Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

Local division Munich
UPC_CFI_443/2023

Order

of the Court of First Instance of the Unified Patent Court in proceedings for provisional measures relating to European patent 2 043 492 issued on *21/05/2024*

LEADERSHIPS:

1. In the case of a suspected infringement in two or more countries, in view of the necessary prior examination of whether the defendants' embodiments actually make use of the teaching of the patent in dispute and whether legal action will also be possible with any prospect of success, and in view of the corresponding serious preparation of the proceedings, it cannot generally be concluded that there has been an unreasonably long wait if the application for an Order for provisional measures was filed within two months.
2. The principles established by the Court of Appeal in UPC_CoA_335/2023 must be applied when interpreting the patent or certain features in the patent claim. This applies equally to the assessment of infringement and the legal validity of a European patent. The appropriate protection for the patent proprietor and the associated sufficient legal certainty for third parties is largely determined by the wording chosen by the patent proprietor in the light of the description and the drawings. As a result, the interpretation can lead to a broader or narrower understanding.
3. Due to the summary nature of the examination of legal validity in proceedings for the adoption of provisional measures, it is not possible to consider a full examination of all legal defences as in nullity proceedings. Rather, the number of arguments raised against the legal validity must generally be reduced to the best three from the defendant's point of view.
4. Provided that the winning party does not cite any important reasons (e.g. bearing the insolvency risk of the other party), there is no reason to order the reimbursement of costs in proceedings for the ordering of provisional measures if the summary proceedings - as here - must be followed by proceedings on the merits.

Keywords:

Application for provisional measures; unreasonably long waiting period; interpretation of the patent claim; legal validity of the injunction patent

APPLICANT:

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DEFENDANT:

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STREITPATENT:

EUROPEAN PATENT 2 043 492

DECISION-MAKING BODY/CHAMBER:

Judicial body of the Munich local division

PARTICIPATING JUDGES:

This Order was issued by presiding judge Dr Zigann, legally qualified judges Pichlmaier and Dr Schober and technically qualified judge Weber.

LANGUAGE OF THE PROCEEDINGS: German

SUBJECT: R 211 VerfO - Application for an Order for provisional measures

ORAL HEARING: 22/03/2024

BRIEF DESCRIPTION OF THE FACTS:

The **applicant** is the registered proprietor of European patent 2 043 492 (hereinafter: patent in suit). The patent in suit was filed in English on 6 July 2007, claiming English priority GB 0614235 of 18 July 2006. The patent application was published on 8 April 2009. The patent in suit is currently in force in the Federal Republic of Germany and in France. The applicant initially declared the opt-out of the patent in dispute here from the Unified Patent Court on 4 April 2023. However, it effectively revoked this opt-out on 24 November 2023.

The patent in suit represents a "hand-held cleaning device" (hereinafter: "hand-held hoover") under protection. Its patent claim 1 is worded as follows in the English original:

"A hand-held vacuum cleaner (10) comprising a suction conduit (14) having a longitudinal axis, an airflow generator (36) for generating an airflow along the suction conduit, cyclonic separating apparatus (18) arranged in communication with the suction conduit (14) for separating dirt and dust from the airflow, a power source (32) for supplying power to the airflow generator (36) and an elongate handle (28) ***characterised in that*** *the elongate handle (28) is disposed between the airflow generator (36) and the power source (32) and dimensioned and arranged to be gripped by a user's hand, wherein the elongate handle (28) lies transverse to the longitudinal axis of the suction conduit (14) and the cyclonic separating apparatus (18) is positioned between the suction conduit (14) and the elongate handle (28)."*

In German translation:

"A hand-held hoover (10) comprising a suction duct (14) having a longitudinal axis, an airflow generator (36) for generating an airflow along the suction duct, a cyclone separator (18) disposed in communication with the suction duct (14) for separating dirt and dust from the airflow, a power source (32) for energising the airflow generator (36), and an airflow generator (36) for generating an airflow along the suction duct (14).
(36) and comprises an elongate handle (28), ***characterised in that*** *the elongate handle (28) is located between the airflow generator (36) and the power source (32) and is sized and arranged to be gripped by a hand of a user, the elongate handle (28) being transverse to the longitudinal axis of the suction duct (14) and the cyclone separator (18) being located between the suction duct (14) and the elongate handle (28)."*

The parties structure claim 1 as follows:

1. *Hoover held in the hand (10),*

- ***1.1*** *which has a suction channel (14) with a longitudinal axis,*
- ***1.2*** *an air flow generator (36) to generate an air flow along the suction channel,*
- ***1.3*** *a cyclone separator (18) arranged in conjunction with the suction duct (14) to separate dirt and dust from the air flow,*

1.4 *an energy source (32) to supply the air flow generator (36) with energy, and*

1.5 *comprises an elongated handle (28),*

1.5.1 *characterised in that the elongated handle (28) is arranged between the air flow generator (36) and the energy source (32) and*

1.5.2 *is dimensioned and ordered to be gripped by a user's hand,*

1.5.3 *wherein the elongated handle (28) lies transversely to the longitudinal axis of the suction channel (14) and*

1.5.4 *the cyclone separator (18) is arranged between the suction channel (14) and the elongated handle (28).*

In its description, the patent in suit refers to models of hand-held hoovers known from the prior art. Such hand-held hoovers are not ergonomically ideal in their conventional design and are therefore uncomfortable and tiring to use. The task of the patent in suit is therefore to design a hoover which is both easy to guide and can be controlled easily and with little fatigue thanks to an advantageous weight distribution (see paragraph [0006]).

Figures 1 and 2 below show an isometric and a partially cut-away side view of an embodiment. The hand-held hoover (10) comprises a main body
(12). The main body (12) comprises a suction pipe (14) with a suction opening (16). The main body (12) further comprises a cyclone separator device (18) for separating dirt and dust from an air flow drawn in through the suction opening (16). The cyclone separator device (18) is connected to the suction line (14) and the suction opening (16). The cyclone separator (18) comprises an upstream cyclone (20) and a plurality of downstream cyclones (22).

