



## Central Division Paris Seat

**UPC\_CFI\_367/2023**  
**Order**  
**of the Court of First Instance of the Unified Patent Court, issued**  
**on: 30/07/2024**

Guiding principles:

1. Whether the preliminary estimate of the costs of the legal dispute to be submitted following the interim hearing in accordance with R. 104 (k) RoP is confidential information within the meaning of Rule 262A RoP, access to which must be restricted for other parties to the proceedings, must be determined by weighing up the mutual interests. In doing so, particular account must be taken of the right of access to the information that is the subject of the proceedings and the associated right to be heard.
2. In the application pursuant to R. 262A RoP, an application for restriction of public access to information relevant to the proceedings pursuant to R. 262.2 RoP must be implicitly included.
3. When deciding on the application in accordance with R. 262.2 RoP, the public's general interest in information must be considered first and foremost. The requirements for the granting of confidentiality are therefore lowered compared to R. 262A RoP.
4. The public's interest in learning about individually agreed attorney's fees in patent disputes regularly takes a back seat to the litigant's interest in keeping the negotiated fees confidential.

Case (main proceedings): UPC\_CFI\_367/2023, ACT\_580198/2023 on patent: EP 2 681 034 B1

between

**CEAD B.V.**, a limited liability company under Dutch law, with registered office at Schieweg 25, 2627 AN Delft, the Netherlands, and

**CEAD USA B.V.**, a limited liability company under Dutch law, with registered office at Schieweg 25, 2627 AN Delft, Netherlands

**-plaintiffs / defendants-**

Authorised representative:

Dr Wim Maas (112021/2023), Taylor Wessing N.V., Parnassusweg 807, 1082 LZ Amsterdam, The Netherlands,

Dr Alexander Rubusch (560314/2023), Taylor Wessing Partnerschaftsgesellschaft mbB, Benrather Straße 15, 40213 Düsseldorf, Germany,

against

**BEGO Medical GmbH**, a limited liability company under German law, with registered office at Wilhelm-Herbst-Strasse 1, 28359 Bremen, Germany,

**- Defendant / Applicant -**

Authorised representative:

Dr Lars Birken, Dr Florian Henke, Philipp Neels, Eisenführ Speiser Rechts- und Patentanwälte, Johannes-Brahms-Platz 1, 20335 Hamburg, Germany,

Judicial Panel Central  
Chamber Paris

Deciding judge

This Order was issued by Judge Maximilian Haedicke, acting as judge-rapporteur.

Language of the proceedings: German

Subject of the proceedings:

Action for annulment concerning EP 2 681 034 B1

Subject of the Order: Protection of secrets pursuant to R. 262A and R. 262.2 RoP

### Facts of the case

The parties are in dispute regarding the Order of access restrictions pursuant to R. 262A RoP. The applicant has requested this with regard to information on its legal costs, which it submitted in two annexes, Annex ES8 - confidential - and Annex ES9, to its document of 20 June 2024 as part of a list of the necessary costs in the nullity proceedings.

Following the interim hearing pursuant to point 7 of the procedural order of 5 June 2024, the parties were ordered on the basis of R. 104(k) RoP to submit a detailed list of their expected costs, together with an additional redacted version if necessary, and to mark the list as confidential.

The applicant, as the defendant, then submitted an Annex ES8 - confidential - in a statement dated 20 June 2024, which contains an unredacted list of the costs it expects to incur, as well as a redacted version of this list in Annex ES9.

This list includes the working hours of the lawyers and patent attorneys involved in the proceedings as well as the resulting fee claims.

The applicant is of the opinion that the lists of costs incurred and anticipated costs are confidential information relating to the client relationship. The list serves exclusively to determine the costs of the court for the proceedings, which is why it is not necessary for the plaintiffs and their representatives to have access to Annex ES8 - confidential - for this purpose. It was not apparent that the plaintiffs had an interest in access worthy of protection. In particular, it should be taken into account that the parties are in settlement negotiations and that information on the internal cost estimates, costs incurred and the resulting cost risks are essential information for sounding out the negotiating positions, which is why they require confidentiality precisely at this stage of ongoing proceedings. In order to ensure that the court's decision on costs remains comprehensible for the parties, only the representatives of the defendants as plaintiffs should therefore be granted access to Annex ES9.

Third parties not involved in the proceedings should not be granted access to the parties' cost estimates. There is no public interest worthy of protection in this internal, confidential information. Insofar as a general interest regarding the cost risk of legal proceedings is concerned, access to the court's decision is perfectly sufficient.

