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The ECJ on enhanced cooperation: is it the end, or is it the beginning?

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On 16 April 2013 the European Court of Justice ("ECJ") handed down a judgment dismissing the nullity actions filed by Spain and Italy against Council Decision 2011/167/EU, of 10 March 2011, whereby an enhanced cooperation procedure was approved relating to the creation of a unitary patent (joint cases C-274/11 and C-295/11). This decision has of course sparked a debate as to whether it will put to rest the legal concerns raised on the substantive and procedural legal basis used by the EU's institutions to move the EU unitary patent project forward in spite of the concerns expressed by Spain and Italy. To put this debate in context, the readers will remember that the Kingdom of Spain recently filed new nullity actions against Regulation 1527/2012 on the creation of unitary patent protection and Regulation 1260/2012 on the translation arrangements adopted on 17 December 2012 and published in Official Journal L 361 on 31 December 2012.

Upon reading the judgment of 16 April 2013, it transpires that many of the legal concerns raised in Spain's new nullity actions have not been addressed. In fact, they could not have been addressed, since when Spain and Italy filed their nullity actions the final architecture of the project had not yet been decided. To give an example, in paragraph 76 of its judgment of 16 April 2013, the ECJ explicitly highlighted that "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." This is also the case of other aspects of the new nullity actions recently filed by Spain, which have a much wider scope.

In fact, the judgment of 16 April 2013, which, as the first commentators have noted, is very limited in its scope and rather superficial in its analysis, has confined its analysis to whether or not the procedural conditions required for the use of the enhanced cooperation mechanism were met. The ECJ reached a positive conclusion after highlighting, among other aspects, that the Council was right when it considered that enhanced cooperation was a valid "last resort" way out to overcome the stalemate of the negotiations, in particular, in view of the difficulties to reach an agreement on the linguistic regime. The one-million-dollar question is whether the ECJ's conclusion would have been the same if the negotiators had accepted the "English-only" proposal made by Spain in 2011, had moved the project forward through the avenues of enhanced cooperation, and France and Germany (like Italy and Spain in the real world) had remained outside of the enhanced cooperation due to their opposition to the "English-only" proposal. May I let the Judges of the ECJ, if they happen to read these lines, make a deep reflection in conscience as to whether the answer to the

question would have been the same.

All in all, bearing in mind the limited scope of the judgment of 16 April 2013, even narrower than Advocate General Bot's conclusions, this recent decision is likely to be the beginning, rather than the end, of this tortuous debate.

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