JUDGMENT OF THE COURT (Grand Chamber)

16 April 2013 (*)

(Unitary patent – Decision authorising enhanced cooperation under Article 329(1) TFEU – Actions for annulment on grounds of lack of competence, misuse of powers and infringement of the Treaties – Conditions laid down in Article 20 TEU and in Articles 326 TFEU and 327 TFEU – Non-exclusive competence – Decision adopted 'as a last resort' – Preserving the interests of the Union)

In Joined Cases C-274/11 and C-295/11,

APPLICATIONS for annulment under Article 263 TFEU, lodged on 30 and 31 May 2011, respectively,

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent,

applicant,

supported by:

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

intervener,

and

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

supported by:

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent,

intervener,

v

Council of the European Union, represented initially by T. Middleton, F. Florindo Gijón and A. Lo Monaco, and subsequently by T. Middleton, F. Florindo Gijón, M. Balta and K. Pellinghelli, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by C. Pochet, J.-C. Halleux and T. Materne, acting as Agents,

Czech Republic, represented by M. Smolek, D. Hadroušek and J. Vláčil, acting as Agents,

Federal Republic of Germany, represented by T. Henze and J. Kemper, acting as Agents,

Ireland, represented by D. O'Hagan, acting as Agent, assisted by N. J. Travers, BL,

French Republic, represented by E. Belliard, G. de Bergues and A. Adam, acting as Agents,

Hungary, represented by M. Z. Fehér and K. Molnár, acting as Agents,

Kingdom of the Netherlands, represented by C. Wissels and M. de Ree, acting as Agents,

Republic of Poland, represented by B. Majczyna, E. Gromnicka and M. Laszuk, acting as Agents,

Kingdom of Sweden, represented by A. Falk and C. Meyer-Seitz, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by L. Seeboruth, acting as Agent, assisted by T. Mitcheson, Barrister,

European Parliament, represented by I. Díez Parra, G. Ricci and M. Dean, acting as Agents,

European Commission, represented by I. Martínez del Peral, T. van Rijn, B. Smulders, F. Bulst and L. Prete, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič (Rapporteur), T. von Danwitz, J. Malenovský, Presidents of Chambers, U. Lõhmus, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev and C. Toader, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 September 2012,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2012

gives the following

Judgment

1 By their applications, the Kingdom of Spain and the Republic of Italy 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 (OJ 2011 L 76, p. 53) ('the contested decision').

The contested decision

2 The contested decision is worded as follows:

'Having regard to the Treaty on the Functioning of the European Union, and in particular Article 329(1) thereof,

…

Whereas:

1. In accordance with Article 3(3) of the Treaty on European Union (TEU), the Union shall establish an internal market, shall work for the sustainable development of Europe based on balanced economic growth and shall promote scientific and technological advance. The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products across national borders and providing companies with more choice and opportunities contributes to attaining this objective. A unitary patent which provides uniform effects throughout the Union should feature amongst the legal instruments which undertakings have at their disposal.

…

(3) On 5 July 2000, the Commission adopted a proposal for a Council Regulation on the Community patent for the creation of a unitary patent providing uniform protection throughout the Union. On 30 June 2010, the Commission adopted a proposal for a Council Regulation on the translation arrangements for the European Union patent (hereinafter "the proposed Regulation on the translation arrangements") providing for the translation arrangements applicable to the European Union patent.

(4) 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 [sic] create unitary patent protection for the Union could not be attained within a reasonable period by applying the relevant provisions of the Treaties.

(5) In these circumstances, 12 Member States, namely, Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom, addressed requests to the Commission by letters dated 7, 8 and 13 December 2010 indicating that they wished to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection on the basis of the existing proposals supported by these Member States during the negotiations and that the Commission should submit a proposal to the Council to that end. The requests were confirmed at the meeting of the Council on 10 December 2010. In the meantime, 13 more Member States, namely, Belgium, Bulgaria, the Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia have written to the Commission indicating that they also wish to participate in the envisaged enhanced cooperation. In total, 25 Member States have requested enhanced cooperation.

