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UPC in Sweden: insights from the Nordic-Baltic Regional Division

Petter Rindforth and Maria Zamkova of Fenix Legal share insight into how the Nordic-Baltic Regional Division of the UPC is operating thus far, detailing the handling of *Aarke AB v. SodaStream Industries Ltd* as a case example.

Every six months, one of the European Union (EU) member states holds the Presidency of the Council of the EU, also known as the Council of Ministers. Sweden held the Presidency during the first half of 2023. It was an active and interesting period for intellectual property within the EU. At the end of the Presidency period, the Unified Patent Court (UPC) came into force, and on June 1, 2023, the Nordic-Baltic Regional Division opened its doors in Stockholm, Sweden.

Although "the Nordic countries" geographically include the sovereign states of Denmark, Finland, Iceland, Norway, and Sweden, there are important differences when it comes to the Unitary Patent in general and disputes.

First, Iceland and Norway are not members of the EU and are, therefore, not part of the system as such.

Second, Denmark and Finland have chosen to establish their own national Court of First Instance in Copenhagen (Denmark) and Helsinki (Finland), respectively.

The remaining Nordic country, Sweden, is part of the Nordic-Baltic Regional Division, together with the Baltic countries Estonia, Latvia, and Lithuania. The said division is based in Stockholm, Sweden, in the same building as the Stockholm District Court and the Patent and Market Court.

Any Nordic-Baltic Regional Division panel sits in a multinational composition of three legally qualified judges pursuant to Article 8(4) UPCA.

The panel in the Nordic-Baltic Regional Division consists of two legally qualified judges who are nationals of the member states of the regional division and one legally qualified judge from the pool of judges who is not a national of one of the member states of the regional division. The two



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national judges of Nordic-Baltic are Stefan Johansson (Sweden), Presiding Judge of the Nordic-Baltic Regional Division of the UPC since June 2023, and Kai Härmand (Estonia). Swedish technically qualified judges are Andreas Gustafsson, Anna Hedberg, Kerstin Roselinger, Anders Hansson, and Patrik Rydman.

The process language of the Nordic-Baltic Regional Division is English. The language issue is important, as most SMEs (small or medium-sized enterprises) can understand English but may not be so familiar with German, which was generally the most common language in the initial cases outside Sweden. The language of proceedings was considered and decided in the case No 580849/2023 – UPC_CFI_373/2023, Swedish company *Aarke AB v. SodaStream Industries Ltd* (a company based in Israel, represented by a German attorney).

On October 17, 2023, SodaStream Industries Ltd ("SodaStream") brought an infringement action against the Swedish company Aarke AB based on EP1793917 entitled "A device for carbonating a liquid with pressurized gas." Aarke AB – referring to R. 323 RoP – asked for a change of the language of the proceedings from German to English. On the merits of the Application, Aarke AB referred in particular to recitals two and six UCPA and outlined that the President of the Court of First Instance should consider when determining the language of the proceedings, the principles of fairness, equity, and proportionality, especially in the event where the Applicant – defendant in the main proceedings – is an SME for which the language chosen by the claimant raises a specific challenge.

SodaStream argued that the advantages of retaining the current language must be weighed

against the inconveniences for the respective parties as part of an overall assessment and that the requested change can only be decided under very particular circumstances and exceptional situations. SodaStream added that the protection from which SMEs benefit cannot apply to entities active all over Europe, as is the case for Aarke AB selling the embodiments attacked in more than 30 countries worldwide and offering information and support in the respective official languages of these markets, including German.

The President of the Court of First Instance in the proceedings before the Local Division Düsseldorf, pursuant to R. 323 RoP (the language of the proceedings), issued an order on January 16, 2024, stating that "the situation of the Defendant (Aarke AB) requires a particular consideration in the event that an SME is sued before the court in light of this legal frame. In the case at hand, the respective position of both parties – as known given the information provided at this early stage – is likely to create a significant imbalance in the way they can organize their defense and access to the court although they are equally confronted with a foreign language they don't use in their respective daily activities." The language of the proceeding was ordered to be changed into English.

