



ORD\_42503/2024  
(ORD\_42232/2024)  
App\_41533/2024  
ACT\_581538/2023  
UPC\_CFI\_376/2023

## Brussels - Local Division

**UPC\_CFI\_376/2023**  
**Final decision (Order)**  
**From the Court of First Instance of the Unified Patent Court (UPC)**  
**Local Division Brussels**  
**Delivered on 19 July 2024**

**concerning the Request for Reassessment of 16 July 2024**  
**in application of R. 333.1. RoP and R. 334 RoP**  
**of Final Decision (Order) ORD\_37783/2024 issued on 8 July 2024**

**CLAIMANT:**

Mr [REDACTED] residing at [REDACTED] Belgium;

Represented by: Mter. C. Ronse and Mter. K. Claeys, lawyers at Havenlaan 86C, B414, 1000 Brussels (Belgium), and Mter. M.W. Rijdsdijk and Mter D.E. Colenbrander, lawyers at Amstelplein 1 (Rembrandt Tower, 28th floor), 1096 HA Amsterdam (The Netherlands);

**DEFENDANT(S):**

- (1) OrthoApnea S.L.**, a company incorporated under Spanish law, with its registered office at Flauta Mágica 22, 29006 Malaga, Spain,
- (2) VIVISOL B BV**, a company incorporated under Belgian law with registered office at Zoning Ouest 14, 7860 Lessines, Belgium, and registered in the Crossroads Bank for Enterprises with enterprise number 0454.915.053;

Represented by: Mter. van den Horst and Mter. Niemeijer, lawyers at Prinses Beatrixlaan 582, 2595 BM The Hague (The Netherlands)

**OCROOI(S) SUBJECT TO THE DISPUTE**

*Patent no.*  
EP 2 331 036

*Patent holder(s)*

[REDACTED]

**LANGUAGE OF PROCEDURE:**

DUTCH

**PANEL/DIVISION:**

Present Section (Brussels) with the panel consisting of:

Chairman / Judge-Rapporteur Samuel **Granata**  
Legally qualified judge Margot **Kokke**  
Legally qualified judge **András Kupecz**

I. Procedure

1. On July 8, 2024, a Final Decision (Order) (ORD\_37783/2024) was issued by the Judge-Rapporteur rejecting the Procedural Application filed by Defendants on June 24, 2024 ("*Generic Procedural Application*") ("*Objection against Equivalence*") but allowing an additional period for filing the Statement of Rejoinder ("*Statement of Rejoinder*") (R. 29(c) RoP) and this until no later than August 1, 2024.
2. Against the said Final Decision (ORD\_37783/2024), an Application for Review of *case management order* ("*Application*") was filed by the Defendants on 16 July 2024 (in application of R. 333.1 RoP and R. 334 RoP).
3. By Preliminary Decision dated 17 July 2024, Claimant was requested to take position by 18 July 2024. Plaintiff submitted its position in time.
4. The present decision issued as a Final Decision Rule 9 RoP (ORD\_42533/2024) is considered a Final Decision in application of Rule 333.4. RoP (in APP\_41533/2024) after issuance of the Preliminary Decision (ORD\_42232/2024).

II. Problem Statement and Request

5. As indicated in the Final Decision (ORD\_37783/2024), the issue was the permissibility on the part of the Plaintiff, in response to the Defendants' Statement of Defence ("*Statement of Defence*") (R. 24 RoP), to include in its Reply ("*Reply to Statement of Defence*") (R. 29(b) RoP) (i) supplement the factual framework, (ii) supplement the infringement argument with an equivalence argument and (iii) amend the Petition and do so in light of the application of Rules reproduced in Order ORD\_37783/2024:
  - R. 13.1.(l) to (o) RoP: "*Content of Statement of Claim*".
  - R. 24 (b) to (g) RoP: "*Contents of Statement of Defence*".
  - R. 29 (b) and (c) RoP: "*Lodging of Defence to the Counterclaim for revocation, Reply to the Statement of defence and Rejoinder to the Reply*".
  - R. 263 RoP: "*Leave to change claim or amend case*"
6. In the main order, Defendants requested in their Procedural Request dated 24 June 2024 that in the Rejoinder:
  - (i) To refuse extension on the basis of equivalence
  - (ii) Refusing to accept the newly introduced facts
  - (iii) To refuse the new (amended) petition

Subordinately, in their Procedural Request dated 24 June 2024, Defendants requested an extension of the deadline for their Duplication and this until 18 August 2024.

