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Mr
Bernhard Rapkay
[redacted]

44319 Dortmund

13.05.2016

“Unitary patent package” – Cost situation for SMEs

Dear Mr Rapkay,

I make contact with you in your position as the former rapporteur of the European Parliament’s Legal Affairs Committee for the Regulation on the creation of a European patent with unitary effect (“unitary patent”). As you may know, I have followed the project of the European “patent package” for some time, having published articles on this topic on my website on a regular basis.

In the legislative proceedings, you were one of the most vociferous proponents of the “patent package”, claiming that it would in particular serve to support and ease the burden on SMEs and would significantly reduce their costs for obtaining patent protection and for its enforcement in court. This may have been your expectation, since at the time the components of the “patent package” were adopted in the European Parliament on 11/12/2012 neither the costs for the “unitary patent”, especially the annual renewal fees having to be paid for it, nor the court fees and the level of reimbursable costs at the Unified Patent Court (“UPC”) were known.

After these costs have meanwhile been determined, the allegation that the “patent package” would reduce costs and support SMEs is obviously incorrect. I have recently written an article on this which I enclose for your information.

As you can see from it, it is rather the contrary of the aim communicated in the legislative proceedings that has been created. Especially the cost situation at the UPC will be prohibitive for many SMEs. Interestingly, the latter has been confirmed by the Commission in a working

paper at the end of October 2015, in which it was said that in terms of the significant cost risk entailed, SMEs would need litigation insurance, at the same time admitting that such insurance is not currently available on the market (more details on this can be found in my article).

I would be interested in your assessment of the situation as a former rapporteur, in particular with regard to the envisaged SME support. Do you think this is acceptable, bearing in mind the clearly communicated objectives of the legislator? I would be glad if you could share your thoughts on this with me.

With kind regards

Dr. Ingve Björn Stjerna
Rechtsanwalt
Fachanwalt für gewerblichen Rechtsschutz

Enclosure

From: Bernhard Rapkay
Sent: Friday, 27 May 2016 19:30
To: Ingve Stjerna
Subject: Your letter of 13/05/2016
Attachments: Bernhard Rapkay MdEP.vcf

Dear Mr Stjerna,

many thanks for your letter of 13/05 with regard to the unitary patent. As I have just returned from a journey, I have obtained your letter only very recently.

I will gladly enter into a discussion about this. However, I hope you will understand that I have meanwhile retired and that I have no support and that, in general, I have some distance to my former work. Of course, “distance” in that sense does not mean distancing from my work, it is rather to be understood in the sense of a “temporal distance”.

I will gladly react. But please do not be offended that, after a first glance at your article, I have the impression that it seeks to continue the old battles led by a part of the patent attorneys who have opposed the unitary patent from the outset (the outset of my observations in that matter!). Your repeated reference to Mr Pagenberg, due to my experiences with him, does not cause me too much enthusiasm for your observations. But maybe I am wrong (not with regard to Mr Pagenberg, however).

When looking up your e-mail address at your website, I came across some of your other articles. I was only able to briefly scan through them, but I will look at them in more detail later. However, I immediately came across your view on what you call the “Cypriot compromise”. Remarkable! And missing reality!

So please do give me some time for studying your publications in more detail, before I can make more detailed remarks on your letter.

With kind regards

Bernhard Rapkay

Bernhard RAPKAY
Ehemaliges Mitglied des
Europäischen Parlamentes
(1994 – 2014)

[redacted]
44319 Dortmund
Tel.: [redacted]
Mail: [redacted]

From: Bernhard Rapkay
Sent: Monday, 18 July 2016 21:59
To: Ingve Stjerna
Subject: Unitary patent
Attachments: Bernhard Rapkay MdEP.vcf

Dear Mr Stjerna,

even during my active time I did not appreciate it too much when people, especially those without any legitimacy whatsoever, have tried to impose pressure on me. Back then, I have simply ignored this. Why should I change this now that I am retired? I do not accept to be given time limits!

Beyond this, even more than in my first reaction, I have the strong and also founded opinion that old battles are intended to be continued. Your various publications on your website are manifest evidence for this.

Let me give you an example why I see little point in entering into a discussion with you. In one of your articles you cite me – even in the title itself – that I have characterized the unitary patent as it now stands in the form in which it was (formerly) going to be adopted as “sub-sub-suboptimal”. Yes, I have done so. However, you refuse to also cite the reasons that I provided at that time. I called it sub-sub-suboptimal, because due to the lobbying activities of your Association vice versa the Council, the latter broke its word and undermined the compromise achieved in the trialogue procedure, despite an initial written guarantee, which could be resolved more or less only by the crazy detour via Article 5 of the Court Agreement. At presentations I give these days this is an example much noted by the participants for how Council, often upon pressure by lobbyist groups, creates bureaucratic monsters!

This is not the first time that I am being cited from amongst your ranks in an abbreviated and distorting manner. I refer to my remark on Mr Pagenberg in my first e-mail to you. He cited me as having said “I am not a lawyer”. I have said this, too. Annoying is not that I would feel belittled by this. My self-esteem really does not depend on the opinion of a lobby person. He simply did not get it. I really did not see it as a shortcoming that I was “not a lawyer”, how could I. I meant this as an explicit advantage! It is good that no lawyer was in charge of this! And, by the way, I always communicated this. But if one is prepared to hear only what is needed for one’s own line of argumentation, so be it.

