Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

UPC Court of Appeal
UPC_CoA_402/2024
APL_40470/2024
App_8340/2025

Decision
of the Court of Appeal of the Unified Patent Court
issued on 19 June 2025
concerning an Application for rehearing (R. 245 RoP)

HEADNOTES

The Court of Appeal sets out the general principles to be considered when deciding on a request for a rehearing based on a fundamental procedural defect pursuant to Art. 81(1)(b) UPCA jo. R. 247(c) RoP (fundamental procedural defect; fundamental violation of Art. 76 UPCA)

KEYWORDS

Rehearing (Art. 81(1) UPCA; R. 245 RoP); fundamental procedural defect

APPLICANT AND APPELLANT (AND APPLICANT IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

Alexion Pharmaceuticals, Inc., 121 Seaport Blvd, 02210 Boston (MA), USA
hereinafter ("**Alexion**")

represented by attorney-at-law Elena Hennecke, assisted by other attorneys-at-law of Freshfields, Düsseldorf, Germany

RESPONDENT (DEFENDANT IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

Samsung Bioepis NL B.V., Olof Palmestraat 10, 2616 LR, Delft, The Netherlands
hereinafter ("**Samsung**")

represented by attorney-at-law Dr. Peter Meyer, assisted by other attorneys-at-law of Simmons & Simmons, Munich, Germany

PATENT AT ISSUE

EP 3 167 888

LANGUAGE OF THE PROCEEDINGS

English

DECIDING JUDGES

Panel 2
Rian Kalden, presiding judge and judge-rapporteur
Patricia Rombach, legally qualified judge
Ingeborg Simonsson, legally qualified judge

ORDER UNDER REVIEW

Order of the Court of Appeal of the Unified Patent Court, 20 December 2024, ORD_60219/2024, APL_40470/2024, UPC_CoA_402/2024

SUMMARY OF FACTS AND PROCEDURAL HISTORY

1. Alexion is the proprietor of European Patent 3 167 888 B1 for "treatment of paroxysmal nocturnal hemoglobinuria patients by an inhibitor of complement" (the patent at issue).
2. Alexion lodged an application for provisional measures against Samsung with the Hamburg Local Division of the Court of First Instance (LD). The LD dismissed Alexion's requests, because it could not be established to the necessary degree of certainty that the patent at issue is valid.
3. Alexion lodged an appeal. The Court of Appeal dismissed the appeal and ordered that Alexion must bear the costs of the appeal proceedings.

PARTIES' SUBMISSIONS AND REQUESTS

4. Alexion submits that the Court of Appeal reached the order under review by means of fundamental procedural errors. It contends that the Court of Appeal:
    a. applied a completely new standard for claim interpretation without providing proper opportunity for Alexion to be heard on this.
    b. based its decision on incorrect facts.
5. Alexion requests that the Court of Appeal set aside the order under review and reopen the proceedings for a rehearing and a new decision.
6. Samsung submits that the application is not admissible and, in any case, unfounded and requests that the application be rejected and that Alexion is ordered to pay the costs of the proceedings.

REASONS FOR THE DECISION

7. The Application is not allowable, because the requirements set forth in Art. 81(1) of the Agreement on a Unified Patent Court (UPCA) and R. 247 Rules of Procedure (RoP) have not been complied with. In relation to the order under review, the existence of a fundamental procedural defect has not been established.

8. When considering whether a fundamental procedural defect exists, the following has to be taken into account.

9. The legislator has explicitly chosen that decisions by the Court of Appeal are to be final. A further appeal from these decisions is not foreseen in the UPCA or RoP.

10. Art. 81(1) UPCA offers the possibility to request a rehearing after a final decision when, in short, it is based on an act which has been held to constitute a criminal offence, or in the event of a fundamental procedural defect. These circumstances must not have been known or, in case of a fundamental procedural defect, if known, already objected to during the proceedings leading to the decision or on appeal (R. 248 RoP), except where such objection could not have been raised during the proceedings before the Court of First Instance or the Court of Appeal.

