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Düsseldorf local division
UPC_CFI_1534/2026

Order

of the Court of First Instance of the Unified Patent Court,
Düsseldorf local division
issued on 5 November 2026

HEADNOTE

It constitutes an undue delay for the applicant, instead of promptly undertaking a limited investigation that would have been sufficient to assess infringement of the patent in suit, to conduct more extensive and time-consuming investigations that were not necessary for determining infringement of the patent in suit before filing its application for interim measures.

HEADNOTE

It constitutes an undue delay if, instead of promptly carrying out a limited investigation that would have been sufficient to assess infringement of the patent in suit, the applicant instead carries out time-consuming, in-depth investigations that are not necessary for determining infringement of the patent in suit before filing its application for provisional measures.

KEYWORD

Urgency; necessity; preliminary injunction

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APPLICANT

Cilag GmbH International, Gubelstraße 34, 6300 Zug, Switzerland,

represented by: Prof. Dr Tilman Müller-Stoy, Attorney-at-law
Dr Michael Kobler, patent attorney Dr Maximilian Vieweg,
Bardehle Pagenberg Partnership mbB,
Prinzregentenplatz 7, 81675 Munich

RESPONDENTS

1) **Ningbo David Medical Device Co. Ltd.,** No. 2 Keyuan Road, Shipu Science and Technology Park, Xiangshan, 315731 Ningbo, Zhejiang Province, People's Republic of China,

First Respondent),

2) **Ningbo Verykind Medical Device Co., Ltd,** No. 100 Jinghua Road, High-tech Industrial Development Zone, 315040 Ningbo, Zhejiang Province, People's Republic of China,

Second Respondent),

represented by: Dr Peter Koch, Attorney-at-law, Penforce, Gabelbergerstr. 9
80333 Munich

PATENT AT ISSUE

EP 2 349 022

CHAMBER

Panel 2 of the Düsseldorf local division

DECIDING JUDGES

The order was issued by the presiding judge, Dr Thom, by the legally qualified judge, Dr Rinken, and by the legally qualified judge Adocker, acting as the judge-rapporteur.

LANGUAGE OF THE PROCEEDINGS

German

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SUBJECT MATTER OF THE PROCEEDINGS

Application for provisional measures. Section 32(1)(c), Section 62(1), Section 67 UPC Agreement, Rule 206.1 of the RoP in conjunction with Rule 211.1 of the RoP

ORAL HEARING

18 September 2026

BRIEF SUMMARY OF THE FACTS

1. The applicant bases her application for provisional measures on European Patent EP 2 349 022 B1 (hereinafter also the 'patent in question'), which protects surgical cutting and stapling instruments. This was filed on 9 October 2009, claiming priority from 10 October 2008. The application underlying the patent in question was published on 3 August 2013. The notice of the grant of the application patent as a European patent was published on 6 June 2018; it is in force in Germany, France and Italy (Annexes BP 3 and BP 4). In the German and French registers, the applicant was already registered as the proprietor at the time the application for provisional measures was filed; at that time, an application for transfer of title to the applicant had already been filed in the Italian register, on the basis of which the registration took place even before the oral hearing.

2. No preliminary objections have been filed against the patent in question, nor are any nullity proceedings pending.

3. Claim 1 of the patent in question relates to the manual return mechanism of a surgical instrument for cutting and stapling tissue, comprising an end effector, a drive shaft and a motor. The return mechanism allows the surgeon to move the advanced drive shaft back, particularly if the motor (or its power source) fails. The objective task is to improve safety during surgery.

4. To solve the aforementioned problem, the patent application proposes a surgical instrument having the features set out in its sole independent claim 1. Claim 1 can be structured as follows:

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1 A surgical cutting and fastening device, comprising

2 an end effector comprising a movable cutting element for cutting an object located within the end effector;

3 a drive shaft operatively connected to the cutting element;

4 a motor selectively engageable with the drive shaft; and

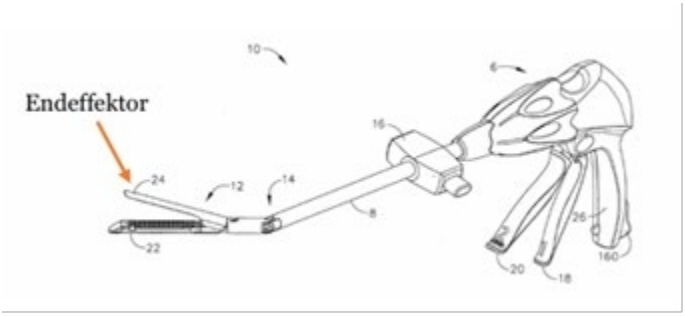
5 a return mechanism comprising a return actuator movable in a first direction, wherein the return actuator is configured to move the drive shaft when the return actuator is moved in the first direction

characterised in that

5.1 the return actuator is configured to operatively disengage the motor from the drive shaft when the return actuator is moved in the first direction, and

5.2 further comprising a pinion operatively engaged with the motor, wherein the pinion is displaceable away from the drive shaft to operatively disconnect the motor from the drive shaft.

