

Order
of the Court of Appeal of the Unified Patent Court
issued on 13 October 2023
concerning an appeal against dismissal of a procedural order

KEYNOTES:

- 1. Under Rule 271 RoP, a Statement of claim, even if it refers to or announces the later submission of Annexes, can be validly served on a defendant, provided that the Statement of claim without the Annexes enables the defendant to assert its rights in legal proceedings before the courts of the UPC. A Statement of claim must therefore at least state with certainty the subject matter and cause of action.*
- 2. Given the purpose of Rule 13.2 RoP as set out above, if a claimant did not upload the Annexes simultaneously with the Statement of claim in the CMS, and thus did not comply with Rule 13.2, and as a consequence these have not been available when the representative of the defendant accessed the CMS with the Access Code contained in the Notice, this in itself is sufficient to constitute a reasoned request by a defendant for an extension of the terms mentioned in Rules 19.1 and 23 RoP for lodging a Preliminary objection and the Statement of defense, regardless of the nature and/or content of the Annexes.*
- 3. Failing any specific circumstances of an individual case which calls for another term, which have to be brought forward by the claimant, the extension of the terms mentioned in Rules 19.1 and 23 shall compensate for and thus be equal to the period during which the Annexes have not been available after service of the Statement of claim contrary to Rule 13.2 RoP.*

KEYWORDS:

Service of the Statement of claim without annexes referred to or announces therein; term extension

CLAIMANTS:

Sanofi-Aventis Deutschland GmbH
Sanofi-Aventis Groupe S.A.
Sanofi Winthrop Industrie S.A.
Regeneron Pharmaceuticals Inc.

Represented by: Niels Hölder (Hoffmann Eitle)

RESPONDENT:

Amgen Inc.

Represented by: Johannes Heselberger (Bardehle Pagenberg)

PANEL AND COMPOSITION:

This order was issued by the second panel of the Court of Appeal in the following composition:
Rian Kalden, presiding judge and judge rapporteur;
Ingeborg Simonsson, legally qualified judge;
Patricia Rombach, legally qualified judge.

LANGUAGE OF THE PROCEEDINGS:

German; language of the oral hearing: English.

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- Date: 29 August 2023
- Case number of the Court of First Instance: UPC_CFI_14/2023; ORD_566193/2023

POINTS AT ISSUE

Date of service of the Statement of claim and term extension.

SUBJECT OF THE PROCEEDINGS AND ADMISSIBILITY

In these proceedings, the appellants (Sanofi) appeal against the procedural order under number ORD_566193/2023 (PO) of the Munich local division (MLD) of 29 August 2023.
The appeal is admissible, as the MLD has given leave to appeal in its PO. All other admissibility requirements have also been fulfilled.

GROUND FOR THE ORDER

The impugned decision and Sanofi's request on appeal

1. In the PO, the MLD rejected Sanofi's request to order that the statement of claim is deemed to have been served on 10 August 2023, so that the terms for lodging a Preliminary objection and Statement of defense would end on 11 September 2023 and 10 November 2023 respectively.
2. The MLD held that the relevant date was the date of service, being 11 July 2023 for appellants under 1) to 3) and 19 July 2023 for appellant under 4). The MLD held that, consequently, the term for lodging a Preliminary objection ended on 11 and 19 August respectively. The MLD granted Sanofi's (auxiliary) request that the deadline for the Statement of defense for the appellants under 1) to 3) be aligned with that for the appellant under 4), being 19 October 2023¹.

¹ All dates as corrected in the order ORD_569369/2023 of 28 September under Rule 353.

