Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

UPC Court of Appeal
UPC_CoA_87/2026

FINAL ORDER

of the Court of Appeal of the Unified Patent Court
issued on 17 August 2026
concerning an appeal against an order on forfeiture of penalties (Art. 82(4) UPCA, R. 354.4 RoP)

HEADNOTES

- As a general rule, the defendant addressed in an injunction is obliged to control third parties to which it assigns tasks to fulfil the injunction on its behalf. Similarly, if a defendant uses a third-party marketing platform and provides content for it, it is the defendant's responsibility to ensure that the platform´s content does not result in non-compliance with the court order.

- It is not sufficient to implement geo-blocking measures to block the purchase option on a platform for territories prohibited by the PI order when offering and placing on the market, which are independent actions under Art. 25 UPCA, have been prohibited by the PI order.

- An accurate website disclaimer for availability of attacked embodiments in the prohibited countries can be adequate for compliance with an injunction, provided that whatever was included on the website could not reasonably be interpreted by any visitor as constituting an offering of the attacked embodiments within the territories as specified in the order.

KEYWORDS
Penalties, forfeiture, offering

APPELLANTS (AND DEFENDANTS IN THE PROCEEDINGS BEFORE THE CFI)

1. **Lepu Medical Technology (Bejing) Co., Ltd,** Beijing, China
2. **Lepu Medical (Europe) Cooperatief U.A.**, Heerenveen, The Netherlands

(hereinafter jointly referred to as Lepu or the Lepu companies)

represented by attorney-at-law Dr. Ralph Nack, Noerr, Munich Germany, and other representatives from that firm and from Fuchs Patentanwälte, Frankfurt am Main, Germany

RESPONDENT (AND APPLICANT IN THE PROCEEDINGS BEFORE THE CFI)

Occlutech GmbH, Jena, Germany

(hereinafter referred to as Occlutech)

represented by attorney-at-law Dr. Peter Koch, Penforce, Munich, Germany, and by representatives from KIPA, Helsingborg, Sweden

PATENT AT ISSUE

EP 2 387 951

LANGUAGE OF THE PROCEEDINGS

English

PANEL AND DECIDING JUDGES

Panel 2
Rian Kalden, presiding judge and legally qualified judge
Ingeborg Simonsson, legally qualified judge and judge-rapporteur
Patricia Rombach, legally qualified judge
Paolo Ernesto Crippa, technically qualified judge
Christian Daniel, technically qualified judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

Order by the Local Division Hamburg on 20 May 2026 in UPC_CFI_553/2025

ORAL HEARING

The parties agreed to dispense with the oral hearing and the Court of Appeal decides the case based on the written pleadings.

SUMMARY OF FACTS

1. Occlutech brought an application for provisional measures against Lepu, alleging infringement or imminent infringement of the patent at issue through the occlusion devices “MemoCarna ASD” and “MemoCarna VSD” (the attacked embodiments). In its order of 21 October 2025 (the PI order), the Local Division Hamburg found it more likely than not that the patent at issue is valid and infringed, and considered both Lepu companies liable for imminent patent infringement in the countries stated in the request (the territory of Germany, France, Italy, Netherlands and Ireland). The Local Division made the observation that the Lepu companies did not counter the liability question apart from denying any intention for sale in Germany/Europe. The Local Division considered that, as imminent infringing acts in Germany were sufficiently proven, an injunction according to Art. 34 UPCA also in other UPCA countries could be granted, “whereas the Applicant specifically requested one only for Germany, France, Italy, Netherlands and Ireland”. The Lepu companies were ordered to cease and desist from offering, placing on the market or using, or importing or storing for those purposes within the territory of Germany, France, Italy, Netherlands and Ireland a medical implantable occlusion device as specified in the order. Failure to comply with the order was coupled with an order to pay to the Court a penalty payment of up to EUR 250,000 for each individual case of non-compliance (R. 354.3 RoP), if need be

repeatedly. According to part V of the operative part of the order, the orders were immediately effective and enforceable.

2. Lepu initially appealed the PI order but then withdrew the appeal.

3. On 2 March 2026, Occlutech applied for forfeiture of penalties.

4. In the impugned order of 20 May 2026, the Local Division Hamburg decided on forfeiture of penalties set in the PI order, ordering the Lepu companies to pay the Court a penalty in the amount of EUR 58,800 for non-compliance with the PI order. A recurring penalty of up to EUR 1,500 per day for any further non-compliance with the PI order was set, the exact amount to be determined at the Court's discretion. The Lepu companies were ordered to bear the costs of the proceedings. The value of the enforcement proceedings was set to EUR 100,000 and the orders were immediately effective and enforceable. Leave to appeal against the order was granted.