5. Figures 1 and 2 of the patent application show such a surgical instrument for cutting and stapling tissue (claim 1, with an end effector at the distal end of the instrument (i.e. away from the surgeon holding the handle; see paragraph [0009]):



6. The respondents manufacture surgical cutting and stapling instruments in China and distribute them via their European distribution partners to clinics and hospitals in Germany, France and Italy, in particular under the names ‘EnDrive Orca’ and ‘EnDrive Zero’.

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7. Respondent 1) is a Chinese company based in Ningbo which manufactures medical devices and surgical instruments. Respondent 1) is the parent company of Respondent 2). It distributes its products in Europe through various distribution companies, and in Germany via RiVOLUTION GmbH. However, it also markets its products itself, for example, together with Respondent
2) as an exhibitor at the MEDICA 2024 trade fair.

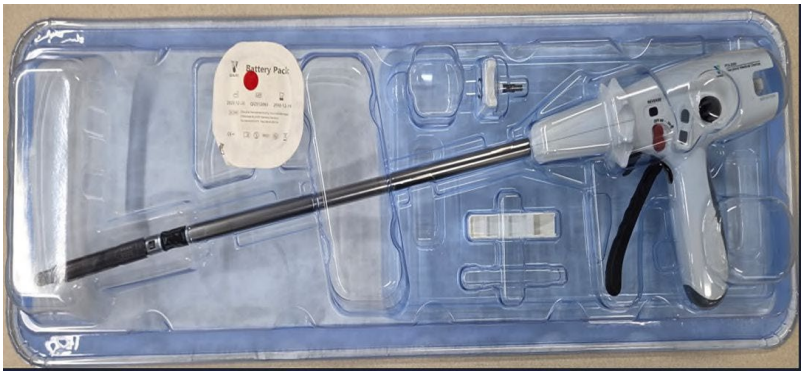
8. For the distribution of the *'EnDrive Orca'* and *'EnDrive Zero'* instruments in Europe, the first defendant utilises the services of Shanghai International Holding Corporation GmbH (Europe) as *an 'authorised representative'* within the meaning of the European Medical Devices Regulation (Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, the Medical Devices Regulation), with which it has concluded a corresponding agreement.

9. The second defendant is also a Chinese company based in Ningbo which manufactures medical devices and surgical instruments. The second defendant is named as the manufacturer on the packaging of the *'EnDrive Orca'* and *'EnDrive Zero'* instruments.

10. In any event, the 'EnDrive Orca' product is also offered and distributed by the Chinese manufacturers in France (by the French company Echovitalis SAS) and in Italy.

11. The 'EnDrive Orca' and 'EnDrive Zero' products are both single-use, battery-operated endoscopic cutting and stapling instruments ("Disposable Powered Endoscopic Linear Cutting Stapler").

Image of the *'EnDrive Orca*':



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Image of the *'EnDrive Zero*':



12. With regard to a predecessor product from David Medical known as 'EnDrive Beluga', the Munich I Regional Court issued two interim injunctions in favour of the applicant's legal predecessor, together with a seizure order against David Medical, on the grounds of infringement of the German part of a European patent (EP 2 621 360 B1) through its sale at the MEDICA 2024 trade fair, which took place in Düsseldorf from 11 to 14 November 2024.

13. In a letter dated 26 March 2025 (Exhibit AG 9), the applicant informed RiVOLUTION GmbH, the German distribution partner of the respondents, that the predecessor product 'EnDrive Beluga' potentially infringed further patents. The patent in question is explicitly mentioned in this letter.

14. Furthermore, in 2025, the claimant, together with its legal predecessor Ethicon LLC, filed two applications for provisional measures against RiVOLUTION GmbH: on 25 April 2025, an application for provisional measures concerning European Patent EP 3 689 262 (staple magazines) with the Hague local division (Case No.: UPC_CFI_374/2025) and, on 29 April 2025, a further application for provisional measures concerning European Patent EP 2 515 768 (surgical stapling instrument) with the Munich local division (Ref.: UPC_CFI_381/2025).

15. By decision of 6 August 2025, the Munich local division issued a provisional injunction against RiVOLUTION GmbH for infringement of European Patent EP 2 515 768 on the grounds of the sale of the 'EnDrive Beluga'. The further application concerning infringement of European Patent EP 3 689 262 was dismissed by the Hague local division on 29 August 2025 on the grounds of lack of urgency, although the court clarified during the oral hearing that it regarded the patent at issue there as valid and infringed.

16. The representative of RiVOLUTION GmbH mentioned during the proceedings regarding

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UPC_CFI_381/2025, during the oral hearing before the Munich local division in August 2025, that David Medical was already in the process of providing a successor product which would no longer infringe the patent in question, and that it would only take a few months to replace the infringing product (‘EnDrive Beluga’) with the successor product.

17. 

18. Despite repeated requests, RiVOLUTION GmbH did not provide the applicant with a copy of the amended embodiments. RiVOLUTION GmbH stated on several occasions – most recently in the letter dated 2 January 2026 (Annex BP 14, PDF page 31 et seq.), which marked the end of the correspondence between the parties on this matter – that it would not provide a copy of the modified embodiments. Against this background, the applicant finally decided to procure the new device herself. This proved difficult due to David Medical’s tightly controlled distribution structure. It was not until 13 February 2026 that the applicant became aware of a source of supply (Annex BP 2).

