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UPC: to be or not to be?

Matthieu Dhenne (Ipsilon) · Monday, January 25th, 2021

After BREXIT, ratification and then withdrawal by the UK, a referral to the German Constitutional Court (“*Bundesverfassungsgericht*“) and finally a ratification by its parliament, the UPC project is once again blocked in Germany, as previously before the *Bundesverfassungsgericht*. Like the phoenix, the project is constantly reborn. But should we resist, or should we surrender? What think of all this?

First of all, the ratification process seems endless, so much so that one wonders about a possible outcome in the long run. Some people no longer believe in it. It is true that this is not the first project and that, since the 1975 Luxembourg Convention, the members of the European Patent Organization have been trying, in vain, to establish a common jurisdiction. Meanwhile, the USA have set up the Court of Appeals for the Federal Circuit (“CAFC”) in 1982, which has proved its worth since. So what are we waiting for?

We must admit that UPC project does not seem to arouse an overwhelming enthusiasm in the media and among our governments. A system designed above all by its potential future users with the interlude of the EPO, the unified jurisdiction will not shine for its simplicity or its accessibility. We are notably thinking of the distinction between European and unitary patents and the opt-in/opt-out mechanism. In any case, this is a system designed by some patent users, and which tends, in contrast, to exclude others. Then the cost of the unitary patent will undoubtedly be a powerful disincentive for a number of actors who do not have the means (start-ups, SME-ETI in particular). Not to mention the fact that if companies are mainly involved in the development of the project, it also results in marginalization of the States. Thus, the choice not to make a jurisdiction integrated into the European Union, as with trademarks and designs, is not only regrettable, but also certainly explains the lack of enthusiasm States have shown for relaunching the process (see [here](#)). Altogether, the shortcomings of the UPC have been the source of its constant contestation by academics (see [here](#) for instance).

But let the reader make no mistake about it. I support UPC. At the same time, I admit finding it difficult to understand why recent events have not been considered as an opportunity to relaunch this project in a more ambitious direction. And, considering the situation in Germany, I believe that France should tackle the issue head on. However, it must be turned into a true European project. We also must plead for Paris to be the epicenter of this jurisdiction. The idea of several central divisions does not make sense, whereas centralization would be logical as much as it would facilitate the functioning of the system. The choice of Paris would be well-founded economically (France is the second largest market in the Europe), historically (France was at the heart of the

construction of European Patent Law with the first patent legislation ever and with the Longchambon report long after, and the European office is already located in Germany), and geographically (Paris is a showcase at the center of Europe).

Therefore, in my opinion, defending the UPC will in any case mean recognizing that the project needs to be reformed. But at the very moment when the German authorities are jeopardizing the UPC, France must take its place as European leader in the field of innovation and take the lead: the future of innovation protection in Europe is at stake!

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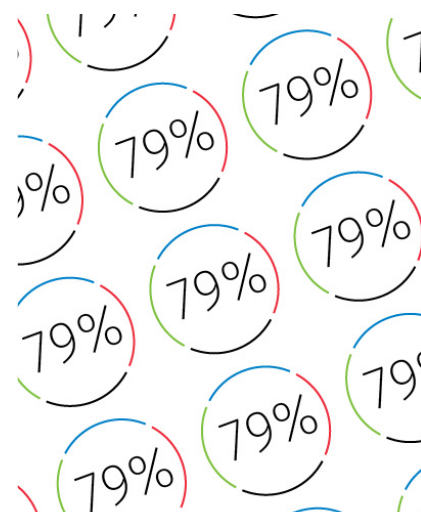
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