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Italy as well as Spain against the decision to proceed with enhanced cooperation for the creation of the EU unitary patent

Daniela Ampollini (Trevisan & Cuonzo) · Monday, August 29th, 2011

Italy has recently filed a complaint with the Court of Justice against Council's decision of 10 March 2011 no. 167 authorising enhanced cooperation under Art. 20 TEU in the area of the creation of unitary patent protection. Spain had already filed one a few weeks before. As is known, negotiations between the Member States on the subject had struggled to proceed over the issue of the language regimes, in substance with Italy and Spain and a few other strongly against a decision to adopt English, French and German as the sole binding languages. A proposal to follow the enhanced cooperation procedure had therefore been made and the Council had agreed. This is a procedure whereby regulations can be adopted having effect only in respect of a limited number (at least nine) of "cooperating" Member States. In this case, the enhanced cooperation presently involves all but Italy and Spain, as all other Member States that had initially expressed similar positions have meanwhile given in. Italy and Spain, however, do not want to be left aside and, at the same time, do not want to give in and renounce their position on the language regime issue. The reasons of the Italian and Spanish complaints to the Court of Justice are unfortunately not available in full. What is available is just the summaries published in the Official Journal. At first sight, at least based on the summaries, the reasons would seem to make some sense. In substance, Italy argues that, under Art. 20 TEU, it would not be possible to proceed with enhanced cooperation in a matter in which the European Union has exclusive powers, and this would be the case for unitary IP titles, under Art. 118 TFEU. Spain seems to add that the enhanced cooperation would in fact result in abuse of power as a tool to exclude dissenting member States and force them to give in or be left aside. Both also claim that the "last resort" requirement provided for by Art. 326 TFEU would have not been complied with. It would seem that the road to a EU unitary patent is still rather long.

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