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# Unified Patent Court and the impartiality issue

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# 1. Unified Patent Court and the impartiality issue

## I. Introduction

### A. Independence and impartiality: importance and interdependence of concepts

Independence and impartiality of courts are universally shared requirements<sup>1</sup>. They define the ability of a judge to treat the parties equally, without preconceived opinions or prejudice. At the national level, impartiality of the courts derives from various sources, in general at the constitutional level. The guarantees of independence and impartiality are closely interrelated<sup>2</sup>. The impartiality of the tribunal is an essential element of the concept of the rule of law: the courts must inspire confidence in citizens in a democratic society<sup>3</sup>: “The most solemn affirmations of principles, the most protective formulas of the freedom and dignity of humankind, are only as effective, and therefore valuable, as the independence and impartiality of the judiciary that ensures their respect.”<sup>4</sup> The EPO share this concern and applies these principles for the members of the Boards of Appeal and of the Enlarged Board of Appeal<sup>5</sup>, referring explicitly to ECtHR’s case law<sup>6</sup>.

But one can see independence as a matter of status, while impartiality is considered as a virtue. In other words, independence is the situation of a body not subordinated to a third party, a prerequisite to impartiality, both being indispensable to the jurisdictional function: a true judge must be impartial<sup>7</sup>.

### B. Impartiality in the UPCA and the Statute of the UPC

The UPC Agreement explicitly refers to the impartiality of its judges in Article 17, entitled “Judicial independence and impartiality.” After reiterating an obvious rule (17.1: “The judges

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<sup>1</sup> International Covenant on Civil and Political Rights, United Nations, article 14§1; The European Union’s Charter of Fundamental Rights, art. 47; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6 § 1

<sup>2</sup> ECtHR, 25 February 1997, *Findlay v. The United Kingdom*, no. 22107/93, § 73; ECtHR, 6 May 2003, *Kleyn and Others v. the Netherlands*, no. 39343/98, 39651/98, 43147/98 and 46664/99, §§ 191-192; ECtHR, 6 October 2011, *Agrokompleks v. Ukraine*, no. 23465/03, § 128: “The Court observes that the concepts of independence and objective impartiality are closely linked. They are particularly difficult to dissociate, where – like in the present case – the arguments advanced by the applicant to contest both the independence and impartiality of the court are based on the same factual considerations. The Court will therefore examine both these issues together.”

<sup>3</sup> ECtHR, 9 May 2000, *Sander v. the United Kingdom*, no. 34129/96, § 22 “(...) it is of fundamental importance in a democratic society that the courts inspire confidence in the public (...). To that end it has constantly stressed that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view.”

<sup>4</sup> Government Commissioner Odent, French conseil d’État, 1949, quoted by J.-M. Varaut, « Indépendance » in L. Cadet (dir.), *Dictionnaire de la justice*, PUF 2004, p.622: “Les plus solennelles affirmations de principes, les formules les plus protectrices de la liberté et de la dignité de l’homme n’ont d’efficacité, donc de valeur, que dans la mesure où leur en prêtent l’indépendance et l’impartialité du corps judiciaire qui en assure le respect.”

<sup>5</sup> Code of Conduct for the Members of the Boards of Appeal and of the Enlarged Board of Appeal, 14 December 2021 (decision CA/D 21/21), Article 3: Members have complete independence in the exercise of their judicial duties, and perform them with integrity, impartiality, loyalty, diligence and discretion. See also article 5.

<sup>6</sup> G 1/05, *Exclusion and objection/XXX*, 7 December 2006, n°19 of the reasons; Case Law of the Boards of Appeal, III.J.

<sup>7</sup> G. Wiederkehr, « Qu’est-ce qu’un juge ? », *Nouveaux juges, nouveaux pouvoirs ? Mélanges en l’honneur de Roger Perrot*, Dalloz - Sirey 1996, p. 575, spéc. p.582 : « On n’est en présence d’un juge véritable que s’il est en situation d’indépendance et d’impartialité, autrement dit s’il n’est en rien impliqué dans l’affaire qu’il va juger. » (“A true judge is only present if he or she is independent and impartial, in other words, if he or she is not involved in the case he or she is going to judge.”)

shall not be bound by any instructions”), the Agreement provides that full-time judges should not have any other occupation (art. 17.2), while part-time judges (technically qualified judges) “shall not exclude the exercise of other functions provided there is no conflict of interest” (art. 17.4).

Moreover, the Statute of the UPC (Annex 1 of UPCA) adds further details at Article 7. In particular, art. 7.2 provides that judges may not take part in the proceedings of a case in which they:

- “(a) have taken part as adviser;
- (b) have been a party or have acted for one of the parties;
- (c) have been called upon to pronounce as a member of a court, tribunal, board of appeal, arbitration or mediation panel, a commission of inquiry or in any other capacity;
- (d) have a personal or financial interest in the case or in relation to one of the parties; or
- (e) are related to one of the parties or the representatives of the parties by family ties.”

