

Decision (R. 265 RoP)
of the Court of First Instance of the Unified Patent Court
Issued on 4 December 2025
Concerning EP 3 302 292 B1

HEADNOTES

As the Court previously held (cf. LD Düsseldorf - UPC_CFI_355/2025 and UPC_CFI_186/2025 – Fujifilm/Kodak), the focus of appropriateness “*is primarily on the amount of costs incurred*” and this from an *ex ante* perspective. When assessing these costs, elements which could be taken into consideration (having regard to the specific circumstances of a withdrawal of an action) are inter alia: the value in dispute together with the ceiling, the significance of the case, the moment of withdrawal in the procedural agenda and the difficulty and complexity of the relevant legal and factual issues. Such an approach should indeed be favoured as it focuses on objectified elements without the necessity for the Court to assess more subjective elements which could interfere with the right of defence and, specifically, the freedom to strategically organize such defence. Assessing the “costs” as such from an “*ex ante*” starting point by applying objectified elements (dependent on the circumstances of the case) to assess “*reasonability and proportionality*” safeguards the access to the UPC (as a claimant or a defendant).

KEYWORDS

- Cost Decision (R. 265 RoP)
- Unnecessary costs (Art. 69(3) UPCA)
- Exceptional circumstances (Art. 69(2) UPCA)
- Reasonable and proportionate legal costs (Art. 69(1) UPCA)

APPLICANT

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Hereinafter the “*Applicant*”

DEFENDANTS:

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2. Establishment Labs S.A.

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3. PulseLavage AB



UPC_CFI_415/2025

Represented by: Mr. Stefan Lieck (Bardehle Pagenberg Partnerschaft MBB)
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Hereinafter jointly referred to as the “*Defendants*”, or individually as “*Defendant 1/2/3*”

PATENT AT ISSUE

Patent no. *Proprietor(s)*
EP 3 302 292 B1 **CooperSurgical, Inc.**

LANGUAGE OF THE PROCEEDINGS: ENGLISH

SUBJECT MATTER OF THE PROCEEDINGS

Request for withdrawal of the Infringement Action (R. 265 RoP)

PANEL/LOCAL DIVISION

The Panel (LD Brussel) consists of the following judges:
President – Judge-Rapporteur / Legally Qualified Judge: Samuel Granata
Legally Qualified Judge: Camille Lignieres
Legally Qualified Judge: Marjolein Visser

DECIDING JUDGES:

This order is issued by the panel comprising the judges above mentioned.

PROCEDURAL BACKGROUND (EPO- AND UPC-PROCEEDINGS)

1. On 30 April 2024, Defendant 3 introduced opposition proceedings before the EPO regarding EP 3 302 292 B1 (hereafter referred to as the “*Patent*”), which were held admissible on 31 May 2024. On 20 March 2025, the Applicant was summoned by the EPO (Opposition Division) for an oral hearing. Along with the summons, the EPO issued a preliminary opinion in which none of the requests were deemed allowable (i.e. neither the granted claims nor the auxiliary requests) (hereafter referred to as the “*Preliminary Opinion*”).
2. On 9 May 2025, the Applicant introduced its action for infringement (Statement of Claim) before the UPC (hereafter referred to as the “*Action*”) against the Defendants. This gave rise to servicing issues, which were solved by issuing a procedural order dated 11 August 2025 as follows:
 - (i) Extension of the term for lodging the Statement of Defence and the Counterclaim for Revocation related to UPC_CFI_415/2025 (specifically until 31 October 2025); and
 - (ii) Acknowledgement that Defendant 2 was willing to accept electronic servicing on its representative (Mr. Ward).
3. The oral hearing was held at the EPO (Opposition Division) premises on 30 September 2025. At the end of the hearing, the EPO (Opposition Division) revoked the patent and, as such, confirmed its Preliminary Opinion.

4. On 15 October 2025, the Applicant requested the withdrawal of the action due to the EPO (Opposition Division)'s decision of 30 September 2025. In its application dated 15 October 2025, the Applicant requested and argued the following:

“we apply, on behalf of the Claimant, to withdraw the action ACT_22042/2025.

