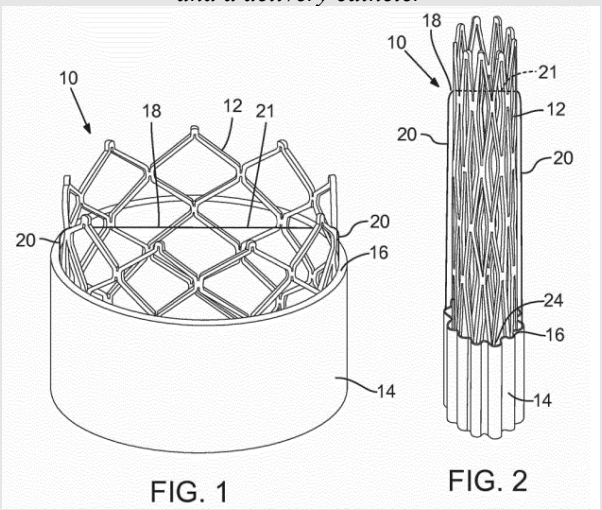
UPC Court of Appeal, 5 May 2025, Meril v SWAT

a system comprising a prosthetic valve and a delivery catheter



PATENT LAW – PROCEDURAL LAW

Impugned order granting access to pleadings and evidence (R. 262 RoP) to parties who are not represented set aside

- as it would compromise the representation requirement (R. 8.1. RoP)

Due to inadmissible self-representation, the formal requirements for lodging a Statement of response have not been met (R. 235 RoP)

- A party not being allowed to represent himself or a co-applicant has to instruct an authorised representative and it is not appropriate for him to lodge an application to change of representative pursuant to R. 293 RoP.

Instead, he should have instructed an authorised representative to represent him in his capacity as a natural person and member of the public. It is not apparent this actually happened.

- Respondents failed to lodge a Statement of response as the submitted Statement of response is not signed by the stated new representative

Reasoned decision (R. 235.3 RoP) or default decision (R. 357.1 RoP)

- It is the discretion of the Court of Appeal to give a reasoned decision or a default decision
- Reasoned decision (R. 235.3 RoP) is a lex specialis of the default decision (R. 357.1 RoP) This means that the remedy of R. 356.1 RoP – an application to set aside that decision within one month of service of the decision by a party against whom a decision by default has been given – applies mutatis mutandis to reasoned decisions.

No compensation for costs in relation to applications for access pursuant to R. 262.1(b) RoP

- Identifying confidential parts of written pleadings and evidence and requesting confidentiality is something parties may do in advance even though there may never even be a request for access.

Source: Unified Patent Court

See also parallel judgments (UPC_CoA_635/2024 and UPC_CoA_636/2024)

