Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

UPC Court of Appeal
UPC_CoA_930/2025

ORDER

of the Court of Appeal of the Unified Patent Court
issued on 4 February 2026
Concerning an application for suspensive effect (R. 223 RoP)
and appeal against an order imposing penalties (Art. 82(4) UPCA, R. 354.4 RoP)
and awarding costs

HEADNOTES:

- Orders imposing a penalty payment (Art. 82(4) UPCA, R. 354.4 RoP) are not orders as specified in Art. 73(2)(a) UPCA or R. 220.1(c) RoP. The last sentence of R. 354.4 RoP reads: "(...) the Court may make an appropriate order which may be subject to an appeal pursuant to Rule 220.2." This means that an appeal against those orders is only admissible if leave to appeal is granted by the Court of First Instance who issued the order, or the Court of Appeal granted leave to appeal after discretionary review according to R. 220.4 RoP.

KEYWORDS:

- Order imposing a penalty payment (Art. 82(4) UPCA, R. 354.4 RoP)
- Leave to appeal

APPELLANT (AND DEFENDANT BEFORE THE COURT OF FIRST INSTANCE)

EOFlow Co., Ltd., Hwangsaeul-ro, Bundang-gu, Seongnam-si, Gyeonggi-do, Republic of Korea
(hereinafter: "EOFlow")

represented by attorney at law Mirko Weinert, Hoyng ROKH Monegier, Düsseldorf, Germany

RESPONDENT (AND APPLICANT BEFORE THE COURT OF FIRST INSTANCE)

Insulet Corporation, Acton, United States of America
(hereinafter: "Insulet")

represented by attorney at law Marc Grunwald, Peterreins Schley, Munich, Germany

PATENT AT ISSUE

EP 4 201 327

PANEL AND DECIDING JUDGES

Panel 2

This order has been adopted by
Rian Kalden, presiding judge and legally qualified judge
Patricia Rombach, legally qualified judge and judge-rapporteur
Ingeborg Simonsson, legally qualified judge
Steven Kitchen, technically qualified judge
Udo Matter, technically qualified judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

Milan Central Division, 4 December 2025, UPC_CFI_1167/2025

LANGUAGE OF THE PROCEEDINGS

English

FACTS

1. EOFlow is a manufacturer based in South Korea. It manufactures an insulin pump named "EOpatch" and "GlucoMen Day Pump" hereinafter "attacked embodiments". EOFlow shipped the attacked embodiments to the exclusive European distributor A. Menarini Diagnostics s.r.l in Italy (hereinafter Menarini).

2. In its order in preliminary injunction proceedings of 30 April 2025 (UPC_CoA_768/2024, APL_64374/2024, ORD_69078/2024, "the order on provisional measures") the Court of Appeal found that the attacked embodiments infringe Insulet´s patent and ordered EOFlow to refrain from making, offering, placing on the market, using or possessing for the purposes mentioned, or importing or storing the attacked embodiments *inter alia* in the territories of the Italian Republic and/or the Kingdom of Sweden.

3. Furthermore, the Court of Appeal ordered that if EOFlow fails to comply with this prohibition periodic penalty payments are payable to the Court of up to EUR 250,000 for each individual violation.

4. Insulet filed an application seeking the imposition of a penalty.

5. EOFlow filed applications under R. 262.2 RoP.

6. With the impugned order, the Milan Central Division as far as relevant ordered penalty payments in the amount of EUR 150,000 for non-compliance with the order on provisional measures ("penalty payment order") and dismissed EOFlow´s R. 262.2 RoP requests. EOFlow was ordered to bear the costs of the proceedings in the amount of EUR 10,000.00, payable to Insulet.

7. EOFlow appealed the order with regard to the penalty payment as well as with regard to the dismissal of its 262.2 RoP requests.

8. EOFlow requests that the appeal has suspensive effect.

9. The judge-rapporteur invited the parties to comment on the non-compliance with R. 220.2 RoP with regard to the penalty order and the consequences thereof, in particular the consequences for the admissibility of the appeal with regard to the imposed penalty and with regard to the cost decision.