(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 …

(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 (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 on the translation arrangements for the European Union patent, presented by the Commission on 30 June 2010, 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

be granted only in one of the official languages of the EPO … No further translations would be required without prejudice to transitional arrangements …

…

(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 [sic] 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.

…

(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 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.

…

(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.

…

Article 1

The Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland are hereby authorised to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection, by applying the relevant provisions of the Treaties.

Article 2

This Decision shall enter into force on the day of its adoption.'

Procedure before the Court

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

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

5 Written observations were submitted by all the Member States but the Republic of Latvia and by all the institutions intervening in the proceedings ('the interveners').

6 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 of the judgment.

The actions

7 In support of its action, the Kingdom of Spain claims, principally, that the contested decision is vitiated by misuse of powers and failure to have due regard for the judicial system of the Union. In the alternative, it alleges breach of the conditions set forth in Article 20 TEU and in Articles 326 TFEU and 327 TFEU, especially those relating to the non-exclusiveness of those competences whose exercise is authorised in respect of enhanced cooperation, to the requirement that recourse be had to the latter only as a last resort and to not undermining the internal market.

8 In support of its action, the Italian Republic maintains that the contested decision is marred, first of all, by the fact that the Council has no competence to establish enhanced cooperation in order to create protection by a unitary patent ('the enhanced cooperation in question'), next, by misuse of powers and breach of essential procedural requirements, namely, and in particular, failure to give reasons and breach of the condition laid down in Article 20(2) TEU, that the decision authorising enhanced cooperation must be adopted as a last resort and, last, various infringements of Article 20 TEU and of Articles 118 TFEU and 326 TFEU.

9 Cases C-274/11 and C-395/11 having been joined, the arguments put forward in support of the two actions may be rearranged in five pleas in law: first, that the Council lacked competence to establish the enhanced cooperation in question; second, misuse of powers; third, breach of the condition that the decision authorising enhanced cooperation must be adopted as a last resort; fourth, infringements of Articles 20(1) TEU, 118 TEU, 326 TFEU and 327 TFEU and, fifth, disregard for the judicial system of the Union.

The first plea in law: that the Council lacked competence to establish the enhanced cooperation in question

Arguments of the parties

10 The Kingdom of Spain and the Italian Republic claim that the field concerned, that is to say, that of the creation of European intellectual property rights to provide uniform protection of intellectual property rights referred to in Article 118 TFEU, falls, not within the ambit of one of the competences shared by the Member States and the Union, but within that of the exclusive competence of the Union as provided for in Article 3(1)(b) TFEU, concerning 'the establishing of the competition rules necessary for the functioning of the internal market.'

11 In their opinion, the Council has, therefore, no competence to authorise the enhanced cooperation in question. Article 20(1) TFEU excludes any enhanced cooperation within the ambit of the Union's exclusive competences.

12 The applicants emphasise that the legislation on the unitary patent will define the extent and the limitations of the monopoly granted by that intellectual property right. That legislation will thus concern the drafting of rules essential to the preservation of undistorted competition.

13 Moreover, any classification of the competences conferred by Article 118 TFEU as shared competences is, they argue, gainsaid by the fact that what that provision, while making reference to the internal market and despite appearing in the chapter of the FEU Treaty that deals with the approximation of laws, confers on the Union is not the power to harmonise national legislation but a specific power to introduce European intellectual property rights.

14 The Italian Republic adds that Articles 3 to 6 TFEU do no more than set out a non-binding classification of the spheres of the Union's competences. It would, therefore, be permissible for the Court to treat as exclusive the competences conferred by Article 118 TFEU without relying on the list in Article 3(1) TFEU.

15 The Council and the parties intervening in its support argue that the rules governing intellectual property fall within the ambit of the internal market and that, in that sphere, the Union enjoys a shared competence under Article 4(2)(a) TFEU.

Findings of the Court

16 The purpose of the contested decision is to authorise the 25 Member States mentioned in the first article thereof to exercise between themselves the competences conferred by Article 118 TFEU so far as concerns the creation of protection by a unitary patent.