The list of the reasons appears to be exhaustive and when one of them occurs, the exclusion of the judge is mandatory. The main issue seems to relate to the scope of art. 7(2)(d): to what extent the “interest” shall be considered “in relation to one of the parties”?

More broadly, the preamble of UPCA recalls “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”: the CJEU case law is, as a consequence, particularly interesting to determine the meaning of the impartiality condition within the context of the functioning of the UPC.

## **C. Importance of the Charter of Fundamental Rights and the European Convention on Human Rights (Relevance of the CJEU and the ECHR case law)**

### **1. Principle of effective judicial protection**

The principle of effective judicial protection is a general principle of Union law, which is now expressed in Article 47 of the Charter of Fundamental Rights of the European Union<sup>8</sup> and derives from the constitutional traditions common to the Member States<sup>9</sup>. The protection conferred by Article 6(1) of the European Convention on Human Rights (ECHR) is thus implemented in Union law by Article 47 of the Charter. This is without prejudice, however, to the fact that, in accordance with Article 52(3) of the Charter, in so far as the right to an effective remedy and to a fair trial contained in Article 47 of the Charter corresponds to a right guaranteed by the European Convention on Human Rights, its meaning and scope are the same as those conferred by that Convention, as interpreted by the European Court of Human Rights (ECtHR)<sup>10</sup>.

Article 52(3) of the Charter aims to ensure the necessary coherence between the rights contained in the Charter and the corresponding rights guaranteed by the ECHR, without prejudice to the autonomy of Union law and the Court of Justice of the European Union. The first paragraph of Article 47 of the Charter is based on Article 13 of the ECHR: The Court must

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<sup>8</sup> CJUE (Grand Chamber), 6 November 2012, C-199/11, *Otis N.V. e. a.*, pt.46.

<sup>9</sup> Case C-279/09, 22 December 2010, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, Rec. p. I-13849, pt. 30

<sup>10</sup> CJUE, 15 May 2012, *Nijs / Cour des comptes (T-184/11 P)*, pt. 84.

therefore ensure that its interpretation of the first paragraph of Article 47 of the Charter<sup>11</sup> provides a level of protection that does not infringe the protection guaranteed by Article 13 of the ECHR, as interpreted by the European Court of Human Rights<sup>12</sup>.

## 2. Necessity of an independent and impartial tribunal inferred from art. 47 of the Charter

The right to an effective remedy guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union precludes disputes concerning the application of Union law from falling within the exclusive jurisdiction of a body which is not an independent and impartial tribunal<sup>13</sup>. The Court refers to the ECtHR case law, which insists on the question whether the body at issue presents an appearance of independence<sup>14</sup>: “what is at stake is the confidence which the courts in a democratic society must inspire in the public, and first and foremost in the parties to the proceedings”<sup>15</sup>. The CJEU therefore refers largely to the ECtHR case law on impartiality within the meaning of Article 6(1) of the ECHR and adopts both subjective and objective tests. The subjective test refers to the personal convictions and behavior of a particular judge, while the objective test needs to ascertain whether the tribunal itself and, among other aspects, its composition, offers sufficient guarantees to exclude any legitimate doubt in respect of its impartiality<sup>16</sup>.

Subjective impartiality concerns the judge’s innermost being: it is required that the judge approaches each case brought before him or her without any bias. It is consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary<sup>17</sup>, and it is generally difficult to procure evidence with which to rebut the presumption: the ECtHR requires tangible evidence<sup>18</sup>.

Therefore, objective impartiality is more important. The Court will examine if there are objective elements that could raise doubts about the impartiality of the judge. For the most part, the analysis will focus on the links between the judge and other actors in the proceedings<sup>19</sup>. It is important to emphasize that appearances are particularly important. ECtHR often quotes an English aphorism - “Justice must not only be done: it must also be seen to be done”<sup>20</sup> - because what is the most important is the confidence which the courts in a democratic society must inspire in the public. The dictum was laid down by Lord <sup>21</sup>~~Chief Justice~~<sup>22</sup>~~of England~~: “It is not merely of some

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<sup>11</sup> The second paragraph of Art. 47 of the Charter corresponds to Art. 6(1) ECHR.

<sup>12</sup> CJUE (fourth chamber), C-175/17, 26 September 2018, X v Belastingdienst/Toeslagen, pt. 35; CJUE (Grand chamber), 15 February 2016, C-601/15 PPU, J. N. v Staatssecretaris voor Veiligheid en Justitie : “the explanations relating to Article 52 of the Charter indicate that paragraph 3 of that article is intended to ensure the necessary consistency between the Charter and the ECHR, ‘without thereby adversely affecting the autonomy of Union law and ... that of the Court of Justice of the European Union’.”