19. The subsequent steps were as follows (Exhibit BP 2):

On 20 February 2026, the items potentially infringing the patent were ordered. On 6 March 2026, the applicant received the relevant specimens. It then commissioned an analysis of the items in the USA at the campus of the group to which the applicant belongs. The analysis began on 18 March 2026. Various in-depth examinations, such as CT scans, were carried out on the dismantled instruments. On 2 April 2026, the applicant received the results of the examination. In the applicant’s view, the final determination of an infringement was made on 9 April 2026. The application for provisional measures was then filed on 4 May 2026.

APPLICATIONS OF THE PARTIES

20. The applicant requests:

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A. The respondents are ordered to refrain from and to cease

surgical cutting and fastening devices comprising

an end-effector comprising a movable cutting element for cutting an object positioned within the end-effector;

a drive shaft operatively connected to the cutting element;

a motor that can be selectively engaged with the drive shaft; and

a return mechanism comprising a return actuator movable in a first direction, wherein the return actuator is configured to move the drive shaft when the return actuator is moved in the first direction,

to be offered, placed on the market, used, imported or possessed for the aforementioned purposes in the Federal Republic of Germany, France and Italy,

characterised in that the return actuator is configured to functionally disconnect the motor from the drive shaft when the return actuator is moved in the first direction,

and further comprising a pinion operatively engaged with the motor, the pinion being displaceable away from the drive shaft to operatively disconnect the motor from the drive shaft.

(direct infringement of claim 1 of EP 2 349 022)

B. In the event of any breach of the order set out in paragraph A., the infringing defendant shall pay a penalty payment (which may be repeated) to the court, amounting to up to EUR 250,000 per breach (para. 354.3 of the RoP).

C. The respondents shall provisionally bear the costs.

D. This order is immediately enforceable.

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D. in the alternative to D:

This order is enforceable against the applicant only if the applicant has provided security in favour of the respective respondent in the form of a deposit or a bank guarantee. The amount of the security shall be determined separately in respect of each respondent.

21. The respondents apply

(1) that the application for provisional measures dated 4 May 2026 be dismissed;
– in the alternative –
(2) to make the issuance of provisional measures conditional upon the applicant providing security, the amount of which is to be determined by the court but should not be less than EUR 5,000,000;

(3) to order the applicant to bear the costs of the proceedings;

(4) and to order the applicant to pay the respondents provisional reimbursement of costs amounting to EUR 30,851.20 within 30 days of the decision being served on the applicant.

22. At the oral hearing, the parties agreed that the recoverable costs would be mutually recognised, subject to the order for costs pursuant to Rule 118.5 of the RoP, up to an amount of EUR 50,000.00.

FACTUAL AND LEGAL ISSUES

1. Standing to sue

23. The *applicant* takes the view that it has standing to bring proceedings. It is entered in the DPMA register as the proprietor of the German part of the patent in application, so that the presumption under Rule 8.5(c) of the RoP applies. The same applies to the French part of the patent in application. With regard to the Italian part, an application for conversion had already been filed at the time of the application for provisional measures (Annex BP 12); as stated at the oral hearing, the conversion to the

applicant, so that the presumption also applies in respect of the Italian part. The patent in question, which was (undisputedly) granted in the name of Ethicon LLC, Puerto Rico, United States (hereinafter: 'Ethicon LLC'), as the applicant (Exhibit BP 4), had been assigned by the latter, together with all claims arising therefrom, to the applicant by means of a Patent Assignment Agreement (PAA) "PAA") with an "Effective Date" of 5 April 2021 (Annex BP 5, BP 5a). In the alternative, Ethicon LLC granted the applicant standing to sue (Annexes BP 6 and BP 6a).

24. Furthermore, both the Munich local division in proceedings UPC_CFI_381/2025 and the Hague local division in proceedings UPC_CFI_374/2025 confirmed the validity of the assignment of the respective patent in application and the associated claims on the basis of the PAA.

25. In their pleadings, the *respondents* argue that the applicant is not registered as the proprietor of the Italian part of the patent in question. The registration, which had taken place in the meantime and was referred to by the applicant at the oral hearing, was not contested by the respondents.

26. Furthermore, the respondents contest the lawful assignment of the patent in question under the PAA. It follows from the applicant's submissions that the PAA was subject to 'conditions and prerequisites'. It is disputed that these prerequisites were fulfilled. In addition, the authority of the signatories to the PAA to act on behalf of their respective parties is disputed. This is also disputed with regard to a subsidiary claim for retrospective approval.

2. Infringement

27. The *claimant* takes the view that both the *'EnDrive Orca'* and the *'EnDrive Zero'* products of the respondents fulfil all the features of the patent in suit.

28. In particular, feature group 5 is also realised, namely the presence of a

> 5 return mechanism comprising a return actuator movable in a first direction, wherein the return actuator is configured to move the drive shaft when the return actuator is moved in the first direction

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characterised in that

5.1 the return actuator is configured to functionally disconnect the motor from the drive shaft when the return actuator is moved in the first direction, and

5.2 further comprising a pinion operatively engaged with the motor, wherein the pinion is displaceable away from the drive shaft to operatively disconnect the motor from the drive shaft.

