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RESOLUTION OF THE 14TH STANDING COMMITTEE

(European Union Policies)

(Drafted by LICASTRO SCARDINO)

approved at the session of 2 March 2011

ON THE

**PROPOSAL FOR A COUNCIL DECISION AUTHORISING ENHANCED
COOPERATION IN THE AREA OF THE CREATION OF UNITARY PATENT
PROTECTION (COM (2010) 790 final).**

(COMMUNITY ACT No 70)

under Article 144(1)(5) and (6) of the Regulation

Forwarded to the President's Office on 9 March 2011

The Committee, having examined document COM(2010) 790 final,

Whereas:

Under Article 1 of the proposal, Denmark, Estonia, Finland, France, Germany, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Sweden and the UK are authorised to establish enhanced cooperation in the creation of unitary patent protection, applying the relevant provisions of the Treaties;

The Committee expresses regret that the instrument of enhanced cooperation – useful, in principle, for advancing the process of Community unification – is to be used for the first time in connection with a matter in which national interests such as patent protection are in conflict, rather than, as would be desirable, in connection with issues of institutional importance for the European Union, such as, foreign policy, security and defence policy;

the abovementioned proposal is intended – by the European Commission – to overcome some obstacles in the negotiations on the proposal for a Council Regulation on the translation arrangements for the EU patent (COM (2010) 350 final of 30 June 2010), thereby legitimising the use of enhanced cooperation, permitted under Article 20(2) of the Treaty on European Union, "as a last resort when [the Council on a proposal from the Commission] has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and that at least nine Member States participate in it";

the European Union Policy Committee on 22 September 2010 adopted an opinion on the proposal for a Council Regulation on the translation arrangements for the EU patent wherein

it considered it necessary to define a European patent system that is not based on the criterion of obligatory trilingualism but which instead incorporates the language of the inventor's country of origin, with translation only into English, which is the language of the international scientific community. This would result in EU patents in a single language version with no translation costs if the inventor were English-speaking, and in the majority of cases in only two language versions, one of which was a translation, instead of the three languages in the proposal, which would have least two, and often three, translations;

the European Commission's reply C/2011/317 of 27 January 2011, adopted in accordance with the procedures for political dialogue after obtaining the opinion of the European Union Policies Committee, which reiterates the underlying aims of the proposal to establish translation arrangements for the EU patent, namely the need to adopt the trilingual system, making provision for translation into English, French and German (the official languages of the European Patent Office) as an obligatory validation requirement for a European patent;

as per recital 5 of the proposal in question, between 7 and 13 December 2010, 12 Member States submitted a formal request to the European Commission indicating that they wished "to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection on the basis of the existing proposals supported by these Member States during the negotiations and that the Commission should submit a proposal to the Council to that end. The requests were confirmed at the meeting of the Competitiveness Council on 10 December 2010";

the European Commission proposal under consideration is dated 14 December 2010, which implies that – given the very short time between the formal request of the twelve Member States and the proposal – the first paragraph of Article 329(1) of the Treaty on the Functioning of the European Union, which assigns to the European Commission the discretionary power to respond to the request of Member States and to submit a proposal to the Council to that effect, was interpreted very formalistically, as proper, in-depth assessment – taking the time required – would be necessary;

the condition set out in Article 20(2) of the Treaty on European Union that enhanced cooperation can only be legal if it is the last resort appears to be strictly applicable in the case of a piece of legislation – the proposal for a Council Regulation on the translation arrangements for the EU patent – formally presented to the European legislature only 30 June 2010;

it is doubtful that the proposal is compatible with the principles governing the EU internal market, which, under Article 326(2) of the Treaty on the Functioning of the European Union, is a pre-condition for the legality of enhanced cooperation, due in part to the possible distortions of competition between Member States, given that businesses located in the Member States taking part in enhanced cooperation would be in potentially better market conditions, thereby inevitably damaging, among other things, the fundamental freedom of establishment provided for in the Treaties;

lastly, that an evaluation of the assumptions and the effects of enhanced cooperation in this area is also needed, requiring also improved understanding of the operation of the principle of subsidiarity, which would – since we are here dealing with two institutions within a scenario where the EU had non-exclusive competences – apply not to a piece of European Union legislation which was valid for all 27 Member States (as the first paragraph of Article 5(3) of

the Treaty on European Union, which refers to objectives that can "be better achieved at Union level" would appear to require), but rather to only some of them ;

Having regard to:

the position of the European Parliament's Committee on Legal Affairs set out on 27 January 2011, wherein it gave its approval to enhanced cooperation under Article 329 of the Treaty on the Functioning of the European Union;

the content of motion 1-00357, submitted to the Senate and published in the minutes of the afternoon session of 21 December 2010;

lastly, the Court of Justice judgment expected to be handed down on 8 March 2011 concerning the fundamental concerns of a legal nature that some Member States have raised in relation to the creation of the European and European Union Patents Court (EEUPC) and its planned overall architecture as described in paragraph 9 of the conclusions of the Competitiveness Council of 4 December 2009;

makes the following observations within its area of competence:

enhanced cooperation in an area that impacts both the principle of equality between the languages of the Member States and the functioning of the single market is of questionable compliance with the Treaties and the letter and spirit thereof;

negotiations on the proposal for a Council Regulation on the translation arrangements for the European Union patent should resume with a view to arriving at an agreed and satisfactory solution between all 27 EU Member States, in full compliance with the second paragraph of Article 118 of the Treaty on the Functioning of the European Union;

it is our duty to wait for the imminent Court of Justice judgment referred to above which may provide information relevant to the evaluation of the choices that the European legislator will have to make with regard to the patent and its translation arrangements.