

EIP

How the UPC Handles Requests for Confidentiality

Two recently published judgments from the Unified Patent Court clarify how requests for confidentiality, both in respect to parties to the proceedings and in respect of third parties, are handled.

Huawei Technologies Co. Ltd v Netgear Inc. and others UPC_CFI_9/2023

Order of 3 October 2023 (ORD 575878/2023)[1]

In its Statement of Claim, the claimant Huawei had requested that certain highlighted portions of the claim and attachments should be treated as strictly confidential, and in particular asked that any person becoming aware of this information should not disclose outside the proceedings, and that any access to the file by third parties should have this information redacted. Huawei also requested that the public be excluded from any part of a hearing in which this information is discussed. The defendants were invited to comment, but did not do so.

The court was basically disposed to grant the confidentiality requests, since they were substantiated and the defendant had not objected, but noted that they had been made in the incorrect manner and that different legal provisions of the UPC were invoked. These in turn involved different procedures.

A request to exclude confidential material from any file inspection by third parties is made under Rule 262(2) RoP, for which there is a specific workflow in the UPC case management system. Huawei had refiled its confidentiality requests in this workflow, but had included the further requests that do not relate to file inspection. It was ordered to refile the application containing only the request pertinent to Rule 262 RoP, and had done

so. In this workflow, provisional protection is automatically provided without the other parties to the proceedings being heard, and the confidentiality request is only reviewed in the event of a third party request for file access.

A request for protection of confidential information in respect of other parties in the proceedings is made under Rule 262A RoP, for which again there is a specific workflow. Unlike a request under Rule 262 RoP, the other parties to the proceedings must be heard. Huawei had not yet submitted this request in the appropriate workflow, but the court indicated that upon doing so the request would be granted.

The requests in relation to the conduct of any hearings relate to the provisions of Rules 105.2 and 115 RoP. There is no specific workflow for these requests, but the court considered they were premature and should be decided by the panel responsible for the conduct of any such hearing.

This judgment demonstrates that the sometimes complex procedures of the UPC's case management system must be correctly used in order to achieve the desired outcome in an efficient manner.

**Astellas Institute For Regenerative Medicine v Healios K.K, Osaka University
UPC_CFI_80/2023**

Order of 17 November 2023 (ORD_584830/2023) [2]

Astellas was the claimant in an action to revoke EP3056564 belonging to Healios and Osaka University at the Munich central division. It requested that access to a confidential annex be restricted to only necessary people as defined in Rule 262A(6) RoP, proposing that this be a single person at each defendant entity. Apparently Astellas could not for technical reasons use the Rule 262A workflow (see above report) and so used the Rule 9 workflow instead. The court accepted this workaround pending resolution of technical issues with the case management system.

The defendants opposed the request and asked for unrestricted access to the confidential annex.

Following a procedure adopted by the Hamburg Local Division, [3] the court ordered access to the confidential annex to be restricted to the UPC representatives only until a final order on the application was made.

The court accepted that the confidential annex constituted highly confidential, commercially sensitive information and that the defendants did not require unrestricted access to it. In the end, it decided that, apart from the UPC representatives, only two

people from the legal division of Healios, and one of Osaka University's external patent attorneys, should have access. This access would be under a strict confidentiality obligation that the material may not be used or disclosed outside of or for any other purpose than the present legal proceedings, even after the conclusion thereof.

Astellas also requested the confidential annex to be withheld from any third party given access to the case file. The court understood this as a request under Rule 262.2 RoP and granted the request. It did however require the claimant to provide a redacted version of the confidential annex for this purpose within seven days of the order. The provision of a redacted version is not mandatory under Rule 262A.3 RoP which states "if applicable", but it is mandatory under Rule 262.2.

[1] <https://www.unified-patent-court.org/en/node/489>

[2] <https://www.unified-patent-court.org/en/node/498>

[3] <https://www.unified-patent-court.org/en/node/440>