The European Patent Reform – The structural lack of judicial independence and impartiality at the Unified Patent Court

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Despite the well-known legal shortcomings, the Unified Patent Court ("UPC") commenced operations on 01/06/2023. It is clear that the obvious problems will not disappear simply by ignoring them as persistently as possible. Sooner or later, they must and will end up before a constitutional court and/or the CJEU. In this context, a recent decision by the UPC Court of Appeal dated 06/10/2025 (Roku International B.V. et al. v. Dolby International AB et al., UPC_CoA_288/2025 et al.) is very remarkable, in which the court refused the appellants' request for a referral to the CJEU. The court's handling of the matter demonstrates not only the protagonists' fear of a review of the UPCA by the CJEU, but also, in particular, a structural deficit in the independence and impartiality of the UPC judges.

I. The proceedings at the UPC Court of Appeal

In the proceedings Roku International B.V. et al. v. Dolby International AB et al. before the UPC Court of Appeal ("UPC CoA"), the two appellants ("Roku") are being sued before the Munich Local Division for infringement of several patents. They have denied infringement and requested that the action be dismissed as inadmissible or, alternatively, that a question be referred to the CJEU for a preliminary ruling on the compatibility of the Agreement on a Unified Patent Court ("UPCA") with Union law.[1]

Insofar as relevant here, the appellants based their appeal – as evidenced by the court's order – on, among other things, the UPC's lack of jurisdiction due to the UPCA's incompatibility with Union law, as a result of which they held the guarantee of the lawful judge violated. They argued that it could not be ruled out that the composition of various UPC chambers would have been different if there had been a London Central Division. The independence and/or impartiality of the Local Division judges was apparently not questioned.[2] The Local Division rejected these objections, whereupon the appellants lodged an appeal and requested that the order be set aside and the action dismissed as inadmissible, upholding the objections, or, alternatively, that the proceedings be stayed and *"the question of the compatibility of the UPCA with Union law"* be referred to the CJEU.[3]

II. The decision by the UPC Court of Appeal

The UPC CoA rejected the appeal.

1. No incompatibility of Art. 31 f. UPCA with Art. 19 TEU and Art. 267 TFEU

Firstly, the court held that the assignment of jurisdiction to the UPC pursuant to Art. 31 UPCA in conjunction with Art. 71a ff. Brussels Ia Regulation and Art. 32 UPCA would not interfere with the division of roles between the CJEU and the national courts pursuant to Art. 19 TEU and Art. 267 TFEU.[4] The appellants' argument that the UPC was not a court of a Member State but an international court was regarded misguided:[5]

> *"The UPC is a court common to the Contracting Member States pursuant to Art. 1, paragraph 2, UPCA (see Court of Appeal, order of 3 September 2024, APL_21943/2024, UPC_CoA_188/2024, Aylo v. Dish, para. 10). It is true that the Unified Patent Court is a court that was established on the basis of an international agreement – the UPCA – i.e. on the basis of international law.*
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> *However, as the Court of Justice of the European Union has already ruled for the Benelux Court of Justice, there is no good reason why a court common to a number of Member States should not be able to submit questions to the CJEU (judgment of 4 November 1997, Parfums Christian Dior, C-337/95, ECR I-6013, EU:C:1997:517, paras 21-23; judgment of 14 June 2011, Miles and Others C-196/09, EU:C:2011:388, paragraph 40; judgment of 6 March 2018, Achmea, C-284/16, ECLI:EU:C:2018:158, paragraph 47)."*

The CJEU's finding in its Opinion 1/09[6] that the original draft agreement was incompatible with Union law was based on the consideration that[7]

> *"…the situation of the Community Patents Court envisaged by the draft agreement submitted to the Court of Justice would have differed from that of the Benelux Court of Justice. It was emphasized that the Benelux Court of Justice is a court common to a number of Member States and is thus situated within the judicial system*

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[1] UPC CoA, Roku Internat. B.V. et al ./. Dolby International AB et al, UPC_CoA_288/2025 et al, Order of 06/10/2025, paras. 1 f.
[2] Fn. 1, para. 3.
[3] Fn. 1, para. 5.
[4] Fn. 1, para. 23.
[5] Fn. 1, para. 25 f.
[6] CJEU, Opinion 1/09 of 08/03/2011.
[7] Fn. 1, para. 27.

> *of the European Union, and hence its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union (Opinion 1/09, para. 82).”*

The UPC CoA holds the UPC to be a court equivalent to the Benelux Court of Justice, since the UPCA had been concluded by EU Member States only and that it was clear from Opinion 1/09 *“that at any rate the creation of such a court common to a number of EU Member States is permissible”*.[8] Such a court was the UPC:[9]

> *“For the UPC to be classified as a court common to a number of Member States, it is sufficient that the UPC has the task of ensuring that the legal rules common to the Contracting Member States are applied uniformly, and that it has a sufficient connection with the judicial systems of the Contracting Member States (see judgment of 14 June 2011, Miles and Others, C 196/09, EU:C:2011:388, para. 41; judgment of 6 March 2018, Achmea, C-284/16, ECLI:EU:C:2018:158, para. 48).”*

Such connection would not require the UPC to rule as an intermediate instance in national court proceedings:[10]

