IN THE CENTRAL DIVISION (MUNICH SECTION) OF THE UNIFIED PATENT COURT

CASE NUMBER ACT_464985/2023 (UPC_CFI_75/2023)

EUROPEAN PATENT NUMBER EP3056563

APPLICANT:

MATHYS & SQUIRE LLP
The Shard, 32 London Bridge Street, London, SE1 9SG, UK (Applicant)

RELEVANT PROCEEDING PARTIES:

1) **ASTELLAS INSTITUTE FOR REGENERATIVE MEDICINE**
9 Technology Drive, MA 01581, Westborough, USA (Claimant)

2) **HEALIOS K.K**
Hamamatsu-cho 2-chome Minato-ku, 105-6115, Tokyo, Japan (Defendant)

3) **RIKEN**
2-1, Hirosawa Wako-shi, 351-0198, Saitama, Japan (Defendant)

4) **OSAKA UNIVERSITY**
1-1 Yamadaoka Suita-shi, 565-0871, Osaka, Japan (Defendant)

COMMENTS ON THE DECISION OF THE COURT OF APPEAL OF THE UNIFIED PATENT COURT ISSUED 10 APRIL 2024 CONCERNING PUBLIC ACCESS TO THE REGISTER (R.262.1(b) RoP)

Mathys & Squire LLP
The Shard, 32 London Bridge Street
London SE1 9SG
T: +44(0)20 7830 0000
F: +44(0)20 7830 0001
mail@mathys-squire.com
www.mathys-squire.com

I. INTRODUCTION

1. In a Preliminary Order dated 28 December 2023, the Judge-Rapporteur stayed the present proceedings pending the outcome of appeal proceedings APL_584498/2023 (UPC_CoA_404/2023) ("the Ocado Appeal") and ordered Mathys & Squire LLP, the applicant in the present proceedings ("Mathys & Squire"), to submit the decision concluding the Ocado Appeal ("the Decision") together with any comments they wished to make in relation to the Decision within 3 weeks of publication on the UPC Court website or it otherwise becoming available to Mathys & Squire if sooner.

2. The Decision[1] concluding the Ocado Appeal was issued by the UPC Court of Appeal ("the CoA") on 10 April 2024 and was published on the UPC Court website on the same day. This was also when Mathys & Squire first became aware of the existence of the Decision.

3. The following are Mathys & Squire's comments on the Decision pursuant to the Preliminary Order. A copy of the Decision is also enclosed as requested by the Judge-Rapporteur.[2]

II. BY DEFAULT WRITTEN PLEADINGS AND EVIDENCE ARE PUBLIC UNLESS THE BALANCE OF INTEREST IS SUCH THAT THEY SHOULD BE KEPT CONFIDENTIAL

4. In the Decision, the CoA confirmed that Articles 10 and 45 UPCA establish the general principle that proceedings before the Unified Patent Court are to be open to the public, unless the balance of interests involved is such that they should be kept confidential.[3] The CoA further confirmed that from Article 52 UPCA "*it is clear that 'the proceedings' include the written procedure*."[4]

5. This clearly establishes the principle that by default pleadings and written evidence (i.e. the contents of the written procedure) should be accessible to the public on request, subject only to a balance of interest test which permits the Court to restrict access to written pleadings and evidence if the balance of interests involved are such that the written pleadings and evidence should be kept confidential.

6. The CoA explained[5] that the role of a Judge-Rapporteur considering an application for access to written pleadings and evidence under Rule 262.1(b) of the Rules of Procedure ("RoP") is to weigh the interests of a member of the public requesting access against the interests mentioned in Article 45 UPCA which include the

[1] ORD_19369/2024.
[2] **Exhibit 47** submitted herewith.
[3] Decision paragraph 42.
[4] Decision paragraph 40.
[5] Decision paragraph 43.

protection of confidential information and personal data and the general interest of justice and public order.

7. To this end a "reasoned request" under Rule 262.1(b) RoP (and by extension any information provided to a Judge-Rapporteur when the Judge-Rapporteur consults with the parties to litigation where access to pleadings and evidence is requested) is required to provide all the information necessary for the Judge-Rapporteur to make this 'balance of interests' assessment. That means that an applicant under Rule 262.1(b) RoP is required both to identify the written pleadings and evidence that are the subject of a request and explain the basis of the applicant's interest in making the request.[6] Similarly, we would contend the information provided by the parties should identify the specific interests of the parties which they allege would be affected by granting access to the requested evidence and pleadings and which potentially counterbalance the applicant's stated interest.

