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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)

Amendments 21/11/2012

Am. 1 - Article 1 - paragraph 2

Text proposed by the Commission	Amendment
This Regulation constitutes a special agreement within the meaning of Article 142 of the Convention on the Grant of European Patents (European Patent Convention), as amended (hereinafter "the EPC").	***deleted***

Justification

The expression "special agreement" of Article 142 of the EPC, can only be understood as being, like the EPC itself, an international agreement within the meaning defined by Article 2 of the Vienna Convention on the Law of Treaties, governed by international law. A regulation of the European Parliament and the Council is a normative act included in EU internal law, thus, it cannot be governed by international law. Therefore, this regulation cannot constitute a special agreement within the meaning of Article 142 EPC.

Am. 2 - Article 3 - paragraph 2

Text proposed by the Commission	Amendment
2. A European patent with unitary effect ***shall have a unitary character. It shall provide uniform protection and shall have equal effect in all*** participating Member States.	2. A European patent with unitary effect ***is a patent title of the European Union that has effects throughout the territories of the*** participating Member States.

Justification

It cannot be pretended that the European patent with unitary effect provides "uniform protection" and has "equal effect" while it is enforced by national courts, in compliance with Article 64.3 EPC stating that "Any infringement of a European patent shall be dealt with by national law". Instead, assuring that it is a title of the EU is in better compliance with Article 118.1 TFEU, which is the legal basis for the present implementation of an enhanced cooperation, allowing the European Parliament and the Council to "establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements".

Additionally, this amendment complies with provision of Article 20-4 TEU stating that: "Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union." Accordingly, such titles wouldn't affect the acquis, and non-participating Member States would not have to consider them as such. Nevertheless, for participating Member States, EU institutions and potential EU agencies which could have to deal with unitary patents, they should be legally considered as undoubtedly being fully included in EU Law.

Am. 3 - Article 3 - paragraph 2a *(new)*

Text proposed by the Commission	Amendment
	A European patent with unitary effect shall have an autonomous character. It shall be subject only to the provisions of this Regulation, to the Treaties and Union Law, and, to the extent that this Regulation does not provide for specific rules, to those provisions of the European Patent Convention which are binding upon every European patent and which shall consequently be deemed to be provisions of this Regulation.

Justification

The autonomous character of the unitary patent is included in the measures implementing enhanced cooperation outlined by the Commission in its explanatory memorandum of the proposal for a Council decision authorising enhanced cooperation in the area of the creation of unitary patent protection (COM(2010) 790). This measure is important to be implemented in order to guarantee the legal certainty of this regulation implementing enhanced cooperation.

Moreover, since some powers have been delegated to the European Patent Office, which is an organisation that is outside the EU, in order to grant unitary patents, it is important to clarify that the provisions of the EPC which carry out such a delegation of powers, shall be contemplated as included in EU law, and, as such, are subject to the same rules as if unitary patents were granted by an EU agency (Judgment of the Court of 13 June 1958. - Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community – Case 9-56).

This amendment uses the wording of the general approach adopted by the Council (Competitiveness) on 4 December 2009 (16113/09 ADD 1), and the wording of the Convention for the European patent for the common market (Community Patent Convention) – 76/76/EEC.

Am. 4 - Article 3a *(new)*

Text proposed by the Commission	Amendment
	By …, the Commission shall present a proposal for a directive by the European Parliament and the Council, along with an impact assessment, for harmonisation of substantive patent law relevant for European patents with unitary effect .

Justification

The European Parliament and the Council shall exercise their legislative powers for the substantive patent law with regard to the European patent with unitary effect.