UPC Court of Appeal,
5 May 2025
(Kalden, Simonsson, Rombach)
UPC_CoA_634/2024
APL_58930/2025
DECISION
of the Court of Appeal of the Unified Patent Court issued on 5 May 2025 concerning public access to the register (R.262.1(b) RoP)
HEADNOTE:
- A decision by default has been issued when a Statement of response was submitted by a respondent who was not allowed to represent himself or the co-applicant.
- R. 235.3 RoP is a lex specialis which applies if the Statement of response is not lodged timely. Apart from the fact that no request is required in R. 235.3 RoP, so it can be applied on the Court's own motion, the drafting history demonstrates that a reasoned decision is effectively a default decision. This means that the remedy in R. 356.1 RoP – Application to set aside that decision within one month of service of the decision by a party against whom a decision by default has been given – applies mutatis mutandis to reasoned decisions.
- Access to written pleadings and evidence (R. 262.1(b) RoP) should not be granted to members of the public who are not represented.
- Compensation for costs should not be awarded in relation to applications for access to written pleadings and evidence pursuant to R. 262.1 (b) RoP. In exceptional cases a party may be ordered to bear any unnecessary costs it has caused the Court or another party (Art. 69.3 UPCA).
KEYWORDS:
Public access to the register, Reasoned decision, Decision by default
APPELLANT (CLAIMANT AND RESPONDENT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)
Meril Italy S.r.l., Milan, Italy (hereinafter 'Meril Italy') represented by: Emmanuel Larere, Member of the Paris Bar, Cabinet Gide Loyrette Nouel, Paris, France, and other representatives from that firm
RESPONDENTS (APPLICANTS BEFORE THE COURT OF FIRST INSTANCE)
1. [...] Helsingborg, Sweden (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
Panel 2
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 36095/2024, App 33486/2024, UPC CFI 255/2024; ACT 551308/2023 (main proceedings)
POINTS AT ISSUE
Public access to the register (R. 262.1(b) RoP), Reasoned decision (R. 235.3 RoP), Decision by default (R. 357 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 in the field of cardiac implant technology, applied to the Central Division Paris under R. 262.1(b) of the Rules of Procedure (RoP) of the Unified Patent Court (UPC) to be given access to all pleadings and evidence which were lodged in the revocation action between Meril Italy and Edwards Lifesciences Corporation.
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. In spite of objections from both Meril Italy and Edwards Lifesciences Corporation, the Paris Central Division granted Respondent 1 and SWAT Medical (insofar as relevant here) access to all pleadings and evidence in the revocation action. While noting that the applicants' interests have to be considered generic because the mere fact of operating in the same field as the patent in dispute is not sufficient to establish a specific interest in the proceedings' documents on their part, the Central Division nevertheless considered that access to the sought written pleadings and evidence had to be granted as the balance of opposing interests was in favour of the disclosure. The Central Division found that the proceedings had come to an end and, therefore, no need of protection of the integrity of the proceedings was present. The same conclusion was drawn with regard to the need to protect the public order, lacking elements displaying that the requests were abusive or may affect security interests. In addition, there was no need to protect confidential information and personal data. A request that the applicant be ordered to keep the written pleadings and evidence confidential was denied. 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 Italy appealed and requested, 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 on behalf of the respondents.
7. On 4 December 2024, the parties were informed by the judge-rapporteur that the Statement of response presently did not meet the requirements of R. 236 RoP. The parties were invited to comment on the question of representation.
8. After having received written submissions from the parties, the Court of Appeal issued an order on 12 February 2025, holding that 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. 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 did not relieve him from the requirement of being represented. Moreover, when applying the requirement of independence of representatives, and noting that Respondent 1 is Chair of the board of directors of SWAT Medical and thus holds a high-level management position within SWAT Medical, the Court of Appeal decided that Respondent 1 was not allowed to represent SWAT Medical. Both Respondent 1 and SWAT Medical were ordered, within 14 days from service, to instruct an authorised representative pursuant to R. 8.1 RoP, and lodge a Statement of response within the same period. In the grounds of the order, under the heading legal consequences, it was made clear that it was this/these representative(s) who were given the opportunity to lodge a Statement of response on behalf of Respondent 1 and SWAT Medical. The respondents were reminded that if no Statement of response was 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).
9. On 26 February 2025, in an application to change a representative with reference to R. 293 RoP (lodged in ORD_7289/2025), Respondent 1 notified that he would no longer be the representative of all respondents and named another person in the same firm who would take over the position as the "main representative" of all respondents. This application was signed by Respondent 1 alone in his stated capacity as "Authorized Representative before the UPC". At the same time, a Statement of response was submitted, also signed by Respondent 1.

10. Following this, Meril Italy requested a reasoned decision pursuant to R. 235.3 RoP, and repeated the requests it had previously made on appeal, adding in the alternative a request for a decision by default in accordance with Art. 37(1) of the Statute of the Unified Patent Court in connection with R. 357.1 and R. 355.1 (a) RoP. Furthermore, Meril Italy raised objections against the person named as new representative, pointing out that he is a deputy board member of SWAT Medical, and identified as cofounder and part of the SWAT Medical team on SWAT Medical's website, and as the said company's contact person.

