



Vienna - Local Division

File number: **UPC_CFI_182/2023**
Application number: **ACT_528738/2023**
Type of application: **Application for interim measures**

Application for interim measures

Decision
of the Court of First Instance of the Unified Patent Court Local Division
Vienna
orally announced on 13 September 2023
concerning EP 3 398 487 B1

Date of receipt of the application: 27 June 2023

GUIDELINES:

- An application for interim measures - like an action - renders the utilisation of the exception rule in accordance with R 5 of the Rules of Procedure ("opt-out") ineffective. The blocking mechanism means that the jurisdiction of the UPC can no longer be withdrawn.
- The scope of protection of a European patent is to be interpreted on the basis of Art 69 (1) EPC and its interpretative protocol in conjunction with Art 24 (1) (c) UPCA.
- In proceedings for interim measures, the successful defendant can be finally awarded procedural costs upon application. The applicant cannot successfully claim the costs of these proceedings as the unsuccessful party, even if the proceedings on the merits are successful.

KEYWORDS:

"Opt-out" after request for provisional measures; interpretation of patent claims; infringement (no)

ECLI REFERENCE CODE:

APPLICANT:

CUP&CINO Kaffeesystem-Vertrieb GmbH & Co KG,
Paderborner Straße 33, D-33161 Hövelhof, Germany

represented by: TaylorWessing
e/n/w/c Natlacen Walderdorff Cancola Rechtsanwälte GmbH,
Thomas Adocker, Schwarzenbergplatz 7, 1030 Vienna, Austria

Patent attorney DI Dr Andreas Gehring, c/o Puchberger & Partner
Patentanwälte, Reichsratsstraße 13, 1010 Vienna

RESPONDENT:

ALPINA COFFEE SYSTEMS GmbH,
Tiroler Straße 32, 6322 Kirchbichl, Austria

represented by: Dr Markus Gangl and Dr Florian Robl, European Patent Litigators, c/o
Torggler & Hofmann Patentanwälte GmbH & Co KG, Wilhelm-Greil-Straße
16, 6020 Innsbruck

DISPOSABLE PATENT:

EUROPEAN PATENT NO. 3 398 487 B1

Decision-making body/chamber:

Judicial Panel of the Local Chamber of Vienna

JUDGES:

This decision was made by the presiding judge Schober and the legal qualified judges Haedicke and Kupecz.

DECISION:

1. The application for the grant of the interim measure, the defendant is ordered from now on, until proceedings to be brought in the main action have become final, in the states of Austria, Germany, Denmark, France, Italy, the Netherlands and Portugal, to manufacture devices according to claim 2 of EP 3 398 487 B1, thus devices for producing milk foam with adjustable temperature according to the method according to claim 1 of EP 3 398 487 B1, comprising a pump (20) for conveying milk from at least one container (12, 14) into [a] pipe (16, 34) to an outlet (36), an air supply (22) for supplying air into the line (16), a flow heater (28) and a throttle device (32), characterised in that the flow heater (28) is arranged on the pressure side of the pump (20) and the throttle device (32) is arranged downstream of the flow heater (28), wherein the flow heater (28) is designed as a thick-film heater with an electrical resistance element, the temperature of which is controllable and [the] internal diameter of the line (16) upstream and of a line section (34) downstream of the throttle device (32) are different, in particular

The right to manufacture, offer, place on the market, use or import or use for the aforementioned purposes milk frothers of the type ALPINA Latte Perfetto Duo is **rejected**.

2. The applications that the defendant be threatened with the imposition of a penalty payment of EUR 3,000 for each individual case and each day of infringement of point 1 and that the defendant be obliged to surrender within 14 days all milk frothers under its control which fall under point 1, in particular all milk frothers of the type ALPINA Latte Perfetto Duo, in order to prevent them from being placed on the market and circulated via the distribution channels, are dismissed.
3. The applicant must provisionally reimburse the respondent for the costs of the proceedings for the adoption of interim measures in the amount of EUR 25,600 within 14 days.

BRIEF DESCRIPTION OF THE FACTS:

The **applicant** is the proprietor of the European patent EP 3 398 487 B1 with the designation "*Method and device for producing milk foam*" (patent application), which was filed in German on 3 May 2017. The application was published on 7 November 2018. The reference to the grant of the patent was made on 9 March 2022; it is in force in various UPCA member states.