III. APPLICATION FOR ACCESS MAY BE GRANTED ON THE BASIS OF GENERAL OR SPECIFIC INTERESTS IN A CASE

8. The CoA identified that an applicant under Rule 262.1(b) RoP may base a request for access to pleadings and evidence on a general interest in a case and indeed the Ocado Appeal, where access to documents was granted, was based on an interest that the CoA considered was "*one of a general nature.*"[7]

9. General interest in a case may be based on a desire to understand Court orders and decisions and a desire to scrutinise the operation of the Court. However, those are not the only grounds on which a general interest may be based.[8] Rather, the CoA held that even in the absence of a decision disposing of an action, "*the case file may still give an insight in the handling of the dispute by the Court and/or serve another legitimate interest of such member of the public, such as scientific and/or educational interests*."[9]

10. In this respect, the CoA declined to follow the approach previously proposed by the present Court,[10] that access to written pleadings should be limited to members of the public who demonstrate "*a concrete and verifiable, legitimate reason for making available written pleadings and evidence*," or that a valid request for access to Court documents could not be based on a wish "*to form an opinion on the validity of a patent out of a personal and a professional interest*" or a wish "*to be informed of … proceedings before the Unified Patent Court for the purposes of education and training.*"

---

[6] Decision paragraph 44.
[7] Decision paragraph 55.
[8] As was argued on behalf of Ocado, Decision paragraph 5.
[9] Decision paragraph 51.
[10] In orders ORD_550152/2023 in Action Number: ACT_459505/2023 (UPC number UPC_CFI_1/2023) issued 20 September 2023 & ORD_552745/2023 in Action Number ACT_464985/2023 (UPC number UPC_CFI_75/2023) issued on 21 September 2023.

11. In addition to general interest, the CoA also considered that an application for access to written evidence and pleadings in a case may be based on a "*more specific interest in the written pleadings and evidence of a particular case.*"[11] In doing so the CoA distinguished between a "*specific interest in the written pleadings and evidence of a particular case*" and a "*direct interest in the subject matter of the proceedings*"[12] such as where an applicant for access to pleadings or evidence is "*a competitor or licensee, or where a party in that case is accused of infringing a patent by a product which is the same or similar to a product (to be) brought on the market by such member of the public*."[13]

12. Previously, the CoA has held that a "*direct interest*" enables an applicant to intervene and become a party to proceedings under Rules 313-315 RoP.[14] An individual with such a "*direct interest*" in proceedings is treated as a party to the proceedings following a successful application to intervene.[15] As such the individual automatically enjoys the right to access to all pleadings and evidence in the case.[16]

13. As the RoP provide a party with a "*direct interest*" in proceedings with a means of joining proceedings and obtaining access to written documents and evidence, it is clear that a "*specific interest in the written pleadings and evidence of a particular case"* is not limited to applicants with "*direct interests*". Indeed, in the Decision the CoA expressly indicated that "*specific interests*" are a broader concept than "*direct interests*". More specifically, in the Decision the CoA introduced the concept of "*direct interest*" with the words "*This is in particular so*", demonstrating that "*direct interest*" is a subset of the concept of "*specific interest*". A person with a *"specific interest"* may thus apply for access to written pleadings and evidence via Rule 262.1(b), but if the *"specific interest"* is <u>also</u> a *"direct interest"* then that person has the additional option of becoming a party to proceedings through an intervention under Rules 313-315 (thus granting access to written pleadings and evidence as well as conferring additional procedural rights).

