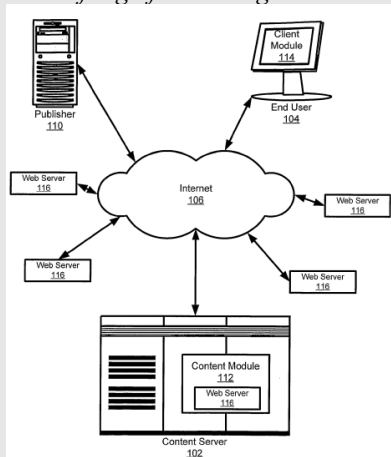


UPC CFI, Central Division, Paris Seat, 18 February 2025, Aylo Premium v Dish Technologies

apparatus, system, and method for adaptive-rate shifting of streaming content



PATENT LAW – PROCEDURAL LAW

Security for costs can also be applied for by claimant (**R. 158 RoP**)

- **R. 158.1 RoP provides that, at the request by “one party” the Court may order “the other party” to provide adequate security for the legal costs and other expenses incurred by the requesting party, which the other party may be liable to bear.**

Unlike **Art. 69 (4) UPCA**, the Rules of Procedure do not specify the party requesting the order as “the defendant” and the respondent of the request as “the applicant”. The wording of the Rules of Procedure therefore provides that the request to provide security may be made not only by the defendant in the main action, but also by “a party” and thus in principle also by the claimant (**LD Düsseldorf, order of 30 April 2024, UPC CFI 463/2023 ACT 590953/2023, 10x Genomics, Inc. / Curio Bioscience Inc., p. 39**)

Request rejected

- **Claimant has not shown to the conviction of the Court that Defendant will not be able to pay the litigation costs if it should lose the lawsuit.**

17. The Court relies on the evidence provided by the parties when evaluating the case at hand. Based on this evidence, the Court considers whether there is a clear indication that Defendant will not be able to pay the litigation costs. Further, the Court acknowledges that Claimant is subject to strict requirements concerning the burden of presentation and proof.

Source: **Unified Patent Court**

**UPC Court of First Instance,
Central Division, Paris Seat, 18 February 2025
(Thomas, Haedicke, Sanchini)**

Order

of the Court of First Instance of the Unified Patent Court
Central Division (Paris Seat)

delivered on 18/02/2025

lodged in the revocation action

No. ACT_23310/2024/UPC-CFI 198/2024

Applicant, Claimant in the main action:

AYLO PREMIUM LTD

Represented by: Prof. Dr. Tilman Müller-Stoy, Dr. Georg Anetsberger

Respondent, Defendant in the main action:

DISH Technologies L.L.C.

Represented by: Denise Benz

PANEL

Presiding judge Francois Thomas

Legally qualified judge, judge-rapporteur Maximilian Haedicke

Technically qualified judge Alessandro Sanchini

DECIDING JUDGE:

This order has been issued by the full panel

LANGUAGE OF PROCEEDINGS:

English

THE PARTIES

1. Claimant has brought a revocation action against the patent at issue (**EP3 822 805 B1**) before this Seat of the Unified Patent Court, registered as number ACT 23310/2024 UPC CFI 198/2024.

2. Defendant in these proceedings is the claimant in a parallel infringement action concerning the German part of the patent-in-suit before the German Regional Court Munich I (Court reference number 21 O 15905/23).

3. Defendant is a wholly owned subsidiary of DISH DBS Corporation, which in turn is a wholly owned subsidiary of DISH Network Corporation. DISH Network Corporation is a wholly owned subsidiary of EchoStar Corporation (hereinafter: EchoStar).

4. On 14 October 2024, the applicant brought a request for security for legal costs pursuant to **R.158 RoP**.

5. The Court has issued a preliminary order on 10 January 2025, inviting the parties to submit further observations.

6. The parties have submitted their observations on 21 January 2025 for DISH and 6 February 2025 for AYLO.

7. An interim conference was held on 10 February 2025, in which the parties were given the opportunity to address the matter at hand.

8. According to **R. 331.2 RoP**, the judge rapporteur has referred this decision to the panel.

PARTIES’ REQUESTS

9. Claimant requests:

- that Defendant is ordered to provide security for the legal costs and other expenses incurred and/or to be incurred by Claimant in the amount of at least EUR 400,000,- within one month, alternatively within a time period to be specified by the Court, in any event in due time prior to the oral hearing (**R. 158.1 RoP**).