The patent relates to a method for producing milk froth at an adjustable temperature and a device for producing milk froth at an adjustable temperature. Patent claim 1 reads:

*Method for producing milk foam with adjustable temperature, wherein milk from at least one container (12, 14) and supplied air are sucked in by a pump (20) as a milk/air mixture, conveyed through a flow heater (28) and thereby heated, and subsequently converted into a milk foam in a throttle device (32) and conveyed to an outlet (36), **characterised in that the milk/air mixture is heated on the pressure side of the pump (20) in a flow heater (28) formed as a thick-film heater with an electrical resistance element, the temperature of which can be adjusted**, in that the milk/air mixture is heated on the pressure side of the pump (20) in a continuous-flow heater (28) designed as a thick-film heater with an electrical resistance element, the temperature of which can be regulated, and is converted into milk foam, and a counterpressure is generated in the milk/air mixture in the continuous-flow heater (28) by the throttle device (32), the flow characteristic downstream of the throttle device (32) being characterised by a*

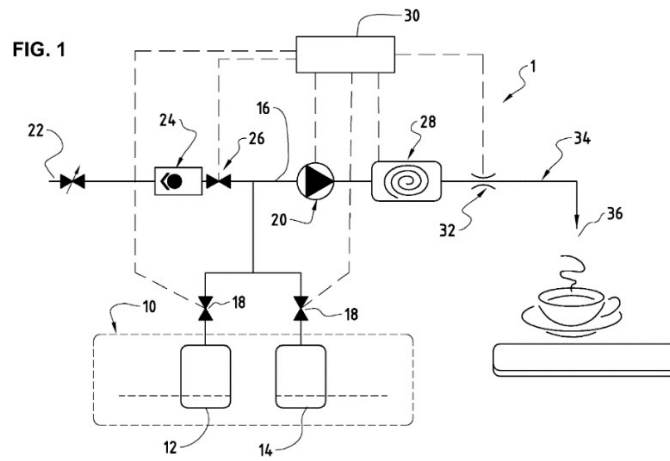
line section (34) with an internal diameter which is different from that of the line (16) upstream of the throttle device (32).

(Device) claim 2 of the patent in suit reads as follows and can be subdivided into the following features (note: the classification of the features was made by the parties and was not disputed):

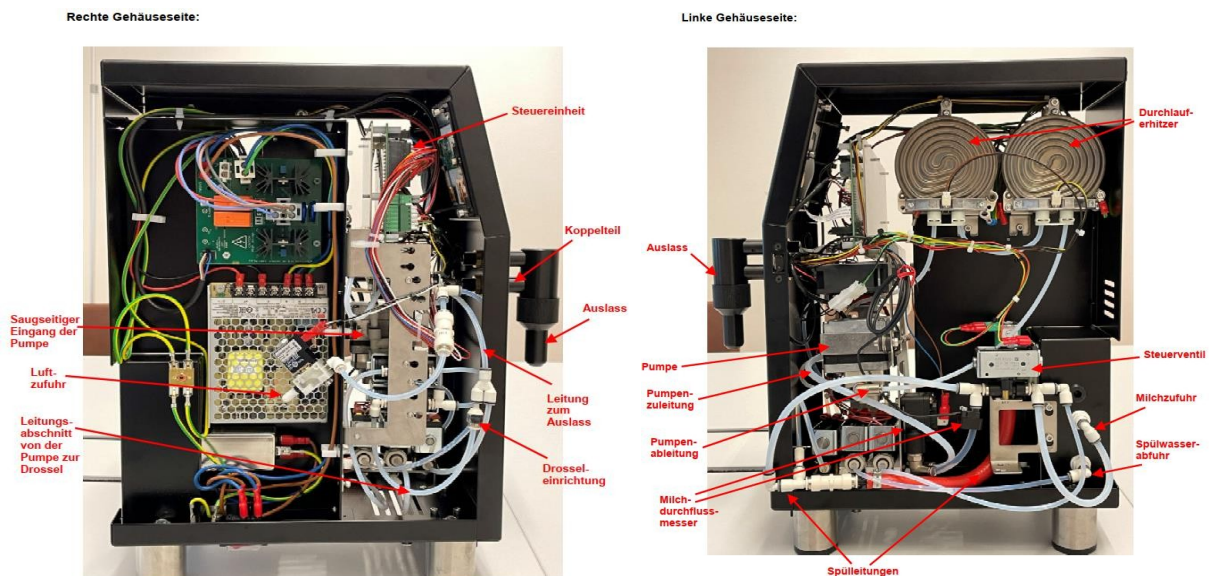
- (a)** *A device (1) for producing milk foam with adjustable temperature according to the method according to claim 1, comprising*
 - (b)** *a pump (20) for conveying milk from at least one container (12, 14) into [a] conduit (16, 34) to an outlet (36),*
 - (c)** *an air supply (22) for feeding air into the pipe (16),*
 - (d)** *an instantaneous water heater (28) and*
 - (e)** *a throttling device (32),*
- characterised in that**
- (f)** *the flow heater (28) on the pressure side of the pump (20) and*
 - (g)** *the throttling device (32) is arranged downstream of the instantaneous water heater (28), wherein*
 - (h)** *the flow heater (28) is designed as a thick-film heater with an electrical resistance element, the temperature of which is adjustable, and*
 - (i)** *[the inside diameter of the line (16) upstream and of a line section (34) downstream of the throttle device (32) are different.*