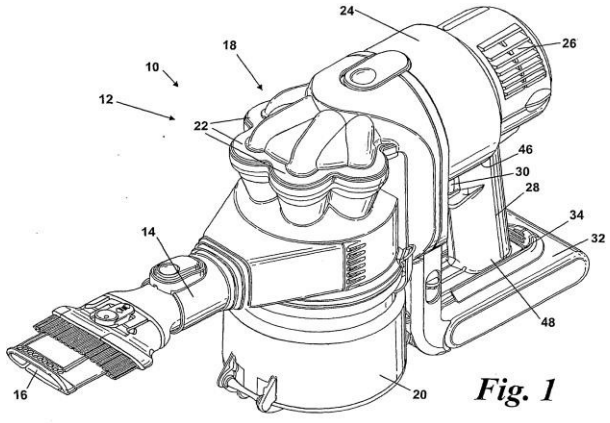


Fig. 1

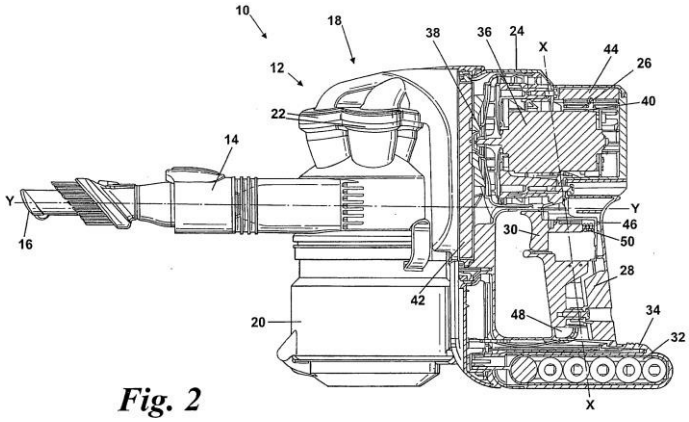


Fig. 2

With its application for an Order for provisional measures, the applicant is directed against the offer and sale of the Shark Detect Pro model in the version without an automatically emptying base station (IW1611EU) and with it (IW3611EU), which can be seen in the following illustrations (hereinafter: attacked versions):

Model IW1611 (hereinafter: attacked embodiment 1)

Model IW3611 (hereinafter: contested embodiment 2)

On 27 September 2023, the applicant established that the defendant 1 was offering various hand-held hoovers in France on its French website https://sharkclean.fr/, which imitate the ergonomic advantages of the defendant's models and are intended to make use of the teaching of claim 1 of the patent in suit. The models offered are the models illustrated above (embodiments 1 and 2).

In the further course, the applicant established that these models of the Shark Detect Pro have also been sold in Germany on the German website https://www.sharkclean.de/ since 7 November 2023, as well as the other model of an infringing handheld hoover with the number BU1120DE since 9 November 2023.

APPLICATIONS BY THE PARTIES:

By submission dated 27 November 2023, the **applicant** applied to the Munich local division for the following provisional measures to be ordered:

I. *The defendants are ordered to cease and desist in the territory of the Federal Republic of Germany and/or the territory of the French Republic,*

a hand-held hoover (10) having a suction duct (14) with a longitudinal axis, an air flow generator (36) for generating an air flow along the suction duct, a cyclone separator (18) in communication with the suction duct, and an air flow generator (36) for generating an air flow along the suction duct.
(14) is arranged to separate dirt and dust from the airflow, a power source (32) to power the airflow generator (36), and an elongate handle (28), characterised in that the elongate handle (28) is located between the airflow generator (36) and the power source (32) and is sized and arranged to be gripped by a user's hand, the elongate handle (28) lying transversely to the longitudinal axis of the suction duct (14) and the cyclone separator (18) being located between the suction duct (14) and the power source (32), to be gripped by a hand of a user, the elongate handle (28) being transverse to the longitudinal axis of the suction duct (14), and the cyclone separator (18) being disposed between the suction duct (14) and the elongate handle (28).

II. For each individual violation of the Orders under I., the respective defendant must pay a (possibly repeated) penalty payment of up to EUR 250,000 to the court.

III. The defendants are ordered to pay the costs of the proceedings.

IV. These Orders are immediately effective and enforceable.

At the oral hearing on 22 March 2024, the applicant modified applications I. and III. as follows (modification is emphasised by underlining):

I. The defendants are ordered to refrain from the following in the territory of the Federal Republic of Germany and/or the territory of the French Republic
a hand-held hoover (10) having a suction duct (14) with a longitudinal axis, an airflow generator (36) for generating an airflow along the suction duct, a cyclone separator (18) disposed in communication with the suction duct (14) for separating dirt and dust from the airflow, a power source (32) for energising the airflow generator (36), and an elongated handle
(28), characterised in that the elongate handle (28) is disposed between the air power generator (36) and the power source (32) and is sized and arranged to be gripped by a hand of a user, the elongate handle (28) being arranged to be gripped by a hand of the user.
(28) lies transverse to the longitudinal axis of the suction duct (14) and the cyclone separator device
(18) is arranged between the suction channel (14) and the elongated handle (28), or if this is done as in the hand-held hoovers with the model numbers IW3611EU, IW3611DE, IW1611EU, IW1611DE and/or BU1120DE,

to offer and/or deliver.

III. The defendants are provisionally ordered to pay the costs of the proceedings.

In their objection of 18.1.2024 and at the hearing on 22.3.2024, the **defendants** filed a motion:

- *the rejection of all applications and*
- *reimbursement of the provisional costs, stating that the costs include the costs of the proceedings for provisional measures, i.e. the reimbursable costs of the defence. The actual costs would exceed the maximum amount of reimbursable costs, which are capped at EUR 56,000 for an amount in dispute of EUR 350,000.*

ARGUMENTS OF THE PARTIES:

The **applicant essentially argued** that embodiments 1 and 2 make identical use of the teaching of the patent in dispute. There are marginal differences in the external design, but not in the Order and function of the relevant components. Features 1, 1.1, 1.2 and 1.4 are realised. A cyclone is also generated in the injury mould, which makes use of feature 1.3. The separation of the particles takes place in the area of a wedge-shaped plastic part, on the upper side of which particles collect and are thus separated from the air. It is therefore a cyclone separator. Between the air flow generator and the energy source, the elongated handle within the meaning of features 1.5 and 1.5.1 is located in the infringing forms. The shape of this handle is modelled on a pistol grip, so that it can be easily grasped by hand (=feature 1.5.2). The axis of the handle also intersects the longitudinal axis of the suction channel, i.e. it is transverse in the sense of feature 1.5.3. The cyclone separator is located between the suction channel and the elongated handle in accordance with feature 1.5.4.

It had carried out test purchases via the German and French websites, with the defendants 1 and/or 2 either appearing in the legal notice of the website as contractual partners of the purchases or issuing the invoices or being involved in the processing of the orders and dispatch.

The patent in suit is legally valid and has not yet been the subject of opposition or nullity proceedings. It clearly and inventively distinguished itself from the prior art considered in the grant proceedings by combining the advantageous ergonomic design of the hand vacuum cleaner with the advantages of a cyclone-based dirt separator. In particular, there was obviously no reason and no possibility to combine the prior art in such a way as to arrive at the inventive step of the patent in suit in an obvious manner.

The forms of infringement were presented to the public for the first time at the IFA trade fair in Berlin from 1 September to 5 September 2023. It was not possible to specifically examine these forms of infringement at the trade fair. It first learned of the sales launch in France on 27 September 2023; on
7.11. and 9.11.2023, it had established that the sales launch had taken place in Germany. It had therefore not waited unreasonably with the application in question and the Order for provisional measures was urgent and necessary.

