

ARTICLE

UPC ALREADY IN INFRINGEMENT OF ARTICLE 6 ECHR ?

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Is the UPC appeal court so in its youth that it has not yet learned to count up to 5 (at least without the help of its technically qualified judges) ?

The Unified Patent Court, UPC, is a brand-new judicial court that opened its doors in June 2023 to deal with European patent infringement. The Unified Patent Court Agreement (UPCA) instituting this court explains that it should be devised to ensure expeditious and high-quality decisions, following its the 6th considering of the UPCA. The quality, and the highest one, is also referred to as for the selection of judges that compose this court following article 15(1) of the UPCA.

Nonetheless, despite the checked quality of the selected and appointed judges, the aim of expeditious decision seems to have gain the upper hand over legal standard: with less than a dozen of decisions issued by the internal Court of Appeal of the UPC, this Court of Appeal already appears to have failed to follow the rule of law for the composition of the Court of Appeal's panels.

August & Debouzy's patent litigation team together with its European Law Brussels' Office have analyzed the legal situation at stake.

The UPCA is supposed to rule the composition of the panels of the Court of Appeal

UPCA organizes the composition of the UPC judicial panels, notably at its internal Appeal Court level. Article 9 of the UPCA is unambiguous, "any panel of the Court of Appeal shall sit in a multinational composition of five judges". Three of these judges are legally qualified and two are technically qualified. The only exception to this principle is recited in paragraph 2 of the same article but for the sole purposes of actions under Article 32(1)(i), i.e. "*actions concerning decisions of the European Patent Office in carrying out the tasks referred to in Article 9 of Regulation (EU) No 1257/2012*" (In short, actions relating to the EPO's tasks in relation to the unitary effect). The objective of these texts is clear: to enable the litigant to obtain a decision of the highest quality in a matter as complex and intricate as patents.

Irrespective of this straightforward principle and exception, the UPC's Court of Appeal already issued five rulings^[1] in which only three legally qualified judges were involved without falling within the exception established by Article 9(2) UPCA despite the fact that it is usually admitted that exception to a principle should be construed narrowly relative to this principle.

Court of appeal decisions invoke effectiveness to step away from the statutory composition of the five-judge panels

In three of these decisions limiting the appeal panel to only 3 judges, the Court of Appeal attempts to justify this apparent breach of the word of law, with an identical justification. It is then explained that three legally qualified judges can adjudicate the question at issue (here the language of the proceedings) because:

- There are no technical issues.
- By way of analogy, the logic of the rules governing the Court of First Instance, where such a question is dealt with by only one legally qualified judge, can be applied to the Court of Appeal.
- The Court must ensure different principles: cost effectiveness, expeditious decisions, proportionality, flexibility, fairness, and equity.

The reasoning given by the Court of appeal seems to cover in practice a lack of technical human resources that the Court admits only half-heartedly: "*since otherwise one or several weeks would have to be added for the purpose of allocating two technically qualified judges with qualifications and experience in the field of technology concerned*".

As we know, the Court of Appeal is required to deliver its decisions within a short timeframe. As a result, for the Court, the aim of celerity and efficiency seems to justify the means.

One can argue that it is perfectly right that the aim of efficiency could be relied on when reading the UPCA. In particular, Article 41.3 recites that "the Rules of Proceedings (RoP) *shall guarantee that the decisions of the Court are of the highest quality and that proceedings are organised in the most efficient and cost-effective manner*".

But is this reference to efficiency be sufficient here to move away 2 judges of a panel?

Review of the ECHR's caselaw unlikely to allow derogating from the UPCA five-judge panel principle

Yet Rule 247 of the RoP of the UPCA provides that a "fundamental procedural defect" within the meaning of Article 81 §1 of the Agreement is "(e) a violation of Article 6 of the Convention for the Protection of Human Rights and



Fundamental Freedoms" i.e. of the European Convention of Human Rights (ECHR)

And Article 6, §1 of the ECHR states that: "[...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.". The ECHR is interpreted by the European Court of Human Rights, which has notably clarified the notion of a "court established by law":

"[...] a tribunal that is not established in conformity with the intentions of the legislature will necessarily lack the legitimacy required in a democratic society to resolve legal disputes [[2]]"[3].

