



Central Division (Section Munich)

UPC_CFI_1/2023 Order rejecting Rule 262.1(b) RoP request of the Court of First Instance of the Unified Patent Court delivered on 20/09/2023

HEADNOTES:

Rule 262.1(b) RoP requires a concrete and verifiable, legitimate reason for making available written pleadings and evidence upon a request by a member of the public. The wish from a natural person to form an opinion on the validity of a patent out of a personal and a professional interest is not a legitimate reason as required by Rule 262.1(b) RoP.

Keywords:

Rule 262.1(b) RoP request (rejected). Legitimate reason for access (no).

REFERENCE CODE ECLI: Not provided

APPLICANT/S

| | | |
|----|---------------------|--------------------|
| 1) | ... | Represented by ... |
| | (Applicant) - ... - | ... |
| | ... | |

RESPONDENT/S

RELEVANT PROCEEDING PARTIES

- 1) Sanofi-Aventis Deutschland GmbH
(Claimant) - Brüningstrasse 50 - 65926 -
Frankfurt - DE
Represented by Daniel Wise

- 2) Sanofi-Aventis Groupe
(Claimant) - 82 Avenue Raspail - 94250 -
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- 3) Sanofi Winthrop Industrie S.A.
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- 4) Amgen, Inc.
(Defendant) - One Amgen Center Drive - CA
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Represented by Michael Eder

PATENT AT ISSUE

| Patent no. | Proprietor/s |
|------------|--------------|
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| | |
|-----------|-------------|
| EP3666797 | Amgen, Inc. |
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DECIDING JUDGE

This is an Order of the Judge-rapporteur: András Kupecz (‘JR’).

LANGUAGE OF PROCEEDINGS:

English

SUBJECT-MATTER OF THE PROCEEDINGS

262.1(b) RoP request

SUMMARY OF THE FACTS

- In relation to case 459505/2023, the Registry received a request pursuant to Rule 262.1(b) of the Rules of Procedure of the Unified Patent Court (‘RoP’) from the Applicant dated 6 July 2023 requesting access to the content of the register, including all written pleadings and evidence filed in the context of this revocation action.
- The reason for the request was that the patent at issue and its legal validity (or lack thereof) are of interest to one of Applicant’s clients.
- A preliminary order was delivered on 14 July 2023 by the JR inviting the parties to submit their comments and/or observations to the request, including any request pursuant to Rule 262.2 RoP.
- The Claimants in the main action in their submission dated 28 July 2023 note that the Applicant isn’t the one with a reason to have access to the documents, but rather a third party remaining anonymous (“one of his clients”). Moreover, the Claimants note that as the identity of the third party is unknown, it is not possible to assess whether there is in fact a reason to grant access to the documents.
- The Defendant in its submission dated 28 July, 2023 put forward no objections.
- No party made a request pursuant to Rule 262.2 RoP.
- In a further Preliminary Order, given on 4 August 2023, the JR indicated that having consulted the parties, the Application could not be granted. The Applicant was given the opportunity to make further submissions.
- On 18 August, 2023, the Applicant submitted comments in response to the Preliminary Order. In its submissions, the Applicant no longer refers to one of his clients and makes the request (only) in his own name. As a reason for gaining access to the written

pleadings and evidence, the wish to form an opinion on the validity of the patent under consideration was provided.

- On 28 August, the JR invited the parties to submit further comments in response to the comments submitted by the Applicant on 18 August.
- The parties submitted no further comments.
- Further facts, grounds and arguments will be addressed in the below where relevant for the outcome of this order.

FORMS OF ORDER SOUGHT

Applicant requests access to the content of the register for the above identified revocation action against European patent EP3666797, including all written pleadings and evidence filed in the context of this revocation action, in accordance with Rule 262.1(b) RoP.

GROUNDS

Considering the Application, having consulted the parties, and having provided the Applicant an opportunity to make further submissions, the present Application requesting access to all written pleadings and evidence as filed in case ACT_459505/2023 is rejected based on the grounds given below.

Rule 262.1 RoP and its history

Rule 262 RoP relates to public access to the register of the Unified Patent Court. Rule 262.1 RoP makes a clear distinction between public access to 1) decisions and orders (sub a) and 2) written pleadings and evidence (sub b). The first category shall be published whereas the latter shall be available only upon a reasoned request upon which the judge-rapporteur is to decide after consulting the parties.

From the use of the term “reasoned request” and from the clear distinction made in Rule 262.1 RoP, it follows that a request has to be made which contains a concrete, verifiable and legally relevant reason, i.e. more than just any (fictitious) reason. In other words: a legitimate reason is required for making available written pleadings and evidence to a member of the public. Otherwise, this provision and the distinction made would seem to be moot and without substance.