> *“Contrary to Roku’s opinion, such a link with the judicial systems does not require the UPC to rule as an intermediate instance in proceedings pending before national courts, as is the case with the Benelux Court of Justice. Nothing to the contrary emerges from the Achmea and Miles decisions of the Court of Justice of the European Union. In those decisions, the CJEU determined that a court common to a number of Member States did not exist because there was no comparability with the Benelux Court of Justice because in each case the court in question ‘does not have any <u>such</u> links with the judicial systems of the Member States’ (underlining added). This demonstrates that a decision as an intermediate instance is not necessary; rather, a comparable connection to the judicial system of the Member States is sufficient.”*

What, in the opinion of the UPC CoA, should this “comparable connection” look like? The court states:[11]

> *“In this respect, the UPC is comparable to the Benelux Court of Justice. This is because it has sufficient links with the judicial systems of the Member States. The fact that the UPC is a court common to the Contracting Member States has been expressly clarified by the Contracting Member States in Art. 1 UPCA. This alone is sufficient for it to be qualified as a court common to the Contracting Member States (in the case of derivation from the constitution of a Member State, see the CJEU’s decision in Achmea, para. 44). Accordingly, the UPC is considered, for the purposes of that Regulation, to be a court of one of the Contracting Member States – and thus part of its legal system – as a court common to the Contracting Member States pursuant to Art. 71a Brussels Ia, when the UPC exercises jurisdiction on the basis of Art. 32(1) UPCA in matters falling within the scope of the Brussels Ia Regulation.”*

The “comparable connection”, therefore, is considered to exist because the Member States have “expressly” said so in the UPCA. The court continues:[12]

> *“In the case of the UPC, the link with the judicial system of the Member States is established by the fact that, according to Art. 1 UPCA, it is subject to the same obligations under Union law as any national court of the Contracting Member States. Thus, the UPC is in functional terms an inherent part of the judicial system of the Member States, even though it was established by a treaty (see Opinion of the Legal Service of the Council of the European Union loc. cit. para. 33). The Court is subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union. Art. 20 and Art. 21 UPCA state that, as a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Art. 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court.”*

Furthermore:[13]

> *“The close link with the judicial systems of the Member States also follows from the liability of the Member States and the actions provided for this purpose (cf. Opinion of the Legal Service of the Council of the European Union loc. cit. para. 33).”*

And:[14]

> *“If a question requiring a preliminary ruling arises in the context of an action for damages, the competent authority may refer the question to the Court of Justice of the European Union for a preliminary ruling pursuant to Art. 267 TFEU. Contrary to Roku’s opinion, the UPC does not completely supersede the national courts.”*

The UPC CoA’s conclusion is this:[15]

> *“Thus, the UPC is subject to the ‘mechanisms capable of ensuring the full effectiveness of the rules of the European Union’ as stipulated by the Court of Justice (Opinion 1/09, para. 82).”*

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[8] Fn. 1, para. 28.
[9] Fn. 1, para. 29.
[10] Fn. 1, para. 29.
[11] Fn. 1, para. 30.
[12] Fn. 1, para. 31.
[13] Fn. 1, para. 32.
[14] Fn. 1, para. 34.
[15] Fn. 1, para. 36.

2. No need for a referral to the CJEU

The UPC CoA sees no reason to refer the matter to the CJEU for a preliminary ruling, as the UPCA rules on jurisdiction were undoubtedly compatible with Union law:[16]

> *"It is not necessary to refer the question of the compatibility of the conferral of powers on the Unified Patent Court with Art. 19 TEU and Art. 267 TFEU to the Court of Justice of the European Union. In view of the decisions of the Court of Justice cited in paragraphs 26 and 29 above and Opinion 1/09 cited in paragraph 27, there is no doubt as to the compatibility of the conferral of powers on the UPC in Art. 71a and Art. 71b Brussels Ia with Art. 19 TEU and Art. 267 TFEU (see CJEU, judgment of 6 October 1982, C-283/81, ECLI:EU:C:1982:335, CILFIT, para. 21; judgment of 3 July 2019, Eurobolt, C-644/17, para. 30; CJEU, judgment of 6 October 2021, C-561/19, ECLI:EU:C:2021:799, Consorzio Italian Management and Catania Multiservizi)."*

3. No violation of the right to a lawful judge

According to the UPC CoA, the appellants' objection that the absence of the London Central Division, as provided for in the UPCA, infringed their right to a lawful judge was also unfounded.

With regard to Art. 19 TEU and Art. 267 TFEU, there was no such infringement, as the relevant rules on jurisdiction were regarded compatible with Union law.[17] Nor would it arise from the absence of a Central Division in London. A violation of Art. 47(2) of the EU Charter of Fundamental Rights ("EU CFR") and Art. 6(1)1 of the European Convention on Human Rights ("ECHR") was not included in the exhaustive list of grounds for opposition in Rule 19.1 of the UPC Rules of Procedure, so that an opposition based on a violation of these fundamental rights was already inadmissible.[18] Furthermore, it would also be unfounded.

