

UPC CFI, Central Division Munich, 21 September 2023, Astellas v Healois

## PATENT LAW – PROCEDURAL LAW

**Public access to letter for service rejected ([Rule 262.1\(b\) RoP](#))**

A concrete and verifiable, legitimate reason is required for making available written pleadings and evidence upon a request by a member of the public. To be informed of the proceedings before the Unified Patent Court for the purposes of education and training is not a legitimate reason as required by Rule 262.1(b) RoP. It is also insufficiently concrete and verifiable. No legal basis to give access to letter for service.

Source: [Unified Patent Court](#)

**UPC Court of First Instance,  
Central Division Munich, 21 September 2023**

(Kupecz)

UPC\_CFI\_75/2023

Order rejecting [Rule 262.1\(b\) RoP](#) request of the Court of First Instance of the Unified Patent Court delivered on 21/09/2023

### 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. To be informed of the proceedings before the Unified Patent Court for the purposes of education and training is not a legitimate reason as required by Rule 262.1(b) RoP. It is also insufficiently concrete and verifiable. No legal basis to give access to letter for service.

### KEYWORDS:

[Rule 262.1\(b\) RoP](#) request (rejected). Legitimate reason for access (no). No legal basis for access to letter for service.

REFERENCE CODE ECLI: Not provided

### APPLICANT/S

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

### RESPONDENT/S

### RELEVANT PROCEEDING PARTIES

#### 1) **ASTELLAS INSTITUTE FOR REGENERATIVE MEDICINE**

(Claimant) - 9 Technology Drive - MA 01581 - Westborough - US

Represented by David Carling

#### 2) **Healios K.K**

(Defendant) - Hamamatsu-cho 2-chome Minato-ku - 105-6115 - Tokyo - JP

Represented by James Nicholls

#### 3) **Riken**

(Defendant) - 2-1, Hirosawa Wako-shi - 351-0198 - Saitama - JP

Represented by James Nicholls

#### 4) **Osaka University**

(Defendant) - 1-1 Yamadaoka Suita-shi - 565-0871 - Osaka - JP

### PATENT AT ISSUE

Patent no. Proprietor/s

[EP3056563](#) Healios K.K, Riken, Osaka University

### DECIDING JUDGE

This is an Order of the Judge-rapporteur: Andrés Kupecz ('JR').

**LANGUAGE OF PROCEEDINGS:** English

### SUBJECT-MATTER OF THE PROCEEDINGS

262.1(b) RoP request

### SUMMARY OF THE FACTS

- In relation to case 464985/2023, on 10 July 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 requesting copies of documents from the file, in particular a copy of the Statement of Revocation and a copy of the Letter for Service on the Patent Proprietor added to the file on 4 July 2023.

- The reason for the request was so that the Applicant can be informed of the proceedings before the Unified Patent Court for the purposes of education and training.

- A preliminary order was delivered on 21 July 2023 inviting parties to submit their comments and/or observations to the request, including any request pursuant to Rule 262.2 RoP.

- The Claimant in the main action in its submission dated 2 August 2023 opposes the Application arguing that a third party should not be permitted to use the carefully constructed pleadings (prepared at a not insignificant cost) with a view to advancing its own case or commercial interests. The claimant states that it has no way of verifying how the knowledge gained from reviewing our client's Statement of Revocation will be applied in practice.

- The Defendants in the main proceedings in their submission dated 31 July 2023<sup>1</sup> did not object or provide further comments.

- No party made a request pursuant to Rule 262.2 RoP.

- In a further preliminary order, given on 18 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 31 August, 2023, the Applicant submitted comments in reply to the further preliminary order.

- 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 copies of documents from the file of the above proceedings at the Unified Patent Court pursuant to Rule 262.1(b) of the RoP. The Applicant has requested a copy of the Statement of Revocation and a copy of the Letter for Service on the Patent Proprietor added to the file on 4 July 2023.

### GROUND(S)

<sup>1</sup> This submission was originally uploaded to the CMS only on behalf of one of the defendants which 'blocked' the CMS workflow until the

request was also uploaded on behalf of the other two defendants on 18 August 2023.

