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The German UPCA Ratification – at Schweinsgalopp towards Mautdebakel

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As is well known, not least since Mark Twain's famous and unforgettable analysis, the Awful German Language is full of funny compound words (actually, according to Mark Twain, "they are not words, they are alphabetic processions") for which no direct equivalent seems to exist in English or any other language.

Schweinsgalopp is one of these words. Its literal translation would be something like "piggish gallop" and when Germans say something is done "im Schweinsgalopp", we usually mean that it is done in an unduly hasty and messy way. Pretty much the opposite of the virtues Germans are usually proud of, such as thoroughness, deliberation and responsibility.

This takes us directly to the current plans of the German Ministry of Justice and Consumer Protection (BMJV in German) to rush a second ratification of the UPC Agreement through parliament in an unchanged form, as if nothing had happened in the meantime. True, the BMJV has heard about Brexit and seems to be aware that the UK intends not to participate in the UPC Agreement, yet never mind – the UK has ratified it and so Germany can ratify it too, start the system and the deal with any problems later… somehow. The EU Commission also seems to endorse this view.

Politically, I would respectfully submit that this is just madness. The BMJV seems to take the position that the UK ratification is sufficiently valid and irrevocable that it enables the UPC to be established, but at the same time, it is expected that the UK will officially and in due time revoke its participation to the UPCA so that Germany and France are able to take over the London Central Division when the system starts. And the other UPC member states are apparently supposed to later declare that they are perfectly happy with this approach. The BMJV's reasons attached to the current draft bill seem to take it as a given that when the UK withdraws, the jurisdiction of its Central Division will automatically cede on the two remaining Central Divisions in Paris and Munich. They do not discuss where this is stated in the UPCA (spoiler: nowhere) nor where this idea comes from (spoiler: possibly out of self-interest, but certainly out of very thin air) nor why they think that this adequately expresses the political will of the other UPC member states. And they seem to ignore the possibility that the UK might perhaps not even want to rush its withdrawal from the UPCA, e.g. because it wishes to tie it to a withdrawal of the EU's fishing fleet from UK waters or the like (Max Drei and Attentive Observer have elaborated on the UK's interest in much more depth in their recent comments on this blog).

On top of that, there are significant legal risks. The BMJV seems to believe that the very same UPCA that was declared unconstitutional by the Federal Constitutional Court (FCC) would now be in conformity with the German constitution, because the FCC had based its decision only on the faulty legislative process in the Bundestag. But it has not remained unnoticed, at least here on this blog, that the FCC also included a bit of a writing on the wall in the famous paragraph 166 of its UPC decision:

> 2. Insofar as there are indications that the establishment of unconditional primacy of Union law in Article 20 UPCA violates Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, the Federal Constitutional Court will in principle comprehensively review the measure in question for its compatibility with Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law (cit. omitted). However, it is not necessary to give a final decision thereon in the present case, because the invalidity of the UPCA Approval Law already results from other reasons.

This, together with the interview of the Juge Rapporteur, Prof. Huber in the FAZ, reported by Simon Klopschinski here, should be sufficient to at least think twice about the UPCA in its current form and what could possibly be done to mitigate the FCC's concerns. Putting your head in the sand (in German *Vogel-Strauß-Politik*) and ignoring these pretty clear statements is a solution that may very well end in disaster once more.

This takes us to the third German compound word that I would like to introduce today, i.e. *Mautdebakel*. Its literal translation is "toll debacle". The term aptly summarizes what happened the last time fundamental legal concerns raised by various experts were ignored by the responsible (not to say competent) government minister in order to score cheap political points. Slightly simplified, the story goes like this: The German minister of traffic, a Bavarian, was annoyed that he and his countrymen have to pay a lot of road toll in Austria, Italy etc., yet the Austrians, Italians etc. get a free ride on Germany's beloved highways. This cannot be right, he and his party thought, so let's introduce a road toll for foreigners. Not so fast, argued the lawyers of his ministry, we live in the EU, so we cannot disadvantage other EU citizens. Therefore, the road toll must apply to Germans likewise. Okay okay, responded the minister, but then let's reduce our German car tax so that Germans at least do not have to pay more as a result of this toll bill, because this would make me very unpopular. Hmmm, argued the EU experts, but this will most probably not be accepted by the CJEU as it has the same effect as a toll just for foreigners. Go whistle, said the minister, we'll do it anyway. So bills introducing the toll system and reducing the car tax were passed, agreements with companies that were supposed to be responsible for collecting the road toll were concluded… and then came the predicted big blow by the CJEU: the bill was found to violate EU law and was invalidated. And now the prospective toll companies request the government to honor its obligations against them or to pay a significant amount of damages.

