

Preparation of the vote on the patent package Note by the S&D Secretariat

Preliminary remarks:

The discussion on the creation of a unitary title of protection for European patents is as old as the internal market (first Draft Convention for a European Patent dates back to 1959-1962). 50 years after, in times of economic and social crisis, S&D confirms its commitment to support Europe's innovative resources.

The creation of the unitary patent would put an end to decade long unfruitful negotiations. The unitary patent should be granted in the 25 MS based on a single application and, according to Commission estimates, would reduce costs by 70% for applicants, roughly down from 32000 Euro which is now the costs for patent protection valid in 25 MS. Patent proprietors should pay one common annual renewal fee for European patents with unitary effect.

"The biggest opportunity to strengthen innovation in Europe with respect to intellectual property rights is the creation of the EU patent".¹ (Merkies report).

State of play before the vote

Since the conflict caused by the last EC summit in June 2012, the Cypriot Presidency has worked out a compromise proposal adopted in COREPER on 19 November 2012. During the past months informal negotiations took place between the rapporteurs, Commission and Council in order to be sure that the adopted proposal is acceptable for the Parliament. The EPP and S&D rapporteurs consider that the compromise reached is in line with our **redlines**:

- compliance with EP prerogatives and the Union law
- preserve the ECJ role as far as preliminary rulings are concerned and guarantee the primacy of EU law
- right to legislate further as per conferred Union competences

The compromise proposal is based on a cross -reference (laid down in **new article 5 in the text of the Regulation**) to the national laws, and the Unitary Patent Court Agreement that copy/paste the content of articles 6-8 in articles 14f-h UPC. These provisions in articles 14f-h would be extended to unitary patents, so that in the end this corresponds to Articles 6-8 of the regulation.

S&D line

We acknowledged the wish of the Member States and invited the Council to come forward with a workable proposal that should answer two criteria: to be legally sound (we have not accepted the initial explanation of the Council- "our political masters decided so" without any legal justification). **S&D will not accept any proposals in breach of EU law and bypassing scrutiny of ECJ. The European Parliament cannot be cut off and prevented to adopt future sectoral measures, as per Union competences. We do not give up our rights to legislate to a body outside the EU framework, in particular on sensitive matters linked to limitations to patentability, such as software and biotechnologies.**

¹ <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0162&language=EN>
(MERKIES report)

General legal framework: There is no legal argument against the use of the enhanced cooperation procedure

The overall legal framework for the patent package is the enhanced cooperation amongst 25 MS (Spain and Italy decided not to join the enhanced cooperation for the time being) approved by the European Parliament by a large majority in February 2011:

<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20110214&secondRef=ITEM-014&format=XML&language=EN>

Italy² and Spain³ took the case to the ECJ (May 2011) claiming that the enhanced cooperation would be against the spirit of the Single Market. The opinion of the Advocate General on the two cases should be available on 11.12.2012. The opinion is not binding on the EP. The enhanced cooperation came in place after 10 years of fruitless negotiations, the main stumbling block being the language regime: patents can only be filed in English, German and French. An "English only" solution was asked by Spanish representatives based on statistics on the most frequently used language for patent filings.

At the Competitiveness Council meeting of 10 November 2010, it was recorded that there was no unanimity to go ahead with the proposed Council Regulation on the translation arrangements for the EU patent. It was confirmed at the Competitiveness Council meeting on 10 December 2010 that insurmountable difficulties existed, making a decision requiring unanimity impossible now and in the foreseeable future. It follows that the objectives of the proposed Regulations to establish unitary patent protection in the entire European Union can not be attained within a reasonable period by applying the relevant provisions of the Treaties. Twelve Member States (Denmark, Estonia, Finland, France, Germany, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Sweden and the United Kingdom) have addressed formal requests to the Commission indicating that they wish to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection and that the Commission should submit a proposal to the Council to that end. Subsequently, other 13 Member States, except Spain and Italy, joined the enhanced cooperation.

