



UPC_CFI_380/2024
Procedural Order
of the Court of First Instance of the Unified Patent Court
delivered on 01/10/2024

In the matter

INSULET CORPORATION 100 Nagog Park, Acton, MA 01720, USA represented by its CEO Jim Hollingshead,

- Applicant -

Representatives: Attorney at law Dr. Marc Grunwald, Dr. Frank Peterreins and all other attorneys of the law firm Peterreins Schley,

EOFLOW Co. Ltd 302Ho, HUMAX VILLAGE, 216, Hwangsaetul-ro, Bundang-gu, Seongnam-si, Gyeonggi-do, 13595, Republic of Korea, represented by its CEO Jesse Kim

- Defendant –

Representatives: Attorney at law Dr. Mirko Weinert, HOYNG ROKH MENEGIER,

PATENT AT ISSUE

Patent no.

Proprietor/s

EP4201327

Insulet Corporation

DECIDING JUDGE

COMPOSITION OF PANEL – FULL PANEL

Presiding judge	Andrea Postiglione
Judge-rapporteur	Andrea Postiglione
Legally qualified judge	Anna-Lena Klein
Technically qualified judge	Uwe Schwengelbeck

LANGUAGE OF PROCEEDINGS: English

SUBJECT-MATTER OF THE PROCEEDINGS: Request for intervention (313RoP)

THE FACTS

On 3 July 2024 INSULET filed an application for provisional measures for patent infringement with the Central Division Milan against EOFLOW co. Ltd a Korean-based company.

The application is based on claims 1, 2, 3 and 4 of the European Patent with unitary effect UP 4 201 327 C0 granted on 19 July 2024. 2 On 8 July 2024.

INSULET has filed a further – similar – application for provisional measures against the exclusive distributor of the attacked embodiment – A. Menarini Diagnostics s.r.l., the present Applicant to intervene (in the following “MENARINI”) – with the Local Division Milan, case-no. UPC_CFI_400/2024.

Before UPC local Division Milan, the proceeding before this Court is well known and was widely debated already in August 2024.

On 26 August 2024 EOFLOW filed a request for a Connection Joinder (RoP 340), rejected by the Court by order of 4 September 2024. The Court considered that the parallel handling of both cases with the adapted timeline and the employment of a same TQJ and LQJ in both panels would limit the risk of divergent decisions. An application for review of this order (RoP 333) was likewise rejected later.

On 16 September 2024 Menarini filed an application to intervene based on the facts that a decision in the present case would affect the legal interests of Menarini regarding the contractual relationship towards Defendant (the manufacturer of the attacked embodiments, i.e. upstream) as well as the contractual relationships of Menarini towards its customers (i.e. downstream).

EOFLOW supported the request of intervention with written submissions.

INSULET opposed the intervention pointing out that Menarini had no legal interest to intervene in the case at hand. Menarini was already a party in the parallel proceedings (UPC_CFI_400/2024)

before the Local Division Milan ("Parallel Proceedings") and could present its case there. INSULET also raised the preliminary objection of the mandatory filing the intervention request in electronic form.

AS TO THE PRELIMINARY OBJECTION

INSULET puts forward as preliminary objection that according to Art. 44 UPCA, R. 4.1 RoP, pleadings must be submitted to the registry only in electronic form using workflows and official forms and that an exception is only conceivable if electronic filing is not possible because the CMS has ceased to function (i.e., an electronic malfunction or technical incapacity), which must be demonstrated to the court.

In the case at hand, continues INSULET, MENARINI only sent a hard copy and refrained from filing electronically, as there was no intervention-workflow. This means, MENARINI has not even claimed that the CMS has ceased to function, which must lead to a rejection of the application to intervene.

INSULET observes furthermore that in case a suitable workflow is not available, the affected party is obliged to request to introduce an electronic copy of the application to intervene via a new workflow according to R. 9 RoP (Local Division Munich, Order of January 2, 2024, UPC_CFI_14/2023, ORD_597730/2023, page 3).

The Court does not sustain the objection.

MENARINI was not a party to this proceedings UPC_CFI_380/2024 and thus it was technically not possible to open a workflow in the CMS for the application to intervene, not even under RoP 9 which is reserved to Court Orders or decisions. In fact, in the present release of the CMS the function allowing the intervention of a third party is not present.

Thus, whether the application is filed in hard copy and the judge opens a workflow for this purpose under art. 9 RoP, or whether the procedure is opened directly with the filing of the application to intervene in hard copy, it is clear that, in the absence of alternatives, due to lack of capacity on the part of CMS, the procedure for intervention can only be initiated in hard copy.

A different interpretation would lead to a substantial violation of the intervener's substantial rights since the right to intervene is provided for in the RoP (art. 313) and must therefore be able to be exercised in any form.