5. Lepu has appealed the impugned order. On 10 June 2026, the Court of Appeal rejected Lepu's application for suspensive effect.

PARTIES' REQUESTS

6. Lepu requests the Court of Appeal to reduce the penalty amount imposed in the impugned order to an appropriate amount not exceeding EUR 20,000, in the exercise of the Court of Appeal's discretion pursuant to Art. 82(4) UPCA and R. 354.3 RoP. In the alternative, Lepu requests that the case be referred back to the Court of First Instance, which shall decide bound by the guidance of the Court of Appeal on points of law.

7. Occlutech requests that the appeal be rejected and that Lepu be ordered to bear the costs.

SUBMISSIONS

8. Lepu does not dispute that the Lepu companies jointly continued to offer the attacked embodiments via the Dutch Lepu company's website during the period from 2 December 2025 to 2 March 2026, i.e. for 91 days, but argues that this violation caused no commercial harm to Occlutech. Lepu asserts that the Court of First Instance failed to properly assess the degree of fault attributable to Lepu with regard to the Dutch Lepu company's website and also failed to adequately weigh that the additional breach in regard to the MedicalExpo platform was provoked, isolated and unauthorised. As a result, the Court of First Instance imposed a penalty that is manifestly disproportionate to the gravity of the conduct identified. According to Lepu, not a single unit of the attacked embodiments was sold, shipped or otherwise placed on the market in the five UPC Contracting Member States subject to the PI order during this period.

9. Occlutech defends the impugned order. It contests that no harm was caused to it and questions the correctness of Lepu's assertion that no attacked embodiments were sold. It objects against Lepu's description of its own actions as minor and without risk of repetition.

GROUNDS FOR THE ORDER

10. The appeal is admissible but not well-founded.

Art. 76 UPCA

11. The fact that the territory of Ireland is part of the PI order (cf. CoA, order of 19 August 2024, UPC_CoA_388/2024, Sibio et al vs Abbott) has no significance in this case. Ireland was included in the request for an injunction, not as a Contracting Member State but separately, and jurisdiction was not contested and not appealed against. Moreover, only Germany is at issue when penalties are forfeited.

Legal framework

12. The system of penalties under the Rules of Procedure has been set out in Kodak vs Fujifilm (CoA, order of 14 October 2025, UPC-CoA-699/2025). For the purpose of the present appeal, the following is of importance:

    - Pursuant to R. 354.3 RoP an order or decision may include an order for the forfeiture of a penalty sum in case of (future) non-compliance with an order (hereinafter: a penalty order).
    - If a claimant alleges that a defendant has not or not timely complied with a penalty reinforced order, a penalty does not become automatically payable, but the claimant must request the Court who issued such order, to order the defendant to pay the penalty sum forfeited. The penalty amounts and the time periods set for compliance, as provided for in the order or decision, shall generally be the basis for calculating the amount payable by the defendant. The Court may, however, deviate therefrom in favour of the defendant for reasons of reasonableness and proportionality, if the circumstances of the case so require. Relevant factors in this regard include, among others, aspects such as the severity of the established breach, its duration, and the defendant's ability to pay. It is for the defendant to present and substantiate facts that reasonably prevented it from fully and timely complying with a penalty reinforced order or that otherwise justify the imposition of a lower amount of penalties than the amount that would follow from the penalty amounts and the time periods set for compliance, as provided for in the order or decision or later order or decision.
    - The burden of proof that a penalty reinforced order has been fully and timely complied with lies with the defendant, since the evidence concerns information within the defendant's own sphere which is not accessible to the claimant. It is generally incumbent on the defendant to provide a substantiated account of the measures taken to comply with the penalty reinforced orders.
    - If the penalty reinforced order is contained in an order for provisional measures, to which R. 118.8 RoP does not apply, the time period for compliance with such a penalty reinforced order starts upon service of the order for provisional measures on the defendant or, if that order does not contain a time period for compliance, upon notification of the time period set by the claimant, in both cases provided that, if applicable, a security pursuant to R. 211.5 RoP has been rendered.
    - The Court of Appeal only looks at facts and circumstances existing prior to the impugned order.

13. The Court of Appeal considers that the Local Division was right to hold that as a general rule, a defendant addressed in an injunction is obliged to control third parties to which it assigns tasks to fulfil the injunction on its behalf. Similarly, if a defendant uses a third-party marketing platform and provides the content for it, it is the defendant's responsibility to ensure that the platform´s content does not result in non-compliance with the court order.