In the present case, *"a London section"* was not competent to hear the dispute, and for that reason alone, a violation of the right to a lawful judge was excluded.[19] Furthermore, the absence of a Central Division in London had no effect on the composition of the Local Division panel called upon to decide the case. The legitimate doubts about the independence and impartiality of the judge or judges concerned, which are required for a violation according to the case law of the CJEU and the European Court of Human Rights ("ECtHR"), *"cannot be derived from the fact that, contrary to Art. 7 UPCA, there is no section of the Central Division in London"*.[20] Because:[21]

> *"The establishment of a section of the Central Division in London became impossible after the UK did not ratify the UPCA following its withdrawal from the EU. The fact that such a section was not established and that British judges were not considered in the appointment process thus does not give rise to reasonable doubt in the minds of individuals as to the independence and the impartiality of the competent judges."*

Furthermore, the Administrative Committee of the UPC ("UPC-AC") was authorized *"by analogy under Art. 87(2) UPCA"* to subsequently relocate the section of the Central Division planned for London to Milan, even with modified responsibilities:[22]

> *"Art. 87(2) UPCA states that the Administrative Committee may amend the UPCA to bring it into line with an international treaty relating to patents or Union law. The fact that the Agreement does not provide for the power to amend if the implementation of the UPCA proves impossible is due to an unintended gap. Art. 87(2) UPCA serves the purpose of ensuring that there are no obstacles to the implementation of the Agreement. Since a corresponding need also exists in the case of de facto obstacles, Art. 87(2) UPCA must be applied mutatis mutandis in this case.*
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> *Contrary to Roku's opinion, the fact that the United Kingdom left the European Union before the UPCA entered into force does not prevent this. The power to amend the UPCA pursuant to Art. 87(2) UPCA is not limited to adaptation in the event of legal changes after the entry into force of the Agreement. The wording 'to bring it into line with an international treaty [...] or Union law' rather suggests that, in particular, an incompatibility with Union law, which already existed at the time of the entry into force of the Agreement, empowers the Administrative Committee to amend it accordingly. This is the only way to ensure that there are no obstacles to the implementation of the Agreement and that the Administrative Committee can react appropriately to any incompatibility with Union law that is identified. Nothing else can apply in the case of an analogous application of Art. 87(2) UPCA due to de facto obstacles."*

Such a change in the structure of the court, based on a *"de facto impossibility"*, would not require new democratic legitimation on the part of the Contracting Member States; rather, their participation was considered sufficiently guaranteed by the right of veto in Art. 87(3) UPCA.[23] Furthermore, the UPC-AC was not limited to removing London as the Central Division location; rather, the measures deemed necessary under Art. 87(2) UPCA were at its discretion.[24]

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[16] Fn. 1, para. 37.
[17] Fn. 1, para. 39.
[18] Fn. 1, para. 41.
[19] Fn. 1, para. 44.
[20] Fn. 1, para. 48.
[21] Fn. 1, para. 48.
[22] Fn. 1, para. 50 f.
[23] Fn. 1, para. 52.
[24] Fn. 1, para. 53.

III. Assessment

The UPC CoA's decision is highly questionable.

1. No incompatibility of Art. 31 f. UPCA with Art. 19 TEU and Art. 267 TFEU?

Firstly, the court's statements on the alleged compatibility of the UPCA's jurisdiction rules with Art. 19 TEU and Art. 267 TFEU – apart from linguistic shortcomings – seem astonishingly weak. Fundamental aspects of the relevant CJEU case law are reproduced in an already unconvincing manner, with the result that the findings made on this basis are also unconvincing.

An appeals court such as the UPC CoA is obliged to deliver an in-depth examination of the parties' submissions and to provide a well-founded legal examination of these. The UPC CoA's blanket statement that the UPC was a court equivalent to the Benelux Court of Justice without even specifying the latter's characteristic features and comparing them with the UPC, is completely insufficient.

a) The CJEU case law

As is well known, the draft Agreement, which was found by the CJEU to violate Union law in its Opinion 1/09, was subsequently amended only in certain respects and adopted in the form of the UPCA. In view of the CJEU's comments on the Benelux Court of Justice, an attempt was made to reorganize the Patent Court along the lines of the latter, while leaving the content of the Agreement as unchanged as possible. The decisive measure to ensure the Agreement's compatibility with Union law was seen as limiting participation to EU Member States and newly including in the Agreement a provision that the Patent Court is a common court of the Member States, subject to the same obligations as any national court (Art. 1(2) UPCA). In addition, the provisions on the primacy of EU law and on referrals to the CJEU for preliminary rulings were amended, and the liability rules for infringements of Union law, as requested by the CJEU, were added.

The main objection to the initial draft Agreement in Opinion 1/09 was that the principles of the autonomy of Union law and the completeness of the system of legal remedies were jeopardized by the direct application of Union law by a court established by means of an international Agreement, which operates separately from the national courts of the Member States and replaces them within its jurisdiction.[25] However, under the UPCA, the UPC's position remains unchanged.

The attempt to equate the UPC with the Benelux Court of Justice which is mentioned in Opinion 1/09, para. 82, as being compatible with Union law, through the mere allegation in Art. 1(2) UPCA, that it was "a court common to the Contracting Member States", fails for the simple reason that the two courts differ significantly in terms of their structure, jurisdiction, and connection to the national courts. The UPC does not materially fulfill the requirements for status as a "common court of the Contracting Member States". An international court such as the UPC cannot be made a national court authorized to directly apply Union law or refer cases to the CJEU for a preliminary ruling simply by asserting that it fulfills the relevant requirements when it fails to do so materially.[26]

For the CJEU, the decisive factor for the status of a "common court of several Member States" is, above all, the existence of a connection between this court and the national court systems of the Member States.

