Unified patent court and the right to a fair trial

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12. UNIFIED PATENT COURT AND THE RIGHT TO A FAIR TRIAL: SOME CRITICAL REMARKS

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1. Introduction

The catastrophic democratic regression that is currently affecting certain Member States of the European Union – among other things, in the way they respect the standards of the Rule of law and the independence of their judges – has generated, on the part of the two European courts, a series of principled judgments and welcome reminders as to the lines that must never be crossed.[1] These jurisprudential principles then function as benchmarks which may lead to new questions or criticisms. Either they revive discussions that have been humming along quietly for many years.[2] Or they look towards new targets, which until now have been little considered. This is the case, very largely, for the Unified Patent Court (hereinafter also UPC).

This Unified Patent Court has the appearance of a legal UFO.[3] As recalled by other contributions to this book,[4] its creation is the result of an international treaty – the Agreement of 19 February 2013 on a Unified Patent Court (hereafter UPC Agreement) – and it has its own legal personality. The UPC Agreement

1 See, among others: M. LELOUP, *The Impact of the Fundamental Rights Case Law of the European Court of Human Rights and the European Court of Justice on the Domestic Separation of Powers*, PhD Dissertation, University of Antwerp, 2021; M. LELOUP, "Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR", *European Constitutional Law Review* 2021, 394-421.

2 See C. RIZACALLAH and S. VAN DROOGHENBROECK, "Nomination des juges et « tribunal établi par la loi » – Confirmation, évolution et révolution en marge de l'arrêt *Gušmundur Andri Ástrášsson* c. Islande de la Cour européenne des droits de l'homme", *Journal des Tribunaux* 2021, 573-580.

3 See P. CAMPOLINI, "La compétence internationale de la juridiction unifiée du brevet. Examen critique du règlement (UE) n°542/2014", *R.D.C.* 2016, 22; A. WSZOŁEK, "Still Unifying? The Future of the Unified Patent Court", *IIC - International Review of Intellectual Property and Competition Law* 2021, 1143-1160; D. DE LANGE, "EU patent harmonization policy: reconsidering the consequences of the UPCA", *Journal of Intellectual Property Law & Practice* 2021, 1078-1090.

4 See in particular the contribution of Tamar Khuchua.

is part of a comprehensive European patent package, at the core of which lies the introduction of a European patent with unitary effect as a new intellectual property right recognized at EU level. However, as recalled by Advocate General Y. Bot in the Case C-146/13,[5] the UPC Agreement does not fall within any of the categories referred to in the TFEU. It is an intergovernmental agreement negotiated and signed only by certain Member States on the basis of international law. The UPC is therefore not, as such, an institution of the European Union, let say an organ of the CJEU. It is as a court "common" to the Contracting Member States – and thus part of their judicial system – for disputes concerning European patents and European patents with unitary effect. It is a court of a hybrid nature, floating somewhere in legal no man's land between the national and international dimensions. The Agreement confers upon the UPC exclusive jurisdiction over the types of patent disputes listed in an extensive catalogue – in particular actions concerning patent infringements, disputes on the validity of patents and certain actions concerning decisions of the European Patent Office.

The UPC comprises a Court of First Instance, a Court of Appeal (in Luxembourg), an Arbitration and Mediation Center and a common Registry.[6] The Court of First Instance will consist of a central division in Paris (with a thematic section in Munich and possibly a third city as replacement for London),[7] along with several local and regional divisions. The creation of a local division in Brussels was made possible, for example, in accordance with articles 87 and 88 of the law of 29 June 2016 'on various provisions concerning the economy'.[8]

The perfect conformity of the "creature" thus put in place with the standards governing the legality and independence of courts, as they have been reminded and refined in the context of the democratic backsliding referred to above, is certainly not self-evident. We only need to reread the decision rendered on 23 June 2021 by the German Constitutional Court on this subject for an example in this regard.[9] Admittedly, the legal objections put forward by the applicant parties – to which we will return below – did not succeed. But they were no less defensible. The problem, however, is to find the most solid legal basis for them: this is where the legal and institutional hybridity of the "creature" is a source of difficulty. The UPC is certainly, as we have said, an integral part of the judicial systems of the Member States. But its "common" character and the international source of

5 Opinion of 18 November 2014 in case C-146/13, *Spain v Parliament and Council*, §163.
6 Art. 6(1) UPCA.
7 Article 7 UPCA.
8 Wet van 29 juni 2016 houdende diverse bepalingen inzake Economie, *Moniteur belge* 6 juli 2017.
9 *Bundesverfassungsgericht* (2nd senate) 23 June 2021, BvR 2216/20 and BvR 2217/20.

its creation remove it in whole or in part from the scope of the *national constitutional standards* of the right to a fair trial (section 2). Consideration can also be given to the applicability to the UPC of article 6 of the *European Convention on Human Rights* and the rules and principles it embodies. Here again, however, there are still some grey areas (section 3). It is then that one will be able to turn with more assurance to the right to a fair trial of the *European Union*, which integrates, in fact, the aforementioned rules and principles (section 4). Having concluded that the EU Charter of Fundamental Rights indeed applies to the UPC, we will take a critical look at the way that Court is supposed to function according to the UPC Agreement and see whether it respects the standards of the right to a fair trial as set out in the European case law (section 5).

