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The European Patent Reform – "Cypriot compromise" compromised

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Office translation of the original German language document, the article reflects the personal opinion of the author.

As things presently stand, the CJEU will announce its judgments in Spain's nullity actions against the two Regulations on unitary patent protection and the language regime on 05/05/2015. As is known, one of the asserted nullity reasons is the lack of a legal basis after the replacement of former Articles 6 to 8 by the current Article 5. New backgrounds which have surfaced on this approach most recently, initially sold to the public as "compromise by the Cypriot Council Presidency", suggest that this "compromise" had a much different origin. It had already been reported that efforts were made – apparently involving the German Ministry of Justice – to publicly present the Spanish actions as lacking any prospects of success in the specialist press. Not known yet were the endeavours undertaken to bring this article to the attention of the CJEU. A report on the measures used to pave the way for the "unitary patent package".

I. The origin of the "compromise" on Articles 6 to 8 of the "unitary patent" Regulation

As is generally known, the legislative process on the "unitary patent package" hit troubled waters in summer 2012, following the dispute about former Articles 6 to 8 of the draft Regulation on the "unitary patent", in which originally the rights from a "unitary patent" and its limitations were defined. In a special meeting on 19/11/2012, the Legal Affairs Committee of the European Parliament finally adopted a "compromise" which provided for the replacement of said Art. 6 to 8 by a new Art. 5, pursuant to para. 3 of which the rights resulting from a "unitary patent" and the respective limitations are now to be determined according to national law, especially according to the international Agreement on the "Unified Patent Court".[1] The respective Regulation Nr 1257/2012 was adopted by the European Parliament on 17/12/2012 with a large majority.

Since then, different statements have been made on the origin of this approach which – according to the position of one of the rapporteurs – became known as the "sub-sub-suboptimal compromise" and most recently a remarkable turn took place.

1. Development by the Council Presidency?

Initially, the "compromise" was attributed to the Cypriot Council Presidency in office at that time.[2]

2. Development by the Legal Affairs Committee?

In November 2013, the Legal Affairs Committee of the European Parliament held a state of play debate on the implementation of the "unitary patent package".[3] In it, for the Drafting Committee for the Rules of Procedure of the "Unified Patent Court", the word was given to Prof. *Winfried Tilmann*, Of Counsel in the Düsseldorf office of the international law firm Hogan Lovells. As is has been set out elsewhere[4], he has been campaigning in favour of the "unitary patent package" like nobody else, apparently motivated, at least in part, by a role as an advisor to the German Ministry of Justice and Consumer Protection (afterwards "BMJ"). At the beginning of his speech, he described the origin of said "compromise" as follows:[5]

> *"Mr Chairman, members of the Legal Affairs Committee! The fact that we are here today is largely owed to your strong resistance last year which prevented the creation of a Regulation without a claim for an injunction and thus one without a legal base in Union law. You have developed here article 5 of the Regulation which, in my opinion, is an injunction claim fully rooted in Union law and all of us hope that this position will be shared by the European Court of Justice in relation to the two actions of Spain pending there against the two Regulations, Union patent and translation regime."*

While the "compromise" was initially attributed to the Cypriot Council Presidency, now suddenly the Legal Affairs Committee was said to be responsible. Those who had looked at the previous public announcements with skepticism saw their assumption confirmed.

3. Did Prof. Tilmann prepare the "compromise"?

However, Prof. *Tilmann* should have known better. As recently transpired, the "compromise" seems to have been developed by nobody else but himself! This was lately reported by a renowned colleague from outside the attor-

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[1] Cf. *Stjerna*, The European Patent Reform – The "sub-sub-suboptimal compromise" of the EU Parliament, accessible at www.stjerna.de/suboptimal-compromise/?lang=en and *id*., The Parliamentary History of the European "Unitary Patent" (Tredition 2016), ISBN 978-3-7345-1742-6, para. 926 ff., cf. bit.ly/3oGov6f.

[2] Cf. *Stjerna*, Parliamentary History (fn. 1), para. 961 ff.

[3] Meeting of 05/11/2013, a video recording is accessible at bit.ly/3tmUxos; a verbatim protocol of all speeches (afterwards "protocol EN") is available at bit.ly/33j5xZK.

[4] *Stjerna*, The European Patent Reform – Prof. Tilmann, the old Roman god Janus and the requirements of Article 118(1) TFEU", accessible at www.stjerna.de/requirements-118-1-tfeu/?lang=en.

