

**Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'**

COM(2013) 554 final — 2013/0268 (COD)

(2014/C 214/05)

Rapporteur: **Mr PEGADO LIZ**

On 25 September and 8 October 2013, respectively, the Council and the European Parliament decided to consult the European Economic and Social Committee, under Articles 67 and 81 of the Treaty on the Functioning of the European Union, on the

*Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

COM(2013) 554 final — 2013/0268 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 10 February 2014.

At its 496th plenary session, held on 26 and 27 February 2014 (meeting of 26 February), the European Economic and Social Committee adopted the following opinion unanimously.

## **1. Conclusions and recommendations**

1.1 The purpose of the proposal for a regulation <sup>(1)</sup> referred to the EESC is to amend Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

1.2 The proposal has a dual purpose: on the one hand, enabling compliance between the Agreement on a Unified Patent Court or 'UPC Agreement', signed on 19 February 2013, and the statute of the Benelux Court of Justice, amended on 15 October 2012 <sup>(2)</sup>, and the Brussels I Regulation (recast); on the other hand, to address the lack of common jurisdiction rules vis-à-vis defendants in non-European Union States.

1.3 The EESC supports the initiative of the EP and the Council, which is essential for legal certainty and security in relation to unitary patent protection in the European Union.

1.4 The EESC is pleased with the simplicity of the four new provisions to be added to the Brussels I Regulation; it considers these to be necessary, sufficient, duly justified and timely.

1.5 However, the EESC regrets that it was not consulted at a timely stage on the proposals for regulations to implement enhanced cooperation on ensuring unitary patent protection and on the package establishing the Unified Patent Court, in view of its previous opinions on these subjects.

1.6 Given the lack of previous consultation, the EESC would like to raise some questions at this late stage on the structure and functioning of the Court, which it believes need to be discussed in depth. In particular the EESC

- insists that the fees involved should be clear and transparent and applicable without any kind of threat to the right of access to justice,
- recommends that Rule 14 (2) should be either deleted or substantially modified and
- stresses the need of high professional training of the selected judges.

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<sup>(1)</sup> COM(2013) 554 final.

<sup>(2)</sup> See the text of the Decision of the Ministerial Committee of the Benelux Economic Union of 8 December 2011 establishing a Protocol amending the Treaty of 31 March 1965 concerning the establishment and statute of a Benelux Court of Justice M (2011) 9, and the text of the protocol concluded in Luxembourg on 15 October 2012, in Bulletin Benelux, no. 2, 2012, of 15.11.2012, at [http://www.benelux.int/wetten/Publicatieblad/Publicatieblad\\_2012-2\\_fr.pdf](http://www.benelux.int/wetten/Publicatieblad/Publicatieblad_2012-2_fr.pdf). See also the original text of the Treaty of 31 March 1965 as amended by the Protocols of 10 June 1981 and 23 November 1984 at <http://www.courbeneluxhof.be/fr/basisdocumenten.asp>.

## 2. Background

2.1 The Commission's proposal to the EP and the Council is the latest stage in the lengthy saga of the 'European patent with unitary effect'.

2.2 Calls for a patent providing uniform legal protection within the European Union go back to the 1960s. There has been a series of attempts and failures to achieve this.

2.2.1 This long and rocky road has at least led to one partial success: the establishment of a European patent by the Munich Convention signed on 5 October 1973, which also established a joint patent application procedure to the European Patent Office (EPO).

However, there are as many national legal rules on this European Patent as the number of countries specified by applicants. This is why States, institutions and users have long been advocating a simple system to ensure patent protection in the EU.

2.2.2 We have seen many attempts to establish 'Community', subsequently 'European Union' patents, but one after another these have failed. For example, the 1975 Luxembourg Convention on the community patent never entered into force due to failure to reach agreement between the Member States.

2.2.3 It was not until 2000 that the discussions on the future Community Patent were re-launched by the European Council at the Lisbon Congress, which announced a general programme to boost the competitiveness of European business. Directly after this meeting the European Commission put forward a proposal for a regulation to establish a new unitary industrial property certificate, the Community Patent <sup>(3)</sup>.

