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**THE URGENCY OF PRELIMINARY INJUNCTIONS IN
THE UNIFIED PATENT COURT**

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Tiivistelmä: Tutkielma käsittelee kiireellisyysvaatimusta, joka liittyy väliaikaisiin kieltomääräyksiin yhdistetystä patenttituomioistuimesta tehdyn sopimuksen ("UPC-sopimus") soveltamisalaan kuuluvissa oikeudenkäynneissä. Yhdistetyn patenttituomioistuimen oikeuskäytännön mukaisesti kiireellisyysvaatimuksella on keskeinen merkitys arvioitaessa sitä, voidaanko väliaikainen kieltomääräys myöntää riita-asioissa, jotka koskevat yhtenäispatentteja ja tiettyjä eurooppapatentteja. Kiireellisyysvaatimuksen tulkinta, sellaisena kuin se ilmenee UPC-sopimuksen sopimusjäsenvaltioissa, ei kuitenkaan osoita normatiivista yhdenmukaisuutta.

Tutkimuksessa hyödynnetään vertailevaa lähestymistapaa analysoimalla eurooppalaisen patenttijärjestelmän historiaa, UPC-sopimuksen myötä voimaan tullutta järjestelmää ja sen relevanttia oikeuskäytäntöä, kieltomääräyksiä koskevia erityisiä menettelysääntöjä sekä kiireellisyysvaatimuksen oikeudellisen tulkinnan taustalla sovellettavia yhdenmukaistamisperiaatteita. Erityistä huomiota on kiinnitetty siihen, miten kiireellisyysvaatimusta sovelletaan eri kansallisissa oikeusjärjestelmissä osana eurooppalaista patenttijärjestelmää, sekä tulkinnan vaikutuksesta yhdistetyn patenttituomioistuimen tehokkaaseen toimintaan.

Tutkimustulokset osoittavat merkittäviä epä johdonmukaisuuksia kiireellisyysvaatimuksen soveltamisessa ja korostavat johdonmukaisen sääntelykehyksen tarpeellisuutta. Lopuksi tutkielmassa tarkastellaan mahdollisia muutoksia voimassa olevaan UPC-sopimukseen perustuvaan sääntelyyn. Eriteltyt muutokset yhdenmukaistaisivat kiireellisyysvaatimuksen soveltamista oikeusvarmuuden ja suhteellisuusperiaatteen osalta, edistäen näin UPC-sopimuksen luoman viitekehyksen johdonmukaista täytäntöönpanoa kaikissa sen sopimusvaltioissa.

Avainsanat: Yhdistetty patenttituomioistuin, yhtenäispatentti, eurooppapatentti, turvaamistoimet, väliaikaiset kieltomääräykset, kiireellisyys, harmonisointi

Summary

Title: The Urgency of Preliminary Injunctions in the Unified Patent Court

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Summary: This thesis examines the urgency requirement in preliminary injunction proceedings under the Unified Patent Court (UPC). According to prevalent UPC jurisprudence, the requirement plays a fundamental role in determining whether interim injunctive relief may be granted in disputes concerning Unitary patents and certain European patents. However, the judicatory interpretation for urgency within different Contracting Member States of the Agreement on a Unified Patent Court remains unharmonised.

The study utilises a comparative approach by analysing the history of the European patent regime, the UPC and its relevant case law, specific procedural rules concerning injunctive relief, and underlying principles of harmonisation concerning the legal interpretation of urgency. Particular attention is placed to the divergence in how urgency is understood as a requirement for preliminary injunctions in different national legal systems within the European patent regime, and its implications for the effective functioning of the UPC.

The findings reveal notable inconsistencies within the current application of the urgency requirement, highlighting a need for a more systematic and coherent framework governing the subject matter. Finally, the examination addresses potential amendments to the prevalent UPC framework. The amendments would better align the urgency requirement with the principles of legal certainty and proportionality, thereby enhancing the uniform application of the UPC framework across the Contracting Member States.

Key words: Unified Patent Court, Unitary patent, European patent, protective measures, preliminary injunctions, urgency, harmonisation

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Düsseldorf Higher Regional Court (OLG Düsseldorf), GRUR-RS 2021, 19458 24 - *Cinacalcet III*.

Düsseldorf Local Division of the UPC’s Court of First Instance, Order ORD_592936/2023 of 11 December 2023 in matter UPC_CFI_452/2023 - *Ortovox v Mammut*.

Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_13918/2024 of 9 April 2024 in matter UPC_CFI_452/2023 - *Ortovox v Mammüt*.

Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_56534/2024 of 31 October 2024 in matter UPC_CFI_368/2024 - *Magna v Valeo*.

Düsseldorf Regional Court (LG Düsseldorf), GRUR 2022, 1806 - *Therapie III*.

Düsseldorf Regional Court (LG Düsseldorf), GRUR-RR 2023, 205 - *Solarzelle II*.

Dutch Supreme Court (HR), HR 15 December 1995, NJ 1996/509 - *Kimberly Clark/Procter & Gamble*.

Finnish Market Court, decision no. MAO:111/19 of 11 March 2019, F. *Hoffman-La Roche AG, Roche Oy and Genentech Inc. v. MSD Finland Oy*.

Hamburg Local Division of the UPC's Court of First Instance, ORD_39782/2024 of 3 June 2024 in matter UPC_CFI_151/2024 – *UEFA and Others v Ballinno*.

Helsinki Court of Appeal case no. 740 (S 09/1812) 19 March 2010, Janssen-Cilag v. Actavis Oy and Actavis Group hf; cited as HelHo 19.3.2010 nro 740 (S 09/1812).

Helsinki Court of Appeal case no. 741 (S 09/1706) 19 March 2010, Janssen-Cilag v. ratiopharm GmbH and ratiopharm Oy; cited as HelHo 19.3.2010 nro 741 (S 09/1706).

München I Regional Court (LG München I), GRUR-RR 2023, 211 - *Bortezomib II*.

Munich Local Division of the UPC's Court of First Instance, Order ORD_46277/2024 of 27 August 2024 in matter UPC_CFI_74/2024 - *Scandit v Hand Held Product*.

Glossary of the Main Abbreviations

BoA	The Boards of Appeal of the European Patent Office
CJEU	Court of Justice of the European Union
CoA	Unified Patent Court's Court of Appeal
CPC	Community Patent Convention
ECJ	European Court of Justice
EP	European Patent
EPC	European Patent Convention
EPO	European Patent Office
EU	European Union
HR	Dutch Supreme Court (Hoge Raad)
IP	Intellectual Property
OJ	Official Journal
RoP	Unified Patent Court's Rules of Procedure
TFEU	Treaty on the Functioning of the European Union
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
UP	Unitary Patent
UPC	Unified Patent Court
UPCA	Agreement on a Unified Patent Court
UPP	Unitary Patent Package

1 Introduction

1.1 Background and Significance of the Study

On 1 June 2023, the Agreement on a Unified Patent Court (UPCA) entered into force.¹ The implementation of the international treaty was a landmark event, which finalised the establishment of a new legal framework, that introduced a novel form of patent protection within the European Union (EU) patent law regime. This new form of protection, known as the European Patent with unitary effect (UP), was designed to provide an alternative mechanism for achieving uniform patent protection across all Contracting Member States of the UPCA.² A significant number of the Contracting Member States of the UPCA are situated within the internal market of the European Union. Therefore, while the new legal framework has the potential to encompass non-EU members, its effects are primarily concentrated within the European Union.³ In addition, the UPCA's entry into force marked the conclusion of a legal development process which took more than a decade to complete.⁴ At the time of the entry into force, 17 member states had ratified the applicable legal acts, composed of EU regulations No 1257/2012 and No 1260/2012, alongside the UPCA, and the Rules of Procedure of the Unified Patent Court (RoP).⁵ Through the ratification of the UPCA, the Contracting Member States facilitated the adoption of a novel patent system and the establishment of a new judicial framework. The adoption of the UPCA was met with controversy among scholars, legal practitioners, patent proprietors, and EU legislators, as it aimed to harmonise the cross-border enforcement of patent rights across the jurisdiction of the EU, a task that had proven challenging in the past.⁶ The enforcement of patent rights is not a novel phenomenon, as national courts of different EU member states have long been tasked with providing a forum for the enforcement of both national patents and European patents.⁷

The central mechanism of the UPCA is the introduction of a harmonised body of patent law for

¹ See, Agreement on a Unified Patent Court (19 Feb 2013), and European Patent Office: 'Unitary Patent & Unified Patent Court' (n.d.).

² At the time of writing, the Agreement on a Unified Patent Court is in force in 18 states which have completed the ratification process. For further reference, see Unified Patent Court: 'UPC Member States' (n.d.).

³ Stief (2023), 40.

⁴ Zöchling (2023), 354.

⁵ See, for example, Rules of Procedure of the Unified Patent Court, as adopted by decision of the Administrative Committee on 8 July 2022, entry into force 1 September 2022, Rule 1(1). The Rules of Procedure act as complementary rules governing the functioning of the UPC.

⁶ Plomer (2020), 791-792.

⁷ See, for example, Finnish Patent Act (Patenttilaki 550/1967), Section 64.

adjudicating patent disputes, with the aim of minimising variations in legal standards among Contracting Member States and inconsistencies in practices across national courts.⁸ The aforementioned goals of achieving a higher level of harmonisation have been pursued through the establishment of a centralised judicial authority, the Unified Patent Court (UPC), which has been designed to fulfil the role of parallel litigation proceedings within the jurisdictions of multiple Contracting Member States of the UPCA by having exclusive jurisdiction over proceedings concerning UPs and European Patents with unitary effect.⁹ Practical challenges stemming from the insufficient harmonisation of European patent law include, *inter alia*, inconsistent interpretations of central legal provisions and jurisdictional inconsistencies, such as forum shopping have raised several questions. The establishment of the UPC represents an effort to address the longstanding challenges that have arisen within the fragmented European patent law landscape. Support towards the UPC can be, for example, connected to the European Court of Justice's (ECJ) ruling on *GAT v LuK* concerning the interpretation of the Brussels I Convention on the exclusive jurisdiction of EU Member States' national courts concerning patent disputes.¹⁰ This ruling, together with related case law, exposed a gap within the European patent framework concerning the rights of patent proprietors to enforce the protection and the exclusivity of patents across the jurisdictions of different Member States.¹¹ The introduction of the UPC was intended to address the existing gap in the legal framework, providing a solution to the need for uniform enforcement of different stakeholders rights.¹² However, despite the new system having been operational for less than two years at the time of writing, the jurisprudence developed by the UPC has already gathered significant attention, particularly in relation to preliminary injunctions, with the court being described as the "world's most important forum for preliminary injunctions over patents".¹³

Due to UPC's central role as an adjudicatory mechanism, a number of questions regarding the court's operations have been raised. The questions refer to the argument that adoption of the new system has not been without hindrances. Theoretical questions, such as the interoperability between a separate court system and EU law, have been raised. From these broader questions,

⁸ Dijkman and Van Paddenburgh (2018), 99.

⁹ See, Article 1(1) UPC Agreement.

¹⁰ England (2017), 106–108.

¹¹ *Ibid*, 106.

¹² Dijkman and Van Paddenburgh (2018), 104.

¹³ Mueller, F.: 'Unified Patent Court has become world's most important forum for preliminary injunctions over patents' (2024).

more specific issues have emerged, including concerns over differences in interpreting the wording of the UPCA by different judicial bodies of the UPC's Court of First Instance, which could undermine the intended harmonisation effect of the system and lead to further legislative fragmentation. At the time of writing, the signatory states of the UPCA are comprised of EU Member States. Consequently, this thesis primarily examines the European patent law regime as the foundation for comparison, with the aim of addressing issues related to the harmonisation of UPC practices.

1.2 Defining the Subject Matter

One of the procedural questions related to the adoption of the UPCA is the UPC's approach to injunctive relief and provisional measures. This thesis focuses on the role of urgency in provisional measures and the corresponding case law of the UPC.¹⁴ Before focusing on the topic of provisional measures and urgency within the context of the UPC, the fundamental subject matter will be further defined. There are a number of different national legislative acts and international treaties which address the issue of urgency in connection to provisional measures. The most prominent legislative acts related to the topic of this thesis are the European Patent Convention (EPC), Directive 2004/48/EC on the enforcement of intellectual property rights (Enforcement Directive), the UPCA and the related RoP, and relevant provisions of national law for each contracting member state of the UPCA.

Provisional measures are a well-established remedy for patent infringement, but the concept is novel in terms of the new UPs and European patents with unitary effect, which are fall within the jurisdiction of the UPC.¹⁵ The UPC system is structured in a way that different judicial bodies of the Court of First Instance, and the Court of Appeal of the UPC (CoA) are located within the territory of different national jurisdictions of the Contracting Member States.¹⁶ Therefore, there is a possibility for each judicial body to adopt slightly differing interpretations regarding the implementation of urgency provisions for provisional measures, influenced by national legal traditions.¹⁷ Without sufficient level of harmonisation in the case law across the various judicial

¹⁴ Over the past decades, interim injunctive relief has been described by legislators, courts, and scholars using terms such as "preliminary," "interlocutory," and "provisional." This thesis employs these terms interchangeably where appropriate. For further insight, see e.g. Wolf (1984), 173-174.

¹⁵ Ballardini et al. (2015), 192.

¹⁶ Miglio, A.: 'The Unified Patent Court Is Finally in Action: Has a New Judicial Model Entered the Scene?.' (2024), 4.

¹⁷ See, for example, Munich Local Division of the UPC's Court of First Instance, Order ORD_46277/2024 of 27 August 2024 in matter UPC_CFI_74/2024 - *Scandit v Hand Held Product*, and Düsseldorf Local Division of the

bodies of the UPC, challenges such as forum shopping, procedural delays, and inconsistent legal outcomes could arise. These issues may emerge as the UPC continues to develop its body of case law.

Prior to the adoption of the UPCA, the substantive law governing injunctive relief and provisional measures was determined by the national law of the state where a patent had been granted. Therefore, different Member States have different applicable laws and legal norms for addressing injunctive relief. For instance, in Germany, Section 139(1) of the German Patent Act applies to define the requirements that must be met for a patent proprietor to enforce their granted rights through a cease-and-desist order for a specific patent infringement.¹⁸ Furthermore, in Finland, injunctive relief is governed by Chapter 7 of the Code of Judicial Procedure, which addresses precautionary measures. Pursuant to Section 3 of Chapter 7, a national court may, upon the application of the right holder, prohibit the opposing party from engaging in infringing actions.¹⁹ This provision is also applicable in matters related to patents as exclusive rights. Purely national legal provisions governing injunctive relief in the Contracting Member States of the UPCA are not sufficiently applicable in cross-border litigation proceedings.²⁰ However, in order to thoroughly examine the provisions of the UPCA concerning injunctive relief and the urgency of provisional measures, it is essential to understand the context within which the UPC and the judicial bodies of the court operate. In light of the rapidly evolving legal landscape of the UPC, this thesis aims to critically analyse the adoption of urgency in provisional measures under the UPCA and the Rules of Procedure (RoP). It does so by comparing the interpretations of national judicial bodies and various bodies of the UPC regarding urgency in order to identify potential differences in the application of the relevant provisions. Furthermore, the thesis emphasises the importance of a harmonised interpretation of urgency in preliminary measures.

1.3 Research Topic and Questions

Several questions have arisen since the UPC commenced its operations on 1 June 2023, one of which pertains to the urgency of provisional measures under the UPCA. The issue is related to provisional measures for the protection of the patent proprietor's rights. More specifically, the question focuses on the issuance of preliminary injunctions by the judicial bodies of the UPC's

UPC's Court of First Instance, Order ORD_592936/2023 of 11 December 2023 in matter UPC_CFI_452/2023 - *Ortovox v Mammüt*.

¹⁸ Scharen (2019), 112.

¹⁹ See, Finnish Code of Judicial Procedure (Oikeudenkäymiskaari 4/1734), Ch. 7, Section 3.

²⁰ Bulayenko et al. (2022), 11.

Court of First Instance, as a form of provisional measure under Rule 209(2) of the RoP.²¹ An essential aspect of effective provisional measures concerning patents is their ability to provide swift and efficient protection against infringement.²² Therefore, for a judicial system governing injunctive relief, such as the UPC, to be effectively implemented, the competent courts must be capable of processing provisional measure applications with a high degree of efficiency. From the patent proprietors' side, the need for efficiency arises from the urgency to enforce the rights granted in response to an infringing action, which may cause harm to the right holder. Secondly, from a procedural perspective, it is crucial to assess whether the right holder has sought to enforce their rights in a manner that facilitates the appropriate issuance of provisional measures.²³ If the proceedings related to a provisional measure application do not meet the criteria for urgency, a more appropriate course of action would be to seek protection against infringement through main proceedings rather than, for instance, a preliminary injunction. The introduction of the UPC system has provided patent proprietors with a new option for obtaining unitary provisional measures against potentially infringing actions across multiple Contracting Member States simultaneously.²⁴

This thesis examines the UPC's approach to the assessment of urgency concerning injunctive relief and provisional measures in patent dispute resolution. The purpose is to analyse whether the legal concept of urgency, in the context of preliminary injunctions, has been implemented in line with the legislators' intentions, and whether this implementation adheres to relevant legal principles and agreements. In order to establish a well-founded conclusion, this thesis seeks to answer the following research questions: Has urgency been established as a formal requirement for provisional measures in the UPCA? What characteristics different judicial bodies of the UPC take into account when determining urgency? Has concept of urgency been implemented in a coherent and harmonised manner within the UPC system?

The aim of the study is to explore how the UPC defines urgency when granting provisional measures, and what elements are included to the consideration of balancing the interests of both the right holder and the entity committing the alleged infringing action. By examining the applicable legal acts and the practical implementation of relevant provisions, this thesis

²¹ See, for example, UPC Court of First Instance (Munich Local Division), Order ORD_46277/2024, 59, Chapter VI.1.

²² Leistner (2024), 620.

²³ Hoyng, W. & Léon, D. (2022), Netherlands. In Contreras and Husovec (2022), 222-224.

²⁴ Ohly (2022), 62.

evaluates whether the existing framework adequately addresses urgency in order to achieve a sufficient level of harmonisation and legal certainty, as well as whether the prevailing case law effectively balances the rights of all stakeholders. This thesis adopts the principle that harmonisation can be defined as an integrative approach aimed at identifying the optimal or most economically efficient solution to a specific socio-legal issue that arises across multiple legal systems.²⁵ To achieve the outlined aim, this thesis establishes specific objectives, each addressing a distinct area of interest. These objectives include examining the applicable legal frameworks, defining the assessment of urgency as reflected in case law, and comparing differing interpretations of urgency in various academic legal contexts. The aforementioned research questions are selected in order to determine whether the implementation of the legal concept of urgency has been sufficient and coherent within the UPC system. Based on this examination, it is assessed whether the applicable legal provisions and the interpretations concerning urgency in provisional measure proceedings require amendment to achieve a higher level of harmonisation, thereby further advancing efforts toward a uniform patent system across all Contracting Member States of the UPCA.

