



UPC_CFI_499/2024
Order
of the Court of First Instance of the Unified Patent Court
delivered on 01/04/2025
regarding R.320 – re-establishment

APPLICANT

██████████
██████████ - ██████████ – PL
(Defendant in the main action, hereinafter:
“Defendant”)

Represented by Michal
Przyluski

RELEVANT PROCEEDING PARTIES

Amycel LLC
260 Westgate Drive - 95076 - Watsonville, California – US
(Claimant in the main proceedings, hereinafter: “ Claimant”)
Represented by H.W.J. Lambers,

PATENT AT ISSUE

<i>Patent no.</i>	<i>Proprietor/s</i>
EP1993350	Amycel LLC

Deciding judges

The full panel of the court of first instance local division The Hague.

LANGUAGE OF PROCEEDINGS: English

REQUEST, PROCEDURAL DETAILS AND BACKGROUND

1. On 13 December 2024 Claimant filed an application (App_65966/2024, the “R.275-Application”) for alternative service of the Statement of Claim (“SoC”) on Defendant pursuant to R. 275 RoP in an infringement action that it started before this Local Division on 30 August 2024 (ACT_48877/2024 UPC_CFI_499/2024). The infringement action follows provisional

measures proceedings that Claimant initiated against Defendant before this Local Division (case UPC_CFI_195/2024, ACT_23163/2024, the “PI proceedings”). The infringement action was started by Claimant within the time period set by the Local Division in the order of 31 July 2024 granting provisional measures.

2. The SoC in the infringement action was uploaded on 30 August 2024. On 13 December 2024 official service had not succeeded. Service by electronic means was not an option because the representative of Defendant in the provisional measures proceedings had not been appointed by the Defendant for this action. Attempts to serve the SoC on the Defendant – a Polish national - in person were not effective because the SoC was not accepted by him. By order of 19 December 2024 (the “R.275-Order”) the judge-rapporteur, considering the steps already taken by Amycel to bring the SoC to the defendant's attention to be an alternative method that is in accordance with the UPC principles of efficiency and fairness and that respects the rights of the Defendant, ordered the following:
 - I. *The date on which the Statement of Claim is deemed to be served on Defendant is 25 November 2024;*
 - II. *Amycel is ordered to send a copy of this order to Defendant’s former representative with the requests set out in 11 above.*

Paragraph 11 of the order referred to at II, reads as follows:

11. Amycel used the same representative in the provisional measure proceedings (at the local division and in appeal APL_47391/2024, UPC_CoA_490/2024) and in the revocation action (PR_ACT_40493/2024 UPC_CFI_403/2024). Although this representative indicated that he has not been engaged by Defendant for these proceedings, the court assumes that he is in touch with the Defendant. Amycel is therefore ordered to send a copy of this order by email to the former representative, requesting him (i) to forward the order to the Defendant or otherwise bring it to his attention and (ii) to inform the Defendant that a decision by default shall be issued in case he does not appear in these proceedings by filing a statement of defence within three months from 25 November 2024.

This date of service of the SoC has not been disputed in a timely manner by the Defendant.

3. Pursuant to the above, R 23 and R 300 (c) RoP, the deadline to file the Statement of Defence (“SoD”) was Wednesday 25 February 2025.
4. On 4 March 2025 Defendant’s representative – the same representative that represented Defendant in the application for provisional measures in both instances and in the revocation action concerning the patent - submitted the SoD. On the same day he filed an application pursuant to Rule 320 RoP for the re-establishment of rights in respect of the deadline to file the Statement of Defence as App_10764/2025, hereinafter: the “R.320-Application”). The request was substantiated as follows (sic):

“On 24 February 2025 I have fallen ill. In the evening of 24 February I have run high fever, and in view of this I was unable to complete work on the Statement of Defence that day. On 25 February 2025 my condition worsened, and then I sought medical help. With high fever, problems with gastric tract and receiving medical help I was unable to finish my work and submit Statement of Defence on 25 February 2025. On 26 and 27 February 2025 I have been unable to work, and only on 28 February 2025 I was able to slowly resume my duties.

(...)

Furthermore, I indicate that no other representative from my firm could have completed and filed

the response. The Statement of Claim is 66 pages long, and the number of exhibits is substantial, it is just impossible to pass that kind of work along during a time of sickness, without any possibility to discuss that with the client and another representative.

Additionally I indicate that the UPC CMS does not support associations (as EPO MyPortfolio does), and therefore nobody else had direct access to the CMS platform in this case. I have been granted access to the CMS in this case on 6 January 2025. I am the only representative involved in the proceedings on the merits in this case. Furthermore, access to the UPC CMS requires the smartcard for electronic signature, which I did not have with me on 25 February 2025, when I receiving medical help.”

Defendant filed a doctor’s report to substantiate his medical condition.

5. Claimant was given the opportunity to react to the R.320-Application, which it did by submission of 10 March 2025, requesting the court to dismiss the application. Subsequently, Defendant was given the opportunity to reply to Claimant’s submission and Claimant to file a rejoinder. Both used that opportunity, further elaborating their arguments.