IV. COUNTERVAILING INTERESTS

14. In paragraph 43 of the Decision the CoA stated that "*the interests of a member of the public of getting access to the written pleadings and evidence must be weighed against the interests mentioned in Art. 45 UPCA.*" The CoA then proceeded to indicate that the interests mentioned in Art. 45 UPCA "*include the protection of confidential information and personal data… but are not limited thereto*" and that "*the general interest of justice and public order also have to be taken into account*",

[11] Decision paragraph 53, first sentence.
[12] Decision paragraph 53, second sentence.
[13] Decision paragraph 53 distinguishes between "specific interest" and "direct interest" with it being clear that "direct interest" is a narrower than "specific interest" in written pleadings and evidence.
[14] Order of the Court of Appeal of the Unified Patent Court issued 10 January 2024 concerning applications to intervene, paragraph 12 equating a person establishing "*a legal interest in the result of an action*" under Rule 313 RoP with a person having "*a direct and present interest in the grant… of [an] order or decision sought by [a] party*" – submitted herewith as **Exhibit 48**.
[15] Rule 315.4 RoP.
[16] Rules 6.1(b), 6.2, 278.1 RoP.

noting that "*The general interest of justice includes the protection of the integrity of proceedings*" and that "*Public order is at stake e.g. when a request is abusive or security interests are at stake*."

15. Although not referred to in the Decision, we would contend that the comments of the CoA in this respect are consistent with our previous contention[17] that the Court should interpret Rule 262.1(b) RoP so as to be compliant with the Tromsø Convention[18], the Recommendations of the Council of Europe on Access to Official documents[19] and EU regulations regarding public access to documents.[20] In particular, we would contend that considerations of any countervailing interests limiting public access to written evidence should be limited to interests which are necessary in a democratic society and should be proportionate to the aim of protecting the specific interests listed in Article 3 of the Tromsø Convention such as: "*public safety*", "*privacy and other legitimate private interests"* and "*the effective administration of justice.*"[21]

16. Further we would contend that as the CoA has found that the default position is that the register is public, the onus is on the parties to inform the Court of any specific reasons why access to the written evidence and pleadings should be denied. Such reasons should, we contend, be duly substantiated and point out in which specific way legitimate personal or economic interests of the party are affected and what are the consequences thereof, rather than merely making a statement concerning a party's interests in general or merely reference abstract prejudice to hypothetical personal or economic interests. [22]

V. ON-GOING LITIGATION

17. In the Decision, the CoA noted that parties' interest in "*the integrity of proceedings only usually plays a role during the course of the proceedings.*"[23] Interest in the scrutiny of the actions of the Court therefore means that, in general, access to written pleadings and evidence should be given to the public after proceedings have come to an end.[24]

---

[17] Mathys & Squire's Reasoned Request paragraphs 9-16.
[18] Copy previously submitted as **Exhibit 7** with our Reasoned Request.
[19] Copy previously submitted as **Exhibit 8** with our Reasoned Request.
[20] Regulation (EC) No 1049/2001, copy previously submitted as **Exhibit 10** with our Reasoned Request
[21] Tromsø Convention Art. 3 (b), (f) & (i). See also Recommendations of the Council of Europe on Access to Official documents, Art. 4 ii, iv referring to the aims of protecting: "*public safety*" and "*privacy and other legitimate interests*" and Regulation (EC) No 1049/2001 Article 4 referring to protection of: "*public security*", "*privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*" and "*court proceedings*".
[22] As per the EPO *Guidelines for Examination*, Part A, Chapter XI, section 2.3, copy previously submitted as **Exhibit 23** (see second paragraph at page 233 of the supporting documents bundle) and the approach of the EPO's Boards of Appeal in decision T 379/01, copy previously submitted as **Exhibit 25**; both referenced in Mathys & Squire's Reasoned Request paragraph 51.
[23] Decision paragraph 48.
[24] Decision paragraph 49.

18. We contend that it would, however, be wrong to conclude that the ruling of the CoA was that the public is only permitted access to written pleadings and evidence after the conclusion of proceedings.

19. The facts underlying the Decision did not permit the CoA to make such a ruling. The *Ocado v Autostore* litigation had settled prior to the Court of First Instance having to rule on whether a member of the public might have access to the written evidence and pleadings filed with the Court.[25] Hence, any comments made by the CoA in relation to on-going litigation were *obiter* and are not binding on the present Court.

20. Further, although the Decision of the CoA states that the general interest in access to written pleadings and evidence on the one hand, and the protection of integrity of proceedings on the other hand, are *"usually properly balanced and duly weighed against each other … after the proceedings have come to an end"*, it does not state that those are the only circumstances in which the balance of interests falls in favour of granting access when the request for access is based upon a general interest.