<sup>13</sup> CJEU (Grand Chamber), joined cases, A. K. v Krajowa Rada Sądownictwa (C-585/18), and CP (C-624/18), DO (C-625/18), 19 Nov. 2019.

<sup>14</sup> *Ibid.*, pt.127; ECtHR, 6 November 2018, Ramos Nunes de Carvalho e Sá v. Portugal, CE:ECHR:2018:1106JUD005539113, § 144.

<sup>15</sup> ECtHR, 21 June 2011, Fruni v. Slovakia, CE:ECHR:2011:0621JUD000801407, § 141.

<sup>16</sup> ECtHR, 6 May 2003, Kleyn and Others v. Netherlands, CE:ECHR:2003:0506JUD003934398, § 191.

<sup>17</sup> ECtHR, Hauschildt v. Denmark, 24 May 1989, Series A no. 154, p. 21, § 47

<sup>18</sup> ECtHR, 15 December 2005, Kyprianou v. Cyprus, no 73797/01, §115. See, for instance ECtHR, 4 April 2000, no 30342/96, Academy Trading Ltd. and Others v. Greece, §44.

<sup>19</sup> ECtHR, 23 April 2015, no 29369/10, Morice v. France [GC], §77: “The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings”.

<sup>20</sup> For instance ECtHR (Fifth section), 9 January 2013, no 21722/11, Oleksandr Volkov v. Ukraine, § 106.

<sup>21</sup> Lord Chief Justice of England.

<sup>22</sup> Case Rex v. Sussex Justices, [1924] 1 KB 256

importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

More recently, the Court of Justice has also provided clarifications on the guarantees of independence and impartiality of judges required under EU law. These guarantees imply, among other things, the existence of rules that allow for the avoidance of any legitimate doubt, in the view of those who are subject to legal proceedings, as to the impermeability of judges to external elements, in particular, direct or indirect influences of the legislative and executive powers, and as to their neutrality in relation to the interests that are in conflict<sup>23</sup>. This implies the existence of rules regarding the composition of the body, the appointment, the term of office and the grounds for abstention, recusal, and removal of members of the court<sup>24</sup>.

## II. Identifying the issue: the risk of partiality

### A. The case of legal and full-time judges

The UPC comprises a Court of First Instance and a Court of Appeal.<sup>25</sup> It is composed of judges from all participating Contracting Member States. The Court of First Instance has decentralized structure with local or regional divisions in the Member States and for certain cases a central division in Paris (with a thematic section in Munich and possibly a third city as replacement for London),<sup>26</sup>. The body of judges is comprised of legally qualified judges and technically qualified judges. Amicable settlements will be promoted through the creation of a patent mediation and arbitration center.

As mentioned above, the Statute of the UPC does not ignore the risk of partiality of the judges (art. 7.2). UPCA also deals with judicial independence and impartiality in its article 17. It provides (at § 2) that full-time judges “may not engage in any other occupation, whether gainful or not, unless an exception is granted by the Administrative Committee”. There is no doubt that the Administrative Committee may be granting authorizations carefully, and at least in cases that may not risk leading to any conflict of interest, such as lectures for university training programs or scientific conferences, or the exercise of other judicial functions at national level (art. 17.3).

The hypothesis of partiality may here essentially come up when, in particular, the judge has already been called upon to pronounce as a member of its national court on the “case” (art. 7 of the UPC Statute). This is a matter of objective partiality: the situation objectively implies that the judge may be partial, just because the judge who has already made a judgment is too likely to be unwilling to reverse his or her decision. In other words, the appearance of partiality is sufficient to raise a fairness issue. This means, of course, that the Court of Appeal judges cannot be the same as trial court judges: they must withdraw *ex officio*<sup>27</sup>. There is no doubt that UPC full-time judges are fully conscious of the rule, as it applies in their national courts.

One difficulty could arise as to the correct determination of when the UPC case is to be considered “the same” as the previous case decided on the national level by the UPC judge. There is no doubt if the same request (e.g. invalidity) is made concerning the same patent. But many situations can happen where there is room for doubt. The question is whether there has

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<sup>23</sup> CJUE (Grand Chamber), 2 March 2021, Case C-824/18, pt. 117, pt. 139

<sup>24</sup> CJUE (Grand chamber), 20 April 2021, C-896/19, *Repubblika v Il-Prim Ministru*, pt. 56.

<sup>25</sup> Art. 6(1) UPCA.

<sup>26</sup> Article 7 UPCA.