We further request, that

 - I. the parties bear their own costs;*
 - II. 60% of the court fees are reimbursed to the Claimant.*
5. On 20 October 2025 the Judge-Rapporteur issued a procedural preliminary R. 265 order (I) and invited the Defendants to comment on the Application for Withdrawal, which the Defendants uploaded in the CMS within the provided timeframe.
6. In short, the Defendants agreed to the withdrawal of the action but also disputed the request made by the Applicant for *“the parties to bear their own costs”*. Where Defendant 1 - 2 already introduced a confidential document *“Requests for Costs – Details of Defendant 1 and 2’s costs”*, Defendant 3 limited itself to requesting a decision in principle and informing the Court that they would introduce on a later date its application for a cost decision.
7. Further, the Defendants requested the Court to issue a R. 265 RoP decision urgently and this due to the lapse of the term for their Statement of Defence and (if necessary) Counterclaim for Revocation on 31 October 2025.
8. On 24 October 2025 the Judge-Rapporteur issued a procedural preliminary R. 265 RoP order (II) stipulating the following:
 1. *Extends the term for lodging the Statement of Defence and the Counterclaim for Revocation related to UPC_CFI_415/2025 (ACT_22042/2025) to 5 December 2025.*
 2. *Orders*
 - *Defendant 3 to submit its (calculated) request for the reimbursement of costs the latest by 30 October 2025 (6 PM CEST).*
 - *The Applicant to upload to the CMS its comments on the already argued and calculated request for the reimbursement of costs by Defendant 1 – 2 and the to be submitted calculated request for the reimbursement of costs by Defendant 3 the latest by 10 November 2025 (6 PM CEST).*
 3. *Orders the Registry to keep the document titled “Request for Costs – Details of Defendant 1 and 2’s costs” (uploaded as a separate document on 23 October 2025) and the response as a whole uploaded on 20 October 2025 of a confidential nature in the sense of R. 262 (2) RoP.*
9. On 28 October 2025, the Applicant submitted a (separate) application requesting the following:
 - I. a decision be given, declaring the proceedings UPC_CFI_415/2025 / ACT_22042/2025 closed (R. 265.2(a) RoP);*
 - II. the decision as per item I. shall be entered in to the register (R. 265.2(b) RoP);*
 - III. it is ordered that the Parties shall bear their own costs (R. 265.2(c) RoP);*
 - IV. 60% of the court fees shall be reimbursed to the Claimant.*

On 30 October 2025, the Judge-Rapporteur set aside the aforementioned application as inadmissible due to a lack of procedural basis in the RoP (preliminary R. 265 RoP order (III)). The Court also informed the parties in the same order that requests identical to those in the application submitted on 15 October 2025 would be assessed after the written submissions process, as scheduled in the preliminary R. 265 RoP order (II).

10. On 31 October 2025, the Court received the calculated request (with exhibits) from Defendant 3.
11. On 10 November 2025, the Court received a request from the Applicant for an extension to the deadline, which was also on 10 November 2025. This request was granted in a preliminary R. 265 RoP order (IV), which was issued on the same day and included an order (cf. R. 156.1 RoP) for Defendants 1–2 to submit, by 13 November 2025, a detailed overview of the costs for which compensation is requested, together with written evidence of these costs. The Judge-Rapporteur requested that the overview be accompanied by an explanatory note limited to four pages. Based on this term for Defendants 1–2, an extension of time was granted to the Applicant until 20 November 2025.
12. Along with the above submissions, the Court received confidentiality requests from all parties. The Judge-Rapporteur defined the confidential information for each request and established a confidentiality circle in its orders (R.262 and R.262A RoP), issued on the following dates:
 - 7 November 2025 (upon request from Defendant 3)
 - 17 November 2025 (upon request from the Defendant 1-2)
 - 20 November 2025 (upon request from the Applicant)
13. The factual circumstances to which the parties refer in their submissions can be summarized as follows:

Date	Action
30 April 2024	Opposition Proceedings initiated by Defendant 3 before the EPO
20 March 2025	EPO summons the parties to an oral proceedings and issues its Preliminary Opinion.
9 May 2025	Statement of Claim (Action) introduced at the UPC
11 August 2025	Procedural Order by the Court setting the date (on 31 October 2025) for the Statement of Defence and the (possible) Counterclaim for Revocation
30 September 2025	Oral Hearing EPO (Opposition Division) followed by a decision to revoke the Patent
15 October 2025	Application for withdrawal introduced by the Applicant
31 October 2025	Date on which the Statement of Defence / Counterclaim for Revocation were to be expected by the Court which by preliminary procedural R. 265 RoP order (II) was extended to 5 December 2025.