21. Rather, we would contend that the overriding principle which emerges from the CoA's Decision is that the balance of interests must always be weighed according to the particular circumstances of the case.[26] The remarks of the CoA in relation to proceedings which have concluded should therefore be understood merely as elucidating one, non-exhaustive example of a situation (a situation corresponding to the facts of the *Ocado v Autostore* case) in which the balance of interests typically will lie in favour of granting access based on a general interest. This does not preclude the existence of other situations where a similar balance exists, and does not create a blanket ban on access to written evidence and pleadings prior to the conclusion of a case where access is requested on the basis of a general interest.

22. Neither have other Divisions of the UPC concluded that any such blanket ban on access to written evidence and pleadings prior to the conclusion of a case exists.

23. More specifically, on 1 December 2023, Judge-Rapporteur Pierluigi Perrotti of the Local Division of the UPC in Milan granted[27] a request under Rule 262.1(b) RoP for a UPC representative to have access to a copy of the application for preserving evidence and inspection filed in the case of on-going litigation between Progress Maschinen & Automation AG, AWM S.R.L. and Schnell S.P.A.

[25] The *Ocado v Autostore* litigation was declared closed on 8 September 2023. Although a member of the public had requested access to the statement of claim filed by the claimant on 15 August 2023, the Nordic-Baltic Regional Division only ruled on the request on 17 October 2023, by which time the underlying litigation between Ocado and Autostore had been settled.

[26] Decision paragraph 42.

[27] Order ORD_584786/2023 in Action Number: 584786/2023 (UPC number CFI 287/2023) issued on 1 December 2023 submitted herewith as **Exhibit 49**.

24. Although the application related to a pleading filed in relation to on-going litigation, this did not cause the Judge-Rapporteur simply to dismiss the application on the grounds that an individual requesting access to a written pleading filed with the UPC should be required to wait until the conclusion of proceedings prior to being granted access to documents on the Court file.

25. Rather, the Judge-Rapporteur considered the balance of interests which had been raised by the applicant and the parties, and concluded that the general interest raised by a UPC representative that he was interested in accessing an application for preserving evidence and inspection "*particularly since it seemed to be the first of this kind for the UPC and that would have been be [sic] of public interest for such argument to be made available for public scrutiny and discussion*"[28] was sufficient basis for granting access to a pleading in the context of on-going litigation, particularly where the parties had not raised any specific objections to the grant of such access. [29]

26. This, we would contend, is consistent with the correct interpretation of the comments of the CoA: namely, that rather than suggesting that there is a blanket ban on the public being granted access to documents on the basis of a general interest in the case of on-going litigation, a Judge-Rapporteur should base his assessment on the balance of interests involved as represented in an applicant's reasoned request and the specific interests duly raised by the parties in the specific case as represented by the comments provided by the parties.

27. Further we would contend that any such blanket ban on access to written pleadings and evidence pending the resolution of a case would be contrary to the Tromsø Convention and the Recommendations of the Council of Europe on Access to Official Documents. As noted in our original submission,[30] both the Tromsø Convention and the Recommendations of the Council of Europe require that any limitations on access to official documents are "*set down precisely in law.*"[31] If it were the case that the drafters of the RoP intended that the public should be denied access to written evidence and pleadings, prior to the conclusion of litigation, it was open for them to include provisions in Rule 262.1(b) RoP to that effect.[32] The fact that no such explicit provisions were included in the RoP, and the stipulation that limitations on access to official documents should be "*set down precisely in law*",

---

[28] *Ibid*. Summary of Facts, second paragraph.
[29] *Ibid.* Summary of Facts, final paragraph.
[30] Mathys & Squire Reasoned Request paragraphs 10-11.
[31] See Tromsø Convention, Art. 3 and Recommendation Rec (2002) 2 of the Council of Ministers to member states on access to official documents Art. IV. Possible Limitations to Access to Official Documents.
[32] For an example of explicit provisions providing for public access to written evidence and pleadings after the conclusion of a case, see sections 7(1) and 8(1) the Finnish Act on the Publicity of Court Proceedings in General Courts (370/2007), copy previously submitted as **Exhibit 28** submitted with our Reasoned Request along with an unofficial translation provided by the Finnish Ministry of Justice previously submitted as **Exhibit 29**. The Court should, however, note that this does not bar members of the public requesting access to documents in on-going litigation as additionally the Finnish courts are also empowered under section 8(2) to order "*that a trial document… becomes public at an earlier stage if it is apparent that making the document public shall not cause detriment or suffering to participants in the case or if there is a weighty reason for making the document public.*"

should mean that the Court should not read limitations into Rule 262.1(b) RoP which are not there.