[5] Protocol EN, para. 89, from 16:23:47 of the recording.

ney profession to whom Prof. *Tilmann* has apparently made a respective indication.

a) Statements

E-Mail requests sent to Prof. *Tilmann* on 19 and 24/03/2015 and relating to the correctness of the statement that he designed the "compromise" remain unanswered so far. Thereupon, on 26/03/2015, I sent an e-mail to the person responsible for the "unitary patent package" in the German Ministry of Justice, *Johannes Karcher*, asking whether the statement is correct. In his reply of 01/04/2015, he just commented vaguely, calling for caution when dealing with such "rumours" and stating that he "estimates" that the "likelihood" of truth for this statement was "equal to zero". With e-mail of 02/04/2015 I requested an explicit yes or no answer to my question. I did not receive a reply so far.

Regardless of the close cooperation between the BMJ and Prof. *Tilmann* which has already been described elsewhere[6], the Ministry should be well informed about the circumstances underlying the mentioned "compromise" and related activities by Prof. *Tilmann* will certainly not have taken place without knowledge and approval by the BMJ. Against this background, the prolonged silence by the responsible persons speaks for itself and for the correctness of the mentioned statement from amongst the colleagues, otherwise there would appear not to be any reasons why it should not be clearly denied.

The extent of Prof. *Tilmann's* involvement in the negotiations on the "unitary patent package" on the part of the BMJ is documented by e-mail correspondence with him and the formerly responsible representative at the BMJ, *Stefan Walz*, from spring 2014 and of which, so far, only excerpts were available to the public. With regard to the significant relevance of the "unitary patent package" for the European economy, the high level of public interest in the topic and the far-reaching and prominent involvement of the mentioned persons in the legislative proceedings and in the implementation phase, and not least with a view to the fundamental rights of freedom of speech, academic freedom and freedom of press, this e-mail correspondence is now made public to its full extent, interested persons can access it at www.stjerna.de.

b) Implications

If Prof. *Tilmann* was indeed the originator of said "compromise", this would put the lid on the series of peculiarities in relation to the "unitary patent package" for now.

It would mean that a high-ranking representative of a leading international law firm in the field of patent litigation has crucially influenced the legislative proceedings at a decisive stage, while this involvement has been shielded from the public. The latter aspect is even more serious since Prof. *Tilmann* himself subsequently argued intensively for the legal viability of the "compromise". One example is the citation from the debate in the Legal Affairs Committee of the European Parliament reproduced above under cipher I.2. In doing so, he quite often operated neutrally as "Rechtsanwalt" and/or "University professor",[7] thereby giving his statements an additional appearance of objectivity. An indication of his involvement in the development of said "compromise" is nowhere to be found.

Should the origin of the "compromise" indeed lie with Prof. *Tilmann*, it would mean that he has publicly advocated for a solution he had developed himself, the apparent conflict of interest having been concealed. It can hardly be assumed that this did not happen deliberately to the end of influencing the opinion of the professional circles in favour of the "unitary patent package", as they usually attribute a significant weight to words of experienced practitioners like Prof. *Tilmann*, while this weight would apparently be diminished significantly upon disclosing an own participation.

It is recalled that when having been asked in April 2014 whether he was still working as an advisor to the BMJ – as his firm had previously announced in 2012[8] –, Prof. *Tilmann* gave the evasive answer that he had "no function".[9] Although in a purely formal manner, this might be correct, he nonetheless will not have exercised his various activities in support of the "unitary patent package" independently of the political decision-makers at the BMJ, even without an institutionalised "function".

Of course, it can usually not be expected that the national Ministries of Justice have sufficient expertise on each and every legal field as to be able to deal with difficult practical issues entirely by themselves and without relying on external expertise. However, if such external participation in fact takes place, it should go without saying that this is made public, especially if this participation is as extensive as that of Prof. *Tilmann* seems to be in the present context. Vice versa, this also applies to the invoked expert if he publicly comments on aspects of a legislative proposal which apparently he himself has developed.

An entirely different question is whether an external participation in legislative proceedings should be this far-reaching, making one slowly begin to wonder whether the deliberations of the "unitary patent package" with regard to Germany were led by the BMJ with the participation of Prof. *Tilmann* or whether it was rather the other way round.

