

EIP

Determining Date of Service and Corresponding Time limits

Amgen Inc v Sanofi-Aventis Deutschland GmbH & Ors Order of 29 August 2023 (Order ref ORD_566193/2023)[1]

This case arises from a difference of date of service on multiple defendants, and thus raises the issue of how the time limits running from service should then be treated.

In this case, while service on all four defendants was effected by electronic means via the CMS (Rule 271(1)(c) RoP), for three defendants this was effected on 11 July 2023, while for the fourth defendant it was effected on 17 July 2023. The same representative was acting for all four defendants.

A significant point arises about annexes to the statement of claim. The statement of claim was filed without annexes on 1 June 2023, it being indicated that these would be filed later as soon as service on the defendants became possible by electronic means. The annexes were eventually uploaded to the CMS on 10 August 2023. The Court held that regarding Rule 271 RoP only the "statement of claim" is required to be served on the defendants, and so the later filing of the annexes did not affect the dates of service set out above. According to Rule 270.2 RoP, "statement of claim" shall for the purpose of Rules 270-275, where appropriate, mean all originating pleadings in actions referred to in Article 32(1) of the UPC Agreement. The Court considered that a statement of claim referring to an intention to file annexes, but filed without these annexes, is complete. It also stated that the requirements of Rule 13 (1) (m), and 13 (2) RoP for the statement of claim are met in this regard. By indicating the intention to file annexes at a later stage, the evidence, insofar as it is embodied in the annexes, was not yet "relied on" by the statement of claim within the meaning of Rule 13 (1) (m) RoP. According to the Court, this

indication merely demonstrates to the other party that one is in possession of these annexes and will present them at a later date. Consequently, it is legitimate for only the statement of claim to be filed and served. Hence the date of service was not 10 August 2023, but rather the two earlier dates set out above.

Indeed, the Court implicitly endorsed such a course of action, noting that “at the time of filing the action, the party to the action does not know in which way, electronically or in paper form, with or without translation of the statement of claim and/or the annexes, service on the defendant will succeed. Furthermore, it must be taken into account that service by registered mail/return receipt, as far as legally permissible, is often only carried out by postal companies if a total weight of 1 kg is not exceeded. All these reasons speak for the approach chosen here.”

Although the Registry had objected to the absence of annexes in the context of the examination of the formal requirements under Rule 16 RoP, the Court held that this objection was in fact unjustified.

The present case was distinguished from the situation where the statement of claim definitively includes annexes – in such situations the annexes must be filed and served on the defendant, and service is not effected until such time as the annexes are served, as was held in the Order^[2] of the Munich central division of 29 June 2023 in the parallel revocation case UPC_CFI_1/2023 Sanofi-Aventis Deutschland GmbH v Amgen, Inc.

Returning to the issue of the time limits, the defendants requested that the time limit for filing the defence (and also preliminary objection) for the first three defendants should be extended to match that for the fourth defendant. Conversely, the claimant requested that the time limit for filing the defence (and also preliminary objection) for the fourth defendant should be shortened to match that for the first three defendants. Thus, as noted by the Court, “Both parties also seek an alignment of the time limits running for the defendants, but in different directions”.

The Court noted that the reasons given by the defendants did not generally justify an extension of the time limit. In particular, aligning the time limit regime for the different defendants as such is not a reason for an extension of the time limit that runs for the defendant who was successfully served at an earlier point in time. Neither did the delay in making the annexes available justify an extension. The Court noted that “Most of the annexes relate to the contested embodiment or parallel proceedings involving the defendant, and are therefore already available to the defendant. The remaining annexes, with the exception of the feature structure, relate to the patent in suit. These are publicly available. The feature structure is already reproduced in the application.”

These reasons echo those in the Orders in the Edwards Lifesciences v Meril case reported earlier;^[3] and similarly echoing that reasoning (and indeed referring to the Orders made in that case), the Court went on to say that working with a new procedural law and CMS poses challenges, and so in the initial period the cases needed to be handled in a manner that recognises those challenges.

Accordingly, exceptionally, the time limit for the first three defendants to file their defence was extended to 17 October 2023, matching that for the fourth defendant. The time limits for filing a preliminary objection had already expired on 11 and 17 August, and so these were not altered.

Again it seems that in the early days of the operation of the system, especially while the CMS has operational issues, the Court will be flexible with time limits, but it must be assumed that this will last only a short time and that extension requests will be examined more strictly in the future.

Recognising that its view of the subsequent filing of annexes was perhaps controversial, the Court granted both parties permission to appeal this Order. The defendants have since lodged an appeal.

[1] https://www.unified-patent-court.org/sites/default/files/upc_documents/23-08-29-ld-munich-ord-566193-2023-upc-cfi-14-2023-459916-2023-fristen-anonymized.pdf

[2] https://www.unified-patent-court.org/sites/default/files/upc_documents/23-06-29-cd-munich-procedural-order-generic-application-upc_cfi_1_2023_redacted-1.pdf in which the date that the defendant obtained access to the exhibits (annexes) was deemed the date of service of the statement for revocation

[3] https://eip.com//knowledge_hub/article/upc_extension_of_time_limit_for_preliminary_objection/ and https://eipamar.com/en/knowledge_hub/article/extension_of_time_limit_for_statement_of_defence/