

# Kluwer Patent Blog

## Amended Guidelines on Independence of the Swiss Federal Patent Court became effective on 1 January 2015 – An inspiring model for the UPC?

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As posted [here](#) the Swiss Federal Patent Court had to amend its Guidelines on Independence after the Swiss Federal Supreme Court had lifted a decision of the Federal Patent Court concerning the recusal of one of its non-permanent judges on 27 August 2013 in a case concerning the Nespresso coffee capsules.

The [revised Guidelines on Independence](#) became effective on 1 January 2015.

The revised Guidelines are not only interesting for the judges and the parties that are involved in proceedings before the Swiss Federal Patent Court but also for those who have to give thought to the implementation of article 7 of the Statute of the Unified Patent Court for the judges pool of the Unified Patent Court.

The Guidelines on Independence of the Swiss Federal Patent Court are not binding but they guide the practice of the Federal Patent Court and the way the Federal Patent Court interprets the pertinent provisions of article 30 of the Swiss Constitution and in particular of article 47 of the Swiss Code of Civil Procedure.

Article 30 para. 1 (first sentence) of the Swiss Constitution provides that any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court.

According to article 47 para. 1 of the Swiss Code of Civil Procedure, judges shall recuse themselves if:

- a. they have a personal interest in the case;
- b. they have acted in the same case in another capacity, in particular as member of an authority, legal agent, expert witness, witness or mediator;

[...]

- f. they may not be impartial for other reasons, notably due to friendship or enmity with a party or his or her representative.

Article 4 of the revised Guidelines on Independence shows how the Swiss Federal Patent Court plans to implement the aforementioned rules after the decision of the Federal Supreme Court dated 27 August 2013:

According to article 4 of the revised Guidelines a Court member shall recuse himself or herself if they have a personal interest in a matter as defined in Article 47 para. 1 lit. a, b or f of the Swiss Code of Civil Procedure. The revised provision particularly mentions the following reasons:

- a. The Court member is or has been, within the past year, with a governing body or been an employee of one of the parties to the dispute or is or was otherwise able to exert a perceptible influence on one of the parties to the dispute either in a personal capacity or through a company that the member works for outside the Federal Patent Court, or holds significant assets or other interests in one of the parties to the dispute or a closely affiliated company or has a vested interest in the outcome of the matter in dispute.
- b. The 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.
- c. The Court member or the company in which he/she works advises, regularly advises or has advised within the past year one of the parties to the dispute in another matter.
- d. The member or the company that the member works for advises, regularly advises or has advised within the past year a third party against one of the parties to the dispute in another matter.
- e. The member has publicly stated an opinion on the matter, whether in a written, verbal or other manner; this shall not extend to positions of a fundamentally general nature or publications of a legal or technical nature without a direct link to the matter.
- f. The member or the company that the member works for is or was acting in an administrative capacity as the contact person for the patent in dispute.
- g. The member or the company that the member works for is or was directly mandated within the past year or regularly mandated by one of the parties to the dispute as the contact person for maintenance of intellectual property rights.

In addition to the revision of article 4, article 5 of the former Guidelines on Independence has been deleted. The deleted article provided that purely administrative activities for achieving or maintaining the validity of the Swiss part of a European patent of one of the parties (which was not the patent in dispute) did not constitute a ground for recusal. In the revised version such activities are explicitly mentioned in the list of special grounds for recusal (article 4 lit. g of the Guidelines on Independence).

Article 4 of the revised Guidelines on Independence extends the grounds for recusal explicitly to the law firm or patent attorney firm and the company for which the court member works. To enable the parties to find the necessary information the Swiss Federal Patent Court has

disclosed [on its website](#) the law firms, patent attorney firms and companies of the part-time judges of the Federal Patent Court.

In addition, the Federal Patent Court [instructs](#) the parties that are involved in a case before the Court how to search in the official patent, trademark and design registers to determine whether a judge, his/her employer or another employee of the judge's law firm is linked to parties in a given dispute or who may be engaged in business with the concerned judge in a way that may potentially compromise that judge's impartiality.

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This entry was posted on Monday, January 5th, 2015 at 10:03 pm and is filed under [Procedure, Switzerland](#)

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