

UPC CFI, Local Division Düsseldorf, 22 September 2023, Nutricia v Nestlé



## PATENT LAW – PROCEDURAL LAW

**Request for the allocation of a technically qualified judge postponed until the statement of defence has been lodged**

- the submission should take place at a stage in the written procedure where the judge-rapporteur could possibly have a first rough assessment of whether an additional technically qualified judge is needed or not. [...]. By its very nature, the earliest point at which such an assessment could be made is after the filing of the statement of defence

Source: [Unified Patent Court](#)

**UPC Court of First Instance,  
Local Division Düsseldorf, 22 September 2023**  
(Thom)

UPC\_CFI\_201/2023 Procedural Order  
of the Court of First Instance of the Unified Patent Court  
issued on 22 September 2023

Date of filing of the action: 4 July 2023

### CLAIMANT:

N.V. Nutricia, Eerste Stationsstraat 186, 2712 HM Zoetermeer, Netherlands, represented by the Managing Director ...

represented by: Prof. Dr. Nils Heide, Dr. Jan Wohlfahrt, Angelika Link, Gleiss Große Schrell und Partner mbB, Leitzstraße 45, 70469 Stuttgart, Germany electronic address for service: ...

### DEFENDANT:

Nestlé Health Science (Deutschland) GmbH, Lyoner Straße 23, 60528 Frankfurt/Main, Germany, represented by the Managing Directors ... and ... , Germany represented by: Dr. Matthias Meyer, Dr. Daniel Misch as well as patent attorneys Dr. Daniela Kinkeldey, Dr. Anne Halbach, Bird & Bird LLP, Carl-Theodor-Straße 6, 40213 Düsseldorf electronic address for service: ...

### PATENT AT ISSUE:

European patent n° [EP 2 359 858](#)

### PANEL/DIVISION:

Panel of the Local Division in Düsseldorf

### DECIDING JUDGES:

This Order has been issued by the judge-rapporteur Judge Dr Bérénice Thom.

### LANGUAGE OF THE PROCEEDINGS:

English

### SUBJECT OF THE PROCEEDINGS:

Patent infringement action – R. 33 RoP-application

### STATEMENT OF THE FORMS OF ORDER SOUGHT BY THE PARTIES:

The Defendant requests to allocate a technically qualified judge to the panel.

The Claimant objects to the allocation of a technically qualified judge to the panel at this point of the proceedings.

### GROUND(S) FOR THE ORDER:

According to [Art. 8 \(5\) UPCA](#) upon request by one of the parties, any panel of a local division shall request the President of the Court of First Instance to allocate an additional technically qualified judge. [Rule 33 RoP](#) further specifies that any party may lodge an Application for allocating a technically qualified judge to the panel which shall contain an indication of the relevant field of technology ([R. 33 \(1\) RoP](#)) and that the Application shall be lodged as early as possible in the written procedure ([R. 33 \(2\) RoP](#)). According to [R. 33 \(3\) RoP](#) if the requirements of paragraphs 1 and 2 have been complied with, the President of the Court of First Instance shall allocate a technically qualified judge to the panel, after consulting the judge-rapporteur.

Neither the Agreement nor the Rules of Procedure require or even mention a specific time frame for the panel resp. the judge-rapporteur submitting the request to the President of the Court of First Instance. Given that the President of the Court of First Instance will consult the judge-rapporteur in the allocation process, the submission should take place at a stage in the written procedure where the judge-rapporteur could possibly have a first rough assessment of whether an additional technically qualified judge is needed or not. In the panel's understanding, the consultation is not limited to the question of the relevant field of technology. Rather the consultation extends to the question of whether, in the view of the judge-rapporteur, the involvement of a technically qualified judge is necessary at all taking into account the issues in dispute. By its very nature, the earliest point at which such an assessment could be made is after the filing of the statement of defence.

For example, before the first defendant's statement on the merits is made it may be that the aspect of interpretation of the claim and/or infringement will remain entirely undisputed. The mere announcement of addressing non-infringement and/or filing a counterclaim for revocation is not considered sufficient. The experience of patent litigation shows that management strategies depend on numerous factors – not few of purely economic nature – which can change rapidly. Notwithstanding that this may be unlikely in this case the panel also takes into account that the case management should be organised efficiently in order to schedule the final oral hearing within one year if possible (cf. [Preamble \(7\) RoP](#)). This objective could be unnecessarily jeopardised if the fourth judge of the panel is allocated at an early stage, although their contribution might not be required in the end. Case management with a panel of four and in particular scheduling an oral hearing is always more difficult and could unnecessarily delay the proceedings in such cases. As [Rule 37 RoP](#) refers to a different scenario the panel considers that the submission of the request can be

postponed at least until the statement of the defence has been lodged.

**ORDER:**

At this stage of the written procedure the submission of the Defendant's request to the President of the Court of First Instance for the allocation of an additional technically qualified judge is postponed until the statement of defence has been lodged.

**DETAILS OF THE ORDER:**

APP\_559862/2023 related to the main proceeding  
ACT\_544303/2023

UPC-Number: UPC\_CFI\_201/2023

Subject of the Proceedings: Patent infringement action –  
**R. 33 RoP**-application

Issued in Düsseldorf on 22 September 2023

Names and Signatures

Judge Dr Thom

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