



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 18 February 2011**

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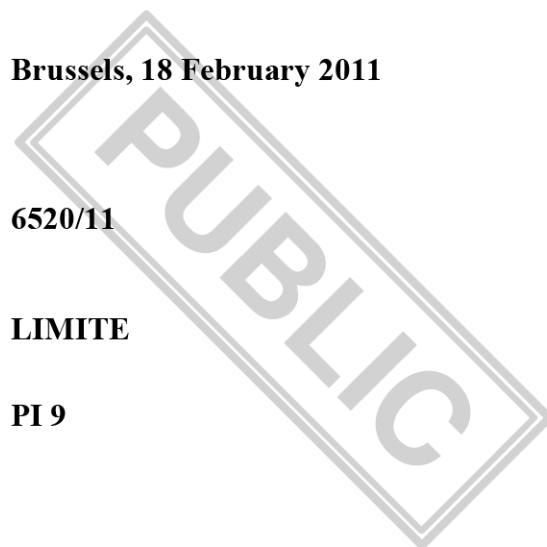
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**6520/11**

**LIMITE**

**PI 9**



**NOTE**

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from: Presidency  
to: Permanent Representatives Committee

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No. prev. doc.: 5566/11 PI 4  
No. Cion prop.: 18115/10 PI 154

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Subject: Preparation for the meeting of the Competitiveness Council (Internal Market, Industry, Research and Space) on 9 - 10 March 2011  
- Proposal for a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection  
= Adoption of the Council Decision

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1. On 1 August 2000, the Commission adopted a proposal for a Council Regulation on the Community patent<sup>1</sup>.
2. The proposal was extensively discussed in several Council meetings but failed to reach the required unanimity, mainly due to the issue of the language regime of the future Community patent.

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<sup>1</sup> 10786/00.

3. On 4 December 2009, the Council adopted conclusions on an "Enhanced patent system for Europe"<sup>2</sup> and a general approach on the proposal for a Regulation on the EU Patent<sup>3</sup> (change from the "Community" to "EU" patent due to the entry into force of the Lisbon Treaty on 1 December 2009). However, the translation arrangements for the EU patent remained out of the scope of these Council conclusions due to the change of the legal basis for the creation of the EU patent under the Lisbon Treaty.
4. In accordance with Article 118(2) of the Treaty on the Functioning of the European Union (TFEU), the Commission submitted to the Council a proposal for a Council Regulation on the translation arrangements for the EU patent<sup>4</sup> on 2 July 2010.
5. Having witnessed all its efforts to reach a unanimous agreement on this proposal fail, the Belgian Presidency, supported by the majority of delegations, concluded at the end of the extraordinary Competitiveness Council on 10 November 2010 that insurmountable difficulties existed making a decision on the translation arrangements requiring unanimity impossible now and in the foreseeable future and that the objectives of the proposed Regulations to establish unitary patent protection in the entire European Union could not be attained within a reasonable period by applying the relevant provisions of the Treaties. This conclusion was confirmed at the Competitiveness Council meeting on 10 December 2010.
6. In the light of these developments, twelve Member States addressed formal requests to the Commission indicating that they wish to establish enhanced cooperation in the area of the creation of unitary patent protection and that the Commission should submit a proposal to the Council to that end.
7. On 16 December 2010, the Commission submitted to the Council a proposal for a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection.<sup>5</sup>

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<sup>2</sup> 17229/09.

<sup>3</sup> 16113/09 ADD 1.

<sup>4</sup> 11805/10.

<sup>5</sup> 18115/10.

8. In the meantime, thirteen more Member States have decided to participate in the envisaged enhanced cooperation, thus bringing the total number of participating Member States to twenty-five.
9. On 14 February 2011, the Council decided to request the European Parliament's consent on the draft Council Decision contained in 5538/11, in accordance with Article 329(1) of TFEU, the Italian and Spanish delegations voting against.
10. On 15 February 2011, the European Parliament gave its consent to proceed with the enhanced cooperation as set out in the draft Decision contained in 5538/11.
11. All delegations, except Italy and Spain, are supportive of the draft Council Decision as it appears in 5538/11.
12. Italy and Spain advocate that the proposed enhanced cooperation is unacceptable on both procedural and substantive grounds. They question the fulfilment of the conditions imposed by the Treaties for the launching of enhanced cooperation in this case and they reserve the right to initiate legal actions against it. They have also affirmed that the impact of the envisaged enhanced cooperation on the efforts to set up a single patent jurisdiction had not been sufficiently assessed in the absence of the opinion of the European Court of Justice. Both the Commission and the Council Legal Service have indicated that there is no legal impediment for the launching of the envisaged enhanced cooperation.
13. In the light of the above, the Permanent Representatives Committee is invited to recommend to the Council to:
  - a) adopt the draft Decision contained in 5538/11;
  - b) have the statements contained in the Addendum to this Note entered in its Minutes.

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