GROUND S OF DECISION

I. WITHDRAWAL OF THE ACTION

14. The decision to withdraw the action follows the parties’ jointly expressed will and as such is granted.

II. REIMBURSEMENT OF COURT FEES

15. The order to reimburse the Applicant 60 % of the court fees is based on R. 370.11, R. 370.9(b)(i) RoP and as such is granted.

III. RECOVERABLE COSTS

A. THE REQUESTS

16. While the Applicant argues that parties should bear their own costs of proceedings, the Defendants requested the reimbursement of the following sums:

	Type of Cost	Broken down Cost Request
Defendant 1-2	Representation Costs	
	Expenses and Costs	
	Total	
Defendant 3	Representation Costs	
	Expenses	
	Total	

B. ARGUMENTS OF THE PARTIES

17. On 19 November 2025, the Applicant submitted comments on the request for recoverable costs. Along with the Application for Withdrawal submitted on 15 October 2025 and the (dismissed) application submitted on 28 October 2025, the arguments of the Applicant can be summarised as follows:

- Based on the circumstances of the case, the Applicant holds that, in application of R. 152.2 RoP, the Court has the discretion to order the parties to bear their own costs or apportion them equitably in "exceptional circumstances". The Applicant identifies the following "exceptional circumstances":

- Based on the procedural Order issued on 11 August 2025, setting the date of the Statement of Defence/Counterclaim for Revocation, the Court made sure that the parties could take the outcome of the opposition and the decision of the EPO into account with respect to their further handling and preparation of the case.
- Further, with their submission of 20 October 2025, Defendant 1-2 claim that the summons to the oral EPO opposition proceedings included the Preliminary Opinion. Taking this opinion into account, the Applicant holds that it would have been reasonable for the Defendants to wait for the outcome of the opposition hearing on 30 September 2025 prior to engaging into any substantial work on the Statement of Defence and Counterclaim for Revocation in order to reduce any unreasonable and unnecessary costs on their part.
- Further, the Applicant holds that at the latest with the decision of the EPO (Opposition Division) of 30 September 2025 to revoke the Patent, it would have been sensible for the Defendants to limit their efforts in preparing their submissions to a minimum. The Defendants could have reasonably expected a procedural reaction by the Applicant after the first instance decision of the EPO (Opposition Division) shortly after the hearing date. Defendant 3, as opposing party before the EPO (Opposition Division), had knowledge of the outcome of its opposition at the day the decision was made.
- As the Applicant applied for the withdrawal of the Action on 15 October 2025, and therefore, in its opinion without undue delay after the decision of the EPO (Opposition Division). The Applicant argues that the delay in submitting its actual Application for Withdrawal finds its basis in the need to consider the next procedural steps.
- Synthesizing, the Applicant holds that, exceptional circumstances are present in the case at hand: a decision on validity of the Patent was expected and available prior to Defendant's obligation to comment in substance on the claim for infringement and introducing a Counterclaim for Revocation.
- Accordingly and in application of R. 69(2) UPCA, equity requires that the parties shall bear their own costs of the proceedings.
- Subsidiary, the Applicant deals with the application of R. 152.1. RoP where it argues that based on mentioned rule (and cited jurisprudence) that the term "*reasonable*" should be interpreted as "*necessary*". Further, the Applicant argues based on the evidence brought forward by the Defendants, it is not possible to assess the cumulative conditions of "*reasonability and proportionality*". Finally, the Applicant addresses the concrete arguments and costs brought forward per Defendant (going into a detailed argumentation related to the costs of representation, the costs for experts and other costs and expenses).

18. The Defendants argue as follows:

- Since the Applicant requested the withdrawal of the Action, it should be considered the "*unsuccessful party*".
- The Applicant launched UPC proceedings while the EPO (Opposition Division) proceedings were underway.
- Before initiating the UPC-proceedings, the EPO (Opposition Division) had issued summons to an oral proceedings containing a Preliminary Opinion (indicating that none of the requests

made by the Applicant were allowable (i.e. the claims as granted and the narrower auxiliary requests)).