The injury forms are 50-60 % below the price level of the current models of the

patent in dispute. This not only threatens a drop in prices, but also the concrete danger that consumers will switch to the cheaper infringing forms instead of the original product.

The balancing of interests to be carried out in accordance with R 211.3 VerfO is in their favour: It could be predicted with a probability bordering on certainty that the patent infringement actually existed. The prior art cited in the grant proceedings against the patent in suit was rightly assessed as not prejudicial to novelty and not contrary to the inventive step compared to the granted version. The requested prohibition was not disproportionate; the parties were main competitors in the field of battery-powered vacuum cleaners and the distribution of the infringing forms directly influenced their own sales opportunities.

At the oral hearing, the **applicant** clarified its submissions on the interpretation of the disputed features 1.3, 1.5.3 and 1.5.4 as follows: With regard to feature 1.3, paragraph [0005] did not define the handheld hoover of US 2002/0189048 as the generic term of patent claim 1; it was only one possible embodiment of a cyclone separator device (18). Paragraphs [0018] and [0019] describe how the separation of large and small dirt particles works; it is precisely this separation that is at issue. Therefore, the reference to US 2002/0189048 is only an explanation of how the separation works. To achieve this, the dirt particles must be set in motion helically (in a spiral). The videos submitted show that the particles move along the cylindrical inner wall and then settle. It is irrelevant whether the particles move again after settling; this only speaks in favour of a poor embodiment of the patent claim. In any case, according to the wording of the claim, a strictly spiral, cyclonic air flow is not required.

With regard to feature 1.5.3, it could be seen from paragraphs [0021] and [0015] that it was only required that the X and Y axes should intersect. It is clearly expressed that the hand is below the Y-axis. "Transverse" means transverse and is a positional designation; it is sufficient that the axes intersect at some point in the extension. It is of course advantageous if the axis of the forearm is positioned as close as possible to the axis of the suction channel.

Feature 1.5.4 does not impose any restriction; "between" is to be understood in such a way that a sequence of rows as in a "table-column arrangement" is also sufficient to fulfil this feature, as is the case with the infringing forms.

The videos show that a rotating movement of the particles is generated during the forms of injury. Separation means separation from the exhaust air flow, which can be seen. The combination of flap, wedge and cylinder in the infringement moulds is a cyclone separation device according to the generic term of claim 1. The positioning of the wedge at the flap causes a tangential movement of the air flow and thus of the particles transported with it.

The applicant countered the respondents' legal argument at the oral hearing by arguing that the skilled person needed a reason for the Order according to feature 1.5.4 of the patent in suit. The objective task of the patent in suit (ergonomics and weight distribution) should not be excluded. Why should the skilled person replace a cup filter with a cyclone separator? There are many ways to improve the suction power. In this case, the specialist would have improved the filter rather than adding a heavier component to a cyclone separator. Order FDB 12 does not state where the separator should be located; it cannot be used for the combination.

be taken into account. The fact that the FDB 10 system was also detrimental to novelty was raised for the first time in the defendants' reply and this objection was therefore belated. The system FDB 10 also does not show a tangential or rotating air flow like the patent in suit.

The **defendants** countered that the patent in dispute was not infringed by their embodiments. This claimed a specific embodiment of a hand-held hoover, to which the applicant had had to restrict itself in the grant proceedings because the claims originally filed, as well as the claims amended in the meantime, had had to be further restricted due to anticipation prejudicial to novelty and lack of inventive step. The claim asserted here is now (only) directed to a specific spatial order using a specific separating device, namely a cyclone separating device described in more detail in the patent in suit. However, the contested embodiments do not correspond to the claimed spatial order of the components, nor do they use a cyclone separating device. Rather, they only have a filter device. The movement of the air flow in the dust container upstream of the filter serves the sole purpose of keeping the sucked-in dirt particles in motion and thus preventing clogging of the filter. The contested embodiments therefore utilise a different operating principle.

The patent in suit is also not legally valid. Hoovers with a cyclone separator were already known in the prior art long before the priority date, as were hoovers with a transverse handle. The design of a handle as a "pistol grip" for easier handling is used in many areas. Also in combination with the placement of a battery at the lower end of the handle for balancing, the skilled person was immediately familiar, not least against the background of the daily use of so-called power tools such as cordless screwdrivers.

In particular, the hand-held hoover described in claim 1 was not inventive because it was suggested on the basis of Annex FDB 8 in conjunction with the common general knowledge. Annex FDB 8 is a German utility model with the title
"Hand-held vacuum cleaner", which was applied for in 1962 and published on 13 December 1962. Only features 1.3 (cyclone separator) and 1.5.4 (positioning between the suction channel and the handle) are missing from the subject-matter of FDB 8. The skilled person, who is aware of the advantages and disadvantages of a cyclone separating device, would replace the cup filter in the subject-matter of system FDB 8 by a cyclone separating device without any inventive step, e.g. in order to replace the use of a filter. The publications KR 2000-0067144A-2000 (= Annex FDB 12) and GB 2035787A (= Annex FDB 13), published as early as 1980, which show embodiments of a cyclone separating device for a vacuum cleaner/hand-held hoover, should also be cited.

In addition, there was an obvious lack of urgency for the ordering of provisional measures. It would have been easily possible for the applicant to determine at the IFA trade fair in Berlin whether the features of the patent in dispute are realised by the challenged embodiments. It had itself submitted that it had become aware of the alleged patent infringement with the start of sales in France on 27 September 2023. Against the background of the scope of the Orders and measures issued by the UPC, it was not necessary to wait for the further sales launch in Germany. Rather, the applicant could have filed its application for provisional measures in October at the latest. It had

However, the company did not carry out a test purchase in Germany until the beginning of November 2023, and in France only on 21 November 2023. Waiting two months after the start of sales was not necessary and was therefore unreasonable.

The applicant would not suffer any irreparable damage by waiting for the decision in the main proceedings. A price collapse was not to be feared because there were a large number of hand-held hoovers available at significantly lower prices. The higher sales price of the applicant's products is also based on the fact that they are sold with several attachments and brushes as well as an extensive range of accessories.

It could be assumed with overwhelming probability that the patent in dispute was neither infringed nor legally valid. The balance of interests was in their favour.

