

EIP

UPC grants access to pleadings for the first time

Ocado Innovation Limited v Autostore AS & Others – Order of 17 October 2023 (ORD 543819/2023)

In September we reported on two judgments by Munich Central Division refusing requests for access to documents under Rule 262.1(b) RoP. In each case the judge granted leave to appeal but as far as we are aware no appeal has been requested.

There is now a third published judgment on an access request under Rule 262.1(b) RoP, this time from Nordic-Baltic Regional Division and in this case granting the request.

The request was made for access to the statement of claim and any orders made in the infringement action brought by Ocado against Autostore (which proceedings have since been brought to a close following a settlement reached by the parties). The applicant also asked if possible for copies of any orders in the parallel proceedings between the same parties in Milan and Düsseldorf. The reason given for access was to see how the claim was framed and the broader public interest for scrutiny and discussion as the court system launches and develops.

The claimant objected pointing out that 262.1(b) relates to “written pleadings and evidence” and not to “orders”. The claimant also referred to the decision of Munich Central Division ([ORD 550152/2023](#)) which interprets the requirement for a “reasoned request” to mean there has to be a concrete, verifiable and legitimate reason for making the documents available to the public. The claimant also requested that if the application was granted the documents should not be provided immediately to allow the claimant time to appeal to Court of Appeal and request suspensive effect in accordance with Rule 223 RoP. The defendants informed the court they would not be making a submission.

Decision

The judge-rapporteur referred to Article 10 of UPCA which says the register shall be public and to Article 45 which clarifies that proceedings shall be open to the public (unless made confidential by the court). This general provision is not limited to decisions, orders or oral proceedings but refers to the proceedings as such which according to Article 52 consist of a written, interim and oral procedure.

In the court's view, this means that the written procedure shall also be open (unless made confidential, to the extent necessary, in the interest of one of the parties or other affected persons, or in the general interest of justice or public order). This has to be kept in mind when interpreting Rule 262 RoP which is titled "Public access to the register". Rule 262 specifies that decisions and orders shall be published while written pleadings and evidence shall be available upon reasoned request. "Reasoned request" also appears elsewhere e.g. in Rule 9 in relation to extensions. For access to documents this should be interpreted as meaning the applicant should provide "a credible explanation for why he/she wants access to the pleadings or evidence". This interpretation builds on Article 45 and is in line with Rule 262.6 which provides that the application shall be allowed unless reasons provided for keeping the information confidential outweigh the interest of the applicant to access such information.

The applicant had provided a credible explanation and there was no confidentiality request so access should be given to the statement of claim (subject to redaction of personal data).

The application for access to orders was refused. The only order in this case was already available on UPC website. As to orders from other divisions, Rule 262.1(b) means the judge-rapporteur is to decide requests in this case not in other cases. He noted that Rule 262.1(a) means that orders shall be published and some have already been placed on UPC website.

Noting that Rule 354 RoP means orders are directly enforceable from their date of service, and an appeal shall not have suspensive effect unless Court of Appeal decides otherwise (Article 74), he ruled that the statement of shall be provided on 7 November 2023 (three weeks from the order date) to give the claimant time to appeal and apply for suspensive effect. He gave leave to appeal.

Comment

The Nordic-Baltic Regional Division has interpreted Rule 262.1(b) RoP by relying on fundamental articles of UPCA about public access, subject to any confidentiality

requirements, and consequently permitted the access request for which a credible explanation had been provided. This contrasts with the decisions from Munich Central Division which concentrated more on the difference between Rule 262.1(a) (shall publish) and Rule 262.1(b) (reasoned request required) and reached a more restrictive interpretation.

The different jurisdictional backgrounds of the judges, Sweden and Netherlands, may also have played a part in their different interpretations of the articles and rules on this issue. In Sweden all documents that are received by a public authority, including a court, are public.^[1] In Netherlands on the other hand only recently has the public been given access to details of hearings that are to take place and there is no public access to court documents.^[2] Hence this may be one area where different national traditions are influencing decisions. It will be interesting to see what approach is taken by Court of Appeal should this, or another access decision, be appealed.

^[1] Public access to information and secrecy – The legislation in brief (regeringen.se)

^[2] Judgment of Supreme Court dated 21 April 2023.