7. By Final Decision of the Judge-Rapporteur of 8 July 2024 (ORD\_37783/2024), the Procedural Application of 24 June 2024 was dismissed in the main order but the application in the subordinate order was acceded to and the Defendants were granted an additional period until 1 August 2024 to submit their Duplication.
8. Synthesised, the Judge-Rapporteur justified his decision as follows:

8.1. *In main order*

R. 13 RoP (concretely R. 13.1. (l) to (o) RoP) introduces a so-called "*front loaded*" procedural system whereby a plaintiff is required to concretely elaborate his arguments and evidence in his Statement of Claim.

In interpreting and applying the above rule, one should take into account (i) the normative purpose of R. 13 RoP and (ii) the procedurally-evolutive course of a judicial dispute and (iii) adversarial proceedings, particularly in this case the possibilities of defence for a party faced with new arguments, facts and an amended petition on this basis.

In concretely assessing the Procedural Application dated 24 June 2024 and in application of the above, the Judge-Rapporteur found that the Claimant had acted within the limits of the norm purpose of R. 13 RoP (acting as a reasonable and prudent person (Claimant) placed in the same circumstances) and that the new facts, arguments and amended petition presented were within the procedurally-evolutive course of a judicial dispute.

In line with this, the Judge-Rapporteur ruled that an application in application of R. 263.2. RoP was not an issue.

8.2. *In secondary (subsidiary) order*

The Judge-Rapporteur did consider it proportionate, reasonable and equitable to apply R. 9.3.

(a) to grant RoP an additional period for filing the Duplication and this until no later than 1 augustus 2024. This, in his view, adequately provides for the possibility of defence (in application of the rule of interpretation indicated above at (iii)).

9. On 16 July 2024, Defendants requested a Review of the above Final Decision (ORD\_37783/2024) by the Panel (hereinafter referred to as "*UPC (Brussels Local Division)*") and this in application of R. 333.1 RoP and R. 334 RoP. The Request for Review reflects the following ruling section:

*"OrthoApnea requests your panel to grant its pre-allegable procedural request and suspend the deadline for filing a Statement of rejoinder from June 24 until a final substantive decision has been issued by one or two months as mentioned under marginal number 6.*

*OrthoApnea maintains part (i) of its primary request of 24 June in full and requests your panel to deny the infringement on the basis of equivalence.*

*OrthoApnea requests that the deadline for filing a Statement of rejoinder be extended, in the event that the prealable procedural request is reduced, to August 30, or at least a deadline to be determined by your panel in good justice.*

*OrthoApnea requests permission to appeal the Order, or any adverse decision by your panel in the review proceedings.*

*order Mr Nelissen to pay the costs of these application proceedings or reserve the decision on the costs of these application proceedings until judgment in the main action.*

III. Review

10. The review by the UPC (Brussels Local Division) of the Final Decision (ORD\_37783/2024) is of a marginal nature in the sense that it is limited to verifying whether the Judge-Rapporteur relied on the correct facts, whether he assessed them correctly and whether he made his decision within the bounds of reasonableness.

III.A. Prelabel request to suspend the deadline by one or two months for the submission of the Duplication from 24 June 2024 until a final substantive decision is made

