



**Munich Local Division
UPC_CFI_443/2024**

Order
of the Court of First Instance of the Unified Patent Court local division Munich
issued on 25 November 2024

GUIDING PRINCIPLES

1. The purpose of Rule 8 (4) and (5) RoP is to keep the proceedings before the Unified Patent Court free from disputes about the substantive ownership of a European patent, irrespective of whether the ownership is relevant for the right to bring proceedings or the entitlement to claim, by establishing the (un)rebuttable presumption that the registered proprietor is also the actual proprietor.
2. The meaning of a sub-claim can, in principle, contribute to the correct interpretation of the main claim of a patent. However, sub-claims do not normally restrict the subject matter of the main claim, but, unlike examples of embodiments, merely show possibilities of its embodiment, possibly with an additional advantage.
3. Since the grant file is not mentioned in Art. 69 EPC, it does not in principle constitute admissible material for interpretation. A European patent cannot be interpreted on the basis of text passages that were deleted from the description during the grant procedure (continuation of local division Düsseldorf, order of 9 April 2024, CFI_452/2023 = ACT_589655/2023 - Ortovox Sportartikel gg. Mammut Sports and others).
4. The balancing of interests to be carried out in interim injunction proceedings must take into account the probability of a wrong decision and also the objective urgency in the sense of the necessity of interim measures with regard to equally possible proceedings on the merits. All aspects must be weighed up in relation to each other. The need to also take into account

The importance of these aspects in the context of weighing up interests arises from the relationship between the interim injunction proceedings and possible proceedings on the merits. From a procedural point of view, the main proceedings are the rule, while the summary proceedings with their summary examination and the possibility of subsequent legal defence are the exception.

5. The interests of the parties must be weighed against the question of whether the granting of interim measures is necessary and required in view of a later decision in the main proceedings, i.e. whether it is unreasonable for the applicant to wait until the conclusion of the main proceedings to enforce his claims in view of the risk of an erroneous order of interim measures and the associated effects for the defendant on the one hand and the impairments associated with the continuation of the patent infringement until a decision on the main proceedings on the other.
6. Rule 211 (4) RoP expresses the fact that an applicant whose behaviour already subjectively indicates that he is not in a hurry cannot expect any help from an order for interim measures. The reverse conclusion, however, that interim measures are to be ordered because the applicant is in a hurry, does not apply. Rather, the order for interim measures must also be objectively urgent.
7. In preliminary injunction proceedings, doubts as to the legal validity of the patent in dispute may play a role in the balancing of interests and preclude an order for provisional measures.

APPLICANT

Häfele SE & Co KG, legally represented by Häfele Verwaltungs-SE, which is represented by the Managing Directors Gregor Riekens (Chairman), Michael Distl, Boris Katic, Adolf-Häfele-Straße 1, 72202 Nagold,

represented by: Attorney Dr Blumenröder, Attorney Dr Busch and all other attorneys of the law firm Grünecker, Leopoldstraße 4, 80802 Munich,

with: Patent attorney Dr Dropmann and all other patent attorneys of the law firm Grünecker, Domkloster 1, 50667 Cologne,

DEFENDANT

Kunststoff KG Nehl & Co, represented by the managing partner Dr Jürgen Schnittke, Stresemannstraße 30-34, 32257 Bünde,

represented by: Lawyer Jacobsen, lawyer Kammüller and all other lawyers of the law firm CBH Rechtsanwälte, Ismaninger Straße 65a, 81675 Munich,

in co-operation with: Attorney Geschke and all other attorneys of the law firm Wildanger, Kehrwald, Graf v. Schwerin & Partner, Couvenstraße 8, 40211 Düsseldorf, and

Patent attorney Dr Dilg and all other patent attorneys of the law firm Dilg, Haeusler, Schindelmann, Leonrodstraße 56-58, 80636 Munich.

PATENT IN SUIT

European Patent No. EP 3 767 151

PANEL/CHAMBER

Panel 2 of the Munich local division

PARTICIPATING JUDGES

This order was issued by presiding judge Ulrike Voß, legally qualified judge Dr Daniel Voß, legally qualified judge Dr Walter Schober and technically qualified judge Merja Heikkinen-Keinänen.

LANGUAGE OF THE PROCEEDINGS

German

OBJECT

Application under Rule 206 RoP

ORAL HEARING

14 November 2024

FACTS OF THE CASE

The applicant seeks the adoption of interim measures against the defendant for infringement of the European patent with unitary effect EP 3 767 151 (Annex ASt 25, in German translation as Annex ASt 13; hereinafter referred to as the patent in suit): patent in suit).

The applicant is entered in the register for unitary patent protection as the proprietor of the patent in dispute. The patent in suit is based on a divisional application from EP 3 055 603 and claims its filing date of 8 October 2014 together with four priorities of 11 October 2023, 27 March 2014, 6 June 2014 and 12 June 2014. The reference to the patent grant was published on 3 July 2024. The application for unitary effect was granted by decision of 12 July 2024 with effect from the date of grant on 3 July 2024. The patent in suit is in force.

An opposition against the grant of the patent in suit has been filed with the European Patent Office. In addition, the defendant has filed an action for revocation with the Central Chamber, Munich Division, in relation to the patent in suit (ACT_51553/2024 UPC_CFI_526/2024). No decision has yet been issued in either of these proceedings.

The patent in suit, the language of the proceedings of which is English, is entitled "Cabinet Levelling Apparatus". Claims 1 and 6 asserted by the applicant are as follows:

1. An apparatus for adjusting a height adjustable leg for supporting a cabinet comprising:
a coupling (10, 30) for forming part of the height adjustable leg, the coupling (10, 30) comprising a driven member (13), and

a tool (50) comprising a driving member (51) and a torque input for applying torque to the driving member (51),

the tool (50) and the coupling (10, 30) complementarily adapted to releasably maintain engagement between the driving member (51) and the driven member (13) to allow the driving member (51) to drive the driven member (13) to rotate the coupling (10, 30) about a longitudinal axis of the leg for height adjustment of the leg, and

wherein the driving member (51) and the driven member (13) are gears that releasably mesh together when the tool (50) is engaged with the coupling (10, 30),

wherein the tool (50) is adapted to remain in a stationary angular position relative to the leg when the driving member (51) drives the driven member (13) and, wherein the driven member (13) and driving member (51) having parallel rotational axes when the driving member gear and the gear of the driven member are meshed together

characterised by an electric motor as the torque input for driving the driving member (51), wherein the motor is located between the handle (52) and the driving member (51).

and

6. a tool (50) for driving a height adjustable leg supporting a cabinet comprising:

a driving member (51) and a torque input for applying torque to the driving member (51), the tool (50) adapted to releasably maintain engagement with a coupling (10, 30) of the height adjustable leg comprising a driven member (13) to allow the driving member (51) to drive the driven member (13) to adjust the height of the cabinet, and

wherein the driving member (51) is a gear adapted to releasably mesh with the driven member (13) of the coupling (10, 30),

wherein the tool (50) is adapted to remain in a stationary angular position relative to the leg when the driving member (51) drives the driven member (13), and

wherein the driven member (13) and driving member (51) have parallel rotational axes when the driving member gear and the gear of the driven member are meshed together, **characterised in that** the tool (50) comprises an electric motor as the torque input for driving the driving member (51), wherein the motor is located between the handle and the driving member (51).

The German translation of the claims according to the patent in suit reads:

1. A device for adjusting a height-adjustable leg for supporting a cabinet, the device comprising the following:

a coupling (10, 30) for forming part of the height-adjustable leg, the coupling (10, 30) comprising an output member (13), and

a tool (50) comprising a drive element (51) and a torque input for applying a torque to the drive element (51),

wherein the tool (50) and the coupling (10, 30) are complementarily configured to releasably maintain engagement between the input member (51) and the output member (13) to allow the input member (51) to drive the output member (13) into engagement with the input member (51).

(13) to drive the coupling (10, 30) to rotate about a longitudinal axis of the leg to adjust the height of the leg, and

wherein the drive member (51) and the driven member (13) are gears that releasably mesh with each other when the tool (50) is engaged with the coupling (10, 30), wherein the tool (50) is adapted to remain in a stationary angular position with respect to the leg, when the drive element (51) drives the output element (13) and wherein the output element (13) and the drive element (51) have parallel axes of rotation when the gear of the drive element (51) and the gear of the output element (13) are in meshing engagement,

characterised by an electric motor as torque input for driving the drive element (51), the motor being arranged between the handle (52) and the drive element (51).

and

6. tool (50) for driving a height-adjustable leg supporting a cabinet, comprising:

a drive element (51) and a torque input for torque transmission to the drive element (51), the tool (50) adapted to releasably maintain engagement with the coupling (10, 30) of the height-adjustable leg comprising the output member (13) to allow the drive member (51) to drive the output member (13) into the coupling (10, 30). (13) to adjust the height of the cabinet, and

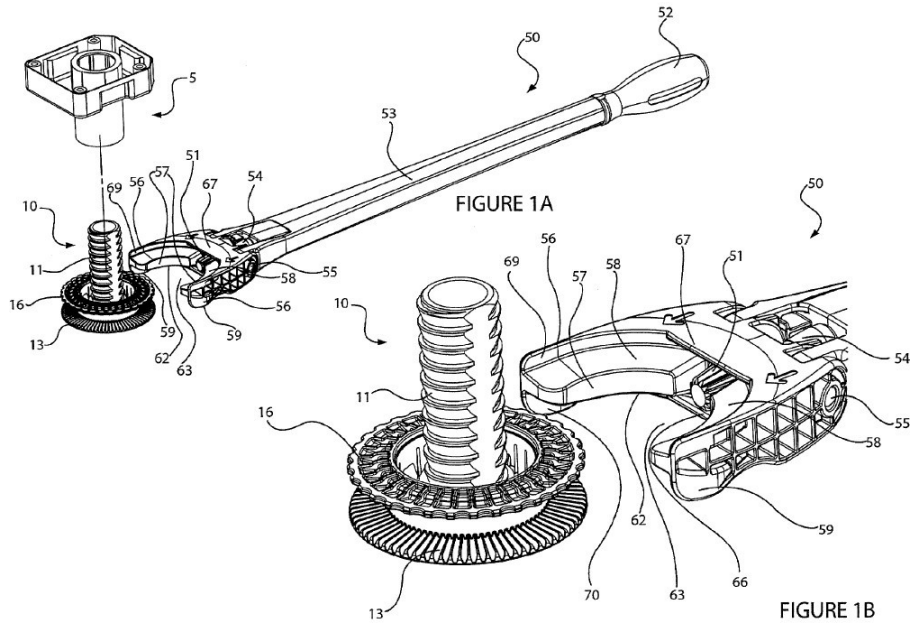
wherein the drive element (51) is a toothed wheel which is designed to mesh releasably with the output element (13) of the coupling (10, 30),

wherein the tool (50) is designed to remain in a stationary angular position with respect to the height-adjustable leg when the drive element (51) drives the output element (13),

wherein the output element (13) and the drive element (51) have parallel axes of rotation when the gear wheel of the drive element (51) and the gear wheel of the output element (13) are in meshing engagement,

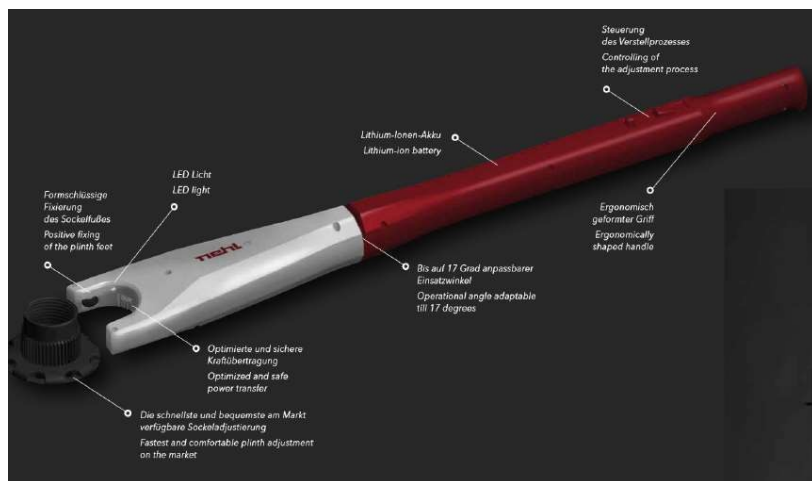
characterised in that the tool (50) comprises an electric motor as torque input for driving the drive element (51), the motor being arranged between the handle and the drive element (51).