According to the description, the purpose of the patent for disposition is to improve the devices known in the prior art for producing milk foam, in particular with regard to the production of milk foam with adjustable temperature. The consistency and quality of the milk froth produced should be improved compared to the known devices, irrespective of the temperature ([0011]), whereby this presupposes the production of a homogeneous and stable milk froth, i.e. a milk froth with as uniform a bubble distribution as possible ([0012]).

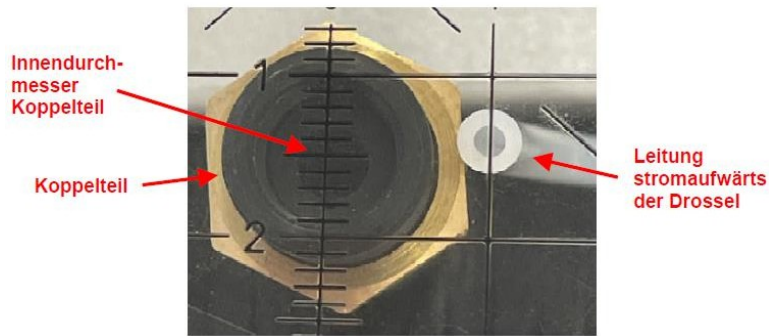
Figure 1, reproduced below (reduced in size), schematically shows a device 1 for producing milk foam with an adjustable temperature; it explains the technical teaching of the patent with reference to a preferred embodiment.



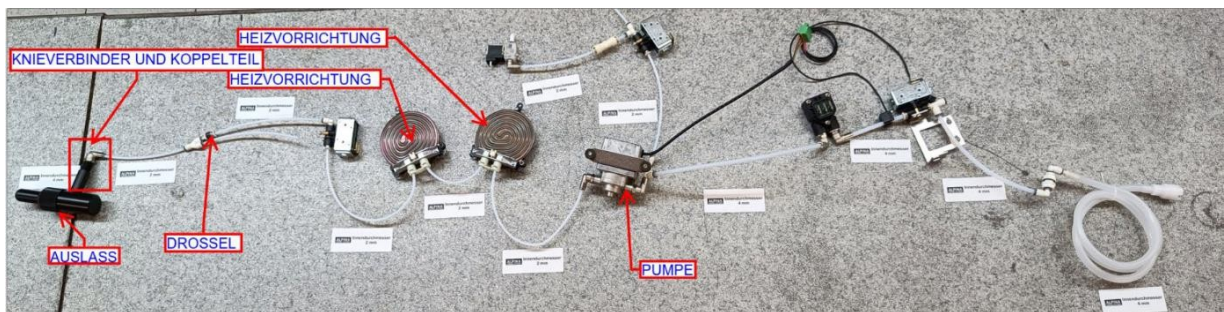
The defendant manufactures coffee machines with milk frothers, including the ALPINA Latte Perfetto Duo milk frother to which the application for interim measures relates. The following illustration shows the main components of the defendant's opened appliance (note: reference signs have been inserted by the applicant):



The applicant's measurements, which are not disputed in detail, show that the pipe has an internal diameter of around 2 mm upstream; the coupling part has an internal diameter of around 4 mm:



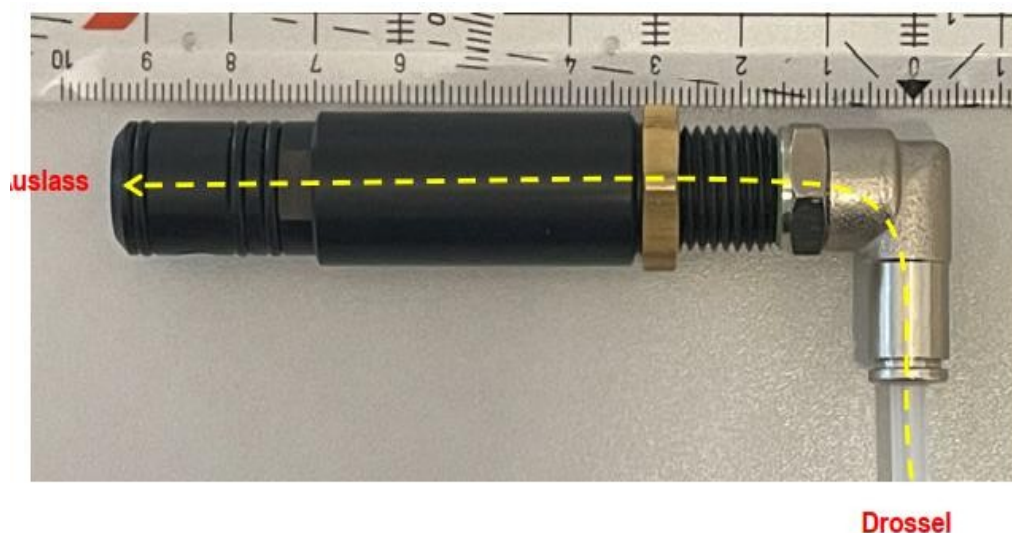
The following figure of the defendant shows the milk/air mixture line of the contested embodiment (note: reference signs have been inserted by the defendant):



The following illustration shows that the line downstream of the choke is connected to the coupling part via a knee connector (note: reference symbols have been inserted by the applicant):



Taking into account the pipe area in the knee connector, this results in a section length with an extended diameter downstream of the throttle device of around 10 cm, as demonstrated in the following figure (note: reference symbols and length determination have been inserted by the applicant):



ARGUMENTS OF THE PARTIES:

The **applicant essentially argued** that with the ALPINA Latte Perfetto Duo milk frother, the defendant realises all the features of claim 2 of the injunction patent. The issuance of the interim measures was urgent because the defendant wanted to promote its patent-infringing product on a large scale at the "HOST Milano" trade fair, one of the most important consumer goods fairs in the world, to be held in Italy from 13 October to 17 October 2023. It is therefore urgently necessary to issue the defendant with an injunction before this trade fair. It is obvious and in line with general life experience that the promotion of a patent-infringing product on a large scale at one of the most important consumer goods fairs worldwide has serious and irreversible effects on the market and market shares. The fact that the product had allegedly been exhibited at other trade fairs in the past and had allegedly been on the market for years did not change the dangers posed by the promotion at HOST Milano 2023 - and also by the apparently planned promotion at this year's Munich Oktoberfest, probably the world's largest leisure event. Neither the recordings contained in the written witness statement (Exhibit 8) nor other evidence submitted by the defendant, such as the YouTube videos, show that the

ALPINA Latte Perfetto Duo products advertised at earlier trade fairs were actually already available in the version now being challenged.