29. In particular, it is irrelevant whether the return actuator ('rotary knob') supplied separately in the product packaging is an integral part of the claimed device. Neither the wording nor the function of feature 5 would, in solving the technical problem of the patent application, require the return actuator to be formed as a single piece with the surgical instrument. The subject-matter of the patent application relates to a safety function, in that it allows the surgeon to move the advanced drive shaft back in the event of motor failure. This function is only required in exceptional situations and, consequently, it would, on the contrary, be natural not to form the return actuator as an integral part of the instrument, but rather as an 'add-on'. Furthermore, the description of the patent application expressly mentions the possibility of an integral design for other elements (the carriage, in paragraph [0022], drive shaft, in paragraph [0074], and pinion, in paragraph [0075]) – the fact that this is not provided for in the wording of the claims with regard to the return actuator also argues against the return actuator being designed as an integral part of the instrument.

30. The fact that the rotary knob of the infringing products is not supplied in an assembled state does not, for legal reasons, preclude infringement, as the simultaneous offering and supply of individual parts of a complete device is regarded as direct patent infringement. In this respect, the respondents are taking advantage of the fact that the rotary knob is fitted by their customers.

31. Furthermore, there is only a single direction of movement for the return actuator itself; the direction of movement of other elements of the return mechanism is irrelevant to the realisation of feature group 5.

32. The *respondents* contend that the contested embodiments do not make use of the subject-matter of the teaching set out in the claimed patent.

33. In particular, they argue the respondents that the

group of features 5 is not fulfilled in the contested products. The rotary knob enclosed with the packaging is a separate tool key and not an integral part of the surgical cutting and fastening device. The claim requires that the surgical cutting and fastening device comprise various components which are integral parts of this device and must not merely be optionally added.

34. Furthermore, contrary to feature 5, the contested products do not have a single first direction in which the return actuator is moved, but rather two distinct directions: namely, a first direction for moving the rack and a second direction for decoupling the motor from the rack, the second direction being distinct from the first. Consequently, the contested products lack the claimed movability in a first direction and the associated configuration of the return actuator, which, in mechanical interaction with the first direction, causes both the movement of the drive shaft (feature 5) and the decoupling of the motor from the drive shaft (features 5.1 and 5.2.1), with the result that feature group 5 is not realised.

3. Validity

35. The *respondents* are of the view that the subject-matter of the patent in suit is, on the one hand, inadmissibly broadened. The term ‘return actuator’ in feature 5 is disclosed neither in the description of the patent in suit nor in the description of the original application WO 2010/042786 A2, but only in the original claims 17 and 24. Whilst claim 1, as granted, requires immediately, directly and unambiguously that the return actuator is movable in a first direction, whereby
(1) the return actuator is designed to move the drive shaft when the return actuator is moved in the first direction, and (2) the return actuator is designed to functionally disconnect the motor from the drive shaft when the return actuator moves in the first direction, claim 17 does not, in fact, provide this unambiguity. It leaves open, with regard to the disengagement from the drive shaft, whether this is effected exclusively when the return actuator is moved in the first direction, as required by granted claim 1.

36. Furthermore, all the features of claim 1 of the patent in suit are prejudicially anticipated by WO 2006/005342 A1 (Annex AG5).

37. Furthermore, claim 1 of the patent application, based on document US

2008/245842 A1 in combination with prior art from US 5421555 A or with WO 2008118707 A2, lacks inventive step.

38. The *applicant* is of the view that the validity of the patent is sufficiently established. The objections raised by the respondents are unfounded.

39. With regard to the issue of impermissible extension, the applicant argues that, based on the wording of the original claim 17 and its grammatical structure, a person skilled in the art would unambiguously understand this to mean that the effect of the motor decoupling is linked to the movement of the return actuator in the first direction, so that there is no impermissible extension.

40. Novelty over WO 2006/005342 A1 (Annex AG5) is established because that document, in any event, discloses the features

1 surgical cutting and fastening device and

5 a return mechanism comprising a return actuator movable in a first direction, wherein the return actuator is configured to move the drive shaft when the return actuator is moved in the first direction

characterised in that

5.1 the return actuator is configured to functionally disconnect the motor from the drive shaft when the return actuator is moved in the first direction, and

5.2 further comprising a pinion operatively engaged with the motor, wherein the pinion is slidable away from the drive shaft to operatively disconnect the motor from the drive shaft.

were not disclosed.

41. Inventive step is also present. The respondents' arguments on this point oversimplify the distinguishing features, formulate the objective technical problem in an impermissibly narrow manner from a retrospective perspective, and rely on a document from outside the relevant technical field (US5421555) or a document from a remote

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technical field (WO 2008118707 A2), which a person skilled in the art would have had no reason whatsoever to consult. Furthermore, the document US 2008/245842 A1 had already been taken into account by the examiner during the grant procedure and had been expressly acknowledged in the patent application. The subject-matter of claim 1 of the patent application had correctly been deemed to be inventive in relation to US842. Nor did the additional consideration of US555 and WO707 alter this.

4. Urgency

42. The *applicant* submits that the application for provisional measures is also time-sensitive. She faces the risk of substantial damage if she were only able to enforce her claims for an injunction in proceedings on the merits. The application was filed at the earliest possible opportunity and without culpable delay (Rule 211(4) of the RoP). The applicant only gained reliable knowledge of the infringement of the patent in question a few weeks before filing the application for provisional measures, namely upon confirmation of the implementation of claim 1 of the patent in question on 9 April 2026. The earlier proceedings between the parties concerned technical aspects of predecessor products which had nothing to do with the subject-matter of the patent in question: EP 2 515 768 relates to the delayed activation and deactivation of a switch, and EP 2 837 262 relates to a staple magazine.