Figures from the patent in suit are reproduced below, showing both a tool and a corresponding coupling. However, the embodiment example does not correspond to the invention insofar as the axes of rotation of the drive and output elements are not parallel. The patent specification makes no reference to an electric motor between the handle and the drive element in relation to the figures shown.

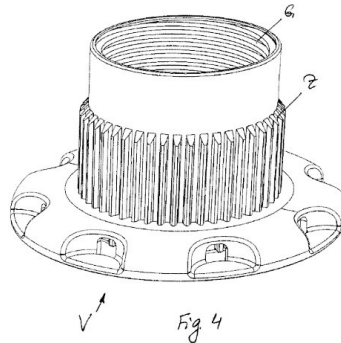


The applicant is a company specialising in hardware technology, lighting and electronic locking systems, which also offers and sells a plinth adjustment system called AXILO, consisting of the combination of an adjustment tool with the plinth adjustment foot for levelling furniture.

The defendant is a plastics processing company. It provides a product brochure for a tool for "fatigue-free adjustment" on the Internet at the URL https://www.nehl.com/wp-content/uploads/190517_Nehl_4-Seiter_N-Just_V01.pdf (attached embodiment 1). For details, reference is made to the corresponding pdf document (Annex ASt 16), from which the following illustration of the contested embodiment 1 originates. In addition, this embodiment corresponds in its technical functions relevant to the decision here to the embodiment example according to Figures 1 to 3 of the defendant's patent application DE 10 2020 118 599 A1 (Annex ASt 17).



Finally, the defendant also offers furniture legs. The base of these furniture legs is identical to the figure 4 reproduced below from the defendant's patent application 10 2020 118 599 A1 (Annex ASt 17).



A plastic foot with an external thread engages in the internal thread of this plinth foot. The length of the foot can be varied. The plastic foot is inserted above a flange into a hole in a foot holder to be attached on the furniture side. Accordingly, the defendant offers feet with different lengths and mountings as shown below. The illustration comes from the URL "<https://www.nehl.com/n-just/>".



The height-adjustable furniture legs consisting of the base foot, the screw-in plastic foot and the furniture-side mount represent the embodiment 3 in question.

The patent family of the patent in dispute includes other property rights, including the European patent EP 3 055 603 (hereinafter EP'603) and the German utility model DE 20 2014 011 517 (hereinafter DE'517). In November 2021, the applicant brought an action before the Düsseldorf Regional Court on the basis of both property rights, in which it asserted claims for injunctive relief against the defendant for offering and selling the contested embodiments. The Düsseldorf Regional Court initially suspended the hearing relating to EP 603 and then, after the patent was upheld in opposition proceedings at first instance with restrictions, scheduled a hearing for 27 May 2025. The hearing in relation to the utility model was also suspended. A first-instance decision by the Utility Model Division in the cancellation proceedings is still pending.

APPLICATIONS BY THE PARTIES

The applicant suggests,

- I. order the defendant to refrain from doing the following in the territories of the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Republic of Estonia, the Republic of Finland, the French Republic, the Federal Republic of Germany, the Italian Republic, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Portuguese Republic, the Republic of Slovenia and/or the Kingdom of Sweden,
 - 1.1 a device for adjusting a height-adjustable leg for supporting a cabinet, the device comprising the following,
 - a) a coupling to form part of the height-adjustable leg,
 - b) whereby the coupling comprises an output element,
 - c) a tool comprising a drive element and a torque input for applying a torque to the drive element,
 - d) wherein the tool and the coupling are complementarily configured to releasably maintain engagement between the input member and the output member to permit
 - e) the driving member drives the driven member to cause the linkage to rotate about a longitudinal axis of the leg to adjust the height of the leg, and

- f) wherein the input member and the output member are gears which releasably mesh with each other when the tool is engaged with the coupling, and
- g) wherein the tool is adapted to remain in a stationary angular position with respect to the leg when the driving member drives the driven member, and
- h) wherein the output member and the input member have parallel axes of rotation when the gear of the input member and the gear of the output member are in meshing engagement, and
- i) an electric motor as torque input for driving the drive element,
- j) whereby the motor is arranged between the handle and the drive element,

EP 3 767 151 B1/claim 1 in
direct patent infringement

to manufacture, offer, place on the market or use in the territory of one or more of the states mentioned under I. or to import or possess for the aforementioned purposes;

1.2 A tool for driving a height-adjustable leg supporting a cabinet, comprising

- a) a drive element and
- b) one torque input
- c) for torque transmission to the drive element
- d) wherein the tool is adapted to releasably maintain engagement with the coupling of the height-adjustable leg comprising the output member to allow the drive member to drive the output member to adjust the height of the cabinet,
- e) wherein the drive element is a toothed wheel which is designed to mesh detachably with the output element of the coupling,
- f) wherein the tool is designed to remain in a stationary angular position with respect to the height-adjustable leg when the drive element drives the output element,
- g) wherein the output member and the input member have parallel axes of rotation when the gear of the input member and the gear of the output member are in meshing engagement, and

- h) the tool comprises an electric motor as a torque input for driving the drive element,
- i) whereby the motor is arranged between the handle and the drive element,

EP 3 767 151 B1/claim 6 in
direct patent infringement

to manufacture, offer, place on the market or use in the territory of one or more of the states mentioned under I. or to import or possess for the aforementioned purposes;

1.3 a tool which

- a) suitable for adjusting a height-adjustable leg for supporting a cabinet comprising
 - aa) a coupling to form part of the height-adjustable leg,
 - bb) wherein the coupling comprises an output element, and
- b) comprises a drive element and a torque input for applying a torque to the drive element,
- c) wherein the tool and the coupling are complementarily configured to releasably maintain engagement between the input member and the output member to permit
- d) the driving member drives the driven member to cause the linkage to rotate about a longitudinal axis of the leg to adjust the height of the leg, and
- e) wherein the input member and the output member are gears which releasably mesh with each other when the tool is engaged with the coupling, and
- f) wherein the tool is adapted to remain in a stationary angular position with respect to the leg when the driving member drives the driven member, and
- g) wherein the output member and the input member have parallel axes of rotation when the gear of the input member and the gear of the output member are in meshing engagement, and
- h) wherein the tool is characterised by a motor as torque input for driving the drive element, which is arranged between the handle and the drive element,

EP 3 767 151 B1/claim 1 in
indirect patent infringement

to offer and/or supply to customers in the territory of one or more of the countries mentioned under I. for use in the territory of one or more of the countries mentioned under I;

1.4 a height-adjustable leg for supporting a cabinet, comprising

- a) a coupling to form part of the height-adjustable leg,
- b) wherein the coupling comprises an output element, wherein the coupling is complementary to a tool, and the tool
- c) comprises a drive element and a torque input for applying a torque to the drive element,
- d) wherein the tool and the coupling are complementarily configured to releasably maintain engagement between the input member and the output member to permit
- e) the driving member drives the driven member to cause the linkage to rotate about a longitudinal axis of the leg to adjust the height of the leg, and
- f) wherein the input member and the output member are gears which releasably mesh with each other when the tool is engaged with the coupling, and
- g) wherein the tool is adapted to remain in a stationary angular position with respect to the leg when the driving member drives the driven member, and
- h) wherein the output element and the input element have parallel axes of rotation when the gear wheel of the input element and the gear wheel of the output element are in meshing engagement,
- i) wherein the tool is characterised by a motor as torque input for driving the drive element, which is arranged between the handle and the drive element,

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indirect patent infringement

to offer and/or supply to customers in the territory of one or more of the countries mentioned under I. for use in the territory of one or more of the countries mentioned under I,

in the alternative

to offer and/or supply height-adjustable legs, as described in section I. 1.4, for use in the territory of one or more of the states mentioned under I., without

- to expressly, conspicuously and prominently point out on every offer, on the first page of the operating instructions, in the delivery documents and on the packaging that the coupling of the height-adjustable leg may not be used with a tool to drive the output element of the coupling of the height-adjustable leg that supports a cabinet without the consent of the applicant as the owner of EP 3 767 151;
- to impose on the customers, subject to the imposition of an appropriate contractual penalty to be paid to the applicant, to be determined by the applicant and, if necessary, to be reviewed by the competent court, the written obligation for each case of infringement not to use the coupling of the height-adjustable leg with tools for driving an output element, a coupling of a height-adjustable leg supporting a cabinet, which are equipped with the features described above under a) to i), without the prior consent of the patent proprietor,

EP 3 767 151 B1/claim 1 in
indirect patent infringement;

II. order the defendant to pay the costs;

III. to set the amount in dispute at EUR 500,000.00.

The defendant applies,

reject the application for interim measures,

in the alternative the continuation of the challenged
behaviour from to make the continuation of the
challenged behaviour dependent on the provision of security by the defendant,

order the applicant to pay the costs of the proceedings to the extent of the dismissal.

KEY POINTS OF CONTENTION

APPLICANT

The applicant considers the offer and sale of the contested embodiments 1 and 2 together with the contested embodiment 3 by the defendant to be a direct use of the teaching of claim 1 of the patent in suit. Claim 6 of the patent in suit is also directly infringed by the contested embodiments 1 and 2. Finally, the offer and distribution of the challenged embodiments 1 and 2 on the one hand and of the challenged embodiment 3 on the other hand constituted an indirect infringement of claim 1 of the patent in suit.

The applicant is of the opinion that the application is sufficiently specific. It is the unanimous legal opinion that it is at the discretion of the court which measure is ordered. It is sufficient to describe the requested measure with sufficient precision, which is the case here.

It also had the right to sue because it was entered in the register as the owner.

With regard to the interpretation of the patent claims, the applicant is of the opinion that the term "gear(s)" for the drive and output element is correctly translated as gear wheel. Such a gear can also be tubular and is not limited to a thin circular disc with uniform notches. All that was required was that the tube had uniform notches on the outer circumference and was in any event rotatable in one direction. Insofar as the claims required that the tool and the coupling were designed to be (complementary) in order to maintain the engagement between the driving and driven elements, this could be achieved by any securing measure or securing device, for example by applying force or clamping the tool.

The height-adjustable leg of the contested embodiment 3 has a gear wheel within the meaning of the patent in suit. The tool and coupling of the contested embodiment are also complementary in this sense in order to maintain the engagement of the drive and output elements. Since the patent in suit does not require a specific angular orientation, the feature is already realised when the tool is applied at right angles to the coupling.

It is undisputed that the challenged embodiment 2 is offered and sold by the defendant. However, the challenged embodiment 1 was also specifically advertised and offered on the defendant's website, as evidenced by the excerpt of the website submitted as Annex ASt 16. The cessation of distribution does not remove the risk of infringement. For a comprehensive prohibition of distribution, it is sufficient if the supplied product can only be used in a technically and economically reasonable manner in a way that infringes the patent.

can. This is the case with the contested embodiments. The base feet could only be adjusted in a technically practicable manner using the patented tool. It is unrealistic that the jaws and gear wheels of comparable tools have the corresponding dimensions for holding the base and for meshing the gear wheels. Under no circumstances would the user mix the base feet of one manufacturer with the assembly tool of another manufacturer. Adjusting the feet by hand is unrealistic.

The legal validity of the patent in dispute was also sufficiently secured. The defendant had participated in the granting procedure with third-party objections. Nevertheless, the European Patent Office had granted the patent in suit. In particular, its teaching was new compared to EP 0 904 899 A2 and ITRE 20100070 A1. These documents did not disclose a coupling suitable for a height-adjustable leg of a cabinet, nor was the motor of the disclosed tools arranged between the handle and the drive element.

