

UPC_CFI_241/2023
Procedural Order
of the Court of First Instance of the Unified Patent Court
delivered on *06/05/2024*

Note: Request under R. 262A R.o.P. by the plaintiffs for a confidentiality order relating to financial information provided pursuant to the court's order also pursuant to Rule 104(K) R.o.P. Access to confidential information is restricted to lawyers only with the consent of the parties.
Keywords: R.262A confidentiality. Access limited to the lawyer

APPLICANT

- 1) **Oerlikon Textile GmbH & CO KG** Represented
(Applicant) - Leverkusen Strasse 65 - 428 97 -by Stefania
Remscheid - DE BERGIA,
Giulio SIRONI

RESPONDENT

- 1) **Bhagat Textile Engineers** Represented
(Respondent) - PLOT NO B/13/10-A, By Luca PELLICIARI,
HOJIWALA INDUSTRIAL ESTATE, ROA NO. 13, Lorenzo BATTARINO,
Sachin Apparel Park SEZ, - 394230 - S chin, Joel COLES,
Surat, Gujarat - IN Rajvinder JAGDEV

PATENT AT ISSUE

Patent no.

Owner/s

EP2145848

Oerlikon Textile GmbH & CO KG

DECIDING JUDGE

Judge Rapporteur Alima Zana

COMPOSITION OF PANEL - FULL PANEL

Presiding judge	Pierluigi Perrotti
Judge-rapporteur	Alima Zana
Legally qualified judge	Carine Gillet

LANGUAGE OF PROCEEDINGS: Italian

ORDER

Note: Request under R. 262A R.o.P. by the claimants for a confidentiality order relating to financial information provided with their response to a request under R. 158 R.o.P. Request granted. Access to confidential information is restricted to lawyers only with the consent of the parties.

Keywords: R.262A confidentiality. Access limited to the lawyer.

Appellant

PANEL OF JUDGES

This Order was made by the Judge-Rapporteur (JR). LANGUAGE OF PROCEDURE Italian

OBJECT OF THE APPEAL

1. The present application for protection of confidential information under Article 262nd R.o.P. was filed by the defence of the plaintiff Oerlikon with respect to a document (No. 19), filed in preparation for the Interim Conference in connection with the JR's invitation to document the costs incurred by the parties in view of a possible trans-active settlement.

The application was filed on 20 April 2024, where it is requested to be treated confidentially, in accordance with the confidentiality regime specified in the application, by constituting a club consisting only of Baghat's advocates, to the exclusion of the party personally.

The applicant provided 'redacted' and 'unredacted' versions of the documents containing this information.

The 'redacted' confidential information concerns business relations with a third party and the particular negotiating conditions agreed upon by the applicant with a third market player.

On 29 April 2024, the JR invited the respondent Baghat to take a position with respect to the petition, in compliance with the right to be heard, as specifically provided for in paragraph No. 4 of Rule No. 262 A of the R.o.P.

On 3 May 2024, the defendant Baghat filed its comments, not objecting to the counterparty's request and instead arguing on the merits with respect to the costs for which Oerlikon claims recoupment.

2. GROUNDS FOR THE ORDER

This order concerns only the issue of confidentiality. The privileged information is relevant only for the purpose of establishing the value of the case and, thus, establishing the range of costs recoverable by the successful party.

3. The request for confidentiality must be granted since:

- a) The defendant did not oppose the adoption of confidential protection measures in the manner indicated by the opposing party: there is therefore consent of the parties to the plaintiff's request. This condition has already been held by this Court to be sufficient to restrict access to a club of which the physical person of the opposing party is not a member, provided that fair trial is not affected (UPC case CFI 239/2023, App. 589842/2023, Local Division the Hague). This requirement-which it is in any case up to the Court to review here-is here as shortly;
- b) The Unified Patent legal system does not seem opposed to the adoption of such a solution considering that:
 - Rule No. 262A, para. 6 of the P.O.R.¹, reproduces the lettering used in Art. 9 (2), last paragraph, of Directive (EU) 2016/943 on the right of access to counter-verse. 9 (2), last paragraph of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information ("trade secrets"), and is sem-clear;
 - this provision, read in conjunction with Article 58 UPCA² thus seems to allow a reading according to which, in addition to limiting access to specific persons, in proceedings before the UPC it is also possible to stipulate that access to 'confidential information' is completely prohibited. And this according to an examination in the light of the '*case by case*' rule and the necessary flexibility of the system;

