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Is UPC Victim of a Latent Vice?

Matthieu Dhenne (Ipsilon) · Wednesday, March 23rd, 2022

Since 19 January 2022, the provisional application protocol (“PAP”) of the UPCA has officially entered into force. However, [as previously reported](#), this entry into force of UPC faces a number of difficulties, including the exit of the UK as a result of BREXIT.

One example is PAP’s Article 3(1), which requires the Protocol to be signed by the UK. This text makes the entry into force of the Protocol subject to numerous conditions, including signature by the UK. However, while the UK did sign the PAP and then ratified the Agreement, it also withdrew from both after BREXIT. We can therefore understand [the interpretation of the JUB Preparatory Committee, dated 28 October 2021](#), according to which this Article 3(1) should be interpreted in the sense of Article 89 of the UPCA. Thus, it would mean that entry into force would no longer be conditional on the signature of 13 signatory States including France, the UK and Germany, but on the signature of 13 States including the three “*Member States in which the greatest number of European patents were producing their effects*” (UPCA’s article 89, now France, Germany and Italy).

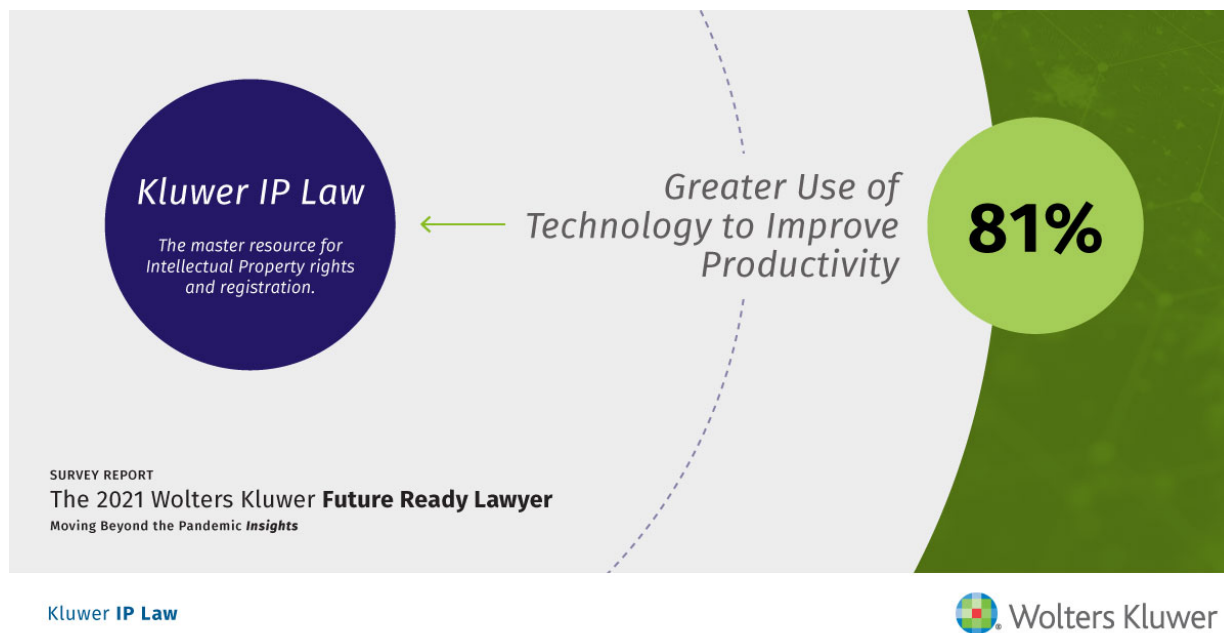
In any case, the Council of the European Union seems to have turned a blind eye to this difficulty by [announcing the entry into force of the PAP](#) without providing any clarification. Such an approach by the Council is nevertheless to be deplored for one simple reason: legal certainty. This is the first quality sought in a legal system, that should also attract future applicants for a unitary patent, could be lacking here. Indeed, how can economic players be invited to use a system where it is known that the basis is fragile and that it could be challenged at any time by a litigant? In the meantime, it seems that we already have a good defense in future proceedings!

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