PARTIES´ REQUESTS

10. In summary, EOFlow requests that the Court of Appeal grant suspensive effect of the appeal, set aside the impugned order, order that the penalty request be dismissed, order that any penalty payments made be refunded to EOFlow, order that Insulet bear the costs of the first instance proceedings as well as the appeal proceedings.

11. As far as relevant here, Insulet requests that the Court of Appeal reject EOFlow´s application for suspensive effect of the appeal, dismiss the appeal and order EOFlow to bear the costs of the proceedings, in the alternative, that the Court of Appeal refer the case back to the Central Division Milan.

Parties´ submissions

12. In essence, EOFlow submits the following.
    - The penalty payment order of the Milan Central Division qualifies as "manifestly wrong".
    - Ordering the payment of a specified amount as cost award without a respective request of a party and lacking any pleadings regarding the amount runs obviously afoul the procedural principles of "*ne ultra petita*" and the right to be heard.
    - Having the historic background and the intended *ratio* of R. 220.2 RoP in mind (i.e. avoiding abusive appeals against procedural orders during ongoing proceedings in order to not delay the proceedings), references to R. 220.2 RoP are phrased in different ways in R. 21.1, 158.3, 223.5, 262.2, 354.4 and 370.5(b), (f) RoP. A difference in wording usually indicates a difference in meaning, provided that the context allows for such difference and does not command otherwise.
    - When looking at the use of the plain "pursuant to" in R. 223.5 RoP it is clear from the context that there is no special need to fulfil additional requirements of the referenced rule. It is just meant as a general reference to the type of appeal.
    - Based on the logic of the other plain "pursuant to" referrals in the Rules of Procedure, this means that R. 354.4 RoP as well just refers to the type of appeal, without pointing to additional prerequisites of the referenced rule.
    - The categorization as "RoP 220.2 appeal" is necessary in order to define the further rules governing such an appeal, e.g. the time periods in R. 224.1 (b) and R. 224.2(b) RoP, and the role of the judge-rapporteur in R. 239.2 RoP.
    - Since most of the penalty proceedings will be initiated after the main action is finished, an "appeal together with an appeal against the decision" could never occur.
    - The requirement for leave to appeal in R. 220.2 and R. 220.3 RoP shall avoid abusive usage of the stand-alone-appeal. When it comes to R. 354.4 RoP the factual situation significantly differs and the *ratio* behind R. 220.2 RoP does not apply.

- Otherwise, the result - an appeal against a penalty order is possible without leave as long as the main action is not finished, but no appeal is possible without leave if the main action is finished and the appeal against the penalty order is a "stand-alone appeal"- would be odd. In both cases, the issue of whether there was a violation of the order and whether the penalty is appropriate needs to be assessed in full and is not only limited to the situation that the decision in the main action could be overturned.
- The order of 29 December 2025 (CoA_936/2025, *Amazon v InterDigital*) indicates that an appeal against a penalty order is admissible without further restrictions.
- The orders in *Photon Wave vs. Seoul Viosys* (order of 15 October 2024, CoA_PC01/2024,) and in *Ballino vs. Kinexon* (order of 12 May 2025, CoA_328/2024) refer to appeals not based on the reference in R. 354.4 RoP.
- Assuming that the Milan Central Division granted leave for appeal with respect to the subordinate question of confidentiality but not with respect to the main issue of the "penalty order" would not be in accordance with the principles in preamble (6) UPCA.
- According to the case-law of the CJEU on the Charter of Fundamental Rights of the European Union (CFR), any additional steps limiting access to justice need (1) to be provided for by law, (2) must respect the essence of the right and (3) having regard to the principle of proportionality be necessary to observe a general recognized interest or need to protect the rights and freedoms of others.
- If one were to regard R. 354.4 RoP as an incorporating reference to the requirement of leave to appeal under R. 220.2 RoP, such a threshold would lack the required quality as "provided for by law". The Rules of Procedure have not been issued by means of a parliament process and the UPCA as such does not contain an article dealing with the subject of R. 354.4 RoP. In addition, R. 354.4 RoP is not sufficiently clear and precise. The limitation that leave to appeal needs to be granted by the Court of First Instance is not contained in Art. 73 (2)(b) UPCA either.
- The rigid handling of a leave to appeal requirement in cases of coercive means – as a penalty order – prevents access to justice and thereby ultimately limits the possibility of a party to have the respective order revisited. This marks a severe impact on the right of that party, since penalty orders directly and severely interfere with the constitutional rights of the affected person/entity.
- Finally, the Court already ruled in *Total vs. Texas Instruments* (order of 14 January 2025, CoA_651/2024) that appeals including a question of access to justice do not require leave to appeal but that the Court can raise such issue on its own motion.
- The Court has the power to grant leave to appeal on its own. If one were to decide differently, the appeal against the penalty order could still be regarded as an application for discretionary review under R. 220.3 RoP.
- Regarding the cost decision, the Court has the power to grant leave to appeal under R. 221 RoP.