Rights conferred by patents could conflict with other areas of EU policy, and could harm important freedom interests, as it has been acknowledged by the Advocates General of the Court of Justice of the European Union, in Opinion 1/09 on the Creation of a unified patent litigation system, underlining that "[written rules of derived law and primary law, written or not, of the Union Law] bear a certain importance in disputes between individuals concerning patents", and mentioning "articles 13 [Freedom of the arts and sciences], 15 [Freedom to choose an occupation and right to engage in work], 16 [Freedom to conduct a business] and 17 [Right to property] of the Charter of Fundamental Rights of the European Union, which now has the same legal value as the treaties". Rights conferred by patents could also hamper productivity and growth in some fast moving fields (See for example, "Sequential Innovation, Patents and Imitation", by James Bessen and Eric S. Maskin, Institute for Advanced Study, arguing that if innovation is both "sequential" (each invention builds on its predecessor) and "complementary" (a diversity of innovators raises the chances of discovery), a firm's profit may actually be enhanced by competition, and a patent system may interfere with such competition and with innovation).

Therefore, the validation of European patents with unitary effect cannot be left to the European Patent Office or courts, but need a regular oversight by the EU legislator. This oversight, more than anything else, needs to be rationalised in the interest of the innovation policy of Europe 2020 Strategy. The involvement of the EU legislator for the substantive patent law of the unitary patent, as proposed by this amendment, would be a response to the severe criticisms of the governance of the current European patent system, in particular as stated in the European Parliament resolution on future patent policy in Europe (P6_TA(2006)0416), on October 12th 2006.

Moreover this is a formal request from the EPO's Enlarged Board of Appeal, in its opinion G 3/08 published on May 12nd, 2010: "When judiciary-driven legal development meets its limits, it is time for the legislator to take over".

Am. 5 - Article 3a *(new)*

Text proposed by the Commission	Amendment
	1. European patents with unitary effect shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application. ***2. The following in particular shall not be regarded as inventions within the meaning of paragraph 1:*** • ***(a) discoveries, scientific theories and mathematical methods;*** • ***(b) aesthetic creations;*** • ***(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;*** • ***(d) presentations of information.***

Justification

The goal of this amendment is to codify into EU Law, provisions defining an invention as set up by the European Patent Convention (EPC) and other international agreements (TRIPS). The wordings of the amendment is perfectly compliant with the EPC, and moreover is enhancing the EPC own wordings, by clarifying some difficulties that have resulted in divergent interpretations by various national courts. Hence, this amendment contributes to the goal of having a unified enforcement of European patents with unitary effect.

Rights conferred by patents could conflict with other areas of EU policy, and could harm important freedom interests, as it has been acknowledged by the Advocates General of the Court of Justice of the European Union, in Opinion 1/09 on the Creation of a unified patent litigation system, underlining that "[written rules of derived law and primary law, written or not, of the Union Law] bear a certain importance in disputes between individuals concerning patents", and mentioning "articles 13 [Freedom of the arts and sciences], 15 [Freedom to choose an occupation and right to engage in work], 16 [Freedom to conduct a business] and 17 [Right to property] of the Charter of Fundamental Rights of the European Union, which now has the same legal value as the treaties". Rights conferred by patents could also hamper productivity and growth in some fast moving fields (See for example, "Sequential Innovation, Patents and Imitation", by James Bessen and Eric S. Maskin, Institute for Advanced Study, arguing that if innovation is both "sequential" (each invention builds on its predecessor) and "complementary" (a diversity of innovators raises the chances of discovery), a firm's profit may actually be enhanced by competition, and a patent system may interfere with such competition and with innovation).

Therefore, the validation of European patents with unitary effect cannot be left to the European Patent Office or courts, but need a regular oversight by the EU legislator. This oversight, more than anything else, needs to be rationalised in the interest of the innovation policy of Europe 2020 Strategy. The involvement of the EU legislator for the substantive patent law of the unitary patent, as proposed by this amendment, would be a response to the severe criticisms of the governance of the current European patent system, in particular as stated in the European Parliament resolution on future patent policy in Europe (P6_TA(2006)0416), on October 12th 2006.

Moreover this is a formal request from the EPO's Enlarged Board of Appeal, in its opinion G 3/08 published on May 12nd, 2010: "When judiciary-driven legal development meets its limits, it is time for the legislator to take over".