- The Applicant's decision on whether or not to initiate or at least continue proceedings before the UPC seemed to depend on the EPO's (Opposition Division) decision. Therefore, the Applicant could have waited to initiate proceedings before the UPC until such decision. As the Applicant did not await this decision from the EPO (Opposition Division), the Defendants had to seek legal advice and prepare to defend themselves upon the introduction of the Action. More concrete the Defendants hold that the advice pertained to whether or not preliminary objections were at order, issues related to the servicing and prepare a draft of a Statement of Defence and Counterclaim for Revocation to be filed on 31 October 2025.
- Due to mentioned timeline the costs made are considered by Defendant 1-2 as "*unnecessary costs*" that the Applicant should bear in application of Art. 69 (3) UPCA. Defendant 3 does not seem to put forward this line of argument.
- The proceedings before the UPC are front-loaded which means that most of the expenses for Defendants is to prepare the Statement of Defence and (possible) Counterclaim for Revocation. The deadline for these documents (31 October 2025) was only two weeks away at the time of the Application for Withdrawal (15 October 2025). The Defendants hold that it would be *absurd* to hold that Defendants could have awaited the outcome of the EPO (Opposition Division) prior to engaging in any substantial work on the Statement of Defence and the Counterclaim for Revocation. This would mean that the Defendants time for replying to the Statement of Claim would be reduced from 3 months to 1 month.
- The Claimant could have withdrawn its Action earlier (i.e. on or short after 30 September 2025), leaving a month between such withdrawal and the Statement of Defence and the Counterclaim for Revocation.
- There is no indication that Claimant would withdraw its Action even if the EPO (Opposition Division) would not have upheld the Patent. Rather, the fact that an Action was introduced (having knowledge of the Provisional Opinion) indicates that the Applicant would most probably appeal should the outcome of the EPO (Opposition Division) -proceedings have confirmed the Provisional Opinion.
- The Applicant was aware of the risk when introducing the Action pending the EPO proceedings (taking into consideration the Provisional Opinion) that they could be considered the "*unsuccessful party*" when withdrawing its Action and had to reimburse the reasonable and proportionate legal costs.
- Given all of the above it should be held *equitable* that the Applicant should bear the full costs made by the Defendants.
- The arguments of the Applicant are illogical where it holds that "*if the EPO had dismissed the opposition, the infringement would have been successful*". The Defendants holds firstly that such a consideration cannot be found in Art. 69 UPCA. And secondly, the Defendants hold that even if the patent had survived the opposition proceedings (in granted or amended form), this does not automatically lead to a finding of infringement.

- Regarding the concrete requested costs and expenses the Defendants, additionally, argue that these are lower than the ceiling (either calculated based on the Action being an infringement action and for sure if a Counterclaim for Revocation would have been introduced).

C. PRINCIPLES ON COST DECISIONS

19. R. 265.2(c) RoP provides that a decision on costs is to be taken in accordance with Part 1, Chapter 5.
20. Art. 69 UPCA states as follows (in its relevant sub-numbering):
1. *Reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity requires otherwise, up to a ceiling set in accordance with the Rules of Procedure.*
 2. *Where a party succeeds only in part or in exceptional circumstances, the Court may order that costs be apportioned equitably or that the parties bear their own costs.*
 3. *A party should bear any unnecessary costs it has caused the Court or another party.*
- (...)
- R. 150.1 RoP states which costs and expenses a cost decision should cover as follows:
- "(...) The cost decision shall cover costs incurred in the proceedings by the Court such as costs for simultaneous interpretation and costs incurred pursuant to Rules 173, 180.1, 185.7, 188 and 201 and, subject to the Rules 152 to 156, the costs of the successful party including Court fees paid by that party [Rule 151(d)]. Costs for interpretation and translation which is necessary for the judges of the Court in order to conduct the case in the language of proceedings are borne solely by the Court."*
- R. 152.1 RoP states as follows:
- "The applicant shall be entitled to recover reasonable and proportionate costs for representation."*
21. R. 152.1. RoP explicitly uses the wording "*reasonable and proportionate*" with regard to costs for representation. Such wording cannot be found in other rules concerning recoverable costs (e.g. R. 153 RoP (compensation for expert costs), R. 154 RoP (compensation for witness costs) and R. 155 RoP (compensation for interpreter and translator costs)). However, the Court refers to the relevant article. 69(1) UPCA, which states that all "*legal costs and other expenses*" must be held to be "*reasonable and proportionate*".

