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*Committee on Industry, Research and Energy*

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**2011/0093(COD)**

25.11.2011

## **OPINION**

of the Committee on Industry, Research and Energy

for the Committee on Legal Affairs

on the proposal for a regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection  
(COM(2011)0215 – C7-0099/2011 – 2011/0093(COD))

Rapporteur: Alajos Mészáros

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## SHORT JUSTIFICATION

Since 2000 the European Union has tried, without success, to adopt a unitary European patent system (before the entry into force of the Lisbon Treaty called Community patent) which could co-exist with national patents granted by national patent offices of the Member States (MSs) and the European patents granted under the European Patent Convention (EPC) by the European Patent Office (EPO).

Due to insurmountable difficulties in reaching a unanimous agreement within the Council on the language arrangements, negotiations failed several times. At the end of 2010 the Competitiveness Council declared it impossible to establish unitary patent protection in the entire EU within a reasonable period or in a foreseeable future.

Following this declaration, 12 MSs asked the Commission to submit a proposal for authorising enhanced cooperation in the area of unitary patent protection in order to be able to move forward in this very important matter. On 10 March 2011, following the consent given by the European Parliament on 15 February, the Competitiveness Council adopted the authorising decision to establish unitary patent protection in the territories of the 25 participating MSs. On 19 March 2011 the EP gave its consent to the launch of the enhanced cooperation. Three weeks later, on 13 April, the Commission presented a package of two legislative proposals that, if adopted, would allow any company or individual to protect their inventions through a single European patent which is valid in 25 MSs.

The creation of a truly unitary patent system will first and foremost bring about a highly needed simplification of the current system. This will allow users to cut administrative burdens and reduce patent costs in Europe of up to 80% thus improving the functioning and the protection of the free movement of goods in the Internal market and enabling innovation and entrepreneurship in Europe.

The high costs and complexity of validating European patents in several MSs represent the main reasons why patent proprietors appear to refrain from seeking EU-wide patent coverage. For instance, the total validation cost (including direct translation costs and estimated costs such as patent agent fees and publication fees) for a European patent of typical length is estimated to cost between EUR22.000 and 26.000 for an EU-wide coverage. Figures demonstrate that each year across all EU Member States companies spent between EUR205 and 230 million on translations, validations and professional charges. Creating an EU patent will help not only to reduce these costs to EUR680 per single patent, but also to create more favourable conditions for investment in R&D facilitating to reach the 3% target of GDP invested in R&D affirmed by Europe 2020.

Moreover, the current legislative proposal establishing the enhanced cooperation procedure and the linked to it expected proposal by the Commission on the creation of a European patent litigation system will bring about a much needed legal certainty in the field of patents in Europe.

The current proposal is the most significant and concrete step towards realising this long-overdue step. The European Parliament has been an ardent supporter of it calling for the creation of a true European patent for many years. To this end, your rapporteur warmly welcomes the Commission proposal, which offers a well-balanced and workable solution which has already been largely endorsed by the Council.

To this end, your rapporteur further considers that the delicate agreement achieved until this stage should be brought to fruition without delay with only some non-essential changes that might further improve the proposal without unravelling progress achieved so far.

One such improvement would be to disconnect the unitary effect of licensing and limiting/transferring/revoking or lapsing of European patents, i.e. while these should be issued/terminated etc with respect to the territories of all participating MSs, licensing should be possible in only a selected number of MSs should that be a company's wish.

Furthermore, the Commission proposal quite rightly acknowledges the importance of a partnership between the EPO and the national industrial property centres (recital 20), particularly with regards the benefit such partnership could offer to small and medium-sized enterprises in their patent activities. Thus your rapporteur believes that such partnership should be encouraged and the Commission should be allowed to stay informed about the development of such cooperation via its formal collaboration with the EPO.

Last but not least, it should be reiterated that any rights borne out of a European patent with unitary effect should be in full compliance with rights conferred by the Treaties and Union law.

Finally, in its capacity as a co-legislator, it is essential that the Parliament is kept duly informed on any aspects of the Commission's obligations towards the legislators to this Regulation.