In the case of Paul Miles and others v. European Schools, it found that:[27]

> *"It is true that the Court of Justice has held, in paragraph 21 of Parfums Christian Dior, that there is no good reason why a court common to a number of Member States, such as the Benelux Court of Justice, should not be able to submit questions to the Court of Justice, in the same way as courts or tribunals of any of those Member States.*
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> *However, the Complaints Board is not such a court common to a number of Member States, comparable to the Benelux Court of Justice. Whereas the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and, moreover, the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules (see Parfums Christian Dior, paragraph 22), the Complaints Board does not have any such links with the judicial systems of the Member States.*
>
> *Moreover, although the Complaints Board was created by all the Member States and by the Union, the fact remains that it is a body of an international organisation which, despite the functional links which it has with the Union, remains formally distinct from it and from those Member States.*
>
> *In those circumstances, the mere fact that the Complaints Board is required to apply the general principles of EU law when it has a dispute before it is not sufficient to make the Board fall within the definition of 'court or tribunal of a Member State' and thus within the scope of Article 267 TFEU."*

In the case of Slovak Republic v. Achmea BV, concerning the question of whether the arbitration tribunal provided for

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[25] *Jaeger*, All Back To Square One? – An assessment of the latest proposals for a Patent and Court for the Internal Market and possible alternatives, Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 12-01, accessible at papers.ssrn.com/sol3/papers.cfm?abstract_id=1973518, p. 11; *id*., What conclusions can be drawn from the opinion of the Court of Justice regarding the European Patent Court?, in: Geiger, What patent law for the Europ. Union? (2012), p. 139 (151, second para.).

[26] *Jaeger*, What's in the Unitary Patent Package?, Max Planck Institute for Innovation and Competition Research Paper No. 14-08, accessible at papers.ssrn.com/sol3/papers.cfm?abstract_id=2435125, S. 26, third para.

[27] CJEU, case C-196/09, judgment of 14/06/2011, paras. 40 to 43.

in an investment protection agreement (short "BIT") between the Netherlands, the Czech Republic, and the Slovak Republic is compatible with the requirements of Union law, the CJEU denied any such link to the national court systems of the Member States:[28]

> *"In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.*
>
> *In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law."*

The CJEU emphasized that a court established by an international Agreement between Member States without the involvement of the EU, which would have to rule on the interpretation of both that Agreement and Union law without being part of the EU court system, is inadmissible for a violation of the autonomy of Union law.[29] In its Opinion 1/17[30], the CJEU reaffirmed the conditions for an international court that is compatible with Union law.

The UPC clearly does not meet these requirements. It lacks the connection to the court systems of the Member States that is essential[31] for its status as a "common court of several Member States". This also means that the UPC is not authorized to refer matters to the CJEU for a preliminary ruling under Art. 267 TFEU, as it would have to be a "court of a Member State" to do so.[32]

b) The necessary "link with the judicial systems of the Member States"

The requirement repeatedly emphasized in the CJEU's case law for a position as a "court of a Member State" in accordance with the Benelux Court of Justice, namely that it must rule in proceedings before the national courts, was apparently also raised by the appellants. The fact that the UPC CoA merely states in general terms that this was not necessary,[33] without providing detailed reasons – especially in light of the relevant CJEU case law – is completely inadequate. Deriving this from the finding that the CJEU ruled in its Achmea and Miles decisions that no *"such links with the judicial systems of the Member States"*[34] were required (emphasis added by the UPC CoA) is dubious, if only because this quotation has been taken out of context and in no way has the meaning attributed to it by UPC CoA. This can be easily deduced from the passages from the aforementioned CJEU rulings reproduced in full above.

The UPC CoA believes that this wording makes it clear that a *"a comparable connection to the judicial system of the Member States is sufficient"*, without, however, specifying what this *"comparable connection"* is in case of the UPC. Instead, it again states in general terms that there were *"sufficient links with the court systems of the Member States"*, which it ultimately borrows from the mere statement in Art. 1(2) UPCA that the UPC was a common court of the Contracting Member States.[35] The UPC CoA considers this finding alone – regardless of its substantive validity – to be sufficient for the connection required by the CJEU. A somewhat unconvincing "argument" for an appeals court.