Therefore, I am also convinced that an exchange of thoughts with you is not expedient. I am unable to identify any conclusiveness in the article you sent me. Why should I now start explaining this to you in all length, if I assume – and this is what I do – that you will take notice of my opinion only once it is confirming yours. Otherwise, I have made efforts for nothing – and I do not need that! You may be displeased about this attitude. Anyhow, I have to live with that. Unfortunately, there are a number of further indications for my impression. For instance, I refer to your explanations on the so-called Cypriot compromise! As regards which it turns out that it truly was not a compromise formulation by the (Cypriot) Council Presidency, but that – what a monstrosity – it came from Parliament. Of course, this came from Parliament. Not from Council! They wanted something different. And this was clear from the outset. For everyone. How this went unnoticed is a miracle to me. After Council had broken its word, after consultating with the President, I have made it clear from the outset that I do not allow the Council (as in any other case) to make a fool of me. This even went so far that, in Council, the British complained about the fact that the Cypriots presented them our text as not negotiable any further. Was their problem!

And then you go on to tackle Mr Tillmann. Yes, of course we have spoken with him, not only once and I did, too. We have also spoken with others, sometimes very intensively. (So do not write in any of your articles that we spoke with Tillmann only!). We did not speak with your Association. Not, because we did not want to. They did not want it! There was no overlap between the two positions. It was our interest to achieve a result. They wanted to derail the project! Based on sometimes very weird reasons. For example that the CJEU was some kind of third instance which would cause delays and cost increases and that, furthermore, CJEU judges were no

patent experts. The latter is true, but nobody claimed something different. The further was not true. (I still have the articles from amongst your ranks in which such claims were made; they are kept in the “Archive of Social Democracy” of the Friedrich Ebert Foundation, together with all my personal files.) The CJEU has a completely different task. I hope your Association has meanwhile understood the preliminary reference procedure.

At the legislative or contractual stage, the legislator is defining general principles only. After that, it is up to the technical bodies responsible for the implementation to implement and further define these principles. If someone thinks that the latter is not guaranteed, he files a court action. And for the construction of Community law, we have the CJEU and its construction monopoly. This is what we have secured also for the unitary patent. Contrary to what certain lobbyists wanted.

Meanwhile, I have copied the “Decision of the Select Committee of the Administrative Council of 15 December 2015 adopting the Rules relating to Unitary Patent Protection (SC/D 1/15)” from the EPO website. I admit that I currently do not feel too much motivation to intensively study it. Tomorrow, I take a flight to a four-week overseas trip. My new personal status allows me to make this a priority.

I will look at it at a later time. At least this is what you have achieved, so everything is fine. However, a first superficial study does not provide any indication for your allegation.

With kind regards

Bernhard Rapkay

Bernhard RAPKAY
Former Member of the
European Parliament
(1994 – 2014)

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Mr
Bernhard Rapkay
[redacted]

44319 Dortmund

25.08.2016

“Unitary patent package” – Cost situation for SMEs, your e-mail of18/07/2016

Dear Mr Rapkay,

thank you very much for your e-mail dating 18/07/2016.

In my letter of 13/05/2016, against the background of your profoundly documented statements on the alleged advantages of the “patent package” in particular for SMEs, I had asked you to comment on the costs as they currently stand. For this purpose, I had provided you with my article “A poisoned gift for SMEs” which compares the promises made in the legislative proceedings with the actual results.

In the 1½ pages of your message, the only statement related that this is that you were “unable to identify any conclusiveness” in the article. You do not explain why you deem the article, the most part of which relies on well documented facts, to be inconclusive. Instead you set out that you would not have to give me reasons as, in your opinion, I would only take notice of your opinion once it was confirming mine.

This position surprises me. I would expect from a former Member of the European Parliament like you that it is willing and able to comment on the political positions it held in a procedure and on the practical realities, especially if these positions were advocated for so vigorously as in your case. Instead you deny a comment with a justification which is obviously lacking any basis. Why should I repeatedly ask for your comments if I was not interested in these?

Instead of the requested statement on the costs of the „patent package“ for SMEs, you start kind of a sweeping blow against „my ranks“ and „my Association“ – while it still remains unclear what you mean by this. You complain about repeatedly having been misunderstood and cited incorrectly, and, more generally, you appear to hold the opinion that nobody has any knowledge on the matter in question, particularly not patent lawyers and patent attorneys practicing in this field of law for decades. Apart from yourself, of course. For obvious reasons, I desist from addressing your explanations in more detail, all the more as I am alienated by your stereotype way of thinking.

The same applies to your comments on some of my articles. Apparently, you have not fully read them, otherwise I am unable to comprehend your weird conclusions.

I regret that you are putting the main emphasis on your personal sensivities while rejecting a professional discussion of the important aspect of the costs caused by the “patent package” which you have advocated for so intensely. Should you wish to reconsider your position and provide a material statement, which remains to be hoped, please let me know.

Otherwise, I thank you for your efforts and wish you relaxing holidays.

With kind regards

Dr. Ingve Björn Stjerna
Rechtsanwalt
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