

CASE COMMENT

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ASSESSMENT OF A REPRESENTATIVE'S INDEPENDENCE UNDER THE UPCA AND ITS CODE OF CONDUCT

In an infringement action between Suinno Mobile & AI Technologies Licensing Oy (the patentee) and Microsoft Corporation (the alleged infringer), Microsoft filed an application requesting that Suinno's action be rejected for manifest inadmissibility under Rule 361 Rules of Procedure ("RoP"). Microsoft based its application on two grounds: (i) the claimant would not have been duly represented under Article 48 of the Unified Patent Court Agreement ("UPCA") and Rule 8 (1) RoP, and (ii) the Statement of Claim would have been insufficient under Rule 13 (1) (k) RoP.

Regarding the first plea, Microsoft argued that Suinno's representation would be contrary to Article 2.4.1 of the [Code of Conduct for Representatives](#) (adopted by the Administrative Committee of the UPC). More specifically, Microsoft contended that Suinno's representative had various roles incompatible with the required independence of a counselor. The representative was also the named inventor of the patent-in-suit, the Managing Director of the first assignee of the patent-in-suit, and the Managing Director of the subsequent assignee of the patent-in-suit. However, the UPC did not agree with Microsoft's reasoning.

First, the Central Division of Paris clarified the rationale behind the obligation to act as an independent counselor: to protect the effectiveness of a party's right to defence. The Court elaborated that this effectiveness should be assessed even in situations involving conflicts of interest or disloyal representation. Hence, Article 4.2.1 Code of Conduct must not be interpreted in an absolute sense, but rather relative to the potential harm to the interests of the represented party. The Court ruled that the mere fact that Suinno's representative also undertook other administrative tasks did not inherently violate the prescribed independence.

Second, the Court ruled a party in litigation cannot invoke any violation of the obligation to act as an independent counselor by the representative of the opposing party. Such an objection is only open to the party for whose benefit this obligation is imposed.

Finally, for the sake of completeness, the Court also held that there was in any event no evidence to support that the lawyer in question would have used his representation rights for purposes other than those for which they were granted.

Regarding the second plea, Microsoft argued that Suinno's request for 'an injunction on the importation and sale' of the alleged infringing embodiment would be inappropriate as such an action would not be available to the patentee under the UPCA. Furthermore, Suinno requested the Court to 'determine and award past damages with interest, as applicable', which Microsoft deemed indefinite as no specific time period has been defined to determine damages. Microsoft's argumentation was not followed by the Court, ruling that the nature of the remedies sought was clearly indicated in the Statement of Claim.