<sup>27</sup> For instance : ECtHR (Plenary), *Oberschlick*, 23 May 1991, no 11662/85, §51.

been jurisdictional activity on “the same case”, “the same decision”, “similar matters”<sup>28</sup>, or “the same set of facts”<sup>29</sup>. It leads to a case-by-case basis evaluation regard being had to the circumstances of the individual case<sup>30</sup>. The mere fact that a judge has already made decisions before the trial cannot in itself justify apprehensions about his or her impartiality. In order to decide whether there is a legitimate reason to suspect that a court is not impartial in a given case, it is necessary to determine whether there are verifiable facts that give rise to a suspicion of the court’s impartiality. It should be kept in mind that the criterion is whether the situation raises a legitimate suspicion of partiality.

## **B. The issue of technical and part-time judges**

The situation of full-time judges can sometimes be delicate to analyze depending on the circumstances, but it seems clear that the most challenging case is that of part-time technical judges. Indeed, part-time legal judges keep, in their country of origin, their independent status, of which impartiality can be considered an emanation. The case is similar for “professional” technical judges in countries that have such a system (Germany, Netherlands, etc.).

### **1. The particular issue of private practitioners**

The trickiest issue lies in the fact that many of the part-time technical judges are private practitioners. Among the 51 technically qualified UPC judges appointed in 2022, 43 are patent attorneys from law firms and in-house companies<sup>31</sup>. The UPC Administrative Committee obviously decided to recruit the best European specialists from various countries. But this implies that they come for the most part (84%) from the private sector, and from the most important law firms and industrial companies in Europe. The risk of conflict of interest is, therefore, very real or, at least, impossible to evaluate. One can recall article 17.4 of the UPC Agreement which provides that part-time judges (technically qualified judges) “shall not exclude the exercise of other functions provided there is no conflict of interest” and “in case of a conflict of interest, the judge concerned shall not take part in proceedings.” (art. 17.5). Even though this might be so, the question arises as to how to define the concept of “personal or financial interest in the case” within the meaning of art. 7.2 (d)? Shall the technical judge be considered to have advised one party or “acted for one party” under art. 7.2(a) and (b) if this party is a client of the law firm in which he or she is a partner (and eventually in another country? What if he/she deals with patents from their own client which are very technically close to the patent at stake in the case?)

The ECtHR had, of course, to decide that professional, financial<sup>32</sup> or personal<sup>33</sup> ties between a judge and a party to the case or his or her counsel may raise issues of partiality. This is obviously the case when it is possible to find some overlaps in time of two proceedings with a person in the two functions of judge, on the one hand, and of legal representative of the opposing party, on the other<sup>34</sup>. But it can also be decided, depending on the circumstances, that a delay of three years between the two relations between parties can lead to a lack of impartiality<sup>35</sup>. Concerning

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<sup>28</sup> ECtHR, 6 May 2003, *Kleyn and Others v. the Netherlands*, nos. 39343/98, 39651/98, 43147/98 and 46664/99.

<sup>29</sup> ECtHR, 1 February 2005, *Indra v. Slovakia*, no 46845/99, §53.

<sup>30</sup> ECtHR, 2 May 2019, *Pasquini v. San Marino*, no 50956/16, §148.

<sup>31</sup> M. Klos, “Patent attorney dominance among UPC technical judges leads to conflict debate”, *JUVE Patent*, 27 October 2022, [www.juve-patent.com](http://www.juve-patent.com).

<sup>32</sup> ECtHR, 25 February 2020, *Elin Sigfúsdóttir v. Iceland*, no 41382/17.

<sup>33</sup> See, among many: ECtHR, 15 October 2009, *Micallef v. Malta*, no 17056/06, §102.

<sup>34</sup> ECtHR, 21 December 2000, *Wettstein v. Switzerland*, 33958/96, §47; ECtHR, 17 June 2003, *Pescador Valero v. Spain*, no 62435/00, §27.

<sup>35</sup> But the case is quite special...: “three years before the hearing of the Supreme Court of Justice, Judge V.B.’s son was expelled from the school by the head teacher and teachers belonging to the applicant entities, and that

the financial interests, those of the judge in question must be directly related to the subject matter of the case<sup>36</sup>. On this question, Switzerland is often cited as a well-working system<sup>37</sup>. The Swiss Federal Court provides some interesting guidelines<sup>38</sup> which are at least very demanding and seem to go further than the requirements of the ECHR. Article 4 of the guidelines, entitled “Special grounds for recusal”, provides, for example, that “[a] Court member shall recuse him- or herself” when “[t]he Court member or the company in which he/she works advises or has advised one of the parties to the dispute or a third party in the matter in dispute or has otherwise influenced the matter in dispute in the capacity of a governing body or employee of such a party” (art. 4.b): this goes beyond the personal link and includes the company (or, therefore, the law firm). By the President of the Federal Court’s own admission, the absence of relations between the judges and the parties is not always easy to verify when dealing with the subsidiaries of large groups whose name does not necessarily allow the link with the parent company<sup>39</sup>. The Swiss Supreme Court seems to go far beyond, deciding that an “appearance of bias of a judge may not only arise when a judge represents or has recently represented a party to the proceedings, but also in case of representation of a *counterparty* of a party to the proceedings at stake”<sup>40</sup>.