Finally, the issuance of interim measures is necessary and the corresponding balancing of interests is in her - the applicant's - favour. On the basis of EP 603, it had already begun to enforce its claim for injunctive relief against the existing patent infringement acts before the Düsseldorf Regional Court with its application for action of 22 November 2021. However, it had not succeeded in doing so despite an immediate request for a retrial following the first instance opposition decision because the oral hearing had only been scheduled for 27 May 2025. The same applies to the utility model from the same IP right family. The infringement proceedings had been suspended and the oral hearing before the Utility Model Division was still pending. The applicant had thus exhausted all legal options. Above all, it could not have taken action against the challenged embodiments any earlier. The existing IP rights were in dispute before the Düsseldorf Regional Court and could not have been asserted before the UPC Agreement. Proceedings based on these property rights were also not equivalent to a European patent with unitary effect such as the patent in dispute. Therefore, only the patent in dispute was relevant. After its grant, it had not unreasonably waited to file the application. On the other hand, it was unreasonable for it to wait any longer in view of the infringements committed by the defendant over many years. In this respect, the order for interim measures was also objectively necessary because the patent infringement led to market confusion and an unjustified competitive relationship. A patent proprietor does not have to accept these impairments until a decision on the merits is reached.

At the oral hearing, the applicant additionally argued that it suffered damages essentially because the money was not primarily earned with the contested tools, but above all with the furniture feet. Customers of the challenged tools would only purchase furniture feet from the applicant that were compatible with the tool and would continue to do so beyond the term of protection of the patent in dispute in order to be able to use the tool once it had been acquired. She, the applicant, sells the furniture feet compatible with her tool for an average of EUR 1.50, the defendant

for an average of EUR 0.50. It is also known from out-of-court discussions that the defendant sells around 1,000 associated furniture legs per tool sold per year. Based on the number of 750 tools sold, as communicated by the defendant, the applicant suffers an annual loss of the equivalent of around EUR 1 million through the sale of furniture feet compatible with the tool. This is not only the damage from the indirect patent infringement, but also the consequential damage from the direct patent infringement. These damages could hardly be compensated because of the difficulties in clarifying the circumstances of use of the end customers due to the intermediary of the defendant, X, and in proving the causality between indirect infringement and subsequent direct infringement.

DEFENDANT

The defendant is of the opinion that the application for interim measures is already inadmissible. A mandatory requirement is a precise specification of the provisional measures requested by the applicant. The submission of the application does not fulfil this requirement because it only suggests that certain measures be ordered and thus places these at the discretion of the court.

The applicant is also not entitled to make a claim. In the proceedings before the Düsseldorf Regional Court, the defendant argued that it had received all industrial property rights from Designerscope Limited NZ. An effective transfer of the patent in dispute to the applicant is disputed.

With regard to the interpretation of the patent claims, the defendant believes that, in addition to the tool, it is not the entire height-adjustable leg and even less the table that is the subject matter of claim 1, but only the coupling. Apart from that, it is a matter of purpose statements. Insofar as the claims required that the drive element and the output element had to be gear wheels, this was based on an incorrect translation of the original English version. Instead, it merely had to be a rotary gear. Furthermore, a tool according to the invention must be "complementary" to the coupling in order to maintain the engagement between the drive and output elements during the interaction. It is not sufficient for the two elements to be able to engage. Rather, this requires that the engagement is also maintained against the acting forces. The tool and coupling must be able to maintain the engagement between the drive and output elements, i.e. to secure them axially and laterally, without the aid of muscle power or other means. Insofar as the claims then also required that the motor be arranged between the handle and the drive element, the broadest possible meaning was to be attributed to this feature in the absence of any restrictions. The motor must be arranged somewhere between the outer limits of the handle and the drive element, this could also be in the handle.

The challenged embodiments did not realise all the features of the patent claims. According to the applicant's narrow understanding of the translation of the term "gears", the coupling does not have an output element in the form of a gearwheel. The teeth present are not part of a gearwheel, but are attached directly to the tube. Moreover, the contested embodiments 1 and 2 did not have a mouth formed at the front of the tool complementary to the coupling of the height-adjustable leg in order to maintain the engagement between the drive element of the tool and the output element of the coupling when transmitting the torque. The opening of the jaw is somewhat elongated compared to the cylindrical toothing of the coupling. If the jaw of the tool engages around the coupling, the gears of the drive element do not automatically mesh with the toothing of the coupling, which acts as the output element. There is also no other mechanism that maintains the engagement. Therefore, there was also no engagement between the tool and the coupling in the axial upward direction.

The defendant claims that the contested embodiment 1 was neither manufactured, nor offered, placed on the market, used or imported or possessed for these purposes. There is simply no use. Exhibit ASt 16 is an image of a prototype that was replaced more than three years ago by the contested embodiment 2. Offers made by the defendant were obviously not directed at the contested embodiment 1, which the defendant could also not supply or place on the market.

The defendant is of the opinion that a direct infringement of claim 1 also fails because tools and feet are sold as independent products. The defendant should be referred to indirect infringement. However, the coupling in the form of the base foot is not protected as such and has been on the market for a long time. Therefore, an absolute prohibition in the event of an indirect infringement of the patent in dispute would be disproportionate. A patent-free use is quite conceivable. The challenged feet could easily be operated with a commercially available spanner or pipe spanner or even turned by hand. Customers would regularly refrain from purchasing the contested tool. On the other hand, the contested tool could be used to adjust other structures fitted with teeth which are not the object of a height-adjustable leg. Furthermore, the warning notice requested in the alternative was too extensive and the amount of the contractual penalty was unreasonable.

Furthermore, the legal status is not sufficiently secured. The teaching of the patent in suit was not disclosed in an executable manner and was based on an inadmissible extension. In any event, the patent in suit was not patentable.

Finally, the order for interim measures was neither objectively necessary nor urgent in terms of time and the necessary balancing of interests **w a s** also in favour of the defendant. The applicant had not submitted any arguments as to why her

interests could not also be safeguarded in an action on the merits. A decision by the court in proceedings on the merits could be expected within one year. It was not apparent that the applicant could only be helped to assert her rights if interim measures were ordered beforehand. Filing an application one month after the grant of a patent did not justify the need for such measures. The applicant could have proceeded earlier before the Unified Patent Court, or in any case in summary proceedings before the national courts by means of other property rights such as EP 603. The applicant had not submitted any reasons for the factual necessity of interim measures. Neither would the applicant lose market share as a result of the alleged patent infringement, nor would customer relationships be disrupted. Nothing had been submitted regarding special damages. In fact - which the applicant disputes - only 750 units of the infringed tools had been sold in total, most recently around 200 units per year. The total turnover amounted to approximately EUR 18,500.00. The challenged furniture feet could also be used patent-free without the challenged tools. There were no disadvantages that could not be compensated for in the main proceedings. Since the defendant had already been on the market for many years with the contested products, nothing had changed as a result of the grant of the patent in dispute. Market confusion had not occurred. The applicant did not have its own patent-compliant product in its programme. However, a mere competitive situation was not sufficient for the granting of interim measures.

At the hearing, the defendant disputed the applicant's assertion that the customers of a tool subsequently only purchase the furniture feet compatible with this tool. There was no such dependency of sales. For example, the defendant's sales of the contested tool had increased in the past, but not the sales of the compatible furniture legs. Industrial furniture and kitchen manufacturers often have no need for tools because they do not install the kitchens and furniture. Furniture and kitchen installers, on the other hand, have to make do with what is supplied to them. The applicant's calculation of damages is not comprehensible. It - the defendant - only sells around 200,000 of the disputed furniture legs per year. It also delivered to X. It is unclear to whom X supplies the tools and furniture legs and how they are used.

REASONS FOR THE ORDER

The application for an order for interim measures is admissible, but is not successful on the merits.

Pursuant to Art. 62(2) UPCA, the ordering of provisional measures is at the discretion of the court after weighing the interests of the parties. Pursuant to Rule 211(2) RoP in conjunction with Art. 62(1) UPCA, it is a prerequisite that it is predominantly probable that the applicant is entitled to initiate proceedings and that the patent will be infringed. Furthermore, the court must not consider it predominantly probable that the patent is not valid (UPC Court of Appeal, order of 26 February 2024, UPC_CoA_335/2023 - NanoString Technologies and others v. 10x Genomics and others; order of 25 September 2024, UPC_CoA_182/2024 - Ortovox Sportartikel v. Mammut Sports Group and others).

In the case in dispute, it can be assumed that the application for interim measures is admissible, in particular that the applicant is entitled to bring the matter before the court. It is also largely probable that the patent in dispute has been infringed. However, the balancing of interests leads to the conclusion that the order for interim measures is not necessary.

A

The application for interim measures is admissible.

I.

The petitioner is entitled to bring an action before the court pursuant to Art. 47 (1) UPCA. Pursuant to Rule 8 (4) RoP, it is to be treated as the proprietor of the patent in suit because it is listed as such in the Register for Unitary Patent Protection.

The defendant does not deny this either. It merely argues that the petitioner was not entitled to apply for registration of the unitary effect of the patent in dispute due to a lack of substantive legal entitlement to the patent. However, the defendant is not able to prevail with this argument.

Rule 8(4) RoP establishes the irrebuttable presumption that the person entered in the Register for unitary patent protection is also the proprietor of the IP right and thus authorised to institute proceedings. This is the reverse of Rule 8(5)(c) RoP, according to which the presumption that the person entered in the Register is also the substantive proprietor of the European patent is rebuttable. Rule 8(4) RoP does not contain such a provision. Accordingly, entry in the Register is sufficient for the right to institute proceedings for an action or summary proceedings on the basis of a European patent with unitary effect pursuant to Art. 47(1) UPCA.

II.

The applicant's application for the adoption of interim measures is sufficiently specific. This is not lacking because the applicant merely suggests that the court order certain interim measures.

Article 62(1) and (3) UPCA, like Rule 211(1) RoP, leaves the ordering of provisional measures to the discretion of the court ("may"). It is not only at the discretion of the court whether a provisional measure is ordered, but also which measure is necessary. (v. Falck/Dorn in: Tilmann/Plassmann, Einheitspatent, Unified Patent Court, 1st ed. 2024, Rule 211 RoP para. 1; cf. also Schacht in: Luginbühl/Hüttermann, Unitary Patent System, 1st ed. 2024, Rule 211 RoP para. 5). However, this does not mean that the court orders the measures it considers necessary if these are not requested as such by the applicant. Rather, the exact wording of the prohibition or other measure to be adopted is left to the UPC Agreement (Schacht loc. cit.). Nevertheless, an application directed at the measure to be adopted is required, whereby minor inaccuracies in the wording of the application have no effect (Schacht loc. cit.).

The applicant's application fulfils these requirements. Even if it only suggests a certain measure, this is to be understood as an application. The application is also so clearly defined and precisely worded that the framework within which the defendant must defend itself and the court must decide is sufficiently clearly outlined.

B

It is predominantly probable that the patent in dispute is infringed by the defendant. The offer and distribution of the challenged embodiments constitute in part a direct and indirect infringement of the patent in suit. In any case, there is a risk of first infringement. Only insofar as the challenged embodiment 3 is offered and supplied in isolation without the challenged tools, an indirect infringement cannot be assumed.

I.

The applicant is to be regarded as entitled to make a claim. As the registered proprietor of the patent in dispute, it is entitled to assert a claim for an injunction against patent infringement.

The power to appeal to the Unified Patent Court pursuant to Art. 47 UPCA must be distinguished from the substantive ownership of a claim under the patent. The defendant has denied the latter on the grounds that it disputes the validity of the transfer of the patent in dispute to the applicant. However, its denial is irrelevant. This follows from Rule 8 (4) RoP.

As explained above, Rule 8(4) RoP contains the irrebuttable presumption that the registered proprietor of a European patent with unitary effect is to be regarded as the patent proprietor and thus as authorised to institute proceedings. In addition, however, Rule 8(4) RoP also leads to the irrebuttable presumption that the person registered as the proprietor of a European patent with unitary effect is also to be regarded as the person entitled under substantive law.

