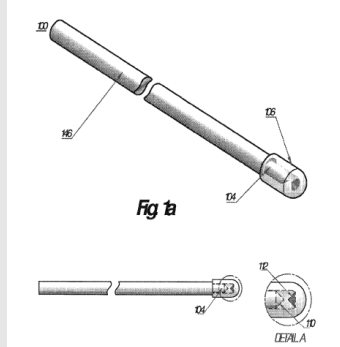


UPC Court of Appeal, 24 February 2025, Bioletic v Light Guide

endoluminal laser ablation device for treating veins



PATENT LAW – PROCEDURAL LAW

Unsuccessful appeal of rejection of provisional injunction changing the status quo on the market

- Provisional measures require that proceedings on the merits – which offer more procedural safeguards – cannot be awaited (Article 62 UPCA, R. 206 RoP, R. 211 RoP)
- The requested measures would change the status quo on the market, established years before the grant of the patent. Appellant has not demonstrated that provisional measures are necessary to protect its current market share or prices or for any other purpose that cannot await a decision on the merits.

Late filed price erosion argument and auxiliary request covering alleged infringed acts at 2025 trade fair (R. 222.2 RoP)

- Biolitec has not justified why the argument on price erosion could not reasonably have been raised during the proceedings before the Court of First Instance.

52. Furthermore, this argument has not been substantiated and, in any event, would require more specific information.

Auxiliary request

53. Biolitec, during the oral hearing, extended its request for provisional measures to cover alleged infringing acts of the Lightguide companies during the MEDICA 2025 trade fair which is due to be held in Düsseldorf from 17 to 20 November 2025.

Source: [Unified Patent Court](#)

UPC Court of Appeal, 24 February 2025
(Grabinski, Blok, Gougé, Augarde, Tilmann)
UPC_CoA_540/2024
APL_52692/2024
ORDER

of the Court of Appeal of the Unified Patent Court issued on 24 February 2025

in the proceedings for provisional measures

HEADNOTES:

- The procedure for provisional measures may find application if, considering the nature of the case, proceedings on the merits cannot be awaited. If proceedings on the merits can be awaited, provisional measures are not necessary since proceedings on the merits offer more procedural safeguards.
- In weighing up the interests of the parties, the Court is not limited to merely taking into account the harm for either of the parties, but also takes into account the time factor. More specifically, the Court assesses whether it is possible to await proceedings on the merits, or whether provisional measures are necessary.
- The requested measures would change the status quo on the market, established years before the grant of the patent. In this case, the Appellant has not demonstrated that provisional measures are necessary to protect its current market share or prices or for any other purpose that cannot await a decision on the merits.

KEYWORDS:

- Provisional measures, [Art. 62 UPCA](#), [R. 206](#), [211 RoP](#)

APPELLANT (APPLICANT IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

Biolitec Holding GmbH & Co. KG, Vienna, Austria (hereafter “*Biolitec*”), represented by attorneys-at-law Paul Szynga, Hannes Jacobsen and Alexander M. Fischer, CBH Rechtsanwälte; European Patent Attorney Dr. Franz Herrmann, Dendorfer & Herrmann, Patentanwälte Partnerschaft mbB

RESPONDENT 1) (DEFENDANT 1) IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

Light Guide Optics Germany GmbH, Meckenheim, Germany (hereafter “*Light Guide Optics*”), **RESPONDENT 2) (DEFENDANT 2) IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)**

S.I.A. LIGHTGUIDE International, Līvāni, Latvia (hereafter “*SIA Lightguide*”),

Both represented by attorneys-at-law Jörg Schmidt and Jan Caspar Maiers, Wildanger Kehrwald Graf v. Schwerin & Partner mbB Rechtsanwälte; European Patent Attorneys Jörg Weidener, and Miriam Marsch, von Rohr Patentanwälte Partnerschaft mbB (Light Guide Optics and SIA Lightguide together referred to hereafter as “*Lightguide companies*”)

PATENT AT ISSUE

[EP 3 685 783](#)

PANEL AND DECIDING JUDGES

Panel 1a:

Klaus Grabinski, President of the Court of Appeal,
Peter Blok, Legally Qualified Judge,
Emanuel Gougé, Legally Qualified Judge and Judge-rapporteur,

Eric Augarde, Technically Qualified Judge,
Max Tilmann, Technically Qualified Judge.