- That a decision by default is issued against Defendant (ACT_23310/2024) if Defendant fails to provide such security within the time specified by the Court (**R. 158.5, 355 RoP**) and the application to amend the patent (App_47486/2024) is dismissed.

10. Defendant requests:

- that Claimant’s request for security for costs be dismissed; in the alternative:

- that Claimant's request for security for costs be dismissed with regard to the amount requested and a reasonable, lower amount of security be ordered.

PARTIES' SUBMISSIONS

11. With regard to the request for security, Claimant has submitted the following:

- There is the highest possible insolvency risk for Defendant.
 - The Local Division Mannheim has ordered that Defendant has to provide costs security according to [R. 158 RoP](#) in parallel infringement proceedings between the parties (LD Mannheim, order of 4 October 2024, UPC_CFI_471/2023; App_29618/2024, ORD_54886/2024).
 - In the section "Acquisition and Capital Structure Risks" of Quarterly Report of DISH Network Corporation for the second quarter of 2024 filed with the United States Securities and Exchange Commission (SEC), reference is made to existing substantial outstanding payment obligations and future additional debt as well as to necessary additional capital requirements that will not be available on favorable terms (Exhibit BP 23, p. ii).
 - Similar wording can be found in EchoStar's quarterly report for the second quarter of 2024 filed with the United States Securities and Exchange Commission (Form 10-Q) Exhibit BP 24).
 - Defendant's group of companies not only lacks financing for almost EUR 2 billion of debt falling due in the short term, but also has a total of EUR 20 billion of debt outstanding in the medium term (e.g. Exhibit BP 25, page 13).
 - There is no positive cashflow in Defendant's group. Further losses are to be expected.
 - Other parties and market experts confirm the risk of insolvency. This is shown by a lawsuit filed on 26 April 2024, by U.S. Bank Trust Company, National Association, in the Supreme Court of the State of New York County of New York against, among others, DISH Network L.L.C., whose wholly owned subsidiary is Defendant.
 - There are published market observations brought forward by market analysts that indicate that there may be doubts as to EchoStar's financial stability.
 - An agreement on 29 September 2024 to sell all shares in Defendant's parent company and its subsidiaries to DIRECTV Holdings LLC does not change the highly risky financial situation of Defendant and its group of companies.
 - New funds which were given to EchoStar created new debts because of follow up investments.
 - The declaration submitted by Defendant does not fulfil the requirements of [R. 158 RoP](#), as it is neither a deposit or a bank guarantee.
12. With regard to the request for security, Defendant has submitted the following:
- Strict requirements must be set in relation to a claim for security against a defendant.
 - Defendant does have the financial means to satisfy a potential claim for reimbursement of costs. Claimant's arguments are based on an outdated factual situation.

- The Local Division Mannheim could not consider these new developments. Therefore, the order of the Local Division Mannheim is based on completely different facts and has no significance with regard to the present request.

- The group to which Defendant belongs has obtained approximately USD 8.256 billion in new funding; This is stated in EchoStar's new financial report for the third quarter of 2024 filed with the United States Securities and Exchange Commission (Form 10-Q) dated 12 November 2024. It also states: "*Our cash and cash equivalents, current restricted and cash equivalents, and market able investment securities totaled USD 2.722 billion as of 30 September 2024 ("Cash on Hand") and we will fund the USD 1.983 billion of debt maturing in November 2024 from Cash on Hand.*"

- EchoStar has undertaken to provide DISH Network and its subsidiaries, i.e. also the Defendant, with sufficient funds to meet any liabilities within the next 12 months. Therefore, there is no basis for ordering security for costs.

- In view of the substantial amount of new funding of more than USD 8 billion that Defendant's group of companies has received, there is no doubt that Defendant will be able to bear any cost reimbursement claims of Claimant in the amount of EUR 400,000.

- The group has paid off (on 15 November 2024) the USD 1.983 billion liability that Claimant cites in its request for security.

- The sale of DISH DBS and its subsidiaries to DirecTV has not been finalized, and closing is unlikely as things stand at present. However, a potential failure of the closing has no effect on Defendant's ability to pay any claim for reimbursement of costs by Claimant in the amount of EUR 400,000.

- The group has completed a successful exchange offer that leaves only USD 139 million in remaining debt maturities in 2024 and 2025.

- The group had the "going concern" qualification lifted.

- The statements in DISH Network's financial report also apply to its subsidiaries including the Defendant. EchoStar is committed to providing Defendant with sufficient funds necessary to meet its obligations through one year.