At the oral hearing, the **defendants** added to feature 1.3 that paragraph [0005] had not been part of the original patent application. The examiner had therefore not been able to comment on it when filing the application. This paragraph had only been added later and originated from the French text. Therefore, this paragraph did not contain a definition and was not evidence of the prior art. It was true that it did not necessarily require a collection container for the separated dirt particles, but it did require structural features that enabled collection. Both US 2002/0189048 and the patent in suit show that the particles are channelled/pushed in a certain direction in order to be discharged to a certain location. It is not sufficient for the dirt particles merely to be separated, they must be collected in a specific area in a targeted manner. US 2002/0189048 only shows a cyclone, but not a cyclone separator. A cyclone requires a helical air movement; a circular air flow - as in the infringement moulds - is not yet a cyclone. The idea behind the violation forms is that the filter is kept free of the sucked-in dirt particles by means of air turbulence and that the sucked-in air can escape again without these particles. The particles are kept in motion by the air turbulence so that they do not clog the filter. For a cyclone separator device, it is necessary that a centrifugal force is generated by a tangential inflow of air in order to push the particles out of the flow direction of the outflowing air. These forces would separate the particles from the air flow and collect them. Feature 1.3 only requires a configuration in which the cyclone separator is intended for the complete separation of dust and dirt, but not that this purpose is actually fully achieved in every practical application. Moreover, according to the patent in suit, the cyclone separator device requires two sequential cyclones. In the applicant's videos, no cyclone can be seen in the embodiments; the wedge only has the function of preventing the air flap, where the sucked-in air flows in, from falling over. The wedge directs the incoming air to the right towards the upper third of the cylinder. However, this does not create a tangential air inflow and therefore no helical air flow in the sense of a cyclone.

Feature 1.5.3 requires that the Y-axis must intersect the handle and not only its axis; intersecting the axes in a different position - as in the contested embodiments - therefore does not realise this feature.

Feature 1.5.4 contains a precise Order of the components with "between"
"Suction channel - cyclone separator - elongated handle", namely on one axis (horizontal plane) next to each other. This is also shown in Figure 2 of the patent in suit. This is also not the case in the contested embodiments.

In paragraph [0024], sentences 1, 2 and the last sentence of the claim should be interpreted as follows
should be cancelled; a cable is not a "rechargeable power source".

When the chairman pointed out that proceedings for provisional measures were of a summary nature and that it was therefore not possible to consider a full examination of all legal arguments, but rather to reduce the number of arguments raised against the legal validity to the three best from the defendants' point of view, the defendants essentially focussed their submission on the lack of legal validity on the following three contentions:

- Lack of inventive step vis-à-vis DE 1 863 708 - Gimelli (Annex FBD 8);
- It is obvious for the person skilled in the art to develop a handheld hoover with an elongated handle and a cyclone separator device with a specific Order based on the FDB 8 in combination with the general knowledge, whereby the FDB 12 shows how;
- JP 54-027573 (Annex FDB 10) - Lack of novelty or inventive step

FACTUAL AND LEGAL POINTS OF CONTENTION

A. Question of urgency (R 209.2 lit b VerfO) and the objection of unreasonable delay (R 211.4 VerfO)
B. Interpretation of claim 1 of the patent in suit (in particular features 1.3, 1.5.3 and 1.5.4) to clarify the question of infringement
C. Question of the objected lack of validity of the patent in suit

REASONS FOR THE DECISION:

The application for the adoption of provisional measures is well-founded.

Re A.: Question of urgency of the interim Order and unreasonable delay

According to the Rules of Procedure, both temporal and factual circumstances are relevant for the necessity of ordering provisional measures. In addition to R 209.2 lit b VerfO ("urgency"), the relevance of temporal circumstances also results in particular from R 211.4 VerfO, according to which the court must take into account unreasonable delays when applying for provisional measures. The fact that factual circumstances must also be taken into account when deciding on the Order for provisional measures can be seen from R 211.3 VerfO, for example, according to which the possible damage that the applicant may suffer must also be taken into account when deciding on the application for an order. In contrast, the potential damage to the defendants must be taken into account when weighing up the interests (see UPC_CFI_2/2023 [LK München]).

Due to the circumstances in this case, the Order for the requested provisional measures is urgent in terms of time (R 209.2 lit b VerfO): The temporal urgency required for the Order of provisional measures is only lacking if the injured party has behaved in such a negligent and hesitant manner in the pursuit of his claims that, from an objective point of view, the conclusion must be drawn that the injured party is not interested in a speedy and effective resolution of his claims.

enforcement of his rights, which is why it does not seem appropriate to allow him to claim interim legal protection (see also UPC_CFI 2/2023 [LK München], UPC_CFI 452/2023 [LK Düsseldorf]).

Anyone wishing to claim urgent legal protection for themselves and their claim must also show the acceleration required by the urgent nature of the proceedings when preparing the proceedings and obtaining the documents necessary for such proceedings. However, this does not mean that he must undertake and complete every single measure to clarify the facts and pursue his rights with the greatest possible haste; rather, the decisive factor is whether he has always proceeded with such determination in the pursuit of his rights that it appears appropriate and justified to allow him to benefit from the advantages of an Order for provisional measures in view of his own behaviour. Therefore, a patent proprietor need only apply to the court if he

a) has reliable knowledge of all those facts that make legal action in preliminary relief proceedings promising, and

b) if he can make the relevant facts credible in such a way that it is reasonably probable that he will prevail.

A patent proprietor does not need to take every risk when pursuing legal action. Rather, he may prepare himself for every possible procedural situation that may arise under the circumstances, so that he is prepared - however the opponent may engage and defend himself - to successfully respond and to be able to present the documents he considers necessary for the success of such an application. In principle, the patent proprietor cannot be instructed to carry out subsequent investigations, if necessary, only during ongoing proceedings and, if necessary, to obtain the necessary documents subsequently. Any measure undertaken by the patent proprietor to clarify the facts relevant to the decision is presumed to be reasonable, which is why it cannot in principle justify a lack of urgency, even if it subsequently proves to be unnecessary in view of the opponent's defence in summary proceedings (which was not foreseeable for the patent proprietor before the court proceedings were initiated).

The only measures to be treated differently are those which, viewed ex ante, make no sense even for reasons of procedural prudence, but only cost unnecessary time in the prosecution. As soon as the patent proprietor is aware of the alleged infringement facts, he must investigate them, take the necessary clarification measures and obtain the documents required to support his claim. Here, too, he must not act hesitantly. He must take the necessary steps with determination and bring them to a conclusion. As soon as the patent proprietor has all the knowledge and documents that reliably enable a promising legal prosecution, he must file the application for an injunction promptly.

On the basis of these principles, the applicant treated the matter with the necessary urgency, in particular against the background that the infringing forms were offered after presentation at the IFA trade fair in Berlin from 1 September to 5 September 2023 in those two countries at different times in which the patent in dispute is in force. On 27 September 2023, it established that the defendant 1 was offering various handheld hoovers on its French website https://sharkclean.fr/ in France, which the

ergonomic advantages of their models and could make use of the teaching of claim 1 of the patent in suit. In the further course, the applicant stated that models of the Shark Detect Pro have also been sold in Germany on the German website https://www.sharkclean.de/ since 7 November 2023 and another model of the infringing handheld hoover since 9 November 2023. When they are finally sold on 27.11.2023
- If the defendant - within two months - files the application for an Order for provisional measures, it cannot normally be concluded that it has waited an unreasonably long time and/or that it is not interested in a speedy enforcement of the law, given a suspected infringement in two or more countries and the prior necessary examination as to whether the embodiments of the defendants actually make use of the teaching of the patent in dispute and whether legal action will also be possible with a prospect of success, and in view of the corresponding serious preparation of the proceedings.