LANGUAGE OF PROCEEDINGS

German

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

□ [Order of the Court of First Instance of the Unified Patent Court, Local Division](#)

[Düsseldorf, of 05 September 2024](#)

□ Action Nos:

ORD_47991/2024

ACT_47064/2024

UPC_CFI_486/2024

ORAL HEARING:

23 January 2025

FACTS AND REQUESTS OF THE PARTIES

The Parties and the patent at issue

1. Biolitec, an Austrian medical technology company that develops laser fibres for minimally invasive laser therapies, has brought an action for provisional measures against the Lightguide companies for infringement of [EP 3 685 783](#) (the patent at issue). Biolitec is the registered proprietor of the patent at issue. The patent at issue is a European patent with unitary effect.

2. The grant of the patent at issue was published on 17 July 2024 based on a third divisional application filed on 5 May 2019 and published on 29 July 2020. The parent application was filed on 2 March 2009 claiming US priorities of 28 February, 8 July and 13 October 2008 and 27 February 2009. The claims of the third divisional application were filed on 28 January 2020 and the communication of intention to grant (R. 71(3) of the European Patent Convention, hereinafter: “EPC”) was published on 22 May 2024. Light Guide Optics participated in the examination proceedings with five third-party observations and filed an opposition against the patent at issue before the European Patent Office on 19 July 2024.

3. Respondent 2), SIA Lightguide, is a Latvian company and the parent company of Respondent 1), the German company Light Guide Optics. It is incorporated as a “Sabiedrība ar ierobežotu atbildību” (limited liability company under Latvian law, or “SIA”) and operates under the name “LIGHTGUIDE International Ltd.” or under its former company name “Light Guide Optics International Ltd.” or “LGO”. 4. SIA Lightguide and Light Guide Optics respectively produce and sell sterile packed single-use devices for transmission of laser radiation, which is emitted laterally at the probe’s end, including the contested embodiment known as “Infinity Side Fiber” which has been produced and marketed at least since 2021. 5. The parties and their groups have been involved in patent disputes in several European countries since 2016 in relation to another version of a sterile packed single-use device for transmission of laser radiation manufactured and distributed by the Lightguide companies, known as “Saturn Side Fiber”, and to another patent (EP 2 620 119) of the same patent family to which the patent at issue belongs. Several

infringement actions have been brought by Biolitec against the Lightguide companies, including proceedings in France, Italy and the Netherlands, as well as before the Düsseldorf Regional Court and Higher Regional Court. 6. After the German Federal Court of Justice limited the German part of EP 2 620 119 in revocation appeal proceedings, CeramOptec GmbH, part of the Biolitec group, obtained in 2021 a provisional injunction from the Düsseldorf Regional Court (case 4b O 81/21) against Light Guide Optics concerning their “Saturn Side Fiber” product for indirect infringement.

The first-instance proceedings

7. On 14 August 2024, Biolitec lodged an application for provisional measures with the Düsseldorf Local Division of the Court of First Instance of the Unified Patent Court (UPC), requesting that the Court issue a provisional injunction ordering the Lightguide companies to refrain from using, offering for sale, placing on the market, importing or otherwise possessing for these purposes the contested embodiment, and grant corresponding provisional measures.

8. Following two procedural orders of 15 and 21 August 2024 seeking clarifications from the Applicant, to which Biolitec responded by filing additional submissions and exhibits, respectively on 19 and 23 August 2024, the Düsseldorf Local Division issued the impugned order without hearing the Defendant, dismissed the application, ordered the legal costs to be borne by Biolitec and granted leave to appeal.