17 In order to determine whether those competences are non-exclusive and may, therefore, in accordance with Article 20 TFEU and subject to the conditions laid down therein and to Articles 326 TFEU to 334 TFEU, be exercised by way of enhanced cooperation, it is of importance to declare straight away that it is '[i]n the context of the establishment and functioning of the internal market' that the first paragraph of Article 118 TFEU confers the competence to create European intellectual property rights and to set up, as regards those rights, centralised, Union-wide authorisation, coordination and supervision arrangements.

18 The competence, conferred by the second paragraph of Article 118 TFEU, to establish language arrangements for those rights is closely bound up with the introduction of the latter and of the centralised arrangements referred to in the first paragraph of that article. As a result, that competence too falls within the ambit of the functioning of the internal market.

19 In accordance with Article 4(2) TFEU, competence shared between the Union and the Member States applies to, inter alia, the area of the 'internal market'.

20 With regard to the Kingdom of Spain and the Italian Republic's argument that the competences conferred by Article 118 TFEU fall within the ambit of the 'competition rules necessary for the

functioning of the internal market' referred to in Article 3(1)(b) TFEU and, therefore, of the Union's exclusive competence, it is to be borne in mind that the area of the 'internal market' mentioned in Article 4(2)(a) TFEU refers, in accordance with the definition given in Article 26(2) TFEU, to 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. Article 26(1) TFEU provides that the Union is to 'adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'.

21 The expression 'relevant provisions of the Treaties' makes it clear that competences falling within the sphere of the internal market are not confined to those conferred by Articles 114 TFEU and 115 TFEU relating to the adoption of harmonisation measures but cover also any competence attaching to the objectives set out in Article 26 TFEU, such as the competences conferred on the Union by Article 118 TFEU.

22 Although it is true that rules on intellectual property are essential in order to maintain competition undistorted on the internal market, they do not, for all that, as noted by the Advocate General in points 58 to 60 of his Opinion, constitute 'competition rules' for the purpose of Article 3(1)(b) TFEU.

23 In this connection it may be recalled that, under 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.

24 The scope of, and arrangements for, exercising the Union's competences in the area of 'competition rules necessary for the functioning of the internal market' are determined in Part Three, Title VII, Chapter 1 of the FEU Treaty, in particular in Articles 101 TFEU to 109 TFEU. To regard Article 118 TFEU as forming part of that area would therefore be contrary to Article 2(6) TFEU and the result would be to extend unduly the scope of Article 3(1)(b) TFEU.

25 That being so, it must be concluded that the competences conferred by Article 118 TFEU fall within an area of shared competences for the purpose of Article 4(2) TFEU and are, in consequence, non-exclusive for the purpose of the first paragraph of Article 20(1) TEU.

26 It follows that the plea claiming that the Council had no competence to authorise the enhanced cooperation in question must be rejected.

The second plea in law: misuse of powers

Arguments of the parties

27 The Kingdom of Spain and the Italian Republic observe that all enhanced cooperation must contribute to the process of integration. In this case, however, they maintain that the true object of the contested decision was not to achieve integration but to exclude the Kingdom of Spain and the Italian Republic from the negotiations about the issue of the language arrangements for the unitary patent and so to deprive those Member States of their right, conferred by the second paragraph of Article 118 TFEU, to oppose language arrangements they cannot approve.

28 They argue that the fact that the FEU Treaty provides, in the second paragraph of Article 118, a particular legislative basis for establishing the language arrangements for a European intellectual property right demonstrates the delicacy of this matter and the improper conduct of the Council. The short period of time elapsing between the Commission's proposal and the adoption of the contested decision is an example of that conduct.

29 The applicants conclude therefrom that the enhanced cooperation procedure was, in this instance, used in order to keep certain Member States out of difficult negotiations and to circumvent the requirement of unanimity, whereas that procedure is, they consider, designed to be used when one

or more Member States is or are not yet ready to take part in a legislative action of the Union in its entirety.

