

German French UPC Supremacy?

Under the heading Juve Patent Survey 2021 Juve uses the title “UPC favourites: French and German judges dominate”.

Juve suggests that its findings are based on Juve’s own worldwide survey of 1300 “patent experts”.

We do not know (other than the indication “heads of patent departments in selected technology companies across Europe as well as lawyers and patent attorneys with patents experience”) who these 1300 patent experts are; how many of these so-called experts have litigated patent cases; and how many of them have litigated several cases in front of the judges they nominate and/or have studied in depth the decisions of these judges.

What we, however, do certainly know is that the survey was clearly French/German biased with more than 70 percent of the respondents being based in these two countries. One can hardly call this a representative survey for Europe, let alone for all the potential users of the UPC among which many will be found in non-European companies.

Moreover, as with so many of these types of surveys, it is very simple to sway the outcome. If a surveyee favors a certain judge (and the patent IP world is very small) it is very easy for the surveyee to seek the support of friends in voting for that same judge.

By way of its article Juve seems to be attempting, after the departure of the UK, to persuade the reader that the UPC is a German/French affair. As it is well known that many experts believe that the quality of certain patent decisions in France have in the past sometimes been questionable and the French courts are certainly not the first courts of call in Europe-wide patent disputes¹, the basic message then seems to be that the UPC is going to be a German affair.

The whole survey is in fact an affront to the other participating countries and the candidate judges of these countries. Moreover, it is an affront to the UPC system itself, which contains a very balanced system for choosing judges both guaranteeing quality and a fair representation of the participating countries. Judges are not chosen on the basis of a popularity poll by 1300 Juve-selected so-called patent experts but only after they have first been selected by the Advisory Committee, which will comprise “patent judges and practitioners in patent law and patent litigation with the highest recognized competence”. This Advisory Committee will not consist of representatives of only Germany and France but of all contracting Member States.

Thereafter the Administrative Committee shall appoint, from those recommended by the Advisory Committee, the judges acting by common accord (Art. 16 UPC). All participating countries have one vote in that Administrative Committee.

¹ As judges in France have to rotate quite frequently, different from countries like for instance the UK, Germany and the Netherlands, one will not find judges in France which deal many years or during almost their whole career with patent cases.

It is correct that according to the Treaty a person of French nationality must be the first President of the Court of First Instance. If one considers the tasks of the President then it is hoped that much emphasis will be put on his administrative, organizational, diplomatic and linguistic capabilities. It is to be expected that the Advisory Committee and the Administrative Committee, which first of all have to appoint French judges, will make sure that among the French judges to be appointed there is a judge with these qualities in the expectation that that judge will be chosen by his fellow full time judges as President of the Court of First Instance.

It is of course a great blow to the system that UK judges cannot participate because these judges are recruited from the top of the patent bar, which is not only a guarantee of high quality but also has the advantage that the judges will have had considerable experience as litigators, filled with the knowledge of what patent law in daily practice means for the users of the system. Only a few other countries recruit (some) judges from the Bar.

The UPC itself recognizes the value of such experience as one can also become a judge if one has not been a judge in a national court but instead has been an outstanding patent practitioner, as long as one possesses the qualifications required for appointment to judicial offices in a Contracting State.

As said, the non-participation of the UK leads to the quality of the UK judges and also their influence on the way proceedings are to be carried out being missed. In that sense it is good to realize that the Drafting Committee of the Rules of Proceedings made an effort to come to an efficient system while repairing some of the deficiencies of certain national systems such as automatic bifurcation; an aversion against hearing experts; and an emphasis on the written submissions with rather limited role for the oral proceedings.

The article in Juve is in this sense a wake up call to make sure that the UPC remains what it was intended to be: a truly European system and that the selection of judges for the Court of First Instance and the composition of the Court of Appeal should reflect this (see Art. 3.3 of the Statute). One may therefore assume that judges for the Court of Appeal² will be selected with first class qualifications and representative for the whole UPC. The 6 selected judges will choose the President of the Court of Appeal in a secret ballot. Of course the fact that the first President of the CFI has to be French and that in order to operate the four divisions in Germany a bigger number of German judges is needed has to be respected. However, as far as the selection process is not a given because of these facts, it is hoped that the Advisory Committee and the Administrative Committee will make sure that its selection creates a truly European Court while of course making sure that a high quality is assured.

² As two panels are required at least 6 (legal) judges for the Court of Appeal have to be appointed.

Although the Statute requires only fluency in one EPC language it is also hoped that without a good command of English (the language which can be used in all Divisions) judges of whatever nationality will not qualify as UPC judge³.

In that sense it is interesting that the judges of many of the smaller countries participating, such as for instance Belgium (which will have a division where one can litigate in either Dutch or any of the EPC languages), have in general good multilingual capabilities.

In conclusion, the quality of the Juve publication is poor, biased and unhelpful for the future UPC system.

It would have been better to await the recommendation of the Advisory Committee or ask the opinion of true experts with personal litigation experience from all the participating countries. In talking to some of these experts it would have become clear that some of the included French and German names would not have made it to Juve's list as judges of various other jurisdictions would have been considered better qualified. Moreover, although in some UPC countries there is less experience with patent cases, that certainly does not mean that there are no excellent practitioners or judges, which, if necessary, after appropriate training and on the job experience (sitting with well experienced judges) would not make excellent patent judges.

Juve would have done better to report on the work which still has to be done before the UPC can start. One of the critical points is finance. The UPC wishes to start with only five fulltime legal judges, and for the rest to rely on parttime judges. Apart from the fact that there is not yet clear agreement how this in practice would work (salary, pension etc.) it seems quite meager to start with only five fulltime judges. If we count the central division in three different cities⁴, the different regional and local divisions and the two necessary chambers of the Court of Appeal, then one wonders who is going to run all this.

It must not be forgotten that the Rules of Proceedings are based on a hands on approach by the Juge Rapporteur from day one of the proceedings, this in order to make sure that we indeed have decisions in one year. In my view that cannot seriously be done by only five full time judges.

Such a "cheap" approach to the UPC does not exhibit a lot of faith in the success of the system! Every effort should be made to make the UPC successful and who knows that in the end that may trigger the UK and other hesitant countries to join. Let us not forget that in 1956 the EU also started with only 6 members!

³ Apart from English it would also be advisable to appoint sufficient qualified judges with a good command of German as there are four local divisions in Germany and German is one of the languages of the Central Division. All these divisions need also non German judges (see also the Statute Art. 20).

⁴ The present idea to divide the London part of the Central Division between Paris and Munich seems to confirm the German/French dominance. A much more "European" solution would be to have the London part of the Central Division in another country.