

DECISION
of the Court of Appeal of the Unified Patent Court
issued on 10 April 2024
concerning public access to the register (R.262.1(b) RoP)

HEADNOTES:

- Art. 9(1) UPCA must be interpreted such that if the subject matter of the appeal proceedings is of a non-technical nature only, and there are no technical issues at stake, the Court of Appeal may decide the matter without the need to assign two technically qualified judges to its panel of three legally qualified judges. This is without prejudice to the fact that once technically qualified judges have been assigned, they will, as judges, have to deal with the entire dispute, including the non-technical aspects thereof.
- When a request to make written pleadings and evidence available to a member of the public is made pursuant to R.262.1(b) RoP, the interests of a member of the public of getting access to the written pleadings and evidence must be weighed against the interests mentioned in Art. 45 UPCA. These interests include the protection of confidential information and personal data ('the interest of one of the parties or other affected persons') but are not limited thereto. The general interest of justice and public order also have to be taken into account. The general interest of justice includes the protection of the integrity of proceedings.
- A reasoned request under R.262.1(b) RoP is not the same, and has to be distinguished from, an application under R.262.3 RoP.

KEYWORDS:

- Composition of the panel of the Court of Appeal, Art. 9(1) UPCA; Public access to written pleadings and evidence, R.262.1(b) RoP

APPELLANT / CLAIMANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE:

Ocado Innovation Limited

Represented by:

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RESPONDENT:

Mr [REDACTED]

Represented by:

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DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE:

- (1) **Autostore AS**
- (2) **Autostore Sp. z o.o.**
- (3) **Autostore System AB**
- (4) **Autostore S.A.S.**
- (5) **Autostore System GmbH**
- (6) **Autostore System AT GmbH**
- (7) **Autostore System Srl**
- (8) **Autostore System S.L**

Represented by:

Laura Ramsay Dehns
Annabelle Beacham Dehns

LANGUAGE OF THE PROCEEDINGS:

English

PANEL AND DECIDING JUDGES:

This order has been issued by the second panel consisting of:
Rian Kalden, presiding judge and legally qualified judge
Ingeborg Simonsson, legally qualified judge and judge-rapporteur
Patricia Rombach, legally qualified judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE:

- Date: 17 October 2023
- Order no. 573437/2023/ UPC_CFI_11/2023 of the Nordic-Baltic Regional Division
(judge-rapporteur Stefan Johansson)

ORAL HEARING ON:

12 March 2024

POINTS AT ISSUE:

- (I) The composition of the panel of the Court of Appeal (Art. 9(1) UPCA), and
- (II) Public access to written pleadings and evidence (R.262.1(b) RoP)

SUMMARY OF FACTS AND PARTIES' REQUESTS

1. On 15 August 2023, Mr. ██████ as a member of the public, applied under R.262.1(b) Rules of Procedure of the Unified Patent Court (RoP) to be given access to – inter alia – the statement of claim in proceedings ACT_459791/2023; UPC_CFI_11/2023, where Ocado was the claimant in infringement proceedings.
2. The Nordic-Baltic Regional Division ordered access for Mr ██████ to the statement of claim, after redaction of personal data within the meaning of Regulation (EU) 2016/679. The judge-rapporteur, in summary, considered that Art. 45 UPCA means that also the written procedure of the Court shall, in principle, be open to the public and that, if a person provides a credible explanation for why he/she wants access, the application shall be approved, unless it is necessary to keep the information confidential.
3. Ocado appealed the order. It requests that Mr ██████ be denied access to the statement of claim.

PARTIES' SUBMISSIONS

Ocado submits the following.

