Enhanced cooperation in the area of the creation of unitary patent protection: implementation

2011/0093(COD) - 11/01/2012 - Committee report tabled for plenary, 1st reading/single reading

The Committee on Legal Affairs adopted the report by Bernhard RAPKAY (S&D, DE) 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.

It recommends that the European Parliament's position at first reading under the ordinary legislative procedure should be to amend the Commission proposal as follows:

Definitions: it is stipulated that a "European patent with unitary effect" means a European patent which benefits from unitary effect in the **territories of all the participating Member States** by virtue of this Regulation. The definition of "**Register for unitary patent protection**" means the register constituting part of the European Patent Register in which the unitary effect and any limitation, license, transfer revocation or lapse of a European patent with unitary effect are registered.

European unitary patent: European patents granted with the **same set of claims** in respect of all the participating Member States shall benefit from unitary effect in the participating Member States provided that their unitary effect has been registered in the Register for unitary patent protection.

In addition, a European patent with unitary effect may be licensed in respect of the **whole or part of the territories of the participating Member States**.

Prior rights: Members **deleted Article 5** of the proposal which stated that 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.

Administrative tasks in the framework of the European Patent Organisation (governance): the participating Member States shall entrust the following tasks to the EPO:

- the inclusion within the European Patent Register and the administration of the Register for unitary patent protection
- the collection and administration of renewal fees for European patents with unitary effect, in respect of the years following the year in which the European Patent Bulletin mentions their grant;
- ensuring that requests by the patent proprietor for unitary effect for a European patent are submitted in the language of the proceedings as defined in Article 14(3) of the EPC no later than one month after the mention of the grant is published in the European Patent Bulletin;
- ensuring that the unitary effect is indicated in the Register for unitary patent protection, where a request for unitary effect has been filed and, during the transitional period provided for in Council Regulation on translation arrangements, has been submitted together with the translations referred to in that Article and that the European Patent Office is informed of any limitations, licenses, transfers and revocations of European patents with unitary effect.

Members suggest that the **Member States shall ensure compliance with the provisions of this Regulation** in implementing their international obligations undertaken in the EPC and shall cooperate amongst themselves to that end. The participating Member States shall ensure the setting of the level of renewal fees in accordance with Article 15 and the setting of the share of distribution of the renewal fees.

The Select Committee of the Administrative Council shall consist of the representatives of the Member States and a representative of the Commission as an observer, as well as alternates who will represent them in their absence. The members of the Select Committee may be assisted by advisers or by experts. Decisions of the Select Committee of the Administrative Council shall be taken with due regard for the position of the Commission and in accordance with the rules set out in Article 35(2) of the EPC.

The participating Member States shall **ensure effective legal protection** before a competent court of one or several participating Member States against the decisions of the European Patent Office.

Level of renewal fees: the level of the renewal fees, shall be fixed, taking into account, among others, the situation of specific entities such as **small and medium-sized enterprises**.

Distribution: the amended text stipulates that the **European Patent Office shall retain 50% of the renewal fees** paid for European patents with unitary effect. The remaining amount shall be distributed to the participating Member States in accordance with the share of distribution of the renewal fees.

The share of distribution of renewal fees among the participating Member States shall be based on fair, equitable and relevant criteria which include the size of the market, while ensuring a minimum amount to be distributed to each participating Member State.

Delegated acts: Members are opposed to the idea of the Commission being empowered to adopt delegated acts concerning the fixing of the level of the renewal fees for European patents with unitary effect.

Report: not later than **three years** (rather than six) 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. The Commission shall regularly submit to the European Parliament and the Council reports on the functioning of the renewal fees.

Notification: each participating Member State shall **notify the Commission of the measures adopted** in accordance with Article 4(2)by the date of application of this Regulation or, in the case of a participating Member State in which the Unified Patent Court does not have exclusive jurisdiction with regard to European patents with unitary effect on the date of application of this Regulation, the date from which the Unified Patent Court has such exclusive jurisdiction in that participating Member State.

Entry into force and application: Members propose that the Regulation shall apply **from 1 January 2014** or the date of entry into force of the Agreement on a Unified Patent Court, whichever is the later.

In this context, the report stresses that in order to ensure the proper functioning of the European patent with unitary effect, the consistency of the case-law and hence legal certainty, and the cost effectiveness for patent holders, the **establishment of a Unified Patent Court** to hear cases concerning the European patent with unitary effect is essential. It is therefore of paramount importance that the participating Member States ratify the Agreement on a Unified Patent Court in accordance with their national constitutional and parliamentary procedures and take the necessary steps for that Court to be **operational as soon as possible**.