



## Brussels - Local Division

**ORD\_7825/2025**  
App\_6987/2025  
App\_7312/2025  
App\_7916/2025  
General Procedural Request  
ACT\_25743/2024  
UPC\_CFI\_216/2024  
Infringement claim

**UPC\_CFI\_216/2024 UPC\_CFI\_556/2024**  
**Order (Order) in application of R. 9 RoP**  
**From the Court of First Instance of the Unified Patent Court (UPC) Local Division**  
**Brussels**  
**Referred to 20 February 2025**

**PLAINTIFF / DEFENDANT ON COUNTERCLAIM:**

**CRETES NV:** Bissegemstraat 169 - 8560 - Wevelgem (Belgium)

Represented by: Mr. Pieter Callens, Mr. Fay Reynaert, Mr. Hans Verstrepen,  
lawyers, with offices at 8500 Kortrijk, President Kennedypark 30A;  
Ms Ellen Crabbé, patent attorney, with offices at 9051 Sint-Denijs-  
Westrem, Pottelsberghelaan 24 (Belgium).

**DEFENDANT/PLAINTIFF ON COUNTERCLAIM:**

**HYLER BV:** Oude Gentstraat 28A - 8760 Meulebeke (Belgium)

Represented by: Mr Kristof Roox, Mr Eline Van Bogget and Mr Margaux Dejonghe,  
lawyers, with offices at 1000 Brussels, rue Joseph Stevensstraat 7  
(Belgium);  
Messrs Paul Hylarides and Anson Van Rooij, patent attorneys, with offices  
at 5611 Eindhoven (Netherlands), Emmasingel 23.

**OCROOI(S) SUBJECT TO THE DISPUTE**

*Patent no.*

- EP3993602
- EP4284152

*Patent holder(s)*

CRETES NV  
CRETES SA

**LANGUAGE OF PROCEDURE:**

DUTCH

**PANEL/DIVISION:**

Lower Division (Brussels) with the panel : Chairman / Judge-

Rapporteur: **Samuel Granata**  
Legally qualified judge: **András Kupecz**  
Legally qualified judge: **Daniel Voss**  
Technically qualified judge: **Bernard Ledeboer**

**DECIDING JUDGE:**

The present procedural decision (order) was issued by the panel (Chamber).



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## I. PROCEDURAL BACKGROUND

1. In the procedural order of 7 October 2024, the General Court dismissed the parties (viz. NV CRETES (hereinafter **CRETES**)(claimant in the infringement claim (UPC\_CFI\_216/2024) and defendant in the counterclaim seeking annulment (UPC\_CFI\_556/2024)) and BV HYLER (hereinafter: "**HYLER**") (defendant in the infringement claim (UPC\_CFI\_216/2024) and plaintiff in the counterclaim seeking annulment (UPC\_CFI\_556/2024)) informed that the date of the *Statement of Defence* (16 September 2024) would be considered determinative and invited the parties to position on streamlining the infringement (UPC\_CFI\_216/2014) and invalidity (UPC\_CFI\_556/2024) proceedings.
2. Subsequent writs were transmitted to the Tribunal on 26 October 2024:
  - from HYLER: "*The parties also agree that the date of notification of the Statement of Defence in the infringement proceedings, in particular 16 September 2024, shall be considered determinative of the deadlines in the invalidity proceedings.*"
  - from CRETES: "*Firstly, the parties confirm their agreement that the date of notification by the UPC of the Statement of Defence in the infringement proceedings, namely 16 September 2024, shall be considered determinative of the deadline for both Reply to the Statement of Defence and Defence to the Counterclaim for Revocation.*"
3. On 15 November 2024, a Friday evening, at 10.22pm (see CMS registration), CRETES uploaded its "*Reply to the Statement of Defence*" (UPC\_CFI\_216/2024) in the CMS. The CMS will further show that the "*Defence to the Counterclaim for Revocation*" (UPC\_CFI\_556/2024) was not loaded into the until 22 November 2024 (3.24pm). HYLER will then upload its *Rejoinder to the Reply to the Statement of defence* (UPC\_CFI\_216/2024) and the *Reply to the to the Counterclaim for Revocation* (proceeding UPC-CFI\_556/2024) into CMS on 16 January 2024.
4. On 11 February 2025, CRETES filed this general procedural request (R. 9 RoP) (request number (and workflow) App\_6987/2025).
5. The application seeks in the main order that the *Rejoinder to the Reply to the Statement of defence* (UPC\_CFI\_216/2024) and the *Reply to the Defence to the Counterclaim for Revocation* (proceeding UPC-CFI\_556/2024) be withdrawn from the debates as filed on 16 January 2025 instead of 15 January 2025 and this in application of R. 29(d) RoP (juncto R. 300(c) RoP).
6. Further (and subordinately), the present application seeks to exclude from the debates (at a minimum) margin numbers 506 to 510 of HYLER's *Rejoinder to the Reply to the Statement of defence* (UPC\_CFI\_216/2024) and the *Reply to the Defence to the Counterclaim for Revocation* (proceeding UPC-CFI\_556/2024) and, more specifically, the following parts:(i) the newly introduced non-infringement argument based on new variants of the FL20, (ii) new exhibit I.21 by (HYLER) and (iii) the new claim for a finding of non-infringement by (HYLER). The legal basis relied upon in this regard concerns Preamble 7 of the RoP in conjunction with R. 24(e) to (h) RoP and R. 29(e) RoP.