30 The Kingdom of Spain adds that the unitary patent system envisaged by those taking part in the enhanced cooperation has to be analysed as being a special agreement for the purpose of Article 142 of the Convention on the grant of European patents (European Patent Convention), signed at Munich on 5 October 1973, which entered into force on 7 October 1977 ('the EPC'). The Council, while presenting the creation of a unitary patent as enhanced cooperation, actually wished, therefore, to authorise the creation of a specific category of European patent under the EPC, a creation that ought not, according to that Member State, to have taken place by means of a procedure provided for by the EU Treaty or by the FEU Treaty.

31 The Council contends that, if the Kingdom of Spain and the Italian Republic do not play a part in this enhanced cooperation, it is because they have refused to do so and not because they are excluded from it, recital 16 in the preamble to the contested decision stressing, indeed, that enhanced cooperation is open at any time to all Member States. Moreover, creating protection by a unitary patent would promote the objectives of the Union and strengthen the process of integration.

32 The parties intervening in support of the Council concur with that view. They emphasise that those areas that require unanimity are by no means excluded from the spheres in which it is permissible for enhanced cooperation to be established. What is more, the latter is a procedure that makes it possible to overcome the problems relating to blocking minorities.

Findings of the Court

33 A measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see, to that effect, Case C-442/04 *Spain* v *Council* [1998] ECR I-3517, p. 49 and case-law cited).

34 By their plea alleging such a misuse of power, the Kingdom of Spain and the Italian Republic claim, in essence, that the Council, by authorising the enhanced cooperation in question, circumvented the requirement of unanimity laid down by the second paragraph of Article 118 TFEU and brushed aside those two Member States' objections to the Commission's proposal on the language arrangements for the unitary patent.

35 In this connection, it must be noted that nothing in Article 20 TEU or in Articles 326 TFEU to 334 TFEU forbids the Member States to establish between themselves enhanced cooperation within the ambit of those competences that must, according to the Treaties, be exercised unanimously. On the contrary, it follows from Article 333(1) TFEU that, when the conditions laid down in Article 20 TEU and in Articles 326 TFEU to 334 TFEU have been satisfied, those powers may be used in enhanced cooperation and that, in that case, provided that the Council has not decided to act by qualified majority, it is the votes of only those Member States taking part that constitute unanimity.

36 In addition, and contrary to what is maintained by the Kingdom of Spain and the Italian Republic, Article 20 TEU and Articles 326 TFEU to 334 TFEU do not circumscribe the right to resort to enhanced cooperation solely to the case in which at least one Member State declares that it is not yet ready to take part in a legislative action of the Union in its entirety. As provided in Article 20(2) TEU, the situation that may lawfully lead to enhanced cooperation is that in which 'the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole'. The impossibility referred to in that provision may be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement.

37 It follows that the Council's decision to authorise enhanced cooperation, having found that the unitary patent and its language arrangements could not be established by the Union as a whole within a reasonable period, by no means constitutes circumvention of the requirement of unanimity laid down in the second paragraph of Article 118 TFEU or, indeed, exclusion of those Member States that did not join in making requests for enhanced cooperation. The contested decision, provided that it is compatible with the conditions laid down in Article 20 TEU and in Article 326 et seq. TFEU, which is considered in connection with other pleas in law, does not amount to misuse of powers, but rather, having regard to its being impossible to reach common arrangements for the whole Union within a reasonable period, contributes to the process of integration.

38 What is more, this conclusion is by no means invalidated by the Kingdom of Spain's argument regarding the existence of Article 142 EPC.

39 In the words of 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'.

40 Given that every Member State of the Union is a Contracting State of the EPC, the introduction of a European patent with unitary effect between the Member States of the Union, as envisaged by the contested decision, may, as the Kingdom of Spain maintains, be effected by 'a special agreement' within the meaning of Article 142 EPC. Nevertheless, contrary to what is claimed by that Member State, it does not follow from that circumstance that the power provided for in Article 20 TEU is used for ends other than those for which it was conferred when Member States of the Union establish such a patent by a measure adopted under enhanced cooperation instead of concluding an international agreement.