The applicant requests,

order that access to the ES8 - confidential annex be restricted so that only the court has access;

in the alternative,

that only the court and the plaintiffs' representatives have access to Annex ES8 - confidential - whereby the plaintiffs' representatives are also obliged to maintain confidentiality towards the plaintiffs regarding the content of the annex,

and further

order that access to Exhibit ES9 be restricted so that only the Court and the plaintiffs' representatives have access to Exhibit ES9, with the plaintiffs' representatives also being bound to secrecy with respect to the plaintiffs about the contents of the Exhibit;

in the alternative,

that exclusively the court, the representatives of the plaintiffs and the managing directors of the plaintiffs have access to the ES9 system.

The defendants apply for

the rejection of the applicant's applications for restricted access to the ES8 - confidential - and ES9 installations.

The respondents are of the opinion that knowledge of the total amount without a breakdown of the costs is not sufficient to enable them to adequately assess whether the conditions for any reimbursement of costs under Art. 69 UPCA are met or whether they should oppose this. An assessment of whether and to what extent "reasonable and proportionate" costs within the meaning of Art.

69 (1) UPCA can only be assessed if a detailed breakdown of costs is known.

In the present case, the special feature that the defendant had filed 72 auxiliary requests instead of the 138 originally filed had to be taken into account. Therefore, a large part of the recorded costs are not reasonable and appropriate within the meaning of Art. 69 para. 1 UPCA, so that a significant reduction of the costs claimed by the defendant will have to be made.

Based on this, it was obvious that restricting access to the statement of costs pursuant to Annex ES8 exclusively to the court was inappropriate and a violation of the right to be heard of the defendants. Restricting access to the statement of costs pursuant to Annex ES8 and restricting access to the redacted statement of costs pursuant to Annex ES9 exclusively to the court and the plaintiffs' representatives, whereby the latter would also be obliged to maintain confidentiality towards the plaintiffs regarding the content of the annex, would hardly be feasible in practice, as the plaintiffs would have to reimburse the costs.

Apart from this, it is not apparent what the interest in confidentiality in the asserted procedural costs is. The defendants do not have to demonstrate an interest worthy of protection in the disclosure of the costs, which, however, arises from Art. 69 para. 1 UPCA, but the defendant has an interest in the confidentiality of this information. The applicant also had no interest in confidentiality in the light of settlement discussions. Since the specific case only concerned the reimbursable costs of the proceedings and their breakdown, internal cost estimates and cost risks were from the outset not the subject of the list of procedural costs relevant to the reimbursement of costs.

### Reasons for the decision

The applicant's applications for access to the information contained in Annexes ES8 - confidential - and ES9 vis-à-vis the defendants must be rejected.

The application to restrict public access to the information contained in Annexes ES8 - confidential - and ES9 must be granted.

1.

Article 9(1) and (2)(a) of Directive (EU) 2016/943 (the so-called Trade Secrets Directive) provides that, in judicial proceedings, access to documents submitted by the parties or third parties containing trade secrets or alleged trade secrets may, on application, be restricted in whole or in part to a limited number of persons. The protection of confidential information is provided for in the UPCA in Article 58 and implemented in the Rules of Procedure of the Unified Patent Court in R. 262A (see UPC (Hamburg District Court), Order of 3 November 2023 - UPC\_CFI\_54/2023; UPC (Düsseldorf District Court), Order of 23 February 2024 - UPC\_CFI\_463/2023).

2.

A confidentiality order pursuant to R. 262A.1 RoP may be considered to the effect that the access of the nullity plaintiffs is restricted to the annexes ES8 - confidential - and ES9 filed by the nullity defendant.

3.

Whether and to what extent a party's access to certain information contained in submitted documents or annexes is restricted must be determined by weighing up the interests of the parties, taking into account the circumstances of the individual case (see R. 262A.5 RoP). In particular, the party affected by the access restriction must take into account the right to be heard in order to exercise their rights in a fair procedure, and

on the part of the requesting party its interest in protecting its confidential information.

4.

As the UPC (LK Düsseldorf) clarified in its decision of 27 March 2024 - UPC CFI 355/2023, para. 19, which the judge-rapporteur agrees with, a party requesting protection of confidential information must provide sufficiently substantiated reasons why it believes that the information in question is worthy of protection. It is not sufficient to rely on general circumstances, such as the existence of competition between the parties to the dispute. The court must be able to understand why the applicant believes that the specific information to be protected is in need of protection and confidential.

It is questionable whether the applicant's argument that the information contained in the annexes is relevant in current settlement negotiations fulfils these requirements. This is because this general argument could be used in all proceedings in which settlement negotiations are underway, as is often the case, to argue that the information on legal fees incurred is worthy of protection and must therefore be kept secret.

In the end, however, this is irrelevant insofar as a restriction of access to the information is also ruled out from other points of view.

5.

Insofar as the applicant requests, with regard to Annex ES8 - confidential - and with regard to Annex ES9, that only the court and, in the alternative, the legal representatives of the applicants for annulment should be granted access to the annexes, the applications must be dismissed.