➤ To be noted that the Parliament already authorized an enhanced cooperation in **ROME III** regulation⁴! It allows international couples to choose the applicable law in case of separation or divorce, based on a hierarchy of criteria (connecting factors) that improves access to justice. For example a German-French couple living in Italy can choose Italian German or French law. In other words, if a law of one of the spouses imposes long and costly procedures (a number of years of separation before divorce), while the law of the other spouse allows smoother conditions, the two can agree to choose the most favourable law in their interest.

The legal service of the Parliament has been consulted at the request of the JURI members, and confirmed that under **Art. 329 (1) TFEU**, EP is **not** asked to give its consent **on the content** of the measures needed to implement the enhanced cooperation. **Under Title 4 TEU, art. 20**, it is clearly stated that it is the **Member States** initiating the enhanced cooperation on matters not falling under the exclusive competences of the Union. The **legality** is to be assessed in the **implementing measures**, not in the authorisation of the enhanced cooperation. For the regulation- the Rapkay report (see below the list of reports under the "patent package"), **Art. 118.1 TFEU** is a measure of approximation of laws for the internal market that does not fall within exclusive competences (internal market measures are non exclusive competences). **Therefore, there is no legal argument against the use of the enhanced cooperation procedure.**

²

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=112582&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1073152>

³

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=112682&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=646923>

⁴ <http://www.era-comm.eu/e-learning/Module%202/index.html>

Assessment of the global agreement of the patent package implementing enhanced cooperation

What is the patent package?

The **patent package** consists of three reports (the procedure is marked in red):

- The Rapkay report 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 (COM(2011)0215 – C7-0099/2011 – 2011/0093(COD)) <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0001&format=XML&language=EN>
- The Baldassare report on the proposal for a Council regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (COM(2011)0216 – C7-0145/2011 – 2011/0094(CNS)) <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0002&format=XML&language=EN>
- The report on jurisdictional system for patent disputes (2011/2176(INI)) - JURI Committee - Rapporteur: Klaus-Heiner Lehne (A7-0009/2012) <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0009&format=XML&language=EN>

What **conflict** developed further to the exchange of letters of 02.12.2011 that was supposed to lead to a first reading agreement?

The package was **removed** from the July plenary agenda further to the intervention of the European Council⁵ that recommended changes to the text of first reading agreement, concluded in December 2011⁶. The text affected in first instance is the only file in the package decided under ordinary legislative procedure:

- The Rapkay report 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 (COM(2011)0215 – C7-0099/2011 – 2011/0093(COD)) <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0001&format=XML&language=EN>

On the 28th of June 2012, the European Council recommended the deletion of **Art. 6 to 8** in the text of the regulation establishing a unitary title, now moved in **Art. 14f-h of the Court Agreement (comparative table in Annex I)**. This decision was contrary to conclusions of the negotiating team, including the three legal services of the European Parliament, Council and the Commission, stating that Art. 6 to 8 are **key** for the legality of the regulation. **The compliance with the Union law was a redline for S&D rapporteur throughout the negotiation process.**

In terms of interinstitutional relations, it is unprecedented that the European Council interferes in the ordinary legislative procedure. On the substance, a solution had to be found for the Regulation establishing the unitary patent that is **compliant with Art. 118.1 TFEU (the legal basis of the regulation)**⁷. As far as the relations with Council are concerned, the rapporteurs

⁵ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/fr/ec/131408.pdf, page 2

⁶ <http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48182/html/EU-patent-Parliament-postpones-vote-due-to-Council's-last-minute-change>

⁷ Chapter III, approximation of laws: 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. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language

endeavoured to find a **pragmatic solution** to fill the competitiveness gap of the EU in relation with the big patent offices (US, China, Australia, South Korea, India, Japan), **while preserving the EP rights** and the acquired competence of the Union to legislate on patent law/limitations to patentability.

