



Central Division
Paris Seat

ORDER
of the Court of First Instance of the Unified Patent Court
Central division (Paris seat)
issued on 16 September 2024
concerning the Application RoP333 No. App_42138/2024
lodged in the infringement action UPC_CFI_164/2024

HEADNOTES: For the purposes of applying Rule 361 'RoP', the condition of manifest inadmissibility implies that the inadmissibility must be clearly evident from the pleadings and its assessment does not require any particular in-depth analysis.

KEYWORDS:

APPLICANT:

Microsoft Corporation - One Microsoft Way, Redmond Washington 98052-6399, USA
represented by Tilman Müller-Stoy, Bardehle Pagenberg

RESPONDENT:

Suinno Mobile & AI Technologies Licensing Oy - Fabianinkatu 21, 00130 Helsinki, Finland
represented by [REDACTED]

PATENT AT ISSUE:

European patent n° EP 2 671 173

PANEL:

Panel 2
Paolo Catalozzi Presiding judge and judge-rapporteur
Tatyana Zhilova Legally qualified judge

Wiem Samoud Technically qualified judge

DECIDING JUDGE:

This order has been issued by the panel

SUMMARY OF FACTS AND PARTIES' REQUESTS:

1. On 22 May 2024 the applicant, defendant in the infringement action (registered as No. ACT_18406/2024 UPC_CFI_164/2022), filed an application (registered as No. App_28103/2024) requesting that the respondent's action be rejected as being manifestly inadmissible, pursuant to Rule 361 of the Rules or Procedures ('RoP').
2. By order issued on 2 July 2024 the judge-rapporteur, after having heard the respondent, rejected the request.
3. On 17 July 2024 the applicant requested that this order to be reviewed and set aside by the panel and that, pursuant to Rule 361 'RoP', both claimant's application pursuant to Rule 262A 'RoP' of 9 April 2024 (registered as No. App_19024/2024) and claimant's action be rejected as being manifestly inadmissible.
4. In the alternative, the applicant requested that leave to appeal is granted and that the following question is referred to the Court of Justice of the European Union for preliminary ruling: "In order to comply and be compatible with Union law, shall the requirement of independence of representatives before the Unified Patent Court ['UPC'], as set out in Article 48 (5) of the Agreement on a Unified Patent Court ['UPCA'] and in Article 2.4.1 of the Code of Conduct for Representatives before the Unified Patent Court, be interpreted as meaning that a legal person cannot be validly represented before the Unified Patent Court by a person who is at the same time its managing director and main shareholder?"
5. On 31 July 2024 the respondent, asked for written comments on the application, argued that the court order is correct and, therefore, the review is unnecessary.
6. In the alternative, the respondent requested that "Leave for appeal should be denied in the event the Court Order is maintained" and that if a referral to Court of Justice does take place, it should be complemented with also the following question in the same preliminary ruling: "In European Union Law, does the patentee himself choose his attorney from the list of qualified representatives? Or does the alleged infringer choose the attorney of the patentee?"

GROUNDINGS FOR THE ORDER

Admissibility of the application for panel review.

7. According to Rule 333 'RoP' case management decisions or orders made by the judge-rapporteur or the presiding judge shall be reviewed by the panel, on a reasoned application by a party that shall be lodged within 15 days of service of the order and must contain the grounds for review and the evidence, if any, in support of the grounds.

8. As the Court of Appeal stated in its order issued on 21 August 2024 concerning the appeal – declared inadmissible – lodged against the order in question (registered as No. APL_44552/2024 UPC_CoA_454/2024), the order denying a Rule 361 ‘RoP’ request is a case management order as meant in Rule 333 (1) ‘RoP’ and, as such, can be subject of review.
9. It follows that the current application is admissible to the extent that it requests the review of the order rejecting the application filed pursuant to Rule 361 ‘RoP’.
10. The current application is not admissible insofar as it seeks to have the claimant’s application, filed on 9 April 2024 pursuant to Rule 262A ‘RoP’ (registered as No. App_19024/2024), rejected.
11. Indeed, this latter application has been addressed by the judge-rapporteur and any issue concerning this application must be lodge by the way of a challenge to the judge’s relative order.

Rule 361 ‘RoP’: the action “manifestly inadmissible”.

12. According to the referred Rule 361 ‘RoP’, the Court may give a decision by way of order “where it is clear that the Court has no jurisdiction to take cognisance of an action or of certain of the claims therein or where the action or defence is, in whole or in part, manifestly inadmissible or manifestly lacking any foundation in law”.
13. The rationale behind this provision lies in the interest in ensuring that expeditious decisions are delivered and that proceedings are conducted in the most efficient manner.
14. With particular regard to the condition of the ‘manifest inadmissibility’ provided in Rule 361 ‘RoP’, this panel considers that the word ‘manifest’ implies that the inadmissibility must be clearly evident from the pleadings without any particular in-depth analysis. In other words, it must be a *prima facie* inadmissibility which follows from simple factual findings (such as verifying that a peremptory deadline has not been met without any justified reason) and which does not require accurate and complex factual findings and/or legal assessments whose outcome is debatable.
15. This interpretation is consistent with the literal wording of the provision and is also consistent with the principle of proportionality, according to which the Court must give due consideration to the nature and complexity of each action and its importance, and to the principle of fairness and equity, according to which the Court must have regard to the legitimate interests of all parties. In fact, these interests may be seriously and unjustifiably affected by a final decision on a claim delivered on a critical and controversial issue where the party has not given the opportunity to address it with the means ordinarily provided for by the Rules of Procedure.