## **AMENDMENTS**

The Committee on Industry, Research and Energy calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

## Amendment 1

### Proposal for a regulation

#### Recital 1

##### *Text proposed by the Commission*

(1) In accordance with Article 3(3) of the Treaty on European Union, the Union shall establish an internal market, shall work for the sustainable development of Europe based on balanced economic growth and shall promote scientific and technological advance. The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products across national borders and providing them with more choice and opportunities contributes to attaining these objectives. Uniform patent protection within the internal market, or at least a significant part thereof, should feature amongst the legal instruments which undertakings have at their disposal.

##### *Amendment*

(1) In accordance with Article 3(3) of the Treaty on European Union, the Union shall establish an internal market, shall work for the sustainable development of Europe based on balanced economic growth and shall promote ***the dissemination of information on*** scientific and technological advance. The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products across national borders and providing them with more choice and opportunities contributes to attaining these objectives. Uniform patent protection within the internal market, or at least a significant part thereof, should feature amongst the legal instruments which undertakings have at their disposal.

## Amendment 2

### Proposal for a regulation

#### Recital 7

##### *Text proposed by the Commission*

(7) The creation of unitary patent protection should be achieved by giving unitary effect to European patents in the post-grant phase by virtue of this Regulation and in respect of the participating Member States. The main feature of European patents with unitary effect should be their unitary character, i.e. providing uniform protection and having equal effect in all participating Member States. Consequently, a European patent with unitary effect should only be limited,

##### *Amendment*

(7) The creation of unitary patent protection should be achieved by giving unitary effect to European patents in the post-grant phase by virtue of this Regulation and in respect of the participating Member States. The main feature of European patents with unitary effect should be their unitary character, i.e. providing uniform protection and having equal effect in all participating Member States. Consequently, a European patent with unitary effect should only be limited,

*licensed*, transferred, revoked or lapse in respect of all the participating Member States. To ensure the uniform substantive scope of protection conferred by unitary patent protection, only European patents that have been granted for all the participating Member States with the same set of claims should benefit from unitary effect. ***However, to ensure legal certainty in the event of a limitation or revocation on the ground of lack of novelty pursuant to Article 54(3) EPC, the limitation or revocation of a European patent with unitary effect should take effect only in respect of the participating Member State(s) designated in the earlier European patent application as published.*** Finally, the unitary effect attributed to a European patent should have an accessory nature and should cease to exist or be limited to the extent that the basic European patent has been revoked or limited.

transferred **or** revoked, or lapse, in respect of all the participating Member States. ***It should be possible for a European patent with unitary effect to be licensed in respect of the whole or part of the territories of the participating Member States.*** To ensure the uniform substantive scope of protection conferred by unitary patent protection, only European patents that have been granted for all the participating Member States with the same set of claims should benefit from unitary effect. Finally, the unitary effect attributed to a European patent should have an accessory nature and should cease to exist or be limited to the extent that the basic European patent has been revoked or limited.

#### *Justification*

*Indeed, the issuing and termination of an European patent with unitary effect should happen with respect to all participating Member States, however, with regards its licensing, it should be possible to do that only for the territories of a few and not all participating states.*

### **Amendment 3**

#### **Proposal for a regulation**

##### **Recital 16**

###### *Text proposed by the Commission*

(16) Patent proprietors should pay one common annual renewal fee for European patents with unitary effect. Renewal fees should be progressive throughout the term of the patent protection and, together with the fees to be paid to the European Patent Organisation during the pre-grant stage, should cover **all** costs associated with the grant of the European patent and the administration of the unitary patent

###### *Amendment*

(16) Patent proprietors should pay one common annual renewal fee for European patents with unitary effect. Renewal fees should be progressive throughout the term of the patent protection and, together with the fees to be paid to the European Patent Organisation during the pre-grant stage, should cover **the** costs associated with the grant of the European patent and the administration of the unitary patent

protection. The level of the renewal fees should be fixed with the aim of facilitating innovation and fostering the competitiveness of European businesses. It should also reflect the size of the market covered by the patent and be similar to the level of the national renewal fees for an average European patent taking effect in the participating Member States at the time where the level of the renewal fees is first fixed *by the Commission*.

protection. The level of the renewal fees should be fixed with the aim of facilitating innovation and fostering the competitiveness of European businesses *and should take into account the status and financing capacities of micro-, small and medium-sized enterprises*<sup>1</sup>. It should also reflect the size of the market covered by the patent and be similar to the level of the national renewal fees for an average European patent taking effect in the participating Member States at the time where the level of the renewal fees is first fixed.