II. The article EIPR 2014, 4 ff. and the CJEU

Likewise, a further episode vividly shows the mechanisms which are applied to try influencing public opinion in favour of the "unitary patent package".

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[6] See fn. 4.

[7] Cf. EIPR 2014, p. 4 ff.; VPP-Rundbrief (circular of the German Association of Intellectual Property Experts) 2/2013, p. 56 ff.; JIPLP 2013, p. 78 ff.

[8] Cf. the letter at www.xup.in/dl,18302731/.

[9] Cf. the respective e-mail correspondence with Mr *Walz* of the BMJ and Prof. *Tilmann*, accessible at www.stjerna.de/cypriot-compromise/?lang=en.

On the grounds that the CJEU would not accept "Amicus Curiae letters" and with the support of the BMJ,[10] in January 2014 Prof. *Tilmann* published an article[11] in the specialist press, according to which the Spanish actions had not prospects at all, publicly analyzing the – as a part of the court file confidential – Spanish writ of complaint from proceedings C-146/13 which the BMJ had provided to him.[12] It seems that this was not regarded sufficient. Instead, it was tried to channel these obviously biased statements to a prominent place, namely directly to the CJEU, so to speak as an "Amicus Curiae letter" through the back door.

1. The "InfoCuria" pages and the Research and Documentation Directorate ("RDD") of the CJEU

As is generally known, for any pending proceeding, the CJEU provides an own information page ("InfoCuria") on the internet where, for instance, dates and documents can be accessed. Furthermore, in a section "Notes on Academic Writings" references are given to academic statements in specialist periodicals which are deemed relevant for the proceedings in question. The responsibility for these pages lies with a separate department of the CJEU, the Research and Documentation Directorate (afterwards "RDD").

2. The article EIPR 2014, 4 ff. on the "InfoCuria" pages for C-146/13 und C-147/13

In spring 2014, those regularly visiting the "InfoCuria" pages of Spain's actions against the „unitary patent" Regulations (docket no. C-146/13 and C-147/13) witnessed a peculiar incident. While in the respective section "Notes on Academic Writings" there was for quite some time only a Dutch article[13] listed, this was suddenly removed at the beginning of February 2014 and substituted by Prof. *Tilmann's* newly published article from EIPR 2014, 4 ff. At the beginning of July 2014, the reference to this paper again disappeared from both "InfoCuria" pages, the section "Notes on Academic Writings" being blank since then.[14]

The event raised a number of questions: What was the reason for the replacement of the initial article? Why did it take place almost immediately after the publication of Prof. *Tilmann's* article? Why was precisely this article referred to while a number of others which had been published already on aspects relevant in proceedings C-146/13 and C-147/13 remained unmentioned?

3. The correspondence with the RDD

In July 2014 I contacted the Director of the RDD, *Sabine Hackspiel*, by e-mail, asking her to provide information on the circumstances having led to the listing and later removal of the *Tilmann* article.

With regard to the significant relevance of the "unitary patent package" for the European economy, the high level of public interest in the topic and the fact that it concerns correspondence on related activities in a public authority and conducted with the responsible Director, and not least with a view to the fundamental rights of freedom of speech, academic freedom and freedom of press, this e-mail correspondence is made public to its full extent, interested persons can access it at www.stjerna.de.

For space reasons, only a part of the questions raised in the correspondence is addressed here.

First of all, it was of interest why of the large number of long available academic statements on aspects relating to the "unitary patent package" specifically that by Prof. *Tilmann* had been selected and, more generally, what the requirements are for an article to be listed in section "Notes on Academic Writings" on the "InfoCuria" pages. A further question was whether the RDD considered referring to the *Tilmann* article appropriate, having regard to its doubtful backgrounds. The respective passages from the request are as follows:[15]

> *"As to the backgrounds of Prof. Tilmann's mentioned article in EIPR, are you aware of the fact that this is a paper which seems to have been commissioned by the German Federal Ministry of Justice, involving the disclosure of confidential court documents to Prof. Tilmann and their public discussion in said article?*
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> (…)
>
> *(6) Do you regard it as appropriate to list on the InfoCuria pages an article which seems to have been written "undercover" on behalf of a party to the proceedings and is therefore likely biased in favor of this party?*
>
> *(7) If so, would you not see this as a problem with regard to the public's trust in the impartiality of the European Court of Justice that its RDD has no problem with referring interested persons to articles which are putting forward government positions, disguised as neutral academic statements?*
>
> *(8) Against all the aforementioned circumstances, is it a coincidence that of the large number of available articles on topics discussed in proceedings C-146/13 and C-147/13 the only reference cited on the InfoCuria pages for these proceedings was, until very recently, one – maybe even the only one – strongly advocating that the actions should be dismissed?"*

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[10] Cf. the respective e-mail correspondence with Mr *Walz* of the BMJ and Prof. *Tilmann*, accessible at www.stjerna.de/cypriot-compromise/?lang=en.