The applicant must carry out a corresponding risk analysis with regard to its chances of prevailing, whereby it must also take into account the fact that it must also file an action on the merits in a timely manner (= 31 calendar days or 20 working days) in accordance with R 213.1 VerfO. If this is the case, it must also expect that the legal validity of its patent will also be challenged before the Unified Patent Court in an action for revocation.

Re B.: Clarification of the question of infringement by interpreting claim 1 of the patent in suit:

The invention of the patent in dispute is a hand-held dust extractor (10) equipped with a cyclone separator. This means that the air flow generator, the filter unit and the power source are held in the hand. None of these elements are located on the surface to be cleaned, as with a floor hoover.

The patent in suit refers to models of hand-held hoovers known from the prior art, whereby these are not ergonomically designed in their conventional forms and are therefore uncomfortable and tiring to use. Vacuum cleaners with a pistol-like handle at the end of the housing are known from the prior art (paragraph [0003]).

It is an object of the present invention to provide a handheld hoover which is easier to handle than the known arrangements. It is a further object to provide a handheld hoover in which the order of the handle, the motor and blower assembly and the power source allow easy and convenient handling (paragraph [0006]). To achieve this, a particular order of the handle with respect to the air flow generator and the power source on the one hand, and the handle with respect to the suction line and the separator device on the other hand, is proposed. The advantages of this Order are explained in particular in paragraphs [0020] and [0021]. The better manoeuvrability results from a better weight distribution around the user's hand and/or around the handle, and a possible correspondence between the axis of the suction channel and the axis of the user's forearm. The position of the handle (28) between the air flow generator (36) and the power source (32) allows the handheld hoover (10) to be easily handled during use. This is because the user's hand is located between the two heaviest components of the hand-held hoover (10). This results in a "dumbbell-shaped" configuration in which the weight of the hand-held hoover (10) is distributed on both sides of the user's hand.

To solve this problem, the patent in suit protects a "hand-held cleaning device". Claim 1 is characterised by the following features (note: the arrangement of the features was made by the parties and was not disputed):

1. *Hoover held in the hand (10),*

1.1 *which has a suction channel (14) with a longitudinal axis,*

1.2 *an air flow generator (36) to generate an air flow along the suction channel,*

1.3 *a cyclone separator (18) arranged in conjunction with the suction duct (14) to separate dirt and dust from the air flow,*

1.4 *an energy source (32) to supply the air flow generator (36) with energy, and*

1.5 *comprises an elongated handle (28),*

1.5.1 ***characterised in*** *that the elongated handle (28) is arranged between the air flow generator (36) and the energy source (32) and*

1.5.2 *is dimensioned and ordered to be gripped by a user's hand,*

1.5.3 *wherein the elongated handle (28) lies transversely to the longitudinal axis of the suction channel (14)* and

1.5.4 *the cyclone separator* (18) *is arranged between the suction channel (14) and the elongated handle (28).*

The colour-coded features of this claim are in dispute between the parties and require interpretation:

<u>The following principles are to be applied in the interpretation:</u>

The patent claim is not only the starting point, but the decisive basis for determining the scope of protection of a European patent under Art 69 EPC in conjunction with the Protocol on the Interpretation of Art 69 EPC. The interpretation of a patent claim does not depend solely on its exact wording in the linguistic sense. Rather, the description and the drawings must always be consulted as explanatory aids for the interpretation of the patent claim and not only for the elimination of any ambiguities in the patent claim. However, this does not mean that the patent claim merely serves as a guideline and that its subject matter also extends to that which, after examination of the description and the drawings, appears to be the patent proprietor's request for protection. The patent claim must be interpreted from the perspective of a person skilled in the art. When applying these principles, appropriate protection for the patent proprietor should be combined with sufficient legal certainty for third parties. These principles for the interpretation of a patent claim apply equally to the assessment of infringement and the legal validity of a European patent (UPC_CoA_335/2023 and CoA 8/2024).

<u>Specialist:</u>

The skilled person from whose point of view the patent in suit and the prior art of the patent in suit is to be assessed is a qualified engineer with several years of practical experience in the development and construction of household hoovers.

Feature 1.3:

According to the invention, the cleaning device has a cyclone separator (18) arranged in connection with the suction duct (14) to separate dirt and dust from the air flow (= feature 1.3). Both parties agree that in such a separator device, a receipt airflow must be generated that allows a helical airflow to be created along a cylindrical or mostly conical wall. The (dirt) particles carried along in this air flow are then pressed against the inner wall due to the centrifugal force acting on them, also slowed down and finally collected/separated.

Feature 1.3 refers to a cyclone separator without defining it in more detail. A person skilled in the art would generally assume - without further explanation - that centrifugal forces are used for separation - in this case of dust particles - which are created by generating a vortex flow. How this vortex flow is to be generated must be ascertained from the patent claim together with its description and the drawings. The skilled person is generally familiar with tangential cyclone separators, axial separators and multicyclones.

Neither the patent claim nor the description and drawings indicate that the invention is limited to a specific type of vortex flow generation (tangential/axial/multi) in order to separate dirt and dust from the air flow in accordance with the patent.

Paragraphs [0001-0004] of the patent in suit explain the prior art and the respective merits of the related patent specifications in relation to hand-held hoovers. In paragraph [0005] it is stated that US 2002/0189048 (= Annex FDB 14) shows a hoover according to the preamble of claim 1. This is (expressis verbis) an indication for the person skilled in the art to check how the cyclone separator device or the patent-compliant vortex flow is to be designed there. Even if paragraph [0005] does not contain a legal definition of the generic term in this respect and FDB 14 is (only) one possible embodiment, the skilled person sees in the reference to FDB 14 a specific indication of what can at least be understood as a patented cyclone separating device.

Appendix FDB 14 refers to a "vortex airflow" (and not a specific cyclone) which presses the dust particles contained in this vortex airflow against the inner wall, so that comparatively heavier dust particles remain in the vicinity of the inner peripheral surface and are thereby separated by the vortex airflow [0023 and 0027]. Patent claims 5, 6 and 7 of system FDB 14 also literally refer to a hoover with a device for forming a vortex flow ("vortex airflow"), without defining this in more detail. Even if the drawings Figures 1 and 2 of FDB 14 would suggest that the vortex airflow is to be generated by a tangential air inflow, neither the claims nor the description contain any limitation in this respect.

