



Arrangement

of the Court of First Instance of the Unified Patent Court, issued on
28 May 2025

APPLICANT

Nanoval GmbH & Co. KG, Kienhorststraße 61-65, 13403 Berlin, Germany

represented by: Phillip Rektorschek

DEFENDANT

ALD Vacuum Technologies GmbH, Otto-von-Guericke-Platz 1, 63457 Hanau,
Germany

represented by: Bolko Ehlgem

STREITPATENT

EP 3 083 107 DECIDING

JUDGE

This order was issued by the presiding judge Dr Matthias Zigann and the legally qualified judges Tobias Pichlmaier (rapporteur) and Walter Schober.

LANGUAGE OF THE PROCEEDINGS

German

SUBJECT OF THE PROCEEDINGS

Review of an order for preservation of evidence and inspection (Rule 197.3 EPGVerfO).

FACTS OF THE CASE

The applicant has carried out evidence preservation measures and an inspection in accordance with

192 ff. EPGVerfO applied for. On 3 February 2025, the court subsequently ordered measures to preserve evidence and an inspection without hearing the defendant in advance.

The defendant is of the opinion that the applicant has not demonstrated the probability of a patent infringement without contradiction; its submission refutes the necessity of a measure to preserve evidence itself. Evidence of the risk of loss of evidence had not been provided. The order should therefore be cancelled. Reference is made to the more detailed grounds in the request of 21 March 2025.

The respondent has requested a review pursuant to Rule 197.3 of the UPC Rules of Procedure. She has made the following **requests**:

the examination of the order for the preservation of evidence and inspection of the Munich Local Chamber dated 3 February 2025 and in this context:

- to revoke the order of 3 February 2025,
- Patent attorney Nils T.F. Schmid to oblige the applicant's representatives present at the preservation of evidence and all other persons to whom confidential information was disclosed to continue to treat the information confidentially and to order the applicant to pay the costs of the preservation of evidence proceedings.

The applicant opposed the application and **filed a motion**,

1. reject the defendant's application of 21 March 2025 for review of the order to preserve evidence and inspection of the Munich Local Chamber of 3 February 2025;
2. reject the defendant's further applications of 21 March 2025;
3. order the defendant to pay the costs of the review proceedings.

The applicant has opposed the application; reference is made to the grounds in the statement of 17 April 2025. The oral hearing to be held in accordance with Rule 197.4 of the Rules of Procedure of the UPC took place on 9 May 2025 and is available as an audio recording.

REASON

The application to revoke the order of 3 February 2025 is unsuccessful.

I. The examination of the order of 3 February 2025 shows that the order was rightly made: The applicant has submitted all evidence reasonably available to it in accordance with Art. 60 UPCA to substantiate the allegation that the patent in suit has been infringed or threatened to be infringed; the Court has therefore ordered prompt and effective provisional measures to secure the legally relevant evidence regarding the alleged infringement before initiating proceedings on the merits. In detail:

1. The defendant is of the opinion that the court incorrectly assumed the existence of a Laval nozzle with regard to the EIGA Premium system. In this context, the defendant argues that the grain sizes according to the patent (according to the defendant's submission less than 50 μm) and the grain sizes mentioned in the product brochure of the EIGA Premium system (20 - 90 μm) differ considerably.

In its order, the court did not assume specific particle sizes, but that the particle size and the particle size distribution width *should be as adjustable as possible* according to the patent in suit. It does not follow from the patent in suit that particle sizes above 50 μm should be excluded. According to the patent in suit, it should be possible to achieve a particularly narrow particle size distribution. The defendant itself argued in the opposition proceedings before the EPO that the implementation of a Laval nozzle arrangement leads to the production of finer-grained powder. It is precisely this, the ability to produce finer-grained powder compared to a standard EIGA system, that is shown by the defendant's advertising of the "EIGA Premium" systems. The court currently has no knowledge that a Laval nozzle does not permit particle sizes above 50 μm . The defendant does not explicitly claim this either. This circumstance and the existence of other circumstances mentioned in the injunction were among the reasons why the court considered the probability of an infringement to be sufficient.

2. Insofar as the defendant believes that the application of the EIGA Premium system with a "new nozzle" or new type of nozzle speaks against the use of the Laval nozzle of the EIGA Standard system in the EIGA Premium system, it must be noted that the court did not assume in its order of 3 February 2025 that the EIGA Standard system was used in the EIGA Premium system.

is that the nozzle from the EIGA standard system is still used in the EIGA Premium.