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7. Extremely subordinately, CRETES requests that an additional period be granted to it as an "*additional response option*" to protect the rights of defence. This request is grounded on the application of R. 36 RoP.
8. Before awaiting an interim order from the Tribunal, HYLER filed a general procedural R. 9 RoP as a defence to CRETES' application on 13 February 2025. This application was assigned the application number (and workflow) App\_7312/2025.
9. On 15 February 2025, an interim order ordered HYLER to upload its defence to CRETES' application in workflow App\_6987/2025 by Monday 17 February 2025 (4pm), after which the parties were informed that the Tribunal would then proceed to issue a final order in both App\_6987/2025 and App\_7312/2025.
10. HYLER complied with this order of the General Court, allowing it to proceed to assess the application.
11. On 17 February 2025, CRETES filed a new general procedural request (R. 9 RoP) which was assigned the request number (and workflow) App\_7916/2025. This request concerns a response to HYLER's defence (reproduced in App\_7312/2025). In its preliminary order dated 15 February 2025, the JR, in addition to ordering HYLER to this defence in App\_6987/2025, indicated that it would proceed to final order after its execution. The Court disregards the new R. 9 RoP application, and disregards the contentions contained therein in the light of the interim order of 15 February 2025, which did not give CRETES an opportunity to make further submissions.

## **II. PROGRESS AND ARGUMENTATION**

12. CRETES' request formally seeks the following
  - *In chief order:*  
*barring the Rejoinder to the Reply to the Statement of defence including the Reply to the Defence to the Counterclaim for Revocation of (HYLER) from the debates.*
  - *In subordinate order:*  
*rule that (i) the new non-infringement argument made on the basis of new variants of the FL20, (ii) new Exhibit I.21 of (HYLER) and (iii) the new claim for a finding of non-infringement of (HYLER) (...); and, consequently, exclude from the debates edge numbers 506-510 of the Re-joinder to the Reply to the Statement of defence including the Reply to the Defence to the Counterclaim for Revocation, piece I.21 of (HYLER) and the new claim for a finding of non-infringement of (HYLER).*
  - *In extremely minor order:*  
*grant an additional reply option to the applicant to respond to the new non-infringement argument and claim and accompanying Exhibit I.21 of (HYLER) in order to safeguard its rights of defence.*
13. In its defence, HYLER argued/claimed as follows:
  - *In Main Order:* declare the claim of (CRETES) for expulsion from the debates of the *Rejoinder to the Reply to the Statement of defence including the Reply to the Defence to the Counterclaim for Revocation of (HYLER)* as unfounded;
  - *In subordinate order:* the deadline for filing the *Rejoinder to the Reply to the Statement of defence including the Reply to the Defence to the Counterclaim for Revocation of*



(HYLER) retroactively extend by one day, taking into account the principles of honour, fairness and proportionality;

- Also in main order: declare as unfounded the claim of (CRETES) for expulsion from the debates of marginal numbers 506-510 of the *Rejoinder to the Reply to the Statement of defence* including the *Reply to the Defence to the Counterclaim for Revocation*, piece 1.21 of (HYLER) and the new claim for a finding of non-infringement of (HYLER);
- In subordinate order: grant (CRETES) an additional period of one week to respond to margin numbers 506-510 of the *Rejoinder to the Reply to the Statement of defence* including the *Reply to the Defence to the Counterclaim for Revocation*, piece 1.21 of (HYLER) and the new claim for a finding of non-infringement of (HYLER);
- In extremely subordinate order: if the claims of (HYLER) as set out in this letter are rejected, allow (HYLER) to file an official response, through the CMS platform or otherwise, to the general procedural request of (CRETES); and
- In any case: to the extent necessary and technically possible, include this general procedural request on the CMS platform as a (preliminary) response to the general procedural request of (CRETES).

