Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

Brussels Local Division
UPC_CFI_871/2026

Order
Pursuant to Rule 158 of the Rules of Procedure
Of the Court of First Instance of the Unified Patent Court (UPC),
Brussels Local Division
Issued on 16 September 2026

HEADNOTES

(Dutch)

1. Where Article 2(2) *of the Scale of Recoverable Costs* refers to an adjustment of the applicable ceiling on recoverable costs *"in the event that the requesting party is unsuccessful"*, the Court must also take this article into account when assessing an application for security, since in such an assessment the Court assumes ab initio that *"the requesting party … unsuccessful'* (cf. Art. 69(4) UPCA *'may be liable to bear').*
2. The value of the claim is definitively determined in the context of the Interim Conference (cf. Rule 104(i) of the Rules of Procedure in conjunction with Rule 370.6 of the Rules of Procedure). An assessment of the value of the claim in the context of a request for *security* is provisional in the sense that it is not binding on either the Tribunal or the Judge-Rapporteur when definitively determining the value of the claim or setting the ceiling (including the manner in which this ceiling was determined).

(English)

1. Whilst Article 2(2) of the *Scale of Recoverable Costs* provides for an adjustment to the applicable ceiling on recoverable costs *"in the event that the requesting party is unsuccessful"*, the Court must also take this provision into account when assessing an application for security, since in such an assessment the Court assumes ab initio that the *"requesting party … will be unsuccessful"* (cf. Article 69(4) of the UPCA *"may be liable to bear").*
2. The value of the dispute is definitively determined in the context of the Interim Conference (see Rule 104(i) of the Rules of Procedure in conjunction with Rule 370.6 of the Rules of Procedure). An assessment of the value of the dispute in the context of an assessment regarding an application for security is *provisional* in the sense that it is not binding on either the Court or the Judge-Rapporteur when it comes to the final determination of the value of the claim or the setting of the ceiling (including the manner in which that ceiling was calculated).

KEYWORDS

- Rule 158 of the Rules of Procedure
- Art. 2(2) *Scale of Recoverable Costs*
- SME

UPC_CFI_871/2026

CLAIMANT(S):

In(k)control BV	9800 Deinze (Belgium), E3-laan 43 – 9800 Deinze (Belgium)
Represented by:	Kristof Neefs, solicitor (Inteo) Timothy Van de Gehuchte, solicitor (Portelio) Ellen Crabbe, patent attorney (Brantsandpatents)
Hereinafter referred to as:	The Claimant or IN(K)CONTROL

DEFENDANT(S):

1. Esko-Graphics BV	Raymonde de Larochelaan 13, 9051 Ghent (Belgium)
2. Esko Software BV	Raymonde de Larochelaan 13, 9051 Ghent (Belgium)
Represented by:	Kristof Roox, solicitor (Crowell & Moring LLP) Jan-Diederik Lindemans, solicitor (Crowell & Moring LLP) Margot Horowitz, solicitor (Crowell & Moring LLP) Margaux Dejonghe, solicitor (Crowell & Moring LLP)
Hereinafter referred to collectively as Hereinafter referred to individually as:	Defendants or ESKO Defendant 1 or ESKO-GRAPHICS Defendant 2 or ESKO-SOFTWARE

PATENT(S) TO WHICH THE DISPUTE RELATES

Patent No.	*Patent holder(s)*
EP 3 841 735	IN(K)CONTROL BV

PANEL/DIVISION:

Chair and Reporting Judge	Samuel Granata
Legally Qualified Judge	Marije Knijff
Legally Qualified Judge	Daniel Voß

PRESIDING JUDGE:

This *order* is issued by the Reporting Judge.

I. COURSE OF PROCEEDINGS, APPLICATION AND SUBMISSIONS

I.A. SUSPENSION OF PROCEEDINGS AND RESUMPTION ON 3 SEPTEMBER 2026

1. On 12 May 2026, ESKO filed a motion requesting that IN(K)CONTROL be ordered to provide security (hereinafter referred to as the 'Motion'), in the principal amount of €400,000 and, in the alternative, €200,000.

2. By Order of 1 June 2026 pursuant to Rule 295(d) of the Rules of Procedure, both the infringement proceedings and the proceedings relating to the Request were suspended with effect from 29 May 2026.

3. On 31 August 2026, the parties informed the Court that no amicable settlement could be reached and requested the resumption of the proceedings. By order of 3 September 2026, the proceedings were resumed (including the Application) and the schedule for the submission of closing submissions was subsequently (re)determined in accordance with Rule 296.3 of the Rules of Procedure.