43. The applicant further submits that [redacted] t would therefore first have had to obtain the physical infringing articles in order to assess whether an infringement had taken place; however, due to RiVOLUTION GmbH's refusal to make such articles available, and the respondents' tightly organised distribution structure, meant that it was only after numerous attempts on 13 February 2026 that a possible source of supply was identified, from which an order was then placed on 20 February 2026. It was then necessary to examine the items in depth in the USA in order to assess whether the claimed patent had been infringed; only then would it have been possible to prepare and file the application for provisional measures.

44. The *Respondents* allege that the applicant had the

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patent in question against the 'original form of infringement' (the product "EnDrive Beluga". The "EnDrive Zero" is of identical construction to the "EnDrive Beluga", which the applicant had already examined in detail in 2024/2025. The reset mechanism has not changed since then. Furthermore, the applicant's letter of 26 March 2025 (Exhibit AG 9), in which the respondents' representative was informed that the predecessor product 'EnDrive Beluga' potentially infringed further patents, explicitly mentions the patent in question. This shows that the applicant was apparently already aware at that time that there was a potential infringement of the patent in application by the predecessor product.

45. As regards the successor product, RiVOLUTION GmbH had already stated on 22 September 2025, and repeatedly thereafter, that it had no intention of making a product available to the applicant [redacted] Furthermore, the new product 'EnDrive Orca' had been available on the market since 21 November 2026.

46. Furthermore, the respondents contend that the applicant has failed to put forward any substantiated arguments as to why an in-depth and time-consuming examination of the contested embodiments was necessary to assess whether there had been an infringement of the patent in question in the USA.

5. Objective necessity and balancing of interests

47. The *applicant* argues that, on balancing the respective interests, its interest in the issuance of provisional measures to safeguard its rights under the patent in suit prevails.

48. It is generally accepted that an injunction is, by its very nature, temporary in the event of its subsequent revocation. In principle, any act refrained from during the period in which the injunction is in force may be carried out at a later date. In the case of a provisional injunction, therefore, prejudging the main proceedings is ruled out on its very basis, and the respondents' interests are already reflected in this temporary restriction. A provisional injunction based on (monopoly)

rights arising from a patent would, moreover, as such entail economic disadvantages for the party subject to the injunction. This lies in the nature of patent law as a monopoly on invention. Economic disadvantages associated with an injunction could therefore, in principle, not be regarded as conflicting interests of the party subject to enforcement. Only if these economic disadvantages go beyond what is normally to be expected could they, at all, be taken into account in the context of the balancing of interests.

49. The applicant contends that no such economic disadvantages are apparent on the part of the respondents. The respondents have demonstrated that they are capable of rapidly developing and bringing to market alternative solutions. By contrast, the applicant would face irreparable harm if it were required to await the decision in the main proceedings: As the respondents have rushed their successor product, ‘EnDrive Orca’ – which replaces ‘EnDrive Beluga’ – onto the market, the applicant is in urgent need of the provisional measures sought. The respondents’ conduct does not suggest that they will, of their own accord, refrain from further acts of infringement in the future. In this respect, there is a serious risk that the applicants’ sister company, ‘J&J Medical’, will suffer significant losses in terms of order intake, turnover and overall market share as a result of the respondents’ infringing acts. Price erosion has also already occurred on the market. Furthermore, the infringing products constitute clear copies of the J&J products.

50. The *respondents* argue in this regard that the Hague local division of UPC, in the proceedings concerning UPC_CFI_374/2025, was not convinced that the facts (which were also put forward in the present proceedings) supported the existence of objective urgency. Furthermore, it is disputed that price erosion in the market has occurred as a result of the respondents’ products. Moreover, the economic disadvantages alleged by the applicant apply equally to the respondents.



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[redacted]

6. Security

51. In the alternative, should provisional measures be issued, the *respondents* seek the imposition of security in an amount of 'not less than' EUR 5 million each. In the event of enforcement, the respondents would suffer lasting damage which would significantly impair their business. Even if this damage were predominantly of a reputational and indirect nature (a decline in turnover from non-infringing products as a participant), security would ensure that the damage caused by the claimant's application could be reliably compensated by the claimant. The claimant has, even up to now, repeatedly attempted to stir up unrest and mistrust through deliberate misrepresentation and direct approaches to customers, thereby causing lasting damage to the respondents' reputation.

52. The *applicant* argues that the respondents have failed to provide a specific account of the damages suffered and have also failed to explain why it would not be possible to obtain compensation from the applicant for any damages arising from enforcement proceedings. A security deposit should therefore not be imposed.

7. Provisional reimbursement of costs

53. In support of their application for provisional reimbursement of costs, the *respondents* argue that a provisional order for costs may also be made in favour of a defendant, and refer to the case law of the Court of Appeal (UPC_CoA_317/2025, Order of 28 November 2025, Barco v. Yealink, para. 96 et seq.).

54. The *applicant* argues that Rule 211.1(d) of the RoP permits an order for costs only in favour of the applicant, meaning that the respondents' application in this regard is inadmissible.