Based on this, the person skilled in the art understands the feature "cyclone separating device" of claim 1 to mean that the separating device is not limited to a tangential air inflow. Consequently, the generation of an eddy current which presses the dirt particles against the (cylinder) wall is sufficient, whereby the comparatively heavier dust particles are separated by the centrifugal force thus generated. The separated dust particles can then remain in the cylinder, as shown in the known device according to paragraph [ooo5].

This design result is also consistent with the aim of the present invention to provide a handheld hoover that is easier to handle than known arrangements. Details relating to particle separation are not the focus of the invention. Accordingly, paragraph [0018] only states that the particles are separated by a cyclonic movement.

It should therefore be noted that the disputed patent claim must be interpreted in such a function-related manner that it encompasses any such vortex flows that enable the separation of particles by means of centrifugal force. The fact that only a two-stage configuration of the cyclone separation device (see paragraph [0010]) would be in accordance with the claim cannot be subsumed under this interpretation. The teaching claimed in the patent in suit is thus independent of a specific configuration of the cyclone separator device. An understanding that feature 1.3 presupposes the use of a two-stage cyclone separator device is far from the person skilled in the art already in view of paragraph [0007].

The embodiments of the defendants thus fulfil feature 1.3. It is to be assumed as certified that in the embodiments the particles - in particular by the wedge attached to the air inlet opening - are set into a spiral vortex movement on the (upper) inside. This generated at least partially helical air movement also causes particles to be deposited (= separated) by means of centrifugal force. The particles thus leave the main air flow that leaves the device after passing through the filter and remain in the cylinder. This can be seen from the films submitted by the applicant, which show the contested embodiments in operation and which were inspected at the hearing. The patent in suit, as explained, does not require that the particles be separated in a targeted manner at a specific location, as the defendants claim.

The fact that paragraph [0024] can no longer be read in its entirety as an explanation of the subject-matter of one of the patent claims does not alter this assessment. However, it should be noted that replacing the cyclone separator device with filter bags and the energy source with a power cable are ruled out on the basis of the formulation of the claim.

Feature 1.5.3

As the skilled person can see from feature 1.5.3, the elongated handle (28) should lie "transversely" to the longitudinal axis of the suction channel (14). The aim of this Order is to improve manageability by having the axis of the suction channel close to the axis of the user's forearm, or to be understood as a straight extension of the user's forearm when the user's wrist is substantially straight. This Order feels comfortable to the user, especially when the handheld hoover (10) is used for a long period of time (see paragraph [0021]).

However, this effect can only be achieved for the skilled person if the handle is positioned close enough to the longitudinal axis of the suction channel, or if the longitudinal axis of the suction channel runs through the handle.

On this point, the applicant can also be followed in that, according to paragraphs [0021] in conjunction with [0015], it is generally sufficient for the X-axis to coincide with the Y-axis at any point.

and that a pistol-like grip is possible. It would of course be advantageous for the axis of the arm to be as close as possible to the axis of the suction channel. The fact that the defendants' embodiments are worse in this respect than the embodiment in Figure 2 of the patent in suit, because the handle is arranged significantly further away from the longitudinal axis of the suction channel, is not detrimental to the realisation of feature 1.5.3 according to the description.

Feature 1.5.4

In feature 1.5.4, the word "between" is to be understood as a usual order along a line, i.e. a usual order of the cyclone separator between the suction channel and the handle along a line. This is also shown in Figure 2 with reference to the term "between". The wording of feature 1.5.4 is to be understood as a spatial physical order of suction channel, cyclone separator and handle; it is not to be inferred from the wording or the description that these components must lie on an axis. Nor is the spatial reference resolved or could it be assumed that any order of the components would be possible as long as the suction pipe is on the left and the handle on the right of the cyclone separator.

In this context, it may be conceded to the defendants that an Order on an axis would functionally achieve better manageability; however, Figure 2 also does not show such a straight-line Order as they attempted to illustrate with the numeric keypad of a telephone. Paragraph [0015] also describes only one embodiment in which the handle 28 is positioned between the airflow generator (36) and the energy source.
(32) should be arranged horizontally. In this embodiment, the X-axis runs through at least a part of the air flow generator (36) and the energy source (32). In addition, the X-axis of the handle (28) is transverse to a longitudinal Y-axis of the suction channel (12). The Y longitudinal axis runs through the suction opening (16). In this embodiment, the X-axis is arranged at an angle to the longitudinal Y-axis that is close to 90°.

With regard to feature 1.5.4, the embodiments of the defendants are also worse in this respect than in Figure 2 of the patent in suit. However, in the view of the skilled person, they nevertheless fulfil this feature because it is not required that the components suction channel, cyclone separator and handle must lie on one plane/axis.

It must therefore be concluded that the defendants' embodiments make use of features 1.3, 1.5.3 and 1.5.4 in accordance with the wording and therefore infringe the patent in suit.

The literal realisation of the other characteristics is rightly not in dispute between the parties.

Re C.: The legal status of the patent in suit

The above-mentioned principles for the interpretation of the applicant's patent claim and its infringement must also be applied to the assessment of its legal validity (see UPC_CoA_335/2023).

According to the case law of the Court of Appeal, there is a lack of sufficient conviction of the validity of the patent required for the Order of provisional measures if the court - after a summary examination - considers it to be predominantly probable that the patent is not valid. In this context, the burden of presentation and proof for facts relating to the

lack of validity of the patent on the defendant's side (UPC_CoA_335/2023).

Due to the summary nature of the examination of the legal merits in proceedings for the adoption of provisional measures, a full examination of all challenges to the legal merits as in nullity proceedings cannot be considered. Rather, the number of arguments raised against the legal validity in the present case must be reduced to the three best arguments from the point of view of the defendants.

On this basis, the local division in Munich, taking into account the submissions of the respondents, is of the opinion that, pursuant to Art 62 (4) UPCA in conjunction with R 211.2 RP "sufficient certainty" of the legal validity of the patent in dispute.

On summary examination, the subject-matter of claim 1 proves to be novel and inventive (Art 54, 56 EPC) compared to the prior art cited by the respondents.

An innovation is deemed to involve an inventive step if it is not obvious to the person skilled in the art from the prior art. This is not the case if the skilled person could have arrived at it on the basis of the prior art, but only if the skilled person would actually have proposed it on the basis of a sufficient reason in the expectation of an improvement or an advantage.