¹. Without prejudice to Article 60(1) of the Agreement and Rules 190.1, 194.5, 196.1, 197.4, 199.1, 207.7 and 209.4, 315.2 and 365.2 a party may apply to the Court for an order that certain information contained in its pleadings or the collection and use of evidence in the proceedings be restricted or prohibited or that access to such information or evidence be restricted to specified persons. (...) 6. The number of persons referred to in paragraph 1 shall not exceed the number necessary to ensure respect for the right of the parties to the proceedings to an effective remedy and to a fair trial, and shall include at least one natural person from each party and the respective lawyers or other representatives of those parties to the proceedings

² "Protection of confidential information In order to protect the trade secrets, personal data or other confidential information of a party to the proceedings or a third party, or to prevent an abuse of evidence, the Court may order that the collection and use of evidence in proceedings before it be restricted or prohibited or that access to such evidence be restricted to specific persons

- in at least one field of application, i.e. in the event of interference of the patent system with the antitrust system, the Community system expressly allows for access not to be granted to natural persons but only to their consultants (cf. on the protection of confidential information by national courts in proceedings concerning the private enforcement of EU competition law' (2020/C 242/01, para. 613);
 - this leaves room for greater flexibility to adapt access to the circumstances of the case and the type of confidential information in question.
 - the principle of due process is more likely to be compromised when the essence of the case is trade secrets and no natural person of a party could have access to the confidential information, as opposed to a case where such information is a secondary issue (as in the present case);
- c) In the implementation of the above-mentioned EU Trade Secrets Directive ((EU) 2016/943) e.g. in Italy, Germany and Belgium, the provisions of the Directive have been extended to all types of cases in which confidential information is involved (even if only as a side issue), including the rule that at least one natural person of each party should have access to trade secrets,
- d) the information that is the subject of the application must be classified as confidential in the light of the wording of Article 58 UPCA, which extends protection not only to trade secrets in the strict sense but also to confidential information. Indeed:
- this is commercial data relating to negotiating relations between the plaintiff and a third-party market operator with particular regard to pricing policies - not in the public domain;
 - their disclosure in favour of a competitor - such as the defendant must generally be considered to be - could have a negative impact on the plaintiff, outweighing the risks of litigation and distorting competition;
- On the contrary, access to a confidential club - constituted only by the parties' lawyers - still allows Baghat to protect his subjective positions, fully exercising his right of defence;
- allowing the substantive party, the defendant here, access to such information would therefore in this case be contrary to the principles of proportionality, fairness and equity that the Court must take into account when applying the R.o.P. and the Agreement.

In conclusion, the Court holds that it is possible for the parties to exclude access by a natural person by mutual agreement or by the interested party's waiver of the right of access, as this is compatible with the Unified Patent system and as fair hearing and the right of defence are guaranteed in practice, in light of the principle of proportionality and flexibility

For these reasons, and after hearing the parties on all relevant issues in the following order, ORDER
THAT

1. the Redacted Information qualifies as confidential information within the meaning of Article 58 UPCA and R 262A RoP;

³⁰Members of the confidentiality circle could range from external advisors of the parties (e.g. lawyers or other consultants) to in-house counsel and/or other corporate representatives. Depending on national rules and the specific circumstances of the case, confidentiality circles could be composed of external advisors only or a combination of external and internal advisors'.

2. Only Baghat's proxy advocates may have access to the classified information, to the exclusion of the substantial party Baghat;
 3. redacted' information may be used by the Baghat defence limited to this case and for no other purpose;
 4. the costs relating to claim 262A will be dealt with together with the costs of the main proceedings.
- Milan 6 May 2024

The judge
rapporteur Alima
Zana

Alima
ZANA

Digitally signed by
Alima ZANA
Date: 2024.05.06
11:52:59 +02'00'

ORDER DETAILS

Order no. ORD_23384/2024 in ACTION NUMBER: ACT_549585/2023
UPC number: Action type:
Infringement Action
Related proceeding no. Application No.: 21554/2024
Application Type: APPLICATION_ROP262A