1.1. Conflict concerning the Rapkay report/the Unitary patent regulation:

Art. 6 to 8 define the effects of the unitary patent (the right to prevent the direct use of the invention-Art. 6, the indirect uses- Art. 7 and limitations to patentability in Art. 8).

Art. 8 on limitations stirred old sensitivities on the non patentability of software and patents on life.

SOFTWARE PATENTS - myths and facts

1. We are not granting patents on software via this regulation that only establishes unitary patent protection in the 25 Member States.
2. The Computer Programmes Directive was a sectoral measure, the Rapkay report is not about revising the Computer Programmes Directive.
3. In 2005, the European Parliament rejected the proposed computer-implemented inventions patent directive. This EP position of 2005 is by no mean the object of the Unitary Patent Regulation in any kind.

APPLE vs SAMSUNG was submitted to USPTO- SAN JOSE COURT and the Japanese patent office. We want the unitary title to be able to compete with USPTO and JPO. Besides, the case is not only about scrolling and sizing but trade dress ('your tablet looks like mine') and industrial designs.

4. We uphold all the limitations to patentability set in the *acquis* transposed in national law (biotech, the research exception, the pharmacy, experimentation exception are in the text). Moreover we have persuaded the Council to insert in the final text of the regulation, in Recital 10, the right of the Union to come forward with other sectoral measures that could further limit or enlarge patentability, as per Union's conferred powers- redline in our negotiation
5. The ref. to 2009/24/EC, in particular Art. 5 and 6 is in the UPC text and binding on Court, the primacy of the EU law is spelled out, Union law is mentioned as source of substantive law in Chapter III of the UPC Agreement
6. Also to bear in mind that, **unlike** US or Australian patent law, **Art. 52 of the European Patent Convention forbids patents on:** *"schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;*

THE BIOTECH DIRECTIVE- myths and facts

EPO does not grant patents on life! For instance, in the Bull sperm case- the patent is revoked, Monsanto lost!
<http://www.epo.org/law-practice/case-law-appeals/recent/t081199eu1.html>

EPO, the **European Patent Office**, transposed via **administrative decisions**⁸ relevant EU acquis in this field of limitations to patentability (also in Art. 53 of EPC), including **no patents on life**, limitations that are considered by the Enlarged Board, except for the measures not yet transposed in national legislation, where EU law is considered as supplementary criteria for evaluation.

The Administrative Council of the European Patent Organisation (political body) decided in 1999 (one year before the expiry of the time limit for the transposition of Directive 98/44 into the legislation of the Member States, planned in July 2000) to introduce the relevant provisions of the directive into the implementing regulations. Relevant provisions mean the pre grant provisions since the EPC only covers, to a very large extent, the life of the patent application before its grant. Therefore, articles 2 to 6 (which belong to chapter I of the directive under the title patentability) have been introduced into the implementing rules through rules 26 to 29. The European Patent Office (the executive body of the European Patent Organisation) is then bound with these provisions. For the other ones (which had to be implemented into the national legislation of the Member States), the directive might be regarded as supplementary means of interpretation by the European Patent Office. This means that the EPO is not directly bound by these provisions (it is quite normal since they are post grant issues) but the EPO can refer to them when interpreting rules 26 to 29 (which corresponds to articles 2 to 6 of the directive).

1.2. Outcome of the COREPER meeting of 19.11.2012:

A new Article 5a (**please refer to the comparative table in the Annex**), replacing Art. 6-8, is the outcome of informal consultations held by the rapporteurs, Commission and the Council services. The three rapporteurs and the Commission acknowledge that the compromise is, as any compromise less satisfactory for the negotiating team that effects and limitations in former Art. 6-8. **This is the core issue subject to a political decision.**

Art. 5(1) and (2) refer to the effects of the unitary title, as uniform injunction available for the territory where protection is granted. **Art. 5(3)** defines the scope of protection and the applicable limitations with ref. to Art. 10. The unitary patent would be assimilated to a **national patent**, subject to uniform protection in all the participating member states. No legal provision in the national legal order can undermine the protection. Art. 5 (4) preserves the right of the Commission to make appropriate proposals further to its report on the functioning of this directive and further amend it.

