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Europe: Legal Service of the Parliament questions in an opinion the decision of the European Council on the unitary patent, an AEF news

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After the European Parliament has decided, in early July 2012, to [postpone its plenary vote\[2\]](#) on the unitary patent, and hence after that its committee on Legal Affairs (JURI) is about to [reconsider the case\[3\]](#), [AEF\[4\]](#), a specialised French press agency, has released three news taking stock of the current situation. Courtesy of [AEF\[4\]](#), we translate here the [third news\[5\]](#), which reveals a report by Parliament's legal services. You can also find an [deciphering\[6\]](#) of the legislative process, and an [interview\[7\]](#) of Gerald Sédrati-Dinet, adviser on patents for [April\[8\]](#), a French advocacy association devoted to promote and protect Free/Libre Software.

CONFIDENTIAL. Europe: legal services of the Parliament question in an opinion the decision of the European Council on the unitary patent

[Anne Roy](#) [9]

Field : Research and Innovation

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?The deletion of Articles 6 to 8 from the proposed regulation [on the unitary patent] removes essential elements of substantive patent protection from the proposed regulation. As a result of this deletion, therefore, the act would not permit the uniform protection of these intellectual property rights throughout the Union and, consequently, would not comply with the requirements laid down in Article 118(1) TFEU [Treaty on the Functioning of the European Union], the proposed legal basis [10]?. This is the conclusion of an [opinion](#) [11] of the Legal Service of the European Parliament, which was given on July 9th, 2012 to the Chairman of the JURI Committee (Legal Affairs), Klaus-Heiner Lehne (EPP, Germany), and which AEF has obtained. This review focuses on the decision of the Heads of State and Government of the EU on June 29th 2012, to remove three articles from the first the legislative part of the ?package? on the European unitary patent.

Following the decision of the European Council, the European Parliament has voted on July 2nd, 2012 to postpone the vote on the European unitary patent, which was originally planned for July 4th, 2012 (AEF No. [171462](#) [12] and [169446](#) [13]) and the JURI Committee has referred to the Legal Service of the European Parliament. JURI has received this first opinion for its meeting of July 9th and 10th, 2012, which, concludes therefore on the non-compliance of the proposal adopted by the Council with the Lisbon Treaty. JURI is expecting for early September a more detailed opinion of the legal service in order to decide how to proceed in the legislative process on the unitary patent (AEF No. [171462](#) [12]).

ARTICLES 6 TO 8 ARE THE ESSENTIAL ELEMENT OF THE REGULATION

In its opinion, the legal service reminds a settled case law of the Court of Justice that ?the choice of legal basis of European Union acts is to be determined solely by reference to objective criteria that are amenable to judicial review, and in particular the aim and content of the act being proposed?. It then reminds that ?the aim and content of the proposed regulation are in fact to establish a European patent with unitary effect which has a unitary character providing uniform protection and having equal effect in all participating Member States. Although the proposed regulation builds on the existing system of European patents granted under the European Patent Convention, it adds a new quality by granting unitary effect to those patents?.

However, for the legal service, "Articles 6 to 8 of the proposed regulation, which relate to substantive patent law, are at the core of a genuine European intellectual property title. These provisions form the essential part of Chapter II of the proposed regulation regarding "Effects of the European Patent with Unitary Effect". They contain, in particular, the right of the patent proprietor to prevent direct or indirect use of the invention (Articles 6 and 7), as well as a number of limitations to the effects of the unitary patent (Article 8)".

IN CASE OF DISAGREEMENT, « LE PARLEMENT PROCÉDERA À UNE DEUXIÈME LECTURE »

Therefore, the opinion continues, "the deletion of Articles 6 to 8 of the proposed regulation would remove the essential element of the substantive patent protection and would leave it incomplete as a European intellectual property title within the sense of Article 118(1) TFEU". According to the authors of the opinion, "this would jeopardize the choice of Article 118(1) TFEU as the legal basis for the regulation". In order to have recourse to Article 118(1) TFEU, "the EU legislature must provide, under EU law and, consequently, under the jurisdictional review of the European Court of Justice, a specific measure granting "uniform protection" of the EU patent with unitary effect in the patent regulation".

Moreover, deciding on the Council's decision to amend a text agreed in an informal trilogue (consultation) between the Commission, the Parliament and the Council in December 2011, the Legal Service of the European Parliament reminds that "the Council, acting unanimously, may amend a legislative proposal from the Commission, as long as the Commission does not withdraw its proposal". It adds: "If the Council does not approve the European Parliament's position at first reading, the Council has to adopt its own position at first reading and communicate it to the Parliament, which will lead to a second reading".

To download:

- [Opinion of the Legal Service of the European Parliament on the unitary patent \(July 9th, 2012\)](#) [14]
Document n° 6652

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- [European unitary patent: the Association for the promotion and defense of free software and 400 companies mobilised against the project?](#) [15]
AEF n° 171549 of Thursday, September 13rd, 2012 - RI
- [12]
AEF n° 171462 of Wednesday, September 12nd, 2012 - RI
- [European unitary patent: "If there is no patent, it is the fault of the Council of the EU" \(Bernhard Rapkay, rapporteur for the Parliament\)](#) [16]
AEF n° 169446 of Wednesday, July 11st, 2012 - RI
- [European unitary patent: "A complex, incomplete and very poorly drafted system" \(Jean-Christophe Galloux, Irpi\)](#) [17]
AEF n° 169183 of Tuesday, July 10th, 2012 - RI
- [URGENT. Unitary patent: European Parliament unanimously decides to postpone the debate and vote in mid-September](#) [18]
AEF n° 168965 of Monday, July 12nd, 2012 - RI
- [URGENT. Jurisdiction of unitary patent: Paris chosen to host the Central Division, with two specialised centers in London and Munich](#) [19]
AEF n° 168862 of Friday, June 29th, 2012 - RI
- [The OECD recommends the creation of a European unitary patent "to reduce the cost of patenting in Europe"](#) [20]
AEF n° 164508 of Tuesday, March 27th, 2012 - RI
- [Unitary patent: "Paris has all the required advantages to host the European court" \(Philippe Cochet, MP, UMP\)](#) [21]
AEF n° 162282 of Friday, February 10th, 2012 - RI

[22] paragraph 1 of Article 118 TFEU states that "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall 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".

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[8] <http://www.april.org>

[9] <mailto:anne.roy@aef.info>

[10] https://www.unitary-patent.eu/content/europe-legal-service-parliament-questions-opinion-decision-european-council-unitary-patent-a#footnote1_9kti26w

[11]

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[13]

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[14]

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[15]

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[16]

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[17]

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[18]

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[19]

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[20]

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[21]

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[22] https://www.unitary-patent.eu/content/europe-legal-service-parliament-questions-opinion-decision-european-council-unitary-patent-a#footnoteref1_9kti26w