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<sup>1</sup> *As defined in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).*

#### **Amendment 4**

##### **Proposal for a regulation Recital 18**

###### *Text proposed by the Commission*

(18) Renewal fees should be paid to the European Patent Organisation. 50 percent thereof minus expenses incurred by the European Patent Office in carrying out tasks in relation to the unitary patent protection shall be distributed among the participating Member States, which should be used for *patent-related* purposes. The share of distribution should be set on the basis of fair, equitable and relevant criteria namely the level of patent activity and the size of the market. The distribution should provide compensation for having an official language other than one of the official languages of the European Patent Office, having a disproportionately low level of patenting activity and having acquired membership of the European

###### *Amendment*

(18) Renewal fees should be paid to the European Patent Organisation. 50 percent thereof minus expenses incurred by the European Patent Office in carrying out tasks in relation to the unitary patent protection shall be distributed among the participating Member States, which should be used for *the enforcement of this Regulation and for other patent and innovation-related purposes, including for the provision of advice and support to small and medium-sized enterprises*. The share of distribution should be set on the basis of fair, equitable and relevant criteria namely the level of patent activity and the size of the market. The distribution should provide compensation for having an official language other than one of the

Patent Organisation relatively recently.

official languages of the European Patent Office, having a disproportionately low level of patenting activity and having acquired membership of the European Patent Organisation relatively recently.

*Justification*

*In order to ensure that the distributed renewal fees serve the goal of the Regulation and benefit the enhanced patent system in Europe, it has to be stated for which purposes the participating Member States can use them.*

**Amendment 5**

**Proposal for a regulation**

**Article 3 – paragraph 2 – subparagraph 2**

*Text proposed by the Commission*

Without prejudice to Article 5, a European patent with unitary effect may only be limited, **licensed**, transferred, revoked or lapse in respect of all the participating Member States.

*Amendment*

Without prejudice to Article 5, a European patent with unitary effect may only be limited, transferred **or** revoked, or lapse, in respect of all the participating Member States.

*Justification*

*Indeed, the issuing and termination of an European patent with unitary effect should happen with respect to all participating Member States, however, with regards its licensing, it should be possible to do that only for the territories of a few and not all participating states.*

**Amendment 6**

**Proposal for a regulation**

**Article 3 – paragraph 2 – subparagraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***A European patent with unitary effect may however be licensed in respect of the whole or part of the territories of the participating Member States.***

*Justification*

*Indeed, the issuing and termination of an European patent with unitary effect should happen*



*with respect to all participating Member States, however, with regards its licensing, it should be possible to do that only for the territories of a few and not all participating states.*

## **Amendment 7**

### **Proposal for a regulation**

#### **Article 4 – paragraph 1**

*Text proposed by the Commission*

1. A European patent with unitary effect shall take effect in the territories of the participating Member States on the **date** of the publication, by the European Patent Office, of the mention of the grant of the European patent in the European Patent Bulletin.

*Amendment*

1. A European patent with unitary effect shall take effect in the territories of the participating Member States on the **fourteenth day following that** of the publication, by the European Patent Office, of the mention of the grant of the European patent in the European Patent Bulletin.

#### *Justification*

*This amendment seeks to bring in a transition period in the countries in which the European patent concerned will be coming into effect, making it possible for publishing queries to be addressed.*

## **Amendment 8**

### **Proposal for a regulation**

#### **Article 5**

*Text proposed by the Commission*

#### **Article 5**

##### **Prior rights**

***In the event of a limitation or a revocation on the ground of lack of novelty pursuant to Article 54(3) of the EPC, the limitation or revocation of a European patent with unitary effect shall take effect only in respect of the participating Member State(s) designated in the earlier European patent application as published.***

*Amendment*

***deleted***

#### *Justification*

*Since the amendment of the European Patent Convention in 2000, such possibility as provided for by this article is not longer possible to which end it might as well be deleted from the regulation.*

## Amendment 9

### Proposal for a regulation

#### Article 6 – paragraph 1 – introductory wording

*Text proposed by the Commission*

1. The European patent with unitary effect shall confer on its proprietor **the right to prevent** any third party not having the proprietor's consent **from the following**:

*Amendment*

1. The European patent with unitary effect shall confer on its proprietor **a legally enforceable right ruling out the lawfulness of the following for** any third party not having the proprietor's consent:

## Amendment 10

### Proposal for a regulation

#### Article 7 – paragraph 1

*Text proposed by the Commission*

1. The European patent with unitary effect shall confer on its proprietor **the right to prevent** any third **party from** supplying or offering to supply within the participating Member States any person without the proprietor's consent, other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.