4. Ocado agrees with the reasons given by this panel in its order of 20 December 2023 (Case UPC_CoA_478/2023) why the Court of Appeal can sit in a composition of three legally qualified judges when only non-technical issues are at stake. This approach furthers the parties' rights and is efficient and cost efficient. The words 'technology concerned' in Art. 9(1) UPCA also makes it clear that technically qualified judges only are required to be assigned when the dispute to be decided upon concerns a technical issue. When there is no dispute of a technical nature, there cannot be a breach of a defendant's right under Art. 6 of the European Convention of Human Rights (ECHR).
5. Access to a case file may be justified to allow the public to understand a final order or decision (hereafter: decision) and scrutinise the court. This only requires that an oral hearing is public and that access to written pleadings and evidence are given after a decision has been rendered. If a case ends without there being a decision, e.g. when a case is settled, then no access should be given, as then there is no justification for it.
6. The patent monopoly could justify access to written pleadings and evidence during the proceedings if these concern the validity of a patent that a member of the public is specifically concerned with. The same applies if a member of the public can establish that he has a direct interest in the subject-matter of that proceedings, such as a potential liability.
7. Based on these criteria, access to the statement of claim as requested by Mr ██████ should be denied. There is nothing to scrutinise and the settlement is confidential.
8. At the time of the request, the statement of claim was not yet served on all defendants. Service had been effected on defendants at the time of the impugned order.

Mr ██████ argues as follows:

9. Art. 9(1) UPCA prescribes that the Court of Appeal sits in a composition of three legally qualified judges and two technically qualified judges, with the only exception of cases referred to in Art. 9(2) UPCA. In proceedings before the UPC there is always a patent and thus a relevant technology involved. Sitting with three legally qualified judges in other cases is contrary to Art. 6 ECHR. Such a panel is not 'established by law'. Technically qualified judges are judges and should also decide on legal issues.
10. A request under R.262.1(b) RoP is admissible even if not all defendants have been served. The words 'made available' has a wider meaning. It is clear from the settlement, which involves all defendants, that they were all aware of the Statement of claim.
11. Access to a case file should always be given, regardless of the stage of the proceedings (before or after decision) and regardless of the nature of the proceedings (infringement or revocation proceedings).
12. A 'reasoned' request only means that the request must set out which documents are requested to be given access to, so that the court may ensure the protection of personal data in relation to these documents.
13. There are no further requirements for a 'reasoned request', except that – as is meant by the phrase 'or in the general interest of justice or public order' in Art. 45 UPCA – requests must not be abusive.
14. Access may only be denied if a party to the proceedings has a legitimate reason to object. Such legitimate objection may only be made on the grounds of protection of confidential information and personal data. Other grounds to deny access under R.262.1(b) RoP have no basis in the UPCA.

REASONS:

I. The composition of the panel of the Court of Appeal (Art. 9(1) UPCA)

15. Art. 9(1) UPCA reads:

Any panel of the Court of Appeal shall sit in a multinational composition of five judges. It shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States and two technically qualified judges with qualifications and experience in the field of technology concerned. Those technically qualified judges shall be assigned to the panel by the President of the Court of Appeal from the pool of judges in accordance with Article 18 UPCA.

16. The Court of Appeal does not agree with Mr ██████ arguments that a panel of just three legally qualified judges would be contrary to Art. 6 ECHR as such a composition is not foreseen in the UPCA. For the reasons given below, it is of the opinion that Art. 9(1) and Art. 9(2) UPCA are not exhaustive as to the composition of the panels of the Court of Appeal and that Art. 9(1) UPCA allows the Court of Appeal to sit with three legally qualified judges in cases where only matters of a non-technical nature are in dispute.

17. The interpretation of Art. 9(1) UPCA as being non exhaustive is supported by its own wording.
18. Art. 9(1) UPCA last sentence assumes that there *is* already a panel before the technically qualified judges are assigned (“Those technically qualified judges shall be assigned to the panel...”). The panel as a starting point consists of the legally qualified judges of the Court of Appeal, who are – other than the technically qualified judges (see Art. 18(2) UPCA) – not part of the pool of judges. The fact that technically qualified judges are assigned from the pool of judges, on the basis of their qualifications and experience in the field of technology concerned, confirms that they are not appointed permanently to the Court of Appeal and as such not part of the panel, until assigned to one on a case-by-case basis.
19. Moreover, the last part of the second sentence of Art. 9(1) UPCA: ‘technically qualified judges with qualifications and experience in the field of technology concerned’, presupposes that there is a field of technology concerned. This, together with the fact that the assignment is done based on the qualifications and experience in the field of technology, indicates that the assignment of two technically qualified judges to a panel is for the purpose of adding their relevant technical expertise to the panel. It follows that in proceedings where only matters of a purely legal or procedural nature are concerned, so that there is no ‘field of technology concerned’ in those proceedings, the assignment of technically qualified judges does not serve the purpose underlying Art.9(1) UPCA and can be dispensed with.
20. The interpretation of Art. 9(1) UPCA as being non exhaustive also follows from the systematics of the UPCA and the Rules of Procedure as to the composition of the panels of the Court.
21. Art. 9(1) UPCA is not the only provision relevant for the composition of a panel of the Court of Appeal. Art. 9(4) UPCA provides:

The panels of the Court of Appeal shall be set up in accordance with the Statute.

