

Kluwer Patent Blog

UPC – Alle Jahre wieder

Thorsten Bausch (Hoffmann Eitle) · Tuesday, December 3rd, 2019

“Alle Jahre wieder” (Every year) is the title of one of the most popular German Christmas songs. And alle Jahre wieder / every year there is advent time, which seems to be the perfect time for the invocation of the immediately imminent advent of the Unified Patent Court (UPC). MIP made the start with its famous „bullshit“ telephone interview of Justice Prof. Huber, as reported [here](#), which announced a decision on the German constitutional complaint in early 2020, followed by [JuVe’s](#) interview with Alexander Ramsay, who announced the possible start of the UPCA in early 2021. Whether the UK will by then still be a member state of the European Union remains to be seen, but who cares? Only pedants like me seem to wonder whether Article 1 UPCA may perhaps stand in the way of the UK post Brexit becoming or staying a member in the UPCA:

The Unified Patent Court shall be a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States.

Yet perhaps it is possible that a court “common to the Contracting Member States” may also be common to the Contracting Member States *and* the UK, at least if and when the UK accepts that it is “subject to the same obligations under Union law as any national court of the Contracting Member States” to the extent that patents are concerned. And in any case, there is no doubt that where there is a political will, there will be a way. A [report](#) by the Policy Department for Citizens’ Rights and Constitutional Affairs, which was commissioned by the JURI committee of the European Parliament also came to the conclusion that *„it seems not per se legally impossible that the UK can stay within the UPCA, even when not an EU Member State“*. Of course, there are some ifs and buts, but the big message of this opinion work is clear – nothing is impossible.

But would a UPC including judges from non-member states, domiciled in part outside the EU and established by an international treaty not again be “an international court which is outside the institutional and judicial framework of the European Union” which the CJEU rejected in its opinion C1/09? Well, let’s leave this question for another day and consider instead the (political) realities of the day.

It seems to me that all adamant supporters of the UK’s participation in the UPCA should now better be busy canvassing for their respective most promising local candidate of Labour, LibDem, SNP or the Green party to avoid the worst, and I have no doubt that many of them will. But if they are unable to convince the majority of their countrymen that Brexit is not such a great idea and the

Conservatives win the general election in December, then the odds are indeed that the UK will leave the EU on 31.1.2020. Which means, at least in my view, that the UPCA would have to be amended in order to allow the UK to still become (or stay) a member. Even Margot Fröhlinger, who can certainly not be accused of being overly UPCA-sceptic, conceded that much, and the literal wording of Article 1 leaves no other option, as I think.

Articles 20 and 21 and some of the recitals to the UPCA are also of interest, e.g. the following ones:

RECALLING the primacy of Union law, which includes the TEU, the TFEU, the Charter of Fundamental Rights of the European Union, the general principles of Union law as developed by the Court of Justice of the European Union, and in particular the right to an effective remedy before a tribunal and a fair and public hearing within a reasonable time by an independent and impartial tribunal, the case law of the Court of Justice of the European Union and secondary Union law;
CONSIDERING that this Agreement should be open to accession by any Member State of the European Union; Member States which have decided not to participate in the enhanced cooperation in the area of the creation of unitary patent protection may participate in this Agreement in respect of European patents granted for their respective territory;

I still find it very difficult to believe that the UK can and will at the same time exit the EU and still “recognize the primacy of Union law, including the TEU, the TFEU etc. etc.” at least to the extent that the UPC is about to apply it. And I find it likewise not very likely that the EU and the CJEU will accept that in future British (i.e. non-EU) judges should be permitted to decide about the interpretation of EU law (note that the UPCA will also have to apply Union law directly, such as the regulation on the EP-UE, the SPC regulation etc). As [last year around the same time](#), I remain on the skeptical side.

Thus, I am afraid I must continue to pour some water in the wine of the notorious optimists and proponents of the soon-to-become-reality UPCA. In my opinion, both the UK and the EU27 must first define their political positions about a permanent membership of the UK in the UPCA.

As regards the EU, even the research paper requested by the European Parliament’s Committee on Legal Affairs and commissioned, overseen and published by the Policy Department for Citizens’ Rights and Constitutional Affairs bluntly acknowledges this in Section 3.2:

The position of the European Council and the contracting Member States of the UPCA on the possibility to cooperate with the UK in the framework of the UPCA is not known. One can only guess that the willingness of the Heads of State and Government will depend on the outcome of the negotiations on the Brexit.