In this respect, the court agrees with the view that the group of persons entitled to access must in principle include at least one natural person from each party in addition to the legal or other representatives (see also EPG (LK Düsseldorf), decision of 23 February 2024, UPC\_CFI\_463/2023; EPG (LK Düsseldorf), decision of 27 March 2024 - UPC\_CFI\_355/2023 ORD\_7096/2024, para. 26; EPG (LK Mannheim), Order of 22 July 2024 - UPC\_CFI\_471/2023; see also EPG (LK Den Haag), Order of 4 March 2024 - UPC\_CFI\_239/2023, App\_589842/2023, para. 10; probably also EPG (LK Milan), decision of 06/05/2024 - UPC\_CFI\_241/2023). Any further restriction is neither compatible with Art. 9 of Directive (EU) 2016/943 nor with R. 262A.6 RoP. Accordingly, in the context of an interpretation in conformity with European law, Art. 58 UPCA, taking into account Art. 9 para. 2 of Directive (EU) 2016/943, must also be understood to mean that the group of persons entitled to access must include at least one natural person from each party. Only in this way is the fundamental right to a fair hearing and the right to a fair trial (see Art. 76 II UPCA, 47 II GrCh, 6 I ECHR) adequately taken into account.

Whether something else can apply if the parties agree to a restriction to the legal representatives as a so-called "confidentiality club" (see UPC (LK Den Haag), decision of 4 March 2024, UPC\_CFI\_239/2023; UPC (LK Paris), decision of 26 March 2024, UPC\_CFI\_397/2023), can be left open, as there is no such agreement.

6.

Accordingly, only a limitation to a larger group of persons, including at least one natural person from the defendants' camp, as requested by the applicant in the alternative with regard to Annex ES9, can be considered. Due to the applicant's interest in allowing as few persons as possible access to the information contained in Annex ES8 - confidential - the application for confidentiality submitted in the alternative is interpreted favourably by the court in such a way that this application also includes a restriction to a larger group of persons than designated by the applicant, i.e. a group of persons including at least one natural person from the defendants' camp.

7.

The following aspects must be taken into account in the necessary consideration:

The applicant's application is based in particular on the fact that this information would enable the opposing party to sound out the negotiating positions in parallel settlement negotiations without confidentiality measures.

At the same time, the information submitted by the applicant as worthy of protection is not information that concerns the main subject matter of the court proceedings or directly influences the applicant's business activities, as would be the case, for example, if technical information from research and development or concluded licence agreements were the subject matter of the confidentiality application. This is information that does not originate from the original economic or entrepreneurial trade, but has only gained significance as a result of a legal dispute.

In favour of the defendants, their right to sufficient access to all information submitted by a party to the court must be taken into account. R. 262A constitutes an exception to the principle that all information and documents submitted by a party in proceedings must be brought to the attention of the other party and the latter must have had the opportunity to comment (see Art. 76 para. 2 UPCA). Only if the parties in the proceedings have the same opportunities to present and defend their positions on certain points in dispute, which presupposes that all parties can comment on the information and statements submitted themselves, can we speak of equal parties and their right to "procedural equality of arms" be realised. In this respect, there is generally no need for a separately substantiated interest (worthy of protection) in access to the information. Rather, the burden of presentation and proof lies with the party who exceptionally requests that information be kept secret.

8.

The interest in unrestricted access to information always carries particular weight if there is a recognisably justified and

there is an interest worthy of protection in being able to comment on the information submitted by the opposing party as worthy of protection and to be able to make submissions in this regard.

In the present proceedings, the plaintiffs and defendants have argued that merely stating a total amount of costs or making the redacted version of the schedule in Annex ES9 available would not enable them to assess whether the conditions for reimbursement of costs under Article 69 UPCA are met. However, reimbursement of the costs of the legal proceedings and other costs in favour of the successful party is only to be made in accordance with Art. 69 para. 1 UPCA "insofar as they are reasonable and appropriate".

The plaintiffs and defendants would not be able to defend themselves against unreasonable and unreasonable costs that they might have to bear if they did not know how these costs were specifically broken down and presented. In fact, if they only knew the total costs, they would have to deny them in an unsubstantiated and generalised manner. Legal argumentation and defence, as well as appropriate legal representation, would be impossible. This would not only result in an unreasonable impairment of the defendants' right to be heard, which also includes the right to sufficient information, but would also constitute a violation of the right to a fair trial (see Art. 76 II UPCA, 47 II CFREU, 6 I ECHR).

In addition, it makes it more difficult for the court to determine the law, which can in principle only rule on circumstances on which both sides of the dispute can be heard.

9.

In this respect, the negative consequences of disclosing the information for the applicant and the consequences of keeping the information secret for the defendants must also be compared.