D. ASSESSMENT

D.1. “Unnecessary Costs” : Application of Art. 69(3) UPCA

22. Before assessing the application of Art. 69(1) and (2) UPCA, the Court should determine whether the costs and expenses, on which Defendant 1–2 *inter alia* base their request for reimbursement, could be considered “*unnecessary costs*” (Art. 69(3) UPCA).
23. The reimbursement of costs based on Art. 69(3) UPCA is independent of which party should be considered “*successful*” or “*unsuccessful*” (cf. Art. 69(1) UPCA).
24. The Court holds that the introduction of the Action pending EPO (Opposition Division) proceedings (even including the Preliminary Opinion) is a fundamental right for the Applicant (access to justice part of the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights, and the right to an effective remedy under Article 13 of the ECHR and Article 47 of the Charter).

Neither the UPCA, nor the RoP provide an indication that infringement proceedings cannot or should not be *introduced* pending EPO (Opposition Division) proceedings and/or pending EPO (Opposition Division) proceedings if a preliminary opinion would limit the changes of success for the infringement proceedings. Rather than denying access to the UPC (justice), Art. 33(10) UPCA state that the Court “*may stay its proceedings when a rapid decision is expected from the European Patent Office*” and R. 295(a) RoP state that the Court “*may*” stay proceedings “*where it is seized of an action relating to a patent which is also the subject of opposition proceedings or limitation proceedings (including subsequent appeal proceedings) before the European Patent Office or a national authority where a decision in such proceedings may be expected to be given rapidly*”. As staying the proceedings is only an option for the Court (which following the Court of Appeal decision dated 28 May 2024 (UPC_CoA_22/2024) is a discretionary power of the Court taking into consideration the balance of interest of the parties), this article and rule (implicitly) indicate that infringement proceedings can be initiated pending EPO (Opposition Division) proceedings.

25. A claimant would take a certain risk (in view of the prospects of success of infringement proceedings) when introducing infringement proceedings before the UPC if such EPO (or national) (Opposition Division) proceedings are pending and, even more, if a preliminary opinion (known to the claimant before the introduction of infringement proceedings) would indicate that the patent might not be upheld. However, even if the risk were high, this does not imply that the costs of the opposite party are to be considered “*unnecessary*”. These costs are considered to be *necessary* in order to defend itself against the claims made by the claimant, and as such Art. 69(3) UPCA does not apply.

D.2. “Exceptional Circumstances”: Application of Art. 69(2) UPCA

26. The Court should then assess whether, based on “*exceptional circumstances*” (Art. 69(2) UPCA), parties should be ordered to bear their own costs irrespective of whether these costs are “*reasonable and proportionate*” in the sense of Art. 69(1) UPCA, as argues by the Applicant.
27. Where the Applicant holds that the Defendants could have awaited the outcome of the opposition proceedings before incurring any costs related to the Action, including the preparation of the Statement of Claim and Counterclaim for Revocation, the Court holds that there are no “*exceptional circumstances*” to be identified within the meaning of Art. 69(2) UPCA.

Although the Applicant has the right to initiate infringement proceedings (see §24), they have taken a risk themselves (see §25), which they cannot pass on to the Defendants. The Defendants should not have altered their reasonable procedural behaviour when preparing their defence and, if necessary, their Counterclaim for Revocation. The Court holds that the Defendants have acted as any cautious and reasonable defendant would have acted. Furthermore, given the EPO (Opposition Division) procedural background, it was reasonable for the Defendants to assume that the Applicant would appeal the EPO (Opposition Division)'s decision if it confirmed its Preliminary Opinion. Therefore, the costs and expenses incurred by the Defendants and/or the circumstances in which they were incurred cannot be considered “*exceptional*” within the meaning of Art. 69(2) UPCA.

28. The Applicant further holds that as it introduced its R. 265 RoP Application for Withdrawal on 15 October 2025 without “*undue delay*” following the EPO (Opposition Division) hearing and outcome on 30 September 2005, any actions or costs incurred after 30 September 2005 should be considered “*exceptional*” under Art. 69(1) UPCA. The Applicant argues that the delay in submitting its actual Application for Withdrawal finds its basis in the need to consider the next procedural steps. The Court does not follow this line of argument.