9. The reasoning of the Court of First Instance can be summarized as follows, insofar as it is relevant to the appeal:

- in addition to temporal circumstances, the assessment of factual circumstances (“sachliche Umstände”) must also be taken into account when ordering provisional measures;
- in order to demonstrate the necessity for a provisional injunction, the Applicant must explain in concrete terms why its request for legal protection cannot be adequately satisfied with an action on the merits and why provisional measures are therefore required;
- the Applicant failed to demonstrate that compensation in the main action would not be sufficient to compensate for the damage incurred by the Applicant, and the Applicant further failed to demonstrate the potential harm to it resulting from the refusal of a provisional injunction under [R. 211.3 of the Rules of Procedure of the Unified Patent Court](#) (hereinafter: “RoP”);
- it is not in contradiction with other UPC decisions and orders which, given the specific circumstances of each case, have recognised the threat of significant long-term harm leading to almost irreversible losses in market share for the Applicant, and have consequently granted provisional measures.

The appeal proceedings

10. Biolitec lodged an appeal against the impugned order. In its Statement of appeal and Statement of

grounds of appeal, Biolitec submitted the following requests:

(i) that the order of the Court of First Instance (Local Division Düsseldorf) of 05.09.2024 (UPC_CFI_486/2024 ACT_47064/2024 ORD_47991/2024) be revoked;

(ii) that the Defendants be ordered to refrain from offering, placing on the market or using, or importing or possessing for these purposes, in the territories of the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the French Republic, the Italian Republic, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Republic of Finland and/or the Kingdom of Sweden, devices for endoluminal treatment of venous insufficiencies, if these have:

a flexible optical fiber defining an elongated axis,

a proximal end optically connectable to a source of radiation, and

a distal end receivable within the vein and including radiation emitting surfaces of the optical fiber, which are adapted to emit radiation from the radiation source laterally with respect to the elongated axis of the optical fibre and to emit radiation radially and circumferentially onto an angularly extending portion of the surrounding vein, and

a substantially transparent cap enclosing the emitting surfaces and fixedly secured to the optical fiber and sealed with respect thereto by fusing

if this is done as below:



(iii) in the alternative to (ii): that the Lightguide companies be ordered to refrain from offering devices according to paragraph (ii) at the MEDICA 2024 trade fair (11-14 November 2024 in Düsseldorf, Germany) or from putting them on the market;

(iv) that the Defendants be ordered to pay to the Court, for each individual breach of the above order, penalty payments (recurring as appropriate) in the amount of €

100.00 for each product and/or, in the case of continuing breaches such as offers on the Internet, of up to € 5,000.00 per day;

(v) that the Defendants be further ordered to hand over the devices referred to under (ii) and (iii) to a bailiff for the purpose of safekeeping, which shall continue until the Court rules on the question of a claim for destruction which is outstanding between the parties, or an amicable settlement has been reached.

11. The grounds of the appeal can be summarized as follows, insofar as they are relevant:

- the Court of First Instance erred in relying on a necessity ("*sachliche Notwendigkeit*") test and in considering that a provisional injunction is necessary only if the interests of the Applicant cannot be satisfied with a main action due to special circumstances such that the harm cannot be economically compensated in the main action;

- [Art. 62\(2\) of the Agreement on a Unified Patent Court](#) (hereinafter: "*UPCA*") on provisional and protective measures shall be interpreted in the light of the relevant provisions of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (hereinafter: the "*Enforcement Directive*") which do not provide for an isolated necessity test for provisional measures;

- the criterion of necessity, which is referred to under [R. 206.2 \(c\) RoP](#) is not explained further in the RoP or even in the UPCA and should be understood as a formal requirement in the application only;

- other provisions of the RoP do not further justify an isolated necessity test;

- a patent grants its proprietor a right of prohibition, including the right to injunctive relief, and the patent proprietor is entitled both to injunctive relief and to damages;

- applying a necessity test goes beyond the requirement of a sufficient degree of certainty set out under [R. 211.2 RoP](#)

12. The Lightguide companies filed their Statement of Response on 21 November 2024, requesting that the Court of Appeal

(i) dismiss the appeal;

(ii) in the alternative, refer the case back to the Court of First Instance for a new hearing;

(iii) in the further alternative, in the event that the Court of Appeal overturns the LD order and replaces it with its own order, specify that the order is enforceable only once the Appellant has provided a security in the amount of EUR 1,000,000.00 in favour of the Respondent;

(iv) order the Appellant to pay the costs of the appeal proceedings.

