



Düsseldorf - Local Chamber

UPC_CFI_177/2023 Arrangement of the Court of First Instance of the Unified Patent Court issued on 30 June 2023

Date of receipt of the application for interim measures: 22 June 2023 APPLICANT:

myStromer AG, Freiburgstrasse 798, 3173 Oberwangen b Bern, Switzerland,

represented by: Rechtsanwalt..., Kanzlei Hoyng ROKH Monegier,
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APPLICANT:

Revolt Cycling AG, Allmendstrasse 15, 8320 Fehraltdorf, Switzerland,

represented by: Patentanwalt ..., Kanzlei Tarvenkorn, Wickord &
Partner, Bernhard-Ernst-Str. 12, 48155 Münster,

electronic address for service: ...

PATENT OF AVAILABILITY:

European Patent No. EP 2 546 134 B1

TRIAL BODY/CHAMBER:

JUDGMENT BOARD OF THE LOCAL CHAMBER OF

DÜSSELDORF CO-INVOLVED JUDGES:

This order was issued by the presiding judge Thomas, the legally qualified judge Dr. Thom and the legally qualified judge Kupecz.

PROCEDURAL LANGUAGE: German

SUBJECT OF THE PROCEEDINGS:

Order for interim measures - Application for rectification of the order

BRIEF PRESENTATION OF THE FACTS

On 22 June 2023 (date of entry into the CMS: 23 June 2023), the local chamber of Düsseldorf ordered the respondent by way of interim measures, inter alia, to refrain from offering, putting on the market or using, or importing or possessing for the aforementioned purposes, bicycle frame/motor hub combination structures specified in the operative part of the order in Germany, the Netherlands, France and/or Italy. The injunction patent EP 2 456 134 B1 on which this order is based is in force in Austria, Switzerland, Germany, France, Italy, Liechtenstein and the Netherlands. Due to an oversight, Austria was not explicitly mentioned in the petition, neither in the list of member states nor in the requests. However, the applicant's request in its main request was formulated to prohibit the respondent from offering and selling the contested embodiment in the contracting member states of the Unified Patent Court, provided the patent for invalidity is in force there.

MOTIONS OF THE PARTIES

The applicant requests,

- I. amend the order (operative part, p. 6 f., point I.) as follows (requested amendment indicated by underlining):

The defendant is ordered to cease and desist from using bicycle frame and motor hub combination structures,

to offer, place on the market or use in Germany, the Netherlands, France, Austria and/or Italy or to import or possess for the aforementioned purposes, the combination structure comprising:

a bicycle frame including a first fork and a second fork arranged opposite to each other, wherein the first fork is provided with a through hole while the second fork has a recess with an internally threaded hole axially corresponding to the through hole, and the first fork is provided with a positioning groove on its inner side adjacent to the through hole; a motor hub provided at its centre with a sleeve having an end with respect to a positioning end such that the positioning end is engageable with and abutable against the positioning groove of the first fork; and an elongated shaft having a front end and a rear end, the rear end being externally threaded; the elongated shaft being capable of passing through the through hole of the first fork and the sleeve of the motor hub therethrough, and the male thread of the rear end being correspondingly engaged in and secured to the female threaded hole of the second fork.

- II. Further, to amend the order (Statement of Facts, p. 2) as follows (requested amendment indicated by underlining):

The patent for injunction is currently in force in Austria, Germany, Switzerland, Italy, Lichtenstein and the Netherlands.

FACTUAL AND LEGAL POINTS OF CONTENTION

The applicant is of the opinion that the lack of mention of Austria in the operative part of the order is a manifest error within the meaning of Rule 353 of the Rules of Procedure, which can be corrected as requested.

REASONS FOR THE ORDER:

The admissible application for correction of the order is unsuccessful on the merits.

I.

There are no objections to the admissibility of the application for rectification. In particular, it was filed within one month after service of the contested order, as required by Rule 353 of the Rules of Procedure.

In addition, the panel could also decide in the composition apparent from this order. The decision on an application for rectification pursuant to Rule 353 of the Rules of Procedure is incumbent on the court that issued the order to be rectified. The aforementioned standard only allows for a correction in the case of clerical and arithmetical errors as well as obvious inaccuracies in the decision or order. Since these are purely formal corrections without an examination of the substance of the matter, it is not necessary for the panel to decide in the same composition as when the order was issued.

II.

However, the application for rectification of the order is unfounded.

1.

Pursuant to Rule 353 of the Rules of Procedure, the court may, by way of order, after hearing the parties, correct clerical and computational errors as well as manifest inaccuracies in the decision or order. The latter includes all incorrect or incomplete statements of what the court actually intended in the order or decision. The declaration of the judicial intention in the decision or order must differ from the intention present when the decision was made.

2.

These requirements are not fulfilled in the present

case. a)

The order for provisional measures was issued on the basis of the application. There, Austria is not explicitly mentioned either in the applications or in the statement of grounds. Rather, the applicant sought an order for interim measures in relation to Germany, the Netherlands, France and Italy as part of her auxiliary application. This was granted by the court. Thus, there is obviously no discrepancy between the order actually made and the will present when the decision was made.

b)

The fact that the applicant in its more general main request seeks an interim injunction in respect of all member states of the Unified Patent Court in which the patent for invalidity is in force does not give rise to any different assessment, taking into account the overall content of the application. On the contrary, an overall consideration of the applicant's submissions in its petition confirms the above finding. Even if it can be assumed in favour of the applicant that Austria was merely inadvertently omitted when naming the contracting member states, the applicant only deals with Germany, the Netherlands, France and Italy in connection with the justification of an act of infringement (see statement of claim, para. 63). This allows no other conclusion than that the lack of mention of Austria in the auxiliary request underlying the order is not a clerical error, but that the request expressed in the statement of claim relates exclusively to Germany, the Netherlands, Italy and France, despite the generally worded main request. The court has issued an order concerning these countries, which is why the order is not manifestly incorrect as required by Rule 353 of the Rules of Procedure.

3.

Insofar as the applicant refers to Article 34 UPCA in support of her claim, she ultimately raises the question of the scope of the order already made on the basis of the provisions of the Convention. The obvious incorrectness of the order in the aforementioned sense, which is required for a correction under Rule 353 of the Rules of Procedure, cannot be justified on this basis from the outset.

ARRANGEMENT:

The applicant's application to correct the order of 22 June 2023 (setting in CMS: 23 June 2023) to the effect that Austria is also covered by the operative part of the order is dismissed.

DETAILS OF THE ARRANGEMENT:

on application APP_541204/2023 concerning main file reference ACT_525740/2023

UPC number: UPC_CFI_177/2023

Type of proceedings: Application for interim measures

Issued in Düsseldorf on 30 June 2023 NAMES

AND SIGNATURES

Presiding Judge Thomas

Legally qualified judge Dr Thom

Legally qualified judge Kupecz