### III. REASONS FOR THE DECISION

#### III.1. On the request for expulsion from the debates of "Rejoinder to the Reply to the Statement of Defence" (UPC CFI 216/2024) and the "Reply to the Defence to the Counterclaim for Revocation" (proceedings UPC-CFI 556/2024)

##### III.1.1. Exchange of letters between counsel for HYLER and CRETES regarding procedural agenda

14. First of all, the Tribunal (i.e. the Brussels Local Division as the Chamber) is obliged to make use of the correspondence exchanged between counsel in its assessment. The Tribunal is aware that such correspondence should be considered confidential, but in the absence of a competent President of the Bar and/or Bar Association at UPC level, who could possibly take a decision about the agreements made between its members on the basis of confidential correspondence and a code of ethics, the Tribunal is obliged to make an assessment using this confidential correspondence. The Court will limit itself to the factual data that were quoted (without quoting from the confidential exchange of letters).
15. It appears from the confidential correspondence between the counsels, concretely a first draft by HYLER's counsels, that the latter wished to send the JR a concrete agenda for conclusions. Although this proposed conclusion agenda mentioned successive deadlines after the filing of certain written arguments, it was concretised by indicating subsequent dates:
  - 16 November 2024 for CRETES to file its "*Defence to the Counterclaim*" together with the "*Reply to the Statement of Defence*" and, if necessary, an "*Application to amend the patent*".
  - 16 January 2025 for HYLER to file "*Reply to the Defence to the Counterclaim*" together with the "*Rejoinder to the Reply to the Statement of Defence*" and, if applicable, "*Defence to an Application to amend the patent*".



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- 16 February 2025 for CRETES for the "*Rejoinder to the Reply to the Defence to the Counterclaim*" if necessary together with a "*Reply to the Defence to an Application to amend the patent*".
16. The above agenda was not in itself disputed. However, CRETES will argue that it saw no added value in displaying the concrete conclusion agenda and for this reason it was omitted in the communication to the JR.
  17. In the light of the above, the Tribunal finds that between the parties, a statutory (conclusive) time-limit regime reflected in the RoP was waived and replaced by a concrete (date-related and not deadline-related) conclusive agenda.
  18. Such agreed statement agenda may be allowed by the Tribunal if it does not substantially deviate from the statutory (deadline-related) statement agenda reflected in the rules (RoP). The schedule of submissions agreed between the parties is perfectly in line with the statutory (time-related) agenda of proceedings as only the (statutory) deadline for filing submissions was agreed. At no time does this compromise the procedural agenda per se for consideration of the case.
  19. The fact that CRETES filed its *Defence to the Counterclaim* together with the *Reply to the Statement of Defence* on 15 November 2024 instead of 16 November 2024 does not thwart these agreements.
  20. It should also be noted that the "*Reply to the Statement of Defence*" in UPC\_CFI\_556/2024 was only uploaded by CRETES into CMS on 22 November 2024 (3.24pm) around which HYLER apparently never made a point (and was itself 7 days late). Therefore, in the strict reading of CRETES, this could mean that this was late and would have all but allowed HYLER to reply until 22 January 2025.
- III.1.2. For the sake of completeness, the circumstances of the case justify the (formal) application of R. 29 RoP does not and neither do the claims for revocation of the *Rejoinder to the Reply to the Statement of defence* (UPC CFI 216/2024) and the *Reply to the Defence to the Counterclaim for Revocation* (proceedings UPC-CFI 556/2024).
21. The Tribunal notes that CRETES uploaded its "*Defence to the Counterclaim*" together with the "*Reply to the Statement of Defence*" on 15 November 2024 (in UPC\_CFI\_216/2024) in the CMS on a Friday evening at 10.22pm (see also above regarding its upload in UPC\_CFI\_556/2024). This relates to 1h 44min prior to the deadline provided in the RoP. Indeed, in a strict application of the RoP, HYLER had to file its "*Reply to the Defence to the Counterclaim*" together with the "*Rejoinder to the Reply to the Statement of Defence*" on 15 January 2025 (and this no later than 23.59h). However, it uploaded them to CMS on 16 January 2025 (6.34pm). The Tribunal fails to see how this affected CRETES' rights of defence. CRETES uploaded its "*Rejoinder to the Reply to the Defence to the Counterclaim*" in the CMS on 15 February 2025 (without making any reservation in this regard).