The examination of the defendant's coffee machine showed that all features of claim 2 of the patent in suit were realised in accordance with the wording. It is also not disputed that a throttling device is arranged downstream of a continuous heater designed as a thick-film heater with an adjustable electrical resistance element in the infringing object. In any event, the defendant makes use of the advantageous technical effects discussed in paragraphs [0019] - [0020] of the patent in suit (generation of a counter-pressure in the flow heater, fine-pored foam, faster temperature control). Only the realisation of feature (i) is disputed. In this respect, the ordering party does not assume that the pipe section (34) must necessarily extend from the throttling device to the outlet. Moreover, the achievement of the technical effect of the pipe section after the throttling device discussed in paragraphs [0026] and [0027] of the patent in suit, according to which this represents a "calming section" in which the air in the milk/air mixture is dispersed into fine bubbles and at the same time the laminar part of the flow is increased, does not require a minimum length of the pipe section. Even a comparatively short pipe section such as the knee connector and the coupling part in the object of injury, which together have a length of about 10 cm, would undoubtedly lead to a "calming" of the flow downstream of the throttling device. The pressure in the knee connector and coupling part of the object of injury must be lower than in the upstream pipe section because it has a smaller internal diameter. It follows from this that the "gradual pressure drop" required in paragraph [0027] of the patent in suit is present upstream of the outlet in the knee connector and coupling part of the infringing subject-matter. The defendant's assertion that a knee connector or coupling part cannot serve as a calming section "*due to its short length*" is therefore incorrect. The fact is that the transition from the 2 mm plastic loop to the 4 mm coupling part forms a calming section which is located directly in front of the outlet and in which there is a gradual drop in pressure of the milk/air mixture so that the foam quality of the milk foam produced is improved; this is in accordance with the patent.

The patent in suit is legally valid; there is no case of inadmissible intermediate generalisation. The teaching of the patent in suit was also inventive over the prior art and not invalid within the meaning of Art. 138 (1) (a) EPC due to the combination of the documents DE 20 2011 110 158 U1 and EP 0 335 250 A1.

The **defendant** argued that there was a lack of urgency. The contested product had been on the market for several years, specifically since 2019. The upcoming trade fair appearance could therefore not justify the need to issue interim measures. There is also no threat of irreversible price erosion and/or an irreversible shift in market share. There was also no infringement of the asserted claim 2 because the claim feature (i) "*the internal diameter of the pipe (16) upstream and of a pipe section (34) downstream of the throttle device (32) are different*" was not realised by the attacked embodiment. In particular, the skilled person must understand the feature of the "*pipe section downstream of the throttle device*" to mean the entire section of the pipe from the throttle (32) to the outlet. This is the only way to ensure that there is a sufficient length for the function of the stabilising section.

The patent in suit assumes that the pipe section extends from the throttle device to the outlet with a constant internal diameter and has such a length that a gradual (i.e. only gradual/small steps/slow) pressure drop with a small pressure difference per unit length takes place. It is therefore not sufficient to equip only a very small part (knee connector and coupling part) of the already very short pipe section (34) with an internal diameter that differs from the internal diameter of the upstream throttle device (32).

In addition, the patent in suit is invalid due to an inadmissible extension; in particular, there is an inadmissible intermediate generalisation. The subject matter of the patent in suit is also not inventive in relation to DE 20 2011 110 158 U1.

The applicant could not bring an action on the merits because of the opt-out, so that the provisional measures could not be granted for this reason alone. It is no longer possible for the applicant to revoke the opt-out because an action is already pending before a national court (Art. 83 (4) UPCA and Rule 5 (8) RP).

MOTIONS BY THE PARTIES:

The **applicant** seeks the adoption of the following interim measures:

1. The defendant is prohibited, with immediate effect and until proceedings to be brought in the main action have become final, from selling in Austria, Germany, Denmark, France, Italy, the Netherlands and Portugal devices according to claim 2 of EP 3 398 487 B1, i.e. devices for producing milk foam with adjustable temperature according to the method according to claim 1 of EP 3 398 487 B1, comprising a pump (20) for conveying milk from at least one container (12, 14) into [a] conduit (16, 34) to an outlet (36), an air supply (22) for supplying air into the conduit (16), a flow heater (28) and a throttle device (32), characterised in that the flow heater (28) is arranged on the pressure side of the pump (20) and the throttle device (32) is arranged downstream of the flow heater (28), wherein the flow heater (28) is designed as a thick-film heater with an electrical resistance element, the temperature of which is controllable and [the] internal diameter of the line is adjustable.
(16) upstream and a pipe section (34) downstream of the throttling device (32) are different, in particular to manufacture, offer, place on the market, use or import or possess milk frothers of the type ALPINA Latte Perfetto Duo for the aforementioned purposes.
2. The defendant is threatened with the imposition of a penalty payment of EUR 3,000 for each individual case and each day of non-compliance with point 1.
3. The defendant is obliged to surrender all milk frothers under its control which fall under point 1, in particular all milk frothers of the type ALPINA Latte Perfetto Duo, within 14 days in order to prevent them from being placed on the market and circulated through the distribution channels.
4. The defendant is to provisionally reimburse the applicant for the costs of the proceedings for interim measures in the amount of EUR 21,800 plus EUR 11,000 in court fees, i.e. a total of EUR 32,800, within 14 days.