1.4 Research Methodology and Structure

At the time of writing, the UPC has been operational for less than two years, which makes the topics of urgency and preliminary injunctions within the system relatively novel. Consequently, the available literature and case law on the subject are currently limited. Therefore, the research utilizes comparative legal methodology in order to gain knowledge and understanding concerning different national and international preliminary injunction practices to address the current level of harmonisation of the notions within the UPC system. The main emphasis has been directed, *inter alia*, towards prevalent national interpretation of urgency in provisional measure proceedings and also on the case law of the UPC's Court of First Instance and the CoA. The methodology has been chosen as one of the aims of the comparative legal method is to establish similarities, differences, and challenge the prevalent state of things by highlighting the value of legal pluralism and unexpected features of the examined legal instruments, which may propose that different legal systems apply different variations of the same instrument or theme.²⁶ The chosen topic is further analysed by using the comparative legal method, aiming to produce an examination of the UPC's approach to urgency and provisional measures through a

²⁵ Husa (2018), 41.

²⁶ Siems (2022), 2–4.

comparison of international agreements, national implementations of related provisions, and case law from various levels and divisions of the UPC. Furthermore, the concept of legal transplants has been included into the performed comparison. The described examination is conducted in a way where different aspects of urgency of provisional measures are explored, with a specific focus on preliminary injunctions. Accordingly, the research questions are of specific nature and are intended to focus on injunctive relief as a form of patent enforcement within the European patent regime. The findings from the analysis of the selected sources are presented through the identification of similarities and differences. The thesis further explores the underlying reasons for the existence of these similarities and differences, and tries to identify the most sufficient option for enhancing the development of the UPC system.²⁷ In accordance with one of the most common aims of the comparative legal method, this research is not intended as a simple criticism monologue but rather a discussion with propositions to further refine the prevalent legal by creating an increased level of harmonisation concerning urgency and preliminary injunction practices within the UPC.²⁸ Therefore, the selected research questions are grounded with the method of legal reasoning which, for the purposes of this thesis, is defined as constructing arguments with reference to applicable legislation, case law, and legal literature.²⁹

To achieve a well-founded and logical outcome, the structure of this thesis is divided into eight chapters. The following chapter delves into fundamental mechanisms of patent law. The third chapter provides an analysis of the historical development and the current state of the UPC system. Chapters four and five examine the topic of provisional measures by presenting legal principles and comparing national legal interpretations within the European patent regime on urgency of preliminary injunctions, which have influenced the prevalent functioning of the UPC. Chapter six explores the concept of urgency in provisional measure proceedings purely within the context of the UPC by comparing relevant case law and contemporary legal guidelines on the subject matter. Chapter seven will systemise and discuss the findings of the prior chapters. The concluding chapter which presents the main findings of the conducted research and proposes possible points for further research.

²⁷ See, for example, Frankenberg (2017), 247. According to Frankenberg, constructive comparison and comparative historical reconstruction can be utilised as legal comparative methodologies to enhance the international legal order and to identify the 'right law' which best addresses the demands of a particular stage of human-social development.

²⁸ Kotz and Zweigert (1998), 34.

²⁹ See, for example, Wallace (2018), 261. Wallace describes legal thinking as a process involving the interpretation and application of legal rules, such as legislation and case law, to specific instances.

2 Legal Definition and Fundamental Mechanisms of Patent Law

2.1 The Function of Patents

The fundamental concept for understanding the UPC is to define what exclusive rights are included within the jurisdiction of the court. The UPC is competent to settle disputes relating to European patents and European patents with unitary effect.³⁰ Therefore, patents with a specific nature are to be considered to fall within the jurisdiction of the UPC. A patent is a right that confers its holder a monopoly over the usage of the inventive product or process, typically for a limited period of 20 years. However, the patent can become subject to opposition or revocation even after the exclusive period of protection has ended.³¹

It is important to highlight that the grant of a patent differs from the commercialisation of the same patent, as the patent does not automatically enjoy commercial value after it has been granted protection within a certain jurisdiction. Therefore, the function of patents can, in practical terms, be defined as a right that establishes incentive for innovation and is intended as a means for remuneration for the inventor for the efforts that they have put into the development of that innovation.³² However, the function of patents is subject to several different limitations such as prior art in the form of patents for which protection has already been granted.³³ In the EU, an inventive product or process shall be considered new if it does not form part of the state of the art.³⁴ As there are a number of different applicable legal frameworks governing patents within different jurisdictions, the functioning of patents differs in depending on the applicable law. In the EU, the development of the applicable law for patents has been quite extensive.³⁵

2.2 History of European Patent Law

Given that patents primarily consist of ideas, information, and know-how the protected content can be easily shared in a manner that constitutes infringement. Therefore, a significant amount of legal regulation has been established in order to protect the rights conferred to the right holder of a patent. In order to gain a comprehensive understanding of the UPC's role in the European

³⁰ Article 1 UPC Agreement.

³¹ Henkel and Zischka (2019), 198–199.

³² Teotia and Sanwal (2021), 4.

³³ Masur and Ouellette (2024), 703.

³⁴ Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000, Article 54(2).

³⁵ See, for example, Xenos (2023).

patent law landscape, it is necessary to examine the related historical developments.

The protection offered for inventions by patents has for a long time been connected to the territorial jurisdiction of individual states, national courts, and applicable legal acts.³⁶ Historically, there have been several different approaches to the protection offered in within different jurisdictions within Europe.³⁷ Therefore, the early form of patent law within the region was fragmented, without any connecting substantive principles related to patentability or procedural norms on the enforcement of patent rights. In the 19th century, even critical legal norms such as the duration of patent protection was not harmonised at any level.³⁸ Due to the nature of patents, and the fact that ideas and information are easier to “transport” across the borders of states than tangible goods, the fragmentation of patent protection to national jurisdictions was seen as an issue.³⁹ Therefore, the first attempt to create a legally enforceable international agreement including states within, inter alia, Europe was the Strasbourg Convention which was aimed at the unification of certain provisions of the substantive laws on patents, driven forward by the Council of Europe.⁴⁰ In essence, the Strasbourg Convention was meant to offer the first harmonising legal principles for the substantive laws concerning patents. The substantive parts included the grounds for patentability criteria and patent scope. However, the Strasbourg Convention did not create any institutional level organisational structures, or related frameworks, for the creation of an entity responsible for the cross-border grant or enforcement of patents. The Strasbourg Convention was one of the earliest efforts for the creation of a uniform European patent regime.⁴¹

After the adoption of the Strasbourg Convention, the European Economic Community (EEC) expressed an interest for further harmonisation of European patent law. Therefore, in 1959 a Coordination Committee on Industrial Property was created. The Coordination Committee was appointed with a task of preparing an international agreement which would address the issue of insufficient harmonisation of patent law in Europe. The project was named as the Community Patent Convention (CPC). The initial approach taken by the EEC and the Coordination Committee may be regarded as significant, given that the objective of the CPC was to establish

³⁶ Basche (2022), 2-3.

³⁷ Stankova (2021), 339.

³⁸ Pila (2013), 921.

³⁹ Khuchua (2023), 48.

⁴⁰ Sherman (1991), 499.

⁴¹ Khuchua (2023), 49.

a binding international legal framework intended to supersede national patent laws.⁴² This objective was soon amended, as the Coordination Committee came to the conclusion that due to the detailed and complex nature of patent law, relevant national provisions were necessary in order to create a functioning level of harmonisation. Consequently, the approach was revised to establish a parallel system in which both national and supranational patents would coexist as viable options under the CPC.⁴³ However, this revision proved to be a challenging one, as the project had to be stalled due to questions between EEC member states over the form of specific substantive rules. However, the desire to reform the European patent landscape was also the reason for initiation another European convention with cross-border effects. Alongside with the development of the CPC, a convention with broader jurisdiction and a larger number of member states was gaining attraction with the practitioners in the field. This legal document was the EPC.

The EPC, consisting of all the contemporary EEC member states, as well as Greece, Spain, and Turkey had similar intentions as the CPC but approached the issue in a different manner. Rather than creating a framework which would govern all the member states' patent issues, the aim was to harmonise the examination requirements for granting patent protection to inventions within member states.⁴⁴ The EPC approached this task by enabling the creation of the European Patent Organisation and its operational body the European Patent Office (EPO). The latter was, according to the Convention, to be appointed with the task of granting European patents.⁴⁵ The reform offered by the EPC was positively welcomed. Accordingly, the Convention was ratified in 1973 and entered into force in 1977.⁴⁶ Since then the EPC has become a central instrument and foundation in shaping the prevalent European patent regime, which can be defined as a complex non-state legal order including both national and regional patent systems.⁴⁷ The introduction of the EPO enabled by the EPC has been crucial in the development of the EPO Boards of Appeal (BoA) within the modern European patent regime. The BoA is the first and final judicial body for any legal proceedings before the EPO. Accordingly, all decision rendered by the BoA carry binding effect with respect to the refusal or maintenance of European patents, which in certain instances, may also fall to the competence of the UPC.⁴⁸ However, it is of most

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Pila (2013), 921.

⁴⁵ Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, Article 4(3).

⁴⁶ Heath (2002), 11.

⁴⁷ Galloux (2023b), 2-3.

⁴⁸ *Ibid.*

importance to mention that whilst the UPC operates with the competence of an international court governed by the UPCA, the EPC does not confer a similar status for the BoA. In addition to the importance of the BoA, it can be stated that the current form of the EPC offers practical features which contribute to the functioning of the European patent regime. For example, the EPC's influence has created a high level of harmonisation concerning the patentability of inventions within Europe. The member states of the EPC also apply certain provisions of the EPC directly to their own national laws.⁴⁹

Besides the EPC, the historical development of the CPC remained inactive for several years until 1969, when the project was revived and entered a new development phase. After the successful ratification of the EPC, the CPC was formally adopted by all EEC member states in 1975.⁵⁰ The amended version of the CPC included a provision which would enable the EPO to grant a specialised type of patents. This form of patents was the community patent. However, the original objective of the CPC for establishing a new legal framework for patents within Europe remained inadequately addressed. Consequently, procedural challenges related to language requirements, along with the potential for insufficient harmonisation for raising the risk of forum shopping among national courts of the member states prevented the CPC from being ratified by the EEC member states. Therefore, the CPC never entered into force.⁵¹ The failure to implement the CPC was not the end for the interest to create a uniform patent system which would offer protection in multiple member states with the same application. As there was still interest for establishing a community patent system, the European Commission published a Green Paper of the Community Patent and the patent system in Europe (Green Paper) in June 1997, which was meant to promote innovation through patents.⁵² The Green Paper recognised the value of the EPC but also gave an endorsement for a community patent which would have unitary nature with referring to more sufficient management and litigation of patents as possible benefits.⁵³ The above discussion demonstrates the historical development of the European patent landscape, and the importance of the EPC which in many ways has succeeded in harmonising the patentability on inventions. However, the harmonisation of patent enforcement has not been as successful.

⁴⁹ *Ibid*, 3.

⁵⁰ Singleton (1979), 119.

⁵¹ Kur (2023), 577.

⁵² Khuchua (2023), 52.

⁵³ Commission of the European Communities. (1997). Promoting Innovation Through Patents: Green Paper on the Community Patent and the Patent System in Europe, COM(97) 314 final, 5-6.

This has been one of the contributing factors for the introduction of the UPC.

2.3 Overview of the Different Legislative Frameworks for Patents in the EU

As demonstrated in the brief analysis of the history and development of European patent law landscape, patents granted within the jurisdiction of EU Member States are regulated by a comprehensive legislative framework, shaped by both national laws and international legal instruments. The prevalent forms of patents in the EU are national patents, European patents, and, most recently, UPs. In all Member States, patents are primarily regulated by national legal frameworks, and further by international legal instruments. In order to gain an understanding concerning the functioning of the UPC, it is necessary to examine the mentioned forms of patents, as they have an effect on the functioning of the UPC system. Certain forms of patents will be excluded from the scope of this thesis. Accordingly, industry specific instruments such as Supplementary Protection Certificates will not be included. The granting of national patents is regulated by the national laws of each Member State, and the protection conferred to a patent is only enforceable in a particular Member State.⁵⁴ In Germany, the applicable legislative act is the German Patent Act (*Patentgesetz*), while in Finland, it is the Finnish Patents Act (*Patenttilaki*). For national patents, governmental authorities are appointed with the task of processing patent applications. Consequently, the procedures for granting patents may vary across different Member States. If an applicant seeks to gain national patent protection in multiple Member States, they must file separate applications for a national patent in each of the respective states. However, the harmonisation of European patent law has introduced alternative systems with supranational elements, which can provide more efficient mechanisms for securing the desired protection across multiple jurisdictions.⁵⁵

As an alternative to filing individual national patent applications, applicants may file for a European patent through the EPO, which enables the obtaining of patent protection in states which have joined the European Patent Convention.⁵⁶ The legal framework enabling the functioning of the EPO is the EPC. European patents can be obtained through the EPO via a single centralised application process. If successful, the application confers the applicant with a bundle of national patents. The bundle does not automatically include all EPC member states,

⁵⁴ Contreras et al. (2017), 1458.

⁵⁵ Criscuolo and Verspagen (2008), 1895.

⁵⁶ See, for example, Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, Article 3.

but rather the applicant may designate which jurisdictions the European patent is to be enforced.⁵⁷ Once a European patent is granted, it grants the holder the same rights and enforceability options as patents granted under national legislation in each contracting member state of the EPC where protection has been sought. Accordingly, the EPC establishes a legal framework in which European patents are regarded as equivalent to national patents, and enforcement of the granted rights can be sought before national courts.⁵⁸ Furthermore, European patents are subject to the same provisions regarding invalidation as those applicable to patents granted under the national laws of each respective member state.⁵⁹ One of the factors for determining the scope of a patent is territoriality. The EPC follows the principle of territoriality by granting a European patent extended territoriality in all member states where the patent has been validated. However, it is of most importance to clarify that the EPC does not adhere to the principle of territoriality in a unitary sense, and it does not confer the right holder with unitary protection which governs all the jurisdictions of the designated states. Rather, the EPC extends the territorial scope of a patent individually for each member state where the patent has been validated.⁶⁰

The final type of patents in this examination is the UP, which is also known as European Patent with unitary effect. As demonstrated in the analysis of the historical development of European patent law, the adoption of the UP is a relatively recent development which was enabled by the UPCA's entry into force in June 2023, alongside the prior entry into force of the Regulation 1257/2012 in January 2013.⁶¹ The legal framework for UPs allows for uniform protection across multiple EU member states.⁶² The legal framework governing the functioning of the UPs is interconnected with the applicable legislation for European patents, as the centralised application process for obtaining a European patent through the EPO forms the basis for applying for a UP. After a European patent is granted, the applicant may file a request for unitary effect from the EPO.⁶³ The request shall be filed within one month after the granting of the patent has been mentioned in the European Patent Bulletin.⁶⁴ The unitary effect conferred by a

⁵⁷ Hall and Helmers (2019), 3.

⁵⁸ *Ibid.*

⁵⁹ See, for example, Plomer (2019), 61.

⁶⁰ Bender (2000), 53.

⁶¹ Ullrich (2015), 1.

⁶² Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ L 361, 31.12.2012), Article 3(1).

⁶³ For reference, see, European Patent Office: 'Applying for a Unitary Patent' (n.d.).

⁶⁴ See, for example, European Patent Office: 'Requirements of the request for unitary effect' (2024). Rule 6(1) includes requirements of the request for unitary effect before the European Patent Office.

UP applies within the jurisdictions of all states participating in the enhanced cooperation established by Regulation 1257/2012, which have additionally ratified the UPCA.⁶⁵ Consequently, the territorial scope of a UP differs from that of a European patent, as both provide protection across multiple jurisdictions, but do so through distinct mechanisms.

2.4 Patent infringement

As a result of significant efforts towards the harmonisation of European patent law, applicable national laws have become more similar with the wording of the EPC in terms of granting patents. However, with respect to preliminary measures and the UPC, it is important to explore a fundamental concept of patent law, which is not regulated in the same harmonised manner as the granting of patents. This concept is called patent infringement. Patent infringement occurs when the novel information which has been claimed as the subject matter for a patent is exploited without the consent of the right holder.⁶⁶ For example, if a legal or a natural entity makes available or sells a product that can be determined to include features which fall within the scope of a patent's claims and does not have the authorisation from the patent holder, the committed act can be found to infringe the rights of the patent holder.⁶⁷

The legal framework applicable to remedying patent infringement for patents granted at the national level is determined by the laws of the jurisdiction in which the patent was issued (*lex fori*). In the case of European patents, the determination of the applicable legislation is more complex, as the number of provisions related to patent infringement under the EPC is limited. The EPC stipulates that infringements of European patents are to be dealt with by national law.⁶⁸ In other words, the EPC governs that the applicable law is the national law where the infringing action has allegedly taken place. If the holder of a European patent seeks to enforce their rights against an infringing action by a third party, the applicable law would be the national law of the member state in which the relevant part of the European patent bundle was granted by the EPO. Due to the bundle mechanism, in cases where the same European patent is infringed in different EPC member states, it is necessary for the patentee to commence separate proceedings in the different jurisdictions. The outcome of the proceedings may vary as different national legal

⁶⁵ Mimler (2023), 452-455.

⁶⁶ Emery (1904), 125.

⁶⁷ Hantman (1990), 456-457.

⁶⁸ Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000 (European Patent Convention 1973), Article 64(3).

frameworks are used to decide on the matter.⁶⁹ This approach creates complexity to the enforcement of European patents with respect to patent infringement, as an identical action may be deemed infringing in one EPC member state while not constituting infringement in another. In order to reduce issues which arise out of the discussed complexity and make patent infringement proceedings more streamlined for UPs, a centralised court with exclusive competence to hear infringement proceedings was created, this court is the UPC.⁷⁰ In the case of UPs, the UPC has unitary cross-border jurisdiction, which means that the territorial scope of the court is extended to encompass all participating member states.⁷¹

⁶⁹ Farmer and Grund (2008), 419.

⁷⁰ Article 32(1)(a) UPC Agreement.

⁷¹ Zipf et al. (2023), 311-312.

3 The UPC's Impact on the European Patent Law

3.1 Regulatory Framework and Jurisdiction of the UPC

As the UPC has been in development for over a decade, European legislators have had time to construct a comprehensive regulatory framework over the functioning of the court. The most central legal sources concerning the functioning come from the UPCA, the Rules of Procedure (RoP), Statute of the Unified Patent Court, EU Regulations 1257/2012 and 1260/2012 governing UP, and in certain situations the EPC and national law of the member states can also be applicable to the functioning of the court.⁷² The UPCA is not a legislative act of the EU but rather an international agreement. However, at the time of writing, all states participating in the UPC system are EU Member States. Accordingly, 18 EU Member States have ratified the UPCA, and six states have not completed the ratification process, but are signatory states to the agreement. Three states are not participating, these being Spain, Poland and Croatia.⁷³ In addition, 11 EPC member states which are not EU member states are also not contracting member states of the UPCA, with the most notable one being the United Kingdom.

