



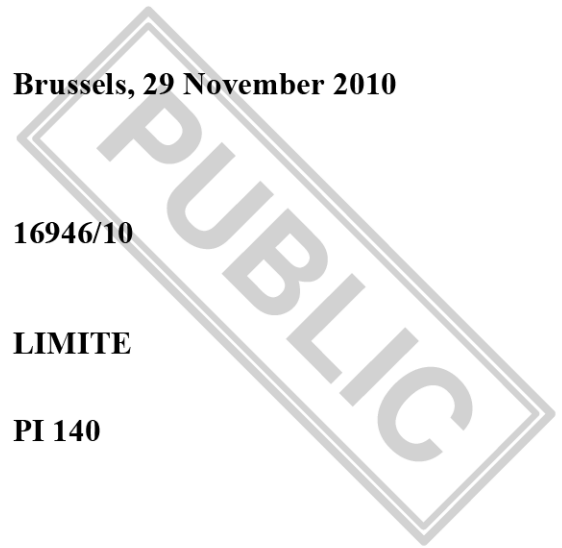
**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 29 November 2010

16946/10

LIMITE

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NOTE

From: Presidency
To: Permanent Representatives Committee/Council
Subject: The European Union Patent: Way forward and possible enhanced cooperation
- Exchange of views

I. STATE OF PLAY

1. It is not necessary to recall the long process since the adoption in August 2000 by the Commission of a proposal for a Council Regulation on the Community patent¹ and the different attempts since then to create the EU Patent (change from the "Community" to "EU" patent due to the entry into force of the Lisbon Treaty on 1 December 2009) and in particular to reach unanimity on the issue of the translation arrangements for the EU patent².

¹ 10786/00.

² For a description of this long process, see 15395/10.

2. In December 2009, the Council adopted conclusions on an "Enhanced patent system for Europe"³ and a general approach on the proposal for a Regulation on the EU Patent⁴. However, the translation arrangements for the EU patent were excluded from the scope of the proposal for a Regulation on the EU patent due to the change of the legal basis for the creation of the EU patent under the TFEU, which in the second paragraph of Article 118 provides for a separate legal basis for the linguistic regime applicable to EU intellectual property titles.

On 2 July 2010, the Commission submitted to the Council its proposal for a Council Regulation on the translation arrangements for the European Union patent⁵.

3. The Working Party on Intellectual Property (Patents) on 14 and 28 July and on 8 and 9 September 2010 examined the proposal, the impact assessment accompanying it and alternative suggestions made by delegations. Following the discussions in the Working Party, a large majority of delegations have voiced a clear support for the Commission proposal.
4. On 29 September 2010, the informal Competitiveness Council had an exchange of views on the proposal for the translation arrangements for the EU patent.

³ 17229/09.

⁴ 16113/09 + ADD 1.

⁵ 11805/10 + ADD 1 + ADD 2.

5. The Council held a policy debate on 11 October 2010 on the elements for a compromise by the Presidency⁶ for a political orientation regarding the main principles and features of the translation arrangements for the European Union patent. A very large majority of delegations supported the elements for compromise proposed by the Presidency, which have been considered to be suitable to serve as basis for further discussions. A very large majority of the delegations emphasized again that certain red lines have to be respected by any possible final compromise: no significant costs should arise from additional translations and that the translation arrangements applicable for EU patents must ensure legal certainty and preserve the unitary character of the EU patent.

6. After the meeting of 11 October, in order to try to reach a compromise, the Presidency has proposed to the extraordinary Council of 10 November 2010 a political orientation that in comparison with the meeting of 11 October, added a second set of elements for compromise⁷.

Despite all the efforts by the Presidency and the concessions made by a number of delegations, some Member States could not accept the proposed final compromise and unanimity could not be reached.⁸ At the end of this extraordinary meeting, the Presidency has drawn the conclusion that it was not possible to reach a unanimity and that the Presidency will reflect on how to capitalise on the results of the negotiations and the broad support of the Member States for the compromise proposed by the Presidency.

⁶ 14377/10.

⁷ 15395/10.

⁸ Council press release 16041/10.

7. Already during the Council meeting of 11 October 2010, several Member States have indicated that they are ready to consider the possibility of establishing a unitary patent within the framework of enhanced cooperation, should the Council not be able to reach agreement before the end of 2010. This intention was confirmed on 9 November 2010 when five delegations sent a letter to the Commission stating that if the negotiations regarding the appropriate translation regime for the EU patent continue to be blocked during the Council meeting of 10 November, it would be clear that European companies will be deprived of a unitary EU patent right for the foreseeable future. These Member States requested the Commission to consider the feasibility of proposing enhanced cooperation in this area, should the Commission in the near future be presented with a request to propose such cooperation.

8. At the Competitiveness Council meeting of 25 November 2010, the patent file was raised under "AOB" by two of the Member States who have sent the letter to the Commission. The Presidency has repeated that during the extraordinary meeting of the Competitiveness Council on 10 November, it has clearly appeared that despite the very broad support of the Member States, the compromise proposal of the Presidency was not acceptable for all Member States.

It was on the other hand clear to the Presidency that if additional elements had been added to the compromise proposal or if another approach had been used to propose a compromise the support from other Member States would have been lost.

In those conditions, the Presidency has informed the delegations that it appears clearly that it is not possible to reach unanimity within a reasonable period of time on the basis of the relevant provisions of the TFEU.

Both the Legal Service of the Council and the Commission have informed the Council that depending on the content of the formal request, enhanced cooperation would be feasible and in principle compatible with the Treaties.

The enhanced cooperation would in particular further the objectives of the Union, reinforce its integration process, would not undermine the Internal Market and would not constitute a barrier to trade, nor discrimination or a distortion of competition.

Following these clarifications on the feasibility of enhanced cooperation in the area of unitary patent protection by the Commission and by the Legal Service of the Council, a number of Member States expressed their interest to move ahead with enhanced cooperation, while others expressed their opposition.

II. EXCHANGE OF VIEWS

9. Given the current situation characterised by

- the impossibility to reach unanimity within a reasonable period of time on the basis of the relevant provisions of the TFEU,
- the readiness of several Member States to consider the possibility of establishing a unitary patent protection within the framework of enhanced cooperation, and
- the clarification provided by the Commission and the Legal Service of the Council on the feasibility of enhanced cooperation in the area of unitary patent protection and its principle compatibility with the Treaties,

the Presidency would like to have an exchange of views during the Council meeting on 10 December 2010 on the possibility of enhanced cooperation for the creation of a unitary patent protection, based on the Commission proposal and elements put on the table by the Belgian Presidency.

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