KEY PROCEDURAL STEPS

55. By order of 19 August 2026, the respondents' application of 10 August 2026 for a reduction in the number of documents, the document of the same date together with the annexes submitted in connection therewith, and the respondents' unsolicited Reply of 17 August 2026 were dismissed.

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56. To avoid repetition, reference is made to the entire contents of the file.

REASONS FOR THE ORDER

57. The application for an order for provisional measures is admissible. However, it is unsuccessful on the merits due to a lack of urgency.

I. (INTERNATIONAL) JURISDICTION OF THE DÜSSELDORF LOCAL DIVISION

58. The Düsseldorf local division has international jurisdiction and, pursuant to Article 33(1)(a) of the UPC Agreement, jurisdiction within the Court of First Instance.

59. The UPC Agreement has international jurisdiction over an infringement action if the European patent asserted by the claimant is in force in at least one Contracting Member State and the alleged damage may occur in that Contracting Member State (Article 31 UPC Agreement, Article 7(2) in conjunction with Article 71b(1) of the Brussels Ia Regulation, cf. the Court of Appeal's order of 3 September 2024 – UPC CoA 188/2024 – AYLO/DISH, GRUR-RS 2024, 29446). If
it is alleged that the damage was caused via the internet, the likelihood of such damage may arise from the possibility of purchasing products and/or using services from a website accessible within the territory of the Contracting Member State in which the European patent has effect (Court of Appeal, AYLO/DISH, cited above).

60. The contested embodiments are, amongst other places, offered and sold on the internet in Germany.

II. STANDING TO SUE

61. In the present case, an assessment of standing to bring proceedings need not be addressed, as the application for provisional measures has already been issued and is unsuccessful on the merits due to a lack of urgency.

III. VALIDITY AND INFRINGEMENT OF THE PATENT IN QUESTION

62. In the present case, however, the assessment of whether it can be established with sufficient certainty that the applicant's rights are infringed by the offering and distribution of the contested embodiments may be left open, as the application for provisional measures has already been issued

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already fails on the grounds of lack of urgency in the matter. For the same reasons, and as it is not relevant to the decision in the present case, no further details are required regarding the legal validity of the patent in suit.

IV. OBJECTIVE NECESSITY OF AN INJUNCTION

63. Pursuant to Article 62(2) of the UPC Agreement and Rule 211.3 of the RoP, it is at the court's discretion to weigh up the interests of the parties against one another and, in particular, to take into account the potential harm that might arise for one of the parties as a result of the application being issued or dismissed. In doing so, the court must take into account not only the harm to one of the parties, but also the time factor. In particular, the court must assess whether proceedings on the merits can be awaited or whether provisional measures are necessary (Court of Appeal, UPC_CoA_540/2024, Order of 24 February 2024, Biolitec v Light Guide, para. 19). In this regard, Rule 206.2(c) of the RoP requires the applicant to set out in its application the reasons why provisional measures are necessary to prevent an imminent infringement, to prohibit the continuation of an alleged infringement, or to make such continuation conditional upon the provision of security. This concerns the merits of the application for provisional measures and must be taken into account by the court when issuing an order pursuant to Rule 211 of the RoP (Court of Appeal, UPC_CoA_540/2024, Order of 24 February 2024, Biolitec v Light Guide, para. 20, with reference to UPC_CoA_335/2023).

64. In the present case, this balancing of interests works against the applicant, since – as set out in detail in the following point – taking the time factor into account, the issuance of provisional measures is not warranted.

V. (TEMPORAL) URGENCY

65. In the present case, the requirement of (temporal) urgency is not met, meaning that no provisional measures can be ordered.

1. Principles

66. Pursuant to Rule 211.4 of the RoP, the Court must take into account any undue delay on the part of the applicant in applying for provisional measures. Whether there has been an undue delay within the meaning of Rule 211.4 of the RoP depends on the circumstances of the individual case (Court of Appeal, UPC_CoA_182/2024, Order of 25 September 2024, Mammut Sports v Ortovox).

67. In principle, the applicant bears the burden of proof regarding the acquisition of knowledge of the potential infringement and its prompt investigation (LD Düsseldorf, UPC_CFI_1927/2025, Ottobock v BrainPortfolio Inc., para. 100). The relevant period extends from the time of becoming aware of the contested embodiment as a potentially infringing product until all the facts and evidence required to substantiate the full facts of the infringement have been obtained. In this regard, all the circumstances of the individual case are relevant. Once such a submission has been made, it is in turn for the defendant to set out the indications from which it can be concluded that the defendant must have been aware of the infringement at an earlier stage and from which hesitant conduct can be inferred. Provided that such indications are substantiated by the defendant, it is then for the claimant to rebut them.

68. Insofar as a defendant relies on the fact that there was already an infringement of the patent in question in relation to an earlier product, they must, in accordance with the 'more likely than not' standard applicable in interim proceedings before the UPC (Court of Appeal, Order of 3 March 2025, UPC_CoA_523/2024, paras. 56, 77 – Sumi Agro v Syngenta), the respondent must, in particular, demonstrate credibly that (i) the product now challenged is essentially the same as a product previously available in relation to the patent in question, and (ii) the product previously available gave reasonable cause to investigate whether the intellectual property right now asserted had been infringed.

