UPC Court of Appeal, 12 February 2025, Meril v SWAT Medical

PATENT LAW – PROCEDURAL LAW

Duty to be represented (Article 48 UPCA, R. 8 RoP)

- **Late filed objection. Meril GmbH did not make this objection before the Central Division or in its Statement of appeal and grounds of appeal. The Court of Appeal disregards this submission**. (**R. 226 RoP** and **R. 222.2 RoP**).
- **Representation is a point of admissibility involving public policy considerations (due process) which the Court may examine at any time, also of its own motion**. When a matter such as this is raised by the Court, there can be reason, depending on the circumstances, to provide the party with an opportunity to appoint a representative. For example, in the **Ocado case**, the Court of Appeal exceptionally allowed the Respondent to remedy the deficit of the absence of a representative because it had not yet been clarified that legal representation was required in the case of a request under **R. 262.1 (b) RoP**.
- **Lawyers and European Patent Attorneys are not exempted from the duty to be represented if they themselves are parties in cases before the UPC. Consequently, the fact that Respondent 1 is an authorised representative himself does not relieve him from the requirement of being represented.**
- **Respondent 1 is Chair of the Board of directors of SWAT Medical. He holds a high-level management position within SWAT Medical and cannot represent the company. It follows that Respondent 1 is not allowed to represent SWAT Medical.**

13. No corporate representative of the legal person or any other natural person who has extensive administrative and financial powers within the legal person because he or she holds a high-level management or administrative position within the legal person or holds a significant amount of shares in the legal person, can be a representative of that legal person, regardless of whether said corporate representative of the legal person or natural person is qualified to act as a UPC representative in accordance with **Art. 48(1) and/or (2) UPCA** (**Suinno vs Microsoft**).

In the circumstances of this case, the Court of Appeal exceptionally allows Respondent 1 and SWAT Medical 14 days in which to appoint and instruct (a) representative(s) (**R. 9.1 RoP**). Within the same period, this/these representative(s) is/are given the opportunity to lodge a Statement of response on behalf of Respondent 1 and SWAT Medical (**R. 9.3(a) RoP**). If no Statement of response is lodged within said time limit, the Court of Appeal may draw adverse consequences from such failure, including the possibility to give a reasoned decision (**R. 235.3 RoP**).

Source: **Unified Patent Court**

Same orders at the same date with similar parties: **#2** and **#3**

UPC Court of Appeal, 12 February 2025

(Kalden, Simonsson, Rombach)

UPC Court of Appeal

UPC_CoA_636/2024

APL_58935/2024

ORDER

of the Court of Appeal of the Unified Patent Court

issued on 12 February 2025

concerning representation (**R. 8.1 RoP**)

HEADNOTE:

- Lawyers and European Patent Attorneys are not exempted from the duty to be represented if they themselves are parties in cases before the UPC.

- Representation is a point of admissibility involving public policy considerations (due process) which the Court may examine at any time, also of its own motion.

KEYWORDS:

representation

APPELLANT (COUNTER CLAIMANT AND RESPONDENT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

Meril GmbH, Bonn, Germany

represented by: Dr. Andreas von Falck, Rechtsanwalt, Dr. Alexander Klicznik, European Patent Attorney, Dr. Felipe Zilly, Rechtsanwalt, Dr. Roman Würtenberger, Rechtsanwalt, Dr. Lukas Wollenschlaeger, Rechtsanwalt and Beatrice Wilden, Rechtsanwältin (Hogan Lovells International, Düsseldorf, Germany)

RESPONDENTS (APPLICANTS BEFORE THE COURT OF FIRST INSTANCE)

1. [...] (hereinafter Respondent 1)

2. **SWAT Medical AB**, Helsingborg, Sweden (hereinafter 'SWAT Medical')

PATENT AT ISSUE

EP 3 646 825

LANGUAGE OF THE PROCEEDINGS

English

PANEL AND DECIDING JUDGES

This order has been issued by the second 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 DECISIONS OR ORDERS OF THE COURT OF FIRST INSTANCE

□ Central Division Paris, 14 October 2024, ORD_37077/2024, App_33487/2024, UPC_CFI_15/2023; ACT_459987/2023 (infringement action, main proceedings) and CC_584916/2023 (counterclaim for revocation)

POINT AT ISSUE

Representation in a case on public access to the register (**R. 262.1 RoP**)

SUMMARY OF THE FACTS AND INDICATION OF THE PARTIES' REQUESTS

1. On 5 June 2024, Respondent 1 as a member of the public, in particular being a board member and investor in a medical device company within the field of cardiac implant technology, applied to the Central Division Paris under R.262.1(b) Rules of Procedure (RoP) of the Unified Patent Court (UPC) to be given access to all pleadings and evidence which were lodged in the counterclaim for revocation case between Meril GmbH and Edwards Lifesciences Corporation (Edwards).

