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REPORT

on the proposal for a Council regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements
(COM(2011)0216 – C7-0145/2011 – 2011/0094(CNS))

Committee on Legal Affairs

Rapporteur: Raffaele Baldassarre

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements

(COM(2011)0216 – C7-0145/2011 – 2011/0094(CNS))

(Special legislative procedure – consultation)

The European Parliament,

- having regard to the Commission proposal to the Council (COM(2011)0216),
 - having regard to the second paragraph of Article 118 of the Treaty on the Functioning of the European Union, pursuant to which the Council consulted Parliament (C7-0145/2011),
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs (A7-0002/2012),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to alter its proposal accordingly, in accordance with Article 293(2) of the Treaty on the Functioning of the European Union;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Asks the Council to consult Parliament again if it intends to substantially amend the Commission proposal;
 5. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a regulation

Recital 6

Text proposed by the Commission

(6) Since the European Patent Office is responsible for the grant of European patents, the translation arrangements for the European patent with unitary effect should be built on the current procedure in the European Patent Office. Those arrangements should aim at achieving the

Amendment

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necessary balance between the interests of economic operators and the public interest in terms of the cost of proceedings and the availability of technical information.

necessary balance between the interests of economic operators, ***in particular small and medium-sized enterprises***, and the public interest in terms of the cost of proceedings and the availability of technical information.

Amendment 2

Proposal for a regulation

Recital 9

Text proposed by the Commission

(9) In order to facilitate access to European patents with unitary effect, in particular for small and *medium-size* enterprises, applicants who do not have a language in common with one of the official languages of the European Patent Office should be able to file their patent applications at the European Patent Office in any other official language of the Union. As a complementary measure, ***for applicants*** obtaining European patents with unitary effect and having their residence or principal place of business within a Member State of the Union which has as an official language a language other than one of the official languages of the European Patent Office, a system of additional reimbursements of the costs related to the translation from that language into the language of the proceedings of the European Patent Office, beyond what is currently already in place at the European Patent Office, should be administered by the European Patent Office in accordance with Article 12 of Regulation xx/xx [substantive provisions].

Amendment

(9) In order to facilitate access to European patents with unitary effect, in particular for small and *medium-sized* enterprises, applicants who do not have a language in common with one of the official languages of the European Patent Office should be able to file their patent applications at the European Patent Office in any other official language of the Union. As a complementary measure, ***small and medium-sized enterprises, natural persons and non-profit organisations*** obtaining European patents with unitary effect and having their residence or principal place of business within a Member State of the Union which has as an official language a language other than one of the official languages of the European Patent Office ***should benefit from*** a system of additional reimbursements of the costs related to the translation from that language into the language of the proceedings of the European Patent Office, beyond what is currently already in place at the European Patent Office. ***The system of additional reimbursements*** should be administered by the European Patent Office in accordance with Article 12 of Regulation xx/xx [substantive provisions].

Amendment 3

Proposal for a regulation Recital 9 a (new)

Text proposed by the Commission

Amendment

(9a) The modalities and the level of reimbursement of the additional translation costs should be conceived in a way which, in principle, ensures full compensation of the translation costs; a ceiling per page is necessary in order to reflect the normal average market price for translation and to avoid abuse.

Amendment 4

Proposal for a regulation Recital 10

Text proposed by the Commission

Amendment

(10) In order to promote the availability of patent information and the dissemination of technological knowledge, machine translations of patent applications and specifications into all official languages of the Union should be available as soon as possible. Machine translations are being developed by the European Patent Office and are a very important tool seeking to improve access to patent information and to disseminate widely the technological knowledge. The timely availability of high quality machine translations of European patent applications and specifications into all official languages of the Union would benefit all the users of the European patent system. Machine translations are a key feature of European Union policy. Such machine translations should serve for information purposes only and should not have any legal effect.

(10) In order to promote the availability of patent information and the dissemination of technological knowledge, machine translations of patent applications and specifications into all official languages of the Union should be available as soon as possible. Machine translations are being developed by the European Patent Office and are a very important tool seeking to improve access to patent information and to disseminate widely the technological knowledge. The timely availability of high quality machine translations of European patent applications and specifications into all official languages of the Union would benefit all the users of the European patent system. Machine translations are a key feature of European Union policy. Such machine translations should serve for information purposes only and should not have any legal effect. ***They should be made available online and free of charge on publication of the patent application and of the granted patent.***

Amendment 5

Proposal for a regulation Recital 11 b (new)

Text proposed by the Commission

Amendment

(11b) After the end of the transitional period, the European Patent Office should continue to publish an additional translation into English of the specification of the European patent provided voluntarily by the applicant. This would provide further international publicity and limit the possibility of an infringer arguing that it had acted in good faith.

