



International Chamber of Commerce

The world business organization

Mr Michel Barnier
European Commissioner for Internal
Market and Services
European Commission
BERL 10/034
B - 1049 Brussels, Belgium

21 January 2011

Subject: European Commission Proposal for enhanced cooperation to create a Unitary Patent in Europe.

Dear Commissioner Barnier,

The International Chamber of Commerce (ICC) welcomes the Commission's recent proposal in response to a request from 12 Member States to invoke enhanced cooperation in order to move forward with the creation of a unitary patent in Europe. We recognize that this proposal is intended to avoid putting the whole EU patent project in jeopardy following the Council's failure on 10 October 2010 to reach unanimity on the translation arrangements.

The Commission, in its Communication Towards a Single Market Act (27.10.10), has articulated its aspiration to have the first EU patents granted in 2014. Although the latest developments unfortunately mean this no longer seems viable, ICC is supportive of measures that will enable the creation of a unitary patent in Europe within a reasonable time frame. Nevertheless, it remains as essential as ever to get it right, not just done quickly.

Enhanced cooperation is of course a compromise approach, and is sub-optimal to the extent that it will actually result in a part-EU patent and, as such, must not be seen as an end in its own right. It is important that as many Member States as possible are on board from the outset in order that a unitary patent has the maximum territorial reach across the EU. It is equally important that enhanced cooperation is seen as a stepping stone for more - and ideally all - Member States to join so that we may eventually attain a true EU patent.

Furthermore, ICC believes that the proposal for a unified patent litigation system in Europe remains at least as important as the creation of an EU patent. To this end, we would urge that both aspects of the EU patent reform project continue to be given at least equal priority, recognizing that a unified Patents Court would be valuable even

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without a unitary patent (i.e. in the context of existing European patents), but that a unitary patent is untenable without a unified Patents Court.

ICC is concerned that the draft EU Patent Regulation agreed in the Council on 4 December 2009 (General Approach) includes provisions relating to infringement and validity of EU patents as this would seem to give the CJEU a role in interpreting substantive patent law which, as a non-specialized court, would be undesirable in our view. ICC proposes that the text establishing a unitary patent should not include substantive patent law provisions. A declaratory provision may also be needed (perhaps in the Draft Agreement on the European and EU Patents Court) expressly stating that the CJEU's competence would not extend to issues of substantive patent law.

A part-EU patent under enhanced cooperation may also give rise to some specific, more detailed concerns for example in relation to the European Patent Convention. However, we can say at this point that amendment to the European Patent Convention is generally not desirable and this remains no less true in the context of enhanced cooperation. We note with approval that, in your letter of 4 November to BusinessEurope, you explain that the Commission is seeking to achieve agreement without a revision of the European Patent Convention. It is likely that we will elaborate more detailed concerns about the proposed Regulation to create the EU patent to your services in the near future.

Finally, ICC is very wary of the proposed subsidy arrangements for translations. We are not convinced they are helpful, and if subsidies are to remain we would prefer that they are borne fully by the EU, not by the EPO, as that would in essence lead to increased fees for applicants. It has always been an important pillar for ICC that an EU patent is cost-competitive. This is no less true for a unitary patent under enhanced cooperation.

We look forward to continuing to work with you and your services towards a unitary patent and a unified patent litigation system that will support and promote the innovative potential and competitiveness of businesses working within the EU.

Yours sincerely,

Jean-Guy Carrier
Secretary General

c. c. Mrs Margot Fröhlinger, Director, Directorate D – Knowledge-Based Economy,
European Commission