4. The parties' final submissions took the form of summary submissions (as is customary in Belgian national proceedings), which simplifies the assessment of the dispute in practical terms.

I.B. RESPECTIVE APPLICATIONS AND SUBMISSIONS OF THE PARTIES

5. ESKO requests the Court to rule as follows:
   - *To take note of ESKO's formal undertaking to bring a counterclaim seeking the revocation of the patent in its Statement of Defence;*
   - *As a primary claim, to rule that the value of the dispute is provisionally estimated at €2,500,000 and that IN(K)CONTROL must therefore provide security of €400,000, and to reject IN(K)CONTROL's offer to provide security of €19,000 as unfounded;*
   - *In the alternative, to rule that the value of the dispute should be provisionally estimated at €1,250,000 and that IN(K)CONTROL must therefore provide security of €200,000, and to reject IN(K)CONTROL's offer to provide security of €19,000 as unfounded; and*
   - *In any event, to rule that IN(K)CONTROL expressly acknowledges that it must provide security.*

6. Reduced to its (concrete) essence, ESKO argues as follows (the detailed reasoning will be assessed in the relevant assessments):
   - IN(K)CONTROL itself acknowledges that its financial resources are limited and that it is reasonable to provide security.
   - The value of the dispute should be set at €2,500,000, comprising € 1,000,000 relating to the infringement claim and the (to be brought) counterclaim for annulment (€1,500,000). In the alternative, ESKO states that *'in the most conservative* scenario' the value of the dispute should be set at € 1,250,000, comprising €500,000 relating to the infringement claim and €750,000 relating to the (to be brought) counterclaim for annulment.
   - On the basis of this valuation, IN(K)CONTROL must provide security in the principal amount of €400,000 (and, in the alternative, €200,000).

7. IN(K)CONTROL requests the Court to rule as follows:
   <u>*In the main:*</u>
   - *Set the amount of the security at €19,000, to be provided by way of a bank guarantee from a bank in the European Union, or by bank transfer to the account of the Registry of the Unified Patent Court;*
   - *Dismiss the defendants' application in all other respects as unfounded;* <u>*In the alternative:*</u>

- *Set the ceiling on any costs to be recovered by IN(K)CONTROL at €56,000;*
- *Sets the amount of the security at €28,000, to be provided by way of a bank guarantee from a bank in the European Union or by bank transfer to the account of the Registry of the Unified Patent Court;*
- *Dismisses the defendants' application in all other respects as unfounded;*

8. Reduced to its (concrete) essence, IN(K)CONTROL argues as follows (the detailed reasoning will be assessed in the relevant assessments):
   - The conditions for providing security have been met.
   - The value of the infringement claim should be set at €200,000, which brings the ceiling for recoverable costs to €38,000 (in the bracket up to €250,000), an amount which, according to *'case* law', must be reduced to 50 per cent (i.e. €19,000).
   - Since no counterclaim for annulment has yet been brought, this must be disregarded when determining the value of the dispute; and even if such a claim were to be brought, *'it is not clear from the case law of the Court of* Appeal' that security may be required. If this counterclaim were, for the time being, to be included in the determination of the value of the dispute, the value of the counterclaim must be determined in accordance with the book value of the patent, which would mean that the total value of the dispute would still not exceed the €250,000 threshold, so that the security specified above would suffice.
   - Should the Court adopt ESKO's valuation, the maximum recoverable costs must be reduced in accordance with Article 2(2) of *the Scale of Recoverable Costs*.

II. Assessment

II.A. IN(K)CONTROL's acknowledgement that the conditions for ordering security have been met

9. The Court notes that IN(K)CONTROL does not contest the fact that the threshold condition for ordering security has been met (and in particular that its financial situation gives rise to a legitimate and genuine concern that an order for costs cannot be recovered) (cf. Order of 18 February 2026, UPC_CoA_890/2025, *Syntorr v Arthrex*, §19; Order of 30 October 2025, UPC_CoA_8/2025, *Oerlikon v Bhagat*, §20; Decision of 9 July 2025, UPC_CoA_431/2025, *Chint v JingAO*, §10; Decision of 17 September 2024; UPC_CoA_217/2024, *Audi v NST*, §7, Decision of the Brussels Local Division of 18 March 2026; UPC_CFI_1357/2025 – UPC_CFI_629/2026, X v LABS).

