



UPC Court of Appeal
UPC_CoA_404/2023
App_584498/2023

ORDER
of the Court of Appeal of the Unified Patent Court
pursuant to Rule 9 RoP
issued on 8 February 2024
concerning representation

HEADNOTES:

- A member of the public who is requesting access to the Register pursuant to R.262.1(b) RoP must be represented before the UPC. In the absence of a representative, the Court of Appeal has allowed the member of the public a time period to remedy this deficit.

KEYWORDS:

- Public access to the register, representation

APPELLANT / CLAIMANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE:

Ocado Innovation Limited

Represented by:

| | |
|-------------------|-----------------------------------|
| Anna Bladh Redzic | Sandart & Partners Advokatbyrå KB |
| Simon Ayrton | Powell Gilbert (Europe) LLP |
| Thomas Oliver | Powell Gilbert (Europe) LLP |
| Joel Coles | Powell Gilbert (Europe) LLP |

RESPONDENT:



DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE:

- (1) **Autostore AS**
- (2) **Autostore Sp. z o.o.**
- (3) **Autostore System AB**
- (4) **Autostore S.A.S.**

- (5) **Autostore System GmbH**
- (6) **Autostore System AT GmbH**
- (7) **Autostore System Srl**
- (8) **Autostore System S.L**

Represented by:

Laura Ramsay Dehns
Annabelle Beacham Dehns

PANEL:

Second Panel

LANGUAGE OF THE PROCEEDINGS:

English

DECIDING JUDGES:

This order has been issued by the panel consisting of:

Rian Kalden, presiding judge and legally qualified judge

Ingeborg Simonsson, legally qualified judge and judge-rapporteur

Patricia Rombach, legally qualified judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE:

- Date: 17 October 2023
- Order no. 573437/2023/ UPC_CFI_11/2023 of the Nordic-Baltic Regional Division (Judge Stefan Johansson)

POINT AT ISSUE:

Representation (R.8.1 RoP)

SUMMARY OF FACTS AND INDICATION OF PLEADINGS:

1. With reference to R.262.1(b) Rules of Procedure of the Unified Patent Court (RoP) on public access to the register, the Nordic-Baltic Regional Division ordered access for the Respondent to the statement of claim in ACT_459791/2023, after redaction of personal data within the meaning of Regulation (EU) 2016/679.
2. Ocado has appealed the order.
3. Ocado, the Respondent and the Autostore companies have been given the opportunity to be heard about whether the Respondent needs to be represented (R.8.1 RoP).
4. Ocado has explained that it does not object to the Respondent appearing in these proceedings in his personal capacity. According to Ocado, Article 48(1) and 48(2) of the Agreement on a Unified Patent Court (UPCA) require that 'parties' be represented by lawyers or patent attorneys with a certain status. With reference to R.8.1 RoP and

R.262.1(b) RoP, Ocado considers that it seems that a member of the public who makes an application under R.262.1(b) RoP is not treated as a party to proceedings, and that accordingly there is no requirement in the UPCA or RoP that they be represented.

5. The Respondent has submitted that he, as a member of the public, is not a 'party' and does not need to be represented pursuant to R.8.1 RoP when seeking access. Although he is the Respondent before the Court of Appeal he does not consider himself a party to the underlying proceedings. He has advanced the argument that there is good reason why a member of the public seeking access to documents is not deemed to be a party. They are not a party to the litigation, but are only seeking access to particular documents in the proceedings. They should not automatically be exposed to all the requirements placed on parties to the litigation by the UPCA and the Rules.
6. Requiring that a member of the public wishing to request access to documents be represented would, in the Respondent's view, place an unnecessary burden on that individual and would undermine the ability of the public to ensure that proceedings are open. Equally, representation should not become obligatory where a member of the public successfully obtains an order for access, which is then appealed by one of the parties. He further sets out how the fact that the CMS has consistently suggested that a member of the public needs to be represented under R.8.1 RoP should not be determinative of the meaning of the RoP, which is a matter for the Court.
7. While the Respondent recognises that there may be a concern that a particular member of public needs or should have representation when requesting access, he argues that the Court has wide and flexible case management powers that could be used to require such representation.
8. With reference to his extensive professional experience in the field, the Respondent has requested that the Court would not exercise management powers to require him to be represented. In the alternative he has asked to be given 14 days in which to instruct a representative.
9. The Autostore companies have not commented on the applicability of R.8.1 RoP.

