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Discordant Frequencies: Is the UPC Truly a Jurisdiction?

Matthieu Dhenne (Dhenne Avocats) · Tuesday, June 3rd, 2025

Yesterday, I shared some early figures from the UPC Court of Appeal, offering a glimpse into how the Court operates two years after its launch. But those reflections lingered long after I closed my laptop. They kept me up — long enough to return to a thornier, more theoretical question that has remained unresolved since the heated debates of 2012: If the UPC is part Rammstein (precision-engineered Teutonic riffs) and part The Clash (raw London punk energy), can it truly be considered a "*court or tribunal of a Member State*" within the meaning of Article 267 TFEU?

Article 267 TFEU empowers "*any court or tribunal of a Member State*" to request preliminary rulings from the CJEU, establishing a structural and functional test that the CJEU has refined over decades of case law—Vaassen-Göbbels (Case 61/65, 30 June 1966), Nordsee (Case 102/81, 23 March 1982), CILFIT (Case 283/81, 6 October 1982), Corbiau (Case C-24/92, 30 March 1993) and Häupl (Case C-246/05, 14 June 2007) draw **two intertwined lines: a structural one (established by law, permanent, exercising compulsory inter partes jurisdiction, applying binding rules, independent) and a functional one (integrated in a Member State's legal order so its rulings are regarded as domestic judicial acts). It should be noted that these two aspects (structural and functional) are closely linked, as can be seen, for example, in the requirement for independence, which has both a functional and a structural dimension.**

Structurally, the UPC appears, at first glance, to meet the main criteria. Created by the UPCA signed on 19 March 2013, it is permanent; enjoys exclusive jurisdiction over unitary patents and most classic European patents unless opted out (Article 32 UPCA); and its judges swear independence under Article 21 UPCA. Panels sit permanently, local divisions cater to routine cases while the central division handles full revocations.

However, the administrative committee, nevertheless raises significant questions.The Administrative Committee exercises very broad powers, encompassing regulatory, structural, budgetary, and judicial functions, pursuant to Articles 11 to 17 of the UPCA and the Statute annexed thereto. Thus, this Committee concentrates normative (e.g. adoption of the Rules of Procedure and internal regulations), budgetary (e.g. adoption of the Court's budget and determination of judicial remuneration), and judicial functions (e.g. appointment of judges) within a single intergovernmental body, without any external oversight or institutional independence from the Contracting Member States. This configuration raises serious concerns regarding its compatibility with the standards of judicial independence and impartiality developed by the Court of Justice of the European Union (CJEU). In *ASJP* (C?64/16, §§ 44–45), the CJEU held that judicial independence requires statutory rules ensuring the body's impermeability to external

pressures and its neutrality with respect to the interests before it. This includes clear rules on appointment, tenure, and protection against dismissal. In *LM* (C?216/18 PPU, paras 66–68), the Court further specified that judicial independence demands an objective and transparent framework capable of dispelling any legitimate doubts as to a court's institutional autonomy, including vis-à-vis the political authorities. The absence of an independent supervisory mechanism, the closed nature of deliberations, and the concentration of regulatory and judicial powers within the Administrative Committee appear difficult to reconcile with these Union law requirements.

The method for selecting judges raises particularly legitimate concerns. Article 17 UPCA prescribes that a Nominating Committee—comprised of representatives of each Contracting Member State and at least one representative of the CJEU—reviews applications and proposes candidates, before an Advisory Committee of patent experts assesses qualifications and passes opinions to the Administrative Committee, which formally appoints judges by common accord (See Regulations Governing the Conditions of Service of Judges, the Registrar and the Deputy-Registrar of the Unified Patent Court). This can give the appearance that the very bodies benefiting from centralization pick their own judges behind closed doors, lacking transparency and concentrating influence.

In fine, these observations cast doubt on the very independence of the Unified Patent Court within the meaning of the CJEU's settled case law. As the Court recalled in *Associação Sindical dos Juízes Portugueses* (*ASJP*, Case C?64/16, 27 February 2018), judicial bodies applying Union law must offer guarantees "*sufficient to dispel any reasonable doubt*" as to their independence and impartiality (§44). This includes not only functional independence, but also structural safeguards, such as objective and transparent appointment procedures (§45–46). However, the UPC's system of judicial appointments—laid down in Article 17 UPCA—concentrates effective control in the hands of intergovernmental bodies that also govern and benefit from the Court's centralised architecture. Judges are nominated by a committee composed of Member State representatives and one CJEU observer, assessed by a group of patent experts, and finally appointed by the Administrative Committee acting by common accord. This opaque and largely political process raises concerns about institutional self-selection and a lack of external checks, potentially undermining public confidence.