The date of service of the Statement of claim as meant in Rules 19.1 and 23 RoP

3. Sanofi's request to determine that the relevant date for the commencement of the term for lodging its preliminary objection and statement of defense was 10 August 2023, was primarily based on the not contested fact that the documents announced in the statement of claim were only submitted on that date. Sanofi argued that a Statement of claim is not complete if the documents it refers to or announces (hereinafter jointly referred to as Annexes), are not attached to it when it is served. Therefore, there was only a complete statement of claim upon receipt of the annexes on 10 August 2023 and therefore the terms mentioned in Rules 19.1 and 23 Rules of Procedure only start from that date.
4. The MLD rejected this argument. To that end, the MLD considered that there was a statement of claim that could validly be served on the defendants pursuant to Rule 271 RoP, even if the annexes had not been attached to that. The Court of Appeal considers this consideration in itself to be right.
5. Pursuant to Art. 24(1)(a) of the Agreement on a Unified Patent Court (UPCA) when hearing a case brought before it, the UPC shall base its decisions on Union law. This includes European Regulation (EU) 2020/1784 (Service Regulation) and the interpretation given to the provisions thereof by the Court of Justice of the European Union (CJEU). The Rules of Procedure therefore must be interpreted in the light of the provisions of the Service Regulation and settled case law of the CJEU on the interpretation of these provisions².
6. Accordingly, under Rule 271 RoP, a Statement of claim, even if it refers to or announces the later submission of Annexes, can be validly served on a defendant, provided that the Statement of claim without the Annexes enables the defendant to assert its rights in legal proceedings before the courts of the UPC. A Statement of claim must therefore at least state with certainty the subject matter and cause of action. Annexes that merely have an evidentiary function and/or are not indispensable for the understanding of the subject matter and the cause of action, do not constitute an integral part of the Statement of claim instituting the proceedings within the meaning of the Service Regulation and Rule 271 RoP³.
7. Only annexes that are indispensable for the understanding of the subject matter and the cause of action must be served (and where necessary translated) on a defendant, together with the Statement of claim.

² E.g. CJEU 8 May 2008, C-14/07, ECLI:EU:C:2008:264 (Ingenieurbüro Weiss).

³ Ibid, par. 73

8. Rule 13.1 RoP, which in paragraphs (a) to (q) sets forth which information a Statement of claim shall contain, serves the purpose of ensuring that the Statement of claim meets the requirements of the Service Regulation.
9. That only Annexes that are indispensable for the understanding of the subject matter must be served is reflected in Rule 271.8 RoP, which provides that the claimant has to submit translations of at least the Statement of claim and the information required under Rules 13.1(a) to (p) RoP. A translation of any Annexes is not necessarily required.
10. The Court of Appeal rejects the argument brought forward by Sanofi that 'Statement of claim' in Rule 271 RoP is defined by Rule 13.2 RoP in the sense that non-compliance with that Rule renders the Statement of claim 'incomplete' and cannot therefore be regarded to be a Statement of claim referred to in Rules 19.1 and 23 RoP. Rule 270 RoP explicitly provides that for service of the Statement of claim within the Contracting Members States the Service Regulation shall apply. A Statement of claim that fulfills the requirements of the provisions of that Regulation, as interpreted by the CJEU, which does not necessarily include the Annexes, shall therefore be considered to be a 'complete' Statement of claim for the purposes of Rules 19.1 and 23 RoP.
11. The wording of Rules 13.1 and 13.2 RoP confirms this. As Amgen rightly points out, the content of the Statement of claim is exhaustively prescribed by Rule 13.1 RoP, including a list of the documents referred to in the Statement of claim (see Rule 13.1(q)). Rule 13.2 prescribes that a copy of each of the documents referred to in the Statement of claim must be supplied at the same time. It follows that these documents themselves are not considered an integral part of the Statement of claim.
12. This is also clear from the consequence of non-compliance with Rule 13.2 as set forth in Rule 16.5 RoP. There is no (let alone automatic) consequence that a Statement of claim is considered to be 'incomplete' when the Annexes are not yet submitted and prevents the terms mentioned in Rules 19.1 and 23 from starting to run even after valid service of such a document under the Service Regulation.
13. The systematics of the Rules of Procedure is in full compliance with settled case law of the CJEU⁴ and principles of due process. Rule 13.1 ensures that the Statement of claim contains all the information that is essential to enable the defendant to understand the claim brought against him. Rule 13.2 allows that the Annexes are not attached to the Statement of claim upon service, but are uploaded in the CMS separately but simultaneously. Thus, these become available to the defendant immediately upon serving the Statement of claim when he receives the Notice with the Access Code.

⁴ Ibid, par. 65, 69, 75, 76

14. The Court of Appeal thus agrees with the MLD that the fact that the Annexes were not served on Sanofi together with the Statement of claim is irrelevant to determining the date of service in this case. Sanofi has not advanced that the Statement of claim (without Annexes) did not comply with the requirements of the Service Regulation or Rule 13.1 RoP. Pursuant to Rules 19.1 and 23 RoP, the term for lodging a Preliminary objection and a Statement of defense respectively, therefore commenced on the date of service of the Statement of Claim on 11 and 19 July 2023 respectively.

