obtain uniform protection throughout the territory of all the participating Member States and would eliminate costs and complexity for those territories.<sup>58</sup>

52 — See point 98 of this Opinion.

53 — See, to that effect, *Swedish Match*, paragraph 48 and the case-law cited, and also Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 80 and the case-law cited.

54 — See pp. 9 and 10 of the Commission's proposal, referred to above.

55 — See the Commission working document, accompanying document to the proposal for a Council regulation on the translation arrangements for the European Union patent, 30 June 2010 (SEC(2010) 796). The document is available in English.

56 — Pp. 9 to 12.

57 — See recitals 3 and 7 to the contested decision.

58 — See recital 11 to the contested decision.

146. Furthermore, at recital 14 to the contested decision the Council states that the undertakings of non-participating Member States should have the opportunity to obtain unitary patent protection on the same conditions as undertakings in participating Member States.

147. I do not believe that the Council's assessment is vitiated by a manifest error.

148. Indeed, it is undisputed that differences in the protection given within the Union for the same invention give rise to fragmentation of the internal market, in particular where such protection may exist in some Member States but not in others.<sup>59</sup> That has the direct consequence that patent holders have great difficulties in preventing the entry on to the territory of the Member States in which they have not registered their patents of goods and products from non-Member States which infringe those patents.

149. Enhanced cooperation relating to the creation of a unitary patent producing uniform effects on the territory of a number of Member States, in this instance the territory of 25 Member States, necessarily helps to improve the functioning of the internal market and to reduce barriers to trade and also the distortion of competition between Member States. On that subject, the Court recognised as long ago as 1968<sup>60</sup> that the national rules relating to the protection of industrial property have not yet been unified within the Union and that, in the absence of such unification, the national character of the protection of industrial property and the variations between the different legislative systems on this matter are capable of creating obstacles both to the free movement of the patented products and to competition within the common market.<sup>61</sup>

150. Nor do I see how the establishment of such enhanced cooperation would undermine economic, social and territorial cohesion. Under Article 174 TFEU, in order to promote its overall harmonious development, the Union is to develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union is to aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions. The objective is therefore to ensure that citizens of the Union have equal opportunities and a high standard of living within each territory of the Union.

151. In this instance, there can be no doubt that a mechanism intended to create a unitary patent entailing uniform protection on the territory of several Member States contributes to the harmonious development of the Union as a whole, since it has the consequence of reducing the existing disparities between those Member States. Moreover, all economic operators could enjoy the benefit of such a patent, since the place of origin of the applicant for a unitary patent is irrelevant for the purpose of obtaining such a patent.<sup>62</sup>

152. It does not appear to me, therefore, that in authorising enhanced cooperation with a view to the creation of a unitary patent the Council manifestly made an error of assessment.

153. Consequently, in the light of the foregoing, I consider that the plea alleging infringement of the first paragraph of Article 118 TFEU, Article 326 TFEU and the second subparagraph of Article 20(1) TEU must be rejected as inadmissible in part and unfounded in part.

<sup>59</sup> — See, to that effect, Case C-350/92 *Spain v Council* [1995] ECR I-1985, paragraphs 34 to 36.

<sup>60</sup> — Case 24/67 *Parke, Davis and Co.* [1968] ECR 55.

<sup>61</sup> — P. 71.

<sup>62</sup> — See recital 14 to the contested decision.



*G – The plea alleging infringement of Articles 327 TFEU and 328 TFEU*

1. Arguments of the parties

154. The Kingdom of Spain observes that Article 327 TFEU provides that any enhanced cooperation is to respect the competences, rights and obligations of those Member States which do not participate in it. However, the Council has adopted language arrangements which oblige the Kingdom of Spain to waive its right under Article 65 of the EPC to require a translation of the patent specification into Spanish in order for it to produce legal effects in Spain. The Kingdom of Spain submits, moreover, that the contested decision does not respect its right to participate in the enhanced cooperation in future, as the Council has adopted language arrangements which that Member States is unable to accept.

155. The Council contends, in that regard, that the Kingdom of Spain's non-participation in the enhanced cooperation is entirely a matter of its own volition. The Council adds that it is clear and reasonable, when the EU institutions establish common rules in a given matter, that the Member States are not free to decide what they want in that matter.

156. Furthermore, the Council and the parties intervening in support of it maintain that this plea is based on the false premiss that it would be materially or legally impossible for the Kingdom of Spain or the Italian Republic to participate in that enhanced cooperation.

2. My assessment

157. It is my understanding that, by such a plea, the Kingdom of Spain maintains, first, that under the contested decision it is required to waive its right under Article 65 of the EPC to require a translation of the patent specification into Spanish in order for it to produce legal effects in Spain, contrary to Article 327 TFEU, and that the condition that enhanced cooperation is to be open to non-participating Member States, laid down in Article 328 TFEU, is not respected, inasmuch as that cooperation makes provision for language arrangements which the Kingdom of Spain is unable to accept.

158. I consider this plea to be inadmissible.

159. In effect, in the context of this plea, the Kingdom of Spain bases its arguments on the language arrangements for the unitary patent and, in particular, on the Proposal of 13 April 2011 for a Council regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.<sup>63</sup>

160. However, as we have seen at points 138 and 139 of this Opinion, the question of those language arrangements is not a condition that determines the validity of the decision authorising enhanced cooperation.

161. The Kingdom of Spain seeks, in reality, to challenge the legality of the future Council regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

162. Consequently, I am of the view that this plea must be rejected as inadmissible.

<sup>63</sup> — COM(2011) 216 final.



#### **IV – Conclusion**

163. In the light of all the foregoing considerations, I propose that the Court should:

- (1) dismiss the actions;
- (2) order the Kingdom of Spain (Case C-274/11) and the Italian Republic (Case C-295/11) to bear their own costs, and the Council of the European Union and the interveners to bear their own costs.