2.2.4 In 2003 the Member States agreed on a joint political approach but were unable to reach final agreement, in particular on language arrangements <sup>(4)</sup>. Following a broad consultation process in 2006, in April 2007 the Commission published a communication which reiterated its commitment to a community patent <sup>(5)</sup>, followed by a communication in July 2008 on 'An Industrial Property Rights Strategy for Europe' <sup>(6)</sup>, and re-launched negotiations with Member States.

2.2.5 In the absence of a consensus, and following the Council's decision of 10 March 2011, on 13 April 2011 <sup>(7)</sup> the Commission proposed to establish a European patent with unitary effect, on the basis of enhanced cooperation. All the Member States except for Italy and Spain accepted this solution <sup>(8)</sup>.

2.3 The 'patent package' comprises two regulations: Regulation (EU) No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and Council Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements <sup>(9)</sup> — and an international Agreement laying the ground for the creation of unitary patent protection in the European Union.

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<sup>(3)</sup> OJ C 337, 28.11.2000.

<sup>(4)</sup> The Competitiveness Council came very close to settling the outstanding issues at its November 2003 meeting (see MEMO/03/245); however, it failed to reach agreement on deadlines for submitting translations of claims.

<sup>(5)</sup> COM(2007) 165 final.

<sup>(6)</sup> COM(2008) 465 final.

<sup>(7)</sup> Council Decision 2011/167/EU authorising enhanced cooperation in the area of the creation of unitary patent protection.

<sup>(8)</sup> It should be pointed out that on 22 March 2013 Spain and Italy brought an invalidity action to the CJEU against the regulations implementing enhanced cooperation in the area of the creation of unitary patent protection (C-146/13 and C-147/13), an action which was rejected by a CJEU judgment of 16 April 2013.

<sup>(9)</sup> OJ L 361, 31.12.2012.

2.4 The Unified Patent Court is provided for by an international agreement between 25 Member States (with the exception of Spain and Poland), signed on 19 February 2013 in parallel with the Competitiveness Council <sup>(10)</sup> and ‘outside the EU institutional framework’ <sup>(11)</sup>. The Court will have jurisdiction over conflicts on future unitary patents and also over currently existing ‘conventional’ European patents <sup>(12)</sup>.

2.4.1 The UPC will be a specialised ad hoc court with local and regional branches in the EU. Instead of parallel procedures in national courts, parties to disputes should benefit from rapid and high quality judgments applicable in all Member States where the patent is valid.

2.4.2 The June 2012 European Council decided that the seat of the Court of First Instance’s central division would be in Paris, with sections in London and Munich <sup>(13)</sup>.

2.4.3 This new system will provide a one-stop shop for European patent applications with unitary effect in countries participating in enhanced cooperation, as well as a court with multiple competences ranging from actions for patent infringement, actions for the declaration of non-infringement, actions for provisional and protective measures or injunctions, actions for revocation of patents, etc. This court will also have jurisdiction over questions raised under Article 32.1 (i) on EPO decisions.

2.5 The EESC has been in the forefront of those who have always advocated and supported the creation of a European patent, both in response to referrals to the Committee on intellectual property and internal market issues <sup>(14)</sup>, and in own-initiative or exploratory opinions <sup>(15)</sup>.

2.5.1 The EESC also adopted opinions in response to referrals on two proposals for Council Decisions, one ‘conferring jurisdiction on the Court of Justice in disputes relating to the Community patent’ <sup>(16)</sup> and the other ‘establishing the Community Patent Court and concerning appeals before the Court of First Instance’ <sup>(17)</sup>.

2.6 However, the EESC was not consulted on the ‘patent package’ (with proposals for regulations which resulted in Regulations (EU) 1257/2012 and 1260/2012 of 17 December 2012 <sup>(18)</sup>) or the draft Agreement on a Unified Patent Court, signed on 19 February 2013 <sup>(19)</sup>.