Rule 8(4) RoP is part of the regulation on the parties and their representation before the Unified Patent Court and concretises Art. 47 UPCA. This provision in turn determines who is authorised to bring an action before the Unified Patent Court. However, it does not contain any provisions on the substantive legal entitlement to the patent. Accordingly, Rule 8 RoP also only has a procedural regulatory content. This is consistent because the Rules of Procedure basically only regulate the proceedings before the Unified Patent Court, while the entitlement to the patent as part of the property and the substantive claims arising therefrom are regulated by Regulation (EU) 1257/2012 of 17 December 2012 (Patent Regulation), the UPCA and, in addition, by national law (see Tilmann in: Tilmann/Plassmann, Einheitspatent, Unified Patent Court, 1st ed. 2024, Rule 8 para. 11). Nevertheless, in addition to the question of the right to bring proceedings, the provision also has an impact on the substantive legal entitlement of a party.

Rule 8(4) RoP generally orders that the registered proprietor is treated as the actual proprietor for the purposes of the proceedings covered by the Rules of Procedure. However, since the actual proprietor is regularly also the proprietor of the rights under the patent, in particular the claims for patent infringement, the presumption of entitlement under Rule 8 (4) RoP also applies. From a procedural point of view, the court is relieved of the obligation to investigate a dispute between the parties regarding the entitlement to claim based on the ownership of the patent and to clarify who the actual owner of the asserted patent is (see also Tilmann in: Tilmann/Plassmann, Einheitspatent, Unified Patent Court, 1st ed. 2024, Rule 8 para.

10). The general purpose of Rule 8(4) RoP (and also of Rule 8(5)(c) RoP) is to keep the proceedings before the Unified Patent Court free from disputes about the substantive ownership of a European patent, irrespective of whether the ownership is relevant for the right to bring proceedings or the entitlement to claim, by establishing the irrebuttable (and in the case of paragraph (5)(c) the rebuttable) presumption that the registered proprietor is also the actual proprietor.

In the case in dispute, the applicant is deemed to be the proprietor of the patent in suit pursuant to Rule 8 (4) RoP and thus also entitled to make a claim. This is because, according to the extract from the register submitted (Annex ASt 11), she is entered in the register as the proprietor of the patent in dispute, a European patent with unitary effect. The denial of the validity of a possible transfer of the patent to the applicant is therefore not justified for the aforementioned reasons.

This is just as irrelevant as the objection that the applicant was not allowed to request the registration of the unitary effect. None of this changes the entry of the applicant in the register and the associated presumption pursuant to Rule 8 (4) RoP that the applicant is also the actual proprietor of the patent in suit and is therefore entitled to the claims under the patent.

II.

The invention of the patent in suit relates to a device for adjusting a height-adjustable leg for levelling or adjusting the height of a cabinet, such as a kitchen, bathroom or laundry cabinet or a (household) appliance or any other object requiring height or level adjustment. It also relates to a tool for adjusting the height of a height-adjustable leg via a coupling (para. [0001]; paragraph references without further reference are those of the patent in suit).

With regard to the prior art on which the invention is based, the patent in suit states that height-adjustable legs are already known which are used to support cabinets, appliances, furniture or the like. They typically comprise a vertically extending threaded shaft which is received in a corresponding threaded base which is attached to an appliance or cabinet whose height is to be adjusted or levelled. The base is attached to the object so that rotation of the shaft causes a foot of the leg to move axially relative to the base to adjust the height of the object supported by the foot. To rotate or pivot the threaded shank in the corresponding threaded socket, the foot could have an engagement feature, such as a hexagonal or square profile, which could be engaged by a laterally extending tool such as a spanner. Alternatively, the foot could be rotated by the user by hand (para [0002]).

A tool used to adjust the height of the leg regularly grips the foot from a lateral direction. If the handle of the tool, such as a spanner, is moved in an arc around or around the foot, this movement may be impeded by neighbouring feet, equipment, walls or cabinets or the object itself, so that the foot can only be adjusted by a series of repeated short arc lengths. Adjusting the height of a leg may therefore require a user to disengage and re-engage the tool and foot several times in order to rotate the foot through a sufficient amount of angular movement within a limited arc length or angle of rotation. This is time consuming and alignment cannot be easily achieved. Vertical as well as tangential and radial alignment is required for re-engagement (para [0003]).

In particular, adjusting a foot that is at the back of a cabinet or appliance can be difficult, as an extra-long tool handle may be required to adjust the foot.

from the front of the cabinet. The adjustment arc for the tool handle for operation is thus further restricted. In addition, the alignment between the mouth of the tool and the corresponding engagement feature of a rear foot can be difficult due to lack of visibility or accessibility. A user would regularly have to lie down on the floor to do this. Tools such as standard spanners or screwdrivers, which are typically used to adjust height-adjustable legs, are not specially designed for the purpose of adjusting a height-adjustable leg, so that their use or the adjustment of the leg by hand is associated with the risk of health impairments (para. [0004]).

There are also height-adjustable legs in which the threaded shaft is held in a threaded collar or pinion, the height of which is fixed relative to the object to be levelled, but can be freely rotated. In this case, the rotation of the threaded shank of the foot can be made more difficult, for example, by a flat section on the threaded shank. The adjustment of a foot threaded shaft and collar assembly could have similar problems for height adjustment as described previously (para. [0005]).

With regard to the printed prior art, the patent in suit states that a fitting element for connecting or installing a piece of furniture is known from EP 0 292 921 A2. The yoke element has a mitre wheel, via the inner tothing of which a rod, which is provided with an outer tothing and which can be used as a movable supporting foot or movable connecting element, is driven. The drive of the first mitre wheel is effected by a second mitre wheel which is associated with a tool which can be inserted into a recess on both sides of the fitting element and can be brought into engagement with the first mitre wheel through a window in the recess. The second mitre wheel could also be integrated into an electrically or pneumatically operated hand tool (para. [0006]).

US 7,556,227 describes an adjustable foot for a device equipped with a rod and a pinion. The pinion engages a gear so that rotation of the rod rotates the gear to adjust the height of the foot. The rod is supported by the device to be held in engagement with the cogwheel and extends to the front of the device. The adjustment of the rear foot of the device can thus be made from the front of the device using a standard screwdriver. Since the device is equipped with a pinion and a rod for each rear foot, the installation of this mechanism in the device is complicated. The pinion and drive mechanism would also become redundant once the height was set (para [0007]).

Furthermore, a tool with the features of the generic term of claim 6 is known from JP H11 270 919 A (para. [0008]).

Another tool for adjusting a foot or leg of an appliance is described in JP1997-206147 A. The tool includes a ratchet mechanism having a ratchet lever or ratchet pawl for engaging with a ratchet tothing on the shaft. The ratchet lever grips the tothing in one direction of rotation and disengages from the tothing in the opposite direction of rotation. This allows the tool handle to be moved forwards and backwards around the foot in a defined arc length in order to adjust the height of the leg in one direction. However, to change the direction of adjustment (for example, from upwards to downwards), it is necessary to switch the lever arm of the ratchet mechanism between two positions (para. [0009]).

Finally, JP2008-213058 describes a tool for a foot similar to that in JP1997 - 206147 A, which has a horizontally pivoting tool head to allow the tool to engage the foot around obstacles. However, the swivelling head reduces the arc length by which the handle must be moved in order to crank the foot for height adjustment. Similarly, it is also necessary to switch the lever arm of the ratchet mechanism between two positions to change the direction of adjustment (para. [0010]).

Against this background, the patent in suit regards it as a task (the technical problem) to specify an improved device for adjusting a height-adjustable leg or an improved tool for adjusting a height-adjustable leg.

As a solution to this problem, the patent in suit in claim 1 proposes a device with the following features, which can be categorised as follows:

1. A device for adjusting a height-adjustable leg for supporting a cabinet, the device comprising the following:
 - 1.1 a coupling and
 - 1.2 a tool;
2. the coupling (10, 30)
 - 2.1 serves to form part of the height-adjustable leg, and
 - 2.2 comprises an output element (13);
3. the tool (50),
 - 3.1 comprises a drive element (51),
 - 3.2 comprises a torque input for applying a torque to the drive element (51);
 - 3.2.1 An electric motor serves as the torque input,
 - 3.2.2 wherein the motor is mounted between the handle (52) and the drive element (51) is ordered;
4. the tool (50) and the coupling (10, 30) are designed to be complementary in order to ensure engagement between the drive element (51) and the output element (13)

to allow the drive member (51) to drive the driven member (13) to cause the linkage (10, 30) to rotate about a longitudinal axis of the leg to adjust the height of the leg;

5. the input element (51) and the output element (13)
 - 5.1 are toothed wheels that mesh releasably with each other when the tool (50) is brought into engagement with the coupling (10, 30),
 - 5.2 have parallel axes of rotation when the gear wheel of the drive element (51) and the gear wheel of the output element (13) are in meshing engagement;
6. the tool (50) is adapted to remain in a stationary angular position with respect to the leg when the drive element (51) drives the output element (13).

Furthermore, in claim 6, the patent in suit proposes a tool with the following features, which have already been reproduced in structured form:

1. A tool (50) for driving a height-adjustable leg supporting a cabinet, comprising:
 - 1.1 a drive element (51) and
 - 1.2 a torque input for torque transmission to the drive element (51);
2. the tool (50)
 - 2.1 is adapted to releasably maintain engagement with the coupling (10, 30) of the height-adjustable leg comprising the output member (13) to allow the drive member (51) to drive the output member (13) to adjust the height of the cabinet,
 - 2.2 is designed to remain in a stationary angular position with respect to the height-adjustable leg when the drive element (51) drives the output element (13),
 - 2.3 includes an electric motor
 - 2.3.1 as a torque input for driving the drive element (51),
 - 2.3.2 wherein the motor is arranged between the handle and the drive element (51);
3. the drive element (51) is a toothed wheel which is designed to mesh detachably with the output element (13) of the coupling (10, 30);
4. the output element (13) and the drive element (51) have parallel axes of rotation when the gear wheel of the drive element (51) and the gear wheel of the output element (13) are in meshing engagement.

III.

The parties' dispute over the understanding of the patent in suit gives rise to the following comments regarding the interpretation of claim 1.

1.

According to the case law of the Court of Appeal (order of 26 February 2024, corrected by order of 11 March 2024, CoA_335/2023 = App_576355/2023 - NanoString gg. 10x Genomics), the following principles apply to the interpretation of claims of European patents.

The patent claim is not only the starting point, but the decisive basis for determining the scope of protection of a European patent under Art. 69 EPC in conjunction with the Protocol on the Interpretation of Art. 69 EPC. The interpretation of a patent claim does not depend solely on its exact wording in the linguistic sense. Rather, the description and the drawings must always be taken into account as explanatory aids for the interpretation of the patent claim and not only be used to resolve any ambiguities in the patent claim. However, this does not mean that the patent claim merely serves as a guideline and that its subject matter also extends to that which, after examination of the description and the drawings, appears to be the patent proprietor's request for protection. The patent claim must be interpreted from the perspective of a person skilled in the art. When applying these principles, appropriate protection for the patent proprietor should be combined with sufficient legal certainty for third parties. These principles for the interpretation of a patent claim apply equally to the assessment of infringement and the legal validity of a European patent.

On this basis, the following applies to the interpretation of claim 1 of the patent in suit.

2.

The subject matter of claim 1 is a device for adjusting a height-adjustable leg for supporting a cupboard. According to the express wording of the claim, the device comprises only two components, namely a tool and a coupling (features 1.1 and 1.2), which are described in more detail in the further features of the claim. However, the cabinet and the height-adjustable leg, with the exception of the coupling, which according to feature 2.1 is intended to be able to form part of the leg, are not part of the claimed device.

Both the cabinet and the leg, insofar as the coupling is not involved, are merely the subject of indications of purpose, effect or function. This becomes clear from the phrases "device for adjusting a height-adjustable leg for supporting a cabinet" (feature 1) or "coupling for forming a part of the height-adjustable leg" (feature 1.2). Such indications of function and purpose regularly define the object protected by the patent only to the effect that it must be suitable for use for the function or purpose specified in the patent claim.

become. In this respect, they impose spatial and physical requirements on the protected device or its components, as the device must be suitable for the stated purpose or function.

