

The European Patent Reform – The rapporteurs and the cost situation

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

The political operators had always declared it to be a main theme of the European patent reform that it would allow for obtaining and enforcing patent protection at lower costs compared to the traditional system. Nonetheless, at the end of the European legislative process the reform package was adopted without any concrete rules on costs. As is known, neither the subsequently determined renewal fees for unitary patent protection nor the level of reimbursable representation costs at the Unified Patent Court fulfill these promises. The author has contacted the former rapporteurs of the EU Parliament *Bernhard Rapkay* and *Klaus-Heiner Lehne*, both of whom had repeatedly emphasized the alleged cost advantages of the new system in the legislative proceedings, asking them for a statement on the cost situation. The answers are sobering.

I. Cost reduction as a guiding principle of the European patent reform

Already at the preliminary stage of the legislative proceedings on the European patent reform, the reduction of costs for obtaining and enforcing patent protection, in particular for small and medium-sized enterprises (“SMEs”), was repeatedly named as a core motive why it was deemed an urgent necessity.¹ This was repeated over and over again throughout the legislative proceedings.

As an example, *Margot Fröhlinger*, at that time acting for the European Commission, now employed by the European Patent Office, stated:²

“We think that the costs for this new system can be kept sufficiently low to make this system attractive for the users and especially for European SMEs.”

As a matter of fact, the EU Parliament’s rapporteurs on the three components of the reform played a key role in the negotiations, namely *Bernhard Rapkay* (S&D group), responsible for the Regulation on unitary patent protection (Regulation 1257/12), *Raffaele Baldassarre* (EPP group), responsible for the Regulation on the language regime (Regulation 1260/12), and *Klaus-Heiner Lehne* (EPP group), responsible for the report on the Agreement on a Unified Patent Court (“UPCA”). Especially in the debate preceding the vote in the EU Parliament on 11/12/2012,

the rapporteurs praised the reform as “*an enormous step forward*”.

Rapporteur *Baldassarre* said (translation from Italian):³

“I really think that by approving these proposals for a unitary patent, we will pave the way for a patent system which is legally certain, cost-efficient, that will serve the interests of small and medium-sized companies and will support innovation and European competitiveness.”

Similar statements were made by the other two rapporteurs *Bernhard Rapkay* and *Klaus-Heiner Lehne*.

According to Mr *Lehne*, the traditional patent system is one (translation from German),⁴

“...which is good for large international corporations, but which is bad for small and medium-sized enterprises. We will resolve this now by adopting a unitary patent in Europe which can be enforced uniformly and which avoids many of the disadvantages for small and medium-sized enterprises.”

He described the alleged advantages of the new system as follows (translation from German, emphasis added):⁵

“I believe that, indeed, this is an enormous step forward for small and medium-sized enterprises. I just want to make this clear and give you a simple example. In the current situation – without this patent package, without the Agreement on the Patent Court – the situation is rather obvious: A medium-sized enterprise applies for a patent. This is very expensive, if they do this for all the 25 states participating in these patent agreements. Afterwards, if they want to assert this patent against a large competitor infringing this patent, they have to do so theoretically in up to 25 Member States. This will bring each medium-sized enterprise close to the limits of its existence and its possibilities.

Even worse: The practical case rather is that quite often, the large company challenges this patent of the smaller company, striving to enter into a deal with the small company and be allowed to use this patent subject to terms as favorable as possible. And when the small company now makes use of their patent, the large competitor will start patent infringement proceedings which they can start in up to 25 Member States, with

¹ Cf. *Stjerna*, The European Patent Reform – A poisoned gift for SMEs, p. 1 f., cipher II., accessible at www.stjerna.de/smes/?lang=en.

² *Stjerna*, The Parliamentary History of the European “Unitary Patent” (Tredition 2016), para. 712, cf. bit.ly/3oGov6f.

³ *Stjerna*, Parliamentary History (fn. 2), para. 1256.

⁴ *Stjerna*, Parliamentary History (fn. 2), para. 1261.

⁵ *Stjerna*, Parliamentary History (fn. 2), para. 1413 ff.

enormous costs and a gigantic cost risk for the small company.

In the future, this will no longer be the case if the small company uses the possibilities created by this new patent system. Then, there will only be one proceeding. In only this single proceeding it will be decided with final effect for the whole of Europe, for all 25 Member States. Thus, for the first time, equality of arms is created between large companies and small ones. And for me, this is a definitive example of why what we are going to approve today is a major step ahead for the SMEs and many things said here are simply nonsense, I would like to say this very clearly.”

