



Central Division
Paris Seat

ORDER

of the Court of First Instance of the Unified Patent Court

Central division (Paris seat)

issued on 20 February 2024

concerning the Generic procedural application No. App_8932/2024

lodged in the proceedings UPC_CFI_455/2023

HEADNOTES: request for procedural order.

KEYWORDS: statement or defence; time extension.

REFERENCE CODE ECLI:

APPLICANT:

Roche Diabetes Care GmbH - Sandhofer Strasse 116, 68305 Mannheim, Germany

represented by Christof Augenstein, Katharina Brandt and Robert Knaps,
Kather Augenstein Rechtsanwälte PartGmbH

supported by Thomas Kronberger, Grünecker Patent- und Rechtsanwälte
PartGmbH

RESPONDENT:

Tandem Diabetes Care, Inc. - 12400 High Bluff Drive, CA 92130, San Diego, USA

Tandem Diabetes Care Europe B.V. - Schiphol Boulevard 359, WTC Schiphol Airport, D-Tower 11th
floor, 1118 BJ, Schiphol, Netherlands

both represented by Charlotte Garnitsch, Wim Maas and Alexander Rubusch,
Taylor Wessing N.V.

PATENT AT ISSUE:

European patent n° EP 2 196 231

PANEL:

Panel 2 of the Central Division - Paris Seat

DECIDING JUDGE:

This order has been issued by the presiding judge and judge-rapporteur Paolo Catalozzi

SUMMARY OF FACTS AND PARTIES' REQUESTS:

1. On 30 November 2023 Tandem Diabetes Care, Inc. and Tandem Diabetes Care Europe B.V. have brought an action for declaration of non-infringement against Roche Diabetes Care GmbH with regard to the patent at issue before this Seat of the Unified Patent Court, registered as No. ACT_589999/2023 UPC_CFI_455/2023.
2. On 22 January 2024 the applicant, defendant in the action for declaration of non-infringement, has lodged a preliminary objection requesting that the Court declares that it has no jurisdiction and dismisses the action. This application still needs to be decided by the Court.
3. In the meanwhile, on 15 February 2024 the applicant has requested that the Court extends the time period for filing the defence to the statement for a declaration of non-infringement until 8 April 2024 or, alternatively, until 18 March 2024.

GROUNDINGS FOR THE ORDER

Applicant's allegation.

4. The Applicant has based its request on the fact that a preliminary objection has been lodged and this preliminary objection will not be decided before the current expiration of the deadline for filing the defence, as the judge-rapporteur has granted to the parties a time limit to submit their comments that expires after that deadline.
5. It has argued that it would be unreasonable to have to finalise submissions which might be unnecessary and would only increase the cost.
6. Moreover, it has added that in case the Court does not dismiss the action for declaration of non-infringement, as well as the parallel revocation action of the same patent which the claimant has lodged, clarity on which subject matter is pending in which proceeding is required.
7. Lastly, it has pointed out that, pursuant to Rule 76 (3) of the Rules of Procedures ('RoP'), a possible infringement action lodged by the patent proprietor in a local or a regional division against the claimant in respect of the patent at issue within three months of the date of the

action for declaration of non-infringement would force a stay of the current proceedings and, therefore, it would be unreasonable if it had to file its infringements arguments as a statement of defence in the pending proceedings.

Rule 9 (3) 'RoP' and the use of the discretionary powers by the Court.

8. Pursuant to Rule 9 'RoP', 'on a reasoned request by a party, the Court may: (a) extend, even retrospectively, a time period referred to in these Rules or imposed by the Court; and (b) shorten any such time period' (para 3.), with the exclusion of the time periods referred to in Rules 198 (1), 213 (1) and 224 (1) (para 4.).
9. The provision confers to the Court the discretionary powers to modify, upon a reasoned request of a party, the deadlines set by the statutory rules for performing procedural activities and in exercising these powers the Court has to observe the principles of proportionality, flexibility, fairness and equity, mentioned in the preamble 2 and 4 of the 'RoP' (see UPC CFI 255/2023 CD Paris, order of 10 November 2023, para 11).
10. With particular regard to the request of time extension, the Court has to take into account that the regime of procedural deadlines is aimed to a plurality of purposes.
11. First of all, it ensures that proceedings are concluded rapidly and respectfully, where possible, of the one-year period set by the preamble 7 of the 'RoP' for the infringement and revocation actions.
12. Secondly, it safeguards the principle of fair trial by providing in advance - that is, before the beginning of a proceedings - for the procedural rules which both parties have to comply with and which are regulating the proceedings itself.
13. Thirdly, it protects the principle of impartiality of the judge, which would be affected where the Court altered arbitrarily the statutory deadline in favour of one of the parties.
14. Lastly, it assures the legal certainty that the procedural activity will be performed within a specific period of time and the parties' trust on the relevant provisions being compulsory.
15. On the other side, the protection and the implementation of the right to defence impose to interpret the statutory rules regarding the deadlines in a flexible and equitable way where a party has an objective difficulty to arrange an adequate defence within the time provided for.
16. For all these arguments, this judge-rapporteur agrees with the statement that the power to extend the time limit should only be used with caution and only in justified exceptional cases (see UPC CFI 412/2023 CD Paris, order of 9 February 2024).
17. It follows that the Court may extend a deadline set by the Rules of Procedures only in case a party alleges and gives evidence that it will not be able or was not able to meet it because of a fact that makes the submission of a document or the arrangement of an adequate content of a pleading in the due time objectively impossible or very difficult.
18. These conditions are not present in the current proceedings, as there is no allegation, nor let alone evidence, of a difficulty in arranging a proper defence, rather the possibility that the submissions of pleadings in due time may be useless in case the Court will allow the preliminary objection.

19. On a different aspect, the fact that the applicant may file an infringement action after the deadline for submitting its statement of defence has expired and that may (or shall) lead to a stay of the current proceeding does not seem to be relevant, as it does not give rise to a difficulty meeting that deadline.

Rule 19 (6) 'RoP' and the decision of the judge-rapporteur.

20. With particular regard to the time limit for submitting a statement of defence, it may be noted that Rule 19 (6) 'RoP', applicable to the actions for declaration of non-infringement *mutatis mutandis* due to Rule 66 'RoP', states that 'The period for lodging the Statement of defence [Rule 23] shall not be affected by the lodging of a Preliminary objection, unless the judge-rapporteur decides otherwise'.

21. This provision expresses the general principle the time periods set out by Rules of Procedures for the actions that the parties have to take in the written procedure are indifferent to the lodging of a preliminary objection.

22. According to Rule 19 (6) 'RoP', the judge-rapporteur is allowed to make an exception to this principle, but the relative decision implies the use of the discretionary powers of the Court and, therefore, must comply with the mentioned requirements for a correct use of these powers.

23. In the case at hand, the factual circumstances and the arguments brought by the applicant do not allow the judge to extend the time limit for lodging the statement of defence as a consequence of the lodging of a preliminary objection because they are not demonstrative of a difficulty arranging a proper defence.

Parallel revocation action and need for clarity.

24. Lastly, as for the need for clarity on which subject matter is pending in the action for declaration of non-infringement and which is pending in the revocation action, the applicant has omitted to explain which are the points of unclarity in the respective statements of claim and how a time extension would allow to remedy to this lack of certainty.

ORDER

The Judge-rapporteur rejects the request.

Issued on 20 February 2024.

The Judge-rapporteur

Paolo Catalozzi

REVIEW

Pursuant to Rule 333 'RoP', the order shall be reviewed by the panel on a reasoned application by a party. The relative application shall be lodged within 15 days of service of the order.