II.B. Assessment of Security

II.B.1. Introductory remarks

10. IN(K)CONTROL raises no objections to the imposition of security *as such*. For further confirmation, the Court may therefore confine itself to referring to the decision of the UPC Court of Appeal of 28 April 2026 (UPC CoA_21/2026, *Suinno v Microsoft*). In that decision, the UPC Court of Appeal held that the system of security for costs does not*, in itself*, restrict access to the courts. Express reference is made here to §22 of the aforementioned decision, which states as follows:

> *"It is beyond reasonable doubt that EU law, the Enforcement Directive and the TRIPS Agreement do not prevent the imposition of a security for costs order***."**

Since the UPC Court of Appeal, in its assessment, has already assessed the applicable regulations against the primary legislation cited, the General Court need not carry out such an assessment again.

11. Before addressing the *specific* objections raised by IN(K)CONTROL against the security imposed for the hearing – whereby the Court understands these objections of principle to apply if the security imposed were to exceed the amount which IN(K)CONTROL itself proposes as security (i.e. €19,000 in the main claim and €28,000 in the alternative claim) – it is appropriate first to determine the amount that could be imposed on IN(K)CONTROL as security in accordance with the applicable regulations and their interpretation by case law.

12. In determining the amount of the security, a two-stage assessment must be carried out. First, the value of the dispute must be determined (see below under II.B.2) and subsequently the applicable ceiling for recoverable costs (see below under II.B.3).

13. It should be noted that, in the aforementioned sub-assessments, the Court must take into account the stage of the proceedings at which such assessments are requested.

14. It remains possible at any time to request an adjustment to the security (either an increase or a reduction) as the dispute progresses (cf. Rule 158 of the Rules of Procedure *"at any time during the proceedings"*).

15. The value of the dispute is definitively determined in the context of the Interim Conference (cf. Rule 104(i) of the Rules of Procedure in conjunction with Rule 370.6 of the Rules of Procedure). The present assessment is therefore provisional in the sense that it is not binding on either the Tribunal or the Judge-Rapporteur when it comes to the final determination of the value of the dispute or the setting of the ceiling (including the manner in which this ceiling was determined).

II.B.2. Value of the dispute

16. In determining the value of the dispute, account must be taken of both the infringement claim and the counterclaim for annulment (see Order LD

Brussels of 18 March 2026; UPC_CFI_1357/2025 – UPC_CFI_629/2026, X v. LABS, §36). Paragraph 25 of that order states that:

> *"Although a counterclaim for revocation is regarded as a separate action under Article 32(1)(e) of the UPCA, it is intrinsically linked to the infringement action (§ 25 AorticLab v Emboline), and this is based on the fact that the system set out in the UPCA and the Rules of Procedure does not allow a defendant to challenge the validity of the patent by way of a defence of invalidity in the infringement proceedings. A defendant may only raise such a defence by filing a separate counterclaim for revocation (UPC_CFI_1357/2025 – UPC_CFI_629/2026) (§ 26 AorticLab v Emboline). As there are no indications that the Defendants would have brought a stand-alone revocation action had they not been confronted with the infringement action, the counterclaim for revocation is considered to be a consequence of the infringement action brought by LABS and, as such, a defensive action (§ 29 AorticLab v Emboline), which will undoubtedly result in additional costs for the Defendants".*

17. Whilst ESKO has not yet brought a counterclaim for revocation and, as indicated above, the Court is aware that ESKO might submit an amended or new application on the basis of Rule 158 of the Rules of Procedure ("*at any time during the* proceedings"), upon its actual lodging, the Court considers that, having regard to the circumstances of the case and, in particular, the undertaking given by ESKO to lodge the counterclaim for annulment together with its Statement of Defence, it is in the interests of procedural economy to include the counterclaim in the present assessment. Reference may also be made to Rule 158.1 of the Rules of Procedure, which states that the Application also relates to *"legal costs and other expenses (...) and/or to be* incurred" (underlined by the Court), so that a future counterclaim for annulment may likewise be taken into account in the Court's assessment.

18. In line with the aforementioned Order of 18 March 2026 (Brussels Regional Court, UPC_CFI_1357/2025 – UPC_CFI_629/2026, X v. LABS), there are no elements from which it could be inferred that ESKO would have considered bringing a stand-alone action for annulment had IN(K)CONTROL not brought an infringement action.

