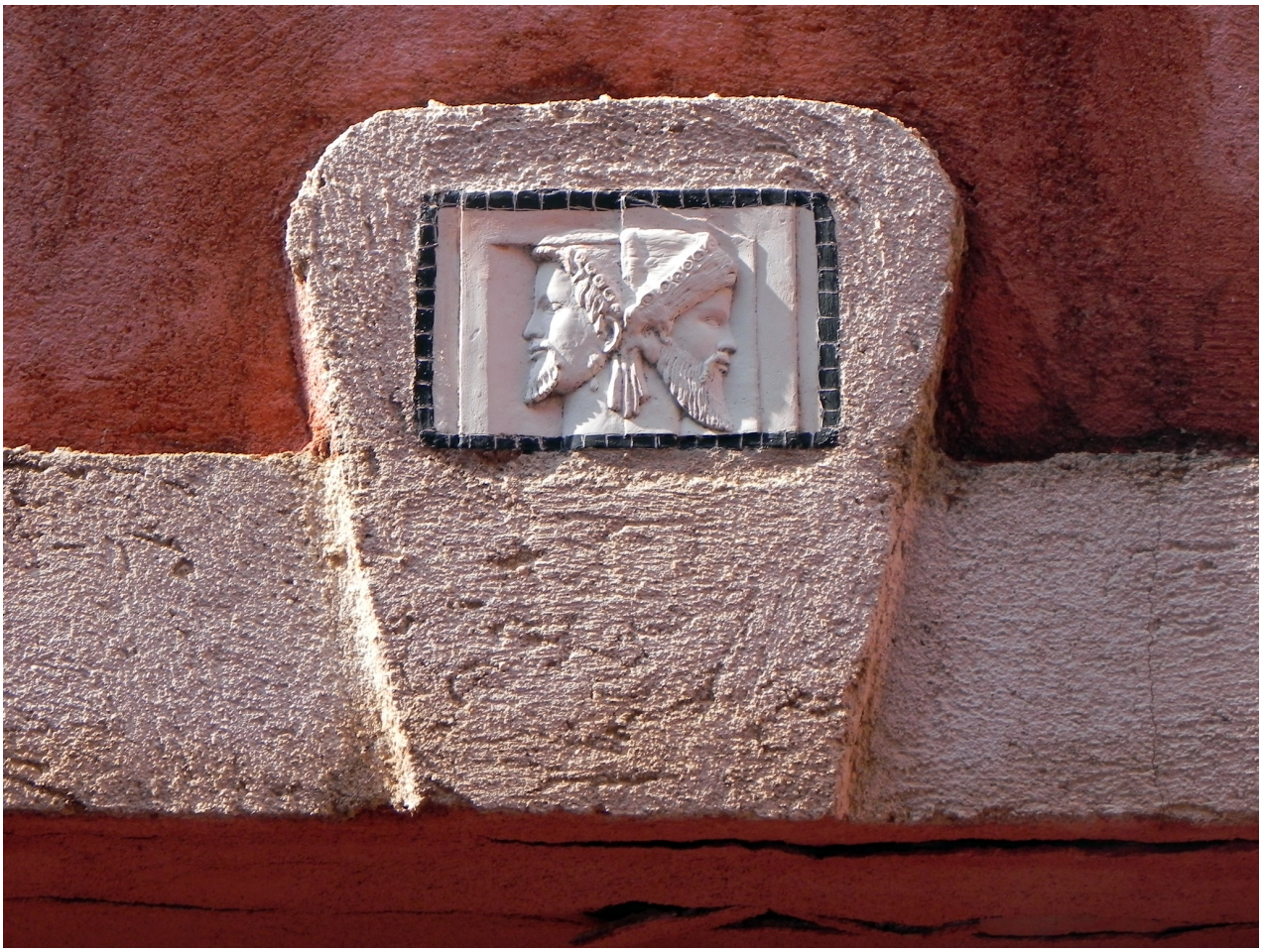
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Can the Unified Patent Court be impartial?

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The Unified Patent Court (UPC), a court of the European Union, will judge infringement and validity cases of the European unitary patent from 2023. The list of judges it published at the end of october includes staff from patent attorneys' offices and law firms working for industry, as well as from industry itself. This is a source of concern for some, including patent attorneys and lawyers.

The Unified Patent Court (UPC) is the European Union (EU) judicial body that will adjudicate cases of infringement and validity of the European unitary patent [1]. It is to be operational by 1er April 2023 [2]. Last October, the UPC published the list of 85 legal and technical judges, from different

EU countries, who will sit in first instance and on appeal. The Agreement provides in Article 16 the "*Appointment Procedure*" for judges. An Advisory Committee draws up a list of candidates and an Administrative Committee appoints the judges on the basis of this list. The Advisory Committee, itself appointed by the Administrative Committee, is composed of patent judges and practitioners of patent law and patent litigation (Article 14). The Administrative Committee is composed of one representative of each contracting EU Member State. The European Commission is represented at the meetings of the Administrative Committee as an observer (Article 12).

The UPC's "*ethical*" rules

34 legal judges, including some magistrates, and 51 technical judges will therefore be hired on a part-time basis by the UPC. The latter include national patent attorneys, european patent attorneys (EPO) and lawyers. In their day-to-day work, these individuals selected to serve as technical judges represent private clients from the industry and research sectors. The UPC has also appointed technical judges who are employed by companies in the same sectors.

The Agreement sets out in Article 17 the rules on the "Judicial independence and impartiality" of the court and judges. Paragraph 4 states: "*The exercise of the office of technically qualified judges who are part-time judges of the Court shall not exclude the exercise of other functions provided there is no conflict of interest.*". Paragraph 5 of the same Article 17 states: "*In case of conflict of interest, the judge concerned shall not take part in proceedings. Rules governing conflicts of interest are set out in the Statute*".