41 It is clear from all the foregoing that the plea alleging misuse of powers must be rejected.

The third plea in law: breach of the condition that a decision authorising enhanced cooperation must be adopted as a last resort

Arguments of the parties

42 The applicants maintain that the condition laid down in Article 20(2) TEU, concerning the adoption of a decision authorising enhanced cooperation as a last resort, must be strictly observed. In this case, they consider that the possibilities of negotiations among all the Member States on the language arrangements had by no means been exhausted.

43 The Kingdom of Spain claims that there elapsed a period of not even six months between the proposal for language arrangements put forward by the Commission on 30 June 2010 and the proposal for enhanced cooperation put forward by that same institution on 14 December 2010. The period from the first proposal for a regulation on the Community patent put forward in August 2000 to the Commission's proposal for language arrangements cannot be taken into consideration in order to determine whether the contested decision was adopted as a last resort. On this head, that Member State explains that a common approach had been defined during the year 2003 and that the language question had not thereafter been further discussed in substance within the Council.

44 The Italian Republic acknowledges that the Council enjoys broad discretion as regards assessing the state of negotiations and that the question whether the condition relating to adoption as a last resort of a decision authorising enhanced cooperation had been satisfied may therefore be subject to only limited examination by the Court. In this instance, however, the 'legislative package' on the unitary patent was incomplete and the negotiations relating to language arrangements were brief. In those circumstances, it is clear that Article 20(2) TEU was disregarded.

45 According to the Italian Republic, the contested decision is vitiated also by failure to conduct a

proper examination and failure to give reasons, in that it gives an excessively laconic explanation of the reasons why the Council considers the conditions laid down by the EU and FEU Treaties in the sphere of enhanced cooperation to have been satisfied.

46 The Council and the parties intervening in its support draw attention to the deadlock at which the negotiations, already very lengthy, on the unitary patent and its language arrangements had arrived.

Findings of the Court

47 In accordance with Article 20(2) TEU, the Council may not authorise enhanced cooperation except '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.'

48 This condition is particularly important and must be read in the light of the second paragraph of Article 20(1) TEU, which provides that enhanced cooperation is to 'aim to further the objectives of the Union, protect its interests and reinforce its integration process'.

49 The Union's interests and the process of integration would, quite clearly, not be protected if all fruitless negotiations could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole.

50 In consequence, as explained by the Advocate General in points 108 to 111 of his Opinion, the expression 'as a last resort' highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.

51 The applicants claim that both at the date on which the Commission presented its proposal for authorisation to the Council and at the date of the contested decision, there still existed real chances of reaching a compromise. They maintain too that the negotiations for reaching agreement on the unitary patent and its language arrangements were not as various or as thorough as claimed by the Council and the parties intervening in its support.

52 In this respect, it is to be borne in mind that taking part in the procedure leading to the adoption of a decision authorising enhanced cooperation are the Commission, which submits a proposal to that effect, the European Parliament, which approves the proposal, and the Council, which takes the final decision authorising enhanced cooperation.

53 The Council, in taking that final decision, is best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future.

54 The Court, in exercising its review of whether the condition that a decision authorising enhanced cooperation must be adopted only as a last resort has been satisfied, should therefore ascertain whether the Council has carefully and impartially examined those aspects that are relevant to this point and whether adequate reasons have been given for the conclusion reached by the Council.

55 In this instance, the Council correctly took into account the fact that the legislative process undertaken with a view to the establishing of a unitary patent at Union level was begun during the year 2000 and covered several stages, which are set out by the Advocate General in points 119 to 123 of his Opinion and given in detail in the proposal for enhanced cooperation submitted by the Commission on 14 December 2010 [COM(2010) 790 final, pp 3 to 6] and, more briefly, in recitals 3 and 4 of the preamble to the contested decision as well.

56 It is apparent too that a considerable number of different language arrangements for the unitary patent were discussed among all the Member States within the Council and that none of those arrangements, with or without the addition of elements of compromise, found support capable of

leading to the adoption at Union level of a full 'legislative package' relating to that patent.

57 Furthermore, the applicants have adduced no specific evidence that could disprove the Council's assertion that when the requests for enhanced cooperation were made, and when the proposal for authorisation was sent by the Commission to the Council, and at the date on which the contested decision was adopted, there was still insufficient support for any of the language arrangements proposed or possible to contemplate.

