

EIP

Independence of representatives

Suinno Mobile & AI Technologies Licensing Oy v Microsoft Corporation (UPC_COA_563/2024; APL_53716/2024)

Appeal Order of 10 February 2025 (APL_68946/2024)[1]

The Appellant (“Sunno”) filed an infringement claim against Microsoft at the Paris Central Division. Sunno also filed an application under Rule 262A RoP requesting certain documents be kept confidential from both the public and Microsoft. The judge-rapporteur ordered[2] that access to the documents be restricted to Microsoft attorneys and directors who have a legitimate need to access these documents for the purposes of the proceedings and rejected an objection by Microsoft based on alleged lack of independence of Sunno’s representative because he was its managing director.

Microsoft filed an application under Rule 333 RoP for a panel review of the order. The CFI panel set aside the ruling of the judge-rapporteur and declared the application under Rule 262A RoP to be inadmissible[3]. This procedural finding however did not affect the confidential nature of the information and so the panel ordered the documents to be disclosed under terms of confidentiality to certain specified persons only. The panel granted leave to appeal.

Decision

The Court of Appeal rejected Sunno’s appeal. It held that Sunno had not been validly represented by a representative within the meaning of Art 48(1)(2) and (5) UPCA when filing the Rule 262A application.

The Court noted that Sunno’s representative, a qualified European patent attorney entitled in general to represent a party in UPC proceedings under Art. 48(2) UPCA, is

Suinno's managing director and main shareholder. This gives him extensive administrative and financial powers within Suinno.

It follows from Art 48(1) and (2) in conjunction with Art.48(7) UPCA that parties must be represented in all actions under Art. 32(1) UPCA[4]; this is also confirmed by Rule 8.1 RoP. Art. 48(5) says that representatives shall enjoy the rights and immunities necessary for the independent exercise of their duties, including privilege from disclosure of communications. These rights and immunities only apply to representatives not to parties. Art. 48(5) and (6) together with Part 5 and Chapter 3 of RoP specify the rights and obligations of representatives.

If the party is a natural person, the representation requirement implies that this person is not entitled to represent him or herself. This follows from the term 'representation' (Art 48(1) and (2) UPCA) and the concept of rights and immunities (Art.48(5) and (6); R287 to 292 RoP). If the party is a legal person the same principle applies.

Accordingly, the Court of Appeal found that:

"no corporate representative of a legal person, or any other natural person who has extensive administrative and financial powers within the legal person, - whether as a result of holding a high-level management or administrative position or holding a significant amount of shares in the legal person - may serve as a representative of that legal person, regardless of whether said corporate representative of the legal person or natural person is qualified to act as a UPC representative in accordance with Art. 48(1) or (2) UPCA."

The Court noted that this interpretation aligns with the interpretation of Art.19(3) of the Statute of the Court of Justice of the European Union as regards representation. CJEU case law interprets Art 19(3) and (4) as setting two conditions: (i) a party must be represented by a lawyer; and (ii) the lawyer must be authorised to practice before a court of a member state. The CJEU has found that a party is not authorised to act on its own behalf and a legal person cannot be properly represented by a lawyer who (i) has extensive administrative and financial powers within the body he represents, (ii) holds a high-level management position within or holds shares in the legal person, or (iii) is the president of the board of administration of the company.

One objective of representation by a lawyer is to ensure that legal persons are defended by a representative who is sufficiently distant from the legal person which she or he represents.

The Court rejected an argument made by Sunnio that this interpretation "destroys access

to justice” and violates the principle of equality of arms.

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The Court also noted that, the independent exercise of the duties of a representative is not undermined by the mere fact that the lawyer or the European patent attorney, qualified as a representative under Art. 48(1) or (2) UPCA, is employed by the party he or she represents. A representative who is employed by a party must also act towards the Court as an independent counsellor by serving the interests of his or her clients in an unbiased manner without regard to his or her personal feelings or interests, pursuant to Art. 2.4.1 Code of Conduct for Representatives.

[1] <https://www.unified-patent-court.org/en/node/60151>

[2] ORD_27206/2024 of 26 June 2024 <https://www.unified-patent-court.org/en/node/865>

[3] ORD_41174/2024 of 16 September 2024 <https://www.unified-patent-court.org/en/node/1104>

[4] other than under Art. 32(1)(i)