Amendment 6

Proposal for a regulation Article 1

Text proposed by the Commission

Amendment

This Regulation implements the enhanced cooperation in the area of the creation of unitary patent protection authorised by Council Decision No 2011/167/EU with regard to the applicable translation arrangements.

1. This Regulation implements the enhanced cooperation in the area of the creation of unitary patent protection authorised by Council Decision No 2011/167/EU with regard to the applicable translation arrangements. It regulates the translation arrangements applicable to European patents to the extent that they have unitary effect.

2. This Regulation is without prejudice to the rules governing the languages of the institutions of the Union established in accordance with Article 342 of the Treaty on the Functioning of the European Union and to Council Regulation 1/1958.

3. This Regulation is based on the linguistic regime of the European Patent Office and should not be regarded as creating a specific linguistic regime for

the Union, or as creating a precedent for a limited language regime in any future legal instrument of the Union.

Amendment 7

Proposal for a regulation Article 3 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Once available, the machine translations of patent applications and specifications into all languages of the Union as referred to in Article 6(3) shall be made available online and free of charge on publication of the patent application and of the granted patent.

Amendment 8

Proposal for a regulation Article 3 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

2b. After the end of the transitional period referred to in Article 6 and in accordance with Article 12 of Regulation xx/xx [substantive provisions], the participating Member States shall, pursuant to Article 143 of the EPC, give the European Patent Office the task of publishing an additional full translation of the specification into English, if such additional translation has been provided voluntarily by the applicant. Such translation shall not be carried out by automated means.

Amendment 9

Proposal for a regulation Article 4 – paragraph 1

Text proposed by the Commission

1. In the case of a dispute relating to a European patent with unitary effect, the patent proprietor shall provide at the request and the choice of an alleged infringer, a full translation of the patent into an official language of the participating Member State in which either the alleged infringement took place or in which the alleged infringer is domiciled.

Amendment

1. In the case of a dispute relating to a European patent with unitary effect, the patent proprietor shall provide at the request and the choice of an alleged infringer, a full translation of the patent into an official language of the participating Member State in which either the alleged infringement took place or in which the alleged infringer is domiciled. ***Such translation shall not be carried out by automated means.***

Amendment 10

Proposal for a regulation Article 4 – paragraph 2

Text proposed by the Commission

2. In the case of a dispute relating to a European patent with unitary effect, the patent proprietor shall provide in the course of legal proceedings, at the request of a court competent in the territories of the participating Member States for disputes concerning European patents with unitary effect, a full translation of the patent into the language of the proceedings of that court.

Amendment

2. In the case of a dispute relating to a European patent with unitary effect, the patent proprietor shall provide in the course of legal proceedings, at the request of a court competent in the territories of the participating Member States for disputes concerning European patents with unitary effect, a full translation of the patent into the language of the proceedings of that court. ***Such translation shall not be carried out by automated means.***

Amendment 11

Proposal for a regulation Article 4 – paragraph 4

Text proposed by the Commission

4. In the case of a dispute concerning a

Amendment

4. In the case of a dispute concerning a

claim for damages, the court hearing the dispute shall take into consideration **that** the alleged infringer **may have** acted without knowing or having reasonable grounds to know that he was infringing the patent before having been provided with the translation referred to in paragraph 1.

claim for damages, the court hearing the dispute shall take into consideration **whether, especially if it is a small or medium-sized enterprise, a natural person, a non-profit organisation, a university or a public research organisation**, the alleged infringer **has** acted without knowing or having reasonable grounds to know that he was infringing the patent before having been provided with the translation referred to in paragraph 1.

Amendment 12

Proposal for a regulation Article 5

Text proposed by the Commission

Given the fact that European patent applications may be filed in any language under Article 14(2) of the EPC, in accordance with Article 12 of Regulation xx/xx [substantive provisions], the participating Member States, shall give, within the meaning of Article 143 of the EPC, the European Patent Office the task of administering a compensation scheme of reimbursing all translation costs up to a ceiling, from the fees referred to in Article 13 of that Regulation, for applicants filing patent applications at the European Patent Office in one of the official languages of the Union that is not an official language of the European Patent Office.

Amendment

1. Given the fact that European patent applications may be filed in any language under Article 14(2) of the EPC, in accordance with Article 12 of Regulation xx/xx [substantive provisions], the participating Member States, shall give, within the meaning of Article 143 of the EPC, the European Patent Office the task of administering a compensation scheme of reimbursing all translation costs up to a ceiling, from the fees referred to in Article 13 of that Regulation, for applicants filing patent applications at the European Patent Office in one of the official languages of the Union that is not an official language of the European Patent Office.

