

# Kluwer Patent Blog

## Fanaticism and legalism at the dawn of the UPC: how UPC fanaticism has left the UPC devoid of privileges and immunities

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As explained in our entry *UPC: four reasons why the PPA is not legally in force*, published on April 21, 2022, one of the collateral damages of Brexit is that the conditions for the entry into force of the “Protocol to the Agreement on a UPC on Provisional Application” (the “PPA”), which included the ratification by the United Kingdom (the “UK”), have not been fulfilled. In response to our blog entry, from the shadow of the Preparatory Committee, it was said that there was no reason to worry. The arguments can be summarized in two points: first, even if there has been a breach of the PPA, it is doubtful which judicial authority, if any, could be called to consider such breach; and second, in any event, by the time the Unified Patent Court Agreement (the “UPCA”) enters into force, the architects of the UPC will have crossed the Rubicon and any breach of the conditions for the entry into force of the PPA will, as a result, have become a moot point.

According to Collins English Dictionary, a “wildly excessive or irrational devotion, dedication, or enthusiasm” is called fanaticism. In the context of what we are discussing here, the words “devotion” or “enthusiasm” seem to be more appropriate. This UPC devotion, relying on the aforementioned arguments, has swept under the rug the fissures not addressed in the UPC’s post-Brexit legal architecture.

From the perspective of legalism, it is a matter of concern that the failure to have addressed, even at the cost of further delays, the legal cracks left by Brexit, may be hiding a formidable timebomb lurking beneath the tip of the UPC edifice. There is a risk that the UPC, instead of crossing the Rubicon, might end up, in its current form, under the waters of the Rubicon. This is because the legal challenges affecting the PPA affect both the UPCA and the “Protocol on Privileges and Immunities of the UPC”.

Let us look at one example: for the time being, UPC enthusiasm will cause the UPC and its staff to start operations tomorrow devoid of the privileges and immunities envisaged in the “Protocol on Privileges and Immunities of the UPC”. One should clarify at this point that, according to article 8 of the UPC’s Statute, the Protocol on the privileges and immunities of the European Union (“EU”) shall apply to the judges of the UPC. For the purpose of conferring such privileges and immunities on UPC judges, the UPC architects drafted the “Protocol on Privileges and Immunities of the UPC”. According to article 18.1 of this Protocol:

*“1. This Protocol shall enter into force 30 days after the date on which the last of the four*

*State Parties – France, Germany, Luxemburg and the United Kingdom – has deposited its instrument of ratification, acceptance approval or accession.“*

As readers will have noticed, article 18.1 is crystal clear in the sense that its entry into force requires the ratification of the UK. So, it is likewise very clear that if, as envisaged, the UPC starts its operations tomorrow, the UPC and its staff will be naked in terms of privileges and immunities.

This debate may well arise outside the UPC's endogamic realm. Let's imagine that a Portuguese tax inspector is called to interpret article 18.1 of the "Protocol on Privileges and Immunities of the UPC" in the context of a tax inspection. By having failed to heal the wounds left by Brexit, the architects of the UPC will have left the inspected person arguing with the tax authorities along the following lines: "Mr / Ms tax inspector, where in the Protocol, it says «UK», in reality you have to read «Italy»". That can be a lot of fun.

And the great paradox of all this, is that the only one who would be able to interpret the scope of article 18.1 of the Protocol, assuming that an interpretation was required, is precisely the one that the architects of the UPC wanted to keep as far away as possible from the UPC edifice (i.e., the CJEU). This is because, as highlighted in the Recitals of the "Protocol on Privileges and Immunities of the UPC", there is an intimate "intrinsic link" between this Protocol and EU law, to the extent that the UPC will be the only court that can benefit from EU's Privileges and Immunities:

*“RECALLING that Article 8(4) of the Statute of the Unified Patent Court covers both the privileges and immunities of the judges of the Unified Patent Court and that the application of the Protocol on the privileges and immunities of the European Union to the judges of the Unified Patent Court has been foreseen because of the intrinsic link of the latter with the European patent with unitary effect and cannot create any precedent for the application of that Protocol to other international organizations with regard to the host nation policies of the Contracting Member States.“*

Clearly, only the CJEU would be able to clarify whether "UK" means "UK" or, on the contrary, it means "Italy." The case might reach the CJEU's desk either upon a referral from an EU national court (for example, in the context of a tax inspection procedure) or upon a referral from the UPC. In this regard, it does not seem to be very fair for the UPC architects to have left UPC judges in the very odd position of having to eventually decide, for example, in the context of a "Preliminary Objection" questioning the jurisdiction of the UPC (Rule 19.1 (a) of the Rules of Procedure), whether "UK" means "UK" or "Italy", or whether "London" means "London" or "Milan", or perhaps "Paris and Munich", taking into account that, if such "Preliminary Objection" is raised, the decision would indirectly affect whether or not their own privileges and immunities have entered into force. Although the reasons that drive UPC enthusiasts are of course legitimate (avoiding further delays), applying the "acte clair doctrine" to argue that "UK" means "Italy" in a matter that affects the UPC privileges and immunities would perhaps raise some eyebrows. An interpretation from the CJEU, which is not expected to be impregnated by that legitimate UPC enthusiasm, would leave us on safer ground.

All in all, for the reasons explained in this entry, until the parties to the UPCA take appropriate action, if and when they do, UPC devotion will have left the UPC devoid of the privileges and immunities envisaged in the Protocol.

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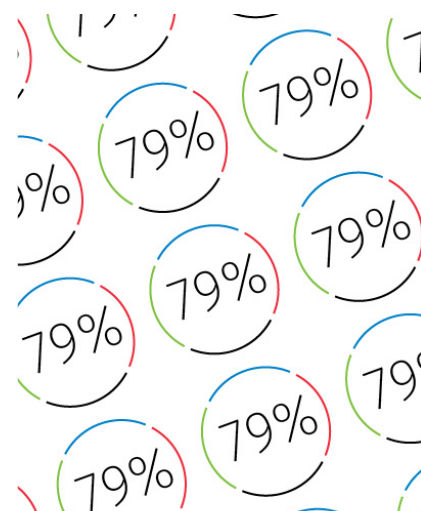
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