It was also clearly the purpose from start that the UPCA should be supplemented by the Rules of Procedure (RoP). Art. 41(1) UPCA provides:

The Rules of Procedure shall lay down the details of the proceedings before the Court. They shall comply with this Agreement and the Statute.

22. The Statute of the Unified Patent Court (Statute) contains articles that provide for the possibility that the Court of Appeal sits in a composition that deviates from that mentioned in Art. 9(1) UPCA.
23. Art. 21(2) of the Statute provides:

When a case is of exceptional importance, and in particular when the decision may affect the unity and consistency of the case law of the Court, the Court of Appeal may decide, on the basis of a proposal from the presiding judge, to refer the case to the full Court.

There is no explanation in the Statute as to the composition of the full Court, but since the Court of Appeal has at least two panels (Art. 3(4) of the Statute), it is clear that such composition is different from and has more judges than the composition of five mentioned in Art.9(1) UPCA (see also R.238 A RoP).

24. The panels of the Court of Appeal do not decide exclusively with five judges. Art. 21(3) of the Statute provides:

The panel may delegate, in accordance with the Rules of Procedure, certain functions to one or more of its judges.

25. Several rules of the RoP allow for other compositions than that of five as mentioned in Art. 9(1) UPCA.

- a. R.254.2 RoP provides that actions for rehearing are assigned to a Court of Appeal panel consisting of three legally qualified judges.
- b. R.220.4 RoP (with reference to R.345.5 RoP, also applicable to the Court of Appeal pursuant to R.345.8 RoP) as well as R.223.4 RoP delegate requests for discretionary review and applications for suspensive effect to the standing judge in the Court of Appeal, which is a single judge.
- c. R.345.4 RoP, which also applies *mutatis mutandis* to the Court of Appeal, provides for the possibility that the panel may delegate to one or more judges of the panel the function of acting as a single judge or the function of acting for the panel in certain actions.
- d. Further, in the Court of Appeal proceedings, the judge-rapporteur is given far-reaching powers in the Rules of Procedure and can for example:
 - reject the appeal by a decision by default if translations are not lodged (R.232.2 RoP),
 - reject non-conform appeals (R.233 RoP),
 - decide on public access to register (R.262.1(b) RoP),
 - decide on the admissibility of Applications to intervene (R.314 RoP)
- e. Pursuant to Art. 43 UPCA, case management is for the Court. However, the judge-rapporteur alone is responsible for case management according to the catalogues in R.332 and R.334 RoP, which includes holding interim conferences and dismissing a claim summarily if it has no prospect of succeeding. The possibility to have panel review (R.102 and R.333 RoP) does not bring case management orders and decisions of the judge-rapporteur outside the ambit of adjudication.

26. From the above it is clear that Art. 9(1) UPCA should not be read in a restrictive way. This would not allow for *any* adjudication in the Court of Appeal other than in a panel of three legally and two technically qualified judges (or with three legally qualified judges under Art. 9(2)). Such interpretation would clearly be contrary to the Statute and the Rules of Procedure, which explicitly allow for adjudication in other compositions and even by a single judge, as set out in detail above.

27. The interpretation of Art. 9(1) UPCA as being non exhaustive as to the composition of panels of the Court of Appeal is furthermore endorsed by the general principles underlying the UPCA and the Rules of Procedure.

28. Art. 41(3) UPCA states:

The Rules of Procedure shall guarantee that the decisions of the Court are of the highest quality and that proceedings are organised in the most efficient and cost-effective manner. They shall ensure a fair balance between the legitimate interests of all parties. They shall provide for the required level of discretion of judges without impairing the predictability of proceedings for the parties.