2. The (Partial) Inoperability of Constitutional Standards of a Fair Trial

As we have seen, the UPC is supposed to be an integral part of the national judicial systems.[10] It has exclusive jurisdiction over matters within its competence, and its decisions are automatically binding.[11]

Could this "national" aspect of the UPC justify its being fully subject to the constitutional rules and principles of the right to a fair trial? The question is certainly not simple:[12] the "international" facet of the jurisdiction interferes to a greater or lesser extent in the applicability and scope of those rules and principles. Traditional national constitutional rules cannot that easily be applied to an "extra-terrestrial" UFO, like the UPC.

It is beyond the scope of this paper to analyse the constitutional data of the 24 UPC-Agreement states. We will be satisfied with a sample. The interference of the international dimension seems maximum, for example, in the case of Belgium.

According to Article 40 of the Belgian Constitution, judicial power is exercised by the *Cours et Tribunaux*. Article 144 of the same Constitution confers a monopoly to these courts as regards to litigations concerning civil subjective rights, in which the attributions of the UPC are unquestionably included. Constitutionally, the transfer of powers to the UPC can therefore only be admitted through the application of Article 34 of the Constitution, which states that "The exercising of specific powers can be assigned by a treaty or by a law to

10 Preamble and Articles 1 and 21 UPCA.

11 Articles 32 and 82 UPCA.

12 With regard to the objections of constitutionality raised by the Polish and Hungarian Constitutional Courts, see A. WSZOŁEK, "Still Unifying? The Future of the Unified Patent Court", *op. cit*, 1150 ff.

institutions of public international law". As the Constitutional Court recalled in its judgment no. 62/2016, the above-mentioned Article 34 cannot be deemed to "confer a generalized blank check, either on the legislator, when it gives its assent to the treaty, or on the institutions concerned, when they exercise the powers that have been conferred on them. Article 34 of the Constitution does not authorize in any case a discriminatory encroachment on the national identity inherent in the fundamental, political and constitutional structures or on the fundamental values of the protection that the Constitution confers on the subjects of law".[13] However, these reminders have no bearing on the specific problematic at hand, since the "international" dimension – albeit only partial – of the court in question paradoxically *excludes* any applicability of the Belgian constitutional guarantees of a fair trial to it. The rules contained in Chapter 6 of Title III of the Constitution apply only to the courts and tribunals of the Belgian judicial power. The absence of lifetime appointment of the members of the UPC is, from this point of view, no more problematic than that of, for example, judges at the European Court of Human Rights or the CJEU.

More radically, the "minimal" guarantee of the principle of legality, as contained in Article 146 of the Constitution,[14] has always been considered – implicitly but definitely – inapplicable in the presence of an international jurisdiction. As a rule, Article 146 requires that "(...) the essential rules relating to the organization, operation and procedure, insofar as they form part of the 'establishment' of a court within the meaning of Article 146 of the Constitution, must be laid down by (a formal) law (...)". It follows that a delegation to the Executive Power is compatible with the principle of legality only "insofar as the delegation is defined in a sufficiently precise manner and concerns the execution of measures whose essential elements have been determined beforehand by the (formal) legislator".[15] In application of these principles, it would have been necessary, more than likely, to conclude to the unconstitutionality of the delegation made by the aforementioned article 87 of the law of 29 June 2016 "on various provisions concerning the economy". According to this provision indeed, "the ministers having respectively intellectual property or justice in their attributions are entitled to address a request to the president of the administrative committee (of the UPC) with a view to the creation of a local division in Belgium in accordance with Article 7(3) of the Agreement of 19 February 2013 on a Unified Patent Court, ...". Yet, this delegation was not

13 Constitutional Court (Belgium) 28 April 2016, nr. 62/2016, para. B.8.7.

14 This Article states no court, no body responsible for proper administration of justice can be established except by virtue of a law.

15 Advisory opinions nr. 25.663/2 from 12 March 1997, *Doc. parl. Sénat,* 1997-1998, n°939/1, p. 22

criticized by the Council of State in its advisory opinion no. 59.213/1/2/3 of 2 May 2016,[16] obviously due to the "partially international" nature of the jurisdiction concerned. The same advisory opinion – probably for the same reason – did not criticize the fact that, according to article 88 of the aforementioned law, the procedural languages of this local division are Dutch, French, German *and English*. The silence observed here with regard to the use of English (an "unofficial" language in Belgian law) in the proceedings before the local division contrasts with the multiple reservations that the same Council of State expressed, a few years later, with regard to the use of English before a purely national court – e.g the *Brussels International Business Court*.[17]

The decision of the German *Bundesverfassungsgericht* of 23 June 2021,[18] cited above in the introduction, further provides an example of a partial *attenuation* of the constitutional requirements of a fair trial in the presence of a court with an "international dimension". In this case, one of the applicants claimed that Art. 6 ff. of the UPCA were contrary to Art. 97(1) of the *Grundgesetz*, in conjunction with Art. 6(1) of the European Convention on Human Rights, and violated the principle of the rule of law under Art. 20(3) of the *Grundgesetz* on the grounds that judges at the UPC are appointed for a six-year term, that this term is renewable, and that no adequate remedy is available to challenge a removal from office. The grievance thus formulated was rejected, notably on the basis of the following considerations:

> "the complainant failed to sufficiently address what minimum standards derive from constitutional law with regard to the selection, re-appointment and removal from office of judges. While the Second Senate, in its decision on the appointment of temporary judges to German administrative courts, held – albeit with regard to the principle of the rule of law (…) – that the temporary appointment of judges with the possibility of subsequent re-appointment could amount to an unconstitutional restriction of judicial independence in violation of constitutional law (…), the Senate qualified its findings by recognising that different rules might apply in relation to judges appointed to *Land* constitutional courts or to lay judges (…). *This applies all the more with regard to international tribunals, as particular considerations arise in connection with the transfer of judicial powers to an international organisation, which must be taken into account and which may justify deviations from the standards set by the Basic Law for ensuring judicial*

16 Advisory opinion nr. 59.213/1/2/3 of 2 May 2016, (*Doc. parl. Chambre,* doc 54-1861/1, p. 114).

17 Advisory opinion nr. 62.411/2/AV of 2 March 2018 (*Doc. Parl. Chambre*, doc 54-3226/001, p. 402).

18 *Bundesverfassungsgericht* (2nd senate) 23 June 2021, BvR 2216/20 and BvR 2217/20.

> *independence*. At international tribunals, judicial appointments for a fixed term are the norm and terms are often renewable (…)" (emphasis added).[19]

3. Is Article 6 of the European Convention on Human Rights Applicable to the UPC?

Since the national constitutions offer little certainty of a strong application – or even application as such – of the standards of the right to a fair trial, one may wonder whether Article 6 of the European Convention on Human Rights provides a more solid basis for any criticism of the organization and operation of the UPC in terms of respect for due process. This, as well, is not an easy question with a straightforward answer.

Of course, there seems to be no doubt that the disputes to be heard by the UPC are disputes "concerning civil rights and obligations" within the meaning of Article 6(1) ECHR.[20] The question arises, however, whether the "international" aspect of the UPC excludes any form of applicability of Article 6(1) ECHR to it, or at least alleviates its implications for the States parties to the Convention.

Admittedly, as reminded by *Mutu & Pechtsein v Switzerland*, the "tribunal" referred to in Article 6(1) ECHR is not limited to a "court of law of the classic kind, integrated within the standard judicial machinery of the country".[21] However, there was a time – a long time ago – when, notwithstanding the conceptual openness thus manifested, the applicability of Article 6 seemed to be strictly limited to the "borders" of national legal orders. Thus, in a decision *X and Y v. United Kingdom* of 1972, the former European Commission of Human Rights stated that "the provisions of Article 6 (1) of the Convention only apply to proceedings before *national* tribunals charged with the determination of a person's 'civil rights and obligations or of any criminal charge against him' (…)".[22]

To our knowledge, this *dictum* has never been repeated as such. The idea that the creation of an international court for the purpose of adjudicating a series of disputes normally falling within the jurisdiction of national courts

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19 *Bundesverfassungsgericht* (2nd senate) 23 June 2021, BvR 2216/20 and BvR 2217/20, §60.

20 See for example: ECtHR 2 May 2013, Case No. 25498/08, *Kristiansen and Tyvik AS v Norway*.

21 ECtHR 2 October 2018, Case Nos. 40575/10 and 6747/10, *Mutu and Pechstein v Switzerland*, §94.

22 ECommHR (Plenary) 23 March 1972, Case No. 5459/72, *X and Y v the United Kingdom*. (emphasis added in quote)

would relieve the State of any responsibility under the Convention is, moreover, clearly contrary to the subsequent case law of the ECtHR. As stated in *Waite & Kennedy v. Germany*,

> "(…) where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial."[23]

From this, the European Court of Human Rights deduces, among others in *Konkurrenten.no AS v. Norway* of 5 November 2019 concerning the Court of Justice of the European Free Trade Association States (EFTA-Court):

> "Contracting States would engage their responsibility under the Convention should they transfer some of their sovereign powers to an international organisation whose internal litigation mechanisms are manifestly deficient when compared with the Convention requirements."[24]

« Manifestly deficient »… The terms used indicate that, if state responsibility does indeed survive the "internationalization" of jurisdiction, it is nonetheless, in line with the *Bosphorus* jurisprudence,[25] particularly light, being limited to manifest "structural shortcomings". The rest of the decision *Konkurrenten.no AS v. Norway* confirms this. According to the Court, the protection of fair trial guarantees offered by the international court "need not be identical to that provided by Article 6 of the Convention". In the words of the above-mentioned decision, the "test" to be applied consists in asking "whether the (international) procedural regime is manifestly deficient when compared with the Convention requirements". It can therefore be seen that the bar is not set very high, and that the anchoring that Article 6 of the ECHR may provide for the requirements of a fair trial before the UPC is, as a result, a little floating. It then remains to

23 ECtHR (GC) 18 February 1999, Case No. 26083/94, *Waite and Kennedy v Germany*, §67.

24 ECtHR (dec.) 5 November 2019, Case No. 47341/15, *Konkurrenten.No AS v Norway*, §39.

25 ECtHR (GC) 30 June 2005, Case No. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*.

be seen whether these imperatives cannot be brought back in "through the windows" of another source of law, in this case, European Union law.