[11] *Tilmann*, "Spain's action against the EU patent package", EIPR 2014, p. 4 ff.

[12] Cf. fn. 4 for more details.

[13] *Speyart, H.M.H.*, "Is er nu eindelijk een Unieoctrooipar-don: "Europees octrooi met eenheidswerking"?", Nederlands tijdschrift voor Europees recht 2013, p. 135 ff.

[14] Cf. printouts of these pages of 08/02/ and 08/07/2014, accessible at bit.ly/3f5NpZS and bit.ly/345jURK.

[15] E-mail correspondence, p. 1/2, accessible at bit.ly/347eoOx.

The RDD's reply was rather vague. On the requirements for including an article in the "Notes on Academic Writings", it was explained:[16]

> *"To be listed in the section 'notes on academic writings' of the Court's website, an article must, in fact, constitute a doctrinal note focusing specifically on a case (or set of cases) before the Court. Pieces which do not meet this condition are treated as full-fledged articles and feature instead in the Courts' library catalogue.* (…) *Only pieces identified prima facie as dealing specifically with a case (or set of cases) before the Court are referenced in the section 'notes on academic writings' in infoCuria."*

As to the reasons for the removal of the *Tilmann* article, it was simply stated:[17]

> *"As for the piece by Prof. Tilman* [sic]*, it was considered appropriate to remove it from the website."*

Also the question on possible consequences for the public's trust in the impartiality of the CJEU caused by referencing ostensibly neutral articles which in fact communicate government positions was dismissed:[18]

> *"As regards, finally, questions 6 to 8 in your e-mail, I thank you for your remarks but assure you that the selection of articles featuring in the section 'notes on academic writings' of infoCuria is conducted on the basis of purely objective criteria. As for the concerns you express, I believe the explanations given above show there is no inference to be drawn from the presence or absence of any given piece of writing on the Court's website. The suppression of Prof. Tilman's* [sic] *note from infoCuria illustrates this, I believe, clearly enough."*

Since this communication left unanswered the decisive questions, for instance those about the listing requirements instead declaring that an article had to be a "doctrinal note", I asked for additional information by e-mail of 18/07/2014.[19] An answer was received only two months later on 12/09/2014 and after repeated enquiries, its contents, however, were even vaguer than before.

On the requirements for listing an article in section "Notes on Academic Writings", it was now set out:[20]

> *"In substance, for a note to be listed in this section of the Court's site it must meet three requirements:*
>
> *- it must be published in a periodical which the Court's Library subscribes to (or in a "Festschrift" or other publication in the Library)*
>
> *- it must be prima facie identifiable by our staff as a doctrinal note dealing specifically with a case or a set of cases of the European Union Courts*
>
> *- it must prima facie provide a minimum of legal analysis and go beyond a simple summary or reproduction of the decision which constitutes its object."*

Interestingly, shortly before the RDD's reply, I had received a message from a colleague who had also noticed the reference to Prof. *Tilmann's* article on the "InfoCuria" pages of proceedings C-146/13 and C-147/13 and who had contacted the RDD with regard to the listing requirements before I had done so. In June 2014, the RDD, by a person different from Ms *Hackspiel*, had advised him as follows (emphasis added):[21]

> *"The rule of including an academic article relevant to a pending case is that a) it refers to a specific case (and not to the general doctrine) and that it doesn't comment sensitive procedural issues, nor reveals any position or observations of the parties. It has to adopt a general approach of the case of law. Unfortunately we don't dispose of any written rules."*

Making a reference to an article in section "Notes on Academic Writings" dependent on it neither disclosing sensitive procedural aspects nor positions of the parties – afterwards called "preservation of procedural confidentiality" – is, of course, absolutely appropriate, this already in the interest of guaranteeing an unprejudiced deliberation and decision of the proceedings by the court.