14. Moreover, the Local Division was right to state that it is not sufficient to implement geo-blocking measures to block the purchase option on a platform for the prohibited territories, because offering and placing on the

market are independent actions under Art. 25 UPCA and were prohibited by the PI order.

Application to the case at hand; the forfeiture of penalties

15. First, it remains undisputed that after the PI order, as a result of an update on 2 December 2025, a disclaimer that was first installed on the Dutch Lepu company's website was removed. The Lepu companies then jointly offered the attacked embodiments on said website, accessible within inter alia Germany, at least during the period of 2 December 2025 to 2 March 2026, thus for 91 days.

16. Lepu contends that it acted promptly and comprehensively upon receipt of the PI order, manually uploading a disclaimer on 7 November 2025, and that the gap in instructions to the service provider was a secondary administrative oversight, not an intentional or conscious act of non-compliance. If there was fault at all, it was at most minor and there is no risk of repetition.

17. What Lepu describes as an administrative oversight is however insufficient to substantiate that Lepu was reasonably *prevented* from ensuring full and timely compliance with the PI order. Lepu's website is clearly within Lepu's control sphere, even if it employs third parties for operation and maintenance.

18. Lepu's arguments that no attacked embodiments were sold and that Occlutech suffered no harm do not negate the failure to comply with the PI order and cannot as such reduce the amount forfeited. Acts of offering a product are not limited to concluded sales and deliveries. It is sufficient to present an item in such a way that viewers can make an offer to acquire it, for example, by concluding a purchase, rental or lease agreement. Thus, this already covers the "invitatio ad offerendum" (CoA, decision of 3 October 2025, UPC-CoA-534/2024, Belkin vs Philips).

19. In addition, penalty payments serve not only a coercive function but also have a punitive nature (CoA, order of 30 May 2025, UPC-CoA-845/2024, Belkin vs Philips). Penalties are paid to the Court, they are not there to compensate the other party.

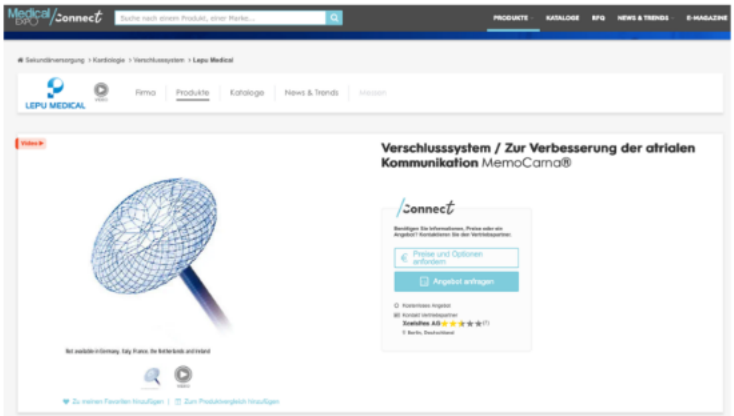
20. Secondly, regarding the MedicalExpo website, and as set out in the impugned order, there was indeed a disclaimer on the product page that the attacked embodiment was not available in Germany. Nevertheless, it is undisputed that after the PI order, the Lepu companies still participated in the "B2B-platform Medical Expo Connect", a platform designed for medical manufacturers and distributors to showcase their expertise in the industry. Also undisputed is that the MedicalExpo website was available in German after the PI order. Equally uncontested is that there was a contact between Occlutech's counsel and a Lepu Key Account Manager in February 2026 where the Key Account Manager confirmed that both "ASD" and "VSD" would be commercially available in Europe.

21. Lepu takes the view that it could not be expected to withdraw entirely from a major international B2B marketplace with global reach merely because its technical architecture performs automated translations. Lepu's position is that the mere passive presence of the MedicalExpo listing, equipped with an accurate disclaimer, does not in itself constitute a prohibited offering within the meaning of Art. 25(a) UPCA and the PI order. Only the subsequent sending of materials to Occlutech's counsel in response to an explicit inquiry may constitute a violation and even then, its legal significance and weight must be assessed in light of its isolated nature, it being contrary to instructions, and the fact that it was provoked. According to Lepu, it issued a comprehensive internal compliance circular expressly banning all MemoCarna marketing, sales, or

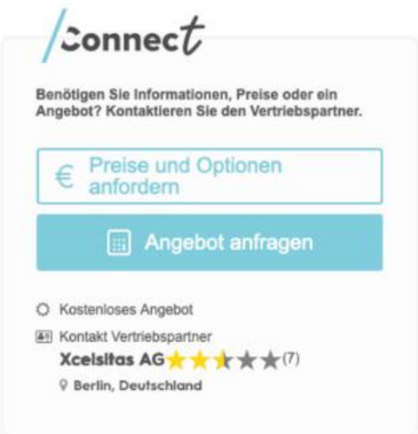
shipment to the five injuncted territories immediately after service of the PI order, and a formal written instruction to MedicalExpo on 27 January 2026 to remove MemoCarna references.