69. Furthermore, on 2 July 2026, in UPC_CoA_19/2026 (Guardant Health v. Sophia Genetics), the Court of Appeal ruled on the question of the extent to which various potentially infringed patents must be asserted in a single application:

> *"A patent proprietor is not obliged to assert all patents in a single application for provisional measures. If the patent proprietor has the information required to file an application for provisional measures in respect of some, but not all, of the patents, it may be regarded as an unreasonable delay to postpone filing the application until the necessary information regarding all the allegedly infringed patents is available."* (Headnote 1)
>
> *'If a patent holder is aware, on the basis of a document, that one*

or more of his patents have been infringed, he must not overlook the fact that the same document also indicates the infringement of one or more of his other patents."
(Headnote 2)

"In principle, a patent holder is not obliged to monitor the market. However, if the patent holder becomes aware of specific circumstances indicating patent infringement, they are required to investigate the matter with due diligence so that they can take action against all infringers as promptly as possible."
(Headnote 3)

70. In UPC_CoA_901/2025 (Abbott v. Sinocare, Menarini) of 17 April 2026, the Court of Appeal held in paragraph 168 that what matters is the point in time at which the claimant or applicant can establish with the requisite certainty that the 'new' product actually infringes the patent.

71. The Court of Appeal further held in UPC_CoA_19/2026 that it is incumbent upon the applicant to set out in detail which further analyses or tests were necessary to assess the existence of a patent infringement, for which claim or which claim features their performance was necessary, how long this took, and why this time expenditure was reasonable. This includes, in particular, a demonstration of the specific patents for which the technical analysis was required; see paragraph 141 of the aforementioned decision, cited below:

"141. It is incumbent upon the patent proprietor applying for the issuance of provisional measures to set out, in a substantiated manner, whether and, if so, which further analyses or investigations were necessary, in respect of which patent claims or claim features these had to be carried out, how long they took and why this period is to be regarded as reasonable."

2. <u>Assessment in the present case</u>

72. Applying the aforementioned principles to the facts of the present case, the court concludes that the applicant waited an unreasonable length of time before filing the application for provisional measures.

73. Firstly, it is already open to question whether the applicant should not have taken action on the basis of the drawings made available to her

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[redacted]

74. In her pleadings, the applicant has failed to provide even a remotely substantiated exp[redacted] it cannot be concluded that a patent infringement exists. Insofar as the applicant argued for the first time at the oral hearing that the presence of feature group 5 in the modified embodiment [redacted], this constitutes a new argument which can no longer [redacted], as no basis for this argument has been laid down in the pleadings. Therefore, in view of the burden of proof resting with the applicant, it is already open to question whether it was justified for the applicant to have waited for the acquisition of the modified subject-matter before taking further steps to initiate proceedings for the issuance of provisional measures against the respondents.

75. Even if one were to assume, in the applicant's favour, that the purchase was nevertheless necessary and difficult, there was in any event an unreasonable delay for the period following the purchase. Although the procurement itself took quite a long time – after all, two weeks elapsed between the order on 20 February 2026 and receipt on 6 March 2026 – the applicant did not immediately examine the products for infringement of the patent in question upon receipt, even though it was already aware of this patent or, at the very least, ought to have been aware of it. The latter is evident from the letter dated 26 March 2025, Annex AG 9, in which the applicant's legal representatives informed the respondents' legal representatives of potentially relevant infringed patents (with regard to the predecessor product 'EnDrive Beluga') and explicitly listed the patent in question therein. Rather, as is evident from Annexes BP2 and BP14,

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— to the USA in order to examine them, by means of extensive investigations such as CT scans, with a view to determining whether they infringed various other patents.

76. Such extensive investigations were not necessary for the patent in suit in the present case. The features of the patent in question are purely mechanical in nature and can be ascertained with minimal investigative effort, without the need for more in-depth investigations, let alone CT scans. The applicant's failure to carry out this minimal investigative effort in a timely manner therefore constitutes an unreasonable delay on her part. The applicant has not put forward any arguments – neither in its pleadings nor at the oral hearing – as to why, instead, time-consuming, in-depth investigations in the USA, in particular CT scans, would have been necessary to establish infringement of the patent in question, or why they were used for this purpose at all. Nor can the court infer this from the annexes submitted. In particular, no investigation report was submitted.

77. This stands in stark contrast to the standard which – as set out above – the Court of Appeal established in UPC_CoA_19/2026, paragraphs 141 and 142 – according to which it is incumbent upon the applicant to provide a well-founded explanation of which further analyses or tests were required, for which claim or which claim features their performance was necessary, how long this took and why this time expenditure was reasonable; this includes, in particular, an explanation of for which specific patents the technical analysis was required. None of this was set out by the applicant in the present case in relation to the patent in suit. Rather, the applicant argued that the respondents were known for making 'minimal changes' to earlier products that had been the subject of complaints. This further suggests that no in-depth investigations were required to assess whether the claimed patent had been infringed – all the more so as the claimed patent was already under consideration in relation to the predecessor product 'EnDrive Beluga', see Annex AG 9.