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22. Furthermore, HYLER's filing on 16 January 2025 of its "*Reply to the Defence to the Counterclaim*" together with the "*Rejoinder to the Reply to the Statement of Defence*" did not in any way jeopardise the procedural agenda (as neither did the agreed conclusive agenda - see marginal 18), so that the norm purpose of R. 29 RoP was not affected either.
23. Finally, it should be noted that CRETES did not submit this application to the Tribunal until 11 February 2025. The alleged failure of HYLER to comply with the time-limit does not call for any detailed investigation on the part of CRETES. If its rights were really affected, it could have made such an application to the General Court as early as 16 January 2025. However, it waited until February 11, 2025. Despite the fact that no deadline is set regarding such an application for expulsion, its filing on 11 February 2025 cannot be brought in line with the principles of fairness and equity and is considered not litigation-loyal.

### III.1.3. Decision

24. The General Court dismisses as unfounded the application originating from CRETES for expulsion from the debates of the *Rejoinder to the Reply to the Statement of defence* (procedure UPC\_CFI\_216/2024) and the *Reply to the Defence to the Counterclaim for Revocation* (procedure UPC\_CFI\_556/2024).
25. Given that the Tribunal could reach an assessment on the basis of the above considerations, it can abstract from additional defences formulated by HYLER.

### III.2. Concerning the request for exclusion from the debates of (at least) margin numbers 506 to 510 of HYLER's "Rejoinder to the Reply to the Statement of defence" (UPC CFI 216/2024) and the "Reply to the Defence to the Counterclaim for Revocation" (proceedings UPC-CFI 556/2024), and more specifically: (i) the newly introduced non-infringement argument based on new variants of the FL20, (ii) new exhibit I.21 of (HYLER), and (iii) the new claim non-infringement of (HYLER)

26. CRETES argues that in its "*Rejoinder to the Reply to the Statement of Defence*" (UPC\_CFI\_216/2024) and the "*Reply to the Defence to the Counterclaim for Revocation*" (proceedings UPC-CFI\_556/2024), HYLER formulated "*a completely new part regarding the alleged non-infringement of its machine on EP 4 284 152*". In doing so, it also allegedly used a new piece of I.21. (which would entail modifications to be made to the machine leading to a finding of non-infringement), which HYLER articulates in a new form of order/defence ("*To hold that the modifications and proposed variants (see marginal numbers 506-510) made by (HYLER) lead to a finding of non-infringement as regards EP 4 284 152*").

#### III.2.1. The claim seeking a finding of non-infringement by HYLER

27. The General Court ruled in favour of averting the said claim and reasoned as follows:

28. A non-infringement claim is reflected in Section 32(1)(b) UPCA as a separate nature of claim ("*actions for the declarations of non-infringement of patents and supplementary*").



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*protection certificates*") over which the UPC has jurisdiction. In addition, this claim is based on facts that were neither provided by HYLER in its infringement claim nor can it be considered as a claim that fits into the procedural economy in response to a position allegedly taken by HYLER in its *"Reply to the Statement of defence"* (UPC\_CFI\_216/2024) and/or the *"Defence to the Counterclaim for Revocation"* (proceedings UPC-CFI\_556/2024).

29. In order for such a claim to be allowed or not, an application under R. 263 RoP (*"Leave to change claim or amend case"*) should have been made to the Tribunal and the procedure shown should have been followed. No such application was made to the Tribunal (prior to raising the non-infringement claim in the *"Rejoinder to the Reply to the Statement of defence"* (UPC\_CFI\_216/2024) and the *"Reply to the Defence to the Counterclaim for Revocation"* (proceedings UPC-CFI\_556/2024) so the claim will be disregarded in current state of the proceedings.
30. It is appropriate here to point to the UPC Court of Appeal's decision of 21 November 2024 (UPC\_CoA\_456/2024), which provided examples of circumstances that necessitate the application of R. 263 RoP (see paragraph 23 of law):

*(23) "Not every new argument is modification of the case for which a party must apply for leave under R. 263 Pr. Modification of the case occurs when the nature or scope of the dispute changes. For example, in an infringement case, this occurs if the plaintiff invokes a different patent or objects to a different product."*

In an *a contrario* application of the above consideration, the Court finds that raising the non-infringement claim in relation to new, intended products, or at least product variants, changes the nature and scope of the dispute.

Incidentally, HYLER failed to convince the Tribunal that this claim could not have been brought *"with reasonable diligence"* earlier (see marginal 34).