13. In essence, Insulet submits the following:
    - R. 354.4 RoP does not itself establish an autonomous provision of granting leave to appeal but expressly refers to R. 220.2 RoP as the governing provision for the admissibility on appeal.
    - This is consistent with the penalty payments as an enforcement mechanism. Leave to appeal against penalty payments should only be granted if the Court of First Instance expressly orders so.

- Penalty payments are intended to ensure prompt and effective compliance with court orders. Permitting leave to appeal as a matter of course would e.g. risk diminishing the coercive and deterrent function of penalty payments and could significantly delay enforcement.
- The Central Division Milan refrained from granting leave in relation to the penalty and cost elements of the order.

GROUNDS:

Inadmissibility of the appeal with regard to the penalty payment

Legal Framework

14. Pursuant to Art. 73(2)(b) UPCA, an appeal against an order of the Court of First Instance may be brought before the Court of Appeal by any party which has been unsuccessful, in whole or in part, in its submissions, for other orders than the ones specified in Art. 73(2)(a) UPCA: (i) together with the appeal against the decision, or (ii) where the Court grants leave to appeal, within 15 days of the notification of the Court's decision to that effect.

15. In accordance with Art. 73(2)(b) UPCA, R. 220.2 RoP states that orders other than those referred to in R. 220.1 and R. 97.5 RoP may be either the subject of an appeal together with the appeal against the decision or may be appealed with leave of the Court of First Instance within 15 days of service of the Court´s decision to that effect. It is established case law of the Court of Appeal that orders other than those referred to in R. 220.1 RoP require leave to appeal, if they are not subject of an appeal together with the appeal against the decision (CoA 9 October 2024, UPC_CoA_586/2024, *Suinno vs. Microsoft* para. 13).

16. Orders imposing a penalty payment (Art. 82(4) UPCA, R. 354.4 RoP) are not orders as specified in Art. 73(2)(a) UPCA or R. 220.1(c) RoP. The last sentence of R. 354.4 RoP reads: "(...) the Court may make an appropriate order which may be subject to an appeal pursuant to Rule 220.2." This means that an appeal against those orders is only admissible if leave to appeal is granted by the Court of First Instance who issued the order, or the Court of Appeal granted leave to appeal after discretionary review according to R. 220.4 RoP.

17. Since this clearly follows from Art. 73(2)(a) UPCA and R. 354.4 RoP, EOFlow´s line of argument – that this limitation of access to justice is not provided by law – is flawed.

18. EOFlow argues without success that it follows from the wording of R. 354.4 RoP that the rule only refers to the type of the appeal without pointing to additional prerequisites of the referenced R. 220.2 RoP. Pursuant to R. 354.4 RoP the penalty order is subject to an appeal “pursuant to R. 220.2 RoP”. This is merely to clarify that the order imposing penalty payments is not an order according to Art. 73(2) (a) UPCA, R. 220.1 RoP. This clarification was necessary because, unlike the typical procedural orders, this order is not necessarily issued in the course of ongoing proceedings prior to a final decision. It may also be, and typically is, issued after the main proceedings have been concluded.