Any cautious and reasonable applicant, upon receiving the Preliminary Opinion, would have evaluated, well before the EPO's (Opposition Division) actual decision, the steps it might take should the EPO (Opposition Division) confirm their Preliminary Opinion. The Court, therefore, holds that the Applicant did act with “*undue delay*” in submitting the R. 265 RoP Application for Withdrawal two weeks after the EPO (Opposition Division) confirmed its Preliminary Opinion, knowing that this would be only two weeks before the Statement of Defence and Counterclaim for Revocation had to be submitted. Conversely, any cautious and reasonable defendant would have perceived such delay as an indication that the Applicant would appeal the decision of the EPO (Opposition Division) and continue the infringement action, and would have processed their Statement of Defence and Counterclaim for Revocation accordingly (due on 31 October 2025).

D.3. Application of Art. 69(1) UPCA

29. As the costs and expenses are not considered to be “*unnecessary*” (cf. R. 69(3) UPCA) and no “*exceptional circumstances*” can be identified (cf. R. 69(2) UPCA), the Court should finally assess the application of Art. 69(1) UPCA.

D.3.a. “*successful party*” and “*unsuccessful party*”

30. The Court holds that given the withdrawal following the decision by the EPO (Opposition Division), the Applicant should be considered the “*unsuccessful party*” and the Defendants the “*successful parties*” (cf. UPC_CoA_232/2025). As such and as a “*general rule*” the costs and expenses incurred by the Defendants should be borne by the Applicant.

D.3.b. “*Reasonable and proportionate legal costs and other expenses*”

31. The assessment whether the legal costs and other expenses are “*reasonable and proportionate*” (see §21) is to be applied to these costs and other expenses which are sufficiently proven.

32. As previously determined by this division in UPC_CFI_131/2025 (LD Brussels) on 25 July 2025, the following principles must be observed when evaluating a request for reimbursement of recoverable costs in accordance with the applicable standards and burden of proof:

- The (claimed payment of) costs are presented by the defendants as “*facts*”. Should these facts be disputed, pursuant to Article 54 UPCA and R. 172.1. RoP, it is incumbent upon the Defendants to provide evidence in support of the “*fact*” they have presented.
- It goes without saying that if the Defendants are most suitable to present evidence on these “*facts*”, they are obliged to submit such evidence to the Court.
- The Court sees neither a reason nor a legal basis why the burden of proof and standard of proof on the part of the Defendants in the context of cost proceedings should be different from or lower than that applicable to other “*facts*” presented in UPC proceedings. The Defendants refer to traditions in the United Kingdom and Germany regarding the standard of proof, but as mentioned, neither the UPCA nor the RoP states an exception to the standard of proof related to facts to be proven if they relate to recoverable costs.

33. The Defendants provide their invoices, proof of payments, an overview of billed and non-billed hours (at the time of submitting their submissions) and a (brief) description of the work performed. The difficulty at hand is that indeed neither the respective Statements of Defence nor the Counterclaims for Revocation have been submitted, due to the application for withdrawal 2 weeks before their due date. As such the Court does not have (objective) elements to fall back on to assess the work performed as being “*reasonable and proportional*”. The only references that the Court can fall back on are one-sided overviews of the hours billed

and/or work in progress, along with brief descriptions of the tasks performed to substantiate these hours.