Request for extension

15. However, in support of its request that the term for lodging a Preliminary objection and a Statement of Defense be calculated from 10 August, being the date of submitting the Annexes to Sanofi, and thus set to end at 11 September and 10 November 2023 respectively, Sanofi made an explicit reference to the general principles of fairness and equality of arms. Sanofi's request must therefore be understood to be also a request pursuant to Rule 9.3 RoP.

16. The Court of Appeal notes that this was also recognised by the MLD where it held that "Den Erfordernis, der beklagten Partei hinreichend Gehör auch mit Blick auf später eingereichte Anlagen zu gewähren, ist gegebenenfalls durch Feinjustierungen des Fristenregimes zu begegnen." From par. 5 of its Statement of defense, it is also clear that Sanofi's request was also understood in this way by Amgen. It was furthermore also discussed on that basis during the oral hearing.

17. This request for an extension of the terms was denied by the MLD. It considered: "The delay in making the annexes available also does not justify an extension of the time limit in this case. 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 Statement of claim."

18. The Court of Appeal agrees with Sanofi that this consideration is based on an interpretation of Rule 13.2 RoP that is contrary to its wording and purpose and contrary to the systematics of the Rules of Procedure.

19. Rule 13.2 provides "Der Kläger hat zudem je eine Kopie aller Unterlagen beizufügen, auf die in der Klageschrift Bezug genommen wird." The English language version reads: "The claimant shall at the same time supply a copy of each of the documents referred to in the Statement of claim." The French language version provides "Le demandeur fournit, simultanément, une copie de chacun des documents visés au mémoire en demande."

20. Rule 4 RoP requires that written pleadings and other documents are lodged in electronic form. For this purpose, the UPC uses the Case Management System (CMS). Once a Statement of claim has been lodged in the CMS, the Registry shall serve it on the defendant in accordance with Rule 271 RoP. Together with service of the Statement of claim, the defendant receives an e-mail or letter (depending on whether service takes place electronically or by other means, such as by post, hereinafter referred to as Notice) which contains a code with which a Representative of the defendant can access the case in the CMS (Access Code).
21. This provision ensures that the Representative of the defendant can access the Annexes immediately after service by using the Access Code given in the Notice. As a result, the defendant has the full term of one month and three months respectively to prepare a Preliminary objection and Statement of defense referred to in Rules 19.1 and 23 RoP respectively.
22. The Court of Appeal notes in this regard that the requirement of Rule 13.2 RoP serves a purpose that is different from the requirements under the Service Regulation.
23. As mentioned, the provisions of the Service Regulation (only) require that the Statement of claim enables the defendant to understand the subject matter and cause of action. This enables the defendant to timely arrange for its defense, by recruiting a Representative who is able to appear before the court and properly defend the case on its behalf. When Rule 13.1 is complied with, it will therefore not be required that all the Annexes are made available to the defendant together with service of the Statement of claim.
24. On the other hand, Rule 13.2 RoP serves the purpose of enabling the defendant to prepare a Statement of defense on the basis of all the arguments brought forward in the Statement of claim and all supporting Annexes in support of its arguments. As such, this provision ensures that the fundamental principles of fairness and equity, which must be ensured by having regard to the legitimate interests of both parties (see preamble 5 to the RoP) are properly adhered to. Given this purpose, the obligation under Rule 13.2 equally applies to all documents that are already in the possession of the claimant and which he in the Statement of claim refers to or announces to submit.
25. The importance of compliance with Rule 13.2 RoP is underlined by the fact that this is subject to the formal checks to be conducted by the Registry under Rule 16.2 RoP. Given the uncontested fact that the Annexes were not uploaded in the CMS simultaneously with the Statement of claim, but only on 10 August 2023, the MLD wrongly considered that the objection by the Registry to the absence of the Annexes in the context of the examination of the formal requirements under Rule 16 RoP was unjustified. This objection rightly followed from the non-compliance with the clear obligation under Rule 13.2 RoP by Amgen and the MLD should have considered what the consequences thereof should be.

