

**EIP**

# UPC Confirms Decision By Default

**Bayerische Motoren Werke Aktiengesellschaft v ITCiCo Spain S.L. UPC\_CFI\_412/2023**

**Order of 9 January 2025[1] (ORD\_58414/2024)**

BMW sought revocation of EP 2796333 belonging to ITCiCo. ITCiCo sought an extension of the deadline for filing a defence, but this was refused.[2] No defence having been timely filed, BMW sought and obtained a decision by default revoking the patent.[3]

ITCiCo then made an application under Rule 356 RoP to set aside the decision by default.

There was disagreement between the parties as to whether a successful application under Rule 356 requires simply that the reason for the default (in this case non-compliance with the deadline for filing a defence) be explained (as argued by ITCiCo), or whether it requires that the applicant demonstrate that the default was not the applicant's fault (as argued by BMW). The Court adopted the latter understanding, making the procedure cognate with a restoration or restitutio in integrum.

The court stated that the rationale of Rule 356 is to allow the party against whom a decision by default has been issued to argue before the Court who delivered the decision that the right of defence was violated due to an erroneous finding by the court, and, in this way, to remedy such an error, "reopening" the proceedings and allowing the party to fully exercise its violated right of defence. It does not allow a party to escape the consequences of non-compliance with procedural time limits. The court noted that the interpretation argued by ITCiCo would deprive procedural time limits of their effect, since a party could take no action, await the decision by default, and only then file its defence. This would allow procedural time limits to be extended, which the court considered contrary to the principles of efficiency of the proceedings, endangering the goal of setting the final oral hearing on the issues of infringement and validity at first instance within one

year, and of fairness and equity.

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The reasons put forward by ITCiCo for not timely filing a defence were similar to those that were held insufficient to warrant an extension, although they were more fully evidenced in a declaration from the company director of ITCiCo. Unsurprisingly therefore the court held that they were insufficient to set aside the decision by default, and the court concluded that “As the requirements for setting aside the decision by default are not met, namely the evidence of a justifiable non-compliance of the deadline for submitting the defence to revocation, the application shall be dismissed.”

This decision once again confirms that the tight UPC deadlines must be strictly observed and there is very limited remedy where a deadline is avoidably missed.

[1] <https://www.unified-patent-court.org/en/node/7122>

[2] [https://eip.com/uk/latest/article/a caution on the availability of extensions/](https://eip.com/uk/latest/article/a-caution-on-the-availability-of-extensions/)

[3]

[https://eip.com/uk/latest/article/central division paris seat issues the first decision by default in a r](https://eip.com/uk/latest/article/central-division-paris-seat-issues-the-first-decision-by-default-in-a-r)