GROUNDS

6. The R.320 Application is admissible as it was filed timely and the relevant court fee was paid (R.320.2 RoP). It also mentions the grounds and the facts on which it relies (R.320.3 (a)).
7. The UPC is to ensure, among other things, expeditious decisions. To that end strict time limits are provided in the Rules of Procedure of the UPC. Not observing such time limits is in principle fatal. It is from this perspective that the exception to this provided in R.320 RoP should be understood.
8. The first paragraph of R. 320 RoP regarding the re-establishment reads as follows:

Where a party has failed to observe a time-limit set by these Rules or the Court for a cause which, despite all due care having been taken by the party, was outside his control and the non-observance of this time limit has had the direct consequence of causing the party to lose a right or means of redress, the relevant panel of the Court may upon the request of that party re-establish the right or means of redress.

9. Although this is disputed by the Claimant, the court shall assume for the purpose of this order that the representative of Defendant was ill during the period specified in the R.320-Application, in particular also on 24 and 25 February 2025, and was thus unable to submit the SoD on 25 February 2025. This is substantiated by a declaration of a doctor from Warsaw dated 28 February, 2025, stating that the representative was ill during the period 24-27.02.2025.
10. However, in the context of the specific circumstances of these proceedings, the court finds that the representative of the Defendant has not taken all due care to avoid that his (unforeseen and outside his control) incapacity to file at the very end of the period during which the SoD could be filed, would have the consequence that the deadline for filing the SoD could not be met.
11. The specific circumstances of this case include:

- Claimant filed the SoC in this infringement action on 30 August 2024

- Claimant did not accept service of the SoC by registered mail (despite the annexed translation into Polish)
- The action was initiated after PI proceedings in which the representative also represented Defendant, together with a colleague, Ms Dargiewicz, of the same firm (JD&P)
- Defendant, represented by the same representative of JD&P, filed a revocation action in the Central Division Milan of the UPC, which ended in a default decision because the court fee was not paid by the Defendant (Claimant in that case)
- Defendant, represented by the same patent attorneys of JD&P, appealed the PI Order (an injunction against Defendant), which ended in a default decision because Defendant failed to timely provide the information he was ordered to provide despite having been given multiple opportunities to do so
- On 20 December 2024, the R.275-Order of the court was sent directly to the patent attorney of J&D, representative in this case but who had also represented Defendant in the other proceedings before the UPC, which email includes the following accompanying text:
 - [pursuant to the order] *“Amycel requests you:*
 - (i) to forward the order to [the Defendant] or otherwise bring it to [the Defendant’s] attention; and*
 - (ii) to inform [the Defendant] that a decision by default shall be issued in case [REDACTED] does not appear in the merits proceedings by filing a statement of defense within three months from 25 November 2024”*
- An employee of J&D confirmed receipt of the email on the same day with the representative copied in

12. It follows from the above that the representative had experience with proceedings before the UPC, especially also with the UPC’s (current) Case Management System (“CMS”), as he represented Defendant in several proceedings. It is also clear from the above that it had been brought to his attention on 20 December 2024, that the court had announced in the present infringement proceedings (in the R. 275-Order) that a default decision shall be given in case of non-compliance with the deadline for filing the SoD.
13. Given the above circumstances, Defendant, and thus his counsel, had an obligation to take (pre-cautionary measures of) due care to avoid non-observance of the time-limit set by the Rules of Procedure. Defendant and his representative were forewarned and should have acted accordingly. In particular, while it is allowed of course to wait until the last day of a deadline for submission, it is then expected that a party(’s representative) takes extra care not to miss this deadline for any reason.
14. According to his own submission, the representative of Defendant requested access to the case on 23 December 2024 after discussing the order with the Defendant (this must refer to the order re the R.275-Application) and effectively gained access to the file on 6 January 2025. The CMS shows that he was registered as representative on that date. In case he would have needed the SoC earlier, he could have asked counsel for Claimant to send him the SoC directly. He was, after all, in direct email contact with Claimant’s representative who sent him the R.275-order on 20 December 2024.
15. He was therefore aware since 20 December 2024 that the deadline for filing the SoD was 25 February 2025 and that the court had announced, partly in view of the delay in service, that a

decision by default shall be taken if the time limit was not observed. This should have made the representative even more prudent not to miss the deadline.