58 With regard, lastly, to the reasons for the contested decision, it is to be borne in mind that, when the measure at issue was adopted in a context with which the persons concerned were familiar, summary reasons may be given (judgment of 26 June 2012 in Case C-335/09 P *Poland* v *Commission*, paragraph 152, and case-law cited). Having regard to the applicants' participation in the negotiations and to the detailed description of the fruitless stages before the contested decision set out in the proposal that was to lead to that decision, it cannot be concluded that that decision was vitiated by any failure to state reasons capable of resulting in its annulment.

59 Having regard to the foregoing, the plea in law alleging breach of the condition that a decision authorising enhanced cooperation is to be adopted only as a last resort must be rejected.

The fourth plea in law: infringement of Article 20(1) TEU and of Articles 118 TFEU, 326 TFEU and 327 TFEU

The alleged infringement of Article 20(1) TEU

– Arguments of the parties

60 According to the Kingdom of Spain and the Italian Republic, the Council was wrong to consider that the enhanced cooperation in question would pursue the objectives set out in Article 20(1) TEU by creating a higher level of integration compared to the current situation. They claim that there exists a certain level of uniformity because the legislation of all the Member States is compatible with the provisions of the EPC. Creating a unitary patent covering only part of the Union is, in their view, likely to damage that uniformity and not to improve it.

61 The Council and those parties intervening in its support observe that both national patents and European patents validated in one Member State or more confer only national protection. The unitary patent contemplated by the contested decision would give undertakings uniform protection in 25 Member States. Uniform protection throughout the Union would indeed be even more favourable to the functioning of the internal market, but enhanced cooperation would at least make it possible to draw close to that objective and would therefore result in better integration.

– Findings of the Court

62 As argued by the Council and the parties intervening in its support, European patents granted in accordance with the rules of the EPC do not confer uniform protection in the Contracting States to that convention but rather, in every one of those States, guarantee protection whose extent is defined by national law. In contrast, the unitary patent contemplated by the contested decision would confer uniform protection in the territory of all the Member States taking part in the enhanced cooperation.

63 In consequence, the applicants' argument that the protection conferred by that unitary patent would not be advantageous in terms of uniformity, and so of integration, compared to the situation created by the operation of the rules laid down by the EPC, must be rejected as unfounded.

The alleged infringement of Article 118 TFEU

– Arguments of the parties

64 The Italian Republic observes that Article 118 TFEU provides for the creation of European intellectual property rights to provide uniform protection 'throughout the Union', by means of the setting up of centralised, 'Union-wide' authorisation, coordination and supervision arrangements. However, what the Council has authorised is, precisely, the creation of a right that is not valid throughout the Union.

65 The Council and the parties intervening in its support repeat their view that the unitary patent contemplated by the contested decision allows undertakings to enjoy uniform protection in 25 Member States and so improves the functioning of the internal market.

– Findings of the Court

66 It is apparent from the first paragraph of Article 326 TFEU that the exercise, within the ambit of enhanced cooperation, of any competence conferred on the Union must comply with, among other provisions of the Treaties, that which confers that competence. The enhanced cooperation to which these actions relate must, therefore, be consistent with Article 118 TFEU.

67 Having regard to this duty to ensure accordance with Article 118 TFEU, the enhanced cooperation in question must establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights.

68 With regard, on the other hand, to the expressions 'throughout the Union' and 'Union-wide' used in Article 118 TFEU, it must be held that it is inherent in the fact that the competence conferred by that article is, in this instance, exercised within the ambit of enhanced cooperation that the European intellectual property right so created, the uniform protection given by it and the arrangements attaching to it will be in force, not in the Union in its entirety, but only in the territory of the participating Member States. Far from amounting to infringement of Article 118 TFEU, that consequence necessarily follows from Article 20(4) TEU, which states: 'Acts adopted in the framework of enhanced cooperation shall bind only participating Member States.'