29. Paragraphs 2 through 4 of the Preamble of the Rules of Procedure stipulate that the Rules shall be applied and interpreted in accordance with Art. 41(3), 42 and 52(1) UPCA based on the principles of proportionality, flexibility, fairness and equity. Proportionality shall be ensured by giving due consideration to the nature and complexity of each action and its importance. Flexibility shall be ensured by applying all procedural rules in a flexible and balanced manner with the required level of discretion for the judges to organise the proceedings in the most efficient and cost-effective manner.

30. The time aspect is a compelling reason for limiting the composition of panels. Allocating two technically qualified judges in a case requires time. The availability of the judge must be checked in relation to his or her other employment, there must be a conflict of interest check and the technically qualified judge will need to ascertain that the field of technology is the right one. The appeals on procedural matters are nearly always urgent and an appeal shall not have suspensive effect unless the Court of Appeal decides otherwise (Art. 74(1) UPCA). The litigation in the Court of First Instance is continuing while the Court of Appeal adjudicates on a procedural appeal. If the procedural appeal shall have any impact on the proceedings in the Court of First Instance, justice must be swift. Assigning technically qualified judges also adds to the costs of proceedings for the Court.

31. Thus, interpreting Art. 9(1) UPCA as being non exhaustive ensures the effectiveness of proceedings and efficiency, thereby ensuring expeditious decisions and cost efficiency in conformity with the general principles as set out above.

32. Further support for the Court of Appeal's interpretation of Art. 9(1) UPCA can be found in the origin of the Unified Patent Court. This court has been set up as a court common to a large number of Contracting Member States and inherits various institutional and procedural aspects from the different legal systems of these States.

33. Having technically qualified judges to always sit in a panel dealing with revocation cases was inspired by (*inter alia*) the German Bundespatentgericht in Germany. The model with technically qualified judges in patent litigation in general (including infringement proceedings) comes from the Nordic countries, in particular Finland, Denmark and Sweden. Having technically qualified judges in the appeal court is a model that for the most part comes from Sweden.

34. In Finland the Market Court sits in a composition of three legally qualified judges and one technically qualified judge. If no technical knowledge is required, the Market Court sits in a composition of three legally qualified judges.¹ In Denmark, the court can adjoin two expert judges if there is need for expertise. The court is entrusted to assess whether expert judges are needed. In Sweden, the composition in first instance is normally two legally qualified judges and two technically qualified judges at the oral hearing. If there is no need for technical expertise, the composition can instead be three legally qualified judges. On appeal, the compositions largely mirror that of the first instance. It is for the court to assess the need for technically qualified judges.²
35. The rationale of catering for the need for technical expertise within a panel where technical issue are at hand, without the obligation to assign technically qualified judges where there is no need, was clearly observed when the UPCA was drafted. The Central Division and its sections (where revocation cases must be lodged) are composed of two legally qualified judges and one technically qualified judge. Local and regional Divisions (where *inter alia* infringement cases may be brought) have panels composed of three legally qualified judges. A technically qualified judge may be added upon the request of a party or at the courts own motion and must be added if a counterclaim for revocation is lodged (Art. 8.5 UPCA, and R.33, 34, 37.3 and 72 RoP). Although this is more explicitly regulated insofar as the Court of First Instance is concerned, there is no reason why the same rationale should not underly the composition of the panels of the Court of Appeal. Also, the genesis of the Unified Patent Court therefore calls for an interpretation of Art. 9(1) UPCA in a manner that is consistent with the logic underlying the composition of the panels at the Court of First Instance.
36. The above leads to the conclusion that Art. 9(1) UPCA has to be interpreted such that if the subject matter of the appeal proceedings is of a non-technical nature only and there are no technical issues at stake in the proceedings before it, the Court of Appeal may decide the matter without the need to assign two technically qualified judges to its panel of three legally qualified judges. The above is without prejudice to the fact that once technically qualified judges have been assigned, they will then, as judges, deal with the entire dispute, including the non-technical aspects thereof.
37. Assigning the proceedings mentioned in Art. 9(2) UPCA, and assigning the application for rehearing (R.254.2 RoP) to a panel of three legally qualified judges, are applications of the general principle of Art. 9(1) UPCA. If in other types of proceedings technical issues are (also) not at stake, the general principle of Art. 9(1) UPCA equally applies and Art. 9(2) UPCA and R.254.2 RoP can be applied by analogy where it concerns the composition of the panel.
38. In the present proceedings, the only issue at stake is the proper interpretation of R.262 RoP, particularly the meaning of ‘reasoned request’ in R.262.1(b) RoP. It is not in dispute that there are no technical issues at stake in these proceedings. It follows that Art. 9(1) UPCA on its proper interpretation allows the Court of Appeal to sit in a composition of three legally qualified judges, without violating Art. 6 ECHR.