REASONS FOR THE ORDER:

1. According to R.8.1 RoP, 'A party' shall be represented in accordance with Article 48 UPCA unless otherwise provided by these Rules. Article 47 UPCA has the heading 'Parties'. This Article 47 UPCA however only refers to 'actions', which is to be understood as actions mentioned in Article 32 UPCA. Applications which are not such 'actions', such as opt-out applications, are not mentioned in Article 32 and thus not subject of Article 47 UPCA.
2. The term 'Parties' in the heading of Article 47 UPCA does not cover 'parties' making applications other than 'actions'. These applicants are however covered by 'a party' in Rule 8.1 RoP. This is clear from the fact that applicants of opt-out procedures (R.5 RoP) are expressly exempted from the requirement that 'a party' is to be represented according to R.8.1 (R. 5.4 RoP). From this follows that 'A party' in R.8.1 RoP is a wider concept than 'Parties' in the heading of Article 47 UPCA and covers all applicants of any application or

action under the UPCA and RoP. The Court of Appeal notes that ‘a party’ in R.220.1 has a similar wider meaning; it also applies to a third party affected by an order or decision such as a third party under R.190 and a member of the public under R.262.1(b). Consequently, all applicants of any application or action under the UPCA and RoP are required to be represented, except if the rules of procedure waive the requirement of representation. An applicant under Rule 262.1(b) is not exempted from the requirement of R.8.1 RoP and is therefore required to be represented.

3. R.8.1 refers to Article 48 UPCA. It sets out the qualifications an authorised representative should have. From that provision it is not clear whether the term ‘Parties’ refers back to Article 47 UPCA. Even if it does, it cannot be deduced (a contrario) that other applicants than parties to actions do not require to be represented. Rule 8.1 RoP makes clear they are.
4. The Court of Appeal does not consider this requirement to be unnecessarily burdensome. The rationale behind the duty to be represented by a representative is to protect parties when it comes to the legal consequences of procedural measures. Furthermore, it ensures the proper conduct of proceedings. For this purpose, representatives are subject to special duties (R.284 and R.290.1 RoP).¹
5. The access to the written pleadings and evidence requires a reasoned request. It is appropriate that representation is required for this purpose.
6. Following a reasoned request to the Registry by a member of the public that written pleadings and evidence, lodged at the Court and recorded by the Registry, shall be made available, the decision is taken by the judge-rapporteur after consulting the parties. Where applicable, personal data within the meaning of Regulation (EU) 2016/679 and confidential information shall first be redacted (R.262.1 RoP).
7. There is thus an adversarial phase where the judge-rapporteur consults the parties about the request. Next, the judge-rapporteur decides on access to written pleadings and evidence, which includes adjudication on the request, on personal data protection and on confidentiality. Decisions can be appealed (see also paragraph 2 above).
8. Members of the public requesting access to the register pursuant to R.262 RoP are consequently in an adversarial situation where representation is called for.
9. It follows from the above that the Respondent should have been represented before the Court of First Instance and must also be represented before the Court of Appeal. The Statement of response that was lodged by the Respondent shall be disregarded, as it was not lodged by an authorised representative pursuant to Article 48 UPCA.
10. The Court of Appeal allows the Respondent's request to be given 14 days in which to appoint and instruct a representative (R.9.1 RoP). Within the same period, this representative is given the opportunity to lodge a Statement of response on behalf of the Respondent (R.9.3(a) RoP). If no Statement of response is lodged within said time limit, the

¹ See also the CJEU in its judgment of 4 February 2020, *Uniwersytet Wrocławski v REA*, Joined Cases C-515/17 P and C-561/17 P, ECLI:EU:C:2020:73, para 62.

Court of Appeal may draw adverse consequences from such failure, including the possibility to give a reasoned decision (R.235.3 RoP).

11. The Court of Appeal proceeds from the assumption that the absence of a representative will be remedied within the said period. Under this assumption, the parties are called to an oral hearing on 12 March 2024 at 9:30 h.
12. The parties are invited to inform the Court of Appeal, within 3 working days from service of this order, whether they prefer the oral hearing to be held online or in person.

ORDER

1. The Respondent shall, within 14 days from service of this Order, instruct an authorised representative pursuant to R.8.1 RoP.
2. A Statement of response shall be lodged within the same period.
3. The parties are called to an oral hearing on 12 March 2024 at 9:30 h. They are invited to inform the Court of Appeal, within 3 working days from service of this order, whether they prefer the oral hearing to be held online or in person.

Issued on 8 February 2024

| NAMES AND SIGNATURES | |
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| Judges | |
| <i>Rian Kalden</i> | Date: 2024.02.08 17:27:42 +01'00' |
| Presiding judge: Rian Kalden | |
| Åsa Ingeborg Simonsson | Digitally signed by Åsa Ingeborg Simonsson Date: 2024.02.08 16:40:35 +01'00' |
| Legally qualified judge and judge-rapporteur: Ingeborg Simonsson | |
| Patricia Ursula Rombach | Digitally signed by Patricia Ursula Rombach Date: 2024.02.08 17:57:25 +01'00' |
| Legally qualified judge: Patricia Rombach | |