34. A further difficulty is that, although the Applicant is to be considered the “*unsuccessful party*” (see §30), this is not based on an assessment of arguments developed by the “*successful party*”, but merely on the withdrawal of the infringement action (and this before arguments were put forward by the Defendants). So even if actual Statements of Defence and Counterclaims for Revocation would have been submitted, the assessment of the Court of recoverable costs being “*reasonable and proportional*” (or not) is hypothetical. To actually assess whether the costs made are “*reasonable and proportional*” would demand the Court assess these arguments as if the case had not been withdrawn. The Court holds that such an assessment should be avoided for procedural efficiency reasons.
35. It is further important to note that, with regard to representation costs, there is a freedom of defence, and more specifically, the freedom to strategically organise such defence. It is indeed up to the respective Defendants to discuss with their representative(s) how to organise their defence. Regarding the financial implications of the opted for strategy, the Defendants could rely on the objective figures in the Decision on “*Recoverable Costs Ceilings*” adopted by the Administrative Committee on 24 April 2023 (hereafter referred to as “*Ceilings Decision*”), which indicate the maximum amount of representation costs that can be recovered. However, there is no obligation for the Defendants and/or the representatives to limit their recoverable costs to such a ceiling.
36. Taking into consideration the very specific circumstances of the case (withdrawal 2 weeks before the Statement of Defence and Counterclaim for Revocation are due), the Court could be compelled to appoint an expert (lawyer and/or accountant) to go through the actual time sheets of the billed hours and advise the Court whether the work executed is in line with what could be expected from a “*reasonable and cautious*” representative. Again the Court holds that such an approach should be avoided for procedural efficiency reasons.
37. As the LD Dusseldorf previously decided the focus of appropriateness “*is primarily on the amount of costs incurred*” and this from an *ex ante* perspective (i.e. in this Action before the Defendants knew that the case would be withdrawn) (cf. LD Dusseldorf - UPC_CFI_355/2025 and UPC_CFI_186/2025 – Fujifilm/Kodak). When considering these “*costs*” elements to be taken into consideration in this individual case are the value in dispute together with the ceiling (as a last resort), the significance of the case, the moment of withdrawal in the procedural agenda and the difficulty and complexity of the relevant legal and factual issues. Such an approach should indeed be favoured as it focuses on objectified elements without the necessity for the Court to assess more subjective elements which could interfere with the right of defence and the freedom to strategically organize such defence (see §30). Having the “*costs*” as such as an “*ex ante*” starting point (assessing them based on objectified elements dependent on the circumstances of the case) with regard to the reasonability and proportionality safeguard the access to the UPC (as claimant or defendant), also for SME’s.

D.3.c. Recoverable costs Defendant 1-2

D.3.c.1. *Costs for Representation*

38. Based on the above, the Court finds that the costs for representation as requested by Defendant 1-2 are not "*reasonable and proportionate*". In the specific circumstances of this case, the Court considers an amount of €100.000,00 to be "*reasonable and proportionate*" costs for representation. The following elements were taken into consideration:

- (i) The Court already held that, as the Applicant introduced their Action after having received the Preliminary Opinion and further referring to the delay between the decision of the EPO (Opposition Division) and the introduction of the Application for Withdrawal, any cautious and reasonable defendant would perceive that the Applicant would appeal the decision by the EPO (Opposition Division). Therefore, any reasonable defendant would indeed timely prepare its Statement of Defence together with its Counterclaim for Revocation pending the EPO (Opposition Division) proceedings and also further process these documents between 30 September 2025 and the Application for Withdrawal. The guidelines for determining court fees and recoverable costs (24 April 2003) (hereafter referred to as the "*Guidelines*") state in Art. 2(b)(ii) that "*the value of the revocation counterclaim may be assumed to be equal to the value of the infringement action (II.1.a) above, plus up to 50%*", which would result in a case value of €4.250.000.
- (ii) The Court has no elements to assess the significance of the case and considers this therefore average.
- (iii) The Action was withdrawn before the actual due date of the Statement of Defence and the Counterclaim for Revocation. This relatively early withdrawal should be counterbalanced however with the fact that proceedings before the UPC are front-loaded, implying that parties should as much as possible bring forward their arguments in their first written submission. As the due date of their Statement of Defence and Counterclaim for Revocation was only 2 weeks away from the Application for Withdrawal (R. 265 RoP), the Court accepts that a relative important amount of the strategic and intellectual work (together with their costs) in preparation of such Statement of Defence and Counterclaim for Revocation would have been performed before the Application for Withdrawal. However, taking into consideration that the deadline to submit was due in 2 weeks from the date of the Application for Withdrawal, the Court also takes into consideration that some work was still to be expected to be executed to fine-tune the Statement of Defence and Counterclaim for Revocation.
- (iv) The Court considers the difficulty and complexity of the relevant legal and factual issues to be relatively low. No preliminary objections were raised and the Action is represented in the statement of claim as straightforward (direct) infringement. While the length of the arguments is not an objective measure of value, it is worth noting

that the Statement of Claim was only 46 pages long, whereas the draft Statement of Defence and Counterclaim for Revocation are expected to be 33 and 80 pages long (based on the information submitted by Defendant 1-2), respectively. Regarding the Counterclaim for Revocation, the Court should refer to the Preliminary Opinion (to which defendant 1 -2 had access through their coordinated approach with Defendant 3) and the actual decision by the EPO (Opposition Division). Similarly, the Court notes that the defences and counterclaim to be put forward by all Defendants are expected to be very similar (Defendant 3 is the manufacturer of the alleged infringing product; Defendant 1 is the distributor of the alleged infringing product; and Defendant 2 is the operating holding company of the group and, along with Defendant 1, the main point of contact regarding the alleged infringing product).