In addition, the UPC CoA explains that the connection between the UPC and the courts of the Member States also followed from it being *"subject to the same obligations under Union law as any national court of the contracting Member States"*, which meant that it was *"in functional terms an inherent part of the judicial system of the Member States, even though it was established by a treaty"*.[36] Surprisingly, to support this thesis the UPC CoA refers to the opinion of the Legal Service of the Council of the European Union dated 21/10/2011, known as Council document 15856/11.[37] At the time, the full publication of this document was rejected on the grounds that this could delay the ratification process in the Member States or even call into question the entry into force of the Agreement altogether.[38] It was made fully public in June 2016 only – five years after it was drafted! – following intensive efforts on this author's part.[39]

It is known that the Council of the European Union represents the governments of the EU Member States and, together with the European Parliament, exercises legislative power .[40] It is strange that an appeals court would rely on an opinion from a Legal Service that is part of an executive body and therefore, *by definition*, inclined toward its political views. The fact that this court also cherry-picks those parts of the opinion that support its arguments while

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[28] CJEU, case C-284/16, judgment of 06/03/2018, paras. 58 f.
[29] CJEU, case C-284/16 (fn. 28), paras. 58 f.
[30] CJEU, Opinion 1/17 of 30/04/2019, para. 124.
[31] *Rosas*, The National Judge as EU Judge: Opinion 1/09, in: *Pascal Cardonel*, Constitutionalising the EU judicial system (2012), p. 105 (119, penultimate para.); *Baratta*, Legal issues of economic integration 2011, 297 (317); *de Visscher*, GRUR Int 2012, 214 (220).
[32] CJEU, case C-284/16 (fn. 28), paras. 48 f.
[33] Fn. 1, para. 37.
[34] Fn. 1, para. 29.
[35] Fn. 1, para. 29.
[36] Fn. 1, para. 31.
[37] Accessible at https://data.consilium.europa.eu/doc/document/ST-15856-2011-INIT/en/pdf.
[38] Cf. *Stjerna*, EU Patent Reform – Law-making in camera, accessible at www.stjerna.de/intransparency-lproceedings/?lang=en.
[39] Cf. *Stjerna*, EU Patent Reform – Council allows access to withheld documents, accessible at www.stjerna.de/access-documents/?lang=en.
[40] Cf. https://en.wikipedia.org/wiki/Council_of_the_European_Union.

leaving unmentioned that this very opinion also states that the Agreement, revised in accordance with CJEU Opinion 1/09 and ultimately enacted as the UPCA, could remain incompatible with Union law, also speaks for itself. Because this opinion also states:[41]

> *"Indeed, as long as the UPC will remain formally separate from the national courts, it may still be considered by the Court as affecting 'the very nature of the law established by the Treaties'."*

After all, the Council's Legal Service also confirms that the UPC lacks the necessary connection to the court systems of the Member States, which, however, the UPC CoA conceals. Such a selective choice of (supposed) arguments is, from the outset, incompatible with judicial activity and readily suggests bias.

c) The Gordon/Pascoe Opinion

In addition, it is worth recalling the opinion presented[42] in September 2016 by barristers Richard Gordon and Tom Pascoe, commissioned by British associations close to the local bar, on the implications of the Brexit vote for the possible UPCA ratification by the United Kingdom. This opinion naturally assumed that the UPC is not a common court of the Contracting Member States of the UPCA (emphases added):[43]

> *"Third, if the effect of Opinion 1/09 were that courts outside the Union legal order may not be granted jurisdiction to decide disputes which raise questions of EU law, that would prove too much. On such an interpretation, the UPCA in its current form (between EU Member States) would be unlawful. That is because the UPCA itself is not Union legislation and does not create a court which is part of the Union legal order. The UPC, as the product of an international agreement, is an international tribunal. This is clear from the designation of the Court as an international organisation in the Protocol on Privileges and Immunities of the Unified Patent Court. It is also clear from the fact that the UPCA imposes various obligations upon the UPC which are already incumbent on national courts (e.g. respecting the supremacy of EU law and making references to the CJEU). If the UPC were truly part of the Union legal order, it would already be subject to these obligations without them needing to be spelled out in the Agreement. Whilst Article 1 of the UPCA and Article 71a of the Brussels Regulation designate the UPC as a 'court common to a number of Member States', we do not consider that such secondary legislation is capable of converting the UPC's fundamental status as an international court into that of a court which is part of the national legal order."*

In the authors' opinion, even the contrary statement in Art. 1(2) UPCA does not make the UPC a "common court of the Contracting Member States" (emphasis added):[44]

> *"(…), we do not consider that the UPC's designation as a 'Court common to the Contracting Member States' is necessary to ensure compliance with the CJEU's Opinion 1/09 (indeed, it is something of a legal fiction because the UPC is clearly an international tribunal, not a national court within the Union legal order). Nonetheless, we anticipate that this amendment may be controversial because it would superficially appear to represent a reversal of the Commission's solution for bringing the UPCA into line with Opinion 1/09."*

This opinion, commissioned by significant members of the British legal profession and widely circulated[45] at the time, also shared the view that the UPCA contradicts the requirements of Opinion 1/09 and thus violates Union law.

2. No need for a referral to the CJEU?

The UPC CoA believes that a referral to the CJEU on the compatibility of the allocation of powers to the UPC with Art. 19 TEU and Art. 267 TFEU was *"not necessary"* as there was *"no doubt"* about this compatibility. In fact, serious doubts are warranted in this regard, given the unconvincing statements made by the UPC CoA regarding its understanding of CJEU Opinion 1/09.

It is well known that the CJEU rules on the interpretation of the Treaties by way of preliminary rulings (Art. 267(1)(a) TFEU). If such question is referred to a court of a Member State and that court considers the answer to be decisive for the outcome of the case, it *may* refer the question to the Court of Justice for a ruling (Art. 267(2) TFEU). A referral is at its discretion in this case. However, according to Art. 267(3) TFEU, the court *must* refer the matter to the CJEU in the event of such a decisive question if its decisions cannot be challenged by domestic legal remedies, i.e., if it is the court of last instance.