Accordingly, the coupling must only be suitable for being part of an imaginary height-adjustable leg. Since the leg is intended to be able to support a cabinet, the tool and the coupling must in turn be suitable for adjusting the height of this leg and thus also the cabinet, whereby the claim is not limited to a furniture cabinet with a certain weight for lack of further details.

3.

The driving and driven elements must be gears (feature 5.1). This translation of the term "gears" from the original English version, which is authoritative under Art. 70 EPC, is preferable. In this respect, it is not so much a question of whether the correct translation has been chosen, but rather what technical meaning the skilled person attaches to the term used, which in turn is to be determined by interpretation.

It is decisive for the understanding of the term "gear" that the patent in suit expressly defines the term in its description ("In this specification and claims, the term 'gear' is intended to mean a rotary gear that is free to rotate continuously in at least one direction.", para. [0173]). Accordingly, the decisive requirements are that the component is free to rotate in at least one direction. It is not clear how this is to be achieved with a gearbox. The defendant also does not explain in more detail how it fulfils the
The term "rotary gear" is derived from "rotary gear". Instead, only the translation "rotary gear" appears to make technical sense.

At most, it would be conceivable that the drive element and the output element together form a transmission. However, in conjunction with the other features of patent claim 1, it is apparent that it is in any case a transmission consisting of two gears which can be brought into engagement with each other in order to be able to transmit the torque applied to the drive element to the output element. According to feature 5.2, the two elements must not only have parallel axes of rotation, but the English version even refers to "driving member gear" and "gear of the driven member". Translating "gear" as "transmission" in this context is out of the question. The English term "meshed together" in connection with the driving and driven member also better expresses the meshing of the two mechanical engineering elements than a mere "meshing", i.e. it is in favour of understanding "gear" as a gearwheel and not as a transmission.

The physical design of the gears forming the drive and output element is left to the skilled person. Any cylindrical, rotatable component with an external toothing that meshes with the toothing of the corresponding drive and output element is sufficient.

or output element can mesh with each other. The gear wheel is not limited to thin, disc-shaped components, nor does it have to be a separate component that can be distinguished from the rest of the coupling, as long as it has external teeth and fulfils its technical purpose: The drive or output element must engage detachably with each other via their toothing so that the output element can be driven via the rotation of the drive element. The drive and output, i.e. the transmission of a torque, correspond to the technical function of a gearwheel, as also required in feature groups 4 and 5.

4.

With feature 4, claim 1 requires that the tool and the coupling are complementary in order to maintain the engagement between the driving element and the driven element. This is not to be understood as meaning that the tool and the coupling are capable of maintaining the engagement between the drive and output elements by themselves, so that the engagement of the drive and output elements is secured in all directions - laterally and axially. Rather, it is sufficient that the engagement is only secured in one direction - be it axially or laterally in only one direction.

Since the drive and output elements are gears, the drive and output elements are in mesh when the two gears mesh, i.e. when their teeth mesh and the output element can be driven via the drive element, as also required by feature 4. For this purpose, the tool must be brought into a corresponding position on the coupling. Patent claim 1 also speaks here of "brought into engagement" (feature 5.1). In addition to the mere engagement, feature 4 also requires that the tool and coupling are complementary in order to maintain the engagement.

The term "complementary" generally means "complementary". Accordingly, the tool and coupling must be designed in such a way that they fit together and can therefore maintain the engagement of the drive and output elements. In this respect, a positive fit should be considered, in which two components fit together or interlock due to their shape in such a way that relative movement is excluded or at least partially prevented. From a functional point of view, this also appears to make technical sense because relative movements between the tool and the coupling can disengage the gears. When the torque is transmitted from the drive element to the output element, forces act in lateral directions that could lead to a corresponding relative movement between the tool and the coupling. Similarly, since the height of the leg is to be adjusted via the drive of the output element, forces can act in an axial direction. These could also disengage the drive and output element during the adjustment process. The engagement can be secured against such relative movements by a complementary design of tool and coupling, which maintains the engagement of the drive and output element.

This understanding corresponds to that of the description of the patent in suit. It states that the tool and the coupling are complementarily adapted so that the tool is secured relative to the coupling in an axial direction and a lateral direction when engaged with the coupling ("the tool and the coupling are complementarily adapted so that the tool is secured relative to the coupling in an axial direction and a lateral direction when engaged with the coupling", para. [0025]). Paragraph [0026] is similar. However, the cited text passage only refers to individual embodiments ("some embodiments", para. [0025], also para. [0026]). It is therefore not possible to generalise that every device according to the patent must be designed in such a way that the tool and coupling prevent relative movement in both the axial and lateral directions. If a

If the "complementary" design of the tool and coupling is understood as being suitable for securing the engagement of the drive and output element, securing in only one direction is instead sufficient according to the teaching of the patent in suit.

This understanding also results from sub-claim 4 of the patent in suit. The meaning of a sub-claim can, in principle, contribute to the correct interpretation of the main claim of a patent. However, sub-claims do not normally restrict the subject matter of the main claim, but, unlike examples of embodiments, merely show possibilities of its embodiment, possibly associated with an additional advantage. Subclaim 4 specifies the complementary design of the tool and coupling in more detail by ordering that the tool is fixed in an axial direction and/or a lateral direction and/or in both axial directions during engagement with the coupling. However, if sub-claim 4 leaves the choice to the skilled person for a complementary design of tool and coupling as to whether he fixes the tool to the coupling in only one direction or in all directions, the subject matter of patent claim 1 cannot be understood. It is sufficient to have a positive fit which ensures the engagement of the tool and coupling in at least one direction. The maintenance of the engagement in the other directions can be achieved by the skilled person by other means - even if it is by muscle power (para. [0138]).

Such embodiments are also shown in the description of the patent in suit. Thus, according to one embodiment shown in Figure 11, the tool for laterally aligning the tool and the foot may comprise a lateral extension 56 to catch or rest against a laterally facing surface of the foot, for example surface 14. This order is intended to ensure that the tool remains laterally engaged with the foot when the foot is driven against the weight of the supported object. (para [0133] and [0134]).

The paragraphs cited by the parties (paragraphs [0137], [0142], [0157], [0165] and [0170]) do not indicate a different assessment.

5.

Feature 3.2.2 of claim 1 requires that the motor is arranged between the handle and the drive element. Thus, hand-driven tools are excluded from the teaching of the patent in suit, as are tools with an interface for an external torque input, which is also expressly stated in the description of the patent in suit (para. [0124]). In addition, feature 3.2.2 contains a specification for the local positioning of a motor. This results in a tool with an axial alignment of handle, motor and drive element in the same order.

Such an order of the motor in the vicinity of the drive element is advantageous and technically expedient because it allows the tool to be as narrow and elongated as possible, which the user can handle even in cramped conditions under a cabinet. Positioning the motor to the side of the handle or even outside the tool is impossible and would make handling the tool more difficult. On the other hand, an order of the motor starting from the drive element on the other side of the handle would, on the one hand, make torque transmission to the drive element more difficult and, on the other hand, make it more difficult to handle the tool on a handle positioned further forwards, not least because of the weight distribution.

However, claim 1 of the patent in suit does not preclude the motor and the handle from overlapping in their axial extension in any way or even the motor being positioned in the handle. It is positioned between the handle and the drive element even if the handle extends beyond the drive element and beyond the motor. In this respect, the patent in suit is not concerned with arranging the handle, motor and drive element exactly outside the spatial limits of the respective other components. Such an understanding cannot be inferred by the skilled person either from the claim or from the description and drawings of the patent in suit. In particular, the skilled person will not stop at the mere wording "between the handle and the drive element", but will recognise that in this context it is a matter of the axial structure or the longitudinal extension of the tool. However, such a structure does not preclude the motor and handle from overlapping in the axial direction. This is readily compatible with the technical sense of the positioning of the motor mentioned in the receipt.

In this respect, it must also be taken into account that the claim neither specifies the spatial and physical extent of the drive element and the motor nor the specific design of the handle. For the latter, based on the term "handle", it is at most required that the user can grip and hold the tool with one or more hands. In any case, the tool must have a suitable area for this purpose so that the tool can be used properly. Such a handle is necessarily provided on the outside of the tool. The motor, on the other hand, will regularly be located in a housing or the like and thus inside the tool. On this basis, there is no obvious reason why the patent in suit should have a

This should exclude the possibility of a design in which the internal motor extends axially into the external area of the tool that functions as a handle.

Nothing else results from the description of the patent in suit. Rather, this description indicates that the claimed teaching is distinguished from the non-inventive examples in which the torque input is formed either by a rotatable handle or by an interface provided at a free end of the handle for connecting a drive shaft to an external torque supply (para. [0124]). The use of an electric motor distinguishes the teaching of the patent in suit from the manually operated handle, and the order between the handle and the drive element distinguishes it from a torque supply located outside the tool. On the other hand, there is no indication that the motor and handle are arranged in a particular way beyond the extent shown.

Finally, the events in the grant proceedings do not lead to a different interpretation. In the grant proceedings, the variant of an order of the motor within the handle was deleted from the patent in suit:

~~comprise~~ an electric motor as the torque input for driving the driving member. A motor
is
~~may be located in a (stationary) handle of the tool, or~~ between the handle and the driving
member.

However, since the grant file is not mentioned in Art. 69 EPC, it does not in principle constitute admissible material for interpretation (LK Düsseldorf, order of 9 April 2024, CFI_452/2023 = ACT_589655/2023 - Ortovox Sportartikel gg. Mammut Sports and others). A European patent cannot be interpreted on the basis of text passages that were deleted from the description during the grant procedure. At most, statements made by the applicant or the granting authority on the understanding of the feature of a patent claim to be interpreted could be considered indicatively as an expert statement (LK Düsseldorf, order of 9 April 2024, CFI_452/2023 = ACT_589655/2023 - Ortovox Sportartikel gg. Mammut Sports and others). However, this is not the case in the dispute. In the decision submitted as Annex ASt 9, the Examining Division at the EPO appears to understand the order of the motor between the handle and the drive element solely in distinction to the deleted description passage and the order of the motor in the handle, without providing any interpretation of the patent claim. However, as stated in the receipt, this is not sufficient.

IV.

With regard to the interpretation of claim 6, there are no deviations from claim 1, so that reference is made without restriction to the above explanations on the interpretation of claim 1.

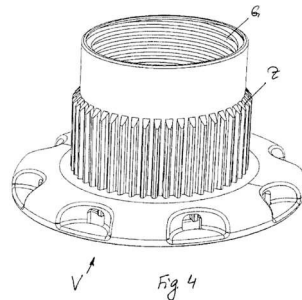
V.

The combination of the contested embodiment 1 with the contested embodiment 3 has all the features of claim 1 of the patent in suit. The same applies to the combination of the contested embodiment 2 with the contested embodiment 3. Furthermore, the contested embodiments 1 and 2 each realise all the features of claim 6 of the patent in suit.

1.

The contested embodiment 1 and the contested embodiment 3 together realise all the features of claim 1 of the patent in suit. This also applies to features 4 and 5.3 in dispute between the parties.

The tool within the meaning of feature 1.2 and features 3 to 6 is formed by the contested embodiment 1. The coupling within the meaning of features 1.1 and 2, on the other hand, is not formed by the entire contested embodiment 3, but only by the base foot reproduced below.



This is because, according to feature 2.1, the coupling is merely intended to form part of the height-adjustable leg. The leg itself (with the exception of the coupling) is not the subject of the claim and therefore not the entire embodiment 3 attacked, but only the base foot.

The drive and output elements of the contested embodiments 1 and 3 are gears within the meaning of feature 5.1. This is undisputed for the contested embodiment 1, but also applies to the contested embodiment 3. The base foot has a sleeve, the lower region of which has a toothed surface. Since the axial extension of a gearwheel within the meaning of the patent in suit is irrelevant and an integral design with other components of the coupling is also harmless, the lower region of the sleeve of the base foot of the contested embodiment 3 is in any case to be regarded as a gearwheel within the meaning of feature 5.1.