II.B.2.a. *Value of the infringement claim*

19. IN(K)CONTROL states that, to date, it has not been able to quantify the value of the infringement claim in concrete terms, as it does not have information regarding the turnover generated by ESKO from the allegedly infringing product, *Print Clone*. In the absence of specific information, it is claiming a provisional sum of €200,000 in damages (should the Court rule in favour of infringement) and is (provisionally) setting the value of the dispute at this amount. ESKO argues that this valuation is being kept 'artificially' low (inter alia to limit the court fees pursuant to Rule 370.8 of the Rules of Procedure). ESKO argues that the figure of €500,000 for the value of the dispute is unrealistic and states that this must, in any event, be increased by the value of the counterclaim (which

the Court has already accepted in principle in paragraphs 16–18 and will set out in detail below in paragraphs 20–22) and sets (as a primary claim) the value of the infringement claim at €1,000,000.

20. At this stage of the proceedings, the Court sets the value of the infringement claim at € 500,000 and gives the following reasons:

- Firstly, it should be noted that, with regard to court fees, the minimum bracket (*'including and up* to') is €500,000 (cf. '*Table of Court* Fees', approved by decision of the Administrative Committee of 8 July 2022 and, in its amended form, by decision of the Administrative Committee of 4 November 2025)) is set, whilst, with regard to recoverable costs, a minimum threshold of €250,000 is set (which results in a ceiling of €58,000 for recoverable costs) (cf. *"Scale of ceilings for recoverable* costs" – Decision of the Administrative Committee of 24 April 2023).
- IN(K)CONTROL has indeed made use of this lowest bracket up to €500,000 to determine the court fees it is required to pay; however, it sets the value of the infringement claim at its provisionally claimed damages of €200,000.
- To assess the value of the infringement claim, the Administrative Committee provided guidelines (see '*Guidelines for the determination of court fees and the ceiling on recoverable* costs', approved by decision of the Administrative Committee of 24 April 2023 and, in their amended form, by decision of the Administrative Committee of 4 November 2025) (hereinafter referred to as the 'Guidelines'). Under Point II.1.b. of the Guidelines (with reference to Point II.1.a.), the following method is set out:

  > *The calculation of the value of the injunction claim and the claim for damages should be based on a royalty calculation as follows:*
  >
  > *(1) The defendant's turnover in the alleged infringing product for the future up to the expiry of the patent (injunction claim) and for the past (damages claim) should be calculated on the basis of the defendant's known existing turnover or, if this is not known or does not yet exist, the market share the defendant has captured and/or may reasonably be assumed to capture.*
  >
  > *(2) A royalty rate should be applied to (1) based on:*
  >
  > *(i) the existing royalty rate for the same invention charged by the claimant, or*
  >
  > *(ii) the generally accepted industry rate for the type of invention in question, or*
  >
  > *(iii) a royalty rate determined by the Court after hearing the parties.*
  >
  > *(3) Where a claim for damages*
  >
  > *(i) is limited to awarding damages in principle, the value of that claim (pursuant to (1)) should be reduced by 50 per cent;*
  >
  > *(ii) if the claim specifies the amount of damages, the value should correspond to the amount claimed.*
  >
  > *(4) The value of an Application for the Determination of Damages, including any Request to lay open books, should correspond to the amount*

of damages specified in the Application or, if no such sum is specified, the value as calculated in accordance with (1) and (2).