"the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the compliance by that tribunal with the particular rules that govern it [[4]] and the composition of the bench in each case [5]"[6]

" A review of the Court's existing case-law reveals that compliance with the requirement of a "tribunal established by law" has so far been examined in a variety of contexts – under both the criminal and civil limbs of Article 6 § 1 – including, but not limited to, the following: [...] (ix) delivery of a judgment by a panel which had been composed of a smaller number of members than that provided for by law [[7]]

As a matter of example caselaw of the ECHR:

- a decision handed down by a panel of five judges when the law expressly provided for seven constitutes a violation of article 6, §1 of the ECHR (ECHR, April 2, 2013, MOMČILOVIĆ v. SERBIA, no. 23103/07).
- a trial panel that did not include the number of judges enshrined in the law is contrary to Article 6, §1 of the ECHR (ECHR, December 17, 2013, Jenita Mocanu v. Romania, no. 11770/08).

The ECHR therefore verifies that the law applicable to the court and its composition has been respected. In the absence of any express provision for the Court of Appeal to be composed of three judges (apart from article 9.2 of the Agreement), a plea based on the violation of article 9 of the Agreement could therefore be set up as a violation of article 6 of the ECHR.

Even if article 41.3 relies on effectiveness, it further adds relative to the proceedings "They shall ensure a fair balance between the legitimate interests of all parties. They shall provide for the required level of discretion of judges without impairing the predictability of proceedings for the parties"

Reducing the number of judges from 5 to 3 is certainly more efficient and economical, but without an express provision in the Agreement (nor in the RoP) allowing the composition of the panel to be changed, it seems that the principle of "the predictability of the proceedings for the parties" is compromised. By disregarding this principle set in article 41 § 3 of the Agreement, there is even less justification of derogation to article 9 UPCA, and thus it further characterizes the violation of article 6 of the ECHR.

UPC also in breach of Article 47 of the Charter ?

The 13th recital of the Agreement refers to Union law as follows: "RECALLING the primacy of Union law, which includes the TEU, the TFEU, the Charter of Fundamental Rights of the European Union [...] and 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 24 of the Agreement continues: "In full compliance with Article 20, the Court shall base its decisions in any case brought before it under this Agreement on: a) Union law [...]".

Union Law includes the Charter of Fundamental Rights of the European Union (the Charter).


Article 47 of the Charter states that: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law". Articles 47 of the Charter and 6 of the ECHR overlap in many respects, such as the notion of "court established by law". Indeed, the Court of Justice of the European Union (CJEU), interpreting the Charter, also refers to the case law of the European Court of Human Rights on this point[8].

Article 52.1 of the Charter states that: "Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essential content of those rights and freedoms. In accordance with the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".

It is therefore possible to restrict the protection of rights conferred under Article 47 of the Charter if the following conditions are met:

- The limitation must be provided for by law;
- It must respect the substance of the right or freedom in question;
- It must be justified by an objective of general interest recognized by the EU or necessary to the need to protect the freedoms of others;
- It must comply with the principle of proportionality.





Faster, more efficient procedures (principles which have a legal basis in the UPCA) could form the basis of a restriction on the fundamental right enshrined in Article 47 of the Charter, since it could constitute a legitimate objective which satisfies the proportionality condition. However, this faster and more efficient procedure, which in this case translates into a reduction in the size of the panel, must be provided for by a legal provision, which is not the case if article 9 UPCA provides for a single case in which the court of appeal does not have to rule with a panel of five judges (article 9.2), this exception is limited in scope. It therefore seems that there is no sufficient legal basis to allow the Court of Appeal to decide to reduce the numerical composition of the bench in a case other than article 9.2.