The Applicant argues on basis of the changes made to Rule 262 in the 18th draft RoP and the explanation provided with these changes that the actual reasons for these amendments were the need to protect personal data (in accordance with the European Union’s General Data Protection Regulation (EU) 2016/679) and the protection of confidential information such as business or trade secrets.¹ Accordingly, a “reasoned request” in Rule 262.1(b) RoP requires the applicant to provide (solely) reasons that allow the judge-rapporteur to weigh the interests of the applicant against those of the parties to the proceedings in such cases where a party requests to keep any specific documents (or parts thereof) confidential. In line with this

¹ Applicant refers to Annex I to the Decision of the Administrative Committee of July 8, 2022 adopting the Rules of Procedure of the UPC.

understanding, no specific legitimate interest should be required for the public to gain access to non-confidential written pleadings and evidence (still, according to the Applicant).

This interpretation does, however, not align with the structure of Rule 262 and its history. Paragraph 2, which was added in the 18th draft RoP, and paragraphs 3-6 of Rule 262 provide for a procedure to be followed to keep certain information of written pleadings and evidence confidential. A weighing of interests between the applicant/member of the public and a party requesting confidentiality may take place in this context (cf. Rule 262.4(b),5 and 6 RoP). Redaction of personal data within the meaning of Regulation (EU) 2016/679, on the other hand, is mandatory and automatic pursuant to Rule 262.1 RoP, first sentence (also 262.7 RoP).

In the view of the Court, the reasons to be provided in the request for access to written pleadings and evidence pursuant to Rule 261.1(b) therefore must pertain to the reason(s) for access to the requested information per se. The reasoned request forms the basis for the decision to be taken by the judge-rapporteur after consulting the parties.

In this respect, it is furthermore noted that, contrary to the position taken by the Applicant, not solely the interests of the member of the public requesting access to pleadings and/or evidence and the parties have to be taken into account. Also the interests of third parties may be at stake and/or an abuse of evidence may have to be prevented as indicated in Article 58 of the Agreement on a Unified Patent Court ('UPCA'). This further supports the view that a concrete and verifiable, legitimate reason needs to be provided in order for the JR to be able to make (also) this assessment.

The history of Rule 262.1 RoP does not lead to another conclusion. Applicant submitted part of the explanation provided by the drafters of the Rule, wherein the distinction between decisions and orders and pleading and evidence is discussed (Applicant's snippet and markings):

Decisions and orders - paragraph 1 (a)

Decisions and orders made by the Court shall be published. Their publication on the website is automatic. When preparing a decision or order the Court will – to the extent necessary – need to establish a redacted version for publication satisfying the requirements of the GDPR and confidentiality requests under paragraph 2.

Written pleadings and evidence - paragraph 1 (b)

Written pleadings and evidence of a specific case shall also be available to the public on a reasoned request to be decided by the judge-rapporteur. The CMS is configured in a way that the public can take note of the existence of documents and orders but not their contents. To see the contents of such documents an application procedure will be necessary. The requested information would be provided after the data check and, where applicable, the redaction of personal information.

Likewise, parts of the content classified as confidential information would be redacted in the documents to the public.

The UPC would with this approach follow the example practiced by the General Court (GC) and the Court of Justice of the EU (CJEU). Both courts have recognized that they are bound by the GDPR not only in their administrative, but also in their judicial activities. This follows from Art. 2 GDPR which does not exempt judicial activities from its scope of application. For this purpose, the courts are empowered to render a party concerned in the case anonymous either upon application by a party or of its own motion (cf. Art 95 RoP CJEU; Art. 66 RoP GC).

The Court does not view this explanation as support for the intention to create a 'default' right of access to written pleadings and evidence, also not if there is no (party) confidential information contained in the written pleadings and evidence. To the contrary, after the change to Rule 262 RoP, this information is only available upon a "reasoned request", whereas prior to the change such access was automatic. To 'interpret away' the requirement to provide a (concrete, legitimate and verifiable) reason to obtain access, as essentially argued by the Applicant, is not supported by the Rule itself nor by its history. Rather in the Court's view, the change from an 'automatic system' to an 'application based system' means that the default situation is that third

parties can view the register and take note of the existence of documents but not their contents (see above, “an application procedure will be necessary”). Reasons have to be provided that justify departing from the default situation to allow a member of the public access to the file.