It is likely that UPC cannot (and will not) go that far... In any case, the general rules outlined above must be applied on a case-by-case basis.

## 2. A case-by-case analysis avoiding vicious circle

There is no suspense about the final answer: it will be evaluated on a case-by-case basis ... based on the case itself and on the context of the judge’s position. But we know that the technical judges themselves are wondering, and that it is important, for the success of the system, that it wins the confidence of future users. It is therefore important to try to specify the rules that should apply, and to identify the possible dead-end situations. As a matter of fact, one can be pessimistic. Indeed, some people consider there will always be an interest at stake: “even in case of an absence of conflict, as an attorney or court user you always have an interest to make a case law in a direction or another, for a strategic file”<sup>41</sup>. But, even if the comment seems true, the “interest” mentioned here appears too indirect to be considered for the enforcement of impartiality principle in practice, according to case law. Another dead-end can be noticed considering the ability of an attorney, appointed as technical judge, to plea before the Court: this seems, *a priori*, absolutely unacceptable, especially from the perspective of appearances; but, upon analysis, one may consider this would not be in compliance with UPCA article 17.4 (provided there is no conflict of interest), nor the principle of freedom and independence of attorneys with constitutional value in many countries, not for instance the first of the core

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Judge V.B. threatened the school authorities with retaliation” (ECtHR, *Tocono et Profesorii Prometeiști c. Moldova*, 26 June 2007, no 32263/03, § 31).

<sup>36</sup> *Elín Sigfúsdóttir v. Iceland*, §53.

<sup>37</sup> S. Holzer, “Amended Guidelines on Independence of the Swiss Federal Patent Court became effective on 1 January 2015 – An inspiring model for the UPC?”, *Kluwer Patent blog*, January 5, 2015.

<sup>38</sup> Guidelines on Independence (effective from 01.01.2015), <https://www.bundespatentgericht.ch/en/legal-basis>.

<sup>39</sup> M. Schweizer (interviewed by K. Zürcher), “Une machine décisionnelle svelte”, 27 Dec. 2022, [www.bvger.ch](http://www.bvger.ch)

<sup>40</sup> M. Wilming, “Decision of the Supreme Court on recusal of a non-permanent judge”, 18 Oct. 2013, [www.patentlitigation.ch](http://www.patentlitigation.ch), referring to: Case No. (not identified), Decision of 13 February 2013 (FPC, unpublished) Case No. 4A\_142/2013 and Decision of 27 August 2013 (Supreme Court), “Ablehnungsbegehren”.

<sup>41</sup> M. X. Peigné, quoted by M. Klos, *JUVE Patent*, above mentioned.



principles of the Charter of core principles of the European legal profession & Code of conduct for European lawyers<sup>42</sup>. The contradiction is, therefore, irreducible.

These remarks are especially dangerous from the point of view of the social acceptability of the new Court. The start-up of the new jurisdiction will be a crucial period: the risk of conflict of interest will diminish with time.

The question is whether the Court will be able to enter a virtuous circle, with an effective operation that will resolve the problems of conflict of interest. On the one hand, this will make it possible to recruit full-time technical judges as soon as possible. On the other hand, it is known that the distancing in time makes it possible to avoid doubts about impartiality: a judge who has previously exercised the function of counsel will not be judged to be partial because of the time spent between the two procedures: “having regard in particular to the remoteness in time and subject matter of the first set of proceedings in relation to the second set and to the fact that [the judge]’s functions as counsel and judge did not overlap in time, the Court finds that the applicants could not have entertained any objectively justified doubts as to [the judge]’s impartiality”<sup>43</sup>. For instance, the ECtHR found it relevant that a period of five years had elapsed between the end of a judge’s previous employment with a bank and the time when his participation in subsequent civil proceedings was first challenged<sup>44</sup>. Switzerland is more comprehensive, and its guidelines provide the duration of one year<sup>45</sup>. In the end, time should play a role in reducing the risk of partiality, but only if full-time technical judges are appointed, as it does not seem conceivable that practitioners in law firms would limit their activity vis-à-vis clients or future clients because of their status as technical judges.