78. The Court therefore concludes that, upon receipt of the items potentially infringing the patent, the applicant deliberately delayed initiating proceedings for the issuance of provisional measures in respect of the patent in question until extensive investigations had been carried out to obtain the necessary information regarding the infringement of further patents, which, however, were not necessary for the assessment of an

infringement of the patent in question. This is also indicated by the fact that, on the same day that it filed the application for provisional measures at issue here (4 May 2026), the applicant filed an application for provisional measures before the LD Hamburg against the same parties in respect of the same infringing items (UPC_CFI_1535/2026), which was based on a patent other than the patent at issue here.

79. This course of action constitutes an unreasonable delay, particularly in light of the first headnote cited above in the decision of the Court of Appeal UPC_CoA_19/2026, with the result that the requirement of (temporal) urgency for the issuance of provisional measures must be deemed not to have been met.

80. Consequently, it is no longer relevant whether there was an unreasonable delay during the period prior to receipt of the infringing items.

VI. PROVISIONAL REIMBURSEMENT OF COSTS

81. The applicant's application for provisional reimbursement of costs is unsuccessful, as the application for provisional measures has already been dismissed on the grounds of a lack of urgency in the matter.

82. By contrast, the respondents' application for provisional reimbursement of costs is well-founded. In the case *of Barco v Yealink* (UPC_CoA_317/2025 and UPC_CoA_376/2025), the Court of Appeal held in its decision of 28 November 2025:

> *"A provisional order for costs may also be made in favour of the respondent in proceedings for provisional measures. The fact that Rule 211.1(d) of the Rules of Procedure (RoP), unlike Rule 150.2 RoP, does not expressly provide for a provisional order for costs in favour of the successful party does not preclude this. In this respect, the same principles apply to proceedings for interim relief as to the main proceedings. A provisional assessment of costs up to the applicable upper limit for reimbursement renders separate proceedings for a costs order under Rule 150 of the Rules of Procedure unnecessary."*

83. Accordingly, a provisional order for costs may be sought not only by the applicant but also by the respondents.

84. As regards the amount, in accordance with the case law of the Court of Appeal, the focus is

to award provisional reimbursement of costs amounting to half the upper limit of recoverable costs based on the value in dispute. Where the value of the claim is EUR 1 million, the upper limit is EUR 112,000; half of this is therefore EUR 56,000, meaning that, subject to a corresponding application, an award of this amount would be possible (UPC_CoA_898/2025, Order of 27 March 2026, Onward v Niche Biomedical). However, as the respondents are seeking only a lower amount, namely EUR 30,851.20 based on the German Lawyers' Fees Act, an award is made solely in this amount.

VII. VALUE OF THE CLAIM

85. The claimant has 'provisionally estimated' the value of the claim at EUR 1 million. This figure has not been contested by the respondents and appears reasonable in view of the economic value of the dispute. The court therefore sets the value of the claim at EUR 1 million.

VIII. PRELIMINARY RULING ON COSTS

86. A decision on costs is also justified in interim proceedings (Hamburg local division, Order of 21 February 2025, UPC_CFI_701/2024; Order of 26 June 2024, UPC_CFI_124/2024). This is also in line with the view of the Court of Appeal (Order of 3 March 2025, UPC_CoA_523/2024 – Sumi Agro v Syngenta; Order of 6 August 2024, UPC_CoA_335/2024, 10x Genomics et al. v NanoString) that a decision on costs should be made in inter partes proceedings concerning provisional measures, as these proceedings bring the case to a close. Pursuant to Article 69(1) of the UPC Agreement, the reasonable and proportionate costs of the proceedings and other expenses incurred by the successful party shall, in principle, be borne by the unsuccessful party, unless equity dictates otherwise. Consequently, in the present case, the applicant is liable for the costs.

ORDER

I. The application for provisional measures is dismissed.

II. The applicant shall bear the costs of the proceedings.

III. The applicant shall pay the respondents a provisional reimbursement of costs amounting to [redacted] within 30 days of the order being served on the applicant.

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IV. The value of the claim is set at EUR 1,000,000.00.

Düsseldorf, 5 November 2026

Presiding Judge Dr Thom	Anna Bérénice Dr THOM Digitally signed by Anna Bérénice Dr THOM Date: 4 November 2026 14:52:38 +01'00'
Legally qualified judge Dr Rinken	Ingo Rinken Digitally signed by Ingo Rinken Date: 4 November 2026 15:16:48 +01'00'
Legally qualified judge Adocker as judge-rapporteur	Thomas Adocker Digitally signed by Thomas Adocker Date: 4 November 2026 14:28:12 +01'00'
On behalf of the Deputy-Registrar	Digitally signed Frank Hermann Moritz 4 November 2026 16:03:15 +0100 Unified Patent Court Einheitliches Patentgericht Juridiction unifiée du brevet

INFORMATION REGARDING THE APPEAL

The unsuccessful party may lodge an appeal against this order within 15 days of its service (Art. 73(2)(a), 62 UPC Agreement, R. 220.1(c), 224.2(b) RoP).

INFORMATION ON ENFORCEMENT (Art. 82 UPC Agreement, Art. 37(2) UPC Agreement, R. 118.8, 158.2, 354,
355.4 RoP):

A certified copy of the enforceable decision or the enforceable order shall be issued by the Deputy-Registrar on application by the party seeking enforcement, Rule 69 of the Rules of Procedure.