According to the applicant's submission, the disclosure of her exact cost positions in a settlement negotiation would result in a worse negotiating position for her and she could thus suffer economic disadvantages.

On the other hand, non-disclosure puts the defendants at a disadvantage in the pending court proceedings, which could result in them having to bear the costs of the legal dispute of the other side - as decided by a court judgement - even though the other side is not legally entitled to them. In the absence of knowledge of the basis of calculation, they would have no possibility of taking action against the costs decision on the basis of what they consider to be unreasonable and inappropriate costs. This means that non-disclosure could also result in a wrong sovereign decision with negative economic consequences for the defendants.

10.

Taking into account the particular importance of the right to sufficient access to the information that is the subject of the proceedings and the associated right to be heard of the defendants, as well as the required



After weighing up the conflicting interests presented, the court must dismiss the application for non-disclosure of Annexes ES8 - confidential - and ES9 vis-à-vis the defendants.

11.

The applications expressly submitted by the applicant for the confidentiality of the information vis-à-vis the respondent pursuant to R. 262A RoP contain the following information

"Minus" an application for confidential treatment of the information vis-à-vis the public pursuant to R. 262.2 RoP.

In its document dated 21 June 2024, the applicant states in para. 9 that third parties not involved in the proceedings should not be granted access to the parties' cost estimates. Due to this submission and the associated interest in granting as few persons as possible access to the information on their costs, their applications pursuant to R. 262A RoP can be interpreted favourably by the court to the effect that they also constitute an application pursuant to R. 262A RoP.

R. 262.2 RoP on the non-disclosure of confidential information to the public.

This is also supported by the fact that an Order to keep certain information confidential in relation to the other party pursuant to R. 262A RoP always also excludes the accessibility of the information to the public in the register pursuant to R. 262 RoP (see also Tillmann/Plassmann/v. Falck/Stoll, EPGVerfO R. 262A para. 24). Otherwise, the opposing party affected by the access restriction could obtain the confidential information by inspecting the register. A restriction of access to information for parties to proceedings pursuant to R. 262A thus always includes an exclusion of the public from access to the information pursuant to R. 262 RoP as a "minus". If an Order pursuant to R. 262A RoP also includes the legal consequence of R. 262.2 RoP, an application for confidentiality of information relating to fees to parties to proceedings within the meaning of R. 262A RoP also includes an application for confidentiality vis-à-vis the public pursuant to R. 262.2 RoP.

12.

In contrast to R. 262A RoP, which regulates the restriction of access to procedural information vis-à-vis parties to proceedings, R. 262.2 RoP deals with access to procedural information for the public and third parties. In this respect, R. 262 RoP is an expression of the principle of procedural publicity (see Art. 45 UPCA) and regulates access to the procedural information contained in the Register.

While the parties to the proceedings who would be affected by a possible Order of confidentiality pursuant to R. 262A RoP are particularly affected by the fundamental right to be heard and their right to a fair trial, only the general public interest in information must be taken into account when deciding on the application pursuant to R. 262.2 RoP. The requirements for granting a restriction on publication are therefore lowered.

13.

Taking this standard into account, the assessment required under R. 262.2 RoP also shows that this application must be granted:

It is true that the public has an understandable interest in knowing by whom and to what extent the costs of court proceedings must be borne. This arises in particular from the fact that third parties, as part of the public, can assess whether they wish to take the corresponding litigation and cost risk for future court proceedings of their own if they are aware of the cost decisions.

However, since lawyers' fees in patent disputes are generally agreed individually by way of fee agreements anyway, it is not possible to draw any well-founded conclusions about possible own costs in other court proceedings from knowledge of the legal costs incurred and to be incurred. If remuneration is paid in accordance with the statutory remuneration, the amount of the remuneration is already determined by law.

At the same time, the applicant has a legitimate interest in ensuring that the fees she negotiates individually with her legal representatives remain secret from the public.

Nothing else follows from the public's control function either. This is sufficiently enabled by access to the court's decision on the question of which party is to bear the costs and in what amount.


The application pursuant to R. 262.2 RoP for confidential treatment of the information vis-à-vis the public must therefore be granted.

### Order

1. The applicant's application of 21 June 2024 for the protection of confidential information pursuant to R. 262A RoP regarding the restriction of access to Annexes ES8 - confidential - and ES9 for the respondents is rejected.
2. The application for confidential treatment pursuant to R. 262.2 RoP is granted with regard to Annexes ES8 - confidential - and ES9.

judge-rapporteur:  
Maximilian Haedicke

Maximilian  
Wilhelm  
Haedicke



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### Order details

Order No. ORD\_39244/2024 in PROCEDURE NUMBER: ACT\_580198/2023

UPC number: UPC\_CFI\_367/2023

Nature of the proceedings: Action for annulment

No. of the related procedure Application No.: 37662/2024

Type of application: APPLICATION\_ROP262A