Well, this could be interesting. And might well take a few more years.

As regards the UK, the auspices of a permanent membership in the UPCA even after the “implementation period” are likewise pretty cloudy, not to say gloomy. According to a recently

leaked [Fourth UK-US TIWG Readout](#) from negotiations within a UK-US Trade and Investment Working Group from June 2018, to which representatives of the UKIPO and the USPTO attended, the following seems to be the situation:

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15. CE (US) was surprised the UK government ratified the UPC agreement before the UK's exit., and asked what the implications are for judgements of the CJEU, as the Court of First Instance which cover pharmaceuticals is based in London – what will happen post exit? NC (UK) confirmed we have ratified the agreement and we have a positive view of the court. We intend to stay part of the agreement throughout the implementation period (a transitional phase in which we will abide by EU rules). Beyond this is subject to negotiations. The FEP White Paper is due to be published; we can have a further discussion following its publication.
16. CE (US) asked about the constitutional challenge in Germany which is holding up their ratification. If this process takes longer than expected and the UK leaves before then will the UK's ratification be null and void? MH (UK) responded that we are not sure but are preparing for all eventualities.

Thus, the UK intends to stay part of the UPCA during the “implementation” (transition) period, which ends on 31.12.2020 according to the currently agreed version of the [UK Withdrawal Agreement](#). But what will happen thereafter? *Beyond this is subject to negotiations* does not sound to me like a very strong commitment. And who knows which surprises the UK-US negotiations about a much desired Free Trade Agreement will still bring us. In view thereof, would it really be sensible for Germany to ratify the UPCA in early 2020, provided that the Federal Constitutional Court dismisses the constitutional complaint? In this case, the [Mr. Ramsay](#) and the UPC Preparatory Committee would resume its preparations, judges, including judges from the UK, would be appointed etc. – and just about when the court is ready, the UK might (have to) exit the UPCA again, namely if the “negotiations” alluded to by the UK representative fail. And then we have the salad.

I consider that it is exactly such a nightmare scenario that has prompted the German Ministry of Justice to state that Germany will ratify the UPCA “[in a responsible fashion](#)”. Which can only mean that we first need clarity about the political will in regard to the UPC from both the EU side and the UK side *post Brexit* (if Brexit happens at all – hope dies last), before Germany will (or at least) should deposit its instrument of ratification. Any other procedure would be pretty hazardous.

Therefore, I would now be bold enough to dare bet that the new [Berlin airport](#) will open **before** the UPCA enters into force. Just to recap: The opening of the BER airport was originally foreseen for 2011, which date has meanwhile shifted to 31.10.2020. Conversely, the UPCA was signed on 19 February 2013, thus I would not be surprised if we were to see the UPC's opening around 2022, perhaps even later. It might still open earlier than [Stuttgart 21](#), though, if this is a consolation for any one. The opening of Stuttgart 21 was originally planned for 2019, which date first shifted to 2021 and now to 2025.

The upshot of all of this that major infrastructure projects seem to take time, at least in Germany. Thus, JuVe's punchy headline “wheels in motion for the UPC” may very well be premature by a few years, even if one ignores for a moment the astonishing fact that quite a lot of the UPC

supporters seem to be pretty certain how the Federal Constitutional Court will decide on this appeal. I find this a bit patronizing and tend more towards an open wait-and-see attitude.

With this, relax and enjoy your advent.

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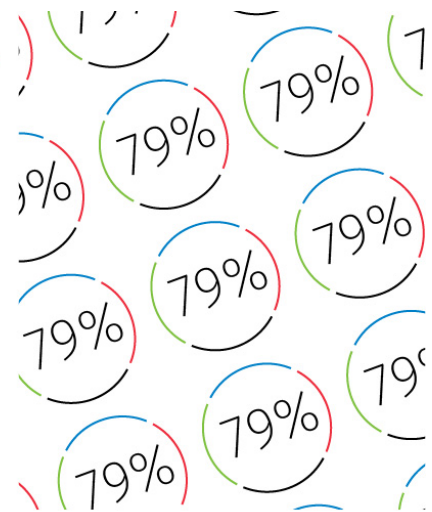
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