The **defendant** applies:

1. Dismiss the application for interim measures.
2. The applicant must reimburse the defendant for the costs of representation.
3. In the alternative, in the event that the application is granted:

- 3.1 The applicant had to provide adequate security in the amount of EUR 500,000
- 3.2 As a precautionary measure, the cancellation of the interim measures will be requested if the applicant does not initiate proceedings on the merits before the court in good time.
- 3.3 The defendant requests that the applicant not be provisionally ordered to pay the costs of the proceedings for interim measures.
- 3.4 The applicant must pay the defendant appropriate compensation for all damages incurred as a result of these interim measures.

FACTUAL AND LEGAL POINTS OF CONTENTION

- A. Opt-out after the application for interim measures has been filed; lack of jurisdiction for the proceedings on the merits (action for justification)
- B. Clarification of the question of infringement by interpreting claim 2 of the patent in suit
- C. Question of urgency of the interim measures applied for
- D. Question of the objected nullity of the dispositive patent

REASONS FOR THE DECISION:

As a result, the application for interim measures must be denied.

A.

Following the initiation of the proceedings in question on 27 June 2023, the applicant filed an application on 6 July 2023 to make use of the exemption under Rule 5 VerfO. In a submission dated 24 August 2023, it then filed an application to remove the opt-out from the register (Rule 5A of the Implementing Regulation). It argued that the patent attorney who had carried out the opt-out was not authorised to do so.

The Registrar's decision on the request to remove the opt-out is still pending.

The application for interim measures is admissible irrespective of the application submitted by the applicant to utilise the exception under Rule 5 of the Rules of Procedure. However, it has the effect that the opt-out of 6 July 2023 is invalid (see Rule 5(6) of the Rules of Procedure). The Vienna Local Division of the Unified Patent Court remains competent to decide, also for subsequent proceedings on the merits (action for justification).

The applicant was no longer able to make use of the exception under Rule 5 of the Regulation because it had previously filed a request for interim measures before the Unified Patent Court. This request is to be subsumed under the term "action" within the meaning of Rules 5 and 5A of the RP (or Art 83 (3) UPCA). This results on the one hand from the English and French language versions of the CPR ("action"). Under

The term "action" covers both proceedings which are referred to in German as Klage and those which have provisional measures as their object. On the other hand, the same becomes clear by looking at Art 32(1) UPCA: Both the English and French language versions of the UPCA refer to "actions" as infringement, declaratory and nullity actions, etc. (see Art 32(1)(a), (b) and (d) UPCA). (see Art 32 para 1 lit a, b and d UPCA) as well as in Art 32 para 1 lit c UPCA of "actions for provisional and protective measures and injunctions" or "les actions visant à obtenir des mesures provisoires et conservatoires et des injonctions". Therefore, if Rules 5 and 5A RP and Art 83(3) UPCA use the term "action" without further concretisation, this also includes - according to the wording - interim injunction proceedings.

This result also corresponds to the meaning and purpose of the aforementioned regulations. The blocking mechanism means that the pending court proceedings can no longer be removed from the jurisdiction of the court. This not only makes sense in terms of procedural economy, but also prevents an "opt-out" from being declared, for example, to prevent an imminent negative outcome of the proceedings. Otherwise, the "opt-out declarants" are free to dispose of the court proceedings as they wish and to withdraw from them.

This result is supported not least by Rule 265 of the Rules of Procedure, which also applies as a general procedural rule to applications for interim measures. Accordingly, an action or an application for interim measures cannot be withdrawn without further ado, but the withdrawal must be authorised by the court. This does not occur if the other party has a legitimate interest in the court deciding on the action. If a "Opt-out" also possible after the application for interim measures is pending, this could circumvent the requirements for withdrawing an action/application by removing the proceedings from the court.

B.

Clarification of the question of infringement by interpreting claim 2 of the patent in suit

The patent describes a method and a device for producing milk foam with an adjustable temperature. The production of milk foam, i.e. a relatively stable mixture of milk or milk substitute and air or gas, which is optionally heated, is generally known and used in a variety of ways in various coffee machines.