Considering the Application, having consulted the parties, and having provided the Applicant an opportunity to make further submissions, the present Application requesting access to copies of documents from the file of the above proceedings at the Unified Patent Court pursuant to Rule 262.1(b) RoP 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 submitted that the distinction between Rule 262.1(a) and Rule 262.1(b) RoP simply provides the mechanism for avoiding the publication of all pleadings and evidence (as for decisions and orders).

Apart from the wording of Rule 262.1(b) RoP, it follows from the history of that Rule, in particular the 18th draft RoP and the explanatory remarks thereto, when this provision in its current form was introduced,<sup>2</sup> that the drafters did not intend 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 introduced in Rule 262 RoP, this information is only available upon a “reasoned request”, whereas prior to the change such access was automatic. 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 (i.e. “an application procedure will be necessary”).<sup>3</sup> Reasons have to be provided that justify departing from the default situation to allow a member of the public access to the file. This goes beyond simply providing a mechanism for avoiding the publication of all pleadings and evidence.

In this respect, it is furthermore noted that 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.

In the view of the Court, the reasons to be provided in the request for access to written pleadings and evidence pursuant to Rule 262.1(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.

It follows from the above that ‘interpreting away’ the requirement to provide a (concrete, legitimate and verifiable) reason to obtain access, as essentially argued by the Applicant when submitting that requiring a “legally valid and verifiable” [reason] introduces a qualitative threshold that is unnecessary beyond the content of Rule 262.1(b) RoP. Provided that the request is accompanied by a reason it should be allowed” (underline JR), is not supported by the Rule itself nor by its history. Whether there is indeed a legitimate reason in a particular case will have to be assessed on the basis on all the facts and circumstances of that particular case.

#### **No legitimate reason in the present case**

The present application is made by a natural person “so that [he] can be informed of the proceedings before the Unified Patent Court for the purposes of education and training”. In the Court’s view, this is not a legitimate reason for access to the requested documents. Apart from the lack of concrete and verifiable information in the reason stated by the Applicant, the Court fails to see why the requested pleadings (a statement of revocation drawn up by another representative in a ‘random’ case) would be useful, let alone necessary, for said purpose (which can be achieved by other means such as reading the Court’s orders and decisions which shall be published in accordance with 262.1 (a) RoP).

The reason provided is also insufficiently concrete and verifiable for the JR to be able to weigh this reason against the (commercial) interest in denying access as brought forward by the Claimant in the main proceedings who requested that the Court refuses the application to the extent that it concerns the Statement of Revocation.

In respect of the “copy of the Letter for Service on the Patent Proprietor”, in addition to the above, there is no legal basis to make available this type of document, as said letter is not “written pleadings” or “evidence” as required by Rule 262.1 (b) RoP.

#### **Conclusion**

In conclusion, no concrete and verifiable, legitimate reason has been provided by the Applicant to obtain a copy of the Statement of Revocation and a copy of the Letter for Service on the Patent Proprietor added to the file on 4 July 2023. Absent such a reason and/or absent a sufficient legal basis, the request in accordance with Rule 262.1(b) RoP is rejected.

#### **Leave for appeal**

The Court is aware that Rule 262.1(b) RoP has been met with criticism by a number of commentators in the

<sup>2</sup> Available at [https://www.veron.com/wp-content/uploads/2022-07-08\\_ROP\\_TRACKED\\_ac\\_04\\_08072022\\_rop\\_annex\\_1\\_en\\_final\\_tracked\\_for\\_publication.pdf](https://www.veron.com/wp-content/uploads/2022-07-08_ROP_TRACKED_ac_04_08072022_rop_annex_1_en_final_tracked_for_publication.pdf), p. 38-41.

<sup>3</sup> 3 P. 40 of explanatory notes, 4th paragraph.

context of transparency of court proceedings.<sup>4</sup> 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).<sup>5</sup> Therefore, leave to appeal this Order is hereby granted.

**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 DETAILS**

Order no. 552745 in ACTION NUMBER:  
ACT\_464985/2023

UPC number: UPC\_CFI\_75/2023

Action type: Revocation Action

Related proceeding no. Application No.: 545443/2023

Application Type: APPLICATION\_ROP262\_1\_b

Issued on 21 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)

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