2. *The compensation scheme referred to in paragraph 1 shall be funded through the fees referred to in Article 13 of Regulation xx/xx [substantive provisions] and shall be available only for small and medium-sized enterprises, natural persons, non profit organisations, universities and public research organisations having their residence or principal place of business within a*

Amendment 13

**Proposal for a regulation
Article 5 – paragraph 1 b (new)**

Text proposed by the Commission

Amendment

1b. The compensation scheme referred to in paragraph 1 shall ensure full reimbursement of the translation costs up to a ceiling set in such a way as to reflect the average market price for translations and to avoid abuse.

Amendment 14

**Proposal for a regulation
Article 6 – paragraph 1 – subparagraph 1 a (new)**

Text proposed by the Commission

Amendment

Such translations shall not be carried out by automated means.

Amendment 15

**Proposal for a regulation
Article 7 – paragraph 2**

Text proposed by the Commission

Amendment

2. It shall apply from [a specific date will be set and it will coincide with the date of application of Regulation xx/xx on the implementation of enhanced cooperation in the area of the creation of unitary patent protection].

2. It shall apply from 1 January 2014 or from the date of entry into force of the Agreement on a Unified Patent Court, whichever is the later.

EXPLANATORY STATEMENT

1. Introduction

A well-functioning patent system that is able to meet the real needs of users plays a vital role in the economic growth and competitiveness of the EU. Indeed, in addition to being one of the main reasons for the development of innovation¹, the use of intellectual property rights makes a significant contribution to the economic development of the entire area concerned².

The aim of achieving unitary patent protection within the EU has been pursued by the Member States for nearly half a century. Further to the impossibility of reaching agreement on a Community patent, in 1973 the so-called Munich Convention³ was drawn up, to which all current EU Member States subsequently acceded.

The centralised procedure provided for by the Convention did not, however, enable the main barriers to the development of the European patent system to be removed. In particular, the high level of legal uncertainty⁴ and the considerable costs relating to the validation and maintenance of patents⁵.

The concomitance of these limitations has led to a patent system that is extremely fragmented and insufficiently competitive internationally. Suffice it to say that a European patent that has been validated in 13 states is 13 times more expensive than in the United States and 11 times more expensive than in Japan⁶.

2. Rapporteur's position on the translation arrangements

¹ Cfr Gambardella et al. (2006): 'Study on evaluating the knowledge economy - What are patents actually worth? The value of patents for today's economy and society' – can be consulted on the following website: http://ec.europa.eu/internal_market/indprop/docs/patent/studies/patentstudy-report_en.pdf. The study highlights the strong correlation between the use of intellectual property rights and the development of innovation, demonstrating empirically that the development of innovation depends closely on the level of protection of the invention.

² Cfr. Arora, A. and Gambardella, D. (2010): '*Ideas for rent: an overview of markets for technology*', Industrial and Corporate Change, 19(3): 775-803.

³ At present 38 countries are party to the Munich Convention, signed on 5 October 1973. The Convention led to the establishment, on 7 October 1977, of the European Patent Organisation, which has two bodies: the European Patent Office and the Administrative Council. The Convention enables a European patent to be granted through a single procedure. Once the European patent has been granted, it is up to the patent holder to request that it be recognised by the contracting states, on the basis of the relevant individual national regulations and recognition procedures.

⁴ The accumulated costs of parallel litigation in the four Member States that currently have the bulk of patent litigation cases (Germany, France, United Kingdom and the Netherlands) vary between €310 000 and €1 950 000 at first instance and €320 000 and €1 390 000 at second instance. Cfr. Harhoff (2009), *Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System*, Final Report.

⁵ The overall cost of validation of a European patent reaches, on average, €12 500 if validated in 13 Member States and over €32 000 if validated in the whole EU. Cfr. van Pottelsberghe, Bruno and François Didier (2006): *The Cost Factor in Patent Systems*, Université Libre de Bruxelles, Working Paper WP-CEB 06-002.

⁶ Cfr. SEC(2010)796: Commission impact assessment on the translation arrangements for the EU patent, p. 9 - 11.

2.1 Preliminary remarks and priorities

Although the current proposal is based on the working languages of the European Patent Office and is the result of a difficult political compromise, your rapporteur considers it necessary to protect and promote, as far as possible, the English language, as the language which is predominantly used in international trade relations.