11. The literal wording of Art. 81(1) UPCA makes clear that a rehearing may *exceptionally* be granted only if the decision suffers from one of these serious deficiencies. A rehearing is thus not a regular appeal proceeding, but an extraordinary legal remedy. Only *fundamental* procedural defects can be the basis for a rehearing.

12. It is therefore not intended that mere errors of any kind can be a ground for an application for rehearing. In order to qualify as a ground for rehearing, a procedural defect must be so fundamental that it is intolerable for the legal system and overriding the principle that proceedings which have led to a final decision should not be re-opened in the interest of legal certainty.

13. Furthermore, a defect may only be considered fundamental if it can be established that without the defect the same decision would not have been taken (see judgment of 3 July 2014 in Kamino International Logistics and Datema Hellmann Worldwide Logistics, C-129/13 and C130/13, EU:C:2014:2041, paragraph 79 and the case-law cited). It is for the applicant to show this.

14. It is for the parties to bring forward arguments that they consider relevant and wish to be considered. The assessment of arguments presented by the parties and the conclusions drawn therefrom, cannot as such be subject to review in an application for rehearing. From the above it follows that this is even so if such an assessment could be considered to be incorrect, as long as the error does not constitute a *fundamental* defect as meant in Art. 81(1) UPCA.

15. The same applies to evidence. It is for the parties to bring forward all the evidence required to sufficiently substantiate their arguments. The Court shall evaluate the evidence presented by the parties freely and independently (Art. 76(3) UPCA). The Court may make its own assessment of the weight that expert opinions and witness statements carry, whereby it may consider its evaluation of the neutrality of an expert or witness. The manner in which questions are asked or in which answers are formulated, may be a basis for such an assessment.

16. It falls to the Court to assess the relevance to the subject-matter of the dispute and the need to examine the witnesses named and requested to be heard. Similarly, there is not in general an obligation for the Court to hear any of the experts whose written opinions have been submitted as evidence by a party. This is even less so in proceedings for provisional measures. Pursuant to R. 210.2 RoP last sentence, Part 2 of the Rules on Evidence shall be applicable to these proceedings only to the extent determined by the Court.

17. Where a statement of fact is not specifically contested by any party, it follows from R. 171.2 RoP that it shall be held to be true as between the parties. However, even if there is such an uncontested fact, this does not imply that the legal consequence for which this fact was submitted automatically follows. It still falls upon the Court to decide whether the facts advanced justify such a legal consequence (Court of Appeal, Kodak v Fujifilm, 17 April 2025, UPC_CoA_312/2025, par. 12).

18. The interpretation of a patent claim is a matter of law (Court of Appeal, Insulet v EoFlow, 30 April 2025, UPC_CoA_768/2024, par. 37). When interpreting a claim, it is for the Court of Appeal to establish what the skilled person's understanding is of the terms used in the patent claim in the context of the patent claim as a whole and considering the description and drawings. In doing so, it shall consider and weigh the arguments and facts brought forward by the parties, including any expert opinions, freely and independently, however, without being bound by it.

19. In that respect, there is no reason why the decision of the Technical Boards of Appeal in the opposition proceedings relating to the patent at issue, if relied on by one of the parties, cannot be considered as an indication of the views of the person skilled in the art at the filing date.

20. The Court is free to make findings on points of law. The parties are expected to have knowledge of the law(s) relevant to the case, including case law developed in relation thereto and anticipate the possible application of it to the case at hand.