69 Consequently, the arguments alleging infringement of Article 118 TFEU are unfounded.

The alleged infringement of the second paragraph of Article 326 TFEU

– Arguments of the parties

70 The Kingdom of Spain and the Italian Republic recall the wording of the second paragraph of Article 326 TFEU, according to which enhanced cooperation 'shall not undermine the internal market or economic, social and territorial cohesion [and] shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.'

71 The enhanced cooperation in question would, in their opinion, jeopardise all those principles and objectives. Creating uniform protection for innovation in one part only of the Union would encourage activities relating to innovatory products to be drawn to that part of the Union, to the detriment of the non-participating Member States.

72 In addition, they claim that the enhanced cooperation in question would be the source of distortion of competition and of discrimination between undertakings by reason of the fact that trade in innovatory products will be, according to the language arrangements provided for in recital 7 of the preamble to the contested decision, made easier for undertakings working in English, French or German. The enhanced cooperation contemplated would, moreover, reduce the mobility of researchers from Member States not taking part in this cooperation or from Member States whose official language is not English, French or German, for the language arrangements provided for by the decision will make access to information on the scope of the patents difficult for those researchers.

73 Economic, social and territorial cohesion in the Union too would be damaged, they argue, in that the enhanced cooperation would prevent the coherent development of industrial policy and increase the differences between Member States from the technological point of view.

74 The Council and the parties intervening in its support take the view that this plea in law is based on premises in the realm of speculation. Furthermore, the origin of the fragmentation of the market is to be found, not in the contested decision, but in the present situation, in which the protection offered by European patents is national. What is more, inasmuch as the applicants base their arguments on the language arrangements contemplated, their actions are inadmissible, the definitive features of those language arrangements not being fixed by the contested decision.

– Findings of the Court

75 For the same reason as that set out in paragraph 68 above, it cannot validly be maintained that, by having it in view to create a unitary patent applicable in the participating Member States and not in the Union, the contested decision damages the internal market or the economic, social and territorial cohesion of the Union.

76 In so far as, in order to demonstrate such damage to the internal market and discrimination and distortion of competition as well, the applicants also make reference to the language arrangements considered in recital 7 in the preamble to the contested decision, it must be declared that the compatibility of those arrangements with Union law may not be examined in these actions.

77 As is stated in recital 7, the language arrangements there described do no more than correspond to a proposal by the Commission with the addition of certain elements of compromise proposed by the Member State presiding over the Council of the Union at the time the requests for enhanced cooperation were made. The language arrangements as set out in that recital were, therefore, only at a preparatory stage when the contested decision was adopted and do not form a component part of the latter.

78 It follows that the arguments alleging infringement of Article 326 TFEU are in part unfounded and in part inadmissible.

The alleged infringement of Article 327 TFEU

– Arguments of the parties

79 Contrary to what is prescribed by Article 327 TFEU, the enhanced cooperation in question does not, according to the Kingdom of Spain, respect the rights of the Member States not participating in it. In particular, the Kingdom of Spain and the Italian Republic's right to take part in future in this enhanced cooperation is infringed, for the Council favours language arrangements that those two Member States do not accept.

80 According to the Council and the parties intervening in its support, this plea relies on the mistaken premiss that it is impossible, *de facto* or *de jure*, for the Kingdom of Spain and the Italian Republic to take part in this cooperation.

– Findings of the Court

81 Under Article 327 TFEU, the enhanced cooperation authorised by the contested decision must respect 'the competences, rights and obligations' of the Kingdom of Spain and the Italian Republic as Member States not taking part in the cooperation.

82 Nothing in the contested decision prejudices any competence, right or obligation of those two Member States. In particular, the prospect, indicated by that decision, of the introduction of the language arrangements objected to by the Kingdom of Spain and the Italian Republic may not be

described as prejudicial to the competences, rights or obligations of those latter States. While it is, admittedly, essential for enhanced cooperation not to lead to the adoption of measures that might prevent the non-participating Member States from exercising their competences and rights or shouldering their obligations, it is, in contrast, permissible for those taking part in this cooperation to prescribe rules with which those non-participating States would not agree if they did take part in it.