### **III. Solving the Issue: Procedural Remedies**

In general, the principle of collegiality can be considered as a guarantee of impartiality of a decision, since it is rendered by at least three judges who mutually control each other. However, in the present situation, this is of little relevance, since the technical judge is called upon to rule on specific questions: he/she is, in a way, a single judge within a collegiate jurisdiction. In any case, we will refer, once again, to appearances<sup>46</sup>...

#### **A. Procedures under the UPC system**

##### **1. Preventive measures: Abstention**

Art. 17.5 UPCA provides that “the judge concerned shall not take part in proceedings” in case of a conflict of interest, referring to the Statutes for further precision. Article 7 of the Statutes provides that the judges shall sign a declaration by which they may act, during and after the term of their office, with “integrity and discretion” (art. 7.1), while article 7.2 details cases of partiality. In these cases, the judge can inform the President of the Court of Appeal or the Court of First Instance that he/she considers that he/she should not take part in the judgment or examination. The President can also decide that a judge should not sit in a particular case and notifying his/her decision in writing, explaining its reasons (article 7.3).

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<sup>42</sup> Council of Bars & Law Societies of Europe, Charter of core principles of the European legal profession & Code of conduct for European lawyers, 17 May 2019, art. 1.1 (a) : “the independence of the lawyer, and the freedom of the lawyer to pursue the client’s case”.

<sup>43</sup> ECtHR, 23 November 2004, Puolitaival and Pirttiäho v. Finland, no 54857/00, §54.

<sup>44</sup> ECtHR, 11 December 2001, Walston v. Norway, no 37372/97, §48.

<sup>45</sup> Guidelines, cited above, art. 4.a and art. 4.c.

<sup>46</sup> ECtHR, 21 juillet 2009, Luka c. Roumanie, no34197/02, §40.

We have every reason to believe that judges will be very careful in applying these rules. On the one hand, they are all fully aware of their duty of impartiality. Indeed, this is obvious for professional judges, but also for private lawyers and counsel. The professional deontology of their professions is always marked by the seal of integrity. For instance, the EPI (Institute of Professional Representatives before the European Patent Office) Code of conduct<sup>47</sup> provides that any member of the Institute “should act as an independent counselor by serving the interests of his clients in an unbiased manner without regard to his personal feelings or interests” (art. 1 (c)). Concerning attorneys-at-law, independence is a fundamental concept governing the exercise of their duty<sup>48</sup>.

Despite this optimistic remark, it is obvious that a party must be able to invoke the risk of bias on the part of one of its judges, an eventuality provided for in the rules of procedure.

## 2. *A posteriori* measures: Recusal

Rule 346 of the UPC Rules of Procedure<sup>49</sup> governs this process. A party can object to a judge taking part in proceedings and notify this objection to the President of the Court (of First Instance or Appeal) “as soon as is reasonably practicable in the circumstances” (Rule 356.1). This is not a strict rule to invoke *in limine litis*, and the “reasonable” rule gives some flexibility as avoiding that a disloyal litigant notifies a partiality objection late in the proceedings. Considering the importance of appearances, the rule is important and compliant with the ECtHR case law<sup>50</sup>. In general, these kinds of proceedings are rarely implemented and are often unsuccessful. But, in any case, litigators should have in mind that not using the possibility of Rule 346 could imply the inadmissibility of further appeals<sup>51</sup> because he/she unequivocally waived this ground for disqualification<sup>52</sup>. The ECtHR does not seem so strict<sup>53</sup>, even if its case law does not seem unambiguous on this question<sup>54</sup>.

The President then decides whether the objection is valid (R. 346.3) and can refer to the Presidium in case of difficulty (R. 346.4). The European Court requires the court to give reasons

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<sup>47</sup> OJ EPO, 2022, 129, A61, Supplementary publication 1.

<sup>48</sup> For instance, in France, independence of the attorney is enshrined in the oath that he or she takes upon entering the profession. It was established as a fundamental principle recognized by the laws of the Republic, by the famous decisions of the Constitutional Council of January 19 and 20, 1981, and is protected as a corollary of article 6 of the European Convention on Human Rights.

<sup>49</sup> Rules of Procedure of the Unified Patent Court as adopted by decision of the Administrative Committee on 8 July 2022, [www.unified-patent-court.org/en/court/legal-documents](http://www.unified-patent-court.org/en/court/legal-documents).

<sup>50</sup> ECtHR (third section). 9 January 2018, *Nicholas v. Cyprus*, no 63246/10, §64: “Given the importance of appearances, however, when such a situation (which can give rise to a suggestion or appearance of bias) arises, that situation should be disclosed at the outset of the proceedings and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case. This is an important procedural safeguard which is necessary in order to provide adequate guarantees in respect of both objective and subjective impartiality.”