4. The UPC and the EU Charter of Fundamental Rights

The above discussion on the application of the ECHR to an international court like the UPC is, all things considered, only of partial practical relevance. This is so because, in any case, the EU Charter of Fundamental Rights must be understood to apply. The UPC must thus respect the right to a fair trial as enshrined in Article 47 of the Charter.

While the Agreement nowhere explicitly mentions that the UPC is bound by the Charter, there can be little doubt on this point. The preamble considers that the UPC must respect and apply Union law. It thereby recalls the primacy of Union law, which includes the TEU, the TFEU and the Charter of Fundamental Rights, 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. Article 1 of the UPC Agreement further specifies that the UPC 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 those Member States. Since it is abundantly clear that the UPC will be dealing with questions of the interpretation and application of Union law,[26] Article 47[27] of the Charter and Article 19(1)(2) TEU[28] are applicable to it. Article 17 of the UPCA moreover stipulates that the judges of the UPC will enjoy judicial independence and will not be bound by any instructions. Finally, Article 21 of the UPCA holds that, like any court common to the Member States, the UPC shall cooperate with the Court of Justice of the EU and shall introduce a request for a preliminary reference in accordance with Article 267 TFEU. Yet, according to longstanding case law, only bodies that fulfil certain requirements, among others being independent and established by law, may introduce such requests.[29]

Overall, there can thus be little doubt that the UPC is required to respect the right to a fair trial, enshrined in Article 47 of the Charter. Because of this, the UPC must also respect the standards of the right to a fair trial as protected in Article 6 ECHR, given that Article 52(3) of the Charter states that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR,

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26 See also Article 20 UPCA.

27 CJEU 6 October 2020, C-245/19, *État luxembourgeois*, para. 55.

28 CJEU 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 37.

29 CJEU 29 March 2022, C-132/20, *Getin Noble Bank*, paras. 61-76; CJEU 21 January 2020, C-274/14, *Banco de Santander*, paras. 51-80.

the meaning and scope of those rights are to be the same as those laid down by the ECHR. Article 47 of the Charter must thus provide a level of protection that does not fall below that of Article 6(1) ECHR.[30] This is where we see the return of Article 6 ECHR "through the windows" of EU law.

All of this means, in conclusion, that the UPC must comply with the right to a fair trial as enshrined in Article 47 of the Charter and Article 6 ECHR, as interpreted by the ECJ and the ECtHR respectively. In the following section we will look at the UPC Agreement and discuss whether any problems arise in this regard.

5. The UPC Agreement and the Right to a Fair Trial

The Contracting Parties clearly considered the issue of the right to a fair trial while drafting the UPC Agreement. This immediately becomes apparent from the many – at times detailed – provisions on issues such as case allocation, the option of recusal, the assignment of judges, and the proceedings before the Court. Yet, that does not have to mean of course that the UPC Agreement and the Statute annexed to it (the Statute) do not merit a critical look on whether they respect the standards that can be found in the European case law. In the past, some authors have already raised some critical questions in that regard, mainly regarding the alleged unfavourable position of parties using a language different than English, French or German – the three core languages of the UPC system.[31] Yet, in this article, we will focus on issues that have so far not received such attention, mainly related to judicial independence and the right to a tribunal established by law as interpreted in the most recent European case law.

A. Appointment of Judges at UPC

The appointment of judges has been a very hot topic in Europe in the last few years. The case law of the ECtHR and the ECJ has developed spectacularly in a very short period of time and has established new principles which are also of relevance for the judges at the UPC.

30 CJEU 6 October 2021, C-487/19, *W.Ż.*, §123; CJEU 24 March 2020, C-542/18 RX-II, *Review Simpson*, §72.

31 See, among others: A. WSZOŁEK, "Still Unifying? The Future of the Unified Patent Court", IIC - International Review of Intellectual Property and Competition Law 2021, 1152; D. XENOS, "The impact of the European patent system on SMEs and national states", Prometheus 2020, 63.

It is important to recall here that the UPC will be composed of both legally qualified judges and technically qualified judges. The idea behind this combination is that the technically qualified judges provide the necessary technical expertise to the panel, while the legally qualified judges have had the necessary legal training to make sure that the judicial procedure goes fairly and is decided on the basis of the relevant legal provisions. The ECtHR does not, in principle, prohibit the presence of such technically qualified judges in a court, as long as those members are sufficiently independent.[32]

Article 15 of the UPC Agreement states that legally qualified judges must possess the qualifications required for appointment to judicial offices in a Contracting Member State. Technically qualified judges must have a university degree and proven expertise in a field of technology. Moreover, both types of judges must ensure the highest standards of competence and shall have proven experience in the field of patent litigation and must have a good command of at least one official language of the European Patent Office.[33] Those provisions are relevant in light of the recent case law of the ECtHR, in which it explicitly stated that it is inherent in the very notion of tribunal, that it is composed of judges that are selected on the basis of merit, meaning judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions. Moreover, the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be.[34]

The appointment of judges at the UPC is regulated by Article 16 of the UPC Agreement and Article 3 of the Statute. The two main actors in the appointment process are the Administrative Committee and the Advisory Committee. The Administrative Committee consists of representatives of the Member States.[35] Even though there is no clear indication of what type of person is meant by this, it can be expected to be highly placed civil servants, connected to the executive branch. The Advisory Body consists of patent judges and practitioners in patent law and patent litigation with the highest recognised competence and enjoying complete independence in the performance of their duties.[36] The Advisory Committee draws up a list of the most suitable candidates and makes sure that this list contains at least twice as many candidates as there are vacancies. It is

32 ECtHR 22 June 2004, Case No. 47221/99, *Pabla Ky v Finland* ; ECtHR (GC) 1 December 2020, Case No. 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, para. 222.