Am. 6 - Article 3a *(new)*

Text proposed by the Commission	Amendment
	1. A set of instructions for solving a problem by means of an automated system consisting only of generic data processing hardware (universal computer), also called "program for computers" or "computer-implemented solution", is not an invention in the sense of applicable substantive patent law to a European patent with unitary effect, regardless of the form under which it is claimed. ***2. A claimed object can be an invention in the sense of applicable substantive patent law to the European patent with unitary effect only if it contributes knowledge to the state of the art in a field of applied natural science; an invention is a teaching about cause-effect relations in the use of controllable forces of nature.***

Justification

This amendment defines some rules of patentability in the same way as voted by the European Parliament on September 24th 2003 on its first reading of the Directive on the patentability of computer-implemented inventions (2002/0047 (COD)). The wordings of the amendment is perfectly compliant with the EPC, and moreover is enhancing the EPC own wordings, by clarifying some difficulties that have resulted in divergent interpretations by various national courts. Hence, this amendment contributes to the goal of having a unified enforcement of European patents with unitary effect.

Rights conferred by patents could conflict with other areas of EU policy, and could harm important freedom interests, as it has been acknowledged by the Advocates General of the Court of Justice of the European Union, in Opinion 1/09 on the Creation of a unified patent litigation system, underlining that "[written rules of derived law and primary law, written or not, of the Union Law] bear a certain importance in disputes between individuals concerning patents", and mentioning "articles 13 [Freedom of the arts and sciences], 15 [Freedom to choose an occupation and right to engage in work], 16 [Freedom to conduct a business] and 17 [Right to property] of the Charter of Fundamental Rights of the European Union, which now has the same legal value as the treaties". Rights conferred by patents could also hamper productivity and growth in some fast moving fields (See for example, "Sequential Innovation, Patents and Imitation", by James Bessen and Eric S. Maskin, Institute for Advanced Study, arguing that if innovation is both "sequential" (each invention builds on its predecessor) and "complementary" (a diversity of innovators raises the chances of discovery), a firm's profit may actually be enhanced by competition, and a patent system may interfere with such competition and with innovation).

Therefore, the validation of European patents with unitary effect cannot be left to the European Patent Office or courts, but need a regular oversight by the EU legislator. This oversight, more than anything else, needs to be rationalised in the interest of the innovation policy of Europe 2020 Strategy. The involvement of the EU legislator for the substantive patent law of the unitary patent, as proposed by this amendment, would be a response to the severe criticisms of the governance of the current European patent system, in particular as stated in the European Parliament resolution on future patent policy in Europe (P6_TA(2006)0416), on October 12th 2006.

Moreover this is a formal request from the EPO's Enlarged Board of Appeal, in its opinion G 3/08 published on May 12nd, 2010: "When judiciary-driven legal development meets its limits, it is time for the legislator to take over".

Am. 7 - Article 8 – point -a *(new)*

Text proposed by the Commission	Amendment
	(-a) the acts allowed pursuant to the Treaties and Union Law;

Justification

Compliance with EU Law is mandatory for the legal certainty of rights conferred by the European patent with unitary effect. Such compliance is mandatory according to Article 326 TFEU ("Any enhanced cooperation shall comply with the Treaties and Union law.") and Article 334 TFEU ("The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end."). Hence, it should be guaranteed that the European patent with unitary effect does not prevent acts authorized by any existing or future EU legislation.

Rights conferred by patents could conflict with other areas of EU policy, and could harm important freedom interests, as it has been acknowledged by the Advocates General of the Court of Justice of the European Union, in Opinion 1/09 on the Creation of a unified patent litigation system, underlining that "[written rules of derived law and primary law, written or not, of the Union Law] bear a certain importance in disputes between individuals concerning patents", and mentioning "articles 13 [Freedom of the arts and sciences], 15 [Freedom to choose an occupation and right to engage in work], 16 [Freedom to conduct a business] and 17 [Right to property] of the Charter of Fundamental Rights of the European Union, which now has the same legal value as the treaties". Rights conferred by patents could also hamper productivity and growth in some fast moving fields (See for example, "Sequential Innovation, Patents and Imitation", by James Bessen and Eric S. Maskin, Institute for Advanced Study, arguing that if innovation is both "sequential" (each invention builds on its predecessor) and "complementary" (a diversity of innovators raises the chances of discovery), a firm's profit may actually be enhanced by competition, and a patent system may interfere with such competition and with innovation).