The wording of the UPCA introduces a mechanism under which the UPC is competent to hear and decide on patent infringement and revocation proceedings of UPs and certain European patents.⁷⁴ For the majority of European patents which do not possess unitary effect, the UPC does not have jurisdiction.⁷⁵ It is also important to define that the scope of applicability for the UPC is further limited by Art. 83 of the UPCA, as it gives rise to a transitional period of seven years after the date of entry into force of the UPCA during which right holder may opt out the European patent from the exclusive competence of the UPC. Therefore, European patents which have been opted out by the patent proprietor, do not fall within the jurisdiction of the UPC, and related infringement and revocation proceedings must be launched nationally in EPC member states. However, if a European patent has not been opted out by the right holder in accordance with Article 83, the UPC's decisions are enforceable in the territory of the UPCA member states in which the European patent has effect.⁷⁶ To conclude, the UPC is competent to enforce patent

⁷² See, the preamble of the Rules of Procedure of the Unified Patent Court.

⁷³ See, for example, Herbert Smith Freehills: 'Which states are in the UPC & where will a UP have effect? (2024).

⁷⁴ Article 32(1) UPC Agreement.

⁷⁵ See, for example, Articles 3 and 32 of the UPC Agreement, which define the framework for application concerning different forms of patents which belong to the jurisdiction of the UPC. Article 3(c)-(d) governs that in the case a European patent had not yet lapsed at the date of entry into force of the UPC Agreement, the UPC Agreement shall apply to those European patents, even as they lack the unitary effect. Additionally, the UPC Agreement is applicable to European patent applications which were pending at the time of entry into force.

⁷⁶ Article 34 UPC Agreement.

protection within the territory of Contracting Member States of the UPCA. The agreement outlines an applicable framework for determining the scope of protection and its limitations. It is important to distinguish that the EPC is the legislative act which governs the granting of European patents. Therefore, although the functioning of the UPC is *de jure* only governed by the UPCA, as the EPC is applicable to the granting of patents, the functioning of the UPC is *de facto* influenced by the EPC.

3.2 Structure of the UPC

As a new court system within the Contracting Member States, the UPC has been structured in a way which includes a Court of First Instance, which is further constructed of local divisions (LD), regional divisions and central division. Furthermore, the composition of UPC includes a Court of Appeal (CoA), which is competent to hear and decide on the appeals of originating from the Court of First Instance.⁷⁷ There is also a Registry, which is responsible for handling administrative and procedural tasks of the court.⁷⁸ The Court of First Instance has adopted a decentralised structure in terms of the different divisions belonging to it. In order to reach a high level of harmonisation, all divisions must interpret the relevant legal frameworks, the most notable one being the UPCA, in a coherent manner. If the divisions do not create uniform case law, and do interpret substantive questions differently, it can result in legal uncertainty and forum shopping.⁷⁹ Therefore, it is essential to conduct a detailed examination of the divisional structure from which case law originates before proceeding to analyse the concept of urgency.

The first type of division within the UPC's Court of First Instance is the LD.⁸⁰ LDs are meant to deal with a high level of patent proceedings and may be established by individual member states. LDs have the competence to adjudicate both infringement and revocation actions.⁸¹ LDs have been set up in multiple member states with a high level of patent litigation, such as Germany and France for example. For Contracting Member States which do not have such a high level of proceedings, a regional division may be established. Regional divisions are competent to handle similar proceedings as LDs, but the division is responsible for the proceedings of all the participating member states, for example the Nordic-Baltic Regional Division is established by Sweden, Estonia, Latvia, and Lithuania, and it is centrally located in

⁷⁷ See, Article 6 UPC Agreement. In addition, see, Hoyng (2023), 19–20.

⁷⁸ Article 6(1) UPC Agreement.

⁷⁹ Goddar and Werner (2023), 206.

⁸⁰ See, Article 7 UPC Agreement.

⁸¹ See, for example, Unified Patent Court: 'Unified Patent Court Structure' (n.d.).

Stockholm, Sweden.⁸² Finally, the last type of division for the UPC's Court of First Instance is the central division, which is the institutional body responsible for revocation actions, non-infringement matters, and infringement proceedings in which the defendant is domiciled outside the UPC member states.⁸³ The central division has been constructed as a decentralised judiciary; the competence has been divided based on technical specifications. In general, the central division is located in Paris, which is responsible for general and life sciences. In addition, the central division has sections in Munich and Milan. The central division in Munich is responsible for mechanical engineering proceedings, and Milan is appointed with chemistry and biotechnology.⁸⁴ For all types of divisions, the panel deciding for a specific matter is composed in similar manner. The composition of the panels for the Court of First Instance shall be multinational and is required to include two legally qualified judges, which are nationals of UPCA member states, and one technically qualified judge.⁸⁵

The decisions made by the Court of First Instance may become under review by the UPC's CoA. The CoA is the final judiciary within the UPC system, and its jurisdiction is focused on hearing appeals to the decisions of either the LDs, regional divisions or the central division of the Court of First Instance.⁸⁶ The CoA is competent to hear appeals concerning all of the decisions of the Court of First Instance. Therefore, the proceedings that are brought before the CoA have the same subject matter as the Court of First Instance. For example, the CoA may review an interim measure such as an order for a provisional measure made by the Court of First Instance. The CoA may either uphold, amend, or revoke the decisions made by the Court of First Instance by giving a final decision.⁸⁷ As an international treaty, the UPCA functions independently of the EU's legislative framework. In practice, this means that UPC decisions may only be referred to the Court of Justice of the European Union (CJEU) in circumstances where the interpretation of EU law is required.⁸⁸ This points to the significant responsibility on the UPC to function effectively, as in many cases, it serves as the sole judiciary competent to rule on matters related to UPs and certain European patents.

⁸² Agreement on the Establishment of a Nordic-Baltic Regional Division of the Unified Patent Court, Article 1.

⁸³ Leistner (2024), 626.

⁸⁴ See, for example, Herbert Smith Freehills: 'UPC Structure' (2024).

⁸⁵ See, Article 8(6) UPC Agreement.

⁸⁶ *Ibid*, Article 9.

⁸⁷ *Ibid*, Article 75(1).

⁸⁸ Goddar and Werner (2023), 205.

3.3 UPC Rules of Procedure

After analysing the most prominent legislative frameworks governing the UPC and its structure, it is pertinent to further examine a legal document that plays a central role in shaping the UPC's urgency jurisprudence. This document is the RoP, which provides detailed rules that regulate the manner in which the UPC functions. The rules included within the wording of the RoP entail, *inter alia*, guidelines on the jurisdiction of the court and its related obligations in litigation proceedings. Technically, the RoP govern and create details for the manner in which proceedings are to be conducted before the UPC. However, the role of the RoP is meant to be supportive as the legislative document cannot contradict or alter the wording of the UPCA. The rules introduced in the RoP are binding but in case of conflict, the UPCA shall be considered to have precedence.⁸⁹ The RoP govern that the UPC is liable to operate in accordance with the UPCA, Statute of the Unified Patent Court (Statute), and the RoP.⁹⁰ The RoP touch upon a wide scope of different topics relevant to the functioning of the UPC. Several of the rules included in the document are meant to address specific legal matters, some of these rules are examined in detail in chapters five and six of this thesis. However, the most notable rules which are applicable to a significant portion of the UPC's operations are related to procedural aspects of the litigation process.

Chapter 1 of the RoP focuses on the procedural rules of written procedures. The most significant procedural elements in the early stages of proceedings governed by the RoP are the Statement of claim and Statement of defence, as these documents initiate and define the scope of the litigation. Taking into consideration the topic of this thesis, it is important to note that the Statement of claim formally initiates the main proceedings related to the infringement. Other procedural topics, such as provisional measures will be further discussed in the later chapters of this thesis. The Statement of claim is made by the patent right holder in the role of the claimant.⁹¹ The RoP outline that the claimant shall lodge a Statement of claim in a division which is in accordance with the requirements of Art. 33 of the UPCA.⁹² After the Statement of claim has been made, the defendant has three months to lodge a statement of defence.⁹³ After the Statement of defence has been lodged, there is a possibility for further replies under the permission of the

⁸⁹ Van Dongen (2023), 374.

⁹⁰ See, for example, RoP, Rule 1.

⁹¹ Rule 13(1)(a-q) RoP. The provision is central in terms of the requirements for initiating written proceedings, such as provisional measure proceedings before the UPC.

⁹² *Ibid*, Rule 13(1).

⁹³ *Ibid*, Rule 23.

competent judicial body of the Court of First Instance court, following a number of different stages before the issuance of a decision. Consequently, it is evident that the main proceedings can take much time, due to the necessity of ensuring procedural fairness for all parties during the entire litigation process. As patent rights are based on the notion under which the right holder should be able to monetise on the patented invention, a lengthy litigation process over infringing actions may result in drastic losses to the right holder.⁹⁴ Therefore, there is a need for legal mechanisms that provide swift protection against infringing actions, either prior to or concurrently with the main proceedings. Due to this situation, the UPCA and the RoP have adopted provisions which govern the granting of provisional measures, such as preliminary injunctions, which address the issue of balancing the rights of the stakeholders while ensuring that the main proceedings are conducted appropriately. The following chapter will further discuss provisional and preliminary measures, and their applicability in different EU member states.

⁹⁴ Bollampally (2021), 634-635.

4 Injunctive relief as a Remedy for Patent Infringement

4.1 Definition and Scope of Injunctive Relief

As discussed in the analysis of patent infringement in chapter 2.4, different judicial frameworks have adopted varying approaches to jurisdiction and the remedies available for infringement. However, most judicial frameworks within the European patent regime share a similar approach, under which the availability of legally enforceable remedies to infringement is recognised as a fundamental value of a functioning judicial system.⁹⁵ In principle, remedies are offered to the parties whose rights have been infringed.⁹⁶ Patent law recognises the patent proprietor as the right holder, and as a stakeholder whose rights are subject to potential infringement. The remedies offered by patent law can fall within two different categories. Firstly, there is the possibility to remedy the party which has experienced harm by granting compensatory damages.⁹⁷ This is usually a monetary remedy in which the infringing party is ordered to pay a certain amount to the right holder. The amount of the damages is usually dictated by the occurred harm.⁹⁸ The second type of remedy which is widely utilised to tackle infringement is injunctions. Injunctions are orders issued by a relevant judicial authority which may refrain the third party from commencing or continuing an infringing action.⁹⁹ The remedy provided by injunctions is typically characterised as injunctive relief. In order to thoroughly examine the provisional measure mechanisms within the UPC that facilitate injunctive relief, it is imperative to first analyse the subject matter and the underlying legal norms within the context of the European patent regime, given that many EU Member States are also contracting parties to the UPCA. After analysing the mechanisms in a general context, the findings serve as a foundation for a legal comparison with the corresponding mechanisms established under the framework of the UPCA.¹⁰⁰

National patent laws, international agreements, and related legal frameworks exhibit varying approaches to the application of injunctive relief.¹⁰¹ In national legal systems within the EU, the issuance of injunctions relating to patent disputes requires careful and detailed consideration by

⁹⁵ Ploeg and Polackova (2023), 319.

⁹⁶ Hofmann and Raue (2024), 578.

⁹⁷ Dijkman (2020), 309.

⁹⁸ Nikolic (2019), 479.

⁹⁹ Contreras and Husovec (2022), 3.

¹⁰⁰ See, for example, Husa (2018), 41. The discussion highlights the promotion of global law as a means to foster coherence and uniformity, serving as a motivation for legal comparison. Similarly, this thesis employs legal comparison as a tool to enhance coherence in the development of the UPC system.

¹⁰¹ See, for example, Biddle et al. (2019), 122-125.

the presiding judge of the competent court. This is because a certain degree of discretion is necessary to reach a justified decision that appropriately balances the interests of all involved parties. This sort of discretion in proceedings related to the granting of injunctions may enhance the efficiency in dealing with specific cases, as injunctions are not granted without careful consideration.¹⁰² However, in light of the efforts toward harmonising European patent law, it can be argued that while granting national courts significant discretion may be advantageous for addressing patent disputes of a strictly national character, excessive flexibility could undermine the uniformity and effectiveness of the European patent regime, particularly with regard to European patents and UPs. This is attributable to the tendency of national courts of EU Member States and different judicial bodies of the UPC's Court of First Instance to prioritise different characteristics, which may potentially result in inconsistencies. Inconsistency in the jurisprudences of the Contracting Member States of the UPCA has the potential to hinder legal certainty and complicate the intended functioning of harmonised patent systems, such as the UPC.¹⁰³

Having established the historical development of European patent law harmonisation leading to the UPCA, this thesis will now undertake a comparative analysis of the prevailing national patent injunction practices in several Contracting Member States of the UPCA. This comparison aims to explore the prevailing national approaches to injunctive relief, which have the potential to influence the interpretation of UPC judges. Given that presiding judges of the UPC typically possess extensive experience in litigation as national judges, it is improbable that they can completely alter their established interpretations when adjudicating both national patent matters and UPC proceedings.¹⁰⁴ Consequently, this thesis proposes that national approaches to injunctive relief in patent proceedings constitute a valuable reference point for assessing the interpretations of the various judicial bodies of the UPC's Court of First Instance, particularly as the UPC system continuously evolves to address novel and specific legal questions related to injunctions. Injunctive relief has been described as having the closest connection to a right to exclude others.¹⁰⁵ Injunctions can be divided into different types of actions which are available

¹⁰² Contreras and Husovec (2022), 4.

¹⁰³ de Lange (2021), 1090.

¹⁰⁴ Macrez (2023), 312-313.

¹⁰⁵ Semenov (2020), 134.

for different instances.¹⁰⁶ As this thesis aims to examine provisional measures and urgency, the main point of interest will be on provisional measures which are regulated by international legislation. In addition, the research of this chapter focuses on preliminary injunctions, which are among the most commonly used measures for preventing infringement in the national law context. Other measures, such as the seizure of infringing goods or the preservation of evidence will not be addressed, as they fall outside the scope of the research questions.

Firstly, it is sufficient to examine the legal framework applicable to provisional measures under the European patent regime. Provisional measures are governed by several international agreements and national legislative acts. One of the most popular definitions for provisional measures can be derived from the Trade-Related Aspects of Intellectual Property Rights (TRIPS). Article 50(1)(a) of TRIPS Agreement governs that legal authorities shall have the authority for ordering prompt and effective provisional measures in order to prevent any occurrence of intellectual property infringement. However, the approach adopted in the TRIPS Agreement is quite general and does not offer practical guidance concerning the practical functioning or granting of provisional measures.¹⁰⁷ Furthermore, the TRIPS Agreement offers only a limited number of requirements which need to be fulfilled by a judicial authority to be able to grant provisional measures. These requirements are that an infringement of any intellectual property right has had to be committed, and that the ordering of a provisional measure prevents the occurring, and possible entry of an infringing good into the channels of commerce within a certain jurisdiction which the judicial authority is responsible for.¹⁰⁸ This broad scope permits varying interpretations of how provisional measures should be established within a national legal system and how they should operate. As Article 50 of the TRIPS Agreement provides only a general framework of requirements, national courts may adopt more specific notions which fall within the wide framework at their discretion. This creates differences in the implementation of provisional measure provisions, and more specifically in the issuance of preliminary injunctions.¹⁰⁹ For example, Article 50(2) of the TRIPS Agreement stipulates that provisional measures may be adopted *inaudita altera parte*, without hearing the

¹⁰⁶ See, for example, Sikorski, R. (2024). Patent Law Permanent Injunctions and the Reception of Proportionality in the European Union, 16. The author discusses the distinctions between preliminary and permanent injunctive relief, which are among the most common types of injunctions granted within the European patent system.

¹⁰⁷ Semenov (2020), 135.

¹⁰⁸ See, the Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), Article 50(1)(a).

¹⁰⁹ See, Contreras and Husovec (2022), 315. In addition, preliminary injunctions represent a more specific mechanism for achieving interim injunctive relief within the national legal context, whereas provisional measures, as a broader category of remedies, are primarily utilised in international law.

other party, particularly in instances where any delay could result in irreparable harm to the right holder. The issuing of a provisional measures without offering the defendant with an opportunity to be heard constitutes a significant legal action.¹¹⁰ However, the wording of Article 50 of the TRIPS Agreement leaves noticeable freedom for national courts to determine what can be defined as delay or irreparable harm. The mentioned characteristics may have different meaning depending on the chosen point of view among many other substantive aspects. In the absence of exhaustive and specific provisions, a delay in the ordering of a provisional measure could for example constitute a time period of 24 hours, or it could constitute 30 days. Finally, the determination of delay in national context is typically entrusted to the discretion of the courts, as will be demonstrated in the following chapters. The possibility for this sort of discretion in the national implementation creates mechanisms which may become solely dependent on substantive facts of specific proceedings, rather than uniform procedural requirements introduced by international treaties.¹¹¹ The wording of the TRIPS Agreement is similar to the related provisions of the Enforcement Directive. Again, the relevant articles of the Enforcement Directive do not provide detailed rules governing the availability of provisional at the EU Member State level. Accordingly, Article 9(4) of the Enforcement Directive enables national courts to, *inter alia*, issue a provisional measure to prevent any imminent infringement of an intellectual property right. According to the Article if a delay in the issuance of measure would cause irreparable harm, the responsible judicial authority shall make its decision without hearing the defendant. Again, the wording of the provision grants the national courts of EU Member States discretion to interpret delay and related urgency based on their own views. The mentioned international instruments do not, for example, offer practical guidelines or mechanisms for the adoption of urgency in provisional measures provisions at the national level. As the guidance provided by the international treaties and EU legislation offer only a limited scope for application of provisional measure mechanisms, it is sufficient to examine the manner in which the national implementation has been conducted. The examination of national legislative frameworks concerning provisional measures provides a foundational basis for understanding their application within the framework of the UPCA and the RoP.

In Germany, preliminary injunctions proceedings are regarded as an effective mechanism for obtaining swift protection against patent infringement. When compared with other EU Member

¹¹⁰ Rule 212(1) RoP.

¹¹¹ Manu (2023), 309.

States, it is evident that such circumstances do not apply uniformly across the European patent regime.¹¹² The applicable legal framework for preliminary injunctions in Germany is derived from the Code of Civil Procedure and the Patent Act. Accordingly, the scope of preliminary injunctions has not been limited in national provisions. Therefore, a claim of cease and desist may contain, but is not limited to, any infringing action made against a conferred intellectual property right, such as a national patent right.¹¹³ It is important to note that within German jurisprudence, the applicant of a provisional measure usually receives an opinion from the competent court on the application requesting preliminary injunction before the defendant gets to file their arguments. In practice, this means that the competent court which has jurisdiction will give the applicant the information whether a decision granting the requested injunctive action will be granted or whether the application will be deemed as insufficient.¹¹⁴ If this point is analysed further, a distinction between the balancing of rights for the stakeholders can be made. In a case where the applicant is able to solely initiate, for example, preliminary injunction proceedings and gain knowledge about the upcoming decision of the court regarding the filed request before the actual granting on the request, the defendant is left in a rather challenging position as they are not able to provide counter argumentation concerning the injunctive action filed by the applicant. The presented justification for this arrangement is that the involvement of the defendant could adversely affect the urgency of the proceedings.¹¹⁵ Therefore, it can be concluded that the fundamental principle of due process is partially set aside in order to facilitate an effective remedy for patent infringement. If the function of due process is to ensure that a judicial authority makes a decision which is fair to all parties, leaving the defendant without the opportunity of being heard at all stages of the proceedings does propose an issue to the procedural functioning of the respective legal system. According to national scholars the German approach to preliminary measures values, above other features, the efficient and urgent enforcement of the given decision.¹¹⁶

In Finland, preliminary injunctions can be sought by the right holder before or during patent litigation proceedings. The most common legal basis for an application for a preliminary injunction is coded within chapter 7, Section 3 of the Procedural Code. In these cases, the right

¹¹² Deutsch (2013), 136.