In this regard, it is worth noting that 77%¹ of all patent applications filed at the EPO are already in English². From this it is easy to deduce that English is now the language of choice of the business and academic sector as far as technological research activities and innovation are concerned. In addition, English is in fact the technical language par excellence, as evidenced by the fact that 95% of all scientific reviews in R&D sectors are published in English³.

Your rapporteur also believes that European SMEs are continuing to suffer from lower productivity and slower development compared to their counterparts in the US and in other emerging economies, especially as far as innovation is concerned. This difficulty was also identified by the Commission in its 2007 communication aiming to reopen the debate on the European patent system. The Commission pointed out that the main reasons for the lack of participation by SMEs in the patent market were the lack of available advisory services – especially at the research stage – and the costs, which were all too often unsustainable⁴.

During the consultation on the future of the patent system in Europe⁵ the SMEs themselves drew attention to the need for specific support, in particular with reference to the costs of translation, patent research and legal protection.

The same requirement was expressed during the consultations on the Small Business Act, in which SMEs maintained that the main obstacles to access to the European patent market were the high costs and legal complexity of the patent system, stressing the need for a simplified, accessible patent system with reduced costs⁶.

The need for specific measures to facilitate the access of SMEs to the European patent market has also been repeatedly confirmed by academic research in this field⁷. At the same time, that research has shown the considerable adverse impact the costs of translation and of validating

¹ Cfr. v. Pottelsberghe, Bruno (2010): *Europe should stop taxing innovation*. Bruegel Policy Brief, 2010/02, p. 6.

² According to the data set out in the Commission's impact assessment, however, 45% of the total number of patent applications are in English (cfr. SEC(2010)796, p.21). In this regard it should be pointed out that the Commission data concern solely applications filed by European applicants. However, given that applications for unitary patent protection can be made also by applicants from third countries, the overall statistic describes the situation more exhaustively.

³ Cfr. van Pottelsberghe, Bruno (2010), op. cit., p. 7.

⁴ COM(2007) 165. p. 13.

⁵ Cfr. Commission report on the preliminary findings of the consultation available at: http://ec.europa.eu/internal_market/indprop/patent/consultation_en.htm.

⁶ Cfr. the following contributions to the consultation process: BDI (Bundesverband der deutschen Industrie), DIHK (Deutscher Industrie- und Handelskammertag), CBI (Confederation of British Industries) and UEAPME (European Association of Craft, Small and Medium-Sized Enterprises), Available at: <http://ec.europa.eu/enterprise/policies/sme/small-business-act/>.

⁷ Cfr.: Van Pottelsberghe, B. and Danguy, J.(2010): *Patent fees for a sustainable EU (community) patent system*; Van Pottelsberghe, B. and Francois, D. (2009): *The cost factor in patent systems*, Journal of Industry, Competition and Trade, 2009:9(4), 329 - 355.

and maintaining patents have on SMEs' decisions on whether or not to internationalise their businesses¹, thus hampering the development of innovation in the EU.

Your rapporteur agrees with the above-mentioned requests and the need for specific measures to facilitate the access of SMEs to the European patent market and to innovation. In this regard, he is convinced that the legislative measures concerning unitary patent protection provide an excellent opportunity to respond to the requests expressed by SMEs, in particular as far as costs and legal support are concerned.

2.2 Proposed amendments

Translation arrangements for the European patent with unitary effect

Your rapporteur intends to retain the decision to base the linguistic arrangements on the working languages of the EPO, in accordance with the outcome of the impact assessment carried out by the Commission² and with Council Decision 2011/167/EU, which authorises enhanced cooperation in the area of unitary patent protection.

That said, your rapporteur is somewhat critical that an instrument such as enhanced cooperation has been chosen in a sector that is integral to the internal market. Accordingly, while hoping that all EU Member States will soon be able to participate, your rapporteur wishes to point out that the linguistic arrangements chosen should not set a precedent for a limited language regime in any future legal instrument of the Union (see Amendment 8).

Equally, in the light of the above information, your rapporteur takes the view that the patent system should be oriented towards the use of the English language. In this regard, he is aware of the difficulties that a direct shift to a monolingual patent system would involve for the European Patent Office and for some of its users.

Nevertheless, your rapporteur is of the opinion that users should be offered the possibility of steering the system towards the use of English, in order to decide how better to publicise and protect their own inventions. Your rapporteur therefore proposes that at the end of the transitional period governed by Article 6 of the regulation, the European Patent Office should be given the task of publishing a translation into English of the specification of the European patent as provided voluntarily by the applicant at his or her expense (see Amendments 7 and 10).

Your rapporteur believes that this will enable applicants to give greater publicity to their inventions, whilst protecting themselves from any misuse of the 'good faith' clause (see Article 4(4)) by alleged infringers³.