The contested embodiment 1 and the contested embodiment 3 are also designed in a complementary manner in accordance with feature 4 in order to maintain the engagement between the gears on the tool side and the toothed surface of the base foot. The defendant, on the other hand, objects that the mouth of the tool is not positioned opposite the sleeve of the

The base foot is somewhat elongated and, as a result, the gears on the tool side do not automatically engage with the cylindrical teeth of this sleeve when the jaw grips the sleeve. However, automatic engagement is not important. For a complementary design of tool and coupling within the meaning of feature 4, it is already sufficient if the gears can be brought into engagement with one another and the engagement is secured at least in one direction - be it axially or laterally in only one direction. This is the case with the contested embodiments 1 and 3. It is undisputed that the gear wheels of the tool and the toothed surface of the base foot can be brought into engagement with each other. This engagement is also laterally secured on three sides by the jaw opening of the tool with its lateral arms. The fact that the engagement in the direction of the opening of the jaw must be maintained by muscular force is harmless. It is also irrelevant that the angular position of the tool in relation to the coupling can be changed and that at a certain point the gears become disengaged from the coupling. The patent in suit does not require that the engagement is secured in every direction and in every conceivable orientation of the tool.

2.

The above remarks on the realisation of the features of claim 1 by the contested embodiments 1 and 3 apply equally to the contested embodiments 2 and 3. Tool 2 differs from tool 1 only in that it has no rollers at the outer end of the opening area. However, this is irrelevant for the teaching of the patent in suit. The combination of the contested embodiments 2 and 3 realises all the features of claim 1 of the patent in suit.

3.

Finally, the contested embodiments 1 and 2 also realise the features of claim 6 of the patent in suit. These are largely identical to the features of claim 1 insofar as the tool is concerned. Claim 6 merely does not relate to the coupling. In all other respects, unrestricted reference can be made to the comments on the realisation of claim 1.

VI.

It is also predominantly probable that the offer and sale of the contested embodiments by the defendant constitute a direct infringement of the patent in suit pursuant to Art. 25 lit. a) UPCA and an indirect patent infringement pursuant to Art. 26 UPCA, insofar as the offer and sale of isolated plinth feet are not at issue.

1.

It is undisputed between the parties that the defendant manufactures the challenged embodiments 2 and 3, offers them on its website <https://www.nehl.com/n-just/> and also places them on the market within the meaning of Art. 25 lit. a) UPCA without being authorised to do so. The offer and distribution of these embodiments in combination with

is more than likely a direct infringement of claim 1 of the patent in suit.

On the other hand, it cannot be successfully objected that the tools and the pedestals are sold as independent products. Insofar as the contested embodiments 1 and 3 are advertised together, it is a matter of offering the overall device within the meaning of patent claim 1. The same applies to the placing on the market of the overall device insofar as both embodiments are sold together. The defendant does not deny that the challenged embodiments 2 and 3 are also offered and marketed together.

However, the defendant also offers the contested embodiment 1 together with the contested embodiment 3. It is undisputed that the defendant advertises the contested embodiment 1 together with the contested embodiment 3 on its website. A corresponding prospectus is available as Annex ASt 16. The provision of such a prospectus on the website constitutes an offering within the meaning of Art. 25 lit. a) UPCA, because interested parties are to be induced to purchase the advertised product. Whether the defendant is actually willing or able to deliver or whether the contested embodiment 1 is only a prototype is irrelevant for the offering and is in any case not apparent to the interested public. Therefore, the defendant's objection that it is obvious from a consideration of the offer and the defendant's advertising that such a design as the challenged embodiment 2 is not offered does not apply either. Why this should not be the case has not been explained.

Insofar as the defendant denies having manufactured, placed on the market and used the contested embodiments 1 and 3, there is in any case a risk that the two embodiments will be manufactured and placed on the market in the future.

Art. 62(1) UPCA also permits provisional measures with regard to imminent patent infringements. In order for an imminent patent infringement to be assumed, the overall circumstances must provide concrete indications that an infringement is imminent. An imminent infringement must be characterised by certain circumstances that indicate that, although the infringement has not yet taken place, the potential infringer has already created the conditions for being able to start the infringing act immediately (LK Düsseldorf, order of 6 September 2024, UPC_CFI_165/2024 - Novartis et al. v. Celltrion Healthcare et al.).

These conditions must be assumed in the case in dispute, even if the defendant claims that the contested embodiment 1 is only a prototype that was replaced years ago by the contested embodiment 2. However, the defendant continues to offer the contested embodiment 1. This makes it appear very likely that it will continue to offer the contested embodiment 2 at a

corresponding demand into circulation. The defendant is also in a position to do so without further ado. In any case, it manufactures the contested embodiment 2, from which embodiment 1 differs only insignificantly. Production of the contested embodiment 1 appears to be possible without any problems. This is also proven by the fact that the defendant had already produced a prototype. Accordingly, there is nothing to prevent the defendant (and what would have been submitted by it) from switching directly from the manufacture and sale of the challenged embodiment 2 to that of the challenged embodiment 1.

2.

It is highly probable that the manufacture, offer and sale of the contested embodiments 1 and 2 also in themselves constitute use of the teaching of claim 6 of the patent in suit pursuant to Art. 25 (a) EPC. Insofar as the contested embodiment 1 is no longer manufactured and distributed, it must be assumed that infringement is still imminent. Reference is made to the explanations on the direct infringement of claim 1 of the patent in suit.

3.

Furthermore, it is predominantly probable that the offer and (threatened) sale of the attacked embodiments 1 and 2 constitute an indirect use of the teaching of patent claim 1 within the meaning of Art. 26 (1) EPC.

As already stated, the defendant offers the attacked embodiments 1 and 2 via its website in the Contracting Member States and supplies them (attacked embodiment 2) or threatens a future supply (attacked embodiment 1). The challenged tools are means which, as part of the overall device, are suitable for using the invention and relate to an essential element of the invention. The defendant also knows, or at least should have known, that the offerees and purchasers of the tools will use them to utilise the invention. This is because the contested tools can only be used sensibly with the coupling of a height-adjustable leg in accordance with the invention. This is exactly how the use is advertised by the defendant.

4.

Finally, the offering and distribution of the contested embodiment also constitutes 3 with the base foot in the UPC Agreement contracting member states is more likely than not to constitute an indirect infringement of patent claim 1 pursuant to Art. 26 (1) UPC Agreement, insofar as this occurs together with one of the attacked tools.

The base foot constitutes the coupling within the meaning of claim 1, i.e. as part of the overall device comprising the mould and the coupling it is suitable for use with the invention and thus constitutes an essential element of this invention.

In any event, the defendant should have known that the attacked embodiment 3 is intended for use of the invention by the offerees and purchasers if it offers or supplies the attacked furniture legs together with the attacked tools.

Even if, according to the defendant's submission, the attacked furniture feet are offered and sold as independent products, the intended use for the offered furniture feet results in principle from the fact that the defendant refers to the use of the attacked embodiment 1 or 2 together with the furniture feet. In this respect, it is to be expected that a recipient of the offer also intends to use the attacked embodiment 3 together with the tool in accordance with the patent.

However, this only applies to the supply of the contested embodiment 3 if a tool in accordance with the patent is also supplied. For then there is also the sufficiently certain expectation that the attacked furniture feet are height-adjusted with the aid of this tool. However, it cannot be assumed that every customer has such a tool and that the contested furniture legs will be installed with the aid of such a tool. If the contested furniture feet are supplied without the contested embodiment 2, it is not foreseeable with certainty that the furniture feet will be used in accordance with the patent with such a tool. On the contrary, it is rather to be expected that the feet will be adjusted without a corresponding tool.

The court has no doubt that the challenged embodiment 3 can also be used patent-free. On the one hand, it is not necessary to adjust all the feet of the piece of furniture when setting it up. Without the need for height adjustment, however, there is also no need to use a patent-compliant tool and thus also no need to use the teaching of claim 1. Furthermore, it cannot be assumed that every purchaser of the attacked furniture feet has a patent-compliant tool. Such a tool is also not required because the height of the furniture feet can be adjusted by hand. This may be associated with certain difficulties. Nevertheless, it seems likely that a not inconsiderable number of purchasers do not use a patented tool. This is because, in the absence of standardisation, such a tool is only suitable for adjusting the height of furniture legs of a certain type. Insofar as the furniture feet of different manufacturers have a comparable height adjustment technology at all, they will regularly differ in their diameter and the type of output element. Commercial customers will not have the appropriate tools for all the different types of furniture legs. This applies even less to consumers, who regularly purchase only a small number of pieces of furniture with height-adjustable feet, so that the purchase of a patented tool does not appear worthwhile. It should also be borne in mind that furniture comes in different sizes and weights. The furniture feet in particular

of smaller and lighter furniture will be easy to adjust by hand and make the use of an appropriate tool obsolete.

Insofar as the defendant primarily supplies X, nothing else arises. This customer is not a kitchen or furniture manufacturer, so that there is no patent-compliant use on the part of X. The considerations set out in the receipt apply to the customers of this company. It is completely open whether they will use the contested furniture feet together with the contested tools.

C

It is irrelevant whether the patent in suit will prove to be legally valid with a high degree of probability. In any case, after weighing up all the interests of the parties - even taking into account the objections to the legal validity of the patent in dispute - the court does not consider it necessary to issue interim measures despite the infringement of the patent in dispute.

I.

Pursuant to Art. 62(2) UPCA and Rule 211(3) RoP, the court shall, at its discretion, weigh the interests of the parties against each other, taking into account, in particular, the possible prejudice that one of the parties could suffer from the issuance of the interim measures or the dismissal of the application and, pursuant to Rule 211(4) RoP, also an unreasonable delay in applying for interim measures (cf. also UPC Agreement Court of Appeal, order of 25 September 2024, UPC_CFI_182/2024 - Ortovox Sportartikel gg. Mammut Sports Group and others; LK Munich, order of 27 August 2024, UPC_CFI_182/2024 - Ortovox Sportartikel gg.2024, UPC_CFI_74/2024 = ACT_9216/2024 - Hand Held Products gg. Scandit; LK Düsseldorf, order of 31 October 2024, UPC_CFI_347/2024 = ACT_37931/2024 - Valeo Electrification gg. Magna PT and others).

However, the aspects mentioned are not an exhaustive list of the circumstances to be taken into account when weighing up interests (see "in particular" in Art. 62 para. 2 UPCA and Rule 211 para. 3 RoP). Rather, all relevant circumstances must be included in the balancing of interests (LK Munich, order of 27 August 2024, UPC_CFI_74/2024 = ACT_9216/2024 - Hand Held Products gg. Scandit). Above all, the balancing of interests must take into account the probability of a wrong decision and also the objective urgency in the sense of the necessity of interim measures with regard to equally possible proceedings on the merits. All aspects must be weighed against each other in relation to each other (v. Falck/Dorn in: Unified Patent Court, 1st ed. 2024: Rule 211 RoP para. 28).

The need to also take these aspects into account when weighing up interests arises from the relationship between the interim injunction proceedings under Rule 206 et seq. RoP to possible proceedings on the merits. In terms of procedural law

In this respect, the main proceedings are the rule, while the summary proceedings with their summary examination and the possibility of subsequent legal defence are the exception (LK Düsseldorf, order of 31 October 2024, UPC_CFI_347/2024 = ACT_37931/2024 - Valeo Electrification/Magna PT and others). This relationship follows directly from the provisional nature of the order for interim measures. The aim is to provisionally secure the rights of the patent proprietor until the conclusion of the main proceedings. In principle, however, there is a risk that the order for interim measures will subsequently prove to be incorrect and the defendant will be wrongly prohibited from doing business because only a summary examination is carried out and the defendant is limited in his legal protection options due to the urgent nature of the proceedings. If, on the other hand, the order for interim measures is refused, the applicant is not left without rights, but can take the route provided for by the Rules of Procedure anyway and enforce his claims in the main proceedings.