A right to access to pleadings and evidence in the absence of a legitimate reason also does not follow from a “general principle of publicity” as further argued by the Applicant. The requirement that proceedings shall be open to the public (Article 45 UPCA) does not entail that all pleadings and evidence submitted should be accessible to the public. In accordance with this requirement, the Court register as such (but not necessarily the content of documents submitted by the parties) shall be public (Article 10.1 UPCA). Decisions and orders shall be published (Article 23 Statute of the Unified Patent Court (‘Statute’), Rule 262.1(a) RoP). Decisions are read in open court, Article 35(5) Statute and the Court’s oral hearings are in principle public (see e.g. Rule 115 RoP²).

A general right to public access to the contents of a case file also cannot be based on European Union law or practice. For example, the General Court of the Court of Justice of the European Union, also referred to in the history of Rule 262.1 RoP cited above, in its Rules of Procedure (Article 38), states that: “no third party, private or public, may have access to the file in a case without the express authorisation of the President of the General Court, once the parties have been heard. That authorisation may be granted, in whole or in part, only upon written request accompanied by a detailed explanation of the third party’s legitimate interest in having access to the file.” (underline JR).

Furthermore, the rules and practices in relation to access to case files vary significantly amongst the Contracting Member States. Therefore, no general right to public access can be deduced from the various national laws.

Thus, the Court concludes that Rule 262.1(b) RoP requires a concrete and verifiable, legitimate reason for making available written pleadings and evidence upon a request by a member of the public.

No legitimate reason in the present case

In the original Application, the Applicant made the request on behalf of an anonymous third party (“one of [his] clients”) who was interested in “the patent at issue and its legal validity (or lack thereof)”. In the preliminary opinion of the Court dated 4 August 2023, the Applicant was informed that based on this very limited statement which lacks concrete information, it could not be assessed if any third party indeed has a legitimate reason for access to the requested information.

In its submission dated 18 August 2023, the Applicant no longer refers to one of his clients and makes the request (only) in his own name. As a (sufficient) legitimate reason for gaining access to the written pleadings and evidence, the wish to form an opinion on the validity of the patent under consideration is brought forward. As a member of the public and a patent attorney, this was both a personal and a professional interest.

The mere “wish” from a natural person to form “an opinion” on the validity of a patent out of a “personal and a professional interest” cannot be accepted as a sufficiently concrete, legitimate reason to make available all pleadings and evidence in this case. Apart from the lack of concrete and verifiable information in the reason stated by the Applicant, the Court fails to see why access

² Also see the Preamble of the UPCA, “right to a fair...and public hearing” (underline JR).

to the written pleadings and evidence in this particular case would be useful, let alone necessary in order to fulfil a wish of forming an opinion on the validity of the patent. The Applicant can study the patent and its (public) prosecution history as well as the prior art without access to what the parties to the proceedings have submitted. The fact that the Application concerns a revocation action concerning a European patent which, as argued by the Applicant, “confers rights on the patent proprietor(s) with erga omnes effect”, does not make this assessment different. The general public can likewise inform themselves based on other sources than the pleadings and evidence filed in this action.

Conclusion

In conclusion, no concrete and verifiable, legitimate reason has been provided by the Applicant for access to the content of the register for the above identified revocation action against European patent EP3666797. Absent such a reason, the request in accordance with Rule 262.1(b) RoP is rejected.

Leave for appeal

The Court is aware that Rule 262.1(b) has been met with criticism by a number of commentators in the context of transparency of court proceedings.³ Hence, a clear and consistent interpretation of a “reasoned request” pursuant to Rule 262.1(b) RoP and a consistent application of said Rule is especially important (also see Preamble RoP, paragraph 8).

Therefore, leave to appeal this Order is hereby granted.

³ See for example Augenstein in BeckOK PatR/Augenstein, 29. Ed. 15.7.2023, EPGÜ Art. 58 Rn. 6, 7.

ORDER

For these grounds, having consulted the Applicant and the parties on all aspects of relevance for the following order, the Judge-rapporteur:

- rejects the Application.
- grants leave for appeal.

Order no. 550152 in ACTION NUMBER: ACT_459505/2023

UPC number: UPC_CFI_1/2023

Action type: Revocation Action

Related proceeding no. Application No.: 546231/2023

Application Type: APPLICATION_ROP262_1_b

Issued on 20 September 2023

KUPECZ

Judge-rapporteur

INFORMATION ABOUT APPEAL

Leave to appeal is granted. The present Order may be appealed within 15 days of service of this Order which shall be regarded as the Court's decision to that effect (Art. 73(2)(b)(ii) UPCA and 220.2, 224.1(b) RoP).