3. Insofar as the defendant states that the different nozzle shape of the EIGA Premium plant is apparent from the defendant's protective documents, it is the defendant's failure to have been able to state clearly in any of the protective documents filed which plant or plants are referred to in these protective documents. It is not the task of the court to remedy this deficiency by comparing it with the defendant's submission in the opposition proceedings by way of an overall interpretation of all the pleadings submitted in various proceedings and to interpret on this basis what the defendant might have meant.

Irrespective of this, the question of the *actual* realisation of individual characteristics will have to be clarified in the main proceedings and not as part of the review of the order of 3 February 2025. With the order of 3 February 2025, the court explained why, in the court's view, there were sufficient indications of the *likelihood* of a violation, on the basis of which the order of 3 February 2025 appeared justified. The defendant does not address this in its application for review. Insofar as the grounds for the application for review are based on circumstances that were not the subject of the order of 3 February 2025, these cannot justify an annulment.

4. Insofar as the defendant argues that it has been granted its own patent for a new nozzle, which deviates from feature 1.2, it must be noted that a patent of the defendant was not the basis for the assessment of the factual situation in the order of 3 February 2025 and therefore cannot justify a revocation of the order. In general, it should be noted that an invention can utilise the teaching of an earlier invention even if it is itself patentable.
5. Insofar as the defendant believes that the request for a cross-licence speaks against a patent infringement, it assumes that companies are generally law-abiding and therefore always request a licence before using a patent. This assumption contradicts the reality of life.

II. The respondent's assumption that an order under Art. 60 UPCA must also be cancelled because the risk of the destruction of evidence has not been sufficiently proven is legally erroneous.

1. According to Art. 60(5) UPCA, the fact that the patent proprietor would probably suffer irreparable damage as a result of a delay or if there is a demonstrable risk that evidence will be destroyed is a reason for ordering measures under Art. 60 UPCA **without hearing the other party**. In a mirror image, Art. 60 para. 6 UPCA and Rule 197 UPC-Rules provide that measures ordered without hearing the other party are to be examined on the basis of an oral hearing. The oral hearing serves to make up for the hearing. However, the sole subject of the examination is the question of whether the measures were rightly ordered; in this context, the possible destruction of evidence is irrelevant.

2. Irrespective of this, the following should be noted:

Insofar as the defendant claims that the mere fact that protective letters had been deposited was interpreted by the court as a lack of willingness to cooperate (paragraph 37 of the application for review), it is making a false statement. The defendant's representative must therefore be reminded of his obligation to provide truthful information.

The exercise of the right to file a protective brief and thus preventively defend oneself against a possible allegation of infringement may not be considered as such to the detriment of the person concerned. The court did not do this with the order of 3 February 2025. Rather, the court concluded that there was a lack of willingness to cooperate from the fact that the protective letters and the response to the specific request for authorisation apparently deliberately failed to provide any specific information about the "EIGA Premium" system. With appropriate information, an inspection order could have been avoided. In response to the request for authorisation, the defendant merely states that

"We have examined the claims made and come to the conclusion that the product "EIGA-Premium" differs fundamentally from the protected technical teachings of the property rights EP 3 083 107 and DE 10 2013 022 096 is different."

The court order therefore states:


"The defendant has thus shown that it does not wish to cooperate voluntarily in clarifying the facts of the case. Based on this, it is not far-fetched to assume that it is no longer possible to fully preserve evidence after the defendant had prior knowledge of the planned implementation of evidence preservation measures. The applicant would suffer irreparable damage as a result."

Since the defendant had several opportunities to comment and was apparently unwilling to co-operate in clarifying the facts, there was no need for a further hearing before the order was issued.

The following is therefore issued

ARRANGEMENT

1. The defendant's applications of 21 March 2025 are dismissed. The order of 3 February 2025 is confirmed.
2. Orders the defendant to pay the costs of the review proceedings.

Dr Zigann Presiding Judge	Matthias ZIGANN  <small>Digitally signed by Matthias ZIGANN Date: 2025.05.28 12:13:13 +02'00'</small>
Dr Schober Legally qualified judge	Walter Schober  <small>Digitally signed by Walter Schober Date: 2025.05.28 11:39:36 +02'00'</small>
Pichlmaier Legally qualified judge	(Tobias) (Günther) Pichlmaier  <small>Digitally signed by Tobias Günther Pichlmaier Date: 2025.05.28 09:32:07 +02'00'</small>