¹¹³ Picht (2019), 216-218.

¹¹⁴ Deutsch (2013), 139.

¹¹⁵ Picht (2019), 220.

¹¹⁶ Deutsch (2013), 139.

holder seeks the granting of a preliminary injunction before commencing the main infringement proceedings. The approach adopted by the Finnish legal system divides injunctions into two categories. Firstly, there is final injunctions, which may be granted after the main proceedings have been concluded. Secondly, there is the possibility for preliminary injunction.¹¹⁷ The definition for injunctions provided in the Finnish legal acts is quite similar to the relevant provisions of the TRIPS Agreement and the Enforcement Directive; injunctions may enable the prohibition for the commencing or continuation of actions which infringe on the scope of a protected patent.¹¹⁸ As final injunctions become available after the conclusion of usually lengthy main proceedings, preliminary injunctions are seen as the more efficient remedy to infringement. In general, an applicant may expect a preliminary injunction application to be processed and granted from the Finnish Market Court within the duration of a few months.¹¹⁹ When this approach is compared to the German practice, it is evident that whilst the time for granting a preliminary injunction is not drastically different between the jurisdictions, the Finnish system displays elements which do not support the swift granting of preliminary injunctive relief as strongly as its German counterpart. Additionally, the level of discretion for the issuance of interim injunctive relief is higher in Finland after infringement has been proven. In practice this means that injunctions are issued automatically upon finding infringement, which is dependent on the attitudes of judges despite the fact that the law grants them a right to exercise a limited amount of discretion.¹²⁰

Most of the national legal systems of the EU Member States, which are also Contracting Member States of the UPCA, have utilised the discretion allowed by the provisions of the TRIPS Agreement and the Enforcement Directive regarding the issuing of preliminary injunctions.¹²¹ In Germany and Finland, the right holder is required to demonstrate that the merits of the associated main proceedings have a strong likelihood of a favourable ruling as the case moves forward. In Poland, a preliminary injunction may be granted if the right holder has a credible claim for proving infringement in the main proceedings.¹²² This slightly differing practice is

¹¹⁷ Norrgård, M. (2022), Finland. In Contreras and Husovec (2022), 100.

¹¹⁸ See, Section 7(3) of the Finnish Code of Judicial Procedure.

¹¹⁹ Norrgård, M. (2022), Finland. In Contreras and Husovec (2022), 101. Also see, for example, the Finnish Market Court decision MAO:111/19 *F. Hoffman-La Roche AG, Roche Oy and Genentech Inc. v. MSD Finland Oy*. In the case a preliminary injunction was granted on the basis of an infringing action against a pharmaceutical patent. Despite conflicting evidence regarding both the patent's validity and the alleged infringement, the court rendered its decision in three months from the date of the application.

¹²⁰ Contreras and Husovec (2022), 315-316.

¹²¹ *Ibid*, 322.

¹²² *Ibid*.

noteworthy, as Poland is one of the EU Member States which have not participated in the operations of the UPC system.¹²³ In terms of the nature of preliminary injunctions within the European patent regime, it can be observed that whilst most of the included national legal frameworks are active in facilitating the harmonisation efforts made towards European patent law, differences regarding the procedural practices are evident.

4.2 Urgency of Preliminary Injunctions within the European Patent Regime

Before analysing the functioning of the UPC system with regard to provisional measures, it is sufficient to further examine the role of urgency as a procedural requirement for provisional measures and preliminary injunctions within the European patent regime. Urgency is of most importance in most proceedings concerning a request for a preliminary injunction due to the nature of the mechanism, if the matter is not urgent it has been determined that the right holder has the possibility enforce their rights with other mechanism.¹²⁴ To facilitate a clear understanding of the concept, this thesis presents that urgency in provisional measure and preliminary injunction proceedings can be divided into two distinct types. Firstly, there is the applicant's urgency to obtain a cease-and-desist order from the competent court to prevent the potential harm. This type of urgency arises from the substantive facts of specific proceedings and is driven by the risk of potential harm that may occur if an infringing action is undertaken or not promptly ceased. The urgency related to potential harm to the applicant is secondary in terms of procedural considerations, as it acts mostly as the right holder's underlining motivation for prompt enforcement of their rights.¹²⁵ Nevertheless, it is important for the presiding judges to critically assess this type of urgency as part of the balancing of interests between the right holder as the applicant, and the alleged infringer as the defendant.

The second, and arguably more significant, type of urgency is established as a procedural requirement to assess whether the applicant has acted in a manner that justifies the need for urgent enforcement of their rights in the relevant proceedings. As the legislation of the European patent regime concerning the granting of provisional measures and preliminary injunctions requires efficiency in order for the mechanism to function as intended by the legislators, a

¹²³ This observation was made during the time of writing, Poland may become involved in the UP and UPC systems in the future.

¹²⁴ Neuhaus (2023), 743.

¹²⁵ Leathley (2023), 343.

subsequent requirement for assessment is created towards the applicant.¹²⁶ Accordingly, the concept of urgency includes a purely procedural time requirement.¹²⁷ The procedural requirement is connected to the time period within which an applicant should, according to requirements of the applicable legal framework, submit an application for a preliminary injunction to the competent court. As established in chapter 2, the European patent regime includes different options for protecting an invention within the jurisdiction of different EU Member States, such as national patents and European patents. Therefore, an insufficient level of harmonisation regarding the urgency requirement between different legislative frameworks has the potential to hinder legal certainty, as right holders cannot be sure what is expected of them in terms of submitting a preliminary injunction application within different jurisdictions.¹²⁸ Accordingly, a prominent issue in relation to provisional measure and preliminary injunction proceedings within the European patent regime is the urgency of the injunction application.¹²⁹

As established in the chapter 1 of this thesis, a patent proprietor is conferred with a right to exclude others from using the invention which the patent protects. However, the theoretical framework of patent law has not established an absolute principle regarding the timeframe within which the right to exclude should be applied in practice, as most proceedings differ with each other due to substantive facts. This is where preliminary injunctions become relevant, as they offer a swift option for the enforcement of patent rights. An example from German case law demonstrates that one of the primary criterion for assessing the granting of a preliminary injunctions is whether the applicant can reasonably be expected to wait for the conclusion of the main proceedings before enforcing the right conferred to them.¹³⁰ A similar approach for the determination has been adopted by the CJEU in *Phoenix Contact v. Harting*.¹³¹ Given the binding legal effect of the CJEU ruling in *Phoenix Contact v. Harting*, this thesis proposes that a similar approach to the German urgency assessment could be adopted across the Union.

According to one of the fundamental principles concerning the urgency assessment, an applicant

¹²⁶ See, for example, Court of Appeal of the UPC, ORD_44387/2024 of 25 September 2024 in matter UPC_CoA_182/2024 - *Mammut v Ortovox*, para 226.

¹²⁷ See, for example, Helsinki Court of Appeal case no. 740 (S 09/1812) 19 March 2010, *Janssen-Cilag v. Actavis Oy and Actavis Group hf*; cited as *HelHo 19.3.2010 nro 740 (S 09/1812)*. In addition, see LG Düsseldorf, GRUR-RR 2023, 205 - *Solarzelle II*.

¹²⁸ Mullally, K. C. (2009). Legal (un) certainty, legal process, and patent law. *Loy. LAL Rev.*, 43, 1112.

¹²⁹ Neuhaus (2023), 743.

¹³⁰ OLG Düsseldorf [Düsseldorf Higher Regional Court], GRUR-RR 2017, 477 marginal no 13 - *Vakuumgestütztes Behandlungssystem*; LG Düsseldorf, GRUR 2022, 1806, marginal no 48—MS - *Therapie III*.

¹³¹ C-44/21, *Phoenix Contact v Harting*, ECLI:EU:C:2022:309.

is responsible for promptly initiating the preliminary injunction proceedings after becoming aware of a possible infringement to the right conferred to them as patent proprietors.¹³² In essence, this principle results in a requirement under which an applicant should research the facts of a specific infringement in timely manner, and procure any evidence which could enable a promising preliminary injunction. The applicant should conduct the actions within a certain period of time in order to claim urgency. Urgency has been recognised as a central element in the assessment for granting preliminary injunctions, to the extent that, according to EU jurisprudence, a competent court may refuse to grant an injunction if it determines that the related application lacks urgency.¹³³ Under German case law, an application for a preliminary injunction may lack urgency if the document has not been filed within a fixed time period.¹³⁴ The complexity of assessing urgency arises from the substantive question of when the applicant first became aware of the infringement and when they obtained all the necessary information and evidence required to support a promising injunction. The aforementioned topics have been interpreted differently across various EU Member States, as explored in the following examination.

4.2.1 The Finnish Interpretation of Urgency Concerning Preliminary Injunctions

The Finnish legal system has adopted a specific approach to urgency in patent related preliminary injunctions proceedings. Accordingly, the Finnish system has established specific requirements regarding urgency, which an applicant must satisfy in order to demonstrate their interest in enforcing the rights conferred by a patent.¹³⁵ The topic has been addressed in national case law by the Helsinki Court of Appeals. In *Janssen-Cilag v. Actavis*, the District Court of Helsinki rejected the applicant's request for a preliminary injunction against infringing medicinal products introduced to the Finnish market by the defendant. According to the District Court, the application for a preliminary injunction against the defendant lacked urgency, as it was submitted at a time when the infringing product had already been on the Finnish market for a time period of one year. However, the Helsinki Court of Appeals found that the delay in submitting the preliminary injunction application was justified by the extensive efforts for obtaining all necessary information and evidence when preparing the application. Therefore,

¹³² See, for example, Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_592936/2023 in matter UPC_CFI_452/2023 - *Ortovox v Mammut*.

¹³³ Neuhaus (2023), 745.

¹³⁴ *Ibid.*

¹³⁵ Norrgård, M. (2022), Finland. In Contreras and Husovec (2022), 111.

urgency could be claimed even in a case in which the submitting of the application was made one year after the date on which the applicant had become aware or should have become aware of the infringing action.¹³⁶ Similarly in *Janssen-Cilag v. ratiopharm*, the District Court of Helsinki rejected an application for preliminary injunction due to lack of urgency. Again, the Helsinki Court of Appeals stated that actions related to the gathering of evidence, such as laboratory analysis, could be found as justifications for an acceptable delay. Accordingly, the Helsinki Court of Appeals determined that the application for a preliminary injunction did constitute urgency.¹³⁷ It is worth emphasising that at the time of writing, the Finnish legal system does not explicitly recognise urgency as a requirement for granting preliminary injunctions.¹³⁸ However, the topic has been addressed in case law, which indicates that the requirement is relevant in certain proceedings related to preliminary injunctions. In addition, national legal literature has suggested the formal recognition of urgency as a requirement for the granting of preliminary injunctions since the year 2002.¹³⁹ The interpretation of the Helsinki Court of Appeals in *Janssen-Cilag v. Actavis* and *Janssen-Cilag v. Ratiopharm* has been criticised for its relatively lenient approach in concluding that a delay of one to two years may constitute urgency.¹⁴⁰

4.2.2 The Dutch Interpretation of Urgency Concerning Preliminary Injunctions

The judicial practice in the Netherlands relating to injunctions in patent proceedings has historical significance within the European patent landscape. In the 1990s, the jurisprudence of the Netherlands recognised the validity of patent injunctions with cross-border elements.¹⁴¹ This form of enforcement can be characterised as having sought to achieve objectives similar to those of the UPC far before the adoption of the UPCA. However, according to the CJEU, early forms of cross-border patent injunctions initiating from the Netherlands were not in accordance with EU law. In the year 2006, the CJEU governed in *Roche v. Primus*, and in *GAT v. LUK* that the interpretation of the Brussels I Convention on the exclusive jurisdiction of EU Member States' national courts concerning patent disputes did not allow for cross-border injunctions.¹⁴²

¹³⁶ Helsinki Court of Appeal case no. 740 (S 09/1812) 19 March 2010, *Janssen-Cilag v. Actavis Oy and Actavis Group hf*; cited as *HelHo 19.3.2010 nro 740 (S 09/1812)*.

¹³⁷ Helsinki Court of Appeal case no. 741 (S 09/1706) 19 March 2010, *Janssen-Cilag v. ratiopharm GmbH and ratiopharm Oy*; cited as *HelHo 19.3.2010 nro 741 (S 09/1706)*.

¹³⁸ Norrgård, M. (2022), Finland. In Contreras and Husovec (2022), 112.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ Hoyng, W., Léon, D. (2022), Netherlands. Contreras and Husovec (2022), 222.

¹⁴² See, C-539/03 *Roche Nederland and Others* ECLI:EU:C:2006:458, and C-4/03 *GAT* ECLI:EU:C:2006:457.

However, this practice was later clarified, and ended in a situation in which cross-border preliminary injunctions issued by national courts were allowable, and in accordance with EU law is specific instance.¹⁴³ From that point onwards, the District Court of The Hague has issued various preliminary injunctions, many of which have incorporated cross-border elements in patent proceedings.¹⁴⁴

When the Dutch jurisprudence concerning the issuance of purely national injunctions is examined, it can be observed that the judicial framework has been built upon the principle of balancing the interests of the stakeholders. This practice has been confirmed by the Supreme Court of the Netherlands.¹⁴⁵ The Dutch practice has also cultivated detailed and sufficient case law in terms of issuing preliminary injunctions. Unlike in Finland, Dutch case law recognises, and places significant emphasis on urgency as one of the central points of assessment. Urgency constitutes a fundamental factor in determining whether a court should grant a preliminary injunction that an applicant is required to demonstrate the urgency of the matter to qualify for issuance in all preliminary injunction proceedings.¹⁴⁶ The Dutch assessment on urgency focuses on the examination of an applicant's actions in promptly enforcing the rights conferred to them by a patent. However, the assessment on urgency has been viewed as flexible in accepting demonstrations of urgency. Subsequently, the requirement of urgency has not been used to deny the granting of a preliminary injunction in proceedings in which the infringement of the applicant's rights has been otherwise established by the competent court.¹⁴⁷ The substance of the Dutch interpretation of the urgency assessment closely resembles that of the Finnish assessment. However, the two diverge significantly in that Dutch courts recognise and give value to urgency as a requirement for the granting of a preliminary injunction.

4.2.3 The German Interpretation of Urgency Concerning Preliminary Injunctions

Similarly to other examined EU Member States, injunctive relief is also available under the German judicial system. The German legislation sets out various requirements for the granting of injunctions. Accordingly, specific principles apply to the issuance of preliminary

¹⁴³ See, C-616/10 *Solvay* ECLI:EU:C:2012:445.

¹⁴⁴ Hoyng, W., Léon, D. (2022), Netherlands. Contreras and Husovec (2022), 222.

¹⁴⁵ Dutch Supreme Court (HR), HR 15 December 1995, *NJ* 1996/509 (*Kimberly Clark/Procter & Gamble*), para. 3-4).

¹⁴⁶ See, for example, *DSM v Novozymes* (Prel. Rel. DC The Hague 2017), para. 4.2.1.

¹⁴⁷ Hoyng, W., Léon, D. (2022), Netherlands. Contreras and Husovec (2022), 222.

injunctions.¹⁴⁸ The legal foundation for preliminary injunctions is derived from Sections 935, and 940 of the Code of Civil Procedure.¹⁴⁹ The principles for issuing a preliminary injunction establish additional requirements that the applicant must satisfy in order to obtain interim injunctive relief. Similar to other EU Member States, the applicant must demonstrate the validity of the patent on which the preliminary injunction application is based and establish that the patent has been infringed. In addition, the applicant must provide a justification for the preliminary issuance of the injunction. In other words, the applicant must be able to present why the preliminary injunction is necessary and why the matter cannot wait to be resolved on the merits of the case.¹⁵⁰ Urgency falls within the scope of the second requirement, as it is one of the central ways in which the applicant may prove that preliminary relief is necessary. Urgency is determined within a narrow legal framework, under which the enforcement actions of the applicant are assessed in both pre-litigation and litigation phases.¹⁵¹ The urgency assessment is therefore based on the examination of whether the applicant delayed in submitting the application for a preliminary injunction to the competent court after first becoming aware of the infringement.¹⁵²

German case law concerning urgency of preliminary injunctions is the most developed out of all the EU Member States examined in this thesis. In national judgment on 15 December 2022 (*Solarzelle II*), the Regional Court of Düsseldorf gave an interpretation concerning the commencement of the time period for the urgency requirement. In this case, the patent in question was granted on 27 August 2014 for a specific type of solar cell construction, encompassing physical characteristics such as material thickness, and the angle of certain material layers within the solar cell. Following the granting of the patent, opposition proceedings were initiated based on several different claims. In the proceedings, the validity and patentability of the patent in question was challenged. The proceedings were concluded in late September 2022, resulting in the patent being only partially upheld due to a lack of novelty in several of the auxiliary requests.¹⁵³ After the conclusion, the right holder of the solar cell patent filed an

¹⁴⁸ Picht, P. & Karczewski, A. (2022). In Contreras and Husovec (2022), 143.

¹⁴⁹ German Code of Civil Procedure – CCP, Zivilprozessordnung, ZPO, “Code of Civil Procedure as promulgated on 5 December 2005 (Federal Law Gazette I p. 3202; 2006 I p. 431; 2007 I p. 1781), last amended by Article 1 of the Act dated 10 October 2013, Sections 935 and 940.

¹⁵⁰ Picht, P. & Karczewski, A. (2022). In Contreras and Husovec (2022), 143.

¹⁵¹ *Ibid*, 145.

¹⁵² *Ibid*.

¹⁵³ Neuhaus (2023), 744.

application for a preliminary injunction against an infringing action on 28 October 2022.¹⁵⁴ In this case, the Regional Court of Düsseldorf presented an assessment of the time aspect concerning the granting of the preliminary injunction. The complexity of determining the relevant time period constituting urgency arises from the fact that the right holder first became aware of the infringing actions of third parties at the initiation of the related opposition proceedings. The Regional Court concluded that it did not find a lack of urgency in the application, which was filed several years after the applicant first became aware of the infringing actions. This assessment was based on several findings. Firstly, the Regional Court stated that as the applicant did submit the preliminary injunction application within a one-month time period from the conclusion of the opposition proceedings, the action did constitute urgency.¹⁵⁵ However, according to the Regional Court, this requirement becomes applicable only after the applicant has obtained all necessary information and evidence which would ensure a promising preliminary injunction application in a reasonable manner.¹⁵⁶ According to the view of the Regional Court, an applicant is permitted to wait for the conclusion of proceedings concerning the validity of a patent, which forms the basis of the preliminary injunction application, before submitting the application before the competent court. Therefore, it can be concluded that when the validity of a patent is in question, German national judicial authorities are generally hesitant to grant preliminary injunctions to mitigate the risk of issuing injunctive relief for a patent that may later be deemed to lack validity.