Therefore, validation of European patents with unitary effect cannot be left to the European Patent Office or courts, but need a regular oversight by the EU legislator. This oversight, more than anything else, needs to be rationalised in the interest of the innovation policy of Europe 2020 Strategy.

Am. 8 - Article 8 – point ja *(new)*

Text proposed by the Commission	Amendment
	(ja) the acts of developing, modifying, distributing, selling, lending, making available or using a computer program intended to run on a computing equipment that is not specialised for implementing the patented subject matter;

Justification

This limitation takes into account the current practice of the European Patent Office to grant patents on computer programs and computer-implemented business methods. Such patents have demonstrated to hamper productivity and growth in the IT fast moving field (See for example, "Sequential Innovation, Patents and Imitation", by James Bessen and Eric S. Maskin, Institute for Advanced Study, arguing that if innovation is both "sequential" (each invention builds on its predecessor) and "complementary" (a diversity of innovators raises the chances of discovery), a firm's profit may actually be enhanced by competition, and a patent system may interfere with such competition and with innovation). Therefore, acts relating to general-purpose computing need to be protected from the enforcement of such patents, specially when European IT firms essentially include SMEs under the threat of large patent portfolios owned by extra-EU multinational firms.

This amendment defines a limited exception in compliance with Article 30 TRIPS. It should be noted that on September 24th, 2003, the European Parliament on its first reading of the Directive on the patentability of computer-implemented inventions (2002/0047 (COD)) has voted a similar amendment, with a larger scope of exception than this amendment, in order to protect the fundamental freedom of expression ("Member States shall ensure that the production, handling, processing, distribution and publication of information, in whatever form, can never constitute direct or indirect infringement of a patent, even when a technical apparatus is used for that purpose").

Am. 9 - Article 12 - paragraph 1

Text proposed by the Commission	Amendment
1. The participating Member States shall give***, within the meaning of Article 143 of the EPC,*** the European Patent Office the following tasks to be carried out in conformity with the internal rules of the European Patent Office:	1. The participating Member States shall give the European Patent Office the following tasks to be carried out in conformity with ***the Treaties and Union Law, and*** the internal rules of the European Patent Office

Justification

Compliance with EU Law is mandatory for the legal certainty of rights conferred by the European patent with unitary effect. Such compliance is mandatory according to Article 326 TFEU ("Any enhanced cooperation shall comply with the Treaties and Union law.") and Article 334 TFEU ("The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end."). Hence, it should be guaranteed that the European patent with unitary effect does not prevent acts authorized by any existing or future EU legislation.

Rights conferred by patents could conflict with other areas of EU policy, and could harm important freedom interests, as it has been acknowledged by the Advocates General of the Court of Justice of the European Union, in Opinion 1/09 on the Creation of a unified patent litigation system, underlining that "[written rules of derived law and primary law, written or not, of the Union Law] bear a certain importance in disputes between individuals concerning patents", and mentioning "articles 13 [Freedom of the arts and sciences], 15 [Freedom to choose an occupation and right to engage in work], 16 [Freedom to conduct a business] and 17 [Right to property] of the Charter of Fundamental Rights of the European Union, which now has the same legal value as the treaties". Rights conferred by patents could also hamper productivity and growth in some fast moving fields (See for example, "Sequential Innovation, Patents and Imitation", by James Bessen and Eric S. Maskin, Institute for Advanced Study, arguing that if innovation is both "sequential" (each invention builds on its predecessor) and "complementary" (a diversity of innovators raises the chances of discovery), a firm's profit may actually be enhanced by competition, and a patent system may interfere with such competition and with innovation).

Therefore, the validation of European patents with unitary effect cannot be left to the European Patent Office or courts, but need a regular oversight by the EU legislator. This oversight, more than anything else, needs to be rationalised in the interest of the innovation policy of Europe 2020 Strategy.