83 Indeed, the prescription of such rules does not render ineffective the opportunity for non-participating Member States of joining in the enhanced cooperation. As provided by the first paragraph of Article 328(1) TFEU, participation is subject to the condition of compliance with the acts already adopted by those Member States that have taken part in that cooperation since it began.

84 In addition, it has to be noted that the Kingdom of Spain and the Italian Republic have not disproved the matters mentioned in the second, third and fourth sentences of Recital 14 in the preamble to the contested decision.

85 It follows that the arguments alleging infringement of Article 327 TFEU are unfounded too.

86 It follows from all the foregoing that the fourth plea in law raised by the applicants in support of their actions, alleging infringement of Articles 20(1) TEU, 118 TFEU, 326 TFEU and 327 TFEU, must be rejected.

The fifth plea in law: disregard for the judicial system of the Union

Arguments of the parties

87 The Kingdom of Spain observes that the judicial system of the Union is composed of a whole body of means of obtaining redress and of procedures, designed to ensure review of the lawfulness of the acts of the institutions of the Union. It considers that the Council disregarded that system by authorising enhanced cooperation without specifying what the judicial system envisaged was. While it is true that it is not necessary to create, in every measure of secondary legislation, a set of judicial rules for that measure, the Kingdom of Spain takes the view that the judicial rules applicable must nevertheless be specified in a measure authorising the creation of a new European intellectual property right.

88 The Council and the parties intervening in its support argue that the Court has made it clear in paragraph 62 of Opinion 1/09 [2011] ECR I-1137 that Article 262 TFEU provides for the mere option of creating a specific legal remedy for disputes relating to the application of acts of the European Union creating European intellectual property rights, but does require any particular judicial structure to be set up. At all events, it is in no way necessary for the decision by which enhanced cooperation is authorised to contain details of the procedures under the judicial rules to be introduced in respect of that cooperation.

Findings of the Court

89 The authorisation of enhanced cooperation challenged in these actions was granted by the Council pursuant to Article 329(1) TFEU, that is to say, on a proposal from the Commission and after obtaining the Parliament's consent.

90 The Commission's proposal was based on the requests of those Member States wishing to establish the enhanced cooperation in question. As provided for in that article, those requests must specify 'the scope and objectives of the enhanced cooperation proposed'.

91 It is clear from the documents before the Court that those details appeared both in the requests and in the Commission's proposal. They were repeated in the contested decision, in recitals 6 and 7 in particular.

92 The Council was not obliged to provide, in the contested decision, further information with regard to the possible content of the system adopted by the participants in the enhanced cooperation in question. The sole purpose of that decision was to authorise the requesting Member States to establish that cooperation. It was thereafter for those States, having recourse to the institutions of the Union following the procedures laid down in Articles 20 TEU and 326 TFEU to 334 TFEU, to set up the unitary patent and to lay down the rules attaching to it, including, if necessary, specific rules in the judicial sphere.

93 It follows that the fifth plea too must be rejected.

94 Given that none of the pleas in law relied on by the Kingdom of Spain and the Italian Republic in support of their actions may be upheld, those actions must be dismissed.

Costs

95 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has requested that the Kingdom of Spain and the Italian Republic be ordered to pay the costs and they have been unsuccessful, each of them must be ordered to pay, in addition to its own costs, those incurred by the Council in Case C-274/11 and Case C-295/11, respectively.

96 Pursuant to Article 140(1) of the Rules of Procedure, the Member States and institutions that have intervened in the proceedings are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby

1. Dismisses the actions;

2. Orders the Kingdom of Spain to bear, in addition to its own costs, those incurred by the Council of the European Union in Case C-274/11;

3. Orders the Italian Republic to bear, in addition to its own costs, those incurred by the Council of the European Union in Case C-295/11;

4. Orders the Kingdom of Belgium, the Czech Republic, the Federal Republic of Germany, Ireland, the French Republic, the Republic of Latvia, Hungary, the Kingdom of the Netherlands, the Polish Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament and the European Commission to pay their own costs.

[Signatures]

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*Languages of the case: Spanish and Italian.