Recital 10 of the regulation now reads: In the report referred to in Article 20(1) of this regulation, the Commission shall evaluate the functioning of applicable limitations and, where necessary, shall make appropriate proposals, taking account of the contribution of the patent system to innovation and technological progress, the legitimate interests of the third parties or overriding interests of society. The Agreement on a Unified Patent Court does not preclude the European Union from exercising its powers in this field.

⁸ The Implementing Regulations to the European Patent Convention 2000⁸ as adopted by the Administrative Council of 12 December 2002 introduce in the Chapter V the Rules 28 former **23 (b, c and d)**// Sonderausgabe 2 zum ABI. EPA



2. The Court Agreement:

2.1. The conflict

At the meeting of the European Council of 28-29 of June the 25 Member States found agreement on where the seat of the central division of the newly established court will be (in Paris, in addition to jurisdiction over textiles, paper, physics, electricity, transporting and performing operations) and the competences of two additional jurisdictions of the same central divisions in London (pharmacy, biotech, medical devices, in other words "human necessities" and metallurgy) and München (mechanical engineering, lighting, heating, weapons, blasting). **The UPC Agreement is not part of the EU jurisdictional system, and it will not be submitted to the EP for consent. The rapporteurs strived to influence the course of the negotiation, in parallel with the two regulations. This text will be subject to usual ratification procedures.**

The [ECJ opinion 01/2009](#) concludes: The envisaged agreement creating a unified litigation system is not compatible with the provisions of the EU Treaty and the TFEU Treaty. However, the opinion details **conditions to be met** to ensure that EU judicial structures and primacy of EU law are preserved.

2.2 The solution

The questions raised by ECJ find an answer in the initiative report drafted by Klaus Lehne (submitted to plenary vote for 11.12.2012), inviting the Member States to build a court system respectful of the European Court of Justice and its role in the uniform application of the EU law. To this purpose, the new system of decentralized courts should cooperate with the ECJ on preliminary rulings and should consider EU law when making decisions.

S&D and the EPP rapporteurs worked against hostile background and press campaign led by some patent lawyers, arguing that substantive provisions on the effects of the unitary patent would result in mandatory preliminary rulings from ECJ that might prove cumbersome for SMEs, the newly created patent courts (local, regional divisions that would have to deal with the bulk of the cases) and would therefore limit innovation.

As a reminder, ECJ does not have a specialized division on IP⁹, which is a possibility since the Nice treaty.¹⁰ This is now spelled out in Art. 257 TFEU (Council and European Parliament shall act by means of regulation on a proposal from the Commission after the consultation of the ECJ or at the request of the European Court of Justice). To date we are not aware of a stringent demand of the ECJ to have a regulation in this field. ECJ takes a considerable amount of time to complete procedures and it has an increasing workload (16 months on an average). To date, having additional judges appointed at ECJ is still under discussion and politically sensitive for Member States. In spite all this, **our redline was: scrutiny of ECJ is necessary so that the UPC agreement meets the requirement of the EU law**, in particular those referred to in the ECJ opinion 1/09, on the primacy of the EU law, and with due consideration of relevant acquis when assessing patent applications.

⁹ see chart on IP courts worldwide, EU is only considering <http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf>, so does Armenia, Costa Rica, Ecuador, Eastern Carribean States

¹⁰ .Article 229a Without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice in disputes relating to the application of acts adopted on the basis of this Treaty which create Community industrial property rights. The Council shall recommend those provisions to the Member States for adoption in accordance with their respective constitutional requirements..

