

# Kluwer Patent Blog

## UPC – November Rumors

Thorsten Bausch (Hoffmann Eitle) · Tuesday, November 27th, 2018

Looking back at this blog in 2018 from a bird's eye perspective, I cannot resist the feeling that one of the most popular topics has been musing about the UPC's future and speculating about the timing and the outcome of the decision by the Bundesverfassungsgericht (BVerfG) on Dr. Stjerna's constitutional complaint. Even Stjerna himself has not held back with such speculations, as reported [here](#).

So why not have a sip at a good glass of Riesling, and take a deep look into my own crystal ball? Here is what I have seen:

### Timing

The prophets forecasting an early decision by the Bundesverfassungsgericht in view of the urgency of the matter for Europe – or perhaps rather for their own pockets, have so far consistently been proven wrong. Dr. Stjerna's constitutional complaint was filed on 31 March 2017 and has definitely not been decided "by Christmas", as some predicted (in 2017). It was put on the (wish)list of court cases to be decided in 2018. But this does not mean much, as many cases on this list have been there for years. So much for the facts.

What do the complainant and interested third parties suspect?

Dr. Stjerna himself made abundantly clear that he has no idea when the BVerfG will decide on his case. He complained about this on his [website](#) by pointing to the fact *that the court does not provide any information about the proceedings and their expected course even to the complainant, who is currently the only party to the proceedings*. BTW, he can only know this, if he is the complainant himself, which he has never explicitly conceded, but also never denied.

The German Government also does not know when (and how) the case will be decided, as Dr. Pakuscher from the Federal Ministry of Justice and Consumer Protection recently confirmed during a seminar in Munich.

Conversely, Prof. Tilmann, speaking in a seminar on SPCs organized by the Max Planck Institute for Innovation in Munich on 13 November, presented it as a fact that the competent 3-member panel of the Bundesverfassungsgericht would get together in December and then decide whether it will present the case to the entire bench of the 2nd Senate (8 judges) or whether it would decide on the case itself, which would be the case e.g. if the panel were of the opinion that Dr. Stjerna as a private person had no standing to file a constitutional complaint against the UPCA.

Prof. Tilmann did not reveal the source of this information, nor was he asked for it during this seminar. Maybe he will be kind enough to supply a comment in response to this blog to help readers to better understand the basis on which he made his statement.

Dr. Stjerna seems to suspect that Prof. Tilmann may be better informed than others about what is going on behind the scenes. He [drew attention](#) to a weighty (1500 pages) commentary by Prof. Tilmann on the UPC Agreement that he supposed would appear in the calendar week beginning on 22.10.2018. He connected this supposition with his case and summarized his speculation in form of the remarkable question: “Would C. H. Beck [the publishing house] put the commentary into print and make the associated considerable investment if it had to fear not being able to later on sell the book as a result of a decision by the BVerfG against ratification of the UPCA?”.

Well, according to Prof. Tilmann his commentary had already been published in June of this year, and he had a sample of it in front of him when speaking at the November SPC seminar in Munich. This might seem to disprove Dr. Stjerna’s speculation. On the other hand, the website of the [Beck Verlag](#) shows that publication of the commentary by Tilmann/Plassmann in German is currently scheduled for “probably Feb. 2019”, whereas an English e-publication (comprising 1832 pages!) is already available. I cannot exclude – and it is not unreasonable to assume – that C.H. Beck is indeed minded to await a positive outcome of the decision of the Bundesverfassungsgericht before bringing this weighty and expensive commentary on the market in a paper version. Thus, I would not be overly surprised if the publication date of this commentary in the paper version were to be shifted again in January 2019. Conversely, whether the Beck website is a good predictor for when, let alone how, the BVerfG will decide on the constitutional complaint is a judgement that I would leave to you and Dr. Stjerna. I prefer proper hieromancy with no tin foil hat.

## Outcome

Predictably, prophets strongly disagree also with regard to the outcome of the constitutional complaint. Prof. Tilmann and numerous other attorneys-at-law from larger law firms are as convinced that the constitutional complaint will (or at least should) be dismissed, as Dr. Stjerna is that he will (or at least should) win. Meanwhile, the interested circles in the UK have been busy massaging their representatives in the House of Lords that the UPC is a great idea and should be or remain open to non-EU states also. In doing so, they spread the rumor further that the outcome of the German case is more or less clear. [This website](#) quotes Kevin Mooney with

“The rumours that I heard (...) are that we can..., we hope to expect a decision in December and that it is likely to be favourable.”