### 3. EP and Council proposal

3.1 Article 89 of the Agreement on a Unified Patent Court stipulates that the Agreement shall enter into force:

a) on 1 January 2014

or

<sup>(10)</sup> The EP had approved this on the preceding day. Bernhard Rapkay’s report on the Regulation establishing a unitary patent was adopted by 484 votes to 164 against with 35 abstentions (under the co-decision procedure); Rafael Baldassarre’s resolution on translation arrangements was adopted by 481 votes to 152 against with 49 abstentions (the EP having a purely consultative say on this text); finally, Klaus-Heiner Lehne’s resolution was adopted by 483 votes to 161 against with 38 abstentions. This latter resolution on the jurisdictional system for patent disputes is a non-legislative text.

<sup>(11)</sup> See Council Doc 16351/12+COR 1 and Doc 6590/13 PRESSE 61, 19.02.2013.

<sup>(12)</sup> OJ C 175, 20.06.2013.

<sup>(13)</sup> Article 7 of the Agreement on a Unified Patent Court

<sup>(14)</sup> See opinions: OJ C 155, 29.05.2001, p. 80; OJ C 61, 14.03.2003, p. 154; OJ C 256, 27.10.2007, p. 3; OJ C 306, 16.12.2009, p. 7; OJ C 18, 19.01.2011, p. 105; .OJ C 376, 22.12.2011, p. 62 OJ C 68, 06.03.2012, p. 28; OJ C 234, 30.09.2003, p. 55; .OJ C 234, 30.09.2003, p. 76; OJ C 255, 14.10.2005, p. 22; OJ C 93, 27.04.2007, p. 25; OJ C 204, 09.08.2008, p. 1; OJ C 77, 31.03.2009, p. 15; OJ C 132, 03.05. 2011, p. 47; OJ C 9, 11.01.2012, p. 29; OJ C 24, 28.01.2012, p. 99; JO C 76, 14.03.2013, p. 24.

<sup>(15)</sup> See opinions: OJ C 100, 30.4.2009, p. 65; OJ C 44, 11.2.2011, p. 68; OJ C 143, 22.5.2012, p. 17; OJ C 299, 4.10.2012, p. 165; CESE3154/2013 (not yet published in OJ).

<sup>(16)</sup> OJ C 112, 30.04.2004, p. 81.

<sup>(17)</sup> OJ C 112, 30.04.2004, p. 76.

<sup>(18)</sup> Proposals COM(2011) 215/3 final and COM(2011) 216/3 final, 13.4.2011.

<sup>(19)</sup> Draft Agreement on a Unified Patent Court, and draft statute — final revised text of the presidency 16074/11, 11.11.2011.

- b) on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession in accordance with Article 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place (Germany, France and the United Kingdom)

or

- c) the first day of the fourth month after the date of entry into force of the amendments to Regulation (EU) No 1215/2012 concerning its relationship with this Agreement, whichever is the latest.

3.2 The purpose of the EP and the Council proposal under review is to adopt the requisite amendments to Regulation (EU) 1215/2012, firstly so as to ensure compliance between the UPC Agreement and that Regulation, and secondly to address the particular issue of jurisdiction rules vis-à-vis defendants in non-European Union States<sup>(20)</sup>.

3.3 At the same time, given that the Benelux Court of Justice (BCJ) has parallel competences in various fields including intellectual property law, the proposal also takes into account the protocol adopted on 15 October 2012 amending the text of the Treaty of 31 March 1965 concerning the establishment and statute of the BCJ, which requires an amendment to the Brussels I Regulation (recast) with the aim firstly of ensuring compliance between the revised Treaty and the Brussels I Regulation (recast), and secondly addressing the lack of common jurisdiction rules vis-à-vis defendants in non-European Union States<sup>(21)</sup>.

3.4 The text under review therefore proposes the following amendments to Regulation (EU) 1215/2012:

- a) provisions addressing the relationship between the UPC Agreement and the Protocol to the 1965 Benelux Treaty on the one hand and the Brussels I Regulation on the other hand;
- b) provisions completing the uniform jurisdiction rules in relation to third State defendants in civil and commercial disputes brought before the Unified Patent Court and the Benelux Court of Justice in matters covered by the UPC Agreement or the Protocol to the 1965 Benelux Treaty.