33 Article 2 Statute.

34 ECtHR (GC) 1 December 2020, Case No. 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, para. 220.

35 Article 12 UPCA.

36 Article 14 UPCA.

then up to the Administrative Committee to appoint the judges on the basis of that list by common accord.

In general, this system resembles the system of judicial appointments in many European countries, where an independent body – such as a judicial council or a selection committee – makes a suggestion of which judges should be appointed, with the final appointment decision being taken by a member of the executive, often the head of state or the minister of justice. Both the ECtHR and the ECJ have held that the participation of a such an independent body may contribute to making the appointment process more objective and may add an additional safeguard against pressure by the political branches of government.[37]

One may, however, wonder whether the system established by the UPC Agreement fully complies with the principle of judicial independence, given the specific powers of both committees. In this respect, it is important to point out that the members of the Advisory Committee are in fact appointed by the Administrative Committee.[38] The members of the neutral body that must independently assist the Administrative Committee during the appointment process are therefore appointed by that very same Committee. The recent case law of both European Courts has given ample evidence of how the objective appointment process of judges may be called into question when doubts arise as to the independence of the advisory body.[39] This is moreover exacerbated by the fact that the Administrative Committee retains quite some leeway in the eventual appointment decision. The UPC Agreement stipulates that the Advisory Committee draws up a list of the most suitable candidates which shall contain twice as many candidates as there are vacancies. In its decision, the Advisory Committee should be guided solely by factual and technical criteria, in order to find the best suited and most eligible candidates. However, while the list as such is binding upon the Administrative Committee, its order of candidates is not. The UPC Agreement expressly grants the Administrative Committee discretion in this regard, since it has to try and ensure the best legal and technical expertise and a balanced composition of the Court on as broad a geographical basis as possible.[40] It is thus perfectly possible that the

37 ECtHR 21 April 2020, Case No. 36093/13, *Anželika Šimaitienė v Lithuania*, para. 82; CJEU 19 November, C-585/18 a.o., *A.K., CP and DO*, para.137.

38 Article 14(2) UPCA.

39 ECtHR 3 February 2022, Case No. 1469/20, *Advance Pharma Sp.Z O.O. v Poland*; ECtHR 22 July 2021, Case No. 43447/19, *Reczkowicz v Poland*; CJEU 19 November, C-585/18 a.o., *A.K., CP and DO*; CJEU 15 July 2021, C-791/19, *Commission v Poland (Régime disciplinaire des juges)*.

40 Article 3(3) Statute.

Administrative Committee ultimately appoints those members who – while still suitable for the position – were ranked lower than the others. While the CJEU has made clear that the sole fact that the body that ultimately decides on the judicial appointment may retain some power in the appointment process, it stressed that such power should be sufficiently circumscribed and should in principle be used only exceptionally.[41] Otherwise, the chances increase that that body exercises undue discretion that undermines the integrity of the outcome of the appointment process.[42] As has been pointed out in the literature, the fact that the Administrative Committee must take appointment decisions by common accord can certainly be understood as a mitigating factor in this regard.[43] Nevertheless, the conclusion remains that there are not many safeguards that circumscribe the Committee's power.

One last point in this regard concerns the possibility to appeal against a certain appointment decision. While the European case law on that issue is as of yet not fully crystalized, the most recent judgments – especially those of the ECtHR – seem to require a possibility to appeal when it comes to judicial appointments.[44] The appointment decision must then be amenable for review by an impartial and independent tribunal established by law. As far as the UPC is concerned, Article 52 of the Service Regulations stipulate that where a candidate for a judicial post at the Court considers that the merits of his or her candidacy have not been rightfully assessed, that candidate can file a petition for review to the Administrative Committee. The appointment decision is thus amenable for review before the Administrative Committee, the same body that issued the appointment decision in question. In that light, and given its composition, there can thus be little doubt that the Administrative Committee cannot be seen as an impartial and independent tribunal established by law. Overall, the possibility created by Article 52 of the Service Regulations would thus seem to not be in line with the prevailing standards in the European case law.

B. Setting up and Discontinuing Local and Regional Divisions

Article 7 of the UPC Agreement stipulates that the Court of First Instance comprises a central division as well as local and regional divisions. Upon the

41 CJEU 20 April 2021, C-896/19, *Repubblika*, para. 71.

42 CJEU 24 March 2020, C-542/18 RX-II, *Review Simpson*, para. 75.

43 T. BÜTTNER, "Article 16 UPCA" in Winfried Tilmann and Clemens Plassmann (eds.), *Unified Patent Protection in Europe: A Commentary*, Oxford, OUP, 2018, 424.