*Amendment*

1. The European patent with unitary effect shall confer on its proprietor **a legally enforceable right ruling out the lawfulness of** any third **party's** supplying or offering to supply within the participating Member States any person without the proprietor's consent, other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.

## Amendment 11

### Proposal for a regulation

#### Article 8 – introductory wording

*Text proposed by the Commission*

The rights conferred by the European patent with unitary effect shall not extend to any of the following:

*Amendment*

The rights conferred by the European patent with unitary effect shall **accord with rights conferred by the Treaties and by**

**Union law and shall** not extend to any of the following:

*Justification*

*Rights conferred by European patents with unitary effect could sometimes conflict with other areas of EU policy and thus ensuring compliance with EU law is compulsory as provided for by Article 326 TFEU ("Any enhanced cooperation shall comply with the Treaties and Union law").*

**Amendment 12**

**Proposal for a regulation**  
**Article 8 – point b a (new)**

*Text proposed by the Commission*

*Amendment*

***(ba) the use of biological material for the purpose of breeding, discovering and developing any new plant variety;***

*Justification*

*It is important to provide for a limited breeders' privilege in order to ensure the freedom to operate with regard to biological material for the purpose of the development and discovery of a new plant variety.*

**Amendment 13**

**Proposal for a regulation**  
**Article 8 – point h**

*Text proposed by the Commission*

*Amendment*

***(h) acts as covered*** by the ***farmers privilege pursuant*** to Article 14 of Regulation (EC) No. 2100/94 ***which applies mutatis mutandis;***

***(h) the use by a farmer of the product of his harvest for propagation or multiplication by him on his own holding, where there has been a sale of plant propagating material to that farmer by the proprietor of the patent or with his consent for agricultural use, corresponding*** to Article 14 of Regulation (EC) No. 2100/94;

*Justification*

*With regard to the farmer's privilege, it is important to align the wording of the limitation to*

*the wording of Directive 98/44/EC on the legal protection of biotechnological inventions.*

#### **Amendment 14**

##### **Proposal for a regulation**

##### **Article 8 – point i**

*Text proposed by the Commission*

(i) the use *by a farmer* of *protected livestock for farming purposes, on condition that the breeding animals or other* animal reproductive material *were sold or otherwise commercialised to the* farmer by the *patent* proprietor or with *his/her* consent. *Such use includes the provision of the animal or other animal reproductive material for the purposes of his/her agricultural activity, but not the sale in the framework of or for the purpose of commercial reproductive activity;*

*Amendment*

(i) the use of *an animal* or animal reproductive material *by a farmer for an agricultural purpose, where there has been a sale* by the proprietor *of the patent* or with *his* consent *to the farmer* of *breeding stock* or other animal reproductive material *which constitutes or contains the patented invention. This does not include any sale within the framework of or for the purpose of commercial reproduction activity;*

##### *Justification*

*With regard to the farmer's privilege, it is important to align the wording of the limitation to the wording of Directive 98/44/EC on the legal protection of biotechnological inventions.*

#### **Amendment 15**

##### **Proposal for a regulation**

##### **Article 15 – paragraph 1 – point c a (new)**

*Text proposed by the Commission*

*Amendment*

*(ca) such as to take into account the status and financing capacities of small and medium-sized enterprises.*

#### **Amendment 16**

##### **Proposal for a regulation**

##### **Article 15 – paragraph 2 – point b a (new)**

*Text proposed by the Commission*

*Amendment*

***(ba) taking into account the specific situation of small and medium-sized enterprises as defined in Commission Recommendation 2003/361/EC;***