Should this not be a lesson to our BMJV? It should. All the more since just recently the ministries of traffic and of justice jointly failed again in formulating a law so that it has the desired legal effect. This time, the plan was to amend the *Straßenverkehrsordnung* (Road Traffic Regulations) so as to penalize speeders even harsher than before. However, owing to a technical drafting mistake that was overlooked by the BMJV, the new Regulations are most likely invalid, because they fail to cite the law on which they are based. Sometimes, it is really worthwhile asking your

experts for advice, allowing them the necessary time to provide it and then listening to what they have to say. This is perfectly possible and normally secures a pretty reasonable outcome, as Germany's COVID-19 story has shown.

As has been comprehensively reported here, several experts and interest groups have now taken a stand on the draft ratification bill. For what it's worth, my own take on the various position statements is this. There are, unsurprisingly, proponents for and proponents against the BMJV's planned (early) ratification. Yet the quality and depth of the arguments presented by the opponents of an immediate ratification do really outweigh those of its supporters. Indeed, it is probably fair to say that the supporters have not presented a single argument in their position papers why a ratification in Schweinsgalopp would be unproblematic and legally safe. Either they have not recognized the problems or they chose to ignore them. With that, a second Mautdebakel is looming.

In my opinion, such a debacle is easily avoidable. The BMJV should think twice about its draft bill. Germany should only ratify once the UK has indeed formally terminated its participation in the UPCA; when there is clarity and political agreement on the division of competences of the Central Division(s); and when measures have been taken that mitigate the risk of another invalidation of the bill by the FCC. Very sensible proposals in this regard have been put on the table by some of the expert commenters; they should be carefully considered and taken seriously.

That being said, the current situation post Brexit might offer a unique opportunity to re-think the entire EU patent strategy and the UPCA project a bit more generally. It is probably difficult to deny, as the EU Commission recently put it, that within the single market, divergence between the different national IP titles creates fragmentation and unequal conditions of trade within the EU. At present, there are only national patents and EP bundle patents that have the same effect as national patents within the EPC states in which they are validated. The EU Patent Package intended to improve this situation by establishing a "unitary patent" and a "Unified Patent Court". While this is laudable in principle, let us be honest: **The current UPCA further divides, rather than unifies the European patent landscape**. Two of the five largest countries within the EU27, i.e. Spain and Poland, do not want to participate in the UPCA from the outset. HU has constitutional obstacles, CZ political ones that seem to prevent them from ratifying. IE, GR, CY, RO, SI and SK have also not ratified the UPCA as of yet. Thus, there will be a "UPC territory" and a "non-UPC territory" within the EU internal market for the foreseeable future. This state of affairs cannot be considered satisfactory and does not serve the European integration in the end.

Moreover, and even more fundamentally, it is remarkable that the EU has no direct say in the most important institution implementing patent policy in Europe, i.e. the European Patent Office. Maybe the EU should really think of being more courageous and consequential, i.e. to leave (or remodel) the EPC and to assign the sole competence for granting patents with effect for the EU to the EU IPO and the competence for their enforcement and for checking the correctness of decisions of the EU IPO to a true EU court ("one-stop-shop"). The EU IPO would clearly be much better suited to implement EU policy than the (current) EPO. Moreover, it would be firmly placed within the political, financial and jurisdictional framework of the EU, rather than being a small state of its own (Eponia). This would also avoid the constitutional problems arising from a patent office that is able to finally refuse applications or revoke patents without legal redress being possible against such a decision by an independent court.

Yes, I know that this will be anything but easy. But if the European Union really wants to bundle

and strengthen its approach to patents, this is probably the road that it should go.

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