- As indicated, IN(K)CONTROL states that it has no specific information regarding the scale of ESKO's exploitation of the allegedly infringing product, *Print Clone*. ESKO, which is best placed to provide evidence in this regard, has likewise failed (at this stage of the proceedings) to provide concrete evidence on which the Court could rely in order to apply Point II.1.a.(1) of the Guidelines. It has not indicated how many licences were sold or at what price, nor has it indicated what the projection for the future would be. ESKO itself also states in proceedings pending before the Ghent Commercial Court that it has, to date, generated '*very limited* revenue'. The extent to which this revenue is limited (or, rather, how high it is) has not been disclosed to the Court.
- On the other hand, IN(K)CONTROL does not limit its claims to (provisional) damages, but also seeks an injunction and an order requiring the disclosure of information. Such claims, and in particular the injunction, are directed towards the future and must also be taken into account in the valuation of the claim for past infringement. Whilst the value of the infringement claim for the past is set at €200,000 (given the lack of specific information and the fact that the allegedly infringing product, *Print Clone,* was only recently launched on the market), the Court has set this at €300,000 for the future. In doing so, the Court takes into account (to maximise the figure) the fact that the patent remains valid for a further 13 years throughout the entire UPC jurisdiction (and that claims are being brought on the basis of the (alleged) *'long-arm* jurisdiction' of the UPC) and (to reduce the figure) the fact that ESKO itself states that, to date, it has has generated "*limited* revenue" and that ESKO has already voluntarily ceased the commercialisation of the allegedly infringing product, *Print Clone* (cf. official letter dated 15 June 2026 from ESKO's legal advisers to IN(K)CONTROL's legal advisers).
- The reference to the amount of the penalty payments claimed by IN(K)CONTROL is not sufficient to overturn the above assessment of the claim for damages arising from the infringement. After all, whilst the amount of damages may be one of the factors to be taken into account when determining penalty payments, other factors are also relevant (including the likelihood of compliance with an injunction, taking into account ESKO's financial capacity). The amount of the penalty payment may therefore be based on other parameters (including ESKO's financial capacity). Without yet proceeding to assess the lawfulness of the specific penalty payment claimed (an assessment to be carried out by the panel), it is important for the assessment of the Application to note that the amount of the penalty payment is not directly indicative of the assessment of the value of the infringement claim.
- Finally, consideration must be given to IN(K)CONTROL's argument, in which it states, with reference to Point II.1.a. of the Guidelines, that in the case of a claim on a point of principle, the value must be reduced by 50 per cent. The Court notes, however, that

IN(K)CONTROL's claim is not a claim on a point of principle, as it is seeking damages of €200,000, but also because claims are being brought for the future.

II.B.2.b. *Value of the counterclaim for annulment*

20. It has already been stated that, when assessing the value of the dispute, the Court takes into account the expected counterclaim for annulment (supra §16–18).

21. IN(K)CONTROL argues that, when valuing such a counterclaim for annulment, the value of the patent must be taken into account in accordance with Point II.b.1 of the Guidelines. It bases this valuation on its book value. It then values this at a purchase price of €18,616.64 and, after depreciation, at €14,772.16. ESKO, on the other hand, uses Point II.b.2 (iii) of the Guidelines as the basis for this calculation and applies the value of the infringement claim increased by 50 per cent.

22. The Court sets the value of the counterclaim for annulment at the same amount as the infringement claim (i.e. €500,000) and justifies this as follows:

- Point II.2.b. of the Guidelines sets out the following method for assessing the value of the counterclaim for revocation:
  - *(1) The value of a counterclaim for revocation (...) should be determined having regard to the value of the patent to be revoked.*
  - *(2) In the absence of relevant information*
    - *(i) the value of a revocation action may be assumed to be equal to the value of an appropriate licence fee calculated on the basis of the parties' turnover for the remaining term of the patent,*
    - *(ii) the value of the counterclaim for revocation may be assumed to be equal to the value of the infringement action (II.1. a), above) plus up to 50 per cent.*
- The valuation provided by IN(K)CONTROL based on the 'accounting' value of the patent (i.e. acquisition cost less depreciation) is not accepted, as it constitutes an unrealistic benchmark for determining the 'economic' value of the patent. The 'accounting' value in no way reflects the commercial value of the patent, which consists of the exclusivity it confers, the market position it protects, the licence income it generates and the competitors it excludes.
- As the Court does not have relevant data to apply Point II.2.b.1 of the Guidelines or Point II.2.b.2.(i) of the Guidelines, it is compelled to apply Point II.2.b.2.(ii) of the Guidelines.
- Since IN(K)CONTROL states that it has not, to date, granted any licences for the patent, it has sufficiently demonstrated that the value of the counterclaim for revocation is equivalent to the value of the infringement claim and

the Court does not exercise its discretion to increase the value of the counterclaim to the value of the infringement claim plus 50 per cent.

II.B.3. The ceiling for recoverable costs

23. Now that the value of the infringement claim (€500,000) and the counterclaim for revocation (€500,000) have been assessed, the dispute as a whole is valued at €1,000,000.