VI. THE COURT SHOULD ADOPT A PROPORTIONATE APPROACH

28. The final matter of principle that we consider is evidenced by the CoA Decision is that the Court should adopt a proportionate approach to granting access to written evidence and pleadings filed with the Court, and should not refuse access to such documents if there is a way for the Court to grant access which sufficiently limits any potential detriment to the parties and protects legitimate interests of the parties in the case at hand.

29. This, we would contend, is demonstrated by the comments of the CoA in paragraph 54 of the Decision, where the CoA indicated that the Court has an inherent power to "*impose certain obligations on granting access such as the obligation for that member of the public to keep the written pleadings and evidence he was given access to confidential as long as the proceedings have not come to an end*."

30. It is contended that this approach, where the Court provides access to written evidence and pleadings subject to the minimum interference necessary to protect the established interests of the parties, was the approach followed by the Milan Division in the case referred to above. There, when granting access to an application for preserving evidence in the on-going Progress Maschinen & Automation case, access was granted "*after redaction of personal data within the meaning of Regulation EU n. 2016/679.*" [33] This redaction had been requested by one of the parties and by providing a redacted copy of the relevant documents, the Court protected the interests identified by the parties as requiring protection whilst still permitting an applicant access to a pleading filed with the Court.

VII. APPLICATION TO OUR REQUEST

31. As noted above[34], it was clearly accepted by the CoA in the Decision that a general interest in reviewing evidence and pleadings submitted to the Court alone is sufficient basis for granting a member of the public access to written pleadings and evidence filed with the Court. Our general interest in obtaining access to the pleadings and evidence which we have requested was discussed at length in our original reasoned request and will not be repeated here.

Specific interests

32. Further, we have specific interests in the case in question.

33. EP3056563 ("EP'563), the patent that the Astellas Institute for Regenerative Medicine seeks to revoke in the present proceedings, relates to a method of producing retinal pigment epithelial cells which have the potential of treating age-

[33] Order, Note 27, *Supra*.
[34] See paragraphs 8-10 above.

related macular degeneration, the leading cause of vision loss in the elderly. Both the claimant and the defendants are actively involved in research in this area which has the potential to impact the treatment of large numbers of individuals world-wide.

34. Mathys & Squire, the applicant in the present proceedings, are a leading intellectual property firm. As such we represent clients who are active in the field of stem cell research. Our clients are interested in obtaining patents which will be defensible against revocation actions brought in the UPC. The manner and approach which the Court takes to the assessment of the validity of EP'563 is likely to have an immediate impact on the manner in which Mathys & Squire undertakes the drafting and prosecution of patents and patent applications in this field.

35. For that reason, we have an immediate interest in establishing how the validity of EP'563 is being challenged so that we can assess whether the attacks against EP'563 might have an impact on currently pending applications presently under our control. Such an interest is immediate as it may impact cases presently under prosecution which are approaching grant, which would restrict later amendment and therefore cannot wait until the conclusion of the present proceedings. It also impacts the drafting of new applications currently being prepared due to the restrictions on adding matter to applications after filing. This includes the drafting of applications from which priority may be claimed as the validity of subsequent priority claims will depend upon the content of such applications.

No countervailing arguments

36. None of the parties have presented any evidence or arguments as to the existence of any specific personal or economic interests specific to this case which would justify keeping the written pleadings and evidence in the present case confidential.

37. No-one has suggested that the request made by Mathys & Squire is abusive and indeed there are no grounds at all to suggest that it is. There is nothing to suggest that the subject matter of the dispute in question raises any security interests or engages any other grounds such as those set out in Article 3 of the Tromsø Convention which would justify refusing Mathys & Squire access to the written pleadings and evidence.