## **Amendment 17**

### **Proposal for a regulation**

#### **Article 16 – paragraph 2 – point b**

*Text proposed by the Commission*

*Amendment*

(b) the size of the market ***expressed in the number of population,***

(b) the size of the market, ***while ensuring a minimum amount to be distributed to each participating Member State,***

#### *Justification*

*In the distribution of renewal fees among Member States it might be more practical to ensure a distribution based on the size of the market (not in terms of population but in terms of market covered by the patent) but at the same time ensuring nonetheless some form of minimum payment to all participating MSs.*

## **Amendment 18**

### **Proposal for a regulation**

#### **Article 18**

*Text proposed by the Commission*

*Amendment*

The Commission shall establish a close cooperation through a working agreement with the European Patent Office in the fields covered by this Regulation. This cooperation shall include regular exchanges of views on the functioning of the working agreement ***and*** in particular on the issue of renewal fees and the impact on the budget of the European Patent Organisation.

The Commission shall establish a close cooperation through a working agreement with the European Patent Office in the fields covered by this Regulation. This cooperation shall include regular exchanges of views on the functioning of the working agreement, in particular on the issue of renewal fees and the impact on the budget of the European Patent Organisation, ***as well as on the cooperation between the European Patent Office and the central industrial property***

*offices of the participating Member States, in particular as regards the provision of support for patent activities to small and medium-sized enterprises.*

*Justification*

*As reflected in recital 20, there could be a clear benefit of "an enhanced partnership" between the EPO and the national central industrial property offices in particular with regards the patent activities of SMEs. Such cooperation should be encouraged and the Commission should be kept informed in the framework of its cooperation with the EPO.*

**Amendment 19**

**Proposal for a regulation**  
**Article 20 - paragraph 1**

*Text proposed by the Commission*

1. Not later than *six* years from the date on which the first European patent with unitary effect takes effect in the territories of the participating Member States, the Commission shall present to the Council a report on the operation of this Regulation and, where necessary, make appropriate proposals for amending it. Subsequent reports on the operation of this Regulation shall be presented by the Commission every *six* years.

*Amendment*

1. Not later than *three* years from the date on which the first European patent with unitary effect takes effect in the territories of the participating Member States, the Commission shall present to *the European Parliament and* the Council a report on the operation of this Regulation and, where necessary, make appropriate proposals for amending it. Subsequent reports on the operation of this Regulation shall be presented by the Commission every *three* years.

## PROCEDURE

<b>Title</b>	Enhanced cooperation in the area of the creation of unitary patent protection
<b>References</b>	COM(2011)0215 – C7-0099/2011 – 2011/0093(COD)
<b>Committee responsible</b> Date announced in plenary	JURI 10.5.2011
<b>Committee(s) asked for opinion(s)</b> Date announced in plenary	ITRE 7.7.2011
<b>Rapporteur(s)</b> Date appointed	Alajos Mészáros 1.9.2011
<b>Discussed in committee</b>	5.10.2011
<b>Date adopted</b>	23.11.2011
<b>Result of final vote</b>	+: 45 -: 4 0: 0
<b>Members present for the final vote</b>	Jean-Pierre Audy, Ivo Belet, Bendt Bendtsen, Jan Březina, Giles Chichester, Pilar del Castillo Vera, Christian Ehler, Vicky Ford, Adam Gierek, Norbert Glante, Robert Goebbels, Fiona Hall, Jacky Hénin, Edit Herczog, Kent Johansson, Romana Jordan Cizelj, Lena Kolarska-Bobińska, Béla Kovács, Philippe Lamberts, Angelika Niebler, Jaroslav Paška, Aldo Patriciello, Anni Podimata, Herbert Reul, Teresa Riera Madurell, Paul Rübig, Amalia Sartori, Francisco Sosa Wagner, Konrad Szymański, Patrizia Toia, Evžen Tošenovský, Ioannis A. Tsoukalas, Vladimir Urutchev, Kathleen Van Brempt, Alejo Vidal-Quadras, Henri Weber
<b>Substitute(s) present for the final vote</b>	Francesco De Angelis, Satu Hassi, Jolanta Emilia Hibner, Yannick Jadot, Ivailo Kalfin, Seán Kelly, Holger Krahmer, Werner Langen, Alajos Mészáros, Mario Pirillo, Vladimír Remek
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Cristian Silviu Buşoi, Anna Hedh