On the basis of these assessments, the interests of the parties must be weighed against the question of whether it is necessary and appropriate to issue interim measures with regard to the subsequent decision in the main proceedings, i.e. whether it is unreasonable for the applicant to wait until the conclusion of the main proceedings to enforce his claims in view of the risk of an erroneous order for interim measures and the associated effects for the defendant on the one hand and the impairments associated with the continuation of the patent infringement until a decision on the merits on the other (LK Düsseldorf, order v. 31 October 2024, UPC_CFI_347/2024 = ACT_37931/2024 - Valeo Electrification gg. Magna PT and others; v. Falck/Dorn in: Unitary Patent, Unified Patent Court, 1st ed. 2024: Rule 211 RoP Rn

25). As is also indirectly apparent from Rule 206 (2) (c) and (d) RoP, a reason must be made credible that an interim measure is required that orders behaviour before the final decision that can only be definitively ordered with the decision on the merits. This is precisely why the court must also take into account any unreasonable delay on the part of the applicant pursuant to Rule 211 (4) RoP (v. Falck/Dorn in: Unified Patent Court, 1st ed. 2024: Rule 211 RoP para. 25). Special circumstances are therefore required which make the matter appear objectively urgent and make it unreasonable to wait for a decision on the merits.

These special circumstances can be justified by extraordinary damages that the authorised party is likely to suffer as a result of the patent infringement until a first-instance decision on the merits. It is true that irreparable damage is not a necessary prerequisite for the ordering of provisional measures (UPC Agreement Court of Appeal, order of 25 September 2024, UPC_CoA_182/2024 - Ortovox Sportartikel gg. Mammut Sports Group and others; ECJ, decision of 28 April 2022, C-44/21, para. 32 - Phoenix/Harting). However, it must be taken into account that every patent infringement and the time delay associated with its prosecution in the main proceedings until an injunction decision at first instance is typically associated with a time delay.

limited continuation of the impairment of the applicant's rights. According to the interpretation of the law, these impairments are to be accepted in principle, unless there are special circumstances that make interim measures appear necessary and required (LK Düsseldorf, order of 31 October 2024, UPC_CFI_347/2024

= ACT_37931/2024 - Valeo Electrification gg. Magna PT and others). In any case, there must be special circumstances for the adoption of interim measures that make it appear unreasonable to wait for a decision in the main proceedings.

Such special circumstances may be, for example, that the infringing product is a seasonal article and waiting for the main proceedings would result in the business of an entire season being affected (see LK Düsseldorf, order of 9 April 2024, UPC_CFI_452/2023 = ACT_589655/2023 - Ortovox Sportartikel gg. Mammut Sports et al.), or that the infringing product is a product that has been adapted to the needs of the customer by means of a longer-lasting process, which can no longer be easily replaced by a product of the patent holder after the conclusion of the supply agreement (see LK Düsseldorf, order of 31 October 2024, UPC_CFI_347/2024 = ACT_37931/2024 - Valeo Electrification gg. Magna PT and others). It is also conceivable, for example, that the term of protection of the patent is about to expire and that waiting for the main proceedings would mean that the patent proprietor would no longer be able to enforce its claim for injunctive relief at all. It is also possible that the infringing product is offered at a significantly lower price than the patentee's product and that there are other circumstances that make it unreasonable for the patentee to wait until a first instance decision on the merits, for example because the lower prices are perpetuated by setting fixed prices or agreeing discount agreements and a price erosion sets in that cannot be corrected or because it is a one-off sales campaign that deprives the patentee of customers on a large scale.

II.

Measured against these principles, the applicant's interest in obtaining an interim injunction does not outweigh the respondent's interest in clarifying the matter in proceedings on the merits. The applicant can reasonably be expected to await the decision in such main proceedings, which could have been expected in the second half of 2025 if the applicant had brought an action on the merits instead of an application for interim measures.

1.

The balancing of interests cannot be carried out separately from the interim measures that the court can order pursuant to Art. 62(1) and (3) UPCA and Rule 211(1). In the case in dispute, the applicant seeks the issuance of an interim prohibition order pursuant to Art. 62(1) UPCA and Rule 211(1)(a) RoP. However, in this respect

different embodiments and infringing acts.

An unrestricted prohibition order can be considered with regard to the manufacture, offer and sale of the combination of the contested tool and the contested base. The same applies to the offer and sale of the contested tools alone, because they can only be used in accordance with the patent.

With regard to the contested base feet, however, a prohibition per se, which would completely prohibit the offer and sale of this embodiment, cannot be imposed from the outset. This is because the contested embodiment 3 can in principle be used patent-free. This possibility of patent-free use cannot be prohibited to the defendant. However, a limited prohibition not to offer or supply the challenged embodiment without a warning or the acceptance of a contractual penalty promise is also out of the question. This is because an indirect patent infringement only appears predominantly probable if the attacked embodiment 3 was offered or supplied together with the attacked tools. In contrast, indirect patent infringement cannot be assumed for the isolated supply of the attacked embodiment 3. However, it would then be sufficient to prohibit the applicant from offering or supplying the attacked embodiment 3 together with the attacked embodiment 1 or 2.

2.

The applicant has not presented any reasons that make the adoption of interim measures appear necessary from a factual point of view. She bears the burden of presentation and proof for the facts justifying the necessity of the interim measure, Rule 206 (2) (d) RoP.

a)

The applicant has not submitted in the documents any extraordinary damage that could be caused by the further distribution of the contested designs until a decision on the merits at first instance. They cannot be established even after her further submission at the hearing.

aa)

First of all, it must be taken into account that the isolated sale of the contested plinth feet is possible without a patent and cannot be considered for a damage assessment.

bb)

With regard to the challenged tools, the defendant claimed to have sold a total of around 750 units, most recently around 200 units per year, with a total turnover of EUR 18,500. The applicant disputed this submission. However, she herself has

only stated at the hearing that it had sold a total of around 3,600 of its own tools. Accordingly, the defendant's market share is significantly smaller and, when viewed in isolation, does not lead to any significant damage on the part of the applicant. In addition, even in the event of a ban on the further distribution of the challenged tools, the applicant would not be able to take over the market share of the defendant without further ado. Not only is the applicant in competition with the suppliers of other tools for adjusting the height of furniture legs, with whom it has to compete for this market share, but the applicant's tools are also not compatible with the plinth feet sold by the defendant. Customers of the contested embodiment 3 will not purchase the applicant's tools to adjust the plinth feet.

cc)

The applicant therefore also argued for the first time at the hearing that the money was not earned with the tools and that the damage directly associated with the sale of these tools was not decisive. Rather, it was the furniture feet that were important. This is because customers of the challenged tools, such as carpenters, kitchen fitters and installers, would continue to purchase the furniture feet of the defendant, which are compatible with this tool, in the future and beyond the end of the term of protection of the patent. It - the applicant - sells around 330,000 furniture feet per month that are compatible with the tool it offers and sells. That is about 4 million furniture feet per year with a turnover of about EUR 6 million at an average price of EUR 1.50. If one assumes the number of 750 tools sold as reported by the defendant, the applicant would suffer (consequential) damage of the equivalent of around EUR 1 million as a result of the sale of the compatible furniture feet.

However, the applicant is unable to prevail with this argument. The so-called "lock-in" effect described by the applicant cannot be established, nor can the damage calculated by the applicant. The defendant disputed the claimant's submission in this regard at the hearing. However, contrary to Rule 206 (2) (d) RoP, the applicant has not submitted any reliable evidence that customers are actually tied to the defendant and the defendant's furniture legs compatible with this tool to a significant extent by the purchase of a challenged tool and that the applicant thereby suffers the damage alleged by it.

Rather, it is plausible that it depends on the respective customer whether they have a tool for adjusting furniture legs at all and then purchase compatible furniture legs. Consumers are excluded from this consideration from the outset because they generally do not have tools for adjusting furniture legs, do not buy them for the one-off installation of a kitchen or individual pieces of furniture and only rarely purchase furniture legs in isolation. Companies that do have and use tools for adjusting the height of furniture legs are usually those that do,

who install kitchens and furniture. If these are service providers for the kitchen and furniture retail trade, such as joineries, they will not purchase furniture legs either. They assemble the kitchens and furniture as they are supplied by the retailer. If in doubt, they have various tools to adjust the different types of furniture legs. The decision as to which furniture legs are used is made by the furniture or kitchen builder. However, if they do not assemble the kitchens and furniture themselves because they sell them as an industrial manufacturer or because a service provider or even the private end customer does this themselves, they will have no particular interest in purchasing or installing furniture legs depending on a specific tool for adjusting these legs. Ultimately, the price for purchasing the furniture legs will be relevant for him. A certain degree of customer loyalty would therefore only be conceivable for carpenters and other furniture and kitchen manufacturers who assemble the furniture and kitchens they produce themselves. However, a significant "lock-in" effect cannot simply be assumed for this segment either. Ultimately, the price of tools and the price difference in furniture legs will also be decisive. It does not seem unlikely that a cabinet maker or kitchen fitter will buy several different tools. They may also be inclined to switch to a different supplier due to significantly cheaper furniture legs, with the consideration that the purchase of a tool from this supplier will soon pay for itself.

The applicant has not made any specific comments on all of this. It is not clear to what extent furniture legs are actually purchased by customers who install the kitchens and furniture they manufacture themselves. In no case will it be possible to draw direct conclusions from the number of furniture legs sold that are compatible with the applicant's tool as to the extent to which sales of the contested embodiment 3 are generated by the sale of the contested embodiment 2. Even less can it be deduced from this that this is accompanied by extraordinary damage on the part of the applicant. The defendant has also pointed out that it sells the attacked embodiments to X. This company is neither active in the production nor in the trade of furniture and kitchens, nor is it involved in their installation. It appears to be ruled out that X obtains the challenged embodiment 3 from the defendant because it also previously acquired the challenged embodiment 2. However, it is unclear which customers X has and for what reasons they purchase the contested furniture legs. It is not apparent that sales of the attacked embodiment 3 are dependent on the number of attacked embodiments 2 sold. This is also contradicted by the fact that the defendant submitted undisputedly at the oral hearing that the turnover generated by it with the attacked tool increased in the past, whereas the turnover with the attacked furniture legs stagnated. A "lock-in" effect on the part of the defendant cannot be established.

The mere fact that the defendant and its customer, X, continue to distribute the contested designs does not suggest that it is a matter of

is such a profitable business that the applicant will suffer extraordinary damage.

dd)

The applicant also argued at the hearing that the subsequent calculation and enforcement of the damage caused by the distribution of the contested designs would be associated with difficulties, so that it could not reasonably be expected to wait until a decision on the merits. The damage from the indirect infringement was to be based on the use by the customers, which could hardly be clarified. This applies all the more if the customers of the X had to be taken into account. Likewise, the consequential damages associated with the direct infringement could hardly be clarified by the subsequent distribution of the challenged embodiment 3. The enforcement of a recall claim would also be associated with a loss of reputation on the part of the applicant, which would also be contrary to reasonableness.

These objections also do not weigh in its favour when weighing up the interests at stake. The applicant merely lists the typical consequences of legal enforcement for direct and indirect patent infringement. These are not special circumstances that make it unreasonable to wait until a first instance decision on the merits. Above all, the Unified Patent Court has not yet established any case law on the question of which damages are to be regarded as based on contributory patent infringement and are to be compensated. The uncertainties associated with this, as well as the effort involved in clarifying consequential damages, do not make it unreasonable to wait until a first-instance decision on the merits.

b)

For special circumstances, the applicant further invokes in its documents that even if the patent infringement itself may not be sufficient for a factual necessity of interim measures, it is nevertheless unreasonable for the patent holder to accept the market confusion associated with the sale of the infringing product alongside the original product and a competitive relationship unjustifiably established by the patent infringement. However, the applicant only presents possible circumstances in abstract terms that are intended to justify the need for interim measures. However, there is a lack of specific circumstances for the individual case at hand. The applicant has provided no evidence that market confusion has actually occurred and what this confusion is supposed to consist of. However, insofar as the applicant wishes to rely on the fact that a patent infringement is regularly accompanied by market confusion and an unjustified competitive relationship, these are not special circumstances that make it appear unreasonable to wait for a decision on the merits.