Well, my own prediction is that at least one of these prophets will eventually be right. With that, I end my speculation on this issue and turn to the next big unknown.

## Impact of Brexit

In this regard, the promoters of the UPC, and particular those from law firms with a strong UK presence, as well as Ms. Fröhlinger, seem to believe that everything is easy, and that a few minor adjustments by the Administrative Committee will suffice to keep the UK within the UPCA. Where there’s a will, there’s a way.

While I do not deny the latter, I am not so sure whether and where there is really a continued will on all sides to engage in this project together. Taking the UK side first, it seems to be common ground that the UK would have to acknowledge supremacy of EU law and the CJEU as the final arbiter on matters relating to the UPCA in order to become and stay part of this agreement. So far, this has been a red line for the UK government, but it has not prevented the UK from ratifying the UPCA and thus will probably not be an unsurmountable obstacle. From the EU side, we have not seen many public commitments by politicians one way or the other. Mr Barnier blandly said that they will “look into this issue”. Two renowned scholars from the Max-Planck-Institute have voiced the opinion that it would **legally be impossible and politically undesirable** that the UK stays in the UPCA. This view finds predictably little sympathy with the proponents of the UPC on both sides of the channel, one of which even used the considerable length and depth of the Max-Planck study **to downplay or even ridicule its conclusions**. The Max-Planck scholars’ view is not an isolated one in Germany, though. A member of the Board of the German chamber of patent attorneys has very recently voiced the concern that the EU should carefully consider whether it is prudent to leave part of a court common to certain of its member states to a venue and jurisdiction outside the European Union. And an Attentive Observer on [this blog](#) has also weighed in with his/her considered opinions on this issue and supported the Max Planck view.

Be that as it may, most observers seem to think that a pre-requisite for the UK to join or stay in the UPCA is a successful closure of the withdrawal agreement between the UK and the EU. Otherwise, there would be no transition period and the UK would automatically drop out of the EU by virtue of Art. 50 TEU on 29/3/2019, i.e. *before* the UPCA will enter into force. As the Unified Patent Court shall be a court common to the Contracting Member States (Art. 1 UPCA), the “Contracting Member States” are “Member States” party to the UPCA (Art. 2 c UPCA) and “Member States” are defined as member states of the European Union (Art. 2 d UPCA), the UK’s participation is difficult to argue if the UK ceases to be a “Member State” before the UPCA is even enacted.

How realistic is the successful closure of a withdrawal agreement? Hmm... let us return to this question after the debate in the House of Commons in early December and assume, just for the moment, the best possible scenario from a UPCA point of view, i.e. that a Withdrawal Agreement will be closed by 29 March 2019 and that the German Constitutional complaint will be dismissed in December (aka “the Tilmann/Mooney scenario”).

This scenario will then pose the interesting question what Germany will (or should) do, i.e. proceed with the ratification at the risk that the UK may eventually not agree to the supremacy of Union Law and the CJEU as final arbiter, when push comes to shove, and/or that the EU and the UK will not manage to cut a “deal” on their further political and economic relationship at the end of the transition period. This could then mean an early end of the UK’s participation in the UPC Agreement and result in quite a bit of turmoil.

The German Ministry of Justice has remained remarkably tight-lipped on this question so far. When a representative was recently pressed for an answer to what Germany will do if the Constitutional Complaint is dismissed in December, the answer was, according to my handwritten notes (which were taken in a hurry and may not be 100% accurate):

Wir werden mit der Ratifikation verantwortlich umgehen.

Die Parameter müssen klar sein.

We will deal with the ratification in a responsible fashion.

The parameters have to be clear.

And with this Delphic assurance, I wish everybody a contemplative advent season and more clarity by Christmas.

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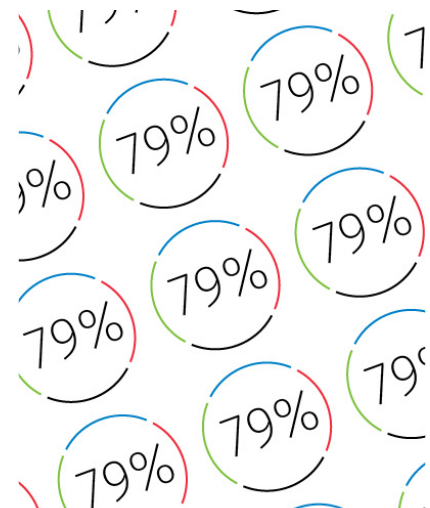
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