24. ESKO argues that the costs it will incur in the present proceedings are 'substantial', and uses this to support its contention that it is 'unlikely' that the actual value of the dispute would be limited to €1,000,000. The various arguments put forward by ESKO in support of this are, *on the one hand,* not accepted and, *on the other hand* (even if they were accepted), not sufficiently substantiated in concrete terms. The Court gives the following reasons:

- ESKO refers, first and foremost, to the *'significant additional* costs' that would have to be incurred in taking a position on claims based on the UPC's *'long-arm* jurisdiction'. In this regard, it is noted that ESKO did not contest the UPC's competence and jurisdiction in *preliminary injunction* proceedings. Should such an argument be put forward at a later stage of the proceedings (if indeed admissible), attention must be drawn to the already well-established case law on this matter. If this argument were to have an impact on the costs incurred in enforcing a UPC decision in non-UPCA Member States, such costs are governed by the respective national enforcement rules, in respect of which security may be sought at this stage if necessary.
- Furthermore, ESKO refers to the translation costs because *'all preparatory work in this case will be carried out in English*'. The Court points out that ESKO is a company established in Flanders and, as such, may also engage Dutch patent attorneys and lawyers. Furthermore, in this context, albeit indirectly, reference may also be made to the proceedings pending before the UPC Court of Appeal, where ESKO is challenging the rejection of its request for a change of language; consequently, it cannot be determined with certainty in which language the further proceedings are to be conducted.

25. Since the Court does not, as such, depart from an assessment of the value of the dispute at €1,000,000, the ceiling on recoverable costs must be set at *'up to and including €1,000,*000' and, specifically, at €112,000 (pursuant to Rule 152.2. RoP in conjunction with the Annex to *the Scale of ceilings for recoverable costs*).

26. Whilst IN(K)CONTROL requests, in essence, that '*should the Court accept ESKO's unproven estimate of the value in* dispute' (which the Court has not done), Article 2(2) of *the Scale of Recoverable Costs* be applied and the ceiling be reduced, the Court considers it appropriate to proceed with an assessment of this matter nonetheless, given that

the estimate of the value in dispute as proposed by IN(K)CONTROL was not fully followed either.

27. Article 2(2) of *the Scale of Recoverable Costs* provides as follows:

> *"Upon request of one of the parties, the Court may lower the ceiling applicable with regard to that party if, in the event that the requesting party is unsuccessful, the amount of recoverable costs of representation to be awarded to the successful party would threaten the economic existence of the requesting party, in particular if the latter is an SME, a non-profit organisation, a university, a public research organisation or a natural person".*

28. Whilst the article in question does indeed refer to an adjustment *"in the event that the requesting party is unsuccessful"*, the Court must also take this article into account when assessing the Application, since its assessment is based ab initio on the assumption that *"the requesting party …* is *unsuccessful"* (cf. Article 69(4) of the UPCA: *"may be liable to bear")*.

29. The aforementioned article expressly provides that a reduction in the applicable ceiling on recoverable costs may be applied in the case of an SME. On the other hand, in order for this possible reduction to apply, IN(K)CONTROL must demonstrate that its economic survival is threatened should the prescribed ceiling be applied. And this is precisely where the problem lies. After all, not only was IN(K)CONTROL already facing a threat to its economic survival before the present proceedings were initiated (see below), but the Court must also take into account the underlying objective of this article. The Court finds that the aforementioned article enables the Court to limit the adverse consequences for an SME so that it does not find its economic survival threatened. The term 'economic' refers to economic (operational) activity that has an impact on the economy (either directly or indirectly, where it could have an impact on employment). Whilst both parties point to IN(K)CONTROL's precarious financial situation, IN(K)CONTROL's annual accounts show that in 2024, nor indeed in 2025, were there any operational activities, nor were any salaries, social security contributions or pensions recorded (see §33). In the Court's view, it cannot be the intention that an SME should avail itself of financial advantages (in the form of the reduction referred to) offered to it if these are not matched by any operational activity or employment. In those circumstances, the Court therefore considers it inappropriate to exercise the discretionary power available to it under Article 2(2) of *the Scale of Recoverable Costs* and upholds the ceiling set out above.

30. Finally, the Court assesses a request by IN(K)CONTROL for a reduction in the ceiling on the basis of ESKO's conduct during the proceedings. The Court can be brief on this point and finds that no evidence has been adduced from which it could be inferred that ESKO has not (to date) behaved as a reasonable and prudent person (the defendant) would have done in the same circumstances*.* Naturally*,* ESKO is entitled to apply for security and is also entitled to oppose

a rejected request to change the language. After all, lodging an appeal is a right.

II.B.4. Specific assessment of the amount of the security

31. Now that the ceiling for reimbursable costs has been set (€112,000), the Court must determine the amount of the security.

32. IN(K)CONTROL argues that, in determining the amount of the security, the sum should be reduced by 50 per cent on the basis of *'case law of the Court of Justice and various* chambers' (whether or not partly on the basis of IN(K)CONTROL's status as an SME). ESKO argues that no such reduction can be made given the nature of IN(K)CONTROL's financial situation and, more specifically, the lack of any operational activities.