22. The Court of Appeal considers, as a starting point, that an accurate disclaimer for the availability in the prohibited countries, if there is no suggestion of offering the attacked embodiments, can be adequate for compliance with an injunction. But like the Local Division, the Court of Appeal takes the view that the disclaimer in question was insufficient for compliance with the provisional injunction. As the addressee of the injunction, Lepu could not suffice with publishing the disclaimer. It also had to ensure that whatever was included on the website could not reasonably be interpreted by any visitor as constituting an offering of the attacked embodiments within the territories as specified in the order.

23. The Court of Appeal agrees with the Local Division's finding that the product was displayed and described in German on the MedicalExpo site, and that an active invitation to potential distributors was made to contact Lepu, again in German, clearly intended to reach potential buyers (also) in the German territory. The Court of Appeal agrees with the point that was decisive for the Local Division, i.e. the following content on the MedicalExpo platform:



Enlarged:



24. The Local Division's view that Lepu did not even claim that any geo-blocking of this display was provided has not been contested on appeal. As demonstrated by Exhibit 4, an inquiry was met with a response in German

that the request had been forwarded:

25. It has also been established, and remains uncontested, that an answer was received from Lepu's Key Account Manager when Occlutech's counsel used the link available on the platform, stating that both "ASD" and "VSD" would be commercially available in Europe, without excluding the countries where the injunction applies. As a result, potential buyers of occlusion devices in the territories encompassed by the provisional injunction could still reach out to Lepu with requests. For these reasons, it must be concluded that despite the disclaimer, the information on the website constituted an offer to potential buyers in the injuncted territories, at least Germany.

26. It may be that Lepu's employees often made disclaimers for sales in Germany, France, Italy and the Netherlands after the PI order. However, the German language, the technical availabilities on the MedicalExpo platform together with Lepu's response to Occlutech's counsel, demonstrate that the measures taken by Lepu were clearly insufficient to ensure compliance with the PI order. Lepu is responsible for this.

27. Lepu's arguments on proportionality have already been taken into account by the Local Division, when it forfeited penalties in an amount significantly below the penalty payment of up to EUR 250,000 for each individual case of non-compliance set in the PI order.

28. As for the number of days of non-compliance in relation to the MedicalExpo instance (cf. impugned order, para. 53), Lepu argues that the appropriate unit of assessment for the email exchange between Occlutech's counsel and Lepu is the single communication, not the entire 133-day period from 21 October 2025 to 2 March 2026.

29. Here, Lepu fails to acknowledge that its presence on the MedicalExpo platform was an ongoing offering of the attacked embodiments in contravention of the PI order (see above). The fact that only one contact with

a Lepu Key Account Manager has been established is not relevant. The offering is already there because of the established facts. Moreover, it is Lepu that has the burden of proof for compliance with the order, not Occlutech.

30. The amount of the individual daily penalties forfeited is unobjectionable. In this regard, the Local Division has broad discretion.

Costs

31. As the unsuccessful party, Lepu must bear the costs of the appeal proceedings.

ORDER

I. The appeal is rejected.

II. The Lepu companies are ordered to bear Occlutech's costs for the appeal proceedings (including the application for suspensive effect).

Issued on 17 August 2026

Rian Kalden Date: 2026.08.17 12:57:01 +02'00'

Rian Kalden, presiding judge and legally qualified judge

Digitally signed by Åsa Ingeborg Simonsson
Date: 2026.08.17 12:52:04 +02'00'

Ingeborg Simonsson, legally qualified judge and judge-rapporteur

Patricia Ursula Rombach Digitally signed by Patricia Ursula Rombach
Date: 2026.08.17 13:01:15 +02'00'

Patricia Rombach, legally qualified judge

Paolo Ernesto Crippa
2026.08.18 07:58:52 + 02'00'

Paolo Ernesto Crippa, technically qualified judge

Rian Kalden Date: 2026.08.17 12:57:33 +02'00'

Christian Daniel, technically qualified judge