11. The application in question is dismissed as unfounded. The UPC (Brussels Local Division) reasons as follows:

- The RoP do not provide for a suspension of the time limits during the written phase, neither after the submission of a Procedural Objection, nor after the submission of a Request for Review by the Panel, nor after the lodging of an appeal against such a review by the Panel. That the RoP also does not provide for a suspension of the time limits following a Preliminary Objection ("*Preliminary Objection*") (R. 19.6. RoP) or an Application for Change of *Procedural* Language ("*Application for Change of Procedural Language*") (R. 323 RoP) reinforces the belief that these rules do not, as a matter of principle, seek a suspension on procedural grounds/requests.
- The reference to Court of Appeal (UPC\_CoA\_301/2024 dated 19 June 2024 (ICPillar LLC v ARM Limited rulings 6 and 7) cannot be sufficiently persuasive to allow the stay. On the contrary, this decision indicates that only in "*exceptional circumstances*" can a suspension of a (first instance) proceeding be allowed in order to minimise procedural appeals (para 6 of the CoA decision). It can be inferred that the same applies *mutatis mutandis* to first instance proceedings. That too should be interrupted as little as possible by (the hearing of) procedural applications. This also prevents proceedings from being improperly delayed by such requests. In line with this ruling, it was also held that not allowing a stay would not render the appeal ineffective at all. Also in the present case, the Defendants still have sufficient time to lodge a possible appeal against this decision.
- A request for suspension can further only be granted if it is proportionate and the balancing of interests of the parties warrants it. This may be the case, for example, where the Defendants' rights of defence are seriously impaired and this is balanced against the Plaintiff's interests, in particular its interest in proceeding expeditiously. That, in the period necessary to assess (i) the initial Procedural Application of 24 June 2024, (ii) the Request for Re-Appraisal of 16 July 2024 and (iii) the (possible) appeal against this assessment, the Defendants no longer wish to develop further arguments in their Duplication in the light of the equivalence argument, cannot have the consequence that the request for suspension should be granted. In the event that the appeal is upheld, it is otherwise open to the Defendants to claim from the Plaintiff any additional costs it may have incurred in filing their Duplies. In that sense, therefore, it seems proportionate that Plaintiff's interests in maintaining the pre-set (and already extended) deadlines outweigh the potential adverse financial impact on Defendants in maintaining the pre-set (and already extended) deadline.

III.B. Review of the Judge-Rapporteur's Final Decision of 8 July 2024 (ORD\_37783/2024) by the UPC (Brussels Local Division)

12. At the outset, it is already indicated that Defendants limit their Request for Reassessment of 16 July 2024 to the rejected Procedural Request (of 24 June 2024) to deny in the Rejoinder the extension of the basis of the claim by invoking equivalence.

Specifically, Defendants no longer object to the "*raising of new facts that were already known or should have been known to Nelissen at the time the Statement of Claim was issued*", and "*amending some of its claims*". All in all, the Final Decision (ORD\_37783/2024) in this regard should already be affirmed.

13. This limited Request for Review is dismissed as unfounded. The UPC (Brussels Local Division) reasons as follows:

- In the Request for Reassessment, no new grounds or evidence were (essentially) put forward by the Defendants than those that underpinned the Final Decision (ORD\_37783/2024).
- Whereas, in the Defendants' view, raising an infringement claim on grounds of equivalence should be considered a "*fundamental new basis*" on which consent should be sought (R. 263.1. RoP), the Judge-Rapporteur rightly held that the (subordinate) line of argument on grounds of equivalence does not affect the subject matter of the proceedings.
- Plaintiff, in line with the procedurally-evolutive course of judicial litigation and after receiving Defendants' first defence, additionally (and subordinately) relied on a breach on grounds of equivalence. It cannot be assumed that Plaintiff should have already taken into account in its Statement of Claim all possible defences of Defendants without being concretely elaborated by Defendants. In this particular case, it has neither been stated nor shown that Plaintiff knew that Defendants would contest the realisation of feature 1.2.4 and, if so, with what arguments.
- Moreover, the defendants have not (substantiated) argued that their defence interests were prejudiced by the (subordinate) plea of equivalence in reply to which they can still respond by rejoinder (subject to the deadline for submission already extended by the Judge-Rapporteur) at the written stage. Essentially, the defendants have merely argued that the invocation of equivalence by reply is incompatible with the *front-loaded* nature of the proceedings before the UPC, without making it clear why it concretely harms their litigation interests in the present case. The UPC (Brussels Local Division) therefore assumes that this is not the case and also sees no reason in this to amend the Judge-Rapporteur's decision.
- That the doctrine of equivalence has not yet been developed within the UPC and that it "*also leads to extensive discussions in domestic proceedings*", cannot be sufficiently convincing to assume that the Defendants' interests have been unduly prejudiced, or at least otherwise exclude the equivalence argument in the Rejoinder in the present case. The equivalence assessment concerns an assessment on a question of law that will be assessed by the UPC (Brussels Local Division) as part of its final assessment in this case. Therefore, the fact that the equivalence argumentation was not yet developed within the UPC and also leads to discussions in national proceedings does not sufficiently convince to consider such argumentation *in the present case* as a "*new basis*" or otherwise inadmissible.