It is Article 7 ("*Impartiality*") of the Statute which lists the situations in which "*the judges may not take part in the proceedings of a case*". These situations refer to direct links that the judges might have with one of the parties involved in the litigation before the UPC:

"*(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 or 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".

An impartiality that is difficult to guarantee

The list of situations in Article 7 of the Statute, which are potential sources of conflict of interest, does not answer all the questions: even if he or she is not concerned by any of these situations, can a judge nevertheless not be influenced in his or her decision by personal interests? In other words, can he or she not have an interest in a UPC decision in favor of one party rather than the other?

Indeed, it can be anticipated that the UPC will have to rule on the validity of a major patent in the biotechnology sector, for example a method for modifying the genome. The outcome of such a decision could, depending on its legal significance, have a lasting impact on case law. If a technical judge believes that such a decision could be unfavorable to the industrial sector to which his clients belong, his thinking will naturally be influenced. However, the subject of case law seems to be perceived by the UPC as an important issue. Article 19 of the Agreement states: "*Regular meetings will be organised between all judges of the Court in order to discuss developments in patent law and to ensure the consistency in the Court's case law.*"

In order to guarantee the coherence of its future decisions and to reassure civil society, including industry, the UPC must give itself the means to be (as) absolutely impartial as possible. For example, to address the issue of conflicts of interest, one solution for the UPC would be to hire full-time technical judges. It should also be noted that the UPC does not shy away from calling on independent external expertise, following the example of the French court. Indeed, the European

judicial body"*may at any time appoint experts to provide specialised insight into particular aspects of the case*["*subject*" means the dispute that is submitted to a court for examination. Article 57.3 of the Agreement states: "*The court experts shall guarantee independence and impartiality. Rules governing conflicts of interest applicable to judges set out in Article 7 of the Statute shall by analogy apply to court experts*".

While technical questions could be addressed to such independent - and non - judgmental - experts, one wonders why the UPC has nevertheless chosen to include in its panel of judges national and European patent attorneys, lawyers and in-house counsels?

"And the named ones are...
The UPC has appointed its judges with the aim of covering the whole industrial sector. This list is published on the UPC website [3].
Some French national patent attorneys and lawyers are also among the chosen. We can mention Eric Enderlin (french and European attorney), Director of the Chemistry and Life Sciences Department of the firm Novagraaf, and Grégoire Desrousseaux (ex-french patent attorney and lawyer) whose firm works in the fields of chemistry, pharmacy, biochemistry and biotechnology.

As mentioned above, it is also surprising to see in the panel of judges in-house-counsels from the industrial sector. In the "*Chemicals and Pharmaceuticals*" group of the judges' list, for example, Rudi Goedeweeck of AGFA- Gevaert, John Meidahl Petersen of the Danish pharmaceutical company Lundbeck and Rainer Friedrich of CSL Behring are present. In other technology sectors, Bose, Orange, Nokia and 3M are also represented.
It is acknowledged that the choice of technical judges made by the UPC is questionable and disturbing at various levels. These potential conflicts of interest are even underlined by the people directly concerned. Marcel-Xavier Peigné, french and European patent attorney at the German law firm Hoffman Eitle states: *"I would say that even if there is no conflict [of interest], as a lawyer or a user of justice, it is always in your interest to set a precedent in one way or another, for a strategic case. So if you are a judge at the same time, it seems quite unfair!*" [4]. For Oscar Lamme of the law firm Simmons & Simmons: "*It was, however, somewhat surprising to find that many technical judges work as patent attorneys and/or lawyers in the private sector or industry. This obviously raises the question of how conflicts and impartiality will be dealt with?*" [5].
High public institutions are not necessarily irreproachable on a deontological level. For example, the ECHR (European Court of Human Rights), which between 2009 and 2019 appointed judges with direct links to Soros network NGOs [6]. What does this mean for the possibility of a biased jurisprudence of the UPC?

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[1] Unified
Patent Jurisdiction website (accessed 21
November 2022)]. The latter and the UPC are presented as "*the building blocks that will supplement and strengthen the existing centralised European patent granting system...and offer users a cost-effective option for patent protection and dispute settlement across Europe*".

The UPC is based on the "*Agreement on a Unified Patent Court*" (Agreement) [[Official Journal of the European Union, "Agreement on a Unified Patent Court", C175/1, 20 June 2013 (accessed 14 November 2022)

[2] European Patent Office, "When will the unitary patent system start working?" (accessed 14 November 2022)]

[3] Unified Patent Jurisdiction (UPC), ["Appointments of judges of the Unified Patent Court and elections of the Presidium"->https://www.unified-patent-court.org/en/news/unified-patent-court-judicial-appointments-and-presidium-elections], 19 October 2022 (accessed 14 November 2022)]. Of these, 18 will work on biotechnology, chemistry or pharmaceutical litigation. In the field of life sciences, and more particularly genome modification, the appointment of Casper Struve,

representing the Danish patent law firm Zacco (DK), is noteworthy. The latter is one of the main patent attorneys for the French company Cellectis, managing more than 80 patent families for it, including those covering the Talen technology [[<authors_article5347>

[4] Juve patent, "Patent attorney dominance among UPC technical judges leads to conflict debate", 27 October 2022 (accessed 14 November 2022)

[5] *Ibid.*

[6] Journalism Observatory, "Les juges Soros de la CEDH et le silence gêné des quotidiens français de gauche", 14 May 2021 (accessed 21 November 2021)

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