



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 2 March 2011**

**6524/11**

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**Interinstitutional File:  
2010/0384 (NLE)**

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**PI 10**

**NOTE**

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from: Presidency  
to: Council

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No. prev. doc.: 6520/11 PI 9 + ADD 1  
No. Cion prop.: 18115/10 PI 154

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Subject: 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.<sup>4</sup>
4. On 2 July 2010, the Commission submitted to the Council a proposal for a Council Regulation on the translation arrangements for the EU patent<sup>5</sup>, in accordance with Article 118(2) of the Treaty on the Functioning of the European Union (TFEU).
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.

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

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

<sup>4</sup> The only reference to the translation arrangements for the EU patent in these conclusions appears in point 36 of 17229/09 and reads as follows :  
"The EU Patent Regulation should be accompanied by a separate regulation, which should govern the translation arrangements for the EU patent adopted by the Council with unanimity in accordance with Article 118 second subparagraph of the Treaty on the Functioning of the European Union. The EU Patent Regulation should come into force together with the separate regulation on the translation arrangements for the EU patent."

<sup>5</sup> 11805/10.

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>6</sup>
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 7 February 2011, the Permanent Representatives Committee reached agreement on the draft Council Decision contained in 5538/11 and proposed to the Council to transmit a request to the European Parliament for its consent.
10. 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.
11. 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.
12. At the meeting of the Permanent Representatives Committee on 23 February 2011, it was noted that all delegations except Italy and Spain are supportive of the draft Council Decision as contained in 5538/11 and of the statements set out in the addendum to this Note.

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<sup>6</sup> 18115/10.

13. Recalling their joint statement at the Competitiveness Council on 10 December 2010<sup>7</sup>, Italy and Spain consider that the proposed enhanced cooperation is unacceptable on both procedural and substantive grounds. These delegations 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 affirm also that the impact of the envisaged enhanced cooperation on the efforts to set up a single patent jurisdiction has not been sufficiently assessed in the absence of the opinion of the European Court of Justice on the draft Treaty for the creation of a single patent litigation system.
14. Both the Commission and the Council Legal Service pointed out that there is no legal impediment to go ahead with the enhanced cooperation, given that this does not cover the new patent jurisdiction envisaged in the draft international agreement referred to the Court of Justice for opinion.
15. The Council Legal Service has pointed out that a Member State referred to in the Council's decision authorising the enhanced cooperation as one of the Member States participating in the enhanced cooperation in question would be entitled to withdraw as long as no substantive act related to the enhanced cooperation has been adopted.

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The said statement reads as follows:

"Italy and Spain strongly believe that it is possible to achieve a consensus-based solution among the 27 Member States as we did in December 2009 on the Patent regime. Therefore, Italy and Spain are committed to evaluate, with flexibility and in a constructive spirit new solutions that will benefit the entire European Union as well as the economic operators and that are acceptable to all Member States.

Italy and Spain are convinced that the Council has not exhausted all the negotiating possibilities. It is clear that *inter alia* the "last resort" requirement for an enhanced cooperation is not fulfilled.

Besides, for the sake of caution the Council should wait for the Court's Opinion on the European Jurisdictional System of Patent since it could have a material impact on this matter. Even one of the Member States which wish to establish enhanced cooperation has pointed out this element.

In this controversial context, Italy and Spain reserve their right to take any legal measure provided for in the Treaties to preserve the values and objectives of the EU as a whole."

16. In the light of the above, the Council is invited 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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