<sup>51</sup> In France the case law declares inadmissible the requests formulated before the Court of Cassation and based on article 6-1 of the ECHR, since the party had the possibility, by application of article 341 of the Code of Civil Procedure, to challenge the magistrates having previously heard the case: Cass. 1re civ., 13 mars 2001, no 98-13.695: JurisData no 2001-008823; Cass. 2e civ., 4 mars 2021, no 19-21.579, F-P : JurisData no 2021-009032.

<sup>52</sup> Cass. ass. plén., 24 nov. 2000, no 99-12.412 : JurisData no 2000-007145 ; Bull. civ., ass. plén., no 10.

<sup>53</sup> ECtHR, *Buscemi v. Italy*, 16 September 1999, no 29569/95; ECtHR, 1st dec. 2020, no 88/05, *Danilov v. Russia*, § 97-102.

<sup>54</sup> ECtHR, 22 February 1996, *Bulut v. Austria*, no 17358/90, § 34: “it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained from doing so”.

for its refusal to accept an application for recusal<sup>55</sup>, and the principle should be respected by the President or the Presidium.

Rule 346.6 provides that the “panel assigned to the proceedings may decide to continue with the proceedings or to stay the proceedings pending the final decision of the President concerned or the Presidium”. One can imagine that no decision has been made by the judge or the panel, as the objection shall appear early in the proceedings, and that the President or the Presidium may decide quickly. Nevertheless, caution is advised and one may keep in mind that it may be consistent to examine concretely whether the challenged judge was in fact able to influence the outcome of the dispute<sup>56</sup>.

## **B. Improving the UPC practice**

### **1. Limiting the risk: Publicity and transparency**

From a general point of view, it is considered that the presence of the public makes it possible to control the impartiality of judges, prevents the development of secret justice and gives trust in the judiciary. The principle is laid down in Article 6 ECHR itself, with derogations for reasons of public interest or protection of privacy<sup>57</sup>. The Court assesses the implementation of these derogations according to the specificities of the case<sup>58</sup> considering the procedure as a whole<sup>59</sup>, and the parties may waive such publicity<sup>60</sup>.

The Rules of Procedure of the Unified Patent Court provides that the “oral hearing and any separate hearing of witnesses shall be open to the public unless the Court decides to make a hearing, to the extent necessary, confidential in the interests of one or both parties or third parties or in the general interests of justice or public order” (art. 115), consistently with the principle of Article 6 ECHR.

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<sup>55</sup> ECtHR, 20 November 2012, no 58688/11, *Harabin v. Slovakia*, § 136-142; ECtHR, 2 March 2021, no 45202/14, *Kolesnikova c. Russie*, § 56-59: The judges rejected the applicant’s arguments in a general manner and without examining them individually, limiting themselves to stating that none of the reasons given by the applicant in her application could constitute grounds for recusal. the Court considers that the national authorities did not dispel the applicant’s reasonable doubts as to the impartiality of the district court. Therefore, there was a violation of Article 6 § 1 of the Convention.

<sup>56</sup> ECtHR, 24 September 2009, *Procedo Capital Corporation v. Norway*, no 3338/05, §71: “the Court finds that the nature, timing and short duration of his involvement in the proceedings concerned were not capable of causing the applicant company to have legitimate doubts as to the impartiality of the High Court as a whole. The High Court was therefore not obliged to discontinue the proceedings and allow them to restart before a differently composed High Court for the purposes of the requirement of an impartial tribunal under Article 6 § 1 of the Convention”; ECtHR, 31 July 2007, *Ekeberg and Others v. Norway*, no 11106/04, 11108/04, 11116/04, 11311/04 and 13276/04, §49.

<sup>57</sup> “In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

<sup>58</sup> ECtHR (Grand Chamber), 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, no 55391/13, 57728/13 and 74041/13, §190, with many cases cited; ECtHR (Plenary), *H v. Belgium*, 30 November 1987, no 8950/80, §54: “Applications were not heard in public, nor were the decisions of the Council of the Ordre ‘pronounced’ in public. Unless cured at a later stage of the procedure, such a defect may deprive the person concerned of one of the safeguards set forth in the first sentence of Article 6 § 1 (art. 6-1) of the Convention”; see also: ECtHR (Plenary), 10 February 1983, *Albert and Le Compte*, no 7299/75 and no 7496/76, §34.

<sup>59</sup> ECtHR (Plenary), *Axen v. Germany*, 8 December 1983, no 8273/78, §28.

