

Critical analysis of the *Draft Agreement on a Unified Patent Court*
as proposed by the Council of the European Union, November 2012,
Doc No 16222/12 PI 146 COUR 74

Briefing of No Patents on Seeds, November 2012

On 14 November the Council of European Union proposed a *Draft Agreement on a Unified Patent Court*. This agreement is part of a legal package to establish an EU Unitary Patent which aims to accelerate the granting of patents within the EU.

Amongst other things, the *Draft Agreement* provides regulations on procedural issues of the *Unified Patent Court* such as oppositions and appeals and the competence of the court. It also gives a list of exemptions that are limiting the effects of the EU patent. By doing so, it goes far beyond the provisions as tabled by the Council in December 2011 as *Presidency compromise text* (18239/11 PI 181 COUR 78).

It also includes some content that was previously part of the articles 6-8 of the *draft regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection*. These articles were removed from the text even after already being agreed with the EU Parliament because of an initiative of UK government in June 2012. The reasons for this remained obscure. However in a meeting on 18 October 2012 of Member States, the UK delegation explained their strategy. According to the protocol of the meeting that was brought to the attention of *No Patents on Seeds!*, the UK Government stated that *stakeholders with economic interests from the UK as well as Business Europe would like to avoid involvement of the ECJ in the interpretation of European patent law in any case. This should be assured right now.* (unofficial translation from protocol in German: *Die Wirtschaftsbeteiligten in GBR wollten - ebenso wie "Business Europe" - eine Beteiligung des EuGH bei der Auslegung europäischen Patentrechts unbedingt vermeiden. Dies müsse jetzt sichergestellt werden.*)

The Draft Agreement on a Unified Patent Court should be rejected for the following reasons:

1. The proposed agreement will create a separate EU jurisdiction: As proposed by the UK government, the Court of Justice of the European Union (ECJ) being the guardian of Union law, is more or less excluded from the jurisdiction on the EU patents. For example there is no possibility to bring any appeal to the ECJ concerning the decisions of the *Unified Patent Court*. Only on a case by case basis the *Unified Patent Court* might ask the ECJ to give preliminary decisions. In any case, the final decision will remain with the *Unified Patent Court*. This means contrary to other decisions concerning EU community law, the decisions of the Patent Court cannot be subjected to any revisions by the ECJ. By establishing this kind of separated jurisdiction, there is some risk that decisions and procedures will be influenced by particular interests. Although the aim of the UK government to exclude the ECJ from taking decisions on EU patents might satisfy the interests of some stakeholders with economic interests, it would weaken the current EU institutions and counteract a general harmonised EU legal framework.

Demand: The ECJ should be enabled to revise decisions of the *Unified Patent Court* to make sure the general principles and legal provisions of the EU are also obeyed in the area of patent law.

2. The interests of civil society organisations are ignored: During the last 20 years, dozens of oppositions and appeals were filed by civil society organisations on behalf of the public interest against granted European Patents. But as planned here there is no provision that makes sure that these organisations will have access to the new legal procedures as planned. Contrary to the provisions of the *European Patent Convention* (EPC) non-profit organisations and individuals cannot represent themselves but have to hire authorised patent lawyers or patent attorneys, which greatly increases costs. Further – contrary to the provisions of the EPC - the costs of the successful party have to be borne by those that are not successful. Despite this new and quite costly regulation, no provisions are foreseen to enable non-profit organisations to participate in the costly procedures. It is only mentioned that the fees of the *Unified Patent Court shall take into account the interests of non-profit organisations. No provision is foreseen to limit the overall procedural costs which are a much higher barrier to participate in legal procedures than just the fees of the court. The Council is even aware of this problem and mentions the need of legal aid* for individuals in case they cannot afford the costs of the procedures. But the interests of civil society organisations are not taken on board, in fact they will be effectively excluded from mounting oppositions in front of the *Unified Patent Court* just because of the costs. This might be in the interest of industry, but it is not in the public interest.

Demand: It must be ensured that civil society organisations (which are not acting as competitors with economic interests) can represent themselves before the *Unified Patent Court* and do not have to take the costs of other parties. The fees for the procedure should not be higher than under current regulations of the EPC.

3. The need for limitations of the effects of patents is not met: Within the EU there are several national limitations to the effects of patents in the area of biotechnology. For example there are limitations to the effects derived from patents on human gene sequences, there are particular ethical provisions concerning human embryos and provisions to protect the interests of farmers such as a clarification that no licence fees can be claimed in cases of contamination (the so called Percy Schmeiser clause) and also exemptions for breeders. But these national limitations are not fully taken on board by the *Draft Agreement*. Further the request of 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* is ignored. The *Draft Agreement* only provides a limited breeders' exemption for the breeding of plants that does not enable a breeder to sell his own seeds independently from any patent. Further, according to the *Draft Agreement*, a farmer only could sell his animals for slaughter and food production but not for breeding purposes without consent from patent holders.

Demand: A full breeders' exemption for plants and animals has to be incorporated. The breeders' exemption should be equivalent to the one as provided under plant variety protection and should also encompass the right of the farmer to continue animal breeding. The Unitary Patent System is a unique chance to give legal clarification on this controversial issue that has been discussed since Patent Directive 98/44 was adopted but has not been solved at the EU or national level. Further the effects of patents on DNA should be limited to specific purposes, to meet the demands of doctors, patient groups and many researchers. Finally, ethical provisions foreseen by national law should not be affected by the *Agreement*. If these issues are not solved by the *Agreement*, Member States will be no longer able to implement meaningful and necessary limitations to biotechnology patents.