Bernhard Rapkay agreed with these explanations (translation from German, emphasis added).⁶

“The problem is what Mr Lehne has said: In order to assert the protection in court, it is necessary, in case of doubt, to go to 25 countries. Now, one is enough. Anyone saying that it has become more expensive for small and medium-sized enterprises, this is his secret, but this is not at all plausible. In fact, this is indeed an improvement for small and medium-sized enterprises.

(...)

I tell you: Those voting against the patent package today are playing the game of large corporations. They are playing the game of large corporations against the SMEs, there can be no doubt about this!”

Critical voices predicting that, as a consequence of the reform, the strong would be strengthened and the weak weakened⁷ were rejected as nonsense.⁸

At the press conference held after the EU Parliament had adopted the patent reform with a large majority, Klaus-Heiner Lehne went on praising it (translation from German, emphasis added):⁹

“One of the deficiencies of the present system, until we have adopted this today, has been that we had the grant of a bundle patent in specific Member States of the European Patent Convention for which this had been requested, but the enforcement of this patent had to be conducted in each Member State separately.

In practice, this has caused that the large were always superior to the smaller. (...) This has now been ended by this system.

(...) So, finally equality of arms has been established in this context and this will cause significant cost reductions. I think this was one of the central require-

ments we had for this new patent package and this is now fulfilled.”

A press statement by the S&D group on the adoption of the reform package cited Bernhard Rapkay as follows:¹⁰

“I am glad that with this compromise, we found a solution especially for the small and medium-sized enterprises in Europe. The new EU patent will make things easier for them in particular.”

The apparently doubtful substance of the cited statements is not a subject of this article.

II. The costs of unitary patent protection and the level of cost reimbursement at the UPC

As the EU Parliament adopted the reform without – as mentioned – securing the promised cost reduction by respective legal provisions, it did not come as a surprise that most of it turned out to be mere lip service and that sometimes immense cost increases are to be expected instead, especially due to the level of reimbursable representation costs at the Unified Patent Court (“UPC”). These have been described in more detail elsewhere.¹¹ For the avoidance of repetitions reference is made to this article, its knowledge is afterwards assumed.

III. The position of rapporteurs Rapkay and Lehne on the cost situation

In the middle of 2016, after the renewal fees for unitary patent protection, the court fees at the UPC and the maximum amounts of reimbursable representation costs had been designated, I wrote to former rapporteurs Rapkay and Lehne, both of whom had meanwhile left the EU Parliament, pointing to their statements in the legislative proceedings on the alleged cost advantages caused by the reform, enclosing the article mentioned above in fn 1, and asking them to comment on whether they considered this cost situation, especially for SMEs, a fulfillment of the promises made.

1. Statement by Bernhard Rapkay

According to his website, Bernhard Rapkay, born 1951, studied “mathematics and economics”, information on a graduation is not provided.¹² Prior to becoming a Member of the EU Parliament for the Socialists in 1994 he was working “in adult education and in several structural policy projects and institutions”.¹³ He was a Member of the EU Parliament without interruption until the end of the legislative period in 2014, when he did not stand for office again. Apparently, he has since retired.

In a letter dated 13/05/2016, I sent a written enquiry to Bernhard Rapkay to which, after some time, he replied.

⁶ Stjerna, Parliamentary History (fn. 2), para. 1431, 1433.

⁷ Cf. for instance the statements by MEPs Lichtenberger and López Istúriz-White in Stjerna, Parliamentary History (fn. 2), para. 1322, 1341.

⁸ Cf. for instance the statements by MEPs Lehne and Rapkay in Stjerna, Parliamentary History (fn. 2), para. 1415, 1429.

⁹ Stjerna, Parliamentary History (fn. 2), para. 1473 ff.

¹⁰ Rapkay: „Weg frei für das EU-Patent“ – Europäisches Parlament verabschiedet Patent-Paket (“Green light for the EU patent – European Parliament adopts patent package”), S&D press statement of 11/12/2012, accessible at bit.ly/2rEVZpD.

¹¹ Stjerna (fn. 1).

¹² www.rapkay.de/6648-persoendlich/.

¹³ Fn. 12.