13. The reasons can be summarized as follows, insofar as they are relevant to this decision:

- the necessity test for ordering provisional measures is part of the balancing of interests of the parties set out under [Art. 62 UPCA](#) and the application for an injunction must first satisfy the requirement of necessity;

- the provisions of the Enforcement Directive and the CJEU case law support such an interpretation;
- the sufficient likelihood of infringement and the legal validity of the patent are not the only requirements for provisional measures; the Applicant must provide concrete factual reasons why he believes that the patent must be enforced in an action for provisional measures and that a decision cannot be put off until the main proceedings, which Biolitec has not established;
- there is a lack of urgency: although the contested embodiment has been on the market since the beginning of 2020 and although Biolitec was aware since May 2024 of the EPO's intention to grant the patent at issue (R. 71(3) EPC communication), it waited another four weeks following the date of grant to file its application for provisional measures.

14. Further facts and arguments brought forward by the parties will, to the extent relevant, be discussed in the grounds below.

15. In a procedural order of 5 December 2024, the judge-rapporteur summoned the parties for the oral hearing on the issue of the necessity of the provisional injunction and indicated that, depending on the outcome of the Court of Appeal's decision on this issue following the hearing, the Court would then determine the next steps in the case.

GROUNDINGS OF THE ORDER

16. The appeal must be rejected for the following reasons.

Necessity of provisional measures

17. Under [Art. 62 UPCA](#) and [R. 211.1 RoP](#), the Court may grant provisional measures intended to prevent any imminent infringement, to prohibit, on a provisional basis and subject, where appropriate, to a recurring penalty payment, the continuation of the alleged infringement or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder.

18. Such provisional measures are treated by way of summary proceedings ([R. 205 RoP](#)). Compared to proceedings on the merits, these proceedings are short and fast and make it possible to bring a patent infringement to an immediate end. The expedited procedure, however, does not allow for full examination of the Applicant's entitlement to commence proceedings, of the validity of the patent and of the alleged infringement as provided for in proceedings on the merits. The expedited procedure can therefore be used only if, considering the nature of the case, proceedings on the merits cannot be awaited. If proceedings on the merits can be awaited, provisional measures are not necessary since proceedings on the merits offer more procedural safeguards.

19. Pursuant to [Art. 62\(2\) UPCA](#) and [R. 211.3 RoP](#), the Court shall have the discretion to weigh up the interests of the parties and, in particular, to take into account the potential harm for either of the parties resulting from the granting or the refusal of the injunction. In view of the considerations given above, this means that Court must

not merely take into account the harm for either of the parties, but also the time factor. More specifically, the Court must assess whether it is possible to await proceedings on the merits, or whether provisional measures are necessary.

20. Accordingly, [R. 206.2\(c\) RoP](#) requires that the Applicant in its application for provisional measures set out the reasons why provisional measures are necessary to prevent a threatened infringement, to forbid the continuation of an alleged infringement or to make such continuation subject to the lodging of guarantees. The Court of Appeal clarified that this is not a formal requirement. It concerns the merits of the application for provisional measures and must be considered by the judge when issuing an order under [R. 211 RoP \(UPC CoA 335/2023 App 576355/2023 – NanoString vs. 10x, p.21\)](#).

21. Provisional measures will be necessary, for instance, where any delay would cause irreparable harm to the patent proprietor. Irreparable harm is, however, not a necessary condition for the ordering of provisional measures ([UPC Court of Appeal, order of 25 September 2024 – UPC CoA 182/2024 APL 21143/2024, para. 237 – Mammot/Ortovox](#)).