As far as the **nature of the new patent court** is concerned, pursuant to Article 19(1) TEU, the guardians of the legal order and the judicial system of the EU are the **ECJ and the courts of the Member States**. It is for the ECJ to ensure respect for the autonomy of the EU legal order created by the Treaties. According to **Article 1(2)** of the revised agreement, the Patent Court is established as "a court common to the **Contracting Member States** and **thus subject to the same obligations under Union law as any national court of the Contracting Member States**". The Contracting Member States explicitly consider the Patent Court to be "**part of their judicial system**" (Article 14b). The Patent Court is assimilated to an 'ordinary' court within the EU legal order.

It could be argued that now the proposed Patent Court would be comparable to the Benelux Court to which the ECJ refers in Opinion 1/09 as follows: "*[since] the Benelux court **is a court common to a number of Member States**, situated, consequently, within the judicial system of the European Union its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union*" (emphasis added, paragraph 82).

As far as preliminary rulings are concerned, **Art. 267 TFEU** confers jurisdiction on the CJEU to give preliminary rulings on the validity and interpretation of the secondary Union law, hence the patent regulation. **ECJ has confirmed in its jurisprudence that, for cases where facts are outside the EU law**, but where those provisions of EU law have been made applicable by domestic laws, ECJ has jurisdiction.

2.3 Outcome of the COREPER meeting of 19.12.2012 concerning the UPC Agreement-main features:

The UPC text reads in recital 10:

CONSIDERING that, as any national court, the Unified Patent Court must respect and apply Union law and, in collaboration with the Court of Justice of the European Union as guardian of Union law, ensure its correct application and uniform interpretation; the Unified Patent Court must in particular cooperate with the Court of Justice of the European Union in properly interpreting Union law by relying on the latter's case law and by requesting preliminary rulings in accordance with Article 267 TFEU.

The links with the Union law are confirmed in **Art. 14a in the UPC text** adopted by COREPER: **The Court shall apply Union law in its entirety and shall respect its primacy**. The ECJ preliminary rulings and their binding character on the Patent Court is clearly spelled out in **Art. 14b**. The liability for damages is also spelled out in accordance with **Union law** concerning non contractual liability of Member States. **Art. 14c**. The **Union law** is listed under Chapter **III Sources of law and substantive law**. International jurisdiction rules will be adapted and adopted in **Brussels I** (EU law) or, where not applicable, the Lugano Convention. Indeed, the Court has exclusive competence for EU patent law, for which the **Union law** is a source of substantive law.

Art. 6 to 8 discussed above are copy pasted in the UPC Agreement (**Art.14 f-h**).

The right of defence of the parties with reference to language arrangements is detailed in **Art. 29-30-31** (at the central division it is the language in which the patent was granted, but with interpretation and translations facilities for the parties for both the Court of First Instance and the Court of Appeal)

A mediation center is established, having its seat in **Lisbon and Ljubliana**. A training facility for judges is established in **Budapest**. The Court of Appeal is in **Luxembourg**. As the structure of the Court of First Instance is designed, local and regional divisions with a **multinational** composition and, for the regional divisions, with the possibility of having **multiple locations**,

remain the main gateway to justice for EU litigants, who can choose a reallocation of the Pool of Judges to find the appropriate expertise.

The Court is **self financed** via renewal fees according to its Statute at the end of a transitional period of 7 years. There is no additional burden to the community budget.

3. The linguistic regime

In spite of its procedural limits (the Baldassare report is a consultation file), important steps have been made in the direction of better governance and SMEs and non profit research bodies-friendly language regime (the language regulation has only 7 articles, the main features being the automatic translations via high quality machines (*not Google translations*) and the reimbursement schemes for SMEs and research bodies to fill their competitiveness gap in relation with big companies. The idea behind was to create as in the US an SME status.

The hybrid nature of the unitary patent, with one foot in the EU law and the other in an international agreement is an **opportunity** and **not a liability**. It encourages competence, multinational representation, pooling of experts in patent and Union law, with total consideration of the EU law and the remit of intervention for ECJ.