Due to the significant relevance of the patent reform for the European economy, the high level of public interest in the topic and the importance of the rapporteurs for its adoption in the EU Parliament, and not least with a view to the fundamental rights of freedom of speech, academic freedom and freedom of press, this correspondence is made public (afterwards “Rapkay correspondence”), interested persons can access it at www.stjerna.de.

My request to Mr *Rapkay* was worded as follows (translation from German):¹⁴

“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.”

In an e-mail received on 27/05/2016, Mr *Rapkay* indicated his preparedness to comment, while stating that this would need some time. After some back and forth, a long e-mail by Mr *Rapkay* was finally received on 18/08/2016, thus more than three months after my enquiry, which, while containing interesting statements on the legislative proceedings, avoids any material discussion of the cost aspect.

He commented on my enquiry (translation from German, the text is kept as closely to the original as possible):¹⁵

¹⁴ Rapkay correspondence, p. 1/2, accessible at bit.ly/3omnb8n.

“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”.¹⁶ 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 with the Council, the latter broke its word and stripped the compromise achieved in the trialogue procedure of any content, despite an initial written guarantee, which could be resolved more or less only by the crazy detour via Article 5 of the Court Agreement.”

This statement was surprising since it does not have too much to do with the topic of my request, the cost situation after the patent reform. However, it will be difficult to find any selective citation in said article, all the more as along with it, a verbatim protocol was published of all the statements made in the meeting in question. What is meant by “your Association” is still unclear. Probably this refers to the “European Patent Lawyers Association” (“EPLAW”), where I am not a member and never was.

After some further allegations in relation to his now almost legendary statement in the legislative proceedings „As it is known, I am rather a legal layman“¹⁷, Bernhard *Rapkay* stated that he did not want to comment on the question raised in my enquiry (translation from German):¹⁸

“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 when it confirms yours. Otherwise, I have made efforts for nothing – and I do not need that! You may be displeased about this. Anyhow, I have to live with that.”

It is regrettable that a former Member of the EU Parliament dodges a discussion about the realization of promises he made in this manner. On the other hand, the facts speak for themselves which may be one reason why Mr *Rapkay* preferred to avoid having to deal with them.

Instead, he went on to discuss other questions, e. g. whether the well-known so-called “Cypriot compromise” on former Art. 6 to 8 had its origin in the Council or the EU

¹⁵ Rapkay correspondence (fn. 14), p. 4.

¹⁶ Apparently referring to the article The European Patent Reform – The sub-sub-suboptimal compromise of the EU Parliament, accessible at www.stjerna.de/suboptimal-compromise/?lang=en.

¹⁷ *Stjerna*, Parliamentary History (fn. 2), para. 816.

¹⁸ Rapkay correspondence (fn. 14), p. 4.

Parliament (which did not play any role in my related articles¹⁹). For Mr Rapkay, however, this seems to still have undiminished importance (translation from German):²⁰

“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, and after discussing 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!”

Mr Rapkay continued (translation from German):²¹

“And then you go on to tackle Mr Tillmann [sic]. 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 [sic] 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. (...) 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 interpretation monopoly. This is what we have secured also for the unitary patent. Contrary to what certain lobbyists wanted.”

At the end, Mr Rapkay once more approached the actual topic of the cost situation, just to again decline a material assessment (translation from German):²²

“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.”

This was all the former rapporteur for the Regulation on unitary patent protection had to say with regard to the realisation of his promises on a reduction of costs.

On 25/08/2016, I again wrote to Mr Rapkay, asking for a material statement:²³

“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. (...)

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 sensitivities 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.”

I did not receive a reply.

¹⁹ Above fn. 16 as well as The European Patent Reform – ‘Cypriot compromise’ compromised, accessible at www.stjerna.de/cypriot-compromise/?lang=en.

²⁰ Rapkay correspondence (fn. 14), p. 4.

²¹ Rapkay correspondence (fn. 14), p. 4/5.

²² Rapkay correspondence (fn. 14), p. 5.

²³ Rapkay correspondence (fn. 14), p. 6/7.

2. Statement by Klaus-Heiner Lehne

The correspondence with the former rapporteur on the UPCA, *Klaus-Heiner Lehne*, was not much different.