The UPC is bound by the primacy of Union law and cooperation with the CJEU to ensure the correct application and uniform interpretation of Union law, with the obligations under Art. 267 TFEU being expressly mentioned (see Art. 20 and 21 UPCA). Under Art. 22(1) UPCA, the Contracting Member States are also jointly and severally liable for damages caused by a breach of Union law by the UPC CoA. As mentioned above, these articles were only included in the Agreement in their current form as a result of CJEU Opinion 1/09.[46]

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[41] Cf. Council Document 15856/11 (fn. 37), para. 44.

[42] Cf. *Stjerna*, EU Patent Reform – The Gordon/Pascoe Opinion and the UPCA's incompatibility with Union law,, accessible at www.stjerna.de/gp-opinion/?lang=en.

[43] Gordon/Pascoe Opinion, accessible at www.stjerna.de/files/160912-Gordon-and-Pascoe-Advice-UPCA.pdf, para. 59.

[44] Gordon/Pascoe Opinion (fn. 43), para. 106, p. 31, final para.

[45] Cf. the article "No legal obstacles for post-Brexit UK to participate in Unitary Patent system" of 18/09/2016 on the Kluwer Patent Blog, accessible at https://archive.ph/yWw8c.

[46] Cf. Council Document 10630/11 of 26/05/2011, accessible at https://data.consilium.europa.eu/doc/document/ST-10630-2011-INIT/en/pdf.

A failure to refer an objectively decisive question concerning the interpretation of the Treaties violates Union law both in terms of a breach of the primacy of Union law and of the cooperative relationship between the courts of the Member States and the CJEU. Also, under the established case law the CJEU is one's legal judge within the meaning of the respective national and international fundamental rights guarantees.[47] Thus, a failure to refer a case to the CJEU under Art. 267(3) TFEU – in addition to Union law – also violates the right to a lawful judge, e.g., if the court of last instance in its decision deliberately deviates from the CJEU's case law on issues relevant to the decision and does not (or not again) refer the matter to the latter.

In the present case, the UPC CoA is the court of last instance in the sense of Art. 267(3) TFEU and is therefore obliged to refer to the CJEU questions concerning the interpretation of the Treaties which are decisive for the dispute's outcome. The question raised by the appellants as to the compatibility of the UPCA jurisdiction with Union law is decisive for the dispute, because if it is found to be incompatible, the action brought would likely be inadmissible.

The UPC CoA's succinct assertion that a referral to the CJEU was *"not necessary"* is unconvincing, as the content of its arguments put forward in this regard hardly stands up to closer scrutiny. It therefore stands to reason that the failure to refer the matter to the CJEU violates Union law and the appellants' right to a lawful judge.

An additional delicate issue is the fact, already mentioned above, that the CJEU only accepts referrals under Art. 267 TFEU from a "court of a Member State". Any referral by the UPC and the UPC CoA to the CJEU would first be examined by the latter to determine whether it has the necessary judicial status. Therefore, a referral to the CJEU involves an incalculable and far-reaching risk for the UPC, as the CJEU could already deny it the necessary status as a "court of a Member State". By referring the matter to the CJEU, the UPC CoA would potentially jeopardize its own continued existence, so its stance is hardly surprising. However, if a court fails to take a legally required measure for irrelevant reasons, e.g., seeking to avoid the required review of its own legal status by a higher court, as requested by a party to the proceedings, this casts doubts on its judicial quality in terms of central fundamental rights guarantees.

3. No violation of the right to a lawful judge?

The UPC CoA's explanations as to why it does not consider the appellants' right to a lawful judge to have been violated are also puzzling.

a) Elimination of the British ratification by the UK's withdrawal from the EU?

The premise itself is peculiar: *"the UK did not ratify the UPCA following its withdrawal from the EU"*.[48] As is well known, the British ratification took place on 26/04/2018.[49] The country's withdrawal from the EU, which took effect on 31/01/2020, does not in itself eliminate this issue; rather, it requires a legally viable solution. What this solution might be remains unclear to this day.[50] The UK's blanket statement in a Note Verbale[51] dated 14/07/2020, that it had *"withdrawn the ratification with immediate effect"*[52] does not change this. The legal basis for this "withdrawal" and the alleged legal consequence of immediate effect that has been attributed to it remain unclear.[53] However, the UPC CoA's assertion that the UK's UPCA ratification automatically vanished into thin air when the country left the EU cannot be upheld. As far as can be seen, no one has argued this to date.

b) Permissibility of changing content through "interpretation"?