The systems known in the prior art for producing milk foam of varying temperature generally comprise (see also the description of the patent in suit) a feed pump for drawing milk or generally the liquid to be foamed from a container and conveying it through a pipe system to an outlet. Furthermore, an air supply device, for example an adjustable air supply device, and a temperature control device are provided for controlling the temperature of the milk or the milk/air mixture to an adjustable temperature as required. [0009]

In general, an initial foaming step takes place when air is fed into a milk flow, which produces a coarse, polydisperse pre-foam. In order to produce a monodisperse foam that is as homogeneous as possible, pressure boosting elements or throttling devices or resistance passage elements are known, which are set up to produce a foam from a milk-air mixture by generating counterpressure, in which the air disperses in the form of bubbles with a certain size distribution. Instead of a pressure-boosting element, a mixing element can be provided, which divides the flowing stream into partial streams and mixes the partial streams in such a way that a milk foam is produced [0010].

Against the background of the state of the art described in this way, the patent for disposition formulates it as a task and invention to provide a method and a device for producing milk foam with an adjustable temperature, whereby the consistency and quality of the foam produced is improved in a simple manner, irrespective of the temperature, compared to the known methods and devices [0011].

This problem is solved by a method for producing milk foam according to claim 1 and by a device according to claim 2 [0013]. The device according to claim 2

is subdivided into the characteristics according to the breakdown given at the beginning (page 4 of the decision).

In view of the parties' positions in the proceedings, it had to be examined whether feature (i) (*[the] inner diameter of the pipe (16) upstream and of a pipe section (34) downstream of the throttle device (32) are different*) is also realised in the challenged embodiment of the defendant in accordance with the literal meaning (both parties rightly did not deny that the subject-matter of the infringement fulfils the other features). In particular, the nature and length of the *pipe section (34), which is arranged downstream of the throttle device*, was disputed in this context in accordance with the patent.

Since claim 2 as such does not make any mandatory specifications for the length of this line section, the interpretation of the patent claim is required for further concretisation. The scope of protection of a European patent is to be determined on the basis of Art 69(1) EPC together with the Protocol on the Interpretation of Art 69 EPC in conjunction with Art 24(1)(c) UPCA. Accordingly, the scope of protection of the patent is determined by the content of the patent claims, for the interpretation of which the description and the drawings must also be taken into account. In this respect, the interpretation of the patent claims serves not only to eliminate any ambiguities, but also to explain the technical terms used therein and to clarify the meaning and scope of the invention described therein. The patent description is the source material for determining the technical teaching that is protected by the patent claim. This form of interpretation combines adequate protection for the patent proprietor with sufficient legal certainty for third parties. The aspect of legal certainty requires that interested third parties are able to recognise whether a contemplated, planned or already realised specific embodiment falls within the scope of protection of the patent claim.

The starting point for determining the scope of protection of the patent in suit is the fact known to the relevant skilled person - an engineer with a technical college or university degree who has specialised in the manufacture of coffee machines and their accessories and has several years of experience in this field - that the milk foam produced for mixing with coffee is particularly advantageous in terms of the consistency and quality of the milk foam produced if the bubbles are particularly fine and uniform.

The person skilled in the art understands from the patent that a counterpressure is generated in the milk/air mixture on the pressure side of the pump by the throttle device. This optimised compression of the milk/air mixture produces a fine-pored foam. This is based at least in part on the effect of the counterpressure generated by the downstream throttling device in the continuous flow heater, which counteracts the formation of larger air bubbles in the milk/air mixture to be heated [0015]. The patent also states that the flow heater, which is designed as a thick-film heater with an electrical resistance element whose temperature can be regulated, is arranged on the pressure side of the pump and the throttle device is arranged downstream of the flow heater, and the inside diameter of the line upstream and of a line section downstream of the throttle device are different. This arrangement according to the invention ensures that the back pressure generated in the throttle device has a favourable effect in the instantaneous water heater. In particular, finer air bubbles can also be achieved in the heated milk/air mixture. The arrangement of the throttling device downstream of the instantaneous water heater according to the invention generates a counterpressure in the latter, so that the air or gas bubbles present in the heated milk/air mixture cannot expand unhindered. The resulting foam has finer pores [0020].