44 ECtHR 7 April 2022, Case No. 18952/18, *Gloveli v Georgia*; CJEU 2 March 2021, C-824/18, *A.B. a.o. (Nomination des juges à la Cour suprême - Recours)*.

request of the Contracting Member States, a local division can be set up in a single Contracting Member State and a regional division for two or more Member States. The Statute specifies that such requests should be lodged with the chairman of the Administrative Committee. The Committee can then decide on whether to set up such a new division and must indicate how much judges will be appointed. In the same Article, the Administrative Committee also gets the power to discontinue a local or regional division at the request of the Contracting Member State.[45]

This power of the Administrative Committee to set up and discontinue courts is exceptional. No other examples of such far-reaching power come to mind. It is also highly doubtful whether it is in accordance with the right to an independent court established by law. According to long-standing case law of the ECtHR, recently also adopted by the ECJ, the term "established" must be taken to mean that the very existence of a tribunal must have a legal basis in a *formal* piece of legislation.[46] The Courts are very clear in this regard. This requirement reflects the principle of the rule of law and makes sure that the judicial organisation in a democratic society does not depend on the discretion of the executive.[47] Yet, that is exactly what happens at the UPC, where the Administrative Committee is the body that decides whether an entirely new court will be established or not. The same concerns arise even stronger regarding the power to discontinue a local or regional division. There are, to the best of our knowledge, no examples of such cases in the European case law, but it seems nearly impossible that the ECtHR or ECJ will accept such a broad power to lie in the hands of a body other than the legislature. Even then, the recent case law of the ECtHR has stressed that judges should have a possibility to challenge such measures,[48] something which does not seem possible in the UPC Agreement.

C. Tenure, Discipline and Removal of Judges

Article 4 of the Statute states that the judges shall be appointed for a term of six years but may be reappointed. This is certainly somewhat of an exception in the judicial system. Most often, judges have a guaranteed tenure until the legally prescribed retirement age, or, exceptionally, until their death. While

45 Article 18 Statute.

46 CJEU 6 October 2021, C-487/19, *W.Ż.*, para. 129; ECtHR (GC) 1 December 2020, Case No. 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, para. 214.

47 ECtHR (GC) 1 December 2020, Case No. 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, para. 214; CJEU 24 March 2020, C-542/18 RX-II, *Review Simpson*, para. 73.

48 ECtHR (GC) 15 March 2022, Case No. 43572/18, *Grzęda v Poland*; ECtHR 22 July 2021, Case No. 11423/19, *Gumenyuk v Ukraine*.

such a limited mandate is in itself perfectly acceptable under European standards, even when these mandates are renewable,[49] it does raise questions about the pressure that the Administrative Committee – as the likely re-appointing body – exerts on the sitting judges who hope to be appointed for a new term.[50]

The removal of the judges is discussed in Article 10 of the Statute. That provision states that a judge may be deprived of his or her office only if the Presidium decides that that judge no longer satisfies the requisite conditions or meets the obligations arising from this office. According to Article 15 of the Statute, the Presidium is composed of the President of the Court of Appeal, the President of the Court of First Instance, two judges of the Court of Appeal elected from among their number, three full-time judges of the Court of First Instance elected from among their number and the Registrar as a non-voting member.

Generally speaking, that seems to be in line with the European case law. The recent judgments have put a strong focus on the procedural protection during disciplinary proceedings and have stressed the fact that such proceedings should comply with the right to a fair trial.[51] This means that the disciplinary proceedings should be held before a body that can be considered to be a tribunal, or, if that is not the case, that the decision by that body is amenable for judicial review. According to the ECtHR, a tribunal is a body that determines matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner, resulting in a binding decision.[52] This body must moreover be sufficiently independent.[53] Since the Presidium is entirely composed of judges – with the exception of the Registrar, who is only a non-voting member – the independence requirement seems to be fulfilled. The fact that Article 10 of the Statute assigns the Presidium as the competent body to decide on the removal of judges would as such thus seem to be in line with European case law.

However, that overall assessment becomes more complicated in light of the subsequent consolidated version of the so-called Service Regulations,[54] drafted

49 CJEU 16 July 2020, C- 658/18, *Governo della Repubblica italiana (Status of Italian Magistrates)*, para. 53; ECtHR 9 February 2021, Case No. 15227/19, *Xhoxhaj v Albania*, para. 297.

50 See on this: CJEU 11 July 2019, C-619/18, *Commission v Poland (Independence of the Supreme Court)*; CJEU 5 November 2019, C-192/18, *Commission v Poland (Independence of ordinary courts)*.

51 CJEU 15 July 2021, C-791/19, *Commission v Poland (Régime disciplinaire des juges)*; ECtHR 5 February 2009, Case No. 22330/05, *Olujic v Croatia*.