Apart from this, market confusion and an unacceptable competitive relationship cannot be assumed in the case in dispute. The defendant has already been on the market for many years with the contested designs. A major customer of the challenged products is X, which resells the products under its trade mark. However, market confusion cannot have occurred with regard to X because it is aware of the property rights situation. It is even a party to the proceedings before the Düsseldorf Regional Court. As far as the other customers are concerned, it is not apparent that they have any idea of the applicant's products and that a misconception about the original product has now arisen as a result of the long-standing distribution of the attacked embodiments.

Finally, it cannot be assumed without further substantiation that a preliminary injunction would change the competitive situation on the market for height-adjustable furniture legs and the tools required for this. The challenged furniture legs are in principle patent-free anyway, as long as they are not offered or supplied with patent-compliant tools. As far as the tools are concerned, there are - as already explained - other suppliers of tools of a different design on the market, so that the applicant continues to be in competition.

c)

When weighing up the interests of the defendant, it must be taken into account that it has been on the market with the challenged products for many years and has a regular customer for its products in X. This established supply relationship would be destroyed if the defendant were now temporarily prohibited from selling the challenged products. The disproportion between the defendant's long-standing market presence with the challenged products and the patent infringement now asserted by way of interim relief arises from the fact that the patent in dispute was not granted until July 2024 and thus about ten years after its filing date. The reason for this is that the patent in suit is based on a divisional application which the applicant only filed for grant at a late stage. Even if the applicant is thus only making use of the legal options available to it under patent law, it cannot be completely disregarded in the context of a balancing of interests whether an infringer only enters the market with its product after the patent has been granted or the patent is only granted after the infringing product has been on the market for many years. In the former case, the infringer appears less worthy of protection than in the latter case, because he could certainly foresee the patent infringement.

3.

The applicant's interest in finally obtaining an injunction under the aspect of temporal urgency in order to be able to counter the further distribution of the challenged designs does not outweigh the lack of factual necessity for the adoption of interim measures. Rather, in the case in dispute it appears

It is also not necessary from a temporal point of view to prohibit the defendant from offering and selling the contested designs.

a)

The applicant cannot be accused of having unreasonably delayed the enforcement of the patent in suit by way of an application for interim measures. The period of waiting within the meaning of Rule 211(4) RoP is to be measured from the date on which the applicant has or should have had such knowledge of the infringement as to enable it to make a promising application for provisional measures under Rule 206(2) RoP (UPC Agreement Court of Appeal, order of 25 September 2024, UPC_CFI_182/2024 - Ortovox Sportartikel gg. Mammüt Sports Group and others). Since the reference to the grant of the patent was not published until 3 July 2024 and the application for unitary effect was not granted until the decision of 12 July 2024, it was only from one of these dates that knowledge of an infringement could exist and an application for interim measures could be initiated. This application was filed on 26 July 2024 and thus without undue delay.

However, the mere fact that the applicant was in a position to apply for interim measures within one month of the grant of the patent and did not wait unreasonably does not in itself establish objective urgency and thus the need for interim measures (see LK Düsseldorf, order of 31 October 2024, UPC_CFI_347/2024 = ACT_37931/2024 - Valeo Electrification gg. Magna PT and others; v. Falck/Dorn in: Einheitspatent, Unified Patent Court, 1st ed. 2024: Rule 211 RoP para. 25). Rule 211 (4) RoP links the requirement of objective urgency with the subjective right of the applicant. The provision expresses the fact that an applicant whose behaviour already subjectively indicates that he is not in a hurry cannot expect any help from an order for interim measures. The reverse conclusion, however, that interim measures are to be ordered just because the applicant is in a hurry, does not apply. Rather, the order for interim measures must also be objectively urgent.

b)

Therefore, the applicant in the dispute also relies on the fact that it had already brought an action against the challenged embodiments before the Düsseldorf Regional Court in November 2021 on the basis of EP 603, but that these proceedings were suspended and, after EP 603 was upheld to a limited extent in November 2023, a new date for oral proceedings was not scheduled until May 2025. It had thus exhausted all legal options, so that in view of the defendant's years of infringements of its - the applicant's - property rights, it could no longer reasonably be expected to wait any longer.

This is not convincing. It is true that EP 603, like the other utility model pending before the Düsseldorf Regional Court, belongs to the same family of industrial property rights as the patent in suit. Nevertheless, these are different industrial property rights with a different scope of protection. A possible infringement of these property rights is therefore not in principle able to justify the urgency of proceedings arising from the patent in dispute. Even less can the duration of the proceedings before the Düsseldorf Regional Court justify urgency in the present proceedings, because it is not clear why the failure, for whatever reason, to enforce other property rights than the patent in dispute before the Düsseldorf Regional Court should be to the detriment of the defendant. Rather, it is the applicant's risk that it has not yet been able to enforce the other property rights of the property right family before the Düsseldorf Regional Court. Whether there would not even have been ways to enforce the other property rights earlier does not need to be decided against this background.

4.

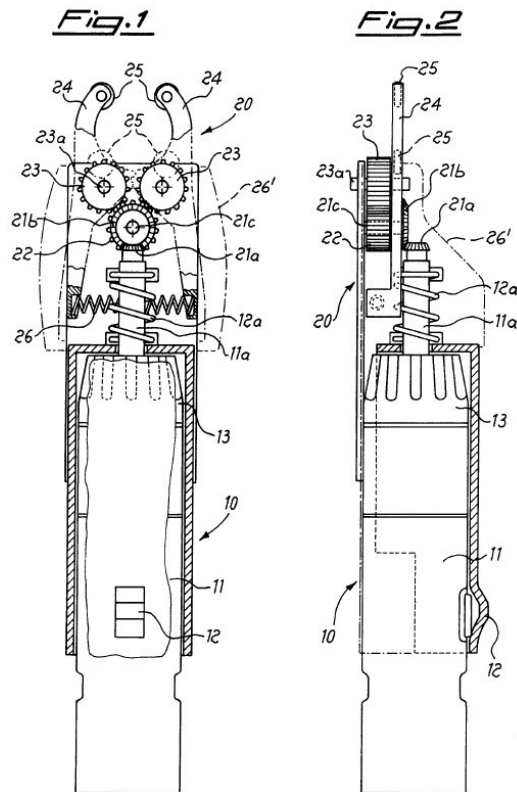
If, as in the case in dispute, the weighing of interests leads to the conclusion that the order of provisional measures is not necessary, the legal validity of the patent in dispute is no longer relevant. Irrespective of this, the court has doubts about the novelty of the patent in dispute, which carry additional weight in the balancing of interests and also prevent an order for provisional measures.

a)

The doubts as to the novelty of the patent in suit cannot be dispelled simply by referring to the fact that the defendant participated in the grant procedure with objections and that the European Patent Office nevertheless granted the patent in suit (cf. Annex ASt 9). This may represent a favourable prognosis for the outcome of the opposition proceedings for the applicant. Similarly, statements made by the European Patent Office in the grant proceedings may be regarded as expert opinions which the court must consider. However, it must be taken into account that, in addition to the opposition proceedings, an action for revocation is also pending before the Central Chamber in Munich, for the outcome of which the grant of the patent in dispute by the European Patent Office is not indicative. In any case, the court must form its own judgement of the legal situation. If reasonable objections to patentability cannot be dismissed out of hand without further ado, doubts as to the legal status are appropriate, which weigh in favour of the defendant in the balancing of interests.

b)

Doubts as to the novelty of the teaching of the patent in suit are substantiated in the case in dispute by EP 0 904 899 A2 (= D8), from which Figures 1 and 2 are reproduced below.



It is - rightly - largely undisputed between the parties that D8 discloses features 1.1 to 3.2.1 and 4 to 6 of claim 1 (features 1.1 to 2.3.1 and 3. and 4. of claim 6) of the patent in suit.

However, it can also be argued with good reason that D8 discloses feature 3.2.2 (feature 2.3.2 of claim 6), according to which the motor must be arranged between the handle and the drive element. It is true that the description of the first embodiment of D8 states that the handle 10 accommodates the motor 12 in its interior. However, this does not exclude the teaching of the patent in suit when correctly interpreted. According to the teaching of claims 1 and 6 of the patent in suit, the handle and the motor can certainly overlap as long as the handle extends beyond the motor on the other side of the drive element. This is directly and clearly disclosed in Figures 1 and 2 of D8. D8 only distinguishes between the housing 10 forming the handle itself and the part 20 for the engagement and for actuating the nut. However, according to Figures 1 and 2 of D8, the housing 10 extends axially beyond the motor 11. In addition, the rear area of the housing can be unambiguously understood as a handle because it is undoubtedly suitable for holding and handling the tool with one hand. If the tool is gripped with one hand in this rear area of the housing 10, the user can still move the switch 12 for starting up the tool with his thumb. He also has a larger lever to better counteract the torque when operating the tool. However, this rear area of the housing with the handle extends well beyond the motor 11. The fact that the

The fact that the tool can also be (additionally) gripped in other areas of the housing is irrelevant.

Insofar as the Examining Division at the European Patent Office has stated in response to the objections of third parties that all the cited documents and thus also D8 do not disclose feature 3.2.2, this is not sufficient to dispel the existing doubts. The examining division appears to have interpreted feature 3.2.2 with a view to deleting the alternative order of the motor within the handle. However, the specific reasons for the Examining Division's decision to grant the patent remain open because it does not make any comments on the interpretation of the patent in suit. There are reasonable grounds which, in the opinion of the court, speak in favour of the interpretation represented here, with the consequence that D8 directly and unambiguously discloses feature 3.2.2 (claim 1) or 2.3.1 (claim 6). Even if the European Patent Office does not follow this view in the opposition proceedings, it cannot be ruled out that the remaining doubts will lead to the cancellation of the patent in suit. The patent in suit is challenged with an action for revocation before the central division, which will form its own opinion on the interpretation of the patent in suit and its patentability. In this respect, the understanding of the Examining Division is not an indication of the outcome of the nullity proceedings.

Finally, the objection that the nut 30 shown in D8 cannot form a coupling for forming a height-adjustable leg due to a lack of sufficient axial length and therefore a lack of axial overlap with a threaded sleeve also remains unsuccessful; the entire device is not suitable for setting height-adjustable legs. However, a specific height of the coupling is neither expressly required by claim 1, nor does it result from the purpose of the coupling to serve as part of a height-adjustable leg. In any case, the nut 30 can be used as a coupling as shown in Figure 12 of the patent in suit.

c)

The above remarks on D8 can be applied without restriction to ITRE 20100070 A1 (= D9), which also discloses, among other things, a tool that is even expressly described as being usable for support means with adjustable height (para. [0008] of Annex CBH 16-D9'). According to D9, the tool and threaded body are therefore suitable for adjusting height-adjustable legs. The D9 also explicitly discloses that a motor 41 is provided, which is arranged within the handle 22 (para. [0050] of the appendix CBH 16-D9'). Figure 4 shows that the handle 22 extends beyond the motor and thus discloses feature 3.2.2 (claim 1) or feature 2.3.2 (claim 6).

D

The determination of the value in dispute in the amount of EUR 500,000.00 takes into account the damage caused by the

patent infringement, which makes an amount of only EUR 250,000 appear
i n a p p r o p r i a t e .

ORDER

1. The application for interim measures is dismissed.
2. The applicant shall bear the costs of the proceedings.
3. The amount in dispute is set at EUR 500,000.00.

INFORMATION ON LEGAL REMEDIES

In accordance with Art. 73 UPCA and Rule 220 (1) RoP, the unsuccessful party may appeal against this order to the Court of Appeal within 15 calendar days of service of this order.

DETAILS OF THE ORDER

Order no. ORD_62433/202433

UPC number:

UPC_CFI_443/2024

No. of the associated procedure Application no.: 43563/2024

Type of application:

Application for interim measures (R. 206 VO)

Ulrike Voß (presiding judge)	
Dr Daniel Voß (legally qualified judge)	
Dr Walter Schober (legally qualified judge)	
Merja Heikkinen-Keinänen (technically qualified judge)	
For the Deputy Chancellor	

Note:

This document is the redacted version of the order intended for the public. It is without the signatures of the judges involved and the Representative of the Deputy Chancellor valid.

Daniel
Voss

Digitally signed by
Daniel Voß Date:
2024.11.25
16:18:31 +01'00'