TIMELINE- NEXT STEPS

1. Political endorsement (*A point* without debate) in the Competitiveness Council on the 10.12.2012
2. EP Plenary debate and vote 11.12.2012//COM: Barnier, CY: Minister XXX
3. Signing of the regulations- any of the Council formations date tbc (17-21.12)
4. February 2013 Signing of UPC (because of parliamentary procedures in DE, HU and CZ)

VOTING RECOMMENDATION (FOLLOW THE GROUP VL):

On the **Rapkay report** in favour of AM 1- consolidated text as amended (joint S&D ALDE EPP am), against all amendments not part of the political agreement (egs.: Greens amendments), final vote: in favour of the parliamentary resolution.

On the **Lehne report**: please bear in mind that we are not giving our consent on the UPC Agreement, but we are voting in favour of a simple initiative report.

On the **Baldassare report**: it does not coincide with the text of the Council regulation, we've been consulted only- if **favour of the Baldassare report** to support the political message for an SME status, better governance and current trends (language wise) for patent applications.

C. POPA
S&D JURI TEAM

ANNEX I:

<p>P7_TA-PROV(2012)0000(consolidated text of the patent regulation as in January 2012)</p>	<p><u>COREPER text of the Regulation with new Art. 5 replacing 6-8, and recital 9 and 10</u></p>	<p><u>Final UPC agreement Art. 14f-h</u></p>
<p>Recital 9: In matters not covered by this Regulation or by Council Regulation (EU) No .../2012 of ... implementing enhanced cooperation in the area of unitary patent protection with regard to the applicable translation arrangements^{11*}, the provisions of the EPC and national law including rules of private international law should apply.</p> <p>Recital 10: The rights conferred by the European patent with unitary effect should enable the patent proprietor to prevent any third party from directly or indirectly using the patented invention in the participating Member States without the patent proprietor's consent. However, third parties should be able to use the patented invention in certain circumstances, for instance for private and non-commercial purposes, for experimental purposes or for acts allowed specifically under Union or international law.</p> <p style="text-align: center;">Article 6</p> <p style="text-align: center;">Right to prevent the direct use of the invention</p> <p>A European patent with unitary effect shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from the following:</p> <p>(a) making, offering, placing on the market or using a product which is the</p>	<p>Recital 9: <i>The European patent with unitary effect should confer on its proprietor the right to prevent any third party from committing acts against which the patent provides protection. This should be ensured through the establishment of a Unified Patent Court.</i> In matters not covered by this Regulation or by Council Regulation (EU) No .../2012 of ... implementing enhanced cooperation in the area of unitary patent protection with regard to the applicable translation arrangements^{17*}, the provisions of the EPC, <i>the Agreement on a Unified Patent Court, including its provisions defining the scope of that right and its limitations</i>, and national law, including rules of private international law, should apply.</p> <p>Recital 10: <i>In its report on the operation of this Regulation, the Commission should evaluate the functioning of the applicable limitations and, where necessary, make appropriate proposals, taking account of the contribution of the patent system to innovation and technological progress, the legitimate interests of third parties and overriding interests of society. The Agreement on a Unified Patent Court does not preclude the European Union from exercising its powers in this field.</i></p> <p style="text-align: center;">Article 5a</p> <p style="text-align: center;"><i>Uniform Protection</i></p> <p>1. <i>The European patent with unitary effect shall confer on its proprietor the right to prevent any third party from committing acts against which</i></p>	<p style="text-align: center;">Article 14f</p> <p style="text-align: center;">Right to prevent the direct use of the invention</p> <p>A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from the following:</p> <p>(a) making, offering, placing on the market or using a product which is the subject matter of the patent, or importing or storing the product for those purposes;</p> <p>(b) using a process which is the subject matter of the patent or, where the third party knows, or should have known, that the use of the process is prohibited without the</p>

¹¹ OJ L ...
^{*} OJ: Please insert the number and date of the Regulation contained in doc st. 18855/11 and complete the reference in the footnote.
¹⁷ OJ L ...
^{*} OJ: Please insert the number and date of the Regulation contained in doc st. 18855/11 and complete the reference in the footnote.

subject-matter of the patent, or importing or storing the product for those purposes;

- (b) using a process which is the subject-matter of the patent or, where the third party knows, or should have known, that the use of the process is prohibited without the consent of the patent proprietor, offering the process for use within the participating Member States *in which that patent has unitary effect*;
- (c) offering, placing on the market, using, or importing or storing for those purposes a product obtained directly by a process which is the subject-matter of the patent.