<sup>60</sup> *Ibid.*: “neither the letter nor the spirit of Article 6 § 1 (art. 6-1) prevents an advocate from waiving, of his own free will and in an unequivocal manner, the entitlement to have his case heard in public”

Rule 262 (a) lays down the principle that access to the register must be public: “Decisions and orders made by the Court shall be published”. But many exceptions exist to keep the confidentiality of some information, at the request of a party, which must explain the reasons of this derogation from the principle of publicity (R. 262.2). Any information excluded on the grounds of Rule 262.2 can be made available at the request of “a member of the public” (R. 262.3) explaining, among other things, “[t]he grounds upon which the applicant believes the reasons for confidentiality should not be accepted” (R. 262.4 (b)). Systematic publication of decisions is therefore the principle, and confidentiality the exception, which is in line with the general principles, and was not necessarily understood as such by previous versions of the rules of procedure. The system thus seems balanced. It should be kept in mind that the underlying principle is to assess, on a case-by-case basis, whether the public is able to understand the reasons for the decision to be made<sup>61</sup>.

Beyond this general remark, a case-by-case analysis requires knowledge of the judges on the panel. As mentioned, it seems that the question is particularly delicate for technical judges with private activities in industry or in law firms. Federal Patent Court of Switzerland offers a good example of transparency about the other private activities the judges have: the webpage dedicated to the composition of the court offers a full list of the judges, with an up-to-date information about the office/firm who employs the non-permanent judges with technical training. The parties, at the beginning of the procedures, can easily access information about the judges appointed for the case. UPC should make such an effort of transparency, ensuring that the information published is reliable and up-to-date.

## **2. Towards internal guidelines?**

The example of Switzerland shows the interest to formalize internal guidelines to assist in the implementation of the procedures. To our view, this could be an interesting perspective, but it seems difficult to implement such guidelines at the early stage of the functioning of the jurisdiction: which exact content shall be given to these guidelines? The numerous issues raised in this article do not allow for definitive answers, but rather clarify the boundaries and constraints inherent to the concept of impartiality. Such guidelines could come to codify already established practices, which will take some time. Moreover, the variety of legal cultures is certainly an asset for the Court, and the exchanges between judges on this delicate subject must precede a formalization by possible guidelines. In any case, guidelines are usually the outcome of a bottom-up process based on cases. But here we come to a dead end: the jurisdiction would need trust to work, therefore to show its virtues, of which the impartiality of the judges is a part; and to show its impartiality and to establish its principles, it needs to work...

In all cases, we recalled that appearance plays a crucial role. The guidelines can be an element but have their limits. Impartiality of the Court depends on the attitude of each judge, because the question of impartiality is, in the end, eminently personal and depends on the difficult evaluation he or she must make of the perception of others. There is no doubt that the first steps of the new international judiciary will be carefully observed, and it must be beyond reproach. This is the price of its social acceptance, and therefore of its success.

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<sup>61</sup> ECtHR (First section), 17 January 2008, *Ryakib Biryukov v. Russia*, no 14810/02, §45; ECtHR (Fifth section), 2 June 2022, *Straume v. Latvia*, no 59402/14, §§ 130-133 (“the full texts of the judgments were not available to the public owing to the fact that the case was examined in closed hearings. Even though the Government argued that requests could be lodged for anonymised copies of the judgments, interested persons had to provide sufficient justification for such a request, and the decision was left to the discretion of the president of the court in question.”)

#### IV. Conclusion

The form of self-regulation involved in assessing impartiality is personal and must be done on a case-by-case basis. We expressed optimism because practitioners are familiar with the issue of impartiality (even if they have only been confronted with it as litigators in the past), and are accustomed to compliance with deontological rules in which the concepts of independence and impartiality are fundamental. But... There is always a “but”.

Regardless of the ethical merits of judges, they are “locked in” to a system that they cannot go beyond (especially part-time judges). The conflict of interests is perhaps inevitable... Since the analysis must be done on a case-by-case basis, it is appropriate to take a concrete case. A procedure concerns a patent in the field of biotechnology. The language of this procedure is French. One judge of this specialty is of French nationality; perhaps two or three other judges know the French language. The choice is then extraordinarily limited to three or four judges, for a crucial technology on a leading market and for which each of the judges is a well-known practitioner belonging to an international firm with offices in several European countries. One can rapidly find oneself in the dead end of realizing that the only competent judges are not impartial... Switzerland, which has about 30 judges, is often confronted with this problem<sup>62</sup>. Are the fifty-one judges of the international court sufficient to avoid this type of situation? In the end, it may be difficult to find the right balance between implementation of rules guaranteeing impartiality and having the best technical qualified judges in his/her technical field.

The near future will tell us if the system can guarantee the technical and ethical quality of the international jurisdiction, and a more distant future if its mode of functioning is sufficient for its social acceptance.

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<sup>62</sup> Interview of M. Schweizer, cited above: “At first glance, a pool of 30 technical judges may seem large. But when you need a physician, your choice is reduced to 6 judges, and if he or she has to be German-speaking because the language of proceedings is German, you are left with only four.”