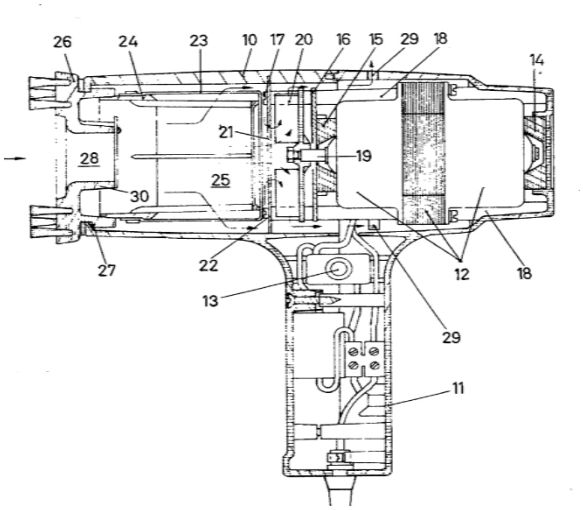
The Respondents take Exhibit FDB 8 as the prior art and combine the resulting understanding with the common general knowledge and/or with many other different patent specifications; in particular, they relied on the combination with Exhibits FDB 10 (JP 54-027573) and FDB 12 (KR2000- 0067144A) at the hearing on 22 March 2024.

With regard to the numerous different combination citations which the defendants wish to use in their documents to prove lack of inventive step, it should generally be noted that, in the context of the required summary examination of the submission, such a large number of possible combinations does not make a lack of inventive step appear to be predominantly probable.

However, the three arguments emphasised in the hearing do not convince the Chamber either:

The object of system FDB 8 lacks the features 1.3 (cyclone separator) and
1.5.4 (positioning between suction channel and handle) of the patent in suit, which the defendants themselves admit (see p. 40 of the opposition). This can also be seen from Figure 1 of Annex FDB 8 below, which does not disclose the two features. In the hoover according to this appendix, only one cup filter (23) is used to filter the air.

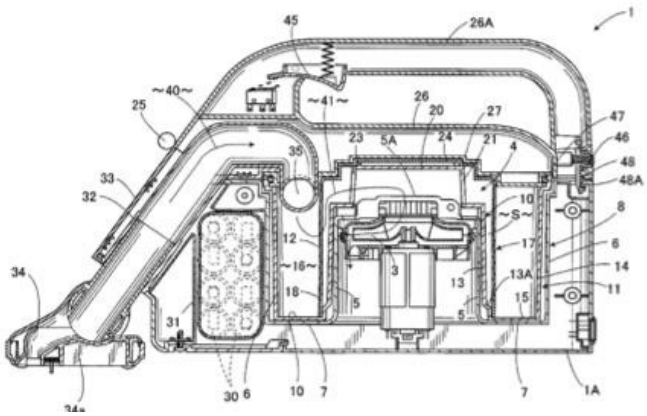
FIG. 1



Contrary to the view of the defendants, however, other features are also not disclosed: The system FBD 8 only discloses an opening (28) which opens directly into the area of the cup filter. In this context, it is questionable whether this also includes a
"suction duct which has a longitudinal axis" (= feature 1.1). Also with regard to feature 1.4 ("an energy source to supply the airflow generator with energy"), it is questionable to what extent an energy source in the form of a power cable should still fall under the claim wording of this feature. It is not apparent how the intended advantage according to paragraph [0020] (distribution of the weight on both sides of the user's hand) can be achieved with it. In purely mechanical terms, a power cord cannot be a desired counterweight to the weight of an airflow generator in order to facilitate handling.

Orders FDB 9, FDB 10, FDB 11 and FDB 24 also have in common (as with FDB 8) that the handle is clearly below the axis "suction channel-separator-airflow generator" (all have a pistol shape) and that the "separator" (of whatever type) is not arranged between the suction channel and the handle.

The respondents claim that a person skilled in the art who is aware of the advantages and disadvantages of a cyclone separator device would replace the cup filter of the FDB 8 system with a cyclone separator device without any inventive step, for example to avoid the use of a filter. Even if the skilled person were to seek an alternative filter device to improve or replace the cup filter in the FDB 8 system, it would remain open as to which filter device he would consider (flat filter, bag filter or cyclone). In this context, it would also have no reason to consider how it would structurally arrange the technically necessary elements in order to better achieve the desired advantage according to paragraph [0020] (distribution of the weight on both sides of the user's hand). In the only example of a hand-held hoover with a cyclone separator to which the patent refers (US 2002/0189048 [in the generic term of the claim, paragraph [0005]), the handle is arranged above the cyclone separator.



The combination of Annex FDB 8 with the general technical knowledge cannot therefore suggest the claimed solution of the patent in suit.

FDB 12 shows a hoover in which the dust collection bag has been replaced by a cyclone separator. However, this finding does not suggest that a cyclone separator device can be installed just as advantageously in a hand-held hoover, nor how the different elements should be advantageously combined with each other in order to improve the manageability of the hand-held vacuum cleaner.

With regard to Annex FDB 10 - insofar as it is available in its translation and can be utilised - reference can be made to the comments on Annex FDB 8. The respondents themselves admit that - with the exception of features 1.3 and 1.5.4 of the patent in suit, as in Annex FDB 8 - all other features are disclosed. However, since Annex FDB 8 does not suggest the claimed solution of the patent in suit even with the combination of the general technical knowledge, this does not lead to a different result in Annex FDB 10 or in the combination thereof.

The objection that the FDB 10 is detrimental to novelty, which was raised for the first time at the hearing, must be countered by the fact that during operation - as claimed - the flap (28) would create a similar air turbulence as in the challenged hand-held hoover, but this was not proven. The FDB 10 therefore does not disclose all features, in particular those of
1.3. and 1.5.4 of the patent in suit. Even if this were the case, the statements on Annex FBD 8 would remain valid. In view of the minor relevance of Annex FBD 10, there is no need for the court to comment further on its potentially late filing.

Appendix FBD 13, which the defendants did not address at the oral hearing, discloses a hand-held (dust) vacuum cleaner with a cyclone separator; however, it is an industrial vacuum cleaner intended for extracting oily chips from machine tools such as lathes, milling machines and the like (see page 1, lines 10 to 23). Accordingly, this hoover is not equipped with its own power source and airflow generator, but must be connected to a compressed air network in order to be functional. A specialist looking for a solution to improve a domestic hoover would hardly research the field of industrial hoovers, especially metal chip vacuum cleaners. Even if they did, they would not find any suggestion for the claimed advantageous structural Order of the various elements in FDB 13.

The other caveat combinations cited by the defendants

can also be countered with the above arguments. None of these combinations can call into question the inventive step of the patent in suit with the required predominant probability.

WEIGHING OF INTERESTS (R 211.3 VERFO):

The Order for provisional measures is necessary in the present case in order to prevent the continuation of the violations and/or at least to prevent further imminent violations (see R 206.2 lit c VerfO).

Pursuant to Art 62(2) UPCA (R 211.3 RP), the court must exercise its discretion in weighing the interests of the parties with regard to issuing the Order or rejecting the application; all relevant circumstances must be included in the weighing, in particular the possible damage that the parties may suffer as a result of the Order being issued or the application for an Order being rejected. The degree of probability to which the court is convinced of the existence of the individual circumstances to be weighed up is also decisive for the exercise of discretion. The more certain the court is that the right holder is asserting the infringement of a valid patent, that there is a need to issue an injunction due to factual and temporal circumstances and that this is not precluded by possible damages suffered by the opponent or other justified objections, the more likely it is that the issuance of an injunction is justified. On the other hand, the more likely it is that there are relevant uncertainties with regard to individual circumstances relevant to the balancing of interests that are detrimental to the court's conviction, the court will have to consider as a milder measure the authorisation of the continuation of the alleged infringement subject to the provision of security or even the dismissal of the application (UPC_CFI_2/2023 (LK München).