33. The Court sets the amount of the security at €75,000 and gives the following reasons:
- It is not disputed that, at this stage of the proceedings, IN(K)CONTROL is regarded as an SME (cf. the definition set out in the Annex to the Commission Recommendation of 6 May 2003 concerning the definition of small, medium-sized and micro-enterprises (Art. 2.3)(cf. Decision of the Munich Local Division of 27 January 2025, UPC_CFI_244/2024 and UPC_CFI_786/2024, p. 8).
- The ceiling on recoverable costs does not automatically correspond to the amount of the security (cf. Decision of the UPC Court of Appeal of 2 July 2026, UPC_CoA_935/2025, *X v Amycell*, §28). The UPC Court of Appeal states that, when assessing Article 69 of the UPCA and interpreting the applicable rules of the Rules of Procedure, account must be taken of the circumstances of the case, whereby the interests of the applicant (ESKO) must be safeguarded, whilst at the same time applying the principle of proportionality and ensuring that no unnecessary restrictions on access to justice are imposed on the party on whom such security is imposed (cf. §28 of the aforementioned decision).
- The fact that the claimant is a so-called *'non-practising* entity' (and therefore has no actual operational activities) is, in itself, insufficient to <u>prevent</u> the security from being reduced to 50 per cent of the ceiling for recoverable costs. The basic assessment must be the extent to which there is a risk that IN(K)CONTROL (as the claimant in the infringement proceedings), taking into account the circumstances of the case, will be deemed (at this stage of the proceedings) unable to pay the costs to ESKO should it be ordered to do so. On the basis of such an assessed risk, the amount of the security can then be determined in the light of the ceiling. In that sense, there is therefore no question of a 'customary' or 'principled' reduction to 50 per cent of the ceiling for recoverable costs. Such a reduction falls within the Court's discretionary power of assessment, in the exercise of which the aforementioned principles must also be applied.

- With regard to the circumstances of the case, ESKO has provided sufficient evidence in law that the risk it faces of having to reimburse the costs of the proceedings is very high. IN(K)CONTROL's annual accounts do indeed show:
  - that IN(K)CONTROL has a structurally negative equity position. Total assets amounted to just €85,064 in the 2024 financial year, and current assets to just €5,453 (of which cash and cash equivalents amounted to only €3,589). In 2025, a slight improvement was noted, with total assets of €90,772. The nature of these assets indicates that they are predominantly intangible (93.6 per cent in 2024 and 80.4 per cent in 2025, respectively). ESKO's assumption that these are primarily capitalised patent costs is not refuted by IN(K)CONTROL in its summary conclusion. In other words, if the patent were to be declared invalid, these assets would be reduced to an absolute minimum (ESKO refers to 'zero').
  - that IN(K)CONTROL's equity is negative (in 2024 €-6,031 and in 2025 €-823). Liabilities due within one year amounted to €91,095 in 2024 (and remained unchanged in 2025). ESKO concludes from the annual accounts (and this is not contradicted in IN(K)CONTROL's conclusions) that these current liabilities relate to a recoverable intercompany loan from the parent company (ETIVOET). Furthermore, it appears that IN(K)CONTROL recorded its first profit in 2025, amounting to €5,208. Finally, it should be noted that the loss carried forward amounted to €31,034 in 2024 and €25,823 in 2025.
- It also appears that there is reasonable doubt as to the going concern of IN(K)CONTROL in the event of a potential loss in the infringement proceedings (and the nullity proceedings). Indeed, the submitted annual accounts for 2024 and 2025 show that IN(K)CONTROL states that Article 3:6 of the (Belgian) Code of Companies and Associations applies. IN(K)CONTROL's continuity appears to depend on support from a third party (i.e. ETIVOET). However, IN(K)CONTROL has not provided any evidence as to the form this support would take.
- In other words, the structure set up by IN(K)CONTROL (or its parent company or an affiliated company) (and taking into account IN(K)CONTROL's financial data as well as the lack of an explicit guarantee from the supporting third-party company to cover the recoverable costs of the proceedings), entails a risk that, should the infringement dispute be lost and the patent be declared invalid, ESKO will be faced with an *empty shell* and the possibility of recovering costs will be reduced to zero. In support of this assessment, reference may also be made to similar decisions handed down by the Court, in which, taking into account the financial situation of the claimant, it was held that security should be maximised:
  - Milan Central Division, 13 March 2025, UPC_CFI_927/2025 (*La Siddhi Consultancy Ltd v Athena Pharmaceutiques SAS and Substipharm*), §29.
  - Mannheim Regional Court, 12 September 2025, UPC_CFI_132/2024 (Total Semiconductor LLC v Texas Instruments et al.) (p. 6)