### III.2.2. New non-infringement argument line and new piece

31. The Tribunal ruled against disregarding both the non-infringement argument and the new document (I.21) for the purpose of assessing the dispute and reasoned as follows:
32. First of all, the Court reiterates the UPC Court of Appeal's paragraph 23 reproduced above and finds that the reasoning and accompanying/supporting document (I. 21) changes the nature and scope of the dispute (see also UPC CFI, Paris Central Division, 18 December 2024, *Tandem Diabetes Care v Roche Diabetes Care* with reference to the above-mentioned Court of Appeal order of 21 November 2024).
33. Further, and in line with the foregoing, reference is made to R. 29(c) RoP which explicitly states that the *"Rejoinder to the Reply to the Statement of Defence"* should be limited to a response to the arguments/assertions (*"matters"*) provided in the *Reply to the Statement of Defence*. This rule is consistent with and should be interpreted in the light of the *front-loaded*



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nature of the UPC proceedings, in which parties are required to present their "full case" as early as possible in the proceedings (Preamble RoP, 7, cf. RoP 24 RoP, from which it follows that, in principle, the defence must be set out in full in the *Statement of Defence*). HYLER's line of argument by no means complies with these legal restrictions but involves a new line of argument, which the Court does not regard as a response to the arguments/statements set out in the *Reply to the Statement of Defence* by CRETES.

34. Finally (and in support of the above), HYLER does not convince the Court as to why HYLER did not submit the new variants earlier (and concretely in its *Statement of Defence*) so that CRETES was in a position to include them in its *Reply to the Statement of Defence*. The argument developed by HYLER that they were not available earlier is not, in the court's view, convincing. HYLER was in every way in a position make the appropriate efforts to present a full defence after receiving the *Statement of Claim*. No argument can be found in the "*Reply to the Statement of Defence*" that would compelled HYLER to formulate this line of argument (and additional document) only in its "*Rejoinder to the Reply to the Statement of Defence*".

### III.2.3. Decision

35. In application of the above, margin numbers 506 to 510 of HYLER's "*Rejoinder to the Reply to the Statement of defence*" (UPC\_CFI\_216/2024) and the "*Reply to the Defence to the Counterclaim for Revocation*" (proceedings UPC-CFI\_556/2024) are disregarded for further assessment of the dispute.

### III.3. On the request for an additional one-week deadline to respond to the new non-infringement argument and claim

35. In light of the foregoing, the request to grant an additional one-week deadline to respond to the new infringement argument and claim was thrown without object.

## IV. APPEAL

36. In application of R. 333 (5) RoP, an appeal is allowed against this final order.

## V. DECISION

### The General Court

1. **Dismisses claim in main order as unfounded.**
2. **Judge that the claim is well founded in subordinate order as .**
3. **At the present stage of the proceedings, disregard the following parts of the *Rejoinder to the Reply to the Statement of defence* including the *Reply to the Defence to the Counterclaim for Revocation* for the further assessment of the dispute :(i) the non-infringement argument based on new variants of the FL20, (ii) piece I.21 of BV HYLER and (iii) the**









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claim for a finding of non-infringement by HYLER BV and consequently marginal numbers 506-510 from the "*Rejoinder to the Reply to the Statement of defence*" including the "*Reply to the Defence to the Counterclaim for Revocation*".

4. Verdict that the claim in extremely minor order no longer any object.
5. State appeal to against this final order. Appeal may be in- filed within 15 days of service ("*service*") of this decision (R. 224.1(b) RoP in conjunction with R. 220.2. RoP).

Referred to **20 February 2025**

<p>Samuel <b>GRANATA</b> Legally qualified judge</p> <p>Judge Reporter</p>	<p>Samuel Rocco M Granata</p>  <p>Digitally signed by Samuel Rocco M Granata Date: 2025.02.20 21:27:24 +01'00'</p>
<p>András <b>KUPECZ</b> Legally qualified judge</p>	<p>András Ferenc Kupecz</p>  <p>Digital unterschrieben von András Ferenc Kupecz Date: 2025.02.20 20:44:20 +01'00'</p>
<p>Daniel <b>Voss</b> Legally qualified judge</p>	<p>Daniel Voß</p>  <p>Digital unterschrieben von Daniel Voß Date: 2025.02.20 20:39:53 +01'00'</p>
<p>Bernard <b>Ledeboer</b> Technically qualified judge</p>	<p>Bernard Christiaan Ledeboer</p>  <p>Digitally signed by Bernard Christiaan Ledeboer Date: 2025.02.20 21:12:27 +01'00'</p>

Decision details

Decision number:

UPC Number:

Action number:

Related Procedure:

Nature of the Claim:

ORD\_7825/2025

UPC\_CFI\_216/2024

UPC\_CFI\_556/2024

ACT\_25743/2024

APP\_6987/2025

APP\_7312/2025

APP\_7916/2025

General Procedural Request