¹ 1 a kap. 2 § lag om rättegång i marknadsdomstolen 31.1.2013, in the wording of 25.8.2016/678.

² Prop. 2015/16:57 s. 221.

II. Public access to written pleadings and evidence, R.262.1(b) RoP

39. Several provisions in the UPCA and the RoP deal with access to the register and case files.

40. As to the Register, Art. 10(1) UPCA second sentence provides:

Subject to the conditions set out in this Agreement and the Rules of Procedure, the register kept by the Registry shall be public.

As to the proceedings before the Unified Patent Court being open to the public, Art. 45 UPCA provides as follows:

The proceedings shall be open to the public unless the Court decides to make them confidential, to the extent necessary, in the interest of one of the parties or other affected persons, or in the general interest of justice or public order.

From Art. 52 UPCA it is clear that ‘the proceedings’ include the written procedure.

Art. 24(2) of the Statute sets out that the rules on access to documents of the Registry shall be provided for in the RoP.

41. Indeed, R.262.1(b) RoP provides that, without prejudice to several articles and rules that provide for the protection of confidential information mentioned in R.262.1 RoP, the redaction of personal data pursuant to Regulation (EU) 2016/679 (hereinafter referred to as protection of personal data) and redaction of confidential information according to R.262.2 RoP,

written pleadings and evidence, lodged at the Court and recorded in the Registry, shall be available to the public upon reasoned request to the Registry; the decision is taken by the judge-rapporteur after consulting the parties.

42. 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, unless the balance of interests involved is such that they are to be kept confidential, which means that in such case access to the public is to be denied.

43. When a request to make written pleadings and evidence available to a member of the public is made pursuant to R.262.1(b) RoP, the interests of a member of the public of getting access to the written pleadings and evidence must be weighed against the interests mentioned in Art. 45 UPCA. These interests include the protection of confidential information and personal data (‘the interest of one of the parties or other affected persons’) but are not limited thereto. The general interest of justice and public order also have to be taken into account. The general interest of justice includes the protection of the integrity of proceedings. Public order is at stake e.g. when a request is abusive or security interests are at stake.

44. To allow the judge-rapporteur to balance all the interests set forth in Art. 45 UPCA, the applicant of a R.262.1(b) RoP request must set out the reasons why he has an interest to obtain access to the written pleadings and evidence. It follows that ‘reasoned request’ in R.262.1(b) RoP means a request that not only states which written pleadings and evidence

the applicant wishes to obtain, but also specifies the purpose of the request and explains why access to the specified documents is necessary for that purpose, thus providing all the information that is necessary for the judge-rapporteur to make the required balance of interests mentioned in Art. 45 UPCA. This includes but is not limited to an assessment whether the request is abusive or not. Nor are the reasons only relevant when determining whether there is a need to keep information confidential.