38. The litigation surrounding EP'563 is part of a broader series of litigation between the parties. In addition to the present proceedings, Astellas has also brought a revocation action[35] against a related sister patent[36] EP3056564 ("EP'564") which is also the subject of a pending opposition before the European Patent Office.[37] To the extent that the written evidence and pleadings in the present case might reiterate arguments presented in the parallel opposition against EP'564 the Court will appreciate that any such arguments and evidence are already part of the public domain as they are freely accessible for download from the European Patent Office

[35] ACT_465342/2023.
[36] EP 3056563 and EP 3056564 are related *inter alia* through a shared claim to priority.
[37] https://register.epo.org/application?number=EP14852053&lng=en&tab=doclist

website. There are no grounds to suggest that the (automatic) availability of written pleadings and evidence submitted to the EPO in relation to EP‘564 is prejudicial to the integrity of the EPO proceedings or to the parallel UPC revocation action in relation to that patent, nor to suggest that the (automatic) availability of such pleadings and evidence in relation to EP‘564 may be prejudicial to the integrity of the present proceedings in relation to a member of the same patent family.

39. If there is confidential or personal information contained within the written evidence and pleadings which warrants protection, that information can be protected through appropriate redaction as was the case in the request for access in the Progress Maschinen & Automation litigation pending before the Milan Court.

40. There is no suggestion that the provision of access to the written pleadings and evidence to Mathys & Squire would impact the abilities of the parties to bring forward their arguments and evidence in an impartial and independent manner or prejudice the ability of this Court to exercise its judicial functions in an impartial and independent manner. Any decision on the merits of the case can only be based on grounds, facts and evidence which were submitted by the parties or introduced into the procedure by an order of the Court.[38] There is no reasonable basis to suggest that Mathys & Squire (or any other non-party) could exert any undue influence on the integrity of ongoing proceedings merely by having sight of the written pleadings and evidence.

41. Further, the present proceedings are at an advanced stage with an interim conference having been concluded on 13 March 2024 and an oral hearing being scheduled for 24 June 2024.[39]

42. In the order issued by the Court on 18 March 2023, the Court set a final deadline of 11 April 2024 for filing a statement in reply in response to the admission of a second declaration (D18) into the proceedings. According to the order, the only outstanding dates prior to the oral hearing are in relation to exhibits relating to costs. Any submissions the parties choose to make in relation to costs will be self-contained and will not be impacted in any way by the provision of Mathys & Squire with the written evidence and pleadings presently on file relating to the substantive proceedings.

43. As such it would appear that the written evidence and pleadings presently on file constitute the parties’ entire case and neither party will be making any further written submissions in relation to the substance of the case. With the parties’ full written case on the substance already on file, provision of the written evidence and pleadings presently on file to Mathys & Squire will not have any impact on how the parties choose to present their substantive case in writing.

44. Nor would providing access to the written evidence and pleadings presently on file to Mathys & Squire have any impact on the abilities of parties to present arguments

[38] UPC Agreement, Art. 76(2).
[39] ORD_598255/2023 issued on 18 March 2023.

at the hearing itself scheduled for 24 June 2024. Any such oral hearing will, of course, be open to the public. However, the public's access to and behaviour at the hearing will be under the control of the judges present in the Court who would be in a position to control any member of the public who sought to influence the manner in which the parties' advocates present their case.

Conclusion

45. In summary, in addition to the general interest that the public should be provided access to written evidence and pleadings submitted to the Court in what is intended to be a public adjudication of a dispute between the parties, Mathys & Squire have specific grounds for being interested in obtaining access to the pleadings and evidence in the present case, due to the nature of the patent which is the subject of the dispute.

46. Providing such access will not in any way threaten the integrity of the proceedings. The parties involved in these proceedings are all substantial public entities and are represented by professional representatives none of whom are likely to be influenced by Mathys & Squire having sight of the written pleadings and evidence on the Court file.

47. No specific economic interests of the parties are affected and the parties have not established any specific adverse consequences, specific to the parties and the case, which might arise from Mathys & Squire being granted access.

48. Further, at the present stage of the proceedings, given that the Court will hear final oral arguments on the case in the very near future, the parties' written arguments on the substance in the case are complete and will not be subject to external influence.

49. In short, there are no countervailing reasons why the present application for access should be refused and hence the balance of interest is in favour of granting Mathys & Squire access to the written evidence and pleadings on the public court file.

Nicholas Fox, Alexander Robinson & Andreas Wietzke

For and on behalf of Mathys & Squire LLP