GROUNDS FOR THE DECISION

Whether the formal requirements for lodging a Statement of response have been met

11. Pursuant to R. 235.3 RoP, if the respondent fails to lodge a Statement of response, the Court of Appeal may give a reasoned decision. Similarly, a failure to lodge a Statement of response triggers application of R. 357 RoP on decisions by default. In the present proceedings, this requires an assessment of whether an authorised representative has lodged a Statement of response on behalf of Respondent 1 and/or SWAT Medical in time.

12. Following the order of 12 February 2025, Respondent 1 was not in a position to renounce the role as representative for himself on his own accord, and transfer that role to someone else, as indeed he was appearing to do on 26 February 2025. On the contrary, it was made clear in the said order that he was not allowed to represent himself, and he was ordered to instruct an authorised representative. Not being a representative himself, it was not appropriate for him to lodge an application to change of representative pursuant to R. 293 RoP. Instead, he should have instructed an authorised representative to represent him in his capacity as a natural person and member of the public. It is not apparent this actually happened.

13. The person now named as representative has however not made any visible appearance before the Court of Appeal and claimed that he represents the respondents (R. 285 RoP) and no power of attorney has been submitted.

14. Crucially, the named representative has not signed the Statement of response (see R. 8.2 RoP) within the deadline.

15. In relation to SWAT Medical it was made clear in the order of 12 February 2025 that Respondent 1 was not allowed to represent SWAT Medical before the UPC, as a result of his high-level management position within that company. The same deficiencies as for Respondent 1 can be observed in the application of 26 February 2025.

16. The Court of Appeal concludes that, although Respondent 1 and SWAT Medical were ordered to instruct an authorised representative, they have failed to do so. No authorised representative lodged a Statement of response within the applicable time period.

17. The Statement of response submitted on 26 February 2025 is not signed by the stated new representative. It is signed by Respondent 1 who, as explained, is not allowed to represent himself or SWAT Medical in these proceedings. This leads to the conclusion that the respondents have failed to lodge a Statement of response.

A reasoned decision pursuant to R. 235.3 RoP, or a default decision pursuant to R. 357.1 RoP

18. In the present case, the requirements for application of both R. 235.3 RoP and R. 357.2 RoP are met.

19. A failure to lodge a Statement of response can result in a decision by default pursuant to R. 357.1 RoP, but this requires a request according to R. 355.1 RoP which applies mutatis mutandis on appeal (R. 357.1 RoP). When considering whether to give a decision by default, the Court of Appeal may consider the merits of the appeal (R. 357.2 RoP). A decision by default will go against the respondent (see "against a party" in R. 355.1 RoP). On the other hand, it "may only be given where the facts put forward by the claimant justify the remedy sought and the procedural conduct of the defendant does not preclude to give such decision" (R. 355.2 RoP).

20. For a reasoned decision pursuant to R. 235.3 RoP, on the other hand, no request is required.

21. There is no reason to hear Respondent 1 and SWAT Medical about the requests for a reasoned decision or default decision made by Meril Italy. Respondent 1 and SWAT Medical were already in default when those requests were made and were not represented. They had been alerted to the risk of a reasoned decision in the order of the Court of Appeal of 12 February 2025 and there is no representative to communicate the request for a default decision with.

Assessment in substance

22. The Court of Appeal has discretion when it comes to giving a reasoned decision or a default decision.

23. R. 235.3 RoP on reasoned decisions was introduced in R. 235 RoP at a rather late stage of the drafting of the Rules. In the 17th draft, it was still in R. 357 RoP (Decision by default – Court of Appeal). In the 18th draft, as well as in the Rules finally adopted, there is a separation between a decision by default and a reasoned decision. R. 235.3 RoP is a lex specialis which applies if the Statement of response is not lodged timely. Apart from the fact that no request is required in R. 235.3 RoP, so it can be applied on the Court's own motion, the drafting history demonstrates that a reasoned decision is effectively a default decision. This means that the remedy in R. 356.1 RoP – Application to set aside that decision within one month of service of the decision by a party against whom a decision by default has been given – applies mutatis mutandis to reasoned decisions.