22. This understanding of [Art. 62 UPCA](#) and [R. 211 RoP](#) is consistent with the Enforcement Directive. [Art. 9 of the Enforcement Directive](#) requires that the Member States ensure that the judicial authorities may, at the request of the Applicant, issue interlocutory injunctions. According to recital 22 of the Enforcement Directive, it is essential to provide such provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question. As indicated there, provisional measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right. The Court of Justice of the European Union (hereinafter: “CJEU”) clarified that, in accordance with [Article 9\(1\)\(a\)](#) of the Enforcement Directive, read in conjunction with recital 22 thereof, the provisional measures must enable the infringement of an intellectual property right to be immediately terminated, without awaiting a decision on the merits, and that those measures are particularly justified where any delay would cause irreparable harm to the holder of such a right. The CJEU emphasized that, thus, the ‘time’ factor is of particular importance for the purposes of effective enforcement of intellectual property rights ([CJEU, judgment of 28 April 2022, C-44/21, ECLI:EU:C:2022:309, Phoenix Contact/Harting, para. 32](#)). Accordingly, [Art. 62 UPCA](#) provides for provisional measures that can be relied on to terminate infringements immediately. The procedure can be used where necessary for the effective enforcement of patents, having regard to the time factor.

The present case

23. The Local Division rightly based its dismissal of the application for provisional measures on the fact that Biolitec, on the basis of its submissions, including its two additional briefs filed on 19 and 23 August 2024 following the judge-rapporteur's procedural orders, did not convince the Court that, on the balance of the interests of the parties, the provisional measures were necessary.

24. Although the Düsseldorf Local Division did not make any explicit findings as to whether it was sufficiently certain, under [Art. 62\(4\) UPCA](#) in conjunction with [R. 211.2 RoP](#), that the Applicant was entitled to initiate proceedings under [Art. 47 UPCA](#), that the patent is valid and that the Applicant's right is infringed, this did not disadvantage Biolitec in the discretionary assessment of the interests of the parties carried out by the Local Division pursuant to [Art. 62\(2\) UPCA](#) and [R. 211.3 RoP](#).

25. The Local Division implicitly assumed (and even explicitly with regard to infringement, when stating *"even if one assumes there is a continuation of an infringement on the basis of the offer on the Internet of the contested embodiment"* – see order of 5 September 2024, p. 8, penultimate sentence of the penultimate paragraph) that the application for provisional measures must be rejected even if the Court had been convinced with a sufficient degree of certainty as to the validity of the patent and its infringement because, in the Local Division's view, Biolitec had not demonstrated the necessity of such measures.

26. Biolitec argues that the necessity of provisional measures follows from the fact that the Lightguide companies' *"Infinity Side Fiber"* product is in direct competition with its own product. The Local Division rightly dismissed this argument. Although direct competition between the products is a relevant factor in the assessment of the necessity of provisional measures, its presence may in an individual case not be sufficient to justify the necessity of provisional measures. In the present case it is also relevant that the contested embodiment (*"Infinity Side Fiber"*) is a single-use and substitutable product, which has been manufactured and distributed by the Lightguide companies in several UPC Member States, including the countries for which provisional measures are requested in this action, at least since 2021, at which time it could not infringe the patent at issue, which was granted only several years later.

27. The requested provisional measures would change the status quo on the market established years before the grant of the patent. In this case, Biolitec has not demonstrated that provisional measures are necessary to protect Biolitec's current market share or prices or for any other purpose that cannot await a decision on the merits.

28. In that respect, the reference made by Biolitec to the *"Mammut/Ortovox"* case is not relevant in the present dispute. There, the Court was convinced of the necessity of the provisional measures because the distribution of the contested embodiment for the winter season could

not be effectively prevented by an action on the merits and, in the balance of the parties' interests, ordering provisional measures was justified ([UPC Court of Appeal, 25 September 2024, UPC CoA 182/2024 APL 21143/2024, para. 238 et seq.](#)). In that case, an imminent change in the respective market positions was at stake with a new product that was being introduced into the market and granting preliminary measures was necessary in order to maintain the status quo that existed immediately prior to the alleged infringement until the decision of the Court on the merits.

