

Kluwer Patent Blog

The UPC – Hopes and Headaches

Thorsten Bausch (Hoffmann Eitle) · Friday, October 21st, 2022

October 19, 2022 was a special day. It was the first day when the [UPC website](#) finally announced the names of the UPC's first 85 judges. JuVe's journalists quickly did their homework and provided further information on the origin and previous careers of these judges [here](#). The overall picture is that the UPC recruiters obviously – and fortunately – prioritised relevant experience and quality in their choice of the judges over any other considerations. In regard to Germany, I think it is fair to say that the quality and experience of the judges picked for the UPC is outstanding – we clearly sent an A-team. I have heard and read similar comments from colleagues from other countries with a significant number of IP cases. All in all, this looks very good. Concerns about quality of the judges of the Unified Patent Court appear unfounded, at least for now, and the new court has indeed deserved a lot of confidence to begin with. Congratulations to all new judges and to their consummate recruiters!

That said, let me pour some water into the wine. The concept of part-time judges gives me a bit of a headache in the context of a court as important as the Unified Patent Court.



My understanding is that many legal and all technical UPC judges will only work in part-time positions at this moment. While I completely understand why this solution was chosen for the initial stage of this court when it is pretty much any one's guess how many cases the Court will actually receive per year, it does not seem to me to be a sustainable solution in the long run. What I am mainly concerned about in this regard are those technical judges who are at the same time patent attorneys (and mostly partners) from IP law firms or from industry, i.e. from entities that inevitably have their own economic interests. The percentage of technical part-time judges in private practice is quite significant:

Biotechnology: 6 of 8

Chemistry/Pharma: 6 of 10

Electrical Engineering: 5 of 9

Mechanical Engineering: 11 of 16

Physics: 5 of 8

Most of them come from renowned and relatively big IP law firms or from big companies such as Airbus, Bose, 3M, Agva-Gevaert, Lundbeck, Orange, Nokia et al. This is understandable, as technical judges are actually a fairly rare species in many countries and experienced patent attorneys are most akin to them. It is also true that the part-time judge model has been practised in Switzerland for quite a while now, even though I am not completely convinced of its success. Perhaps I experienced too many recusals, some of them even during a litigation, which is always an unpleasant surprise. Anyway, if I am informed correctly, only Germany, Denmark and Sweden have technical judges in a stricter sense, so you would not expect technical judges to come from important UPC countries such as France, Italy and the Netherlands.

Before I continue, I should probably disclose that I have deliberately not applied for a position at the UPC for myself, even though I of course felt the attraction of being part of this exciting new European court. One of the considerations that had me decide against applying was the concern that I would probably have to recuse myself in a substantial chunk of or even in the majority of interesting cases for which I might have technical competence. This is because my firm is big enough that there is a certain likelihood that we have represented one of the parties, or their affiliates, licensees or the like, some time in the past. Even if this was not the case, I would still be concerned about economic connections between the parties of the lawsuit and clients of my firm. In addition I also worried about myself: would I really be able to act as an impartial judge in a case where one of the parties was represented by a (patent) attorney colleague who just recently happened to win an important case against me and my client for no good reason (because my client was in the right, of course :). *Vice versa*, how would the (patent) attorney of this party view my judicial independence in such a scenario, particularly if he then happens to lose his lawsuit before me as a judge? There are surely many scenarios where concerns like this might come up. And even if I chose to retire from my firm and only work as a part-timer for the UPC, is that enough, or should I better completely sever all economic and professional connections to my firm in order to appear absolutely neutral?

The rules of compliance for the (part-time) judges of the UPC and, even more, their implementation in practice will therefore be of utmost importance. I hope and expect that the court will be mindful that its reputation must be beyond reproach, and that suspected partiality is about the worst that could happen to it. I could therefore imagine that there will be quite a lot of cases where judges will have to (or should better) recuse internally when they are asked to take on a certain case. Otherwise, i.e. if the judges do not take the fear of suspected partiality serious enough, ugly and time-consuming discussions between the parties and the court could ensue (in the worst case), which in the end only prolong the proceedings and help no one.

Fortunately, some of the newly appointed technical judges might not face such problems. These include, in particular, (technical) judges who have been and continue to be working in judicial positions in their home countries, e.g. at the German Federal Patent Court. I dare speculate that these technical judges will have to shoulder more cases in the long run than the others, but this remains of course to be seen.

For now, we can only wish the Unified Patent Court a good start some time in 2023 and the best of success in resolving complex patent matters on a European scale in a fair, balanced and efficient way.

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