- On the other hand, it should be noted that the ceiling is indeed a 'ceiling' and that it does not always represent the recoverable costs actually incurred. Having already ruled that the ceiling should not be increased on the basis of the scope of the claims, taking into account the (alleged) *'long-arm* jurisdiction' of the Court, nor on the basis of translation costs, the Court reiterates its assessment regarding the attainment of the ceiling. Furthermore, ESKO has provided neither an estimate of the billable hours likely to be incurred in these proceedings (and/or the billable hours already worked) nor the hourly rates at which these will be charged to ESKO. In general, it may be noted that the parties are represented by Belgian counsel and that their hourly rates are highly competitive within the UPC landscape (based on the experience of the Brussels Legal Department in cost proceedings for this division).
- Taking into account these circumstances of the case (a high risk of recoverability, yet also insufficient information regarding whether the ceiling for recoverable costs will be reached), the Court, exercising its discretionary power, reduces the security to €75,000.

II.B.5. Objections of principle following the determination of the amount of the security

34. Now that the Court has set the amount of the security at €75,000, it must be examined to what extent this security and its specific amount would restrict IN(K)CONTROL's access to justice in principle.

35. Firstly, it should be noted that the UPC Court of Appeal has already held that, whilst the status of the claimant may be taken into account when determining the amount of the security *(decision of the Court of Appeal of 30 April 2026, UPC_CoA_1/2026, Adobe v Keeex, paragraph 33)*, the status of a claimant as an SME does not, in principle, require a different approach to be adopted in order to reduce the maximum amount of recoverable costs (cf. Court of Appeal, 1 June 2026, UPC_CoA_48/2026, *La Siddhi Consultancy Ltd v Athena Pharmaceutiques SAS and Substipharm).* As indicated above, this amount may, if necessary, be reduced pursuant to Article 2(2) of *the Scale of Recoverable Costs,* provided that the stipulated and implied conditions are met (see §§26–29).

36. It is further noted that IN(K)CONTROL appears to imply that a security amount exceeding the alternative acceptable security amount of €28,000 would infringe its fundamental rights regarding access to the courts. By this order, the Court imposes a security amount of €75,000. Since IN(K)CONTROL fails to demonstrate sufficiently why such a specific amount would constitute a restriction on its fundamental right of access to the courts, and merely puts forward general arguments referring to the proceedings being made *'unnecessarily* costly', without, however, specifying a concrete amount that would not prevent it from seeking access to the courts (cf. Article 47 of the Charter of Fundamental Rights of the European Union) or would not restrict it in the exercise of the

enforcement of her intellectual property rights (cf. Article 41 of the TRIPS Agreement and Article 3(1) of the Enforcement Directive), the objection in this regard is not accepted.

37. Given the nature of IN(K)CONTROL's economic (operational) activities, or rather the lack thereof, IN(K)CONTROL's accounting data (including the fact that its assets are primarily intangible and boil down to the patent that is the subject of the proceedings) and the fact that IN(K)CONTROL does not create any employment, the Court finds that no fundamental objections relating to the infringement of fundamental rights prevent it from imposing a security in the amount of €75,000.

III. ORDER

The Court

1. Takes note of ESKO's formal undertaking to bring a counterclaim for the revocation of the patent in its Statement of Defence.
2. Orders IN(K)CONTROL, pursuant to Rule 158.1. RoP to provide security in the amount of €75,000 within 21 days of the issuance of this order, either by way of a bank guarantee issued by an EU-licensed banking institution or by bank transfer to the account of the Registry of the UPC.
3. Dismisses all further and other claims as unfounded.

Order issued by the panel on 16 September 2026 by:

Samuel **GRANATA** Chair and Reporting Judge Legally Qualified Judge	
Marije **KNIJFF** Legally Qualified Judge	
Daniel **VOß** Legally Qualified Judge	

<u>Information regarding appeals</u>

An appeal may be lodged pursuant to Article 73 of the UPCA and Rule 220.2 of the Rules of Procedure (Rule 158.3 of the Rules of Procedure). To date, none of the parties has sought leave to appeal.