52 ECtHR (GC) 1 December 2020, Case No. 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, para. 219.

53 ECtHR (Plenary) 29 April 1988, Case No. 10328/83, *Belilos v Switzerland*, para. 64.

54 Consolidated version of the Regulations Governing the Conditions of Service of Judges,

by the Administrative Committee in July 2022. In Article 49 of those Regulations, it is mentioned that the President of the Court of First Instance, or of the Court of Appeal may formally put a judge of the Court of First Instance, respectively the Court of Appeal on notice of failure to respect the obligations arising from his or her office. If the judge in question continues to not fully respect those obligations, the President of the Court will ask the Presidium to decide on further disciplinary measures. The Presidium can then decide whether to impose any of the four prescribed disciplinary measures: a written warning, a reprimand, a reduction of salary or of pension, or the removal from office. In line with Article 10 of the Statute, it is thus the Presidium that has the primary role in deciding on disciplinary measures, including the removal of judges.

However, somewhat out of the blue Article 50 of those Regulations then mentions that a decision of the Presidium under Article 49 may be appealed in writing to the Administrative Committee. This seems like a very significant addition, if not an overhaul, of what is mentioned in the Statute, since the Service Regulations put the final say over all disciplinary matters, including the potential removal of judges, with the Administrative Committee, rather than the Presidium. It is clear from what is mentioned above that the Administrative Committee does not fulfil the requirement of independence from the above-mentioned case law. This means that the final say in disciplinary proceedings lies with a body that cannot be seen as an independent tribunal, which flatly goes against the standards found in the European case law.[55]

One further, related issue pertains to the proceedings for such removal decisions. The UPC Agreement and the Statute are, all things considered, almost completely silent on this point. Article 10 of the Statute only clarifies that the judge concerned will be heard but may not take part in the deliberations. The Rules of Procedure of the Court also mention nothing on this matter and as of yet, there are also no rules of procedure for the Presidium. This is problematic in light of the case law of the ECtHR. The Strasbourg Court requires disciplinary matters concerning judges to afford sufficient procedural safeguards. In this sense the relevant legislation should contain specific rules on the procedure to be followed, on which safeguards are afforded to the judges, on how evidence can be admitted and assessed, and on how the final decision should be reasoned.[56] The UPC Agreement and the Statute contain no information on any of those issues. In order to comply with the standards set out in the Euro-

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the Registrar and the Deputy-Registrar of the Unified Patent Court, adopted by the Administrative Committee on 8 July 2022.

55 See for example: CJEU 25 July 2018, C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, para. 67.

56 ECtHR 9 March 2021, Case No. 76521/12, *Eminağaoğlu v Turkey*, para. 99.

pean case law, it would seem wise to explicitly elaborate the proceedings for the removal of a judge, and to make sure that these proceedings afford sufficient safeguards to the judge concerned.

D. Composition of the Bench and Case Assignment

In conformity with Article 19 of the Statute, the allocation of judges and the assignment of cases within a division to its panels is governed by Rule 345 of the Rules of Procedure. The latter provision stipulates that the President of the Court of First Instance (or a judge to whom he has delegated that task) shall allocate the judges to the panels in the various divisions and sections. The cases will then be assigned to these panels by the Registrar on the basis of an action-distribution-scheme, established by the presiding judge for the duration of one year, preferably distributing the cases according to the date of receipt of the actions at the division or section.

Such a system would appear to be in conformity with the European case law. The European Courts have made clear that case assignment and the allocation of judges is an important aspect for the right to an independent tribunal established by law. Their case law attests to the need to make sure that no actor, either outside or inside of the judiciary, has too much discretion in this regard.[57] By making sure that the panels are fixed and that the cases are assigned to these panels on the basis of a predetermined scheme – preferably on the basis of something as objective as the date of receipt – the system appears to circumscribe the discretion and to remove the dangers of any undue influence.

E. Budget of the Court and Remuneration of Judges

It is a common understanding that sufficient funding is a prerequisite for a performant and independent judiciary.[58] The ECJ has recently also made clear that a level of remuneration commensurate with the importance of their function is an essential aspect of the independence of judges.[59] While the ECtHR has so far not made such an explicit link between the level of remuneration of judges and their independence, its case law does show that it believes that

57 ECtHR 12 January 2016, Case No. 57774/13, *Miracle Europe KFT v Hungary*, para. 58; CJEU 15 July 2021, C-791/19, *Commission v Poland (Régime disciplinaire des juges)*, para. 171.

58 V. JACKSON, "Judicial Independence: Structure, Context, Attitude" in A. SEIBERT-FOHR (ed.), *Judicial Independence in Transition*, Springer, 2012, 58.

59 CJEU 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 45.

budgetary autonomy of a court is an element that benefits the independence of this court.[60]

In most countries, the primary budgetary competence lies with the political branches, which, sometimes after consultation with judicial actors, decide the budget of the judiciary and set the wage of the various types and classes of judges. The judiciary is seen as a key branch of sovereign state power and must thus be funded by the state budget.[61] This is important also from a point of view of access to a court, especially for those less wealthy.

The system of the UPC, however, deviates from this traditional point of view. Article 36 of the UPC Agreement states that the budget of the Court shall be financed by the Court's own financial revenues and that, as such, the Court shall be self-financing. Moreover, the training framework for judges and the functioning of the patent mediation and arbitration centre must also be covered by the Court's budget.[62] The Court's budget consists mostly of the Court fees. According to Article 36(3) of the UPC Agreement, the Court fees shall be fixed by the Administrative Committee and shall consist of a fixed fee, combined with a value-based fee above a pre-defined ceiling. It is only when the Court cannot balance its budget, that the Member States are expected to remit special contributions to cover the deficit.