Lack of independence of the respondent’s representative in the context of the manifest inadmissibility.

16. Having in mind the reported interpretation of Rule 361 ‘RoP’, the panel notes that the applicant’s first argument is based on the grounds of a violation of Rule 290 (2) ‘RoP’ in relation to the non-compliance with the code of conduct by the claimant’s representative, as he is also the claimant’s director and main shareholder.
17. The applicant argues, in particular, that the judge-rapporteur erred in stating that the lack of independence must be assessed not in an absolute sense, but with reference to the possible

harm to the interests of the party on whose behalf the professional acts, and that its possible violation cannot be asserted by the counterparty, which has no interest in such a finding, but only by the party for whose benefit such an obligation is placed.

18. The applicant points out that the concept of legal independence of a representative has to be interpreted in an “absolute sense”, in line with the case-law of the Court of Justice.
19. The panel acknowledges that the wording of Article 48 (5) of the Unified Patent Court Agreement (‘UPCA’), according to which “Representatives of the parties shall enjoy the rights and immunities necessary for the independent exercise of their duties, including the privilege from disclosure in proceedings before the Court in respect of communications between a representative and the party or any other person, under the conditions laid down in the Rules of Procedure, unless such privilege is expressly waived by the party concerned”, appears to be modelled on a similar one found in Article 19 (5) of the Statute of the Court of Justice of the European Union, which reads as follows: “Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure”.
20. The panel is also aware that said Article 19 (5) is consistently interpreted as it does not allow a party to be properly represented before the Courts of European Union by a lawyer that is employed or financial dependent by that party or who has, within the represented body, extensive administrative and financial powers (see, CJEU 14 July 2022, case C-110/21 P, *Universität Bremen/ REA*; CJEU 24 March 2022, case C-529/18 P, *PJ v EUIPO*; CJEU 6 April 2017, case C-464/16 P, *PITEE v Commission*; CJEU 4 December 2014, case C-259/14 P, *ADR Center v Commission*; CJEU 5 September 2013, case C-573/11, *ClientEarth v. Council of the EU*; CJEU 6 September 2012, cases C-422/11 P and C-423/11 P, *Prezes Urzędu Komunikacji Elektronicznej and Republic of Poland v Commission*; CJEU 29 September 2010, cases C-74/10 P and C-75/10 P, *EREF v Commission*).
21. The forementioned case-law of the Court of Justice on the interpretation of Article 19 (5) of its Statute, however, is not binding on the national judges (and ‘UPC’ judges) as it is established with regard to a legal provision which regards exclusively the proceedings before the Courts of European Union and, therefore, is not applicable to Member States and while the similar wording of Article 48 (5) ‘UPCA’ and Article 19 (5) of the Statute of the Court of Justice suggests that the ‘UPCA’ Contracting Member States intended to incorporate the Court's interpretation of the independence requirement, this interpretation is not straightforward and requires more in-depth analysis.
22. It follows that the alleged lack of independence by the claimant’s representative does not appear to be ‘manifest’ and, therefore, could not lead to an assessment of manifest inadmissibility of the action, so that the requirement set by Rule 361 ‘RoP’ is not met.

Insufficient content of the statement of claim.

23. The second and last argument brought by the applicant is that the statement of claim is insufficiently concrete and specific and, therefore, does not meet the requirements set forth by Rule 13 (1) (k) ‘RoP’.

24. In particular, the applicant argues that the statement of claim did not specify whether it included a request for determination of the amount of damages or not, nor, in any case, the amount of damages requested.
25. This argument is not well-founded.
26. In the statement of claim the claimant requested expressly “the Court to determine and award past damages”. The panel considers that this is a sufficiently clear indication of the remedy sought with the infringement action and the fact that the damages asked is not indicate in a specific amount does not render the claim generic and does not constitute a violation of the requirement set by Rule 13 (1) (k) ‘RoP’.

Conclusions.

27. For the aforementioned considerations it follows that the applicant’s request may not be granted and that the order issued by the judge-rapporteur on 2 July 2024 must be confirmed.

Leave to appeal.

28. The panel decides not to grant leave to appeal because there is no concrete need for a ruling on the meaning of the relevant rules. Indeed, the debated issues may be addressed more thoughtfully during the course of the infringement action proceedings.

ORDER

For these grounds the panel:


- rejects the request for panel review of the order issued by the judge-rapporteur on 2 July 2024 filed by Microsoft Corporation on 17 July 2024;
- rejects the request to grant leave to appeal.

Issued on 16 September 2024


The Presiding judge and judge-rapporteur
Paolo Catalozzi

Paolo Catalozzi  Firmato digitalmente da Paolo Catalozzi
Data: 2024.09.16 17:52:07 +02'00'

The legally qualified judge
Tatyana Zhilova

Tatyana Zhilova  Signature numérique de Tatyana Zhilova
Date : 2024.09.16 13:30:49 +02'00'

The technical qualified judge
Wiem Samoud

Wiem SAMOUD  Signature numérique de Wiem SAMOUD
Date : 2024.09.16 17:32:16 +02'00'

ORDER DETAILS

Order no. ORD_43015/2024 in ACTION NUMBER: ACT_18406/2024

UPC number: UPC_CFI_164/2024

Action type: Infringement Action

Related proceeding no. Application No.: 42138/2024

Application Type: APPLICATION_ROP_333