29. The additional submissions in relation to the necessity of the provisional measures which Biolitec brought forward in response to the request of the judge-rapporteur of the Court of First Instance do not change the assessment by the Court that the application for provisional measures must be rejected.

The MEDICA trade fair

30. Biolitec bemoans the fact that the Court of First Instance did not consider the trade fair for medical technology & healthcare (MEDICA), which took place in November 2024, to be a reason for issuing a preliminary injunction.

31. To the extent that the forthcoming participation in a trade fair at which the contested embodiment is exhibited might bring with it the risk of a change in the respective market position and justify the necessity of provisional measures, it in any case requires the presentation and, as appropriate, the substantiation of circumstances that indicate with sufficient certainty that the contested embodiment was actually about to be exhibited by the Lightguide companies at the trade fair.

32. Biolitec has not provided the Court with convincing evidence in that respect and the judgement of the Düsseldorf Local Division was accordingly correct.

33. As rightly pointed out by the Court of First Instance, the fact that the contested embodiment had already been exhibited by the Lightguide companies at MEDICA 2023 and that pictures of it were displayed on social media was in itself not a sufficient indication that the contested embodiment would again be exhibited one year later at MEDICA 2024. A threat of infringement cannot be deduced from the presence of the Lightguide companies at MEDICA 2023, as at that time the patent at issue had not yet been granted.

34. Even though it was also known that the Lightguide companies would be represented at MEDICA 2024, their mere participation in the trade fair did not make it sufficiently likely that they would actually exhibit the contested embodiment there. The announcement of the Lightguide companies' participation in MEDICA 2023, at a time when the patent at issue had not yet been granted, with the general reference to *"minimally invasive devices"* and without any indication as to which types or versions of these minimally invasive devices were involved (see p. 12 of the Biolitec submission of 19 August 2024), cannot be interpreted as an announcement of an exhibition of the specific contested

embodiment at MEDICA 2024 after the grant of the patent at issue.

35. The fact that Light Guide Optics filed an opposition against the patent at issue immediately after grant does not change this assessment.

Stock management

36. By written witness statement of 19 August 2024 by one of the directors of an affiliated company of Biolitec (CeramOptec GmbH) (annex CBH 50) filed with the Court of First Instance, Biolitec substantiated that it is common to hold about six to twelve months' worth of stock, that according to the personal estimate of the witness it is likely that a French distributor of the Lightguide companies typically sells about 120,000 units of the contested embodiment in France alone in the course of a year and that, in view of the single use of the contested embodiments, it is possible or even to be expected that clients or suppliers will hold even more stock.

37. To the extent that an imminent delivery of the contested embodiment to a customer could lead to a change in the market situation and might possibly justify the issuing of a provisional order, however, the Local Division correctly pointed out that the figure of 120,000 units per year, put forward by the witness named by Biolitec (a director responsible for development, production and quality management at a subsidiary of Biolitec), was merely a "*personal estimate*", and that the witness did not have any insights into the actual circumstances regarding the number of the "*Infinity Side Fiber*" contested embodiments stocked or sold by the French distributor.

38. Beyond this witness statement, Biolitec did not provide, in support of the mere one-sentence estimate made therein, any further evidence or information which could possibly have convinced the Court of the weight of such evidence.

39. In addition, the abovementioned estimate provided by Biolitec has been challenged by the Lightguide companies who, after joining the proceedings in the appeal, submitted a witness statement of 20 November 2024 in which a Sales Manager in the Medical Products Division of Light Guide Optics (annex WKS 8) provided additional information which contradicts Biolitec's statement.

40. According to the Lightguide companies, only the "*Saturn Side Fiber*" version of their medical grade optical fibre probes has been sold to their French distributor, not the contested embodiment "*Infinity Side Fiber*", at least not beyond a few samples. Given the context of parallel national proceedings, more specifically the revocation of the French part of Biolitec's patent EP 2 620 119 which is of the same family as the patent at issue, and considering the absence of any convincing information beyond the mere "*personal estimate*" of the witness statement brought forward by Biolitec concerning the alleged distribution of the contested embodiment in France, the statement provided by the Lightguide companies according to

which they have distributed their "*Saturn Side Fiber*" probes in France (the design of which, in the view of the parties, differs from the "*Infinity Side Fiber*" contested embodiment) carries more weight than Biolitec's witness statement.