In the order, Florence Butin, President of the Court of First Instance, also noted that "an important goal of the UPCA is indeed to take into account the situation faced by SMEs which have difficulties enforcing their patents and defending themselves."

This is also in line with the comment Stefan Johansson of the Nordic-Baltic Regional Division made when he was appointed as the Presiding Judge: "It is good that this important reform is finally becoming a reality, and it is especially nice that one of the courts is located in Stockholm."

The first case filed with the *Nordic-Baltic Regional Division* was *Edwards Lifesciences Corporation (claimant) v. Meril GmbH, Meril Lifesciences PVT Limited, Smis International OÜ, and Sormedica UAB (defendants)*, Case Number:

ACT_459769/2023. The case is proceeding and is one of a total of six patent infringement cases filed so far (as of July 31, 2024) with the court in Stockholm.

As of July 26, 2024, 47 cases have been filed with the Nordic-Baltic Regional Division. Most of them have been related to requests for amending patent or counterclaim for revocation (11 cases each), with infringement cases as No 3. However, the majority of the 47 cases are still at the stage where they are not fully public, and it is thereby not possible to identify the details of the disputes.

The high number of revocation counterclaims (11 compared to six infringement cases) is likely because, until April 2024, due to technical problems, if there were several infringing defendants in a case, each defendant had to file a separate counterclaim for revocation. As of April 5, 2024, this is now technically solved.

Résumés

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Above: Swedish Minister for Justice, Gunnar Strömmer, opens the doors of the Nordic-Baltic Regional Division.

The duration of proceedings in the Nordic-Baltic Regional Division is difficult to state in the absence of any full decisions so far. Stefan Johansson has stated that the court will follow the 12-month goal. For cases in other local divisions, so far, the period between the filing of the action and the oral hearing has been between nine to 11 months.

At the same time, the judges must stick to the time frames and make quick and clear decisions, as the number of cases is continuously increasing. The Presidium of the UPC, therefore, recently decided to adjust the working time of some part-time judges as of September 2024. Hamburg Local Division is, not surprisingly, one of the three Divisions, the other two are the Ljubljana Local Division and the Nordic-Baltic Regional Division in Stockholm.

Furthermore, the number of representatives based in Sweden is increasing. As of August 1, 2024, there are 128 representatives, whereof 33 are lawyers authorized to practice in contracting Member States (Article 48(2)), and 95 are patent attorneys (Article 48(2)), mainly "Patent Attorneys with other qualifications" (83), but also "Patent Attorneys with Law Diploma" (5), and "Patent Attorneys with EPLC (European Patent Litigation Certificate)" (7). The latter is the future identification and qualification of patent attorneys, as since June 4, 2024, European patent attorneys

can only register as UPC representatives upon presentation of an EPLC from any of four specifically identified universities in Europe. Before that date, "other qualification," according to Rule 12, was either successful completion of one of 13 specified courses from universities all over the EU or "having represented a party on his own without the assistance of a lawyer admitted to the relevant court." It is noted that all 83 Swedish patent attorneys who applied as "Patent Attorneys with other qualifications" have participated in one of the identified and accepted patent litigation courses.

So, what should we expect for the future of the Nordic-Baltic Regional Division?

The first decisions on infringement actions, as well as those on revocation actions, are expected by the end of 2024. As the Nordic-Baltic Regional Division is already the third most "popular" local UPC after the ones in Germany and France, it will be important to follow and study the Nordic-Baltic cases, in general, but also from an SME protection perspective. Perhaps, in the near future, the word "Nordic" in the Nordic-Baltic Regional Division will also include the two other Nordic countries: Denmark and Finland, thereby making the Nordic-Baltic Regional Division even more interesting from a general legal practice point of view.

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