The determination of the applicable time period concerning urgency has been interpreted in a notably different manner by the Munich Regional Court I. In the decision of 20 July 2022 (*Bortezomib II*), the Munich Regional Court I rejected an application for a preliminary injunction due to a lack of urgency.¹⁵⁷ In other words, the court found that the application did not fulfil the time requirement. Similarly to *Solarzelle II*, the complexity in the urgency assessment arose from questions concerning the validity of the patent in question. Firstly, the Munich Regional Court conducted a detailed balancing of rights, evaluating the potential extent of damages that could have been incurred to the defendant if the court had granted a preliminary injunction based on a patent which lacked validity. The urgency requirement was not fulfilled due to the

¹⁵⁴ LG Düsseldorf, GRUR-RR 2023, 205 - *Solarzelle II*, marginal no. 110-118.

¹⁵⁵ Neuhaus (2023), 745.

¹⁵⁶ LG Düsseldorf, GRUR-RR 2023, 205 - *Solarzelle II* with reference to OLG Düsseldorf, GRUR-RS 2021, 19458 marginal no 24 - *Cinacalcet III*.

¹⁵⁷ LG München I, GRUR-RR 2023, 211 - *Bortezomib II*, marginal no 43.

substantive fact that the applicant had sent a warning notice to the alleged infringer on 11 April 2022, indicating that the applicant was aware of the infringing action at the time.¹⁵⁸ However, the applicant submitted the application for a preliminary injunction with the Munich Regional Court on 16 June 2022. Under the Munich Higher Regional Court's jurisdiction, a strict time period for urgency has been adopted.¹⁵⁹ Accordingly, it was evident that the adopted time period of 1 month had closed far before the submitting of the application. The applicant claimed that the reason for the delayed filing was the gathering of information and evidence for a promising preliminary injunction. In addition, the applicant's argumentation before the Regional Court of Munich I included a claim that the time had cumulated due to a related CJEU ruling, which delayed the analysis required for gaining the required prospects of success.¹⁶⁰ The Regional Court of Munich I found that the claims made by the applicant were not sufficient, as the infringing action and the related CJEU ruling should have been analysed in parallel, not sequentially as the applicant had done.¹⁶¹ The related analysis consisted of an evaluation of the validity of the patent in question by an appointed patent attorney, and a following examination of a lawyer into the possibility for success of the application for a preliminary injunction. In its decision, the Regional Court outlines that mentioned forms of analysis were related to legislative aspects of the cases referred to by the applicant, but did not concern the factual aspects of the investigation concerning the collecting of evidence or information. Therefore, the urgency period had been unduly extended, and the application was found to lack urgency.¹⁶²

Comparison of the two German cases reveals several similarities and differences in the assessment of the applications for preliminary injunctions. Both Regional Courts apply the time period of one month as the requirement for submitting an application for a preliminary injunction. In addition, both courts have implemented strict regulation for lack of urgency if the required timeframe is not adhered to by the applicant. However, the main difference in the application of the assessment on urgency comes from the interpretation of substantive circumstances. In the two cases, the Regional Courts have interpreted the characteristics which contribute to the potential success of the preliminary injunction applications in terms of validity of the respective patents. As the rulings of both *Solarzelle II*, and *Bortezomib II* are further

¹⁵⁸ *Ibid*, marginal no 49.

¹⁵⁹ Neuhaus (2023), 745.

¹⁶⁰ LG München I, GRUR-RR 2023, 211 - *Bortezomib II*, marginal no 49.

¹⁶¹ *Ibid*, marginal no 51.

¹⁶² Neuhaus (2023), 746.

analysed, a clear distinction can be made between the applicants' actions of waiting on the conclusion of related validity proceedings, and the gathering of information and evidence for a promising preliminary injunction application. From these differences it can be outlined that according to German national interpretation, matters which are not within the powers of the applicant, are to be exempt from the one-month time requirement for constituting urgency, whereas matters which are seen to be within the powers of the applicant do count for the one-month requirement. Therefore, it can be concluded that if the applicant is unable to influence the collection of information and evidence related to the application, further assessment should be conducted to determine whether the substantive matter justifies an exemption from the one-month urgency requirement. Even though the aforementioned factors have been established and implemented in a manner that ensures a sufficient level of legal certainty within national jurisprudence, similar considerations will be relevant during the early years of the UPC, as practitioners explore the boundaries of the new court system. Therefore, it is important to assess the interpretation of urgency in relation to provisional measures and preliminary injunctions within the legislative framework of the UPCA.

4.3 Legal Transplants and Applied Comparative Law

One of the forms of traditional comparative law is the examination of legal transplants. Legal transplants can be defined broadly as an act of adopting a certain legal rule, interpretation, or an institution from one jurisdiction to another.¹⁶³ Furthermore, legal transplants can be divided into different variants, such as the relevancy of the actors, the reasoning behind the action, or the assessment of whether the transplantation yields the desired outcomes.¹⁶⁴ For example, the adoption of specific EPC articles to the national legislation of certain member states can be viewed as a legal transplant. Due to the high level of harmonisation efforts within the European patent regime, activities which meet the definition of legal transplants are rather common.¹⁶⁵ As the aim of this thesis is to examine the urgency of preliminary injunctions and the related harmonisation efforts, the most suitable legal transplant variant is the examination which focuses on the outcomes of the transplantation. It is also noteworthy that alternative variants could be applied to the prevalent topic, however such an application could result in a more superficial and simplified examination of the subject matter. Before diving into the practical substance of

¹⁶³ Husa (2021), 379.

¹⁶⁴ Siems (2022), 231.

¹⁶⁵ Frantzeska Papadopoulou (2016), 893.

legal transplants and their application to the matter at hand, it is sufficient to define what legal transplants mean in the context of this thesis. The most notable observation from chapters 4.2.1-4.2.3 is that preliminary injunctions have been notable instruments in national patent enforcement long before the introduction of the UPCA or the UPC. As all of the included national examinations in the aforementioned chapters include legal theory and case law from the UPCA's Contracting Member States, it can be argued that there is a strong possibility for the existence of legal transplants of certain national preliminary injunction elements to the functioning of the UPC. Among the most noticeable legal transplants are the German practices, with strict time requirements for example.

An important question concerning legal transplants in the European patent regime is whether specific legal transplants are desirable, and should they be encouraged? More specifically, this thesis seeks to present the question of whether legal transplantation in terms of the urgency of preliminary injunctions should be committed within the UPC? Firstly, legal transplants enable practical adaptation of common patent enforcement ideas, such as the notion that the patent holder should seek to enforce their right with due diligence and prompt action.¹⁶⁶ However, this opens the debate on what should be considered as diligent enforcement of patent rights. As demonstrated in chapters 4.2.1-4.2.3 of this thesis, different national legal systems of the Contracting Member States apply different interpretations on the definition of diligent enforcement. If legal transplants are applied narrowly from one contracting member state to the whole UPC system with several Contracting Member States, issues may arise. Legal transplants have gained criticism for creating dominant legal systems and power imbalances.¹⁶⁷ This criticism could become a reality within the UPC in terms of the urgency of preliminary injunctions if appropriate procedural balance is not emphasised. The aforementioned scenario is further supported by the fact that, since the UPC opened its doors, certain Contracting Member States have played a more active role in its functioning than others.¹⁶⁸ This enables a situation where legal transplantation might occur from a narrow selection of origin countries. The following examination will dive deeper into the possible existence of legal transplants within the UPC's preliminary injunction practice. In the case legal transplants are identified, it is

¹⁶⁶ Siems (2022), 255.

¹⁶⁷ *Ibid*, 257.

¹⁶⁸ See, for example, Unified Patent Court: 'Case load of the Court February 2025' (2025), 2. The data provided by the UPC confirms that more than 70 percent of the total caseload has been distributed to the courts of Germany and France.

important to note that sufficient procedural safeguards should be implemented in order to combat the imbalances and other negative effects of legal transplants originating from the national jurisprudence of the Contracting Member States to the UPC system.

5 Provisional Measures under the UPC

Following the examination of theoretical implications for interim injunctive relief, and the adoption of related provisions in national context, this thesis explores the granting of interim injunctive relief for UPs and certain European patents by the UPC. This chapter will firstly provide a detailed assessment of the applicable legal framework. As established, the functioning of the UPC is primarily governed by the UPCA and the RoP. These documents create the legal framework under which the different judicial bodies of the UPC operate. This legal acts are explored from the procedural and substantive point of views regarding preliminary injunctions, before moving onto the examination of provisions which govern the urgency of the mentioned form for provisional measures.¹⁶⁹ It is of most importance to conduct a thorough examination of the relevant provisions concerning provisional measures, such as preliminary injunctions, in order to understand the requirements for the UPC in granting urgent injunctive relief.

The main instrument for establishing binding regulation for the UPC is the UPCA. Article 62 of the UPCA addresses provisional and protective measures. According to the Article, the UPC may grant injunctions as a form of provisional measures to prohibit an imminent or continued infringing action committed by an alleged infringer or an intermediary whose services are used by the alleged infringer.¹⁷⁰ In addition, the UPCA enables the UPC to impose penalty payments in order to further enforce the granted interim injunctive relief, and to appropriately compensate the right holder for the damages which may have occurred as a result of the infringement.¹⁷¹ Much like the provisional measure statues of the TRIPS Agreement and the Enforcement Directive, the approach adopted in the wording of the UPCA is quite general, and does not offer significant information regarding the practical granting of provisional measures. Accordingly, Article 62 UPCA does not address any procedural or substantive issues concerning specific types of provisional measures, such as preliminary injunctions, but rather gives a broad guideline for enabling provisional and protective measures as remedies for infringement.¹⁷² The substantive base for the implementation of Article 62 comes from Articles 25 and 26 of the UPCA, which address the right to prevent direct and indirect use of a patent. Simultaneously, the Articles

¹⁶⁹ According to Rule 211.1 of the RoP, the judicial bodies of the UPC may, in particular, order various provisional measures based on an application for a provisional measure. Rule 211.1 (a) specifies that one type of provisional measure is an injunction against the defendant. Accordingly, in this thesis, preliminary injunctions are understood as a specific type of provisional measure available within the UPC framework.

¹⁷⁰ See, Article 62(1) UPC Agreement.

¹⁷¹ *Ibid.*

¹⁷² Hofmann and Raue (2024), 584.

address patent infringement by conferring the patent proprietor with the right to prevent any third party from using the use of the protected invention.¹⁷³ The right to prevent is therefore in connection with the possibility to grant injunctions in accordance with Article 62(1). Provisional measures enabled by the UPCA are further elaborated in Part 3 of the RoP. Rules introduced in the RoP play a crucial role in the proper implementation of the relevant UPCA provisions into the case law of the different judicial bodies of the UPC. Therefore, Rules 211 and 212 of the RoP, which address the granting of provisional measures, are central in terms of this thesis' research questions. Rule 211 of the RoP outlines the general requirements necessary for the granting of provisional measures. Rule 212 of the RoP focuses on a more complex issue which is related to instances where a provisional measure is granted *ex parte*, without hearing the defendant.¹⁷⁴ As the nature of the RoP is to function in accordance with the UPCA, the mentioned rules create requirements which offer further details and narrows down the scope of application concerning provisional measures introduced in the UPCA. It is sufficient to examine the UPCA and RoP simultaneously in order to better grasp the framework under which the UPC has to make decision concerning provisional measures.

If Article 62 of the UPCA is compared with the wording of relevant provisions of the TRIPS Agreement or the Enforcement Directive, it can be observed that the requirement of reasonable evidence set out in Article 62(4) UPCA is quite similar to Article 50(3) TRIPS and Article 9(3) Enforcement Directive. This clearly indicates that the development of the UPCA's provisions on provisional measures has been influenced by its legal "predecessors". Rule 211 of the RoP further narrows the scope of Article 62 of the UPCA by addressing the order which is based on an application for a provisional measure. Rule 211(2) states: "*In taking its decision the Court may require the applicant to provide reasonable evidence to satisfy the Court with a sufficient degree of certainty that the applicant is entitled to commence proceedings pursuant to Article 47, that the patent in question is valid and that his right is being infringed, or that such infringement is imminent*". Rule 211(2) therefore offers detailed requirements which the court has to take into consideration when determining whether to grant a provisional measure. Accordingly, the UPC may grant a provisional measure if, the applicant can demonstrate that they are the proprietor of the patent on which the application is based, and that the UP or the

¹⁷³ Leistner (2024), 623.

¹⁷⁴ Hilty et al. (2013), 6.

European patent in question is valid, and that the right conferred by the patent is being infringed or is at imminent risk of infringement, for example, through unauthorised use by a third party. This list gives rise to a number of observations relating to the granting of provisional measures by the UPC. The most notable observation is that the wording of Article 62(4) of the UPCA does not require proof of validity concerning the patent in question, the only requirement is the providing of evidence relating to the status of the applicant as the right holder.¹⁷⁵ The scope of Article 62(4) UPCA therefore differs from the scope of Rule 211(2) RoP notably. This becomes relevant in terms of urgency of preliminary injunctions as considerations have made in purely national matters, as in Germany for example, for requiring substantive proof of patent validity before the issuing of a preliminary injunction may become available.¹⁷⁶ The validity of a patent is such a central element in the assessment of preliminary injunction applications in national context, that legal proceedings concerning validity may, in certain instances, fulfil the requirements for an extended urgency period for the application. Even as the Court has been given a wider framework for deciding upon the requirement of evidence from the applicant, the national applicable assessments for determining the availability of a preliminary injunction in countries such as Germany and Finland have shown that evidence regarding the discussed criteria have been systematically required.¹⁷⁷ Therefore, it is likely that the court will emphasise the necessity for requiring the mentioned evidence. Accordingly, as the requirements related to the proportionality test and more importantly to the fundamental provisions for the providing of evidence by the applicant are not directly applicable when the judicial bodies of the UPC are determining urgency as the discussed criteria does account for fundamental requirements which need to be fulfilled in order to display a promising application for provisional measure. Furthermore, if the jurisprudence of the UPC would in the future adopt a similar approach to the German practice in determining urgency, it is possible that questions concerning the validity requirement of Rule 211(2) may become applicable to the determination of urgency as well.

According to the wording of Article 62(2) of the UPCA, the availability of a preliminary injunction should be balanced with the proportionality test of granting the injunctive action has been established.¹⁷⁸ Therefore, the UPCA introduces a requirement under which the “potential harm for either of the parties” should be taken into account when assessing the legal

¹⁷⁵ Semenov (2020), 135.

¹⁷⁶ See, for example, *Solarzelle II*.

¹⁷⁷ See, Norrgård, M. (2022), Finland. In Contreras and Husovec (2022), 102. In addition, see Picht (2019), 219-220.

¹⁷⁸ Semenov (2020), 135.

consequences of granting a preliminary injunction according to the applicants requests. Rule 211(3) of the RoP solidifies the same requirement. The intriguing aspect of both Article 62(2) of the UPCA and Rule 211(3) of the RoP is the formulation of the provisions, and more specifically how both documents have been formulated with the word “shall” instead of “may”. This indicates that the drafters of the UPCA and the RoP valued the importance of giving the judicial bodies of the UPC discretion for conducting the proportionality test. However, the proportionality test is placed within a narrow framework for application, with the focus on potential harm of the injunction to either of the parties. Therefore, other substantive factors such as the date of the applicant first becoming aware of the alleged infringement do not appear to be included within the framework for the proportionality test for granting provisional measures enabled by Article 62(2) of the UPCA not Rule 211(3) of the RoP. The observation of such a similarity is quite evident and indicates that the Preparation Committee of the RoP and the drafters of the UPCA saw the narrow scope of application for proportionality assessment as a necessary safeguard for legal certainty between the different courts within the UPC system.

In conclusion, the discussed provisions of the UPCA and the RoP establish a broad framework for the issuance of preliminary injunctions within the UPC system. By outlining the requisite criteria, including the need for demonstrating patent ownership and the risk of infringement, the framework seeks to harmonise judicial practices across judicial bodies located in different Contracting Member States while respecting the overarching principles of fairness and proportionality. This chapter has examined the interplay between the two legal instruments, providing a foundation for further exploration of how the urgency of preliminary injunctions is implemented.

6 Urgency of Preliminary Injunctions within the UPC Framework

6.1 Applicable Legal Framework for Urgency

According to the findings of chapter 4, urgency has been established as a requirement for granting a preliminary injunction within several national legal systems of the UPCA member states. However, as the UPC is a multinational system aimed at the enforcement of UPs and European patents, which both possess cross-border elements, it is necessary to examine how has urgency been implemented into legal framework of the UPC. Firstly, it is necessary to provide an overview of the specific legal provisions relevant to the topic. As established in chapter 5, preliminary injunctions are addressed in the scope of Article 62 of the UPCA, which governs matters related to provisional and protective measures.¹⁷⁹ When the wording of Article 62 is examined in detail, it can be observed that urgency, or any form of time related requirements, have not been included to the wording of the provision. Therefore, the UPCA itself does not establish specific guidelines for assessing urgency in relation to the granting of preliminary injunctions.¹⁸⁰ From this finding a question related to the relevance of urgency arises; is urgency relevant in relation to the granting of preliminary injunctions by the UPC?

Urgency becomes applicable to the granting of preliminary injunctions through the RoP, the applicable Rules related to urgency are Rule 209(2)(b) and Rule 211(4). Rule 209(2) imposes a procedural obligation for the judicial bodies of the UPC for the examination of the application for a provisional measure. More specifically, Rule 209(2)(b) states that “*In exercising its discretion pursuant to paragraph 1, the Court shall in particular take into account [--], the urgency of the action*”.¹⁸¹ This paragraph introduces a requirement for the assessment of urgency in the examination phase of a provisional measure application, as the word “*shall*” has been used instead of “*may*”. Accordingly, urgency can be defined as a formal procedural requirement, which the UPC should include in its assessment while examining an application for a provisional measure. However, the wording of Rule 209(2)(b) is not exhaustive, and it does not introduce further guidance into the substance of the urgency assessment.¹⁸² In other words, the wording of

¹⁷⁹ See, Article 62(1) UPC Agreement.

¹⁸⁰ Hilty et al. (2013), 13-16.

¹⁸¹ The Rule’s wording includes the word “shall” which limits the discretion of the Court when including the assessment of urgency while conducting an examination of a specific application for a provisional measure. If the Rule would have included the word “may” instead of “shall”, the scope for applicability would have given the Court a higher level of discretion, as the urgency requirement would have been optional. However, according to the prevalent wording, the Court must take urgency into consideration whilst conducting the examination in accordance with Rule 209.

¹⁸² Rule 209(2)(b) RoP enables the UPC with the discretion of determining urgency.

the provision governs that urgency shall be taken into consideration but does not shed light on the manner in which the assessment should be conducted. This creates a situation in which the judicial bodies of the UPC have substantial discretion regarding the assessment of urgency, provided that urgency is included in the examination of a provisional measure application.