However, one is left wondering why this condition, the existence of which can be assumed, had been left unmentioned by the Director of the RDD in her previous letters, despite repeated and explicit questions for the listing requirements. Could the reason for this probably be that Prof. *Tilmann's* article did evidently not fulfil this condition, but rather conversely relied on a detailed disclosure and discussion of the arguments brought forward in Spain's writ of complaint in proceedings C-146/13, which would have provoked the question why the article was listed on the "InfoCuria" pages despite its apparent incompatibility with procedural confidentiality?

In an e-mail dating 22/09/2014, I pointed Ms *Hackspiel* to the further requirement of the preservation of procedural confidentiality previously communicated by her Directorate, asking for her confirmation that such does not exist and did not exist at the time when the *Tilmann* article was listed.[22]

In her answer of 13/10/2014, Ms *Hackspiel* first of all declared this statement to be the last one in this matter, as she had already answered "the numerous questions" "rather detailed".[23] She left said condition uncommented, merely referring to her message of 12/09/2014, in which the requirements had been "set out clearly". Furthermore, she stated:[24]

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[16] E-mail correspondence (fn. 15), p. 5.
[17] Ibid.
[18] Ibid.
[19] E-mail correspondence (fn. 15), p. 6.
[20] E-mail correspondence (fn. 15), p. 10.
[21] The message can be accessed at bit.ly/3vb4dEp.
[22] E-mail correspondence (fn. 15), p. 12.
[23] E-mail correspondence (fn. 15), p. 15.
[24] Ibid.

> *"Surely, there might be objective reasons which may render it inappropriate to list certain notes despite the fact that they prima facie meet those criteria. As I am quite sure you will understand, it is, however, impossible to identify a priori all those objective reasons in an exhaustive manner.*
>
> *As I have already pointed out it is not possible for practical reasons pertaining to the way the process of selection of notes is organized, to systematically verify in all cases the actual presence of such objective reasons for each individual note selected. Nonetheless, if and when we identify those reasons at a later stage we draw, it goes without saying, the necessary consequences."*

These explanations seem to try giving the impression that the "inappropriateness" of Prof. *Tilmann's* article had only been found in retrospect, then immediately removing it from section "Notes on Academic Writings". However, this misses the core of the problem. More interesting is the question mentioned above, namely how an article which is obviously incompatible with the procedural confidentiality manages to get listed on the "InfoCuria" pages notwithstanding. It is difficult to believe that this has happened purely inadvertently. Then, who has arranged the listing? The fact that the reference to the article was hastily removed after the first complaints had been received does not render the answer to this question dispensable.

Of course, this event is merely a side note which will not influence the outcome of Spain's nullity actions. However, it is an example of the measures used to foster the realization of the "unitary patent package", apparently at any price. In this process, the supporters' arm is apparently even reaching up into the administration of the CJEU. That an article which has been commissioned by the BMJ and does not fulfil the respective listing requirements nonetheless manages to become listed on the official procedural webpages of the CJEU shows what is possible.

III. Outlook

After all this, with regard to the upcoming decisions of the CJEU on Spain's complaints, once again the statement of the former member of the European Parliament *Luigi Berlinguer* comes to one's mind, who, in said confidential meeting of the Legal Affairs Committee on 19/11/2012, commented on the "compromise" in the dispute on Art. 6 to 8 as follows (translation from Italian):[25]

> *"I recognize that the found solution causes astonishment,* (…) *But if we in Europe always only followed academic guidelines, we would accomplish nothing. In the past, Europe acted with legal boldness, boldness and Salti mortali, which subsequently legally solidified since our Court of Justice helps us to solidify these boldnesses."*

As weird as this statement appears to be in the light of the traditional task and function of the judiciary in a democratically constituted political system, the far-reaching preparedness of relevant powers to push the entry into force of the "unitary patent package" by all means, plainly shows that, in the end, he could be correct.

On 05/05/2015, we will find out whether in relation to the "unitary patent" Regulations, the CJEU will truly be inclined to solidify daring feats or whether they demand a legally well-founded solution instead.

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For possibilities to support my work on the European patent reform please visit www.stjerna.de/contact/?lang=en. Many thanks!

[25] *Stjerna*, Parliamentary History (fn. 1), para. 1026.