The request is therefore admissible.

ON THE MERITS

Intervention *in interim* injunction proceedings is only available in exceptional cases. Following an interim injunction, proceedings on the merits must be initiated, (R. 213.1 RoP) within a short timeline.

The reason for this is that no final decision is made in interim injunction proceedings and the creation of *fait accompli* shall be prevented. The need to expedite the proceedings has procedural consequences: only a summary examination is carried out and there is no such a thing as a *res judicata*.

As the acceleration of the proceedings is therefore the main purpose of interim injunction proceedings and proceedings on the merits must be initiated subsequently, interim injunction proceedings must not be overloaded, for example with interventions that could slow down the proceedings and, above all, can be made in proceedings on the merits.

Furthermore, Menarini replied to the PI in the case before the LD on August 6th. In the PI application to the LD, the applicant mentions the PI application to the CD. The defendant also refers to the PI application before the CD in their reply. Menarini knew about the parallel proceeding already on August 6th but chose to intervene weeks later in proximity of the oral hearing only after the Court rejected the request for joinder. This choice seems to be specious and not compatible to the already scheduled hearing for 16 October 2024

First, Menarini can sufficiently achieve its objectives in the parallel proceedings and should be give no double possibility to represent the case in front of two different Courts.

Moreover, pursuant to Art. 313 RoP intervention is allowed to a third party having its own interest not merely factual but legal. The third party must therefore present itself as the owner of a legal relationship connected with the one brought in litigation by the counterpart or dependent on it and the connection must entail a total or partial impairment of the right of which the third party claims to be the owner in the event the original party loses the case; that is to say, it is necessary to be the owner of a substantial situation connected with the relationship brought in litigation, such as to expose the third party to the reflexive effects of the judgement.

In this case, however, the legal interest of MENARINI is already granted by way of defence in the parallel proceedings in front of UPC Milan Local Division.

Furthermore, the defendants have already tried to avoid parallel proceedings by filing a request of joinder, rejected both by the Judge rapporteur and the panel.

This Court has already pointed out that, outside the perimeter of the mandatory consolidation of cases as governed by Article 33 UPCA, there is no room for the party to obtain a joinder, even

throughout the intervention of third parties in the parallel proceedings, if the court does not consider it appropriate or has adopted other solutions.

If, on the other hand, the third party has a mere de facto interest in one of the parties to the principal relationship being victorious, to only bolster the parallel case, no legitimacy to intervene can be recognised and this is precisely the situation that arises in the present case, since MENARINI already defends its interest in a parallel proceedings in front of UPC Milan Local Division and his intervention is merely aimed at strengthening EOFLOW's defence.

MENARINI has merely raised the possibility that the granting of the injunction in these proceedings may affect its interests; the interest raised is therefore merely hypothetical whereas the risk of divergent decision, above all in pre-trial cases, cannot be entirely eliminated.

In a preliminary Injunction case, similarly as in a proceedings on the merit, the outcome is indeed always bound to the proof, or more precisely, to the "*degree of certainty*" (RoP 211.2) of the evidence presented by the applicant as well as to an assessment of the "*potential harm for either of the parties resulting from the granting or the refusal of the injunction*" (RoP 211.3), which may be different, being different the two parties involved in the proceedings and the evidence lodged; on the other hand, it must be also necessarily considered that an unconditional use of the joinder of cases or of the right of intervention could also be misused to make up for omissions in one of the proceedings at hand.

The request for intervention is therefore rejected.

Milan 1 October 2024

The Presiding judge and judge Rapporteur

Andrea Postiglione

The Technical Qualified Judge

Uwe Schwengelbeck

The Legally qualified Judge

Anna-Lena Klein

INSTRUCTIONS TO THE PARTIES AND TO THE REGISTRY: Since Menarini does not have access to the main case (UPC_CFI 380/24), the Registrar will promptly notify the applicant for intervention of the outcome of the proceedings by the most appropriate and effective means.

INFORMATION ABOUT APPEAL

Appeal is not allowed (rule 317)

INFORMATION ABOUT COSTS AND DAMAGES: the successful party did not make a claim for costs. Since the costs of these proceedings cannot be recovered against Menarini in the main proceedings opposing INSULET and EOFLOW, INSULET may follow Rop 151: "Where the successful party (hereinafter "the applicant") wishes to seek a cost decision, it shall within one month of service of the decision lodge an Application for a cost decision".

ORDER DETAILS

Order no. ORD_52068/2024

UPC number: UPC_CFI_380/2024

Action type: Intervention 313 Rop

Related proceeding no. Application No.: 39640/2024

Application Type: Application for provisional measures (RoP206)