2. Respondent 1 is a European Patent Attorney and a Representative before the UPC and presented himself in the application in that capacity.

3. On 8 August 2024 Respondent 1 amended the application, clarifying it as follows: Main Applicant: Respondent 1, (as individual person in the role of Board member of SWAT Medical); 1st Co-applicant: SWAT Medical; and 2nd Co-applicant: Respondent 1 (as individual person in the role of an investor in medical device technology). He also stated that the application was filed on behalf of these applicants by him as the undersigned representative and that all applicants were members of the public.

4. The Paris Central Division granted Respondent 1 and SWAT Medical (insofar as relevant here) access to all pleadings and evidence in the counterclaim for revocation CC_584916/2023. Leave to appeal was granted and the effects of the order were suspended until the expiration of the deadline for filing an appeal or, if an appeal was filed, until the end of such proceedings, and all the remaining requests were rejected.

5. Meril GmbH has appealed the order and requests, insofar as relevant here, that the impugned order be set aside and that Respondent 1 and SWAT Medical be ordered to bear the costs of the first instance and appeal proceedings.

6. On 30 November 2024, Respondent 1 lodged a Statement of response.

7. When examining the Statement of response pursuant to **R.236** of the Rules of Procedure (RoP), the judge-rapporteur made the following observations (insofar as relevant here), which the parties were invited to comment upon.

7.1. **R.236.1(a)** sets out that the Statement of response shall contain the names of the respondent (and the respondent's representative), however, neither Respondent 1 nor SWAT Medical were named as respondents in the Statement of response. Respondent 1 was named as representative "for Applicants and Respondents".

7.2. According to case-law (**CoA, order of 8 February 2024, UPC CoA 404/2023, App 584498/2023, Ocado**), 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 pursuant to R. 8.1 RoP. In the absence of a representative, the Court of Appeal can allow the member of the public a time period to remedy this deficit. This case-law does not address whether a member of the public who fulfils the requirements for qualification pursuant to **Art. 48(2) and (3)** of the Agreement on a Unified Patent Court can represent him or herself.

SUBMISSIONS OF THE PARTIES

Respondent 1 and SWAT Medical

1. The Statement of response does mention "Applicants and Respondents", which identity is clearly given by the Statement of appeal, which should be mirrored by information related to parties in the CMS maintained by the UPC, and the Case numbers. The requirements of **R. 236.1(a) RoP** are thus met as the Statement was submitted via a workflow in CMS and cannot include other information or mean other parties. In the alternative, details for the Applicant and Respondents "Respondents" are provided in the comments submitted on 12 December 2024 and the defect is remedied.

2. The Statement of response was signed by Respondent 1 who is an authorized Representative before the UPC. It is clear this is the representative of Respondents and not the "Respondents" who signed the Statement. Also, KIPA AB is a law firm mentioned as legal representative of the Respondents in the Statement. All other representatives at KIPA AB are included in the representation and legal representatives.

Meril GmbH

3. Self-representation is not a valid representation under **Art. 48(1), (2) UPCA**. The person acting as a representative must be a third party, different from the party to the proceedings. The concept of legal independence of a representative likewise supports the finding as it requires to use the service of a third person for the purpose of representation (**Art. 48(5) UPCA**). The concept of independence prevents natural persons from acting on their own behalf so that a lawyer or a European Patent Attorney cannot "represent" himself before the UPC.

4. Similarly, Respondent 1 cannot validly represent SWAT Medical AB as being member and chairman of its board as he cannot be considered as independent.

5. Due to the failure to comply with **R. 236 RoP**, no Statement of response was effectively lodged within the deadline set out in **R. 235 RoP** and the Court of Appeal can issue a reasoned decision pursuant to **R. 235.3 RoP**.

6. In addition to the reasons given in the Statement of grounds of appeal to support the requests set out in the Statement of appeal, Meril GmbH further submits that in the absence of a valid representation, no admissible

request for access to the written pleadings and evidence has ever been validly lodged by Respondent 1 and SWAT Medical pursuant to R. 262.1(b) RoP. The access request filed on 5 June 2024 is to be dismissed and, therefore, the impugned order should be set aside, the costs of the first instance proceedings and of the appeal proceedings should be borne by Respondent 1 and SWAT Medical (Art. 69(1), (3) UPCA).