2.2.2 Specific measures for SMEs

¹ Cfr. Harhoff, D., Hoisl, K., van Pottelsberghe, B. (2009): *Languages, fees and the international scope of patenting*, Ecore Discussion Paper, n. 50.

² Cfr. op. cit., p. 23 - 25.

³ The proposal for a regulation stipulates that the competent court should assess all the circumstances of the individual case including, *inter alia*, during the transitional period, the translation submitted together with the request for unitary effect (see recital 8).

As expressed by the users of the system, your rapporteur agrees that priority should be given to reducing the costs incurred by small and medium-sized enterprises, whilst at the same time increasing the legal protection they are afforded (see Amendment 1).

In relation to the latter, your rapporteur welcomes the provision set out in Article 4 of the proposal, designed to protect the good faith of infringers. Equally, however, he takes the view that the provision should be targeted at SMEs in particular (see Amendment 13). Indeed, given the limited financial and organisational resources of SMEs, especially at the research stage and when assessing the idea behind the patent, small companies should be differentiated from large ones during assessments of the good or bad faith of alleged infringers.

As regards, however, the reduction of costs for SMEs, your rapporteur is of the view that the compensation scheme provided for by Article 5 of the proposal should concern solely the reimbursement of additional costs borne by small and medium-sized enterprises which have their residence or principal place of business within a Member State of the Union (see Amendments 2 and 14). In order to ensure that the reimbursement of costs is geared also to individual applicants, research centres and universities, your rapporteur considers it advisable to include natural persons and non-profit organisations among the beneficiaries of the compensation scheme (Amendments 2 and 14).

In addition, your rapporteur takes the view that clear ceilings should be determined for the reimbursement referred to in Article 5(1), so that it covers all translation costs (see Amendment 3). Meanwhile, he considers it essential to base the compensation scheme on market prices for technical translations, in order to avoid abuse on the part of applicants (see Amendment 14).

2.2.3 Machine translations and transitional arrangements

Your rapporteur hopes that the European Patent Office will develop machine translations rapidly. Such translations will indeed play a fundamental role, as they will enable patent information to be made available from the early stages of the procedure, thus providing vital assistance at the research stage, which will be of particular benefit to individual researchers and SMEs.

In this regard, your rapporteur considers it vital to ensure that the machine translations are free of charge and immediately available, so that applicants and users do not have to bear the costs of the development and implementation of the system (see Amendments 4 and 9).

At the same time, your rapporteur is of the view that the involvement of representatives of individual national patent offices will facilitate the assessment of machine translation quality (see Amendments 6 and 16).

In this regard, your rapporteur is unaware of any reason why quality checks on translations should be launched only six years after the entry into force of this regulation. He would therefore prefer to amend this provision, to enable assessments to begin three years after the entry into force of the regulation (see Amendment 16).

With the same aim, namely that of ensuring that translations are of high quality, your rapporteur has amended the provisions concerning the expiry of the transitional period, so that the quality of the machine translations will depend solely on the expert evaluation. To that end, your rapporteur has amended the provision in question, to enable the Commission to propose an extension of the transitional period on the basis of the evaluation of the independent expert committee (see Amendments 17 and 18).

2.2.4 Entry into force.

Your rapporteur is of the opinion that the establishment of unitary patent protection should go hand in hand with the establishment of a unified jurisdictional system.

He therefore proposes amending the text to ensure that this regulation enters into force only when the agreement on the jurisdictional system has been ratified by at least nine Member States, including the three with the highest number of patent applications (see Amendment 19). This amendment will also prevent any constitutional or political obstacles to the ratification process relating to the agreement on jurisdiction, on the part of individual Member States, from preventing the entry into force of the regulations.

PROCEDURE

Title	Enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements		
References	COM(2011)0216 – C7-0145/2011 – 2011/0094(CNS)		
Date of consulting Parliament	30.5.2011		
Committee responsible Date announced in plenary	JURI 7.6.2011		
Rapporteur(s) Date appointed	Raffaele Baldassarre 11.4.2011		
Discussed in committee	21.6.2011	11.10.2011	21.11.2011
Date adopted	20.12.2011		
Result of final vote	+: -: 0:	17 4 0	
Members present for the final vote	Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Françoise Castex, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Klaus-Heiner Lehne, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Alexandra Thein, Diana Wallis, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka		
Substitute(s) present for the final vote	Jan Philipp Albrecht, Jean-Marie Cavada, Luis de Grandes Pascual, Vytautas Landsbergis, Kurt Lechner, Eva Lichtenberger, Arlene McCarthy		
Date tabled	9.1.2012		