The Order for provisional measures is in any case necessary due to the damage threatened to the applicant by the infringing product offers of the defendants. The parties are market competitors in the field of hand-held hoovers. Infringing designs that are 50 to 60 % below the price level of the applicant's models, but contain her patented technology, are undoubtedly capable of influencing consumers' purchasing decisions accordingly. The associated potential damage to the applicant through corresponding loss of sales and possible loss of market share is also very likely due to the generally longer product life cycle of such devices.

Against the background of the established infringement of the patent in suit, the defendants cannot be said to have a legitimate interest in continuing to offer or sell the accused embodiments infringing the patent in suit in Germany and/or France. This is also against the background that this Order will also result in financial disadvantages for it. However, the defendants have explicitly refrained from asserting a security in the event of the Order. Given the predominantly probable facts of the case, the court sees no reason to impose an appropriate security for the disadvantages incurred in the event that the Order for provisional measures is cancelled.

The Munich local division is convinced with the certainty required for the Order of provisional measures that the defendants, by offering and selling the challenged embodiments within the scope of the patent in suit, have unlawfully infringed the patent in suit.

use its technical teaching. The legal validity of the patent in dispute is also secured to the extent required for the Order of provisional measures.

The defendants did not substantiate their objection to the amount of the penalty payment requested in the event of a breach of the Order for provisional measures. In the court's view, the amount of the requested penalty payment is a sufficient threat of sanctions in relation to the nature, scope and duration of the infringement, the degree of fault, the advantage of the defendants from the infringement and the dangerousness of the committed and possible future acts of infringement to prevent future infringements or acts of infringement. In each individual case, an appropriate penalty payment of up to EUR 250,000 must then be set, taking into account the aforementioned factors.

COSTS:

Pursuant to R 211.1 lit d VerfO, the court can order a provisional reimbursement of costs as a provisional measure. If the applicant does not initiate proceedings on the merits of the case within the time limit following the order for provisional measures, the corresponding order must be cancelled in accordance with R 213.1 of the Rules of Procedure. As a rule, the Order for provisional measures is therefore followed by proceedings on the merits. For the decision there, R 118.5 VerfO requires that a basic decision on costs be issued.

If proceedings on the merits of the case are preceded by an Order for Provisional Measures, the VerfO therefore provides for a two-stage procedure: So that the applicant does not have to advance the costs incurred in connection with the application for provisional measures over a longer period of time and thus also bear the insolvency risk of the other party, it has the option of having an obligation on the defendant to reimburse the costs provisionally included in the provisional order. In the main proceedings, the court then makes a basic cost decision on the basis of R 118.5 VerfO, which forms the basis of any subsequent cost assessment proceedings (R 150 et seq. VerfO).

In any case, there is no reason for a provisional decision on costs in proceedings for the Order of provisional measures if the summary proceedings - as here - must be followed by proceedings on the merits and no special reasons, e.g. an insolvency risk, have been put forward that would require such an order. In this respect, the applicant has not argued that and why it would have to bear an insolvency risk of the other party with regard to the costs, for example. There are also no other indications of this.

DECISION AND ORDERS:

Since the Order for provisional measures is necessary both in terms of time and substance and the balance of interests is also in the applicant's favour, the following legal consequences result:

I. The defendants are ordered by way of an interim Order to refrain from doing so in the territory of the Federal Republic of Germany and/or the territory of the French Republic,

a hand-held hoover (10) having a suction duct (14) with a longitudinal axis, an air flow generator (36) for generating an air flow along the suction duct, a cyclone separator (18) in communication with the suction duct, and an air flow generator (36) for generating an air flow along the suction duct.

(14) is arranged to separate dirt and dust from the airflow, a power source (32) to supply power to the airflow generator (36), and an elongate handle (28), characterised in that the elongate handle (28) is located between the airflow generator (36) and the power source (32) and is sized and arranged to be gripped by a user's hand, the elongate handle (28) lying transversely to the longitudinal axis of the suction duct (14) and the cyclone separator (18) being located between the suction duct (14) and the power source (32), to be gripped by a hand of a user, the elongate handle (28) being transverse to the longitudinal axis of the suction duct (14) and the cyclone separator (18) being disposed between the suction duct (14) and the elongate handle (28),

(claim 1 of EP 2 043 492)

to offer and/or deliver,

especially when this happens as with the upright hoovers with the model numbers IW3611EU, IW3611DE, IW1611EU, IW1611DE and/or BU1120DE.

II. For each individual case of non-compliance with the Order under I., the respective defendant must pay the court a (possibly repeated) penalty payment of up to EUR 250,000.00.

III. The parties shall each provisionally bear their own costs of the proceedings for the Order of provisional measures.

IV. In all other respects, the applications of the parties are rejected.

V. This Order is effective and enforceable immediately.

VI. This interim Order will be revoked or otherwise set aside at the application of the Respondents, without prejudice to any claims for damages, if the Applicant does not commence proceedings in the main action before the Unified Patent Court within a period of 31 calendar days or 20 working days, whichever is the longer, from 21 May 2024.

Issued in Munich on 21 May 2024 NAMES

AND SIGNATURES

Presiding judge Dr Zigann

Matthias ZIGANN

Digitally signed by Matthias ZIGANN
Date: 2024.05.21 14:36:00 +02'00'

Legally qualified judge Pichlmaier

Tobias Günther Pichlmaier

Digitally signed by Tobias Günther Pichlmaier
Date: 2024.05.21 14:37:12 +02'00'

Legally qualified judge Dr Schober

Walter Schober

Digitally signed by Walter Schober Date: 2024.05.21 15:38:20 +02'00'

Technically qualified judge Weber

signed by Pascal Weber Date : 2024.05.21 12:10 +02'00'

For the Deputy Chancellor

Anja Mittermeier

Digitally signed by Anja Mittermeier Date: 2024.05.21 14:38:59 +02'00'

INFORMATION ABOUT THE APPOINTMENT

Any party adversely affected by this Order may appeal against it within 15 days of its notification (Art 73(2)(a), 62 UPCA, R 220.1(c), 224.2(b) RP).

INFORMATION ON ENFORCEMENT (ART. 82 EPGÜ, ART 37(2) EPGS, R 118.8, 158.2, 354, 355.4 VERFO)

A certified copy of the enforceable judgement or enforceable Order will be issued by the Deputy Registrar on the application of the enforcing party, R 69 RegR.