GROUNDS FOR THE ORDER

Meril GmbH's submission about initial inadmissibility

7. Meril GmbH's submission that no admissible request for access to the written pleadings and evidence has ever been validly lodged neither by Respondent 1 nor by SWAT Medical is brought too late (R. 226 RoP and R. 222.2 RoP). Meril GmbH did not make this objection before the Central Division or in its Statement of appeal and grounds of appeal. The Court of Appeal disregards this submission.

8. However, representation is a point of admissibility involving public policy considerations (due process) which the Court may examine at any time, also of its own motion. When a matter such as this is raised by the Court, there can be reason, depending on the circumstances, to provide the party with an opportunity to appoint a representative. For example, in the Ocado case, the Court of Appeal exceptionally allowed the Respondent to remedy the deficit of the absence of a representative because it had not yet been clarified that legal representation was required in the case of a request under R. 262.1 (b) RoP.

Duty to be represented

9. All applicants of any application or action under the Agreement on a Unified Patent Court (UPCA) and RoP are required to be represented, except if the RoP waive the requirement of representation. An applicant under R. 262.1(b) RoP is not exempted from the requirement of R. 8.1 RoP and is therefore required to be represented (Ocado).

10. The objective of parties being represented by a lawyer is, on the one hand, to prevent private parties from acting on their own behalf before the Courts without using an intermediary and, on the other, to ensure that legal persons are defended by a representative who is sufficiently distant from the legal person which he or she represents (CoA, 11 February 2025, UPC CoA 563/2024, APL 53716/2024, Suinno vs Microsoft). Furthermore, it ensures the proper conduct of proceedings. For this purpose, representatives are subject to special duties (R. 284 and R. 290.1 RoP). Lawyers and European Patent Attorneys are not exempted from the duty to be represented if they themselves are parties in cases before the UPC. Consequently, the fact that Respondent 1 is an authorised representative himself does not relieve him from the requirement of being represented.

11. It follows from the above that Respondent 1 should have been represented before the Court of First Instance and must also be represented before the Court of Appeal. The Court of Appeal does not accept the argument that KIPA AB is a law firm mentioned as legal representative of the Respondents in the Statement and that all representatives at KIPA AB are included in the representation and legal representatives. Although KIPA AB is mentioned in the letter heads and letter foot of the Statement and in connection with Respondent 1 as legal representative of SWAT Medical, there is no mentioning whatsoever of lawyers or European Patent Attorneys at KIPA AB as representatives of Respondent 1 in person, and no particular practitioner is named.

Independence of representative

12. The next question to be addressed is whether Respondent 1 can represent SWAT Medical.

13. No corporate representative of the legal person or any other natural person who has extensive administrative and financial powers within the legal person because he or she holds a high-level management or administrative position within the legal person or holds a significant amount of shares in the legal person, can be a representative of that legal person, regardless of whether said corporate representative of the legal person or natural person is qualified to act as a UPC representative in accordance with Art. 48(1) and/or (2) UPCA (Suinno vs Microsoft).

22. Respondent 1 is Chair of the Board of directors of SWAT Medical. He holds a high-level management position within SWAT Medical and cannot represent the company. It follows that Respondent 1 is not allowed to represent SWAT Medical.

Legal consequences

23. The issue of the possibility for a corporate representative to represent a legal person before the UPC was uncertain and not yet clarified by the CoA when Meril GmbH filed the appeal. Furthermore, in relation to the question whether a representative can represent himself, it is clarified in this order that lawyers and European Patent Attorneys are not exempted from the duty to be represented if they themselves are parties in cases before the UPC. In the circumstances of this case, the Court of Appeal exceptionally allows Respondent 1 and SWAT Medical 14 days in which to appoint and instruct (a) representative(s) (R. 9.1 RoP). Within the same period, this/these representative(s) is/are given the opportunity to lodge a Statement of response on behalf of Respondent 1 and SWAT Medical (R. 9.3(a) RoP). If no Statement of response is lodged within said time limit, the Court of Appeal may draw adverse consequences from such failure, including the possibility to give a reasoned decision (R. 235.3 RoP).

ORDER

1. Respondent 1 shall, within 14 days from service of this order, instruct an authorised representative pursuant to R.8.1 RoP. A Statement of response shall be lodged within the same period.

2. SWAT Medical shall, within 14 days from service of this order, instruct an authorised representative pursuant

to R.8.1 RoP. A Statement of response shall be lodged within the same period.
Issued on 12 February 2025
Rian Kalden, presiding judge and legally qualified judge
Ingeborg Simonsson, legally qualified judge and judge-rapporteur
Patricia Rombach, legally qualified judge