21. Case law that parties are expected to have knowledge of includes case law of the Technical Boards of Appeal (TBAs) and the Enlarged Board of Appeal (EBA) of the European Patent Office (EPO) relevant for the issues at hand and the arguments advanced. Although the Court of Appeal is not bound by such case law, there is reason to consider TBA decisions and – even more so – EBA decisions - since these Boards apply the same substantive law provisions of the European Patent Convention (EPC) as the Court. A similar approach has been and still is taken by national courts of the Contracting Members States and other countries party to the EPC, such as the UK, who have national laws that are largely based on the substantive law provisions of the EPC. When litigating before the Court, party representatives are thus expected to be also aware of the relevant case law developed by the TBAs and EBA.

22. A decision of the Court shall contain the grounds for the decision and a statement of the facts and arguments on which the Court bases its decision (R. 350 RoP). The Court must consider all arguments brought forward by the parties, but it is, however, not required to explicitly and exhaustively address in its order or decision each and every argument advanced by a party in detail in the order or decision. The Court may disregard arguments that are irrelevant or obviously flawed or dismiss an argument implicitly, e.g. when its dismissal follows from the further considerations of the Court. That applies even more to arguments advanced in exhibits, such as expert opinions. In preliminary measure proceedings the standard to be applied in this respect is lower.

23. The right to be heard is reflected in Art. 76(2) UPCA, which provides that decisions on the merits may only be based on grounds, facts and evidence, which were submitted by the parties or introduced into the procedure by an order of the Court and on which the parties have had an opportunity to present their comments. It is not required that a party must always have had the opportunity to provide comments *in writing*.

24. Unless the decision could not have been objectively foreseen and would come as a surprise to the well informed representative, e.g. for being inconsistent with and fundamentally deviating from established case law or based on case law not yet available at the time of the oral hearing, the right to be heard does not require that the Court notifies the parties in advance of its (preliminary) opinion on any issue in dispute between the parties and / or the basis therefor, either in an interim conference or in a preliminary opinion issued prior to the oral hearing. The UPCA and RoP do not provide for such a system. The Court *may* provide a preliminary introduction to the action (R. 112.4 RoP) which *may* contain a preliminary opinion but is not held to do so.

25. Even though Art. 76(2) UPCA refers to decisions on the merits, the right to be heard also applies in principle to proceedings for provisional measures, albeit that in such proceedings a less stringent standard applies or, depending on the circumstances, the principle may not apply at all (*ex parte* proceedings, in which, however, in order to have the defendant heard to the extent possible, a protective letter, if filed, together with any correspondence between the parties and other material facts to be submitted by the applicant pursuant to R. 205.3(b) and .4 RoP, must be considered (R. 207.8 RoP)).

26. In view of the above principles, the Court of Appeal concludes that the order under review does not suffer from a fundamental procedural defect in the sense of Art. 81(1) UPCA. What Alexion has brought forward in its application is not sufficient to conclude that the Court of Appeal made an error, let alone one that must be considered a flaw of such a serious nature that it would constitute a fundamental error without which the same decision would not have been taken.

27. Alexion in essence does not agree with the conclusions drawn by the Court of Appeal from the arguments and evidence before it. However, a mere disagreement with the reasoning and considerations by the Court of Appeal and the outcome of the case is not a ground for a rehearing.

28. It follows that the application for rehearing must be rejected as not allowable.

29. As the unsuccessful party, Alexion shall bear the costs of the rehearing procedure, as requested by Samsung. These costs shall be included in the costs of the appeal procedure.

ORDER

The Court of Appeal

- rejects the application for rehearing as not allowable;
- orders Alexion to bear Samsung's cost of the rehearing proceedings.

Issued on 19 June 2025

Rian Kalden Date: 2025.06.19 15:30:28 +02'00'

Rian Kalden, presiding judge and judge-rapporteur

Patricia Ursula Rombach Digitally signed by Patricia Ursula Rombach Date: 2025.06.19 15:55:29 +02'00'

Patricia Rombach, legally qualified judge

Digitally signed by Åsa Ingeborg Simonsson Date: 2025.06.19 16:21:31 +02'00'

Ingeborg Simonsson, legally qualified judge