19. It is not an odd or unusual result that when the main action is concluded, an appeal against a penalty imposing order is only possible if leave to appeal is granted by the Court of First Instance or by the Court of Appeal after discretionary review. Appeals against cost decisions referred to R. 157 RoP are also only admissible if leave to appeal is granted (R. 221 RoP).

20. Contrary to EOFlow´s opinion, nothing else follows from the order of 29 December 2025 (CoA_936/2025, para. 14, *Amazon v InterDigital*). It merely refers to the possibility of appeal, but not to the conditions for its admissibility.

Leave not granted

21. Leave to appeal can already be granted in the (impugned) order itself, or – if that is not the case – afterwards by a separate order upon a request for leave, which decision must be issued within 15 days of the impugned order (cf R. 220.3 RoP, CoA 9 October 2024, UPC_CoA_586/2024, *Suinno vs. Microsoft* para. 15).

22. The Milan Central Division expressly granted leave to appeal with respect to the confidentiality request. Regarding the imposition of the penalty, it noted that it is subject to appeal under R. 354.4 RoP. Since leave to appeal must be expressly granted by the Court of First Instance and cannot be presumed (CoA, 15 October 2024, PC 01/2024, *Photon Wave vs Seoul Viosys,* para. 9; 12 May 2025, UPC_CoA_328/2024, *Ballinno vs. Kinexon*, para. 33), it cannot be presumed that the Court of First Instance also granted leave to appeal the order imposing the penalty.

Discretionary review

23. Contrary to EOFlow´s opinion, the appeal cannot be regarded as an application for discretionary review under R. 220.3 RoP. Such an application is not admissible.

24. A party who wants to appeal an order in accordance with R. 220.2 RoP must, unless leave to appeal has already been granted in the order, request the Court of First Instance to grant leave to appeal. It follows from the wording of R. 220.3 RoP ("in the event of a refusal of the Court of First Instance to grant leave") that only if such a request has been denied, is it possible to request a discretionary review (R. 220.3 RoP, *Suinno vs. Microsoft*, para. 18). EOFlow has not requested leave to appeal the impugned order.

25. EOFlow argues without success that this case-law introduces a further requirement into RoP 220.3 RoP, i.e. the prior request of a party, that is not present in the wording of the rule and not provided for in Art. 73 (2) UPCA either.

26. R. 220.3 RoP permits a discretionary review only "in the event of a refusal" ("en cas de refus"). This means that a decision by the CFI on a request for leave is required. Given the clear wording of the other language versions, the German wording must be interpreted in the same way, even though the word "Ablehnung" (refusal) is not used in that language version. No decision is required here as to what applies in cases where the Court of First Instance fails to decide within the time limit despite a

timely request for leave to file an appeal. EOFlow has not requested leave to appeal the impugned order.

Leave to appeal on the Court´s motion

27. EOFlow argues without success that the Court of Appeal already ruled in *Total vs. Texas Instruments* (order of 14 January 2025, CoA_651/2024) that appeals including a question of access to justice do not require leave to appeal but that the Court can raise such issue on its own motion. The facts of that case raised the question as to whether the judge-rapporteur could decide alone whether or not to grant leave to appeal. The fact that the judge-rapporteur himself decided not to grant leave, rather than have the panel decide, prevented that a request for discretionary review pursuant to R. 220.3 RoP was admissible, since there was no panel order (*Total vs. Texas Instruments, para. 7)* thus leaving the party without a remedy. This is not a comparable case. There was nothing that prevented EOFlow from requesting leave to appeal in this case.