The UPC CoA's comments on the alleged UPC-AC power to amend the UPCA pursuant to Art. 87(2) UPCA follow the well-known arguments of UPC proponents. They are very similar to the German Federal government's draft legislation [54] on the repetition of the German UPCA ratification following its annulment by the Federal Constitutional Court, which states (translation from German language):[55]

> *"Regardless of the fact that the UK has currently given its consent, the UK's withdrawal will not affect the applicability of the provisions on entry into force, because these provisions are to be interpreted as meaning that the withdrawal of one of these three States, which could not have been foreseen by anyone, does not prevent the entire entry into force for the remaining parties."*

It has already been pointed out that such a change in content by means of "interpretation" contradicts the Vienna Convention on the Law of Treaties and is inadmissible.[56] At the time, Division III B 4[57] of the German Fedral Ministry of Justice and Consumer Protection ("BMJV"), headed by

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[47] Cf. most recently e.g. BVerfG, 1 BvR 1491/23, Decision of 03/03/2025, paras. 63 ff.
[48] Fn. 1, para. 48.
[49] European Council database on international Agreements relating to the UPCA, accessible at www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2013001.
[50] Cf. *Stjerna*, EU Patent Reform – The "withdrawn" ratification of the UPCA and its protocols by the United Kingdom, accessible at www.stjerna.de/upca-uk-withdrawal/?lang=en.
[51] Cf. www.stjerna.de/files/UK-Note-Verbale-UPCA.pdf.
[52] Cf. the statement by *Amanda Solloway* of 20/07/2020, accessible at archive.is/t2UHA as well as the Council database on the UPCA (fn. 49).
[53] Cf. in detail *Stjerna*, The "withdrawn" ratification of the UPCA (fn. 50).
[54] German Parliament Printed Matter 19/22847 of 25/09/2020, accessible at https://dserver.bundestag.de/btd/19/228/1922847.pdf.
[55] German Parliament Printed Matter 19/22847 (fn. 54), p. 2/3.
[56] Cf. in detail *Stjerna*, The "withdrawn" ratification of the UPCA (fn. 50), p. 5, section III.3.
[57] BMJV Organizational Plan of 17/12/2020, accessible at www.stjerna.de/files/201214-BMJV-Organisationsplan.pdf.

Johannes Karcher, was primarily responsible for this bill, particularly striking being the at best superficial review of the UPCA's compatibility with the German Grundgesetz and Union law.[58] In 2017, Mr *Karcher* had also put forward the theory that even a UK which had left the EU, could be made a Member State of the Agreement through a simplified amendment to the UPCA by the UPC-AC in accordance with Art. 87(2) UPCA.[59]

Mr *Karcher* is now the chairman of the UPC-AC[60], which is responsible, for instance, for appointing the UPC's judges. Would a UPC judge with a term of office of only six years (Art. 4(1) of the UPC Statute) contradict his theses?

In terms of content, the UPC CoA's reasoning as to why Art. 87(2) UPCA is allegedly applicable *"mutatis mutandis"* in the present case appears to be circular. The stipulated amendment power concerns two cases, namely the UPCA's incompatibility with an international Agreement or with Union law. The UPC CoA supplements these two cases with the addition that *"the implementation of the UPCA proves impossible"*, because Art. 87(2) UPCA intended to ensure *"that there are no obstacles to the implementation of the Agreement"*. [61] In doing so, it implicitly acknowledges that there is no evidence to support this, but that it was *"due to the unintended gap"*. According to this judicial "development of the law," the UPC-AC may feel empowered to implement any UPCA amendment in a simplified procedure under Art. 87(2) UPCA.

IV. The "elephant in the room": Structural lack of judicial independence and impartiality in proceedings before the Unified Patent Court

In the "Roku" decision, the silent elephant in the room is the structural lack of judicial independence and impartiality in proceedings before the UPC.

1. Judicial independence and impartiality as a requirement under Union law

The principle of sincere cooperation under Art. 4(3), first subpara., TEU requires EU Member States to ensure that Union law is applied and upheld within their territory and to guarantee effective legal protection. [62] This effective judicial protection includes – not least because of Art. 47(2) EU CFR – the independence of the court and its judges, which must also be guaranteed for the national courts of the Member States.[63] In this context, the CJEU regards judicial independence as a fundamental prerequisite for the system of judicial cooperation between itself and the national courts of the Member States and states that only an independent court in this sense has a referral right under Art. 267 TFEU (emphasis added):[64]

> *"The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence."*

The CJEU described the this judicial independence in more detail in its Opinion 1/17, stating that it requires the complete autonomy of the court in its external relations and its impartiality in its internal relations (emphasis added):[65]

> *"The requirement of independence is, for its part, inherent in the task of adjudication and has two aspects. The first aspect, which is external in nature, presupposes that the body concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out also constitutes a guarantee essential to independence (judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the judicial system), C-216/18 PPU, EU:C:2018:586, paragraphs 63 and 64 and the case-law cited).*
>
> *The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the judicial system), C-216/18 PPU, EU:C:2018:586, paragraph 65 and the case-law cited).*
>
> *Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that*

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[58] Cf. *Stjerna*, EU Patent Reform – The German Ministry of Justice and the legal scrutiny of the UPCA and the draft legislation for its ratification, accessible at www.stjerna.de/bmjv-gg/?lang=en.

[59] Cf. *Stjerna*, EU Patent Reform – UPCA participation of the UK despite EU exit?, p. 2, section III., accessible at www.stjerna.de/upca-eu-exit/?lang=en.

[60] Cf. www.unifiedpatentcourt.org/en/organisation/administrative-committee.

[61] Fn. 1, paras. 50 f.

[62] CJEU, case C-64/16, judgment of 27/02/2018, paras. 34, 37, 40.

[63] CJEU, case C-64/16 (fn. 62), paras. 41 f.