3.5 In particular, these amendments require the addition of a new sentence to Recital 14, and four new provisions — i.e. Articles 71a to 71d to Regulation (EU) 1215/2012.

#### 4. Observations

4.1 Of the three conditions for entry into force of the UPC Agreement, the only one which depends on action by the EU institutions is the condition referring to the amendments to Regulation 1215/2012<sup>(22)</sup> repealing Regulation 44/2001 (Brussels I)<sup>(23)</sup>.

4.2 The proposed amendments are **necessary, appropriate, duly justified** and **timely**.

They are necessary because:

- a) firstly, a clear and explicit explanation was needed that the Unified Patent Court and the Benelux Court of Justice should be considered as courts within the meaning of Regulation 1215/2012 in order to ensure legal certainty and predictability for defendants which may be brought before those courts in a Member State different from the one designated by the rules of this Regulation.
- b) secondly, the Unified Patent Court and the Benelux Court of Justice should be able to exercise jurisdiction with respect to defendants not domiciled in a Member State. In addition, this Regulation should determine the cases in which the Unified Patent Court and the Benelux Court of Justice may exercise subsidiary jurisdiction. The aim of this proposal, i.e. to ensure access to justice and to avoid courts giving different rulings on the same subject, is obvious.

<sup>(20)</sup> The proposal was submitted to all national parliaments of EU Member States on 17/09/2013, in accordance with the subsidiarity principle (SG-Greffe (2013)D/14401).

<sup>(21)</sup> The Benelux Court of Justice, established by a treaty of 31 March 1965, is a court common to Belgium, Luxembourg, and the Netherlands which has the task of ensuring the uniform application of rules common to the Benelux countries concerning various matters such as intellectual property law. The Protocol of 15 October 2012 enabled additional jurisdictional competences to be granted to the Court, including the areas covered by the Brussels I Regulation, although its initial role was essentially to give preliminary rulings on the interpretation of rules common to the Benelux countries.

<sup>(22)</sup> OJ L 351, 20.12.2012, p. 1; see opinion OJ C 218, 23.7.2011, p. 78.

<sup>(23)</sup> OJ L 12, 16.1.2001, p. 1; see opinion OJ C 117, 26.4.2000, p. 6.

- c) the rules of Regulation 1215/2012 on *lis pendens* and related actions should apply not only when proceedings are brought in Member State courts, both those subject to the above-mentioned international agreements and those which are not, but also where, during the transitional period referred to in Article 83(1) of the Agreement on a Unified Patent Court, proceedings concerning certain types of disputes relating to European patents as defined in that provision are brought before the Unified Patent Court on the one hand and a national court of a Contracting Member State to the UPC Agreement on the other hand.
- d) judgments given by the Unified Patent Court or Benelux Court of Justice should be recognised and enforced in Member States which are not Contracting Parties to the respective international agreements in accordance with Regulation 1215/2012.
- e) finally, judgments given by courts of Member States which are not Contracting Parties to the respective international agreements should continue to be recognised and enforced in the other Member States in accordance with Regulation 1215/2012.

4.3 The proposed amendments are **appropriate to the objectives** of:

- a) clarifying that the Unified Patent Court and the Benelux Court of Justice are 'courts' within the meaning of the Brussels I Regulation;
- b) clarifying the operation of the rules on jurisdiction with respect to the Unified Patent Court and the Benelux Court of Justice insofar as defendants domiciled in Member States are concerned, and creating uniform rules for the international jurisdiction vis-à-vis third State defendants in proceedings against such defendants brought in the Unified Patent Court and Benelux Court of Justice in situations where the Brussels I Regulation does not itself provide for such rules but refers to national law;
- c) defining the application of the rules on *lis pendens* and related actions in relation to the Unified Patent Court and the Benelux Court of Justice on the one hand and the national courts of Member States which are not Contracting Parties to the respective international agreements on the other hand, and defining also the operation of these rules during the transitional period referred to in Article 83(1) UPC Agreement;
- d) clarifying the operation of the rules on recognition and enforcement in relations between Member States which are Contracting Parties to the respective international agreements and those which are not.

4.4 The proposed amendments are **duly justified** in the explanatory memorandum preceding and introducing the proposal for a regulation.