The situation is further complicated by the presence of part-time technical judges who often maintain ties to private patent practice. While they are prohibited from representing clients before the UPC, their ongoing professional affiliations raise legitimate concerns regarding conflicts of interest and the dilution of judicial impartiality—particularly in light of the CJEU's emphasis on the appearance of independence as a condition of mutual trust (*LM*, Case C?216/18 PPU, 25 July 2018, §67–68). It has been suggested that part-time technical judges maintaining links to private practice should not only consider stepping down, but that a cooling-off period should also apply to them and their firms after resignation. (See here). The rationale is that, having been formally appointed and having participated in judicial training sessions where they may have accessed non-public internal information, they could not immediately return to representing clients before the UPC without raising legitimate concerns. No such safeguard has been implemented to date. Yet introducing a post-resignation restriction of this kind would likely have reinforced both the appearance of independence and the overall legitimacy of the Court. Yet many retain private patent-practice ties, sparking concerns that their ongoing connections to private practice may dilute true public authority (See Patent attorney dominance among UPC technical judges leads to conflict debate).

Moreover, a court only complies with the right to an effective access to a court if it is independent, impartial, and operates within an adequate institutional framework (*ASJP*, Case C?64/16, 27 February 2018, §§41-45 and *LM*, Case C?216/18 PPU, 25 July 2018, § 60-68). This is all the more critical here, as the right to an effective access to a court itself raises other questions. This right, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and reflected in Article 19(1) TEU, requires Member States to ensure effective judicial protection in the fields covered by Union law. Let's expore an example. I'll borrow at this end the name "Dabus"—not to spark another metaphysical debate on AI personhood, but to follow a flesh-and-blood inventor with a limited wallet and a ticking clock. Dabus can launch a revocation action directly at the UPC under Rule 46 RoP for a €20 000 fixed fee, reducible by 40 percent for micro and small entities under Rule 370 RoP. Alternatively, during the transitional period, she could sue in a national court under Articles 71b–71d of Brussels I Recast, which require the second?seized forum to pause rather than automatically yield. Dabus therefore faces strategic cost and timing calculations: she must weigh the compressed UPC timeline and potential uniformity of a single forum against the high fee—even reduced to €12 000—and the possibility that divergent decisions might arise. Large multinationals routinely hedge by filing in both UPC and national tracks; for someone like Dabus, gambling five?figure sums on parallel proceedings is often impractical. However, legal uncertainty affects everyone, and not only Dabus.

The Court raises other questions from a functional point of view. The UPC's authority springs from the UPCA—an instrument outside the EU treaties—and its panels are not embedded within the hierarchy of any single Member State. As a "*court common to several Member States*" it resides supranationally, lacking the traditional "*rootedness*" in domestic law that the CJEU demands for preliminary-reference power. The EU legislator tried to stitch up this gap by amending Regulation 1215/2012 with Regulation 542/2014—adding Articles 71a–71d to deem the UPC "*a court of a Member State*" for Brussels I purposes and pledging that the UPC "*shall cooperate*" with the CJEU as a national court would (Article 21 UPCA). Yet this legislative embroidery remains, to critics, theoretical until the CJEU actually entertains a UPC reference. Does that statutory framing suffice? It is true that every contracting state ratified the UPCA by statute, domestically embedding the UPC and obliging it to refer questions.

In contrast to the Benelux Court of Justice—which operates in functional subordination to national supreme courts and remains embedded in their judicial hierarchies—the Unified Patent Court (UPC) effectively replaces national courts in the field of patent litigation. It exercises exclusive jurisdiction over a significant body of private law across multiple Member States, and yet it remains institutionally detached from any single national system, **y**et it remains institutionally detached from any single national system. Despite this far-reaching role, a fundamental constitutional uncertainty persists: is the UPC truly a "court or tribunal of a Member State" within the meaning of Article 267 TFEU? And more specifically, can it be regarded as a "*common court*" established by the Member States and integrated "*within the judicial system of the Union*" as contemplated in *Recital 8* of the UPCA? These questions remain unanswered. To date, the CJEU has not been seized of any preliminary reference from the UPC, and has therefore not confirmed—either implicitly or explicitly—that the Court meets the structural and functional standards required under Union law. As a result, the bridge that was meant to link the UPC to the EU judicial architecture—though engineered in steel and declared operational—remains untested. Its foundations rest more on legal design than on institutional practice. Until the CJEU accepts and adjudicates a reference from the UPC, its status as a true "*common court*" will remain theoretical. Its legitimacy will thus continue to depend less on what it claims to be, and more on how it is received, treated, and recognized within the constitutional fabric of the Union.

So where does the riff resolve? In my insomnia-induced impression, the EU and the UPCA's architects have done just enough to give the UPC a plausible claim to Article 267 status—but not enough to silence the feedback. The UPC's standing remains somewhere between a German-built tube amp and a battered British Telecaster: solid engineering, raw power, but plugged into a socket few have tested. Inventors like Dabus—this time, the real ones, not the invented—may still find the volume intimidating, and even headline acts could confront feedback if national and UPC interpretations drift apart. For now, the UPC continues to play its part, the CJEU observes discreetly from backstage, and practitioners follow the developments, wondering which direction the next judicial solo might take.

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