[64] CJEU, case C-64/16 (fn. 62), paras. 43 f.

[65] CJEU, Opinion 1/17 (fn. 30), paras. 202 ff.

body to external factors and its neutrality with respect to the interests before it (judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the judicial system), C-216/18 PPU, EU:C:2018:586, paragraph 66).”

The court stresses this point elsewhere (emphasis added):[66]

“As regards the internal aspect of the requirement of independence, which concerns in particular impartiality, the maintenance of an equal distance from the parties to the proceedings, and the absence of any personal interest of the Members in the outcome of the proceedings, …”

2. Insufficient judicial independence and impartiality at the Unified Patent Court

The UPC does not meet these requirements for judicial independence; it is incompatible with the principle of the Rule of Law and the right to an independent and impartial court under e.g. Art. 2(1) and Art. 19(1)(2) TEU and Art. 47(2) EU CFR. The selection and appointment procedure (Art. 3(2) UPC Statute) by the UPC-AC and the so-called “Advisory Committee” (Art. 12 and 14 UPC Statute), the limited term of office with the possibility of an early dismissal, and the lack of legal protection against interference with their legal status, UPC judges do not exercise their judicial functions in complete autonomy, as required by the CJEU.

Already the limited and comparatively short term of office of six years places every UPC judge in a latent relationship of dependency on the committees responsible for reappointment, which encourages him/her, should he/she seek reappointment, not to decide solely on the basis of law and justice, but to take into account aspects that are genuinely irrelevant to the case but may be conducive to reappointment, e.g., such of a political nature.

Also due to the lack of independence of its judges, the UPC – notwithstanding the contrary statement in Art. 21 UPCA – has no right of referral under Art. 267 TFEU, as this right only applies to an independent court of a Member State.[67]

The UPC is neither a common court of the Member States nor independent.

3. The UPC judges involved in the proceedings

The value of this UPC CoA decision lies in the fact that it exemplifies the precarious legal status of UPC judges under the Rule of Law.

The reporting judge, *Patricia Rombach*, initially worked part-time at the UPC alongside her role as a judge at the German Federal Supreme Court (“BGH”),[68] but has since given up her position at the BGH in favor of full-time employment at the UPC.[69] The second judge involved in the proceedings, *Rian Kalden*, also appears to be working full-time at the UPC.[70] There is no reliable information available about the third judge in the group, *Ingeborg Simonsson*.

Against this background, would rapporteur *Rombach* make a decision that could cast doubt on the UPC’s legally fragile foundations and submit it to review by the CJEU, thereby, in the worst case, depriving the UPC of its basis for existence? Especially since she now works full-time for this court and would thus be risking her own employment there (and the associated “benefits”)? Would the other two judges involved in the proceedings do so? Would any other UPC judge in their place do so?

The problem is obvious. In proceedings at the UPC, there is a latent potential conflict between the judges’ own interests and the interests of the parties to the proceedings. However, any potential personal interest of the judges in the outcome of the legal dispute, however theoretical, already affects the independence of the court.

4. No legal objection by Roku?

In this respect, it seems very surprising that the appellants apparently have not raised the issue of a lack of judicial independence. The decision states in this regard (emphasis added):[71]

“Only if the judge specifically appointed to decide the case is not independent and/or not impartial could this constitute a violation of Art. 47, para. 2, EU CFR and Art. 6 ECHR. The latter is not asserted by Roku.”

One can only speculate about the reasons for such omitted objection. The issue has been known since the first German constitutional complaint in 2017 and, from a legal perspective, is actually an obvious defense argument for any defendant. Did the appellants want to avoid potentially upsetting the court? Or did their lawyers, who presumably want to appear in as many of the highly lucrative proceedings before the UPC as possible, maybe not want to upset the court? We don’t know.

V. Outlook

The UPC CoA decision is as doubtful as it is valuable.

The court’s strange efforts to construct arguments by piecing together selective half-sentences from various CJEU rulings and then reinterpreting them in order to avoid having to address the UPC’s obvious structural frictions and having to refer the matter to the CJEU for clarification speak for themselves. It is precisely this behavior on the part of the court and its apparent effort to avoid addressing the obvious questions before the CJEU that clearly underscores the lack of independence and impartiality of the UPC judges. Such conflicts of conscience, or even the mere appearance thereof, are, from the outset, fundamentally incompatible with an independent and impartial court, as guaranteed, for

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[66] CJEU, Opinion 1/17 (fn. 30), paras. 238.
[67] CJEU, case C-64/16 (fn. 62), paras. 43 f.
[68] Press release of the German Federal Court of Justice No. 149/2022 of 20/10/2022, accessible at https://archive.ph/66kxe.
[69] Cf. the Wikipedia entry on Patricia Rombach, accessible at https://archive.is/VpCKx.
[70] Cf. https://archive.ph/4dTba.
[71] Fn. 1, para. 3, p. 4.

instance, by Art. 2(1) and Art. 19(1)(2) TEU or Art. 47(2) EU CFR.

It remains to be seen when a defendant will be found who addresses the issue with the necessary clarity and brings it before the CJEU, a national Constitutional court or the ECtHR for consideration. Various possibilities for this also exist outside the UPC, e.g., before the national courts of the EU Member States.

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