45. A reasoned request under R.262.1(b) RoP is not the same, and must be distinguished from, an application under R.262.3 RoP. The reasons given when a R.262.1(b) RoP request is made must, as said, be balanced against all the interests mentioned in Art. 45 UPCA.
46. A confidentiality request under R.262.2 RoP may lead to certain information being excluded from public access. If this is the case, the member of the public may subsequently file an application under R.262.3 RoP that such excluded information is also made available. R.262.4 RoP sets out what the application shall contain. It is then for the court (no longer the judge-rapporteur) to balance the interest of the member of the public by accessing the information (only) against the legitimate interest of the party by keeping it confidential.
47. Both parties agree that a member of the public generally has an interest that written pleadings and evidence are made available. This allows for a better understanding of the decision rendered, in view of the arguments brought forward by the parties and the evidence relied on. It also allows scrutiny of the Court, which is important for trust in the Court by the public at large. This general interest of a member of the public usually arises after a decision was rendered. At this point, there is a decision that needs to be understood and the handling of the dispute by the Court can be scrutinised.
48. The protection of the integrity of proceedings ensures that the parties are able to bring forward their arguments and evidence and that this is decided upon by the Court in an impartial and independent manner, without influence and interference from external parties in the public domain. The interest of integrity of proceedings usually only plays a role during the course of the proceedings.
49. This means that these interests – the general interest referred to above and the protection of integrity of proceedings – are usually properly balanced and duly weighed against each other, if access to written pleadings and evidence is given to a member of the public after the proceedings have come to an end by a decision of the court.
50. The Court of Appeal notes that if the decision is rendered by the Court of First Instance and an appeal is or may be lodged, this applies only to the written pleadings and evidence in the proceedings at first instance. Withholding access to these documents no longer serves the purpose of protection of integrity of proceedings, since the publicly available decision will contain the relevant arguments and evidence presented by the parties and thus (may) already become(s) subject to public debate.
51. Proceedings may however also come to an end before a decision is rendered, for instance by a settlement between the parties, or when an action is withdrawn. Given the general principle that the register and proceedings are open to the public, as mentioned above,

once the integrity of proceedings no longer plays a role and thus no longer counter-balances the general interest of a member of the public by access to the written pleadings and evidence, the balance is usually in favour of allowing access (subject to the protection of personal data and confidential information), even if there is no decision to be understood. The case file may still give an insight in the handling of the dispute by the Court and / or serve another legitimate interest of such member of the public, such as scientific and / or educational interests, which is no longer counterbalanced by the integrity of proceedings once the proceedings have come to an end.

52. The argument made by Ocado that access should not be given if proceedings have come to an end due to a settlement, as the settlement may have been made on confidential terms, does not hold. R.262.1(b) RoP refers to written pleadings and evidence, not to an out of court settlement agreement. Furthermore, in addition to the protection of confidential information and personal data pursuant to R.262.1 and R.262.2 RoP, even when a settlement would become part of the case file, e.g. under R.365.2 RoP, the Court may order, upon request, that the details of the settlement are confidential.
53. As Ocado rightly pointed out, a member of the public may also have a more specific interest in the written pleadings and evidence of a particular case, than the general interest mentioned above. This is in particular so where he has a direct interest in the subject-matter of the proceedings, such as the validity of a patent that he is also concerned with as a competitor or licensee, or where a party in that case is accused of infringing a patent by a product which is the same or similar to a product (to be) brought on the market by such member of the public. When a member of the public has such a direct legitimate interest in the subject-matter of certain proceedings, this interest does not only arise after the proceedings have come to an end but may very well be immediately present.
54. In weighing such a direct interest against the general interest of integrity of proceedings, the balance will generally be in favour of granting access to the written pleadings and evidence of such proceedings. The Court may, however, for the purpose of appropriate protection of the integrity of proceedings, impose certain conditions on granting access, such as the obligation for that member of the public to keep the written pleadings and evidence he was given access to confidential as long as the proceedings have not come to an end.
55. When the general principles set out above are applied to the present proceedings, it is clear that the interest stated by Mr ██████ in his request for access to the statement of claim is one of a general nature. Ocado has not argued that the request was abusive and there is no indication it was. At the time of the impugned order, the proceedings had come to an end by a settlement. Ocado had not requested that certain information contained in the statement of claim should be excluded from public access for reasons of confidentiality or personal data protection. The balance of interest was therefore in favour of allowing access.
56. For the reasons above, the appeal must be dismissed.

57. This decision ends the proceedings concerning the application under R.262.1(b) RoP. The judge-rapporteur did not decide on the costs, nor was a cost decision requested on appeal. The Court of Appeal shall therefore not make an order for costs in this decision.

DECISION

The appeal is dismissed.

Issued on 10 April 2024

NAMES AND SIGNATURES	
Judges	For the Registrar
Presiding judge: Rian Kalden	Clerk at the Court of Appeal
Legally qualified judge and judge-rapporteur: Ingeborg Simonsson	
Legally qualified judge: Patricia Rombach	