Article 7

Right to prevent the indirect use of the invention

1. A European patent with unitary effect shall confer on its proprietor the right to prevent any third party *not having the proprietor's consent* from supplying or offering to supply, within the participating Member States *in which that patent has unitary effect*, any person other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.
2. Paragraph 1 shall not apply when the means are staple commercial products, except where the third party induces the person supplied to perform any of the acts prohibited by Article 6.
3. Persons performing the acts referred to in points (a) to (d) of Article 8 shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

that patent provides protection throughout the territories of the participating Member States in which it has unitary effect, subject to applicable limitations.

2. *The scope of that right and its limitations shall be uniform in all participating Member States in which the patent has unitary effect.*
3. *The acts against which the patent provides protection referred to in paragraph 1 and the applicable limitations shall be those defined by the law applied to European patents with unitary effect in the participating Member State whose national law is applicable to the European patent with unitary effect as an object of property in accordance with Article 10.*
4. *In its report referred to in Article 20(1), the Commission shall evaluate the functioning of the applicable limitations and shall, where necessary, make appropriate proposals.*

consent of the patent proprietor, offering the process for use within the territory of the Contracting Member States in which that patent has effect ;

- (c) offering, placing on the market, using, or importing or storing for those purposes a product obtained directly by a process which is the subject matter of the patent.

Article 14g Right to prevent the indirect use of the invention

- (1) A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from supplying or offering to supply, within the territory of the Contracting Member States in which that patent has effect, any person other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or should have known, that those means are suitable and intended for putting that invention into effect.
- (2) Paragraph 1 shall not apply when the means are staple commercial products, except where the third party induces the person supplied to perform any of the acts prohibited by Article 14f.
- (3) Persons performing the acts referred to in Article 14h (a) to (d) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

Article 14h Limitations of the effects of the patent

The rights conferred by a patent shall not extend to any of the following:

Article 8

Limitation of the effects of a European patent with unitary effect

The rights conferred by a European patent with unitary effect shall not extend to any of the following:

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes relating to the subject-matter of the patented invention;
- (c) acts carried out solely for the purpose of conducting the necessary studies, tests and trials in accordance with Article 13(6) of Directive 2001/82/EC¹² or Article 10(6) of Directive 2001/83/EC¹³ in respect of any patent covering the product within the meaning of either of those Directives.
- (d) the extemporaneous preparation by a pharmacy, for individual cases, of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared;
- (e) the use on board vessels of countries other than the participating Member States *in which that patent has unitary* effect of the patented invention, in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of the participating Member States in which that patent has unitary effect, provided that the invention is used there exclusively for the needs of the vessel;

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes relating to the subject matter of the patented invention;
- (ba) the use of biological material for the purpose of breeding, or discovering and developing other plant varieties;
- (c) the acts allowed pursuant to Article 13(6) of Directive 2001/82/EC¹⁸ or Article 10(6) of Directive 2001/83/EC¹⁹ in respect of any patent covering the product within the meaning of either of those Directives;
- (d) the extemporaneous preparation by a pharmacy, for individual cases, of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared;
- (e) the use of the patented invention on board vessels of countries of the International Union for the Protection of Industrial Property (Paris Union) or members of the World Trade Organisation, other than those Contracting Member States in which that patent has effect, in the body of such vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of a Contracting Member State in which that patent has effect, provided that the invention is used there exclusively for the needs of the vessel;
- (f) the use of the patented invention in the construction or operation of aircraft or land vehicles or other means of transport of countries of the International Union for the Protection of Industrial Property (Paris Union) or members of the World Trade Organisation, other than those Contracting Member States in which that patent has effect, or of accessories to such aircraft or land vehicles, when these temporarily or accidentally enter the territory of a Contracting Member State in which that patent has effect;
- (g) the acts specified in Article 27 of the Convention on International Civil Aviation of 7 December 1944²⁰, where these acts concern the aircraft of a country party to that Convention other than a Contracting Member State in which that patent has effect;

¹² Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (OJ L 311, 28.11.2001, p. 1).