26. As to the interpretation of Rule 13.2 RoP, it is noted that, even though the German language version does not make explicitly clear that the Annexes must be lodged in the CMS together with the Statement of claim, as it is done in the English language version ('at the same time') and the French language version ('simultanément'), the wording, purpose and systematics of the Rules of Procedure make clear that Rule 13.2 must be understood in this way. This follows especially from the fact that compliance with Rule 13.2 is the subject of the formal checks.
27. Pursuant to Rule 16.5 RoP, if a claimant fails to correct the deficiencies found by the Registry (including non-compliance with Rule 13.2 RoP), a judge of the division may reject the action as inadmissible. The use of the word 'may' indicates that rejection of an action as inadmissible is a discretionary power by the judge. Under Rule 9.2, the court may also disregard documents that have not been submitted within the applicable time limit. However, if the court decides not to use these discretionary powers, it must still, upon a reasoned request of a party for a term extension, ensure that the general principles of fairness and equity are complied with.
28. Given the purpose of Rule 13.2 RoP as set out above, if a claimant did not upload the Annexes simultaneously with the Statement of claim in the CMS, and thus did not comply with Rule 13.2, and as a consequence these have not been available when the representative of the defendant accessed the CMS with the Access Code contained in the Notice, this in itself is sufficient to constitute a reasoned request by a defendant for an extension of the terms mentioned in Rules 19.1 and 23 RoP for lodging a Preliminary objection and the Statement of defense, regardless of the nature and/or content of the Annexes.
29. Rule 16.2 RoP imposes the duty to verify the compliance with (amongst others) Rule 13.2 RoP on the Registry. The listed Rules that are subject to the formal check are all facts that can easily and objectively be verified, without knowledge of the substance of the proceedings. This makes clear that it is not envisaged that the determination of compliance with Rule 13.2 is dependent on the nature and/or importance of the Annexes that are not lodged. In that respect, it must be noted that if a claimant refers to a document in order to substantiate its arguments, that in itself is a clear indication of its importance to the proceedings. It is also noted that even if certain documents may be considered to be already known to a defendant or generally available, it is still important that it be beyond doubt which precise document the claimant relies on, and the exact contents thereof, which can only be established beyond any doubt, if and when such document is made available by uploading it in the CMS.
30. It is furthermore unfair to put the burden of arguing the relevance of the Annexes for the preparation of a defense on the defendant, where the reason for the request for extension is non-compliance with Rule 13.2 by the claimant to begin with.

31. The MLD therefore wrongly and contrary to the systematics of the Rules of Procedure considered that an extension of the term as requested by the appellants was not justified because: “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 Statement of claim”.
32. Failing any specific circumstances of an individual case which calls for another term, which have to be brought forward by the claimant, the extension of the terms mentioned in Rules 19.1 and 23 shall compensate for and thus be equal to the period during which the Annexes have not been available after service of the Statement of claim contrary to Rule 13.2 RoP.
33. The fact that such an extension of time causes delay and is (in an infringement case generally) contrary to the interests of the claimant, cannot lead to another conclusion. It is in the power of the claimant to comply with Rule 13.2. If it does not do so, the negative consequences should be for the claimant itself and not to the detriment of the defendant.
34. In view of the above considerations, upon the request for extension of the terms mentioned in Rules 19.1 and 23 RoP by Sanofi, the MLD should have decided that the terms of one month and three months mentioned in Rules 19.1 and 23 RoP respectively, were to be calculated from the date of the Annexes were uploaded by Amgen, which according to the “Mitteilung über ein positives Ergebnis einer Formalprüfung” was 10 August 2023 and therefore would end on 11 September 2023 and 10 November 2023 respectively.

Other arguments and requests

35. In view of the above considerations, other complaints against the PO of the MLD brought forward by Sanofi do not require any consideration by the Court of Appeal.
36. There is no need to order that the infringement action (UPC_CFI_14/2023, ACT_459916/2023) pending against the appellants (as defendants) before the MLD be stayed pending the outcome of this appeal, as this decision is given prior to 17 October 2023 and shall have immediate effect. This request shall therefore be rejected.

DECISION AND ORDERS

The Court of Appeal:

- sets aside the PO of the MLD of 29 August 2023;
- orders that the terms to lodge a Preliminary objection and Statement of defense in the proceedings on the merits under number UPC_CFI_14/2023, ACT_459916/2023 shall be extended and shall for all appellants (defendants in the proceedings on the merits under

number UPC_CFI_14/2023, ACT_459916/2023) end at 11 September and 10 November 2023 respectively;

- orders that this decision shall have immediate effect;
- rejects any other or further requests on appeal.

This decision, without reasons, was given orally on 13 October 2023 after the oral hearing. The decision with reasons was given in writing on 16 October 2023.

Rian Kalden, presiding judge and judge rapporteur

Ingeborg Simonsson, legally qualified judge

Dr. Patricia Rombach, legally qualified judge