



Press and Information

Court of Justice of the European Union
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Advocate General's Opinion in Joined Cases C-274/11 and 295/11
Spain and Italy v Council

Advocate General Bot proposes that the Court dismiss the actions brought by Spain and Italy against the Council's decision authorising enhanced cooperation in the area of the unitary patent

Enhanced cooperation must aim to further the objectives of the European Union, protect its interests and reinforce its integration process. A decision authorising enhanced cooperation is to be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole¹. The decision is adopted by the Council on a proposal from the Commission and after obtaining the consent of the Parliament.

By a decision adopted in 2011², the Council authorised enhanced cooperation between 25 of the 27 EU Member States – Spain and Italy having refused to participate – with a view to creating unitary patent protection. The aim of that cooperation is to set up centralised EU-wide authorisation, coordination and supervision arrangements.

Spain and Italy have asked the Court of Justice to annul the Council's decision, maintaining that it is invalid for a number of reasons.

In his Opinion delivered today, Advocate General Bot replies to the arguments put forward by Spain and Italy.

After noting that this is the first time that the Court has been called on to consider the legality of a decision authorising enhanced cooperation, the Advocate General observes that by virtue of the principle of the separation of powers **the Court may carry out only a limited review** of legislative measures adopted by the Council. It is for the institutions involved to assess, on the basis of numerous elements, the effects of enhanced cooperation, to weigh up the various interests at stake and to make political choices on matters within the specific area of responsibility of each institution. The Court must thus confine itself to reviewing whether, in the exercise of that freedom of choice, the Council made a manifest error or misused its powers or manifestly exceeded the bounds of its discretion.

The Advocate General first addresses the argument that the Council **was not competent** to adopt the decision because the creation of a unitary patent falls within the EU's exclusive competences, specifically, the establishment of the competition rules necessary for the functioning of the internal market. The Member States may establish enhanced cooperation solely in matters that are within the EU's non-exclusive competences³. The Advocate General considers that the Treaty on the Functioning of the European Union (TFEU) establishes an exhaustive list of the areas in which the Union has exclusive competence. Furthermore, the creation of a European intellectual property right falls within the scope of the internal market. Whilst it is true that the rights deriving from a patent affect trade and competitive relationships within the internal market, that finding does not

¹ Article 20(2) of the Treaty on European Union (TEU).

² Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (OJ 2011 L 76, p. 53).

³ Article 20(1) TEU.

suffice to make it a right relating to the competition rules. The Advocate General thus takes the view that the TFEU provides an appropriate legal basis for the creation of intellectual property rights within the framework of the establishment and functioning of the internal market, an area which comes within the competence shared between the EU and the Member States.

The Advocate General goes on to consider the plea alleging that **the Council misused its powers**. He observes that enhanced cooperation must aim to further the objectives of the Union, protect its interests and reinforce its integration process. The establishment of an enhanced cooperation mechanism for the unitary patent was inspired by the growing heterogeneity of the Member States and their respective interests or specific needs. Thus, by first noting the absence of unanimity with respect to the language arrangements for the unitary patent and then deciding to deal with that deadlock by establishing enhanced cooperation, the Council merely made use of a tool available to it under the Treaties.

In response to the plea alleging **failure to respect the judicial system of the EU**, the Advocate General observes that in these two actions for annulment the Court is called on to determine whether the conditions for the proper implementation of enhanced cooperation have been fulfilled. He notes that the creation of a specific judicial system for unitary patents⁴ is not among the conditions required by the Treaties for the implementation of enhanced cooperation. The authorisation granted by the Council for the setting up of enhanced cooperation is merely the premiss for the adoption of other legislative acts which will then have to give specific effect to that cooperation.

Advocate General Bot states that enhanced cooperation must come into play **'as a last resort'** when the objectives pursued cannot be attained within a reasonable period by the EU as a whole. He notes that the Treaties do not define either the last resort condition or the concept of a reasonable period. In his view, the 'last resort' is not necessarily the fact that a legislative proposal has been rejected by a vote but rather the fact that there is a genuine deadlock, which could arise at all levels of the legislative process and which demonstrates that it is impossible to arrive at a compromise. Enhanced cooperation would thus be the tool used as a last resort, where it is established that no compromise will be found by means of the normal legislative procedure. The Advocate General considers that the Council, which is familiar with all the ins and outs of the legislative process, the terms of the discussions and the situations giving rise to deadlock, is still best placed to assess whether, in time, an agreement might be reached within it. It thus has a wide discretion to determine whether enhanced cooperation is in fact adopted as a last resort since the objectives pursued cannot be attained within a reasonable period by the EU as a whole. The Court must therefore confine itself to reviewing whether the Council has examined, carefully and impartially, all the relevant matters. In the Advocate General's view, the Council, in relation to the present case, has not made a manifest error of assessment, since, after years of fruitless discussions⁵, it was unable to secure a unanimous vote and be successful in an action with the participation of all the Member States. Consequently, the Advocate General considers the plea alleging breach of the last resort condition to be unfounded.

Advocate General Bot then expresses his view on the arguments concerning **detriment to the internal market and to economic, social and territorial cohesion, barriers to and discrimination in trade between Member States** and alleged **distortions of competition**. He points out that the decision authorising the setting up of enhanced cooperation defines the procedural framework within which other acts will subsequently be adopted. Judicial review of the authorisation decision must thus not be confused with review of the acts subsequently adopted. The Council did indeed refer in the decision to what the language arrangements for the unitary patent might be but that question is not a condition that determines the validity of the decision

⁴ It should be recalled that, in Opinion [1/09](#) of 8 March 2011, the Court stated that the draft agreement creating a European and Community patent court was not compatible with EU law (see also Press Release [17/11](#)).

⁵ The Commission submitted a first Proposal for a Council Regulation on the Community patent in 2000. In 2001 the matter was discussed in the Council and discussions continued until 2004, focusing in particular on the language arrangements, but without reaching unanimous agreement. Discussions were resumed in 2008 and a revised proposal for a regulation was submitted. In 2010 the Commission adopted a proposal for a Council Regulation on translation arrangements but because of insurmountable difficulties it was impossible to achieve unanimity.

authorising enhanced cooperation. That question would have to be addressed at a later stage and form the subject-matter of a separate act adopted unanimously by the participating Member States. The Court would then be able to carry out a review of that act in the context of any action that might subsequently be brought. The Advocate General thus does not consider the Council's assessment to be vitiated by a manifest error. Rather, he is of the view that a mechanism intended to create a unitary patent would have the effect of conferring uniform protection on the territory of several Member States and of contributing to the harmonious development of the Union as a whole by reducing the existing disparities between those Member States. Moreover, all economic operators could enjoy the benefit of such a patent, since the place of origin of the applicant for a unitary patent is irrelevant for the purpose of obtaining it.

Finally, with regard to the alleged infringement of the **obligation to respect the competences, rights and obligations of those Member States which do not participate in the enhanced cooperation** (according to the Spanish government, under the draft regulation the language arrangements which would be put in place would oblige a non-participating Member State to waive its right to translation of the patent specification into its language as such a translation would not produce any legal effects on its territory), the Advocate General considers that, here again, the question of those language arrangements is not a condition that determines the validity of the decision authorising enhanced cooperation.

The Advocate General therefore proposes that the Court should reject all the pleas put forward by Spain and Italy and, consequently, dismiss both actions.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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