16. According to the court, earlier preparation of the SoD was also possible in the present circumstances, and the representative of Defendant has also not argued otherwise. The representative had access to the file at least from 6 January 2025, which is seven weeks before the deadline for uploading a SoD. The court considers this time sufficient because the representative was already familiar with the facts and the patent due to the PI proceedings and the revocation action, in which he also represented Defendant. If he had thought otherwise, he could have filed a reasoned request at the time for an extension of the deadline, which was not done. Therefore, the court considers it was not in line with the due care to be taken by the representative to wait with uploading of the SoD until the last possible day(s). This is the more so, because the court is under the impression that the SoD was not (almost) finalised yet on 24 February 2025, because in that case it could have been uploaded on 28 February 2025, after the representative recovered. Instead, it was uploaded in the afternoon of 4 March 2025.
17. It was also not in line with due care, especially in view of the courts R.275-Order wherein the consequence of a default decision in case of non-compliance with the deadline was already stated, not to involve other representatives from his firm in the proceedings. Representative's argument that registering several representatives is not possible in the CMS, and he was the only one who could upload the SoD, is not accepted. Contrary to the start of the UPC, a team function has been available for more than a year already, as is evident from the following announcement on the UPC website:

Information on new CMS Functionality - My Legal Team

Users are informed that, as of 28 November 2023, the "My Legal Team" functionality is available on the Case Management System (CMS)

As of 28 November 2023, users of the Court's CMS will be able to cooperate on the system, via the "My Legal Team" functionality.

- Registering a legal team in CMS makes it possible for several representatives – provided they are registered representatives at the UPC – to upload documents in the CMS. From a prudent representative, who takes all due care to avoid missing a deadline, it can be expected to make use of the Legal Team Function in CMS, where appropriate.
18. That the representative failed to take such precautionary measures, must be imputed on him.
19. As pointed out by the Claimant, it is also in line with practice at the EPO to expect a representative to use a teams function in order to avoid missing a deadline due to illness of one representative. The European Patent Convention contains a provision on reestablishment of rights (Art. 122 EPC), which equally prescribes "all due care required by the circumstances having been taken". According to the EPO's Legal Board case law, even a one-person office, which the JD&P firm clearly is not, should make appropriate provisions to ensure the observance of time limits in the case of an absence through illness.

See Case Law BoA (2022), par. “5.4.5 All due care in making provisions for staff absences” (underlining added):

“In J 41/92 (OJ 1995, 93) the Legal Board found that if a professional representative ran a one-person office, appropriate provisions needed to be made so that, in the case of an absence through illness, the observance of time limits could be ensured with the help of other persons. If there was no substitute or assistant at the representative's office, co-operation with colleagues or with a professional association could, for example, be sought for this purpose. See also T 387/11, in which the representative, who ran a one-person office, had taken precautions to ensure that another representative could cover for him if he were absent owing to illness, so that deadlines would normally be met. In taking such organisational measures, he had met the requisite standard of "all due care".”

20. As a (European) patent attorney, Defendant’s representative can be assumed to be aware of such requirements. Furthermore, Claimant has brought to the attention of the court that Defendant’s representative submitted a substantive brief to the EPO in unrelated opposition proceedings on (the deadline of) 27 February 2025 which, according to the submission, was signed in Alicante by the representative on 27 February 2027. The representative’s response that this brief was already finalised on 24 February and that he was well enough on the evening of 27 February to submit it, is not substantiated and will be dismissed. Furthermore, this does not explain why the EPO submissions mentions “Alicante, 27.02.2025” at the top, whereas the medical doctor who filed the medical report resides in Warsaw, judging by the heading “Warsaw, dated 28.02.2025”. This was not explained by the representative in his reply. At any rate, it would appear to this court that if the representative was well enough to submit a brief at the EPO, he should equally be able to submit a SoD in the CMS, or at the very least, request for an extension on that date (even if first by email and later in the CMS), or instruct an assistant to do so.

21. For the above reasons, the Application to re-establish the right to file the SoD in this case, is rejected for non-observance of due care. Consequently, the SoD submitted on 4 March 2025 shall not be considered. As the right to file the SoD is not re-established, a decision by default shall be rendered in the infringement action. The same applies to a relating counterclaim for revocation, if any.

22. This order cannot be appealed pursuant to R. 320.7 RoP.

ORDER

1. The R.320-Application for the re-establishment of rights is rejected;
2. The SoD is considered not to be filed;
3. A decision by default shall be taken in the infringement action.

E. Brinkman Presiding judge	Edger Frank BRINKMAN  Digitally signed by Edger Frank BRINKMAN Date: 2025.04.01 15:46:01 +02'00'
R. Lopez Legally Qualified Judge	Rute Alexandra Da Silva Sabino Lopes  Assinado de forma digital por Rute Alexandra Da Silva Sabino Lopes Dados: 2025.04.01 15:14:16 +01'00'
M. Kokke Judge-rapporteur	Margot Elsa KOKKE  Digitally signed by Margot Elsa KOKKE Date: 2025.04.01 17:03:14 +02'00'
On behalf of the deputy-registrar	Nikki Swinkels  Digitaal ondertekend door Nikki Swinkels Datum: 2025.04.01 16:51:31 +02'00'

ORDER DETAILS

Order in ACTION NUMBER: ACT_48877/2024

UPC number: UPC_CFI_499/2024

Action type: Infringement Action

Application No.: 10764/2025

Application Type: Application for re-establishment of rights pursuant to R.320 RoP