39. Where the above elements already determine an amount to be "*reasonable and appropriate*", the Court also considered the applicable ceiling based on the value of the case. Based on the Ceiling Decision, this would imply a ceiling of €400.000. This ceiling is based on proceedings reaching a final decision or order (deciding on infringement and validity) which would imply several additional written arguments (with a possibility for the Applicant to amend the claims), an interim phase and an oral hearing. However, the present case was withdrawn two weeks before the Statement of Defence and the Counterclaim for Revocation were expected. Considering the aforementioned objective elements based on the specific circumstances of the case, it seems rational that such a ceiling could also be set at the aforementioned amount of €100.000.

D.3.c.2. *Other Expenses*

40. Regarding the "*other expenses*" requested by Defendant 1-2, the Court holds that [REDACTED]

[REDACTED] As such the costs [REDACTED]
is granted and this for the amount of € 5.757,90.

D.3.d. Recoverable costs Defendant 3

D.3.d.1. *Costs for Representation*

41. Defendant 3 proves to have paid up to its last submissions a sum of [REDACTED] to its representatives. The remainder of the sum pertains to "*work in progress*" [REDACTED]. [REDACTED]

[REDACTED] The total sum for representations to be paid to Defendant 3 subsequently totals € 75.836,60.

D.3.d.2. *Experts and other expenses*

42. The costs for an “*expert opinion*” (Exhibit_CR_PB1) as requested by Defendant 3 is accepted by the Court [REDACTED]

[REDACTED] It is indeed common for a cautious and reasonable defendant to have executed a test of the attacked embodiment when arguing the non-infringement of a device. [REDACTED]

43. The “*other costs and expenses*” requested by Defendant 3 where they refer to [REDACTED]

[REDACTED] The request for reimbursement of this cost is therefore granted.

44. Finally, [REDACTED] (Exhibit_CR_PB03) which Defendant 3 requests to be reimbursed and this in the amount of [REDACTED] are granted as the Applicant does not seem to oppose these costs.

DECISION

1. The withdrawal of the infringement action is allowed at the Claimant’s application and with the Defendants’ consent.
2. The proceedings referred to in point 1 are declared closed.
3. This decision shall be entered in the register.
4. The following cost decision is issued:

The Claimant is ordered to pay the following amounts as costs and expenses incurred:

- To Defendant 1-2: Costs for representation set at € 100.000 and expenses in the amount of € 5.757,90, totalling an amount of **€ 105.757,90**.
 - To Defendant 3: Costs for representation set at € 75.836,60 and other expenses in the amount of € 5.586,73, totalling an amount of **€ 81.423,33**.
5. Orders the Registrar of the UPC to reimburse the sum of **€ 11.400** (60% of € 19.000) to the Claimant and this as the proceedings known as UPC_CFI_415/2025 are considered terminated.

Decision issued on 4 December 2025 by the panel of the LD Brussels of the Court of First Instance of the UPC (UPC_CFI_415/2025) consisting of and signed by:

Samuel GRANATA Judge-Rapporteur Presiding Judge LD Brussels Legally Qualified Judge	Samuel Rocco M Granata Digitally signed by Samuel Rocco M Granata Date: 2025.12.04 09:43:35 +01'00'
Camille LIGNIERES Legally Qualified Judge	Date : 2025.12.03 19:35:13 +01'00' <i>Camille Lignières</i>
Marjolein VISSER Legally Qualified Judge	Marjolein Jeanette Johanna Visser Signature numérique de Marjolein Jeanette Johanna Visser Date : 2025.12.04 09:24:25 +01'00'
Clerk of the LD Brussels	Afia Sisca S Baah Signature numérique de Afia Sisca S Baah Date : 2025.12.04 11:12:28 +01'00'

Information about appeal

In accordance with Rule 363(2) of the Rules of Procedure, this decision is a final decision within the meaning of Rule 220(1)(a) of the Rules of Procedure.

This decision may therefore be appealed before the Court of Appeal by any party that has been wholly or partially unsuccessful, within two months of the date of notification thereof (Art. 73(1) UPCA, R. 220(1)(a), R. 224(1)(a) RoP).