41. Furthermore, and for the same reasons, the quantities indicated by Biolitec are not supported by any evidence beyond the mere estimate to be found in the witness statement of an employee of a company of the Biolitec group.

42. Stocking to the extent alleged by the Applicant cannot be established with a sufficient degree of certainty and therefore does not justify the necessity of a provisional injunction.

Tenders

43. The third argument brought forward by Biolitec on the basis of the aforementioned witness statement (annex CBH 50) relates to the alleged damage suffered by Biolitec as a result of public tenders put out by hospitals, for which Biolitec would compete with the Lightguide companies. Biolitec illustrates this by making reference to two tenders in Italy in 2023.

44. This argument also lacks sufficient evidence.

45. Biolitec merely explains in general terms, referring to two tenders which took place at a time when the patent at issue had not been granted and therefore no patent infringement had yet occurred, that the parties did bid for the same tenders.

46. Biolitec does not bring any further specific evidence, for example the precise references of said tenders, their contemplated volumes and terms, the relevant terms and conditions of the tenders, including whether and to what extent the contracting authorities were entitled to replace the contractual products by other substitutable products or secure dual sourcing during the contractual term of the contemplated tenders. Biolitec does also not indicate whether the invitation to tender led to an award for the Lightguide companies' contested embodiment or whether the parties have been in competition for other tenders since then.

47. The Court also notes that, concerning the two tenders which took place in Italy in 2023, which are referred to by Biolitec and which are uncontested by the Parties, none of the Lightguide companies were directly bidding, but rather only one of their local distributors.

48. Actual or imminent tenders to the extent alleged by Biolitec are therefore speculative and not established in a way that might justify granting a provisional injunction.

Price erosion

49. The price erosion argument, to which Biolitec referred for the first time during the oral hearing with the Court of Appeal, in an attempt to justify the necessity of provisional measures, does not alter the position of the Court that an order for provisional measures is not justified. It shall also be rejected, for the following reasons.

50. Pursuant to [R. 222.2 RoP](#), requests, facts and evidence which have not been submitted by a party

during proceedings before the Court of First Instance may be disregarded by the Court of Appeal. When exercising discretion, the Court shall take into account, inter alia, whether a party seeking to lodge new submissions is able to justify that the new submissions could not reasonably have been made during proceedings before the Court of First Instance (**R. 222.2 (a) RoP**) as well as the relevance of the new submissions for the decision on the appeal (**R. 222.2 (b) RoP**). This is especially the case when new requests, facts and evidence are introduced at the very last step of the oral hearing.

51. Biolitec has not justified why the argument on price erosion could not reasonably have been raised during the proceedings before the Court of First Instance.

52. Furthermore, this argument has not been substantiated and, in any event, would require more specific information.

Auxiliary request

53. Biolitec, during the oral hearing, extended its request for provisional measures to cover alleged infringing acts of the Lightguide companies during the MEDICA 2025 trade fair which is due to be held in Düsseldorf from 17 to 20 November 2025.

54. On the same grounds as those mentioned under paragraph 30 et seq. and 50 above, the auxiliary request shall be dismissed pursuant to **R. 222.2 RoP**. Costs

55. As the unsuccessful party, Biolitec must bear the costs of the appeal proceedings.

ORDER

(i) The appeal is rejected;

(ii) Biolitec is required to bear the costs of the appeal proceedings.

This order was issued on 24 February 2025.

Klaus Grabinski, President of the Court of Appeal

Peter Blok, legally qualified judge

Emmanuel Gougé, legally qualified judge and Judge-rapporteur

Eric Augarde, technically qualified judge

Max Tilmann, technically qualified judge