- Claimant's argument regarding a third-party assessment intended to "*confirm the risk of insolvency*" is unfounded. This legal dispute pertains to a completely different point in time. The alleged insolvency is merely an incorrect legal assessment by the U.S. Bank.

- Defendant has submitted a declaration of EchoStar dated 17 January 2025 according to which EchoStar undertakes to reimburse Aylo Premium Ltd. (hereinafter: Aylo) for its legal costs relating to the proceedings up to the amount of EUR 400,000.

GROUND

13. This order merely concerns the request for security. The request regarding the application to amend is referred to a separate order.

14. [R. 158.1 RoP](#) provides that, at the request by "one party" the Court may order "the other party" to provide

adequate security for the legal costs and other expenses incurred by the requesting party, which the other party may be liable to bear. Unlike [Art. 69 \(4\) UPCA](#), the Rules of Procedure do not specify the party requesting the order as “the defendant” and the respondent of the request as “the applicant”. The wording of the Rules of Procedure therefore provides that the request to provide security may be made not only by the defendant in the main action, but also by “a party” and thus in principle also by the claimant ([LD Düsseldorf, order of 30 April 2024, UPC CFI 463/2023 ACT 590953/2023, 10x Genomics, Inc. / Curio Bioscience Inc., p. 39](#)).

15. The burden of proof that a party would be required to provide for security necessary to cover the legal cost – in the event that this party has to bear them – lies with the applicant. This can already be deduced from the wording “following a reasoned request” within [R. 158.1 RoP](#). The applicant is usually the defendant seeking security for the case that the plaintiff is unable to reimburse the defendant if the plaintiff uses the lawsuit. However, in the case at hand, it is Claimant requesting security. Due to asymmetry resulting from Claimant’s voluntary decision to litigate, strict requirements must be applied when it is the claimant requesting security.

16. Claimant’s request be rejected. After considering all relevant factors, the Court comes to the conclusion that Defendant is not obliged to provide security, as the evidence that would allow for assessments of such nature is not sufficient.

17. The Court relies on the evidence provided by the parties when evaluating the case at hand. Based on this evidence, the Court considers whether there is a clear indication that Defendant will not be able to pay the litigation costs. Further, the Court acknowledges that Claimant is subject to strict requirements concerning the burden of presentation and proof.

18. Claimant has not shown to the conviction of the Court that Defendant will not be able to pay the litigation costs if it should lose the lawsuit.

19. The going concern qualification in the SEC report has been lifted. The latest report does not contain this qualification anymore. The Court puts much weight on this formal declaration.

20. The debts of EchoStar have decreased due to substantial cash inflow. Defendant’s group of companies has received new funding of more than USD 8 billion.

21. The statements of an opposing party in US court proceedings cannot be considered, because they may, by their very nature, be one-sided.

22. Similarly, articles made by market analysts cannot be decisive by themselves, as the validity cannot be proven by the Court. Furthermore, it is not within the Court’s competence or responsibility to make predictions about the development of the market.

23. It is also not the duty of the Court to second guess business and investment decisions of Defendant. It is outside of the Court’s competence to assess investments which allegedly have debts as consequence. It therefore does not allow any assumptions whether the litigation fees can be paid or not.

24. Defendant itself has not demonstrated to the conviction of the Court that it has sufficient funds. Defendant did also not provide a sufficient amount of financial information. However, Defendant has submitted a declaration of EchoStar indicating that EchoStar undertakes irrevocably to reimburse Aylo for its legal costs relating to the proceedings up to the amount of EUR 400,000.

25. Despite the lack of submission on the liquidity on the level of Dish by Defendant itself, the burden of proof in this regard remains with Claimant.

26. Therefore, the legal nature of the declaration of 17 January 2025 can be left open, as well as whether and by whom it is enforceable and which law applies. The Court has no reason to doubt the sincere intention behind this declaration and the underlying intent of EchoStar to pay for possible litigation costs, as well its ability to do so. Enforceability by Claimant is not a requirement for this. This declaration is not in contradiction with [R. 158 RoP](#) because it is not, by its own means, a security. It rather supports the prognosis that the Defendant will be able to bear the litigation costs if necessary. It qualifies as evidence to assume that the litigation costs will be covered.

27. Since Defendant has submitted the necessary evidence for its solvency, there is no reason to oblige Defendant to pay a security.

28. As Claimant’s request is rejected there is no need to decide on the amount of a security.

ORDER

In light of the above considerations,

1. Claimant’s request for security is rejected.
2. The request regarding the application to amend is referred to a separate order.