The UPC will thus be expected to be financially self-reliant. This predominately economic way of looking at the Court also becomes clear from Article 40(3) of the UPC Agreement, which states that the Statute shall guarantee that the functioning of the Court is organised in the most efficient and cost-effective manner and shall ensure equitable access to justice. There are not that many other examples of courts that are expected to be self-financing.[63] While it does not appear to be *a priori* incompatible with the principle of judicial independence, it is not difficult to see that it might create issues of access to justice, especially given the fact that its jurisdiction is compulsory.

F. The Administrative Committee: an all-powerful actor in the UPC system?

One final topic that will be addressed in this contribution does not concern a specific substantive topic linked to the right to an independent tribunal estab-

60 ECtHR 9 February 2021, Case No. 15227/19, *Xhoxhaj v Albania*, para. 302; ECtHR 5 February 2009, Case No. 22330/05, *Olujic v Croatia*, para. 40.

61 The ECtHR has indicated that the fact that court are financed by the state budget in no way implies that those courts lack independence. ECtHR 2 October 2018, Case Nos. 40575/10 and 6747/10, *Mutu and Pecstein v Switzerland*, para. 151.

62 Articles 38 and 39 UPCA.

63 One example is the contemplated new Brussels International Business Court in Belgium.

lished by law, but rather focuses on a specific actor within the UPC system: the Administrative Committee. Above, it was already highlighted that the Committee has rather far-reaching powers when it comes to the appointment of judges, the discipline of judges, and the setting up and discontinuing of local or regional divisions of the Court.

Yet, those are far from the only areas in which the Administrative Committee can exert its influence. When one reads the UPC Agreement and the Statute, it is readily apparent that the Committee indeed is a central body in nearly all aspects related to the Court. Besides the abovementioned competences, it may also grant exceptions to the rule that judges may not have another occupation,[64] set the Court fees,[65] and decide on the remuneration of judges.[66] Moreover, it decides on the financial regulations and even adopts the Rules of Procedure of the Court.[67] Especially that last power is exceptional and entails a far-reaching interference in the autonomy of the Court.[68]

The Administrative Committee thus has a wide range of powers which is liable to exert pressure on the Court as an institution as well as its individual judges. It is doubtful whether such a state of affairs can really be seen as sufficiently respecting the independence of the UPC, especially since, as was mentioned above, the Committee will most likely be composed of highly placed civil servants. It is difficult to imagine that the European Courts would accept the domestic executive to ever have such a tight grasp on the autonomy of the domestic judiciary and the career of its judges.

6. Conclusion

The judgments of the European Courts on issues of fundamental rights often reverberate far beyond the specific cases at hand. This is all the more so when they are ruling on issues of a more structural nature, such as the right to an

64 Article 17(2) UPCA.

65 Article 36(3) UPCA.

66 Article 12 Statute.

67 Article 33 Statute and 44 UPCA respectively.

68 The requirement of « legality » deriving from Art. 6 ECHR aims at protecting the court against "the discretion of the executive" (ECtHR (GC) 1 December 2020, Case No. 26374/18, *Guðmundur Andri Ástráðsson v Iceland*, para. 214*).* This requirement concerns not only the establishment of the court, its organization and competence, but also the procedure before it (See a. o. C. RIZACALLAH and S. VAN DROOGHENBROECK, "Nomination des juges et « tribunal établi par la loi » – Confirmation, évolution et révolution en marge de l'arrêt *Gušmundur Andri Ástrášsson* c. Islande de la Cour européenne des droits de l'homme", *op. cit.,* 75)

independent court or the right to a tribunal established by law. It is then not surprising that the recent and (r)evolutionary case law of the European Courts on those topics may force us to revaluate existing structures or raises new and unexpected questions. This article was an example of the latter option and looked at the UPC Agreement in light of the recent European case law on the right to a fair trial.

To do so, the Article first examined what legal basis, if any, could impose fair trial standards on the UPC, being the legal UFO that it is. While there are quite some reservations and caveats regarding the application of national constitutional standards and Article 6(1) ECHR, there can be little doubt as to the applicability of the EU Charter of Fundamental Rights. Article 52(3) of the Charter then allows to bring the ECHR case law back in "through the windows".

Having concluded that the UPC is bound by the European fair trial standards, this contribution then examined whether the organisation and functioning of the UPC respects those standards, specifically those of an independent tribunal established by law. While on certain topics there appear to be little problems, for others the UPC system would seem to violate the case law of the European Courts. Especially the powerful position of the Administrative Committee, with broad and far-reaching powers, seems potentially problematic in this regard.

One should of course be mindful of the fact that the UPC has an exceptional institutional position and that it is difficult to simply equate the Court and the Committee with the domestic judicial and executive branches. However, that changes little about the fact that the UPC is, according to the Agreement, a court common to the Member States and that it should thus equally satisfy the criterion of judicial independence as elaborated in European case law. May we predict that sooner or later the European Courts, particularly the European Court of Justice, will be confronted with some particularly difficult cases on such issues.