Mr *Lehne*, born in 1957, studied physics, philosophy and law.²⁴ He graduated in the latter and, after his legal clerkship, started practicing as an attorney at law in Düsseldorf. He was a Member of the German Parliament for the Conservatives between 1992 and 1994.²⁵ He was elected to the EU Parliament in 1994, where he was a member until spring 2014.²⁶ In addition to being a Member of Parliament, he was a partner in the Düsseldorf office of the law firm Taylor Wessing from 2003 to 2014²⁷ which, according to his last “Declaration of Financial Interests”, paid him a monthly salary of the highest income category 4 (“more than EUR 10.000 gross a month”).²⁸ He was repeatedly criticized for this job.²⁹ In spring 2014, Mr *Lehne* left the EU Parliament and joined the EU Court of Auditors as the German representative at the suggestion of the German government, once again accompanied by critical statements in the press.³⁰ From what can be heard, he had to abandon his work for Taylor Wessing as a result of the EU Court of Auditors “Code of Ethics”. However, contrary to respective statements in the press,³¹ he apparently did not abandon his job as an attorney at law as the Düsseldorf bar association currently lists him as a member.³²

In a letter dated 14/06/2016, the wording of which is widely identical to the letter sent to Mr *Rapkay* as cited

²⁴ Cf. the biography at his former website, accessible at bit.ly/2sHidIM.

²⁵ Fn. 24.

²⁶ Fn. 24.

²⁷ Article „Taylor Wessing setzt auf Brüssel“ (“Taylor Wessing put their hope in Brussels”) of 24/09/2003 at juve.de, accessible at bit.ly/2rZFjKi.

²⁸ Cf. his “Declaration of Members’ Financial Interests” of 07/03/2012, accessible at bit.ly/2r5v3RA.

²⁹ Article „Interessenkonflikt durch Nebentätigkeit: Vorsitzender des EU-Rechtsausschusses verdient mind. 120.000 Euro in Großkanzlei“ (“Conflict of interest through part-time job: Chairman of the Legal Affairs Committee earns at least 120.000 Euros in law firm”) of 10/05/2012 at abgeordnetenwatch.de, accessible at bit.ly/2rERVpG; „Softwarepatente: Koordinator der konservativen Volkspartei in der Schusslinie“ (“Software patents: Coordinator of Conservative People’s Party in the line of fire”) of 23/06/2005 at heise.de, accessible at bit.ly/2rQ50uD.

³⁰ Article „Wirbel um Merckels Milliarden-Wächter“ (“Trouble around Merkel’s Watchman over Billions”) of 03/02/2014 at Spiegel Online, accessible at bit.ly/2sXklZF, and „Umstrittener Wirtschaftsanwalt wechselt an EU-Rechnungshof“ (“Controversial corporate lawyer to join the EU Court of Auditors”) of 04/02/2014 at Spiegel Online, accessible at bit.ly/2qZZ9S4; „Abstruser Unsinn – Neuer EU-Rechnungsprüfer wehrt sich gegen Lobby-Vorwurf“ (“Absurd nonsense – New EU auditor defends himself against lobbying accusation”) of 05/02/2014 at nrz.de, accessible at bit.ly/2sXzlXq; „Merkel sendet berüchtigten Industrie-Lobbyisten in EU-Rechnungshof“ (“Merkel sends infamous industry lobbyist to EU Court of Auditors”) of 05/02/2014 at deutsche-wirtschafts-nachrichten.de, accessible at bit.ly/2rOeaar.

³¹ E. g. in the articles at Spiegel Online of 03 and 04/02/2014 (fn. 30).

³² Cf. the online database at bit.ly/2sXpelu.

above,³³ I also asked Mr *Lehne* for a statement on the cost situation of the patent reform and its consistency with the communicated motive of cost reduction, in particular for SMEs. For the same motives mentioned above in relation to the publication of the letters exchanged with Mr *Rapkay*, this correspondence is made public as well; interested persons can access it at www.stjerna.de.

Klaus-Heiner Lehne answered in a letter dated 29/06/2016 and informed me as follows (translation from German).³⁴

“It has indeed been a personal concern to me that the new patent system brings advantages in particular for SMEs. It is for this reason that I have supported the specific measures for SMEs that you mention in the article.

Meanwhile, I am a member of the European Court of Auditors since more than two years and I am no longer involved in the matter. Therefore and due to a lack of deeper knowledge about the current state of play, I cannot provide any comment on the arrangements that are currently being discussed.

I do hope, however, that the arrangements ultimately found will pay sufficient regard to the legitimate interests of SMEs.”

These comments are astonishing. Regardless of his new function, against the background of the clear statements he made in the legislative proceedings as to the alleged cost advantages caused by the reform, he might still be expected to provide a comment going beyond hoping that, amongst others, his repeated promises may somehow come true.