Additionally, in conformity with amendment 1 above, the reference to Article 143 EPC should be deleted.

Am. 10 - Article 12 - paragraph 2

Text proposed by the Commission	Amendment
2. In their capacity as Contracting States to the EPC, the participating Member States shall ensure the governance and supervision of the activities related to the tasks referred to in paragraph 1 by the European Patent Office. To that end they shall set up a Select Committee of the Administrative Council of the European Patent Organisation ***within the meaning of Article 145 of the EPC***.	2. In their capacity as Contracting States to the EPC, the participating Member States ***together with the European Parliament*** shall ensure the governance and supervision of the activities related to the tasks referred to in paragraph 1 by the European Patent Office. To that end they shall set up a Select Committee of the Administrative Council of the European Patent Organisation. ***This Select Committee should take decision according to mandate given by the European Parliament and shall report to the European Parliament. The Select Committee members shall be submitted to an hearing prior to their approval by the European Parliament.***

Justification

The European Parliament shall be associated in the governance and the supervision of the administrative acts accomplished by the European Patent Office.

Additionally, in conformity with amendment 1 above, the reference to Article 143 EPC should be deleted.

Am. 11 - Article 12 - paragraph 3

Text proposed by the Commission	Amendment
3. The participating Member States shall ensure effective legal protection before a national court against ***the*** decision***s*** of the European Patent Office ***in carrying out the tasks referred to in paragraph 1***.	3. The participating Member States shall ensure effective legal protection before a national court against ***any administrative*** decision of the European Patent Office.

Justification

In compliance with objections raised by the Advocates General of the Court of Justice of the European Union, in Opinion 1/09 on the Creation of a unified patent litigation system, the European Union should not either delegate powers to an international body or transform into its legal system acts issued by an international body without ensuring that effective judicial control exists, exercised by an independent court that is required to observe Union law and is authorized to refer a preliminary question to the Court of Justice for a ruling, where appropriate. Decisions of the EPO concerning patents can only currently be reviewed by the internal chambers of appeal created within the EPO, excluding any judicial appeal before an external court. There is no possibility of the European Court of Justice ensuring the correct and uniform application of Union law to proceedings taking place before the chambers of appeal of the EPO.

Am. 12 - Article 17 - paragraph 1

Text proposed by the Commission	Amendment
1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.	1. The power to adopt delegated acts ***pursuant to Articles 15 and 16*** is conferred on the Commission subject to the conditions laid down in this Article.

Justification

Like in paragraphs 2, 3 and 5 of the same article, acts referred to in this paragraph 1 are those defined by articles 15 and 16.

Am. 13 - Article 19

Text proposed by the Commission	Amendment
This Regulation is without prejudice to the application of competition law and the law relating to unfair competition.	This Regulation is without prejudice to the application ***of the Treaties and Union Law, including*** competition law and the law relating to unfair competition.

Justification

Compliance with EU Law is mandatory for the legal certainty of rights conferred by the European patent with unitary effect. Such compliance is mandatory according to Article 326 TFEU ("Any enhanced cooperation shall comply with the Treaties and Union law.") and Article 334 TFEU ("The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end."). Hence, it should be guaranteed that the European patent with unitary effect does not prevent acts authorized by any existing or future EU legislation.

Rights conferred by patents could conflict not only with competition law and the law relating to unfair competition but also with some other legal areas. The Advocates General of the Court of Justice of the European Union, in Opinion 1/09 on the Creation of a unified patent litigation system, have pointed that some "[written rules of derived law and primary law, written or not, of the Union Law] bear a certain importance in disputes between individuals concerning patents", and have mentioned "fundamental rights, the general principles of Union law (for example, the principle of proportionality and protection of legitimate interests) and the freedom of movement of goods".

Am. 14 - Article 20 - paragraph 1

Text proposed by the Commission	Amendment
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.	1. Not later than ***two*** 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 ***and the European Parliament*** 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 ***two*** years.

Justification

The European Parliament shall be associated in the review of this regulation. A shorter period for reviews allows a better scrutiny.