The Rule 211(4) of the RoP provides that “*The Court shall have regard to any unreasonable delay in seeking provisional measures*” in relation to the order based on the application for a provisional measure.¹⁸³ Similarly to Rule 209(2)(b) of the RoP, Rule 211(4) creates a binding requirement for the judicial bodies of the UPC to include an assessment on the urgency of an action seeking provisional measures in to the determination of whether it is appropriate to grant an order in accordance with an application for a provisional measure.¹⁸⁴ Again, this is attributable to the use of the term “*shall*” rather than “*may*,” signifying that the temporal aspect of applying for a provisional measure must be considered when determining the applicant's eligibility for a provisional measure, including, for instance, a preliminary injunction. Unlike Rule 209(2)(b), the wording of the Rule 211(4) does not mention urgency specifically. Therefore, it is sufficient to conduct a detailed examination into the composition of Rule 211(4) in order to gain an understanding on how the urgency assessment, in terms of unreasonable delay, is intended to connect to the granting of preliminary injunctions. The different judicial bodies of the UPC’s Court of First Instance are liable to conduct a rather extensive examination of the provisional measure application before determining whether the application fulfils the justifications for the granting procedure under the UPCA and the RoP.¹⁸⁵ The central element of Rule 211(4) is the “unreasonable delay” notion, which refers to a requirement of prompt actions committed by the applicant in seeking a provisional measure.¹⁸⁶ However, this thesis proposes that it may prove challenging to construct a definition for what constitutes as unreasonable delay in a manner which introduces a sufficient level of harmonisation within all the Contracting Member States of the UPCA. If the contents of Rule 211(4) are compared with certain national practices of the Contracting Member States, it can be concluded that the approach of the Rule 211(4) is similar with the German practice for assessing delay which may have been caused by

¹⁸³ See, for example, Rule 211(4) RoP.

¹⁸⁴ Rule 211(4) RoP mentions provisional measures which include, by analogy, the seeking of preliminary injunctions which are included in the scope of the RoP by Rule 211(1)(a). As the scope of this thesis is narrowed to only include preliminary injunctions, it is sufficient to examine Rule 211(4) with that topic.

¹⁸⁵ Ballardini et al. (2015), 198.

¹⁸⁶ See, for example, Court of Appeal of the UPC, ORD_44387/2024 of 25 September 2024 in matter UPC_CoA_182/2024 - *Mammut v Ortovox*, 38, para 226.

the applicant.¹⁸⁷ As established in chapter 5, the German practice for assessing a possible lack of urgency for submitting a preliminary injunction application is based on the determination of whether the right holder as the applicant initiated the proceedings for enforcing the right conferred to them by a patent without delay from the moment they became aware of the infringing action.¹⁸⁸ The most central element for determining lack of urgency by the German courts is to assess whether the applicant initiated the proceedings immediately after obtaining positive knowledge of patent infringement.¹⁸⁹

The applicable legal provisions suggest that the legal framework concerning the urgency of preliminary injunctions in the UPC system is established by Article 62 UPCA and Rules 209(2)(b) and 211(4) of the RoP, which enable the judicial bodies of the UPC to conduct an assessment on urgency within a wide scope for application. As the aforementioned provisions merely mandate the conduct of an assessment, the judicial bodies retain considerable discretion regarding the substantive content of that assessment. Therefore, the applicable legal framework for granting provisional measures requires the presence of an assessment of urgency but does not specify how such an assessment should be conducted. In order to address the second research question of this thesis, and to gain a better understanding of the actual content and characteristics of the assessment which the UPC conducts when assessing urgency of provisional measure applications, it is sufficient to explore the jurisprudence of the UPC. It is also sufficient to address the third research question by conducting an examination on whether the legal framework established by the provisions of the UPCA and the RoP has provided the UPC with a harmonised and coherent protocol which enables the conducting of a uniform urgency assessment across the different judicial bodies of the system. Both topics will be explored through an analysis of the findings presented in the subsequent case study.

6.2 UPC Jurisprudence on the Urgency Requirement for Preliminary Injunctions

The following case study analyses various orders issued by the UPC's Court of First Instance and CoA. All included orders have been issued in relation to provisional measure applications, which address urgency as one of the central requirements. The examination primarily focuses on how the various judicial bodies of the UPC conduct urgency assessments in relation to

¹⁸⁷ For comparison, see, Neuhaus (2023), 748.

¹⁸⁸ German jurisprudence does not employ the term 'provisional measure' as used in the UPC system but instead refers to 'preliminary injunctions.' While these terms are substantively equivalent, their usage varies depending on the legal context. For instance, see the determination of the Regional Court of Düsseldorf in *Solarzelle II*.

¹⁸⁹ Semenov (2020), 137.

provisional measure applications, including orders for preliminary injunctions. The aim of the examination is to establish how different judicial bodies of the UPC interpret Rules 209.2 (b) and 211.4 of the RoP. The study will use comparison as the central method of analysis in identifying what connecting characteristics have been included in the different urgency assessments, and whether the interpretations adopted by the judicial bodies have resulted in similar consequences for relevant stakeholders.¹⁹⁰ Additionally, the juxtaposition will focus on identifying differences in the interpretation which could undermine coherent functioning of the UPC within the still rather fragmented European patent regime.¹⁹¹ At the time of writing, the UPC has issued multiple decisions pertaining to applications for provisional measures. However, the number of decisions which include an assessment on urgency remains limited. In order to ensure a clear structure for the study, the comparison is conducted in reference to the following research questions:

Which characteristics are considered in the assessment of urgency in provisional measure applications by the UPC?

Has the concept of urgency been implemented in a coherent and harmonised manner within the UPC system?

6.2.1 Ortovox Sportartikel GmbH v Mammut Sports Group AG, Mammut Sports Group GmbH

On 11 December 2023, the Düsseldorf Local Division of the UPC's Court of First Instance issued Order ORD_592936/2023 concerning an application for a provisional measure in a patent dispute matter UPC_CFI_452/2023 regarding a search device for avalanche victims. The applicant in the case was Ortovox Sportartikel GmbH ("Applicant"), who is the sole proprietor of a European patent EP 3 466 498 B1. According to the Applicant, Mammut Sports Group AG and Mammut Sports Group GmbH ("Defendants"), exhibited a product constituting infringement at the "ISSW" trade fair in Bend, Oregon from 8 October 2023 to 13 October 2023.¹⁹² The employees of the Applicant attended the trade fair, and conducted an examination of the product in question. The allegedly infringing product was also made available for pre-

¹⁹⁰ This type of comparative analysis is referred to as comparative judicial behaviour, which can be applied to assess the case law of the UPC's Court of First Instance and the Court of Appeal. For further details on the subject matter of judicial comparison, refer to Epstein et al. (2021), 694-699.

¹⁹¹ Hutukka (2023), 286.

¹⁹² Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_592936/2023 of 11 December 2023 in matter UPC_CFI_452/2023 - *Ortovox v Mammut*, 3.

order at the beginning of November 2023 and further exhibited by the Defendants at the "ISPO Munich 2023" trade fair, which took place in Munich from 28 November 2023 to 30 November 2023.¹⁹³ As a response to the described actions, the Applicant issued a warning letter to the Defendants. The document was dated 28 November 2023.¹⁹⁴ After the issuance of the unsuccessful warning letter, the Applicant filed an application for a provisional measure to the Düsseldorf LD of the UPC's Court of First Instance. The Defendants denied any possible infringement due to the invalidity of the patent in question. The claim was based on the justification that certain parts of the patent's scope constituted prior art and therefore, lacked an inventive step.¹⁹⁵ The Defendants had also claimed a lack of novelty in related validity proceedings before the Federal Patent Court of Switzerland.¹⁹⁶

The Düsseldorf LD found that the application for a provisional measure fell within the scope of Article 47(1) of the UPCA, as the applicant was the proprietor of a European patent granted by the EPO.¹⁹⁷ Therefore, the applicant had the right to submit the application before the UPC. The LD was also convinced with sufficient certainty that the patent conferred to the applicant by the EPO was being infringed within the jurisdiction of Germany and Austria, which are Contracting Member States of the UPCA.¹⁹⁸ Therefore, the LD found the application as admissible and issued the related order on 11 December 2023. One of the factors included in the order was the urgency of the application under Rule 209.2 (b) of the RoP. According to the order, a lack of urgency for a provisional measure is established if the applicant has been negligent in pursuing the enforcement of their rights, demonstrating a lack of interest in acting promptly after becoming aware of the infringement.¹⁹⁹ Therefore, if the LD finds that the applicant has not acted promptly with the enforcement of their rights, it is not appropriate to allow them to take advantage of the provisional legal protection conferred by UPCA. After investigating the arguments of both parties, the LD found that the actions of the Applicant did not constitute a lack of urgency in seeking the provisional measure. The decision was based on the reasoning that even as the Applicant first became aware of the infringing action of the Defendants in the beginning of October 2023, when the product was exhibited at the "ISSW" trade fair, the

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, 4.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ See, for example, Herbert Smith Freehills: 'Which states are in the UPC & where will a UP have effect?' (2024).

¹⁹⁹ Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_592936/2023 of 11 December 2023 in matter UPC_CFI_452/2023 - *Ortovox v Mammüt*, 7.

Applicant only became aware of the infringing action within the territory of UPCA member states on 3 November 2023.²⁰⁰ According to this assessment, the LD determined that the application for a provisional measure was filed within one month from the date on which the Applicant became aware of the infringing action.²⁰¹ Accordingly, there was no delay in the initiation of the proceedings by the Applicant. The LD's decision was also supported by a substantive fact according to which the Applicant had to take into consideration an extensive number of submissions by the Defendants in the related proceedings before the Federal Patent Court of Switzerland.²⁰² The inclusion of the related submission by the Defendants displayed that the Applicant acted diligently and promptly in preparing an application which constituted a sufficient likelihood of success in the main proceedings in order to enable the provisional measure. Therefore, the Court found that the application for a provisional measure was urgent, and that the Applicant had acted in a way which fulfilled the requirement in accordance with R.209.2 (b) of the RoP.²⁰³ After completing the assessment on multiple requirements set by the UPCA and the RoP for the granting of a provisional measure, the LD composed of three legally qualified judges, exercised the discretion conferred to it by Rule 209.2 of the RoP and concluded that the issuance of an *ex parte* preliminary injunction was appropriate and justified in accordance with Article 62(1) of the UPCA.²⁰⁴

Following the Court of First Instance's findings in the order of 11 December 2023, the Defendants requested a further review of the matter. As the *forum* of the initial order for a provisional measure in *Ortovox v Mammut* had been the Düsseldorf Local Division of the UPC's Court of First Instance, the same LD was competent to hear the request for further review. Accordingly, the LD issued a subsequent order ORD_13918/2024 concerning the matter UPC_CFI_452/2023 on 9 April 2024. To avoid repetition and conduct a sufficient examination outlined by the research questions of this thesis, only the urgency assessment of the LD's order of 9 April 2024 will be scrutinised. According to the argumentation of the Defendants, the issuance of an *ex parte* provisional measure in ORD_592936/2023 was not necessary since the infringing product exhibited by the Defendants was only a prototype.²⁰⁵ The Defendants claimed

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, 9.

²⁰⁵ Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_13918/2024 of 9 April 2024 in matter UPC_CFI_452/2023 - *Ortovox v Mammut*, 9.

that the Applicant had acted in a manner which constituted a lack of urgency for the application for a provisional measure, as the Applicant had acted in a manner which constituted unreasonable delay. The Defendants' claims consisted of, *inter alia*, of the argument that the Applicant did not seek to enforce their right after first becoming aware of the infringing product.²⁰⁶ Therefore, the initial application for a provisional measure lacked urgency. The Applicant countered the claims of the Defendants by claiming that the provisional measure was necessary, as the Applicant could have not reasonably had knowledge about the fact that the infringing product exhibited at the trade fairs was a prototype and not an actual product. Furthermore, the Applicant clarified that they exercised the rights conferred by the European patent after becoming aware that the infringing product was being manufactured in an EPC member state.²⁰⁷

The Düsseldorf LD weighted the arguments of the parties concerning the assessment on urgency in accordance with R.209.2 (b) of the RoP. According to the order issued by the local division, the Applicant is required to prepare for an application for a provisional measure in a manner which is reasonable to establish a promising outcome for the provisional measure. In practice this entails that the Applicant must file the application before the Court of First Instance once it has reliable knowledge of all the facts which are necessary to display a likelihood of success for the measure.²⁰⁸ Rule 209.2 (b) also requires that an applicant treats the matter with the necessary urgency. After an applicant becomes aware of the alleged infringement within the jurisdiction of Contracting Member States of the UPCA, said applicant must investigate and gather evidence on the alleged infringement.²⁰⁹ In its decision, the LD also issued a practical guideline on the interpretation of the timeframe related to Rule 209.2 (b) of the RoP, as it stated that once an applicant has gathered all information and evidence which enable a promising outcome for the provisional measure, said applicant must submit the application for a provisional measure within a timeframe of one month.²¹⁰ Accordingly, the LD found that the Applicant treated the matter with the necessary urgency.²¹¹ The local division further clarified this finding by asserting that the Applicant did not act, in any part of the proceedings, in a way which would amount to a lack

²⁰⁶ *Ibid*, 10.

²⁰⁷ *Ibid*, 10-11.

²⁰⁸ *Ibid*, 27, para 1(a).

²⁰⁹ *Ibid*.

²¹⁰ *Ibid*, 28.

²¹¹ *Ibid*.

of urgency.²¹²

The dispute between Ortovox Sportartikel GmbH and Mammut Sport Group received continuation on 25 September 2024, when the UPC's CoA gave a related order ORD_44387/2024 on matter UPC_CoA_182/2024 after the prior orders of the Court of First Instance were appealed by the Defendants. One of the central elements of assessment in the CoA's order was the time period for unreasonable delay governed by Rule 211.4 of the RoP.²¹³ In addition, the CoA stated that the determination for an unreasonable delay mentioned in Rule 211.4 should be based on individual circumstances of each individual case.²¹⁴ The CoA conducted an extensive assessment into the Court of First Instance's orders based on Ortovox's application for a provisional measure in terms of unreasonable delay within the meaning of Rule 211.4 RoP. Contrary to the assessment of the Court of First Instance, which did not take into consideration Rule 211.4, the CoA's assessment included an interpretation of said provision.²¹⁵ The CoA stated that an unreasonable delay may occur if it is found that an applicant conducted the enforcement of their rights in a way which indicates that the matter was not urgent for them. According to this approach, the CoA confirmed that the Court of First Instance had conducted a correct assessment, when it determined that the Applicant had not waited unnecessarily in the enforcing of their rights. Therefore, the CoA did not find any justification for lack of urgency in the matter.²¹⁶ The CoA further examined the commencement of the time period constituting urgency and also assessed the appropriate duration for said period. According to CoA, Rule 211.4 RoP should be interpreted in a way where the time period for the urgency assessment commences on the date on which the applicant has, or should reasonably have had sufficient knowledge of the infringement, in order to file a promising application for a provisional measure before the Court of First Instance pursuant to Rule 206.2 RoP.²¹⁷ In its order, the CoA found that the Applicant could reasonably be expected to have had sufficient knowledge about the infringing product on 28 November 2024, when the final product intended for the markets of contracting states was exhibited at the "ISPO" trade fair.²¹⁸ As the application for a provisional measure was filed on 1 December 2023, the CoA found that the Applicant acted in accordance

²¹² *Ibid*, 29, para 1(bb).

²¹³ Court of Appeal of the UPC, ORD_44387/2024 of 25 September 2024 in matter UPC_CoA_182/2024 - *Mammut v Ortovox*, 1.

²¹⁴ *Ibid*.

²¹⁵ *Ibid*, 38, para 226.

²¹⁶ *Ibid*, 39, para 227.

²¹⁷ *Ibid*, 39, para 228.

²¹⁸ *Ibid*, para 230.

with Rule 211.4 RoP.²¹⁹ With its order, the CoA affirmed the grant of a provisional measure in the form of a preliminary injunction by the Düsseldorf Local Division of the UPC's Court of First Instance. The CoA's ruling constituted a notable change in the approach regarding the urgency assessment, as the fixed time requirement of one month for urgency adopted by the LD was determined as insufficient by the CoA. Accordingly, the CoA interpreted that all matters concerning the urgency of provisional measure applications should be assessed individually without any fixed time limits.²²⁰

6.2.2 Hand Held Products, Inc v Scandit AG

Other LDs of the UPC's Court of First Instance have provided interpretations regarding the urgency assessment under the relevant provisions of the UPCA and the RoP. On 27 August 2024, the Munich Local Division of the UPC's Court of First Instance issued order ORD_46277/2024 on an application for a provisional measure in matter UPC_CFI_74/2024. The applicant of the proceedings was Hand Held Products, Inc ("Applicant") which filed an application before the Munich LD for a provisional measure against the defendant Scandit AG ("Defendant") on 21 February 2024.²²¹ The Applicant claimed that the Defendant was infringing on a European patent with unitary effect EP 3 8866 051.²²² The unitary effect of the patent in question became effective on 21 February 2024, and the scope of protection related to digital devices for reading decodable characters such as bar codes.²²³ One of the included topics of the general assessment for granting the requested provisional measure was the urgency of the application. In the submitted application, the Applicant provided a description outlining urgency with reference to Rule 211.4 of the RoP, and claimed that the application for a provisional measure was submitted at the earliest possible point in time.²²⁴ This was due to the fact that the Applicant submitted the application before the UPC on the same date as the patent in question

²¹⁹ *Ibid*, para 232; para 233.

²²⁰ *Ibid*.

²²¹ Munich Local Division of the UPC's Court of First Instance, Order ORD_46277/2024 of 27 August 2024 in matter UPC_CFI_74/2024 - *Scandit v Hand Held Product*, 14.

²²² *Ibid*, 3-4.

²²³ Furthermore, no oppositions were filed against the European patent with unitary effect EP 3 8866 05 during the validity assessment and granting process conducted by the EPO. The main infringement proceedings were initiated on 21 February 2024, during which the defendant filed a claim for annulment of the patent. At the time of writing, the oral hearing was scheduled for 29 April 2025. For further details, see Munich Local Division of the UPC's Court of First Instance, Order ORD_46277/2024 of 27 August 2024 in matter UPC_CFI_74/2024 - *Scandit v Hand Held Product*, 4.

²²⁴ Munich Local Division of the UPC's Court of First Instance, Order ORD_46277/2024 of 27 August 2024 in matter UPC_CFI_74/2024 - *Scandit v Hand Held Product*, 14.

was granted by the EPO.²²⁵ The Defendant presented a differing argumentation, according to which the Applicant had unreasonably delayed the filing of the application, which constituted violation of Rule 211.4 of the RoP. According to the Defendant, the Applicant had become aware of the alleged infringement in November 2022 at the latest. The Defendant also provided evidence from May 2019, when the Applicant's group of companies had approached the Defendant regarding the alleged infringement.²²⁶ Therefore, the Defendant claimed that the application for a provisional measure lacked urgency and was not necessary pursuant to Rule 211.4 of the RoP.²²⁷

In its assessment, the Munich LD firstly referred to Rule 206.2 (c) of the RoP in order to assert that the granting of provisional measures is necessary in order to prevent infringing actions.²²⁸ After establishing the general requirement for granting of provisional measures, the LD moved onto assessing the urgency of the matter. Similarly to prior UPC jurisprudence, the Munich LD found that a sufficient examination on urgency should be conducted in accordance with Rules 209.2 (b) and 211.4 of the RoP.²²⁹ The LD found that a lack of urgency concerning a provisional measure application can be established only if an applicant has shown, through their actions, that they are not interested in the swift enforcement of the rights conferred to them by a patent.²³⁰ Accordingly, the LD stated that an applicant is required to submit the application when they have obtained reliable information on the related facts, and evidence for justifying the order for a provisional measure. However, unlike the approach adopted by the Düsseldorf LD, the Munich LD asserted that after having gathered all the relevant information and evidence, an applicant must submit the application for a provisional measure before the UPC within two months from the date on which it has obtained all necessary information.²³¹ This is a significant difference between the case law of different legislative bodies of the Court of First Instance as each respective LDs interpreted the specific Rules of the RoP in different manner. Based on the assessment, the Munich LD found that the application for a provisional measure did not lack urgency. This finding was based on the fact that the application was filed on the same day on which the unitary effect of the European patent became effective.²³² As a result, the Applicant

²²⁵ *Ibid.*

²²⁶ *Ibid*, 17.

