

OPEN LETTER TO THE MEMBERS OF THE PARLIAMENT

Eva Lichtenberger, Greens-EFA

The European Patent Package¹ is set to be debated and voted in first reading in the December plenary, despite the fact that the **European Council broke the first reading agreement** reached with the Legal Affairs Committee, and that **no subsequent negotiations** have been held to discuss this.

In spite of concerns about the compatibility of the Patent Package with the Treaties, the Legal Affairs Committee refused my request for a written opinion from the EP's legal service. The **European Court of Justice** is also currently considering the legality of the enhanced cooperation on the patent package, with **a ruling of Advocate General expected on 11 December**: the same day as the vote. It is quite likely that the opinion will conclude that the procedure is not compatible with the Treaty.

Therefore, **it would be appropriate for the Patent Package to be removed from next week's plenary agenda and postponed until after the legality of the procedure has been verified, at the very least.** However, the JURI rapporteurs prefer to go ahead, disregarding concerns for the rule of law.

If the Patent Package is adopted, the EU would be delegating competence and powers in this area to the European Patent Office (EPO), an extra-EU institution. The "compromise" imposed by the Council gives the EPO the power to grant of unitary patents without any effective review by the European Court of Justice (ECJ), which would be largely excluded from the jurisdiction on EU patents. There would be no possibility to appeal decisions of the new *Unified Patent Court* before the ECJ. The *Unified Patent Court* could just ask the ECJ to give preliminary decisions, while leaving the final decision with the *Unified Patent Court*. Furthermore, the European Parliament would give up its rights and competence to co-legislate changes to the patent regime, as the content of the unitary patent no longer would be decided upon in an EU legal act, but in an international agreement between the Member States.

Among experts, there is a strong presumption that the regulation does not comply with Article 118 TFEU which gives the EU competence to create intellectual property rights, so the regulation lacks a correct legal basis in the Treaties².

¹ The Patent Package consists of a Regulation on the European patent with unitary effect and an Agreement on a Unified Patent Court for litigation on infringements and revocation of European and unitary patents.

² This has been clearly stated by the Max Planck Institute for Intellectual Property and Competition Law: "*Article 118 para. 1 TFEU authorises the European Parliament and the Council to establish in accordance with the ordinary legislative procedure measures for the creation of European intellectual property rights in the context of the establishment and the functioning of the Internal Market. (...) it has a particular political objective of advancing market integration, which the Union legislator cannot simply delegate to international consensual agreement among Member States. Such delegation would undercut both the institutional rules (...) and the political autonomy of the Union*"

Instead of laying down clear rules for the internal market, the package at hand would create a very complex system of rules to be applied by the new Patent Court: itself inefficiently spread out at several locations, the Patent court would incoherently cover a myriad of legal regimes - EU law, national law and law based on conventions outside the EU framework. This risks increasing fragmentation instead of harmonisation, to the detriment of business.

There are also serious concerns regarding the substance of patent law. Within the EU there are several national limitations on patents in the areas of biotechnology, limitations on patents on human gene sequences, and provisions to protect the interests of farmers, such as exemptions for breeders, etc. Such limitations have been deleted from the regulation and are only partially taken into account by the *Draft Agreement*. This ignores the clear call by EU Parliament "*to ensure that the EU will continue to apply a comprehensive breeders' exemption in its patent law for plant and animal breeding*", as expressed by the European Parliament resolution of 10 May 2012 on the patenting of essential biological processes.

Indeed, **without a broad farmers' and breeders' exemption, the regulation would seriously inhibit farmers' freedom to use, exchange and share their own locally adapted seeds and breeds**, a process which has been essential to farming since the birth of agriculture.

Alongside these serious concerns about such a potential compromise, the way it is proposed by EU institutions raises concerns both for citizens and for enterprises. Indeed, the haste and secrecy surrounding this negotiation increase doubts on its viability.

The Greens/EFA group will table amendments which seek to unambiguously define a new patent title for the EU, compatible with its legal basis (Article 118 TFEU), ensuring that the patent court is fully integrated in the EU judicial and institutional framework.

The Greens/EFA group will also table amendments to exclude the patenting of plant and animal varieties used in agriculture and rules in line with Parliament's previous positions defining limits to software patents, in order to contribute to having a genuine unified enforcement of European patents with unitary effect.

Thank you very much for your consideration.

Yours sincerely,
Eva Lichtenberger