The Court of Appeal's motivation therefore seems unconvincing to comply with the UPCA's procedural requirements.

UPC technically qualified judges are not just technical experts, they are also judges

The fourth and fifth decision limiting the appeal panel to only 3 judges is not even discussing the reasons why the legal issue at stake (the intervention of a third party^[9] and respectively the proper service of a defendant without giving access to exhibits^[10]) should be dealt with a three-judge panel rather than a five-judge panel, Therefore these decisions are even more failing to have legal basis.

It should be mentioned that the legal question of the fourth decision (intervention of a third party) could have dealt (legally) with a single judge (the judge -rapporteur) in appeal, but this single judge has decided to refer the question to a full panel (following Rule 331.2), which full panel should have been of five judges in appeal and not only of three judges.

This practice of the Court of Appeal is particularly regrettable since the inclusion of technical qualification in the panels of the Court of Appeal was not limited to provide the court with technical skills. Such an inclusion was ensuring that the panels of the Court of Appeal included two technical qualified judges, each one with a vote.

Here, if this practice to exclude technically qualified judges were to be generalized it will give rise of legitimate suspicion that the legally qualified judges only see technically qualified judges as technical experts, that the Court is free to consult or not.

UPCA noncompliance is the problem, UPCA rehearing proceeding is the solution?

Yet, this failure in a proper reading the UPCA, can still be cured by UPC itself, when this court will apply article 81 of UPCA.

Indeed the UPCA is organizing a rehearing proceeding, especially in "event of fundamental procedural defect" under article 81(1)(b) AUPC, which explicitly gives breach of article 6 ECHR as an explicit example (see Rule 257(e) of the Rule of Proceedings, RoP).

For the decisions that have already been issued, and that are discussed here, unless for one party to have raised this procedural defect before the wrongly composed panel, it seems that the rehearing proceeding is closed. Indeed Rule 248.1 RoP recites that "*an Application for rehearing based on the ground of a fundamental procedural defect is only admissible where an objection in respect of the procedural defect was raised during the proceedings*"

Efficiency, again, is UPC's motto.

This motto applies to the court and to the parties that then themselves should be efficient in reminding the court that its law says to compose appeal panels with 5 judges.

[1] Order, 20 December 2023, UPC_CoA_478/2023, App_594342/2023.

Order, 18 December 2023, UPC_CoA_472/2023, App_594327/2023.

Order, 19 December 2023, UPC_CoA_476/2023, App_594339/2023.

Order, 10 January 2024, UPC_CoA_404/2023, App_584498/2023.

Order, 13 October 2023, ORD_580110/2023, UPC_CoA_320/2023, Apl_572929/2023.

[2] *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002

[3] ECHR, December 1, 2020, *Guðmundur Andri Ástráðsson v. Iceland* n°26374/18, , paragraph 211

[4] *Sokourenko et Strygoun c. Ukraine*, nos 29458/04 et 29465/04, § 24, 20 juillet 2006

[5] Richert c. Pologne, no 54809/07, § 43, 25 octobre 2011, et Ezgeta c. Croatie, no 40562/12, § 38, 7 septembre 2017

[6] ECHR, December 1, 2020, Guðmundur Andri Ástráðsson v. Iceland n°26374/18, paragraph 213

[7] *Momčilović v. Serbia*, no. 23103/07, § 32, 2 April 2013, and *Jenița Mocanu v. Romania*, no. 11770/08, § 41, 17 December 2013

[8] EUR-Lex - 62018CJ0542 - EN - EUR-Lex (europa.eu), paragraph 73

[9] Order, 10 January 2024, UPC_CoA_404/2023, App_584498/2023.

[10] Order, 13 October 2023, ORD_580110/2023, UPC_CoA_320/2023, ApI_572929/2023.