Inadmissibility of the appeal against the order on costs

28. The Milan Central Division ordered that EOFlow shall bear the costs of the proceedings in the amount of EUR 10,000, payable to Insulet. It reasoned that all costs relating to enforcement fall outside the scope of R. 151 RoP, as the wording of R. 150 RoP does not permit compensation of costs after a decision was issued, and therefore addressed the costs arising from the enforcement directly in its order.

29. Leaving aside whether the Milan Central Division approach is right, legal remedy against this cost order is an appeal under R. 220.2 RoP and not an application for leave to appeal against cost decisions according to R. 221 RoP. Cases under R. 221 RoP, which specifically refers to R. 157 RoP, only concern the amount of the cost and are decided only by the judge-rapporteur. Orders on costs, which concern not only the question of who bears the costs but also the amount, are subject to the same legal remedy as the decision on the merits. This follows from the fact that the decision on costs is as a general rule based on which party was successful (see Art. 69(1) UPCA).

30. An appeal pursuant to R. 220.2 RoP is inadmissible for the reasons stated above.

Conclusion

31. It follows from the foregoing that the appeal against the order imposing a penalty payment and the cost order is inadmissible.

    As this is a formal matter falling in principle within the scope of the examination referred to in R. 229 RoP, and the parties have been given the opportunity to comment, it is not necessary to hear the parties at an oral hearing regarding the appeal against the order imposing penalty payment and the cost order.

32. Nor is it necessary for the appeal concerning the order imposing a penalty payment and the appeal concerning the rejection of the confidentiality requests to be decided together. The cost decision will be deferred until the final decision in the appeal proceedings.

Application for suspensive effect

33. Since the appeal against the order imposing a penalty payment and the cost order is inadmissible, the application for suspensive effect of the appeal has to be denied.

Appeal with regard to the R. 262.2 RoP requests

34. With regard to the appeal against the rejection of the R. 262.2 RoP requests, it should be noted that the Statement of appeal merely contains a request to set aside the order of the Court of First Instance but not the order sought by EOFlow. Since the Registry did not point out this deficiency (R. 229.1 RoP), EOFlow shall be given the opportunity to correct this deficiency.

35. The parties shall be requested about the need, and if applicable, their availability for an oral hearing regarding the appeal concerning R. 262.2 RoP.

ORDER

I. The appeal against the order imposing penalty payments and the cost order in the order of the Milan Central Division 4 December 2025, UPC_CFI_1167/2025 is dismissed.

II. EOFlow´s application for suspensive effect is dismissed.

III. EOFlow is given the opportunity to correct the deficiency specified in para. 34 of this order **within 14 days**.

IV. EOFlow and Insulet are requested to inform the Court of Appeal whether they agree that the Court of Appeal decides the issue on the basis of the written submissions without an oral hearing being held.

V. If either EOFlow or Insulet considers that an oral hearing should be held, both parties are requested to indicate their availability for an oral hearing on 12 March 2026 and 13 March 2026. In the event of unavailability, compelling reasons for the impediment must be presented and credibly demonstrated.

VI. The parties are also requested to confirm whether they agree to conduct the hearing, if any, by videoconference.

VII. Comments on the above matters regarding an oral hearing should be submitted **within 4 days** of the date of this order.

Issued on 4 February 2026

Rian Kalden Date: 2026.02.03 20:47:17 +01'00'

Rian Kalden, presiding judge and legally qualified judge

Patricia Ursula Rombach Digitally signed by Patricia Ursula Rombach Date: 2026.02.04 07:55:45 +01'00'

Patricia Rombach, legally qualified judge and judge-rapporteur

Digitally signed by Åsa Ingeborg Simonsson Date: 2026.02.03 18:21:46 +01'00'

Ingeborg Simonsson, legally qualified judge

STEVEN RICHARD KITCHEN Digitally signed by STEVEN RICHARD KITCHEN Date: 2026.02.03 19:23:35 +01'00'

Steven Kitchen, technically qualified judge

Udo Matter Digital signiert von Udo Matter Datum: 2026.02.03 18:36:59 +01'00'

Udo Matter, technically qualified judge