²²⁷ *Ibid.*

²²⁸ *Ibid*, 55.

²²⁹ *Ibid.*

²³⁰ *Ibid*, 55, para 1(a).

²³¹ *Ibid*, 56, para 1(a).

²³² *Ibid*, 56, para 1(b).

had acted in compliance with Rules 209.2 (b) and 211.4 of the RoP, thereby satisfying the urgency requirement. The application also fulfilled other requirements for enabling the granting of a provisional measure. As a result, the Munich LD found that it was appropriate under Article 62 UPCA to issue a preliminary injunction in accordance with the request of the application, as it was the only mechanism for effective enforcement of the rights conferred to the Applicant by the patent in question.²³³

6.2.3 Ballinno B.V. v Union des Associations Européennes de Football (UEFA), Kinexon Sports & Media GmbH, Kinexon GmbH

The Hamburg LD has also provided an interpretation regarding the urgency assessment of provisional measure applications. On 3 June 2024, the LD gave an interpretation of the relevant provisions concerning the matter UPC_CFI_151/2024 in the form of a final order ORD_39782/2024. The applicant of the proceedings was Ballinno B.V. (“Applicant”), which claimed that the defendants Union des Associations Européennes de Football (UEFA), Kinexon GmbH, and Kinexon Sports & Media GmbH (“Defendants”) had infringed on a European patent EP1944067 granted by the EPO in 2011, which Ballinno was the sole proprietor of.²³⁴ The patent in question consisted of multiple claims which related to detecting a contact with a football by a first player in games and sports in various different ways.²³⁵ The technologies had been included in the “Video Assistant Referee” decision making process in football games.²³⁶ Similarly to other LDs assessments for the granting of a provisional measure, the Hamburg LD conducted an examination of the application in relation to Article 62 of the UPCA, and relevant provisions of the RoP.²³⁷ Among the included factors for determining whether a provisional measure should be granted in accordance with the applicable legal framework, the Hamburg LD had to assess the urgency of the action. To avoid repetition, only factors relating to urgency are examined in more detail. The application for a provisional measure relating to the order was amended and submitted before the local division of Hamburg on 18 April 2024, in which the Applicant requested a preliminary injunction against the infringing actions committed by the Defendants.²³⁸ In their response, the Defendants claimed that the application for a provisional

²³³ *Ibid*, 59, para 1.

²³⁴ Hamburg Local Division of the UPC’s Court of First Instance, ORD_39782/2024 of 3 June 2024 in matter UPC_CFI_151/2024 – *UEFA and Others v Ballinno*, 2-3.

²³⁵ *Ibid*, 3-4.

²³⁶ *Ibid*, 1.

²³⁷ *Ibid*, 18, para 1.

²³⁸ *Ibid*, 3.

measure was unnecessary in the matter due to, inter alia, the Applicant's unreasonable delay in seeking legal remedies, which consequently demonstrated a lack of urgency.²³⁹

The Hamburg LD based its assessment on prior orders made by other LDs of the Court of First Instance, such as the order of 9 April 2024 by the Düsseldorf LD in *Ortovox Sportartikel GmbH v Mammüt Sports Group AG, Mammüt Sports Group GmbH*.²⁴⁰ Similarly to the findings of the Düsseldorf LD, the Hamburg LD based its assessment on Rules 209.2 (b) and 211.4 of the RoP.²⁴¹ Accordingly, the Hamburg LD established that the lack of temporal urgency can only be found in cases where the actions of an applicant have been so negligent in pursuing legal remedies for the infringement that the ordering of provisional measures would not be appropriate.²⁴² In the case at hand, the Hamburg LD determined that the Applicant did not address the matter in accordance with the required urgency.²⁴³ The decision was based on several details within the actions committed by the Applicant. Firstly, the LD agreed with the Defendants' argument that the Applicant's legal predecessor had first become aware of the infringing technology already in September 2023.²⁴⁴ Additionally, it was undisputed that the Applicant had also become aware of the infringement after the change in the status of the legal predecessor.²⁴⁵ However, as established by prior UPC case law on the urgency assessment, urgency of a provisional measure application should be assessed from the date on which an applicant has obtained all necessary information and evidence which constitutes a promising provisional measure application. Therefore, the Hamburg LD had to further examine the actions of the Applicant.²⁴⁶ In its further examination, the LD found that the Applicant did not seize the necessary measures for obtaining all information and evidence concerning the infringement until mid-February 2024.²⁴⁷ As the Applicant had obtained the necessary information and evidence in mid-February 2024, and submitted the application for a provisional measure before the UPC on 18 April 2024, the Hamburg LD found that the Applicant had waited for an unreasonable period of time, as the time period constituted nearly three months before the submission of the application before the LD of the Court of First Instance.²⁴⁸ The Hamburg LD mentioned the time

²³⁹ *Ibid*, 17.

²⁴⁰ *Ibid*, 18, para 1(a).

²⁴¹ *Ibid*, 18, para 1.

²⁴² *Ibid*, 18, para 1(a).

²⁴³ *Ibid*, 19, para 1(b).

²⁴⁴ *Ibid*, 19, para 1(aa).

²⁴⁵ *Ibid*, 19, para 1(b).

²⁴⁶ *Ibid*, 19, para 1(a).

²⁴⁷ *Ibid*, 20, para 1(dd).

²⁴⁸ *Ibid*, 1.

requirement of one month set by prior Court of First Instance case law as an applicable time period constituting urgency. Subsequently, the application for a provisional measure was found to lack urgency and therefore was not granted.²⁴⁹

6.2.4 Valeo Electrification v Magna PT s.r.o., Magna PT B.V. & Co. KG, Magna International France, SARL

At the time of writing, the UPC's Court of First Instance has issued only one order which addresses the urgency of a provisional measure following the CoA's interpretation of the topic in *Ortovox Sportartikel GmbH v Mammuth Sports Group AG, Mammuth Sports Group GmbH*. This order serves as the final point of analysis in this study, as it provides insight into the development of the Court of First Instance's jurisprudence on the urgency assessment. On 31 October 2024, the Düsseldorf Local Division of the UPC's Court of First Instance issued order ORD_56534/2024, which concerned an application for provisional measures in matter UPC_CFI_368/2024. The proceedings were initiated by the applicant, Valeo Electrification ("Applicant"), a French company which filed an application for a provisional measure seeking the issuance of a preliminary injunction against the defendants Magna PT B.V. & Co. KG in Germany, Magna PT s.r.o. in Slovakia, and Magna International France, SARL in France ("Defendants") for an alleged infringement of European patent EP 3 320 604 B1.²⁵⁰ In the case, the Applicant's requests consisted of, *inter alia*, that the Düsseldorf LD grants a preliminary injunction ordering the Defendants to refrain from "*making, offering, placing on the market or using, or importing or storing the product for those purposes*" a Rotary electric machine.²⁵¹ The machine in question was equipped with a "*means of adjusting the angular position of the shaft*", which was protected by the Applicant's patent.²⁵² In order to avoid repetition and ensure the thesis remains within its scope, the following analysis is limited to examining the urgency aspects of the proceedings.

According to the Applicant, the application for a provisional measure was filed with urgency. This claim was based on the description in which the Applicant first became aware of the

²⁴⁹ In its order, the Hamburg LD placed significant emphasis on the point that it was not sufficiently convinced that the defendants were infringing the patent in question. This served as an additional justification for denying the provisional measure, alongside the lack of urgency.

²⁵⁰ Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_56534/2024 of 31 October 2024 in matter UPC_CFI_368/2024 - *Magna v Valeo*, 3.

²⁵¹ *Ibid*, 9.

²⁵² *Ibid*, 3.

infringement on 4 June 2024.²⁵³ This was due to a situation where key facts and evidence were not available priorly. According to the Applicant's description, it took noticeable time and effort to gather all information and evidence for a promising provisional measure application.²⁵⁴ This indicates that the Applicant was addressing the urgency requirement of the provisional measure assessment pre-emptively. The Düsseldorf LD found that an urgency assessment was necessary in order to construct a sufficient assessment for the granting of the requested provisional measure in the form of a preliminary injunction against the Defendants. Firstly, the Düsseldorf LD referred Rule 211.4 RoP as the main provision for determining whether the application for provisional measures was sought with unreasonable delay.²⁵⁵ In its assessment, the Düsseldorf LD adhered to the principles of the urgency assessment previously established by the CoA.²⁵⁶ The central element of the Düsseldorf LD's interpretation was a clarification according to which the one-month time requirement for filing an application for a provisional measure, which had been implemented by different LDs of the Court of First Instance in multiple prior matters was not to be understood as a fixed time period that could be applied as a general requirement.²⁵⁷ The Düsseldorf LD further clarified that Rule 211.4 RoP should rather be interpreted in a way which enables the different legislative bodies of the UPC to utilise discretion when assessing the circumstances of individual cases.²⁵⁸ The updated determining factor for the urgency assessment should be whether the Applicant's overall conduct demonstrates a lack of necessity for the urgent enforcement of their intellectual property rights.²⁵⁹ This clarification was in line with the CoA's interpretation of Rule 211.4 RoP in ORD_44387/2024 of the matter UPC_CoA_182/2024.²⁶⁰ The Düsseldorf LD then clarified that according to its assessment, and against the argumentation of the Defendants, the Applicant had obtained all necessary information and evidence for a successful preliminary injunction on 6 June 2024.²⁶¹ The Düsseldorf LD further specified that

²⁵³ *Ibid*, 13.

²⁵⁴ *Ibid*.

²⁵⁵ *Ibid*, 30.

²⁵⁶ The applying of Rule 211.4 of the RoP was in line with the CoA's interpretation in *Ortovox v Mammüt*, in which the CoA asserted that Rule 211.4 possesses a significant role in the urgency assessment, see e.g. Court of Appeal of the UPC, ORD_44387/2024 of 25 September 2024 in matter UPC_CoA_182/2024 - *Mammüt v Ortovox*, 1.

²⁵⁷ See, for example, Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_13918/2024 of 9 April 2024 in matter UPC_CFI_452/2023 - *Ortovox v Mammüt*, 28.

²⁵⁸ Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_56534/2024 of 31 October 2024 in matter UPC_CFI_368/2024 - *Magna v Valeo*, 31.

²⁵⁹ *Ibid*.

²⁶⁰ This was the first indication that the Düsseldorf Local Division had changed its approach to interpreting Rule 211.4 RoP to match the interpretation issued in ORD_44387/2024 by the CoA in *Mammüt v Ortovox*.

²⁶¹ Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_56534/2024 of 31 October 2024 in matter UPC_CFI_368/2024 - *Magna v Valeo*, 32.

the application for a provisional measure was filed on 1 July 2024, which is less than a month from the date on which the LD assessed that the time period for unreasonable delay initiated.²⁶² Additionally, the Defendants did not provide any evidence supporting the claim that the Applicant became aware and had gained the necessary information and evidence before 6 June 2024.²⁶³ Therefore, the actions committed by the Applicant did justify the granting of a provisional measure in the form of a preliminary injunction in terms of the urgency of the related application.²⁶⁴ Overall, it is important to note that the urgency assessment was a central consideration in determining the necessity for urgent enforcement.

6.3 Systematisation of the Findings

6.3.1 Similarities in the Interpretation of Urgency in the UPC Jurisprudence

By analysing the included case law, this chapter seeks to identify patterns in the assessment of urgency and highlight divergences that may impact the coherence and uniformity of the UPC system. Through this analysis, the chapter aims to contribute to the broader discourse on harmonising judicial practices within the jurisprudence of the UPC's judicial bodies, with a particular focus on the role of urgency as a critical determinant in the issuance of preliminary injunctions. The desirable form of harmonisation can be described as positive harmonisation, which seeks to introduce a common legal framework for all concerned parties, in the form of common legal minimum standards.²⁶⁵ Furthermore, in the context of the UPC, this implies that all stakeholders are afforded the same rights as those previously involved in preliminary injunction proceedings including urgency elements.

The most notable similarity between all the included cases is the presence of an urgency assessment. This indicates that the judicial bodies of the UPC regard urgency as an important requirement when determining whether a preliminary injunction based on a provisional measure application should be granted. The conducted examination demonstrates that the LDs of the Court of First Instance, as well as the CoA, have consistently established that an absence of urgency precludes the granting of a preliminary injunction for UPs and certain European patents.²⁶⁶ Therefore, it is evident that, although urgency is not explicitly mentioned in the

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*, 32-33.

²⁶⁵ Lohse (2012), 293.

²⁶⁶ Semenov (2020), 137.

wording of Article 62 of the UPCA, it remains as a significant element of the UPC's jurisprudence on provisional measures, particularly in the context of granting preliminary injunctions.

Secondly, the examined orders for provisional measures establish that the applicable legal framework for assessing urgency is built upon Rules 209.2 (b) and 211.4 of the RoP. The provisions have been interpreted in a way which emphasises that the urgency assessment should focus on determining whether an applicant has unreasonably delayed the submitting of an application for provisional measures before the UPC.²⁶⁷ The examination of the CoA's case law indicates that more weight has been given to the interpretation of Rule 211.4 RoP, as it lays out the requirement related to unreasonable delay. Furthermore, a notable similarity in the interpretation of the Rule 211.4 by the different LDs, and the CoA, is the specific point in time from which the urgency of an applicant's actions should be assessed. This point is the date on which an applicant has obtained all necessary information and evidence for a promising provisional measure.²⁶⁸ The coherent approach is a positive development in terms of harmonisation, as the case law has established a relatively clear and common framework for the starting point of the urgency assessment, which can be readily applied by other LDs in future proceedings concerning the urgency of applications for provisional measures. In addition, a distinction can be drawn between the point in time on which the applicant first became aware of the infringement, and the point in which all necessary information was obtained or should have reasonably been obtained pursuant to Rule 206.2 of the RoP.²⁶⁹ The establishment of such a distinction is justified, as assessing urgency based on the date on which an applicant first became aware of the infringement could increase the likelihood of substantial variations in the interpretation of Rule 211.4 of the RoP in future UPC case law. This is due to the assumption that without a distinction between the point of first becoming aware, and the point for obtaining all necessary information, applicants could potentially justify delays in submitting a provisional measure application by citing, for example, prolonged efforts to gather the required evidence. The described situation could lead to variance and lack of coherency in interpreting Rule 211.4

²⁶⁷ Court of Appeal of the UPC, ORD_44387/2024 of 25 September 2024 in matter UPC_CoA_182/2024 - *Mammut v Ortovox*. 1., and Düsseldorf Local Division of the UPC's Court of First Instance, Order ORD_56534/2024 of 31 October 2024 in matter UPC_CFI_368/2024 - *Magna v Valeo*, 1.

²⁶⁸ See, for example, Hamburg Local Division of the UPC's Court of First Instance, ORD_39782/2024 of 3 June 2024 in matter UPC_CFI_151/2024 - *UEFA and Others v Ballinno*, 19, 1.

²⁶⁹ See, Court of Appeal of the UPC, ORD_44387/2024 of 25 September 2024 in matter UPC_CoA_182/2024 - *Mammut v Ortovox*. para 228.

of the RoP by different LDs, as urgency would be closely linked to the substantive facts surrounding evidence collection claims of each specific case. The described practice could create legal uncertainty among patent proprietors and other stakeholders, as it could prove challenging to reliably predict whether certain actions would be deemed as necessary for obtaining all necessary evidence enabling a promising provisional measure pursuant to Rule 206.2 of the RoP.²⁷⁰ This, in turn, could undermine the UPC's credibility as an effective mechanism for the enforcement of patent rights.²⁷¹ Based on the examination, Rules 209.2 (b) and 211.4 of the RoP have sufficiently introduced a harmonised legal framework for assessing urgency across the different judicial bodies of the UPC. It can be presented that the prevalent level of harmonisation ensures that all legislative bodies of the UPC are bound to follow the same legal framework in accordance with established case law. Additionally, assessments concerning urgency should strive for interpreting the applicable legal framework through harmonised judicial dialogue, which can be divided into vertical and horizontal forms. A representation of vertical harmonisation through judicial dialogue in the UPC context is the dialogue between the UPC's judicial bodies, which are on different levels, such as the Court of First Instance and the CoA. This sort of dialogue can be described vertical, as the CoA's interpretation offers directly applicable guidance to the Court of First Instance.²⁷² The second form of judicial dialogue is horizontal judicial dialogue, which can be described as dialogue between judicial bodies which are on the same level in the judicial hierarchy, such as different LDs of the Court of First Instance.²⁷³ Accordingly, the legal framework regarding the general necessity of the urgency assessment has been sufficiently harmonised in both vertical and horizontal contexts. This has been reflected in the CoA's determination that the urgency assessment is necessary for orders issued by the Court of First Instance, as well as in the consistent case law on urgency established by various German LDs. This practice is central in the UPC's development, as efforts for setting similar standards within all judicial bodies located within different territories of the Contracting Member States is one of the founding principles for the adoption of the UPC system. However, whilst harmonisation through judicial dialogue for the applicable provisions ensures that the justifications for the urgency assessment are similar, it does not automatically ensure that

²⁷⁰ See Putra et al. (2022), 5. The discussion highlights issues that may arise when legal certainty is undermined by incoherent legal practices.

²⁷¹ Dreyfuss (2023), 92.

²⁷² For a broad discussion on vertical harmonisation as a part of judicial dialogue, see e.g. Rosas (2007), 127.

²⁷³ For a broad discussion on the implementation of horizontal judicial dialogue, see, for example, Jacobs (2003), 547-556.

different legislative bodies of the UPC interpret the adopted provisions in similar manner.