24. As emphasised in the Court of Appeal's order of 12 February 2025 (see para 8 above), 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. As clarified earlier (see CoA, order of 8 February 2024, UPC CoA 404/2023, App 584498/2023, Ocado vs Autostore), an application under R. 262.1(b) RoP requires the applicant to be represented. Upholding the impugned order would compromise that requirement, since it

would result in granting access to written pleadings and evidence to members of the public who are not represented. The impugned order shall consequently be set aside.

Costs

25. As is clear from **Art. 10** and **Art. 45 UPCA**, the general principle laid down in the UPCA is that the register is public and the proceedings are open to the public (see **CoA 10 April 2024, UPC_CoA_404/2023, APL_584498/2023, Ocado**, at para 42). Public access to the register is of an administrative nature, rather than adversarial.

26. Having said this, it is not immediately clear from the RoP whether costs can be awarded in relation to requests for access to the register.

27. According to **Art. 69(1) UPCA**, reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity requires otherwise, up to a ceiling set in accordance with the Rules of Procedure.

28. In **R. 262 RoP** on public access to the register, a distinction is made linguistically between the public and the parties. This however is not determinative for the question whether costs can be awarded in relation to requests for access to the register.

29. **Art. 47 UPCA** has the heading 'Parties'. The term 'Parties' in the heading of **Art. 47 UPCA** does not cover 'parties' making applications other than 'actions'. These applicants are however covered by 'a party' in **R. 8.1 RoP**. 'A party' in **R. 8.1 RoP** is a wider concept than 'Parties' in the heading of **Art. 47 UPCA** and covers all applicants of any application or action under the UPCA and RoP. 'A party' in **R. 220.1 RoP** 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 RoP** and a member of the public under **R. 262.1(b) RoP** (see **Ocado vs Autostore**).

30. As a result, a linguistic interpretation of the UPCA and the RoP is not clarifying.

31. From a systematic perspective however, the chronology inherent in **R. 262 RoP** provides some guidance. According to **R. 262.2 RoP**, a party may request that certain information of written pleadings or evidence be kept confidential, and thus be excluded from public access, and provide specific reasons for such confidentiality. This type of request is made in advance, before any member of the public has requested access to the register. Identifying confidential parts of written pleadings and evidence and requesting confidentiality is consequently something all parties may do in advance even though there may never even be a request for access. This indicates that costs in relation to access to the register will normally form part of legal costs in general.

32. Furthermore, the fact that there are no court fees for requesting access to the register implies that costs will not be compensated (**R. 370 RoP**). The Scale of ceilings for recoverable costs is based on determining the value of the proceeding. The Guidelines for the determination of the court fees and the ceiling of recoverable costs (AC/09/24042023_E) set out how in most cases there will be a valuation based on an appropriate licence fee, although a valuation based on the claimant's loss of profits or the defendant's profits gained may also be applied. Requests for access to the register is not mentioned at all in the Scale of ceilings and Guidelines, and the model built on license fees makes very little sense, if any, for such requests.

33. For the reasons set out, compensation for costs should not be awarded in relation to applications for access to written pleadings and evidence pursuant to **R. 262.1 (b) RoP**. In exceptional cases a party may be ordered to bear any unnecessary costs it has caused the Court or another party (**Art. 69.3 UPCA**), but this is not the case here.

34. To conclude, Meril Italy is not entitled to compensation for costs from Respondent 1 and SWAT Medical.

DECISION

1. The **order of the Central Division Paris, 14 October 2024, ORD_36095/2024, App_33486/2024, UPC_CFI_255/2024; ACT_551308/2023 (main proceedings)** is set aside.

2. The application App_33486/2024 is dismissed.

3. Meril Italy's request that the respondents shall be obliged to bear the costs of the proceedings at first instance and on appeal is rejected.

A party against whom a decision by default has been given may lodge an Application to set aside that decision within one month of service of the decision (**R. 356.1 RoP**). A further decision by default shall be final (**R. 356.3 RoP**).

Issued on 5 May 2025

Rian Kalden, presiding judge and legally qualified judge

Ingeborg Simonsson, legally qualified judge and judge-rapporteur

Patricia Rombach, legally qualified judge