III.C. Request for extension of deadline for filing of Duplication to 30 August 2024 in case of rejection of preeligible procedure request

14. This application is dismissed as unfounded. The UPC (Brussels Local Division) reasons as follows:

- Taking into account the original time limit for the Statement of Objections with a deadline of 18 July 2024, as well as the Judge-Rapporteur's assessment of the application filed on 24 June 2024 by the Defendants within a period of 14 days (after the parties had made their submissions), the Judge-Rapporteur granted an additional time limit for the Statement of Objections until 1 August 2024. Today, the UPC (Brussels Local Division) still considers this deadline sufficient for filing a Duplication. The defendants have also failed to give a sufficiently concrete and substantiated explanation as to why they believe they need a longer period to prepare the Statement of Claim, for which they already have time since 18 June 2024.
- In addition, however, it may also be indicated that since Plaintiff did not develop the equivalence argument until his Rejoinder, Defendants will be able to develop a written defence in their Duplicate in any event last.

III.D. Application for leave to appeal against this decision of the UPC (Brussels Local Division)

15. Defendants' application for permission to file an (interlocutory) appeal against this decision ("Order") is granted in application of R. 333 (5) RoP (cf. UPC\_CoA\_486/2023 APL\_595643/2023 Decision (Order) of the UPC Court of Appeal dated 21 March 2024).

III.E. Application to reserve the costs of the present application.

16. The application to stay the decision on the order to pay the costs of these application proceedings until final judgment in the main action is granted.

IV. Decision

1. **The pre-allegable request for suspending the deadline by one or two months for filing the Duplication from 24 June 2024 until a final substantive decision on the Procedural Request is made is rejected.**
2. **The request for partial review of the Judge-Rapporteur's Final Decision of 8 July 2024 (ORD\_37783/2024) is rejected as unfounded. The UPC (Brussels Local Division) affirms the Judge-Rapporteur's decision in all its parts.**
3. **The request to grant an additional deadline for filing the Duplique is rejected and the date of 1 August 2024 for the Duplique is maintained.**
4. **The application for leave to appeal against this final decision is granted. An appeal may be filed within 15 days of service ("service") of this decision (R. 224.1(b) RoP in conjunction with R. 220.2. RoP).**
5. **The decision regarding the order to pay the costs of the original Procedural Request dated 24 June 2024 and the Request for Reassessment dated 16 July 2024 is stayed until the final decision in the main case.**

Referred on 19 July 2024 by:

<p>Samuel GRANATA Legally Qualified Judge Presiding Judge- Rapporteur</p>	<p><b>Samuel Rocco M Granata</b></p> <p>Digitally signed by Samuel Rocco M Granata Date: 2024.07.19 18:11:28 +02'00'</p>
<p>András KUPECZ Legally Qualified Judge</p>	<p><b>András Ferenc Kupecz</b></p> <p>Digital unterschrieben von András Ferenc Kupecz Date: 2024.07.19 18:06:09 +02'00'</p>
<p>Margot KOKKE Legally Qualified Judge</p>	<p><b>Margot Elsa KOKKE</b></p> <p>Digitally signed by Margot Elsa KOKKE Date: 2024.07.19 17:40:16 +02'00'</p>

**DECISION (ORDER) - DETAILS**

Decision number.	ORD_42503/2024
(Decision no:	ORD_42232/2024)
Case number:	ACT_581538/2023
UPC Number:	UPC_CFI_376/2023
Related procedure number	App_41533/2024
Type of Action (i):	R. 333 RoP (Request for reassessment)
Type-Action (ii):	Infringement claim