6.3.2 Differences in the Interpretation of Urgency in the UPC Jurisprudence

In addition to the aforementioned similarities, the analysed case law highlights several notable differences in the interpretation of the relevant urgency provisions among the judicial bodies of the UPC. As established in the previous chapter, the urgency assessment has been determined to be subject to the same applicable legal framework by all relevant LDs of the Court of First Instance, as well as the CoA. However, the interpretations provided by different LDs, and the CoA regarding the time period which constitutes urgency differ significantly. All of the judicial bodies of the UPC initiate the urgency assessment from the date on which an applicant has obtained or should reasonably be expected to have obtained all necessary information and evidence constituting a promising provisional measure application. However, the examination of this thesis reveals variance in the assessment of the relevant time period which may be deemed to constitute a lack of urgency in submitting the application for a provisional measure before the UPC, after having obtained the necessary information and evidence. For instance, in ORD_592936/2023 concerning the case *Ortovox Sportartikel GmbH v Mammut Sports Group AG, Mammut Sports Group GmbH*, the Düsseldorf LD adopted a fixed time requirement of one month for assessing the urgency of the provisional measure application. Therefore, the applicant of the proceedings became subject to a one-month urgency assessment for submitting the application before the UPC after having obtained all necessary information. The Munich LD gave a different interpretation concerning the duration of the relevant time requirement. In *Hand Held Products, Inc v Scandit AG*, the Munich LD governed that a fixed time requirement constituting two months should be adopted. This decision was made by the Munich LD despite having knowledge of the differing case law of the Düsseldorf LD.²⁷⁴ This is a notable difference, which may propose a hindrance to the effective harmonisation in the horizontal judicial dialogue context. Furthermore, in *Ballinno v Union des Associations Européennes de Football (UEFA), Kinexon Sports & Media GmbH, Kinexon GmbH*, the Hamburg LD stated that a time period constituting approximately three months was deemed as a significant delay, which constituted a lack of urgency. The Hamburg LD did not give an explicit definition for a fixed time period for the urgency assessment, but rather governed that a time period of “almost three months” was

²⁷⁴ Munich Local Division of the UPC’s Court of First Instance, Order ORD_46277/2024 of 27 August 2024 in matter UPC_CFI_74/2024 - *Scandit v Hand Held Product*, 2.

overly prolonged.²⁷⁵ Furthermore, the Hamburg LD referred to the one-month requirement implemented by the Düsseldorf LD but did not explicitly state that the mentioned duration should be applied in the proceedings.²⁷⁶ Therefore, the interpretation of Hamburg LD diverged from the interpretations of the Düsseldorf LD and the Munich LD, as it applied a broader scope for interpreting the applicable provisions for assessing urgency. Finally, in the order ORD_44387/2024 in relation to the *Mammut Sports Group AG, Mammut Sports Group GmbH v Ortovox Sportartikel GmbH* proceedings, the CoA interpreted the relevant provisions by determining that the urgency assessment should be conducted based on the specific facts of each individual case. In practice, the CoA concluded that no uniform fixed time requirement should not be adopted for assessing urgency and instead, each case should be evaluated individually. In accordance with Rule 220.1 (a) of the RoP, it is possible to bring an appeal against final decisions of the Court of First Instance. Accordingly, decisions rendered by the CoA are to be perceived as an important part of the UPC's jurisprudence in the form of precedents. In the civil law system, precedents may serve as indications or persuasive authority for future case law.²⁷⁷ The CoA's role within the UPC system has been designed to offer clarification and ensure uniformity of LD case law, as a higher-level judicial body of the UPC hierarchy. The rulings of the CoA can, therefore, be regarded as having binding precedent status for all different divisions of the Court of First Instance. Therefore, the CoA's decision in *Mammut Sports Group AG, Mammut Sports Group GmbH v Ortovox Sportartikel GmbH* is highly significant, as all LDs are expected to adhere to the CoA's interpretation of the urgency assessment. At the time of writing, only one case within the Court of First Instance has addressed the urgency concerning the issuance of preliminary injunctions following the CoA's interpretation in order ORD_44387/2024. In *Valeo Electrification v. Magna*, the Düsseldorf LD governed that the priorly established one-month deadline should not be understood as a fixed time requirement by which an applicant would be liable to submit an application for a provisional measure. Rather, an applicant's conduct as a whole should be taken into consideration in the urgency assessment. With this practice, the Düsseldorf LD aligned its assessment to match the interpretation of the CoA. However, the case specific substantive facts enabled the Düsseldorf LD to state that as the applicant of the proceedings did submit the application for a provisional measure within one month after having

²⁷⁵ Hamburg Local Division of the UPC's Court of First Instance, ORD_39782/2024 of 3 June 2024 in matter UPC_CFI_151/2024 – *UEFA and Others v Ballinno*, 1.

²⁷⁶ *Ibid*, 19.

²⁷⁷ Lasok (2024), 10.

obtained all necessary information, the applicant was able to display prompt action as it “did not wait for an unreasonably long time”.²⁷⁸ The ruling does not provide further guidance on the interpretation which the LD would have considered as constituting a lack of urgency, as the substantive fact that the application for a provisional measure was submitted within one month of obtaining the necessary information and evidence did not require the Düsseldorf LD to assess the duration of the urgency period in greater detail. Therefore, the Düsseldorf LD aligned its interpretation with the CoA’s adopted position in theory, but the requirement of the urgency assessment did not change in practice, as the Düsseldorf LD still relied on the one-month time period, which was not described as an official “fixed deadline” anymore. These different interpretations in the UPC’s case law raise a number of questions regarding the role of judicial dialogue and the UPC’s harmonisation efforts of Rules 209.2 (b) and 211.4 of the RoP. These questions are further discussed in chapter 7.

6.3.3 Summary of the Interpretation of Urgency in the UPC Jurisprudence

The similarities and differences between the different judicial bodies of the UPC’s Court of First Instance and the CoA, as discussed in subchapters 6.3.1–6.3.2, are summarised in Table 1.

Table 1 Similarities and differences concerning urgency within different judicial bodies of the UPC

Case Number	Judicial Body of the UPC	Flexibility in Interpretation	Start of the Urgency Period	Duration of the Urgency Period
UPC_CFI_452/2023	Court of First Instance (LD Düsseldorf)	Strict fixed interpretation on urgency	Date on which the applicant obtained or could reasonably have been expected to obtain the necessary information and evidence supporting a promising provisional measure	One month
UPC_CoA_182/2024	The Court of Appeal	Flexible interpretation on urgency	Same as in UPC_CFI_452/2023	No imposed duration
UPC_CFI_74/2024	Court of First Instance (LD Munich)	Strict fixed interpretation on urgency	Same as in UPC_CFI_452/2023	Two months

²⁷⁸ Düsseldorf Local Division of the UPC’s Court of First Instance, Order ORD_56534/2024 of 31 October 2024 in matter UPC_CFI_368/2024 - *Magna v Valeo*, 31.

UPC_CFI_151/2024	Court of First Instance (LD Hamburg)	Strict fixed interpretation on urgency	Same as in UPC_CFI_452/2023	Three months exceeding urgency period
UPC_CFI_368/2024	Court of First Instance (LD Düsseldorf)	Flexible interpretation on urgency	Same as in UPC_CFI_452/2023	One month

7 Rethinking the Urgency Requirement for Preliminary Injunctions

At the time of writing, the interpretation of the urgency assessment under Rules 209.2(b) and 211.4 of the RoP by the various judicial bodies of the UPC can be characterised as lacking harmonisation. Accordingly, this thesis argues that judicial dialogue among the UPC's different judicial bodies has not produced coherent interpretations for determining the applicable time period which constitutes urgency of a provisional measure application. The sole ruling by the CoA provides guidance indicating that the urgency assessment should be conducted on a case-by-case basis, granting a significant degree of discretion to the different judicial bodies of the Court of First Instance to carry out the assessment as they deem appropriate. As demonstrated in *Valeo Electrification v. Magna*, the one-month time requirement adopted by the Düsseldorf LD remained consistent with case law rendered prior to the CoA's ruling. It can be assumed that other LDs may enable this discretion as well. The guidance of the CoA introduces a rule according to which all cases are to be assessed specifically on their substantive facts. However, the guidance does not explicitly preclude the adoption of uniform time requirements in practice, such as the one-month requirement. Consequently, it can be assumed that LDs may continue to conduct urgency assessments in line with prior fixed time requirements, provided that the specific circumstances of each case are duly considered in the assessment. Therefore, it is relevant to ask whether the high level of discretion given to the LDs has a negative impact in terms of harmonising the functioning of the UPC in relation to the issuance of urgent preliminary injunctions? If the different judicial bodies of the Court of First Instance are granted with a seemingly high level of discretion, the time requirement of the urgency assessment may vary between different LDs. This creates an opportunity for forum shopping, as it is more favourable for patent proprietors and practitioners to initiate proceedings before LDs which have adopted more flexible time requirements. For example, the fact that the Düsseldorf LD requires applicants to file an application for a provisional measure within one month after due considerations, whereas the Munich LD imposes a two-month time limitation, creates a situation in which the requirements set by the Munich LD are seemingly more beneficial towards the applicants. At its theoretical essence, forum shopping emphasises the understanding that particular courts or, in the present context LDs of the Court of First Instance, may decide on a given matter in differing ways.²⁷⁹ If this theoretical framework is applied to the pursuit of successful preliminary injunction issuance within the UPC system, it is evident that patent

²⁷⁹ Cass (2019), 21.

proprietors may seek to initiate proceedings in forums which best correlate with regard to the interests of the applicant as party to the dispute.²⁸⁰

The current UPC jurisprudence concerning urgency of preliminary injunction, and more broadly, other forms of provisional measure applications have the potential to introduce various issues within the system. Firstly, the variance in the interpretation of the relevant RoP provisions undermines legal certainty, which is intended to safeguard all parties within a complex judicial system, such as the UPC, where the rule of law is paramount.²⁸¹ The issue stems from the principle that, for the rule of law to function effectively, legal provisions and norms must be predictable and grounded in principles that are known in advance.²⁸² If the various judicial bodies of the Court of First Instance of the UPC interpret the relevant provisions of the RoP inconsistently, the functioning of the system concerning interim injunctive relief through provisional measures cannot be applied in equal manner to all participants of each contracting member state of the UPCA. Secondly, the inconsistent interpretation of the relevant provisions concerning the issuance of preliminary injunctions as a form of provisional measures has the potential to erode the uniformity of the UPC system, which is counterproductive to the objective of establishing a uniform judicial system for UPs and certain European patents.²⁸³ The two mentioned issues can be seen as additional to the above discussed practical issue concerning the possibility of forum shopping.

The final topic of discussion in this thesis proposes how the potential negative effects associated with prevalent urgency assessment can be addressed proactively. The first important finding is that the UPCA, which acts as a primary source of law for the functioning of the UPC, does not address the urgency of provisional measures directly. According to Rule 1 of the RoP, the UPCA shall prevail as the primary source of law before the RoP.²⁸⁴ As established, the applicable legal framework for urgency is derived from Rules 209.2 (b) and 211.4 of the RoP. Furthermore, urgency has not been defined as an explicit requirement for granting provisional measures in Article 62 UPCA. However, the prevalent UPC case law has established urgency as a requirement included in the weighing of interests enabled by Articles 62(2) of the UPCA and

²⁸⁰ See, for example, Perkins and Mills (1996), 600–601. The discussion highlights the advantages that applicants may seek through forum shopping in patent infringement cases across different European jurisdictions. By analogy, many of these advantages can also be considered applicable to the UPC system.

²⁸¹ Van Meerbeeck (2016), 287.

²⁸² Cass (2019), 21.

²⁸³ Galloux (2023a), 149.

²⁸⁴ RoP, Rule 1.

Rule 211.3 of the RoP.²⁸⁵ Therefore, it can be concluded that even as urgency is not explicitly mentioned in the wording of the UPCA, it has been indirectly included as a requirement within the weighing of interests in accordance with Article 62(2) of the UPCA in the UPC case law. The current structure of the applicable legal framework for urgency may be considered sufficient in only the minimal or formal sense. However, an amendment that narrows the discretion afforded to different judicial bodies of the UPC could promote a more uniform interpretation of urgency in relation to provisional measure applications. In addition, the CoA could request a preliminary ruling from the CJEU in accordance with the preliminary reference procedure of Article 267 of the Treaty on the Functioning of the European Union (TFEU).²⁸⁶ The referral could be made in accordance with Article 21 of the UPCA, which enables the UPC to ensure the correct and uniform application of Union law in accordance with the aforementioned TFEU provision.²⁸⁷ The referral could, for example, contain a request for further clarification on the harmonisation of the required time period constituting urgency of a provisional measure application in preliminary injunction proceedings, or a confirmation that the case-by-case approach adopted in *Mammut Sports Group AG, Mammut Sports Group GmbH v Ortovox Sportartikel GmbH* is in accordance with Union law, as governed by Article 20 of the UPCA.

It is reasonable to consider that if the current discretion conferred to the different judicial bodies of the UPC's Court of First Instance regarding urgency is not further clarified, more significant variance in the interpretation of urgency could potentially arise. The variance could occur as more LDs provide their interpretations of the relevant urgency provisions. This assumption is based on the examination of prior national jurisprudence of specific Contracting Member States of the UPCA. At the time of writing, the urgency of provisional measure applications has been assessed by a limited number of judicial bodies within the Court of First Instance, most of which are located in Germany. However, as demonstrated in the examination of national case law concerning the urgency of preliminary injunctions, Finland for example applies a relatively broad and flexible approach to assessing urgency in similar instances. In Finland, the Helsinki Court of Appeals has established that a delay of one to two years in applying for a preliminary injunction may be acceptable.²⁸⁸ This practice differs significantly from the German approach.

²⁸⁵ See, for example, Court of Appeal of the UPC, ORD_44387/2024 of 25 September 2024 in matter UPC_CoA_182/2024 - *Mammut v Ortovox*, para 225. & 226.

²⁸⁶ Schutze (2023), 224.

²⁸⁷ Article 21 UPC Agreement.

²⁸⁸ See, for example, Helsinki Court of Appeal case no. 741 (S 09/1706) 19 March 2010, *Janssen-Cilag v. ratiopharm GmbH and ratiopharm Oy*; cited as *HelHo* 19.3.2010 nro 741 (S 09/1706).

Furthermore, it is important to note that the applicable Finnish legal framework does not explicitly recognise a requirement of urgency.²⁸⁹

When the aforementioned issues are placed within the methodological framework concerning legal transplants, it can be observed that national judges placed at, for example, different LDs of the UPC have brought their national traditions and interpretations to the relevant preliminary injunction proceedings.²⁹⁰ Therefore, the presence of legal transplants may be identified. The possible negative effects related to legal transplants should be addressed with adequate level of procedural balancing, as proposed in chapter 4.3 of this thesis. Further clarification from the CJEU could prove to be valuable in harmonising the approach to urgency, particularly when considering that all Contracting Member States of the UPCA do not impose the same requirements for the urgency assessment, and could therefore interpret the urgency requirement very differently from the practice established by the prevalent case law of the UPC.²⁹¹ This may result in a more flexible interpretation of the urgency assessment enabled by Rules 209.2 (b) and 211.4, thereby placing applicants in a more favourable position by allowing them to initiate proceedings in Contracting Member States with the most lenient approach to the urgency requirement. Further clarification provided by the CJEU could ensure that all judicial bodies of the UPC apply a coherent legal interpretation when assessing urgency in the issuance of preliminary injunctions in accordance with the UPCA and the relevant provisions of the RoP.

²⁸⁹ Norrgård, M. (2022), Finland. In Contreras and Husovec (2022), 112.

²⁹⁰ This approach was suggested by scholars even before the UPC became operational. See Ballardini et al. (2015), 205. The discussion of Norrgård and Nylund notes that the lack of harmonisation in the regulation of preliminary injunctions is likely to result in noticeable diverging in the interpretations between different LDs and regional divisions of the UPC.

²⁹¹ The question of the urgency of provisional measures could be one of the CJEU referrals discussed in Campolini (2023), 345.

8 Conclusion

This thesis has examined how the UPC's Court of First Instance and Court of Appeal interpret the requirement of urgency in the context of granting interim injunctive relief in the form of preliminary injunctions, as provided for under the UPCA and the RoP. The interpretation has been evaluated through an analysis of the historical development and functioning of the UPC, which has been complemented by a comparative assessment of national jurisprudence in the Contracting Member States of the UPCA and an examination of the prevailing UPC case law. The aforementioned efforts have been conducted in order to address the three research questions posed in this thesis:

1. *Has urgency been established as a formal requirement for provisional measures in the UPCA?*
2. *What characteristics different judicial bodies of the UPC take into account when determining urgency?*
3. *Has concept of urgency been implemented in a coherent and harmonised manner within the UPC system?*

The study has demonstrated that, although urgency is not explicitly referenced in the wording of Article 62 UPCA, it is recognised in other relevant sources of law as a formal requirement for the issuance of preliminary injunctions as a form of provisional measures. In the examined case law of the UPC, urgency has been indirectly included as a requirement through the weighing of the interests of the parties, enabled by Article 62(2) of the UPCA, and explicitly in the form of Rules 209.2 (b) and 211.4 of the RoP.

Different judicial bodies of the UPC have considered multiple factors in determining the applicable framework for urgency, including the date on which the applicant obtained, or could reasonably have been expected to obtain the necessary information and evidence supporting a promising provisional measure. Relevant characteristics also include the determination of whether the location of the infringement for which the provisional measure is sought falls within the jurisdiction of one or more Contracting Member States of the UPCA. Finally, both the Court of First Instance and Court of Appeal have emphasised the value of an overall assessment of the applicant's conduct in seeking to enforce their rights through a provisional measure.

The comparison has identified discrepancies in the interpretation of the relevant provisions concerning urgency, which can be attributed to the influence of prior national jurisprudence of the Contracting Member States of the UPCA. This attribution can be further analysed through the methodology of legal transplants and applied comparative law. As certain measures adopted by the UPC's judicial bodies align with the definition of legal transplantation, this thesis argues that adequate procedural safeguards should be implemented to address potential imbalances which may arise from the legal transplants originating from the national jurisprudence of the Contracting Member States to the UPC system.

As demonstrated by the conducted examination of the UPC's case law, proceedings concerning urgency of provisional measure applications are assessed on a case-by-case basis. However, the contemporary practice grants significant discretion to the various judicial bodies of the UPC, resulting in divergent interpretations of the applicable legal framework. Furthermore, the analysis presents that the urgency assessment has been predominantly influenced by the national German approach to provisional measure applications, potentially resulting in a scenario where the jurisprudence of other Contracting Member States of the UPCA may align with the German method for assessing urgency. Due to the novelty of the topic and the limited availability of relevant case law and academic literature, the impact of possible legal transplantation of German jurisprudence on the judicial systems of other Contracting Member States of the UPCA has not been examined. However, the examination of national practices concerning preliminary injunctions among the Contracting Member States reveals substantial divergences in case law. Accordingly, the comparative analysis has exhibited that national case law differs significantly, particularly when the jurisprudence of Finland and the Netherlands are compared to their German counterpart. This finding suggests that further efforts to enhance the level of harmonisation concerning the interpretation of urgency concerning preliminary injunction proceedings may be beneficial for ensuring the coherent functioning of the UPC system.

Over the past decade, European patent law has encountered significant challenges in adapting to accommodate the rapid development of technology. This challenge has been tackled with the introduction of a series of reforms to promote a more harmonised and unitary legal framework, among which the UPCA represents one of the most comprehensive and principal instruments. Among the most fundamental rationales behind the establishment of a unified patent regime has been the pursuit of harmonisation and the creation of a coherent framework for the enforcement

of patent rights across the previously fragmented European patent landscape. Given the rapid progression of the UPC towards a court system which operates on a high level of efficiency, it is of utmost importance to ensure that its functioning remains appropriate across the jurisdictions of all Contracting Member States. Therefore, the prevailing fragmentation in the interpretation of urgency with respect to the granting of preliminary injunctions presents an issue which warrants systemic attention. By highlighting the current interpretative divergences regarding the urgency requirement in preliminary injunction proceedings, this study contributes to the broader discourse on the practical and doctrinal evolution of the UPC system and lays the groundwork for further research into its long-term legitimacy and uniformity.