4.4.1 Finally, these amendments are **timely** because Regulation 1215/2012 is applicable from 10 January 2015, whereas the UPC Agreement only enters into force from the first day of the fourth month after the date of entry into force of the amendments to Regulation (EU) No 1215/2012, which also enter into force on 10 January 2015 (Article 2 of the proposal).

4.5 Thus, **the EESC agrees with and supports the proposal** under review, which it feels is sufficient and necessary to ensure combined and coherent application of the UPC Agreement, the protocol extending the powers of the Benelux Court of Justice, and the Brussels I Regulation (recast).

4.6 **However, the EESC is disappointed not to have been consulted** on the 'patent package' (Regulations (EU) 1257/2012 and 1260/2012) or on the draft international agreement laying the foundations for establishing unitary patent protection in the EU.

4.6.1 Nonetheless, the EESC would like to take this opportunity to welcome the flexibility of arrangements for coexistence of the European patent and the patent with unitary effect, as a system allowing applicants to choose the option which suits them best, either a European patent for several designated Member States, or a European patent with unitary effect on all 25 Member States party to enhanced cooperation.

4.6.2 However, there are still some questions surrounding the simplification envisaged by the 'patent package' given that work on implementing the system is still ongoing.

Indeed, a declaration appended to the Agreement envisages establishing a committee of Member State representatives to work out 'arrangements for the proper functioning of the Unified Patent Court'. Among other things, this Committee has the task of preparing the rules governing the Court's proceedings, and of organising training for judges <sup>(24)</sup>.

4.6.2.1 The coexistence of an arbitration-based dispute settlement mechanism <sup>(25)</sup> and of possible action in the Unified Patent Court also raises questions given that the powers of the UPC will change over the transition period of seven years.

4.6.2.2 Furthermore, there is considerable legal complexity surrounding the entry into force of the patent package as it is contingent on entry into force of the UPC Agreement in line with the provision mentioned in point 3.1.

4.6.2.3 The very structure of the UPC is confusing. The court of first instance will have a central division shared between three cities: Paris for industrial processes, transport, paper textiles, fixed constructions, physics and electricity, London for chemistry, metallurgy and 'human necessities' such as pharmaceuticals, and Munich for mechanical engineering, lighting, heating, weapons and blasting. Local divisions can then be created within a State as well as regional divisions concerning at least two countries. Finally, the appeal court will have its seat in Luxembourg.

4.6.2.4 The fact that the total amount of court fees payable cannot be known in advance may inhibit a defendant from taking action through UPC to defend his rights. This may undermine the defendant's rights to have access to justice.

4.6.2.5 Rule 14 (2) of the Proposed Rules of Procedure of UPC <sup>(26)</sup> is difficult to reconcile with Article 49 of the Agreement between contracting Member States for the establishment of the UPC particularly where the competence of the division before which the case is brought is based on Article 33(1)(a). It is particularly difficult to understand exactly which language is applicable. Article 49(3) of the agreement gives the parties the right to agree on the language of proceedings subject to the approval of the competent panel while Rule 14 (2) states that 'the Statement of claim shall be drawn up in the language in which the defendant conducts its business in its Contracting Member State'. In order to eliminate misinterpretations EESC recommends that Rule 14 (2) should be either deleted or substantially modified.

4.6.2.6 The success of the Unified Patent Court depends greatly on the quality of the selected judges. Though coming from different Member States and with greatly varying experiences due to the many differences in Member States' procedural systems, judges must follow the new Unified Patent Court Procedures. The quality and depth of training of appointed judges is therefore very important for the success of UPC not only on applicable new Rules of Procedure, but also in terms of language capabilities that are essential for the Court.

4.7 Given this complexity, the simplicity of the four new provisions to be added to the Brussels I Regulation is very welcome.

Brussels, 26 February 2014.

*The President*  
*of the European Economic and Social Committee*  
Henri MALOSSE

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<sup>(24)</sup> <http://www.unified-patent-court.org/>.

<sup>(25)</sup> Article 35 of the UPC Agreement.

<sup>(26)</sup> Unified Patent Court (UPC).