¹³ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67).

¹⁸ Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (OJEU L 311, 28.11.2001, p.1), including any subsequent amendments.

¹⁹ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJEU L 311, 28.11.2001, p.67), including any subsequent amendments.

²⁰ International Civil Aviation Organization (ICAO), "Chicago Convention", Document 7300/9 (9th edition, 2006)

<p>(f) the use of the patented invention in the construction or operation of aircraft or land vehicles or other means of transport of countries other than the participating Member States <i>in which that patent has unitary effect</i>, or of accessories to such aircraft or land vehicles, when these temporarily or accidentally enter <i>the territory of the</i> participating Member States <i>in which that patent has unitary effect</i>;</p> <p>(g) the acts specified in Article 27 of the Convention on International Civil Aviation of 7 December 1944, as amended and in force on 1 January 2006, where those acts concern the aircraft of a country other than a participating Member State <i>in which that patent has unitary effect</i>;</p> <p>(h) <i>the use by a farmer of the product of his crop for propagation or multiplication on his own holding, provided that the reproductive vegetable material was sold or otherwise commercialised by the patent proprietor or with his consent to the farmer, for agricultural use. The extent and the conditions of this use are laid down in</i> Article 14 of Regulation (EC) No 2100/94¹⁴ ;</p> <p>(i) the use by a farmer of protected livestock for an agricultural purpose, on condition that the breeding stock or other animal reproductive material were sold or otherwise commercialised to the farmer by or with the consent of the patent proprietor. Such use includes the provision of the animal or other animal reproductive material for the purposes of the farmer's agricultural activity, but not the sale thereof in the framework of, or for the purposes of, commercial reproductive activity;</p> <p>(j) the acts and the use of the information obtained as permitted under Articles 5 and 6 of <i>Directive 2009/24/EC</i>¹⁵, in particular by the provisions on decompilation and interoperability; and</p> <p>(k) the acts allowed pursuant to Article 10 of Directive 98/44/EC¹⁶.</p>		<p>(h) the use by a farmer of the product of his harvest for propagation or multiplication by him on his own holding, provided that the plant propagating material was sold or otherwise commercialised to the farmer by or with the consent of the patent proprietor for agricultural use. The extent and the conditions for this use correspond to those under Article 14 of Regulation (EC) No. 2100/94²¹;</p> <p>(i) the use by a farmer of protected livestock for an agricultural purpose, provided that the breeding stock or other animal reproductive material were sold or otherwise commercialised to the farmer by or with the consent of the patent proprietor. Such use includes making the animal or other animal reproductive material available for the purposes of pursuing the farmer's agricultural activity, but not the sale thereof within the framework of, or for the purpose of, a commercial reproductive activity;</p> <p>(j) the acts and the use of the obtained information as allowed under Articles 5 and 6 of Council Directive 2009/24/EC²², in particular, by its provisions on decompilation and interoperability; and</p> <p>(k) the acts allowed pursuant to Article 10 of Directive 98/44/EC²³.</p>
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¹⁴ Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ L 227, 1.9.1994, p. 1).

¹⁵ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16).

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- ¹⁶ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ L 213, 30.7.1998, p. 13).
- ²¹ Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJEU L 227, 1.9.1994, p.1) including any subsequent amendments.
- ²² Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJEU L 111, 05/05/2009, p.16) including any subsequent amendments.
- ²³ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJEU L 213, 30.7.1998, p.13) including any subsequent amendments.