His reference to the “*specific measures for SMEs that you mention in the article*” likewise misses the point. On the one hand, apart from their uselessness described elsewhere,³⁵ they have little relevance for the costs at the UPC, on the other they were not part of Mr *Lehne*’s report, who was responsible for the UPCA.

Expressing the hope that, somehow, “*sufficient regard to the legitimate interests of SMEs*” will be paid is a bit thin, bearing in mind the creation of “*equality of arms*” between “the small” and “the large” that was announced by Mr *Lehne*³⁶ and the envisaged significant cost reductions by the reform especially for SMEs. Currently, it looks as if nothing of all this would become a reality.

Therefore, I again contacted *Klaus-Heiner Lehne* on 05/07/2016, repeating my request for a statement (translation from German).³⁷

“It may be that – as you say in your letter – you hope that arrangements will be found that “pay sufficient regard to the legitimate interests of SMEs”. However,

³³ *Lehne* correspondence, p. 1/2, accessible at bit.ly/3flz22r.

³⁴ *Lehne* correspondence (fn. 33), p. 3.

³⁵ *Stjerna* (fn. 1), p. 3, cipher IV.2.b).

³⁶ Fn. 9.

³⁷ *Lehne* correspondence (fn. 33), p. 4.

in your function as a rapporteur, you have repeatedly and with emphasis presented it as a guaranteed fact (and I abstain from providing further citations) that SMEs would profit considerably from the new system, especially that it would be much cheaper for them than the traditional one.

In view of this obvious discrepancy between the promises made and the actual reality I would be very much interested in what your thoughts as the formerly responsible rapporteur are about this. Thus, I again ask for your opinion. Is the system in its current form the one that you have presented as a rapporteur at the end of the EU legislative proceedings and that you strongly supported or is it not?"

I did not receive a reply.

IV. Assessment

On sober reflection, it does not come as a surprise that both former rapporteurs chose to evade a discussion as the designated cost level obviously makes it difficult to maintain the narrative of the alleged cost advantages ensuing from the patent reform. On the opposite, the manner in which the rapporteurs dealt with the topic may imply that the purported cost reductions by “unitary patent” and UPC could have been used all along as a mere political slogan to push the reform. Had they ever truly believed in the promised cost reductions, the clearly converse realities created, which caused even the Commission³⁸ to warn against the financial risk involved in proceedings at the UPC, would have suggested a different reaction.

This demonstrates the methods applied to overcome resistance against a controversial legislative project and to help advancing it through the Parliamentary procedure. The political protagonists sell the reform plans as attractive to those affected, pointing to positive future effects allegedly caused by their adoption, often relying on statements by certain experts, and thus paving its way through the Parliamentary procedure as, of course, nobody wants to get into the way of realizing the envisaged advantages. In the present context, vivid examples are the promises of a cost reduction and SME support.

In the context of the “patent package” similar “bets on the future” were also repeatedly placed for other questions, e. g. the practicability of the compromise on former Art. 6 to 8 and whether the material patent law would become subject to the jurisdiction of the CJEU or, most recently, the possibility of the UK to remain a member of the UPCA after a withdrawal from the EU. Also in these cases, quick political action was/is requested and purportedly legitimized based on doubtful concepts, the legal viability of which remains to be confirmed at some time in the future.

Whether the politically promised advantages ultimately become a reality is irrelevant. Even if this is not the case, the legislation, sometimes apparently motivated by mo-

tives much different than those officially provided, is in force and claims validity. Should the unfulfilled political promises come up, often new political protagonists who were not involved in the proceedings can deny any responsibility for this reason alone. The initial protagonists can likewise claim that the responsibility lies with somebody else or – as in case of Mr *Rapkay* and Mr *Lehne* – that they had now so much distance to their past involvement that they could/would not comment on the actual state of play.

What ultimately remains is a piece of legislation which has been enacted on the basis of false premises and the lack of someone bearing the political responsibility for this. This is most useful especially in cases in which the reformed legal situation entails advantages only for a selected few while it may even be detrimental to the majority of those affected, so that, had these consequences been disclosed from the outset, such project would not have stood any realistic chance to ever become law.

It very much looks as if the European patent reform is based on exactly this design.

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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!

³⁸ Commission Document SWD (2015) 202 final of 28/10/2015, accessible at bit.ly/2sHpaqX.