The patent teaches that the production of a high-quality, fine-pored foam is based on a coordinated interaction of pump, throttling device, pipe cross-section and pipe length, whereby the pressure conditions downstream of the throttling device are particularly important for the foam quality, whereby the pressures are in a range between 4 and 15 bar [0024].

With this in mind, the patent for the invention describes in more detail the properties of the lines that are considered necessary to produce high-quality foam. For this purpose, the diameter of the flow cross-section at the throttling point is in the range from 0.5 to 2 mm [0022]. Furthermore, the patent states that a pipe section is provided downstream of the throttle device, the cross-section and length of which up to the outlet is selected in such a way that the foam quality of the milk foam is further improved. This pipe section represents a kind of calming section in which the air in the milk/air mixture, which can still be present at least partially in the form of large bubbles, is dispersed into fine bubbles. In addition, the pipe section downstream of the throttling device also influences the

flow of the milk/air mixture, which still has partially turbulent portions, in which the laminar portion of the flow of the mixture is increased [0026]. This calming section is specified in the patent in that this pipe section is designed with a constant internal diameter, which is different from the internal diameter upstream, and extends over a length of between 0.5 m and 2 m, preferably at approx. 1.5 m. The patent in suit considers this length to be necessary because, according to the patent, a gradual pressure drop with a small pressure difference per unit length takes place in this pipe section [0026].

The person skilled in the art understands from the patent description that the interplay between the throttling device and its average thickness, the thick film heater and the length of the calming section is precisely what is important for achieving the patent's objective of producing particularly fine milk foam. The skilled person further notes that the calming section in the patent in suit is defined by its function in the production of the improved milk foam. It has a gradual pressure drop with a small pressure difference per unit length. The patent description specifies the term of the line section (34) in such a way that it extends over a length of between 0.5 m and 2 m, and preferably has a length of approx. 1.5 m. The person skilled in the art recognises that, according to the teaching of the patent in suit, a corresponding length is important so that the desired pressure drop occurs, which in turn leads to improved milk froth.

On this basis, the Senate (as well as the applicant) assumes that the pipe section (34) is intended to form a calming section that also influences the flow of the milk/air mixture. In order to achieve the desired "c a l m i n g" and

According to the patent description, a "gradual pressure drop" must be present in order to achieve "flow control". What is meant by this "gradual pressure drop" is clear from the patent description. Paragraph [0027] makes it clear that the line section (34) extends over a length of between 0.5 and 2 metres, preferably around 1.5 metres. In this pipe section, there is a gradual pressure drop with a small pressure difference per unit length. The description thus defines functionally and structurally what is meant by a "gradual pressure drop" and is opposed to the applicant's position, which essentially amounts to the line section (34) having no minimum length and consequently any pressure drop, however small, being sufficient to create a stabilising section within the meaning of the

patent. Such an interpretation cannot be reconciled with the above-mentioned technically reasonable interpretation of a person skilled in the art on the basis of the patent description and would not be compatible with sufficient legal certainty for (affected) third parties.

In the understanding of the person skilled in the art, the information on the maximum and minimum length of the cable section serving as a stabilisation section thus contains a length specification that is to be used to interpret the term "cable section" (34). In doing so, the skilled person recognises that the length specification, which is expressed as a number, has a high degree of unambiguity and clarity. This applies in particular because, in addition to a numerically defined maximum value (2 m) and a minimum value (0.5 m), a preferred value of 1.5 m for the calming section is stated as being particularly advantageous. Against the background of the teaching according to the patent, the person skilled in the art will assume that the optimum dispersion of the milk foam can only be achieved if the foam flows through a longer pipe section and "calms down" in this way. The person skilled in the art will not assume that very short sections, which deviate to a considerable extent from the length specifications in the patent description, can achieve the same objective.

Contrary to the opinion expressed by the applicant at the oral hearing, the mention of the numerically defined maximum value (2 m) and the numerically defined minimum value (0.5 m) in sub-claim 8 does not allow the conclusion to be drawn that a very short line section of about 10 cm is also covered by the scope of protection of the patent in claim 2. Dependent (sub)claim 8 concretises (main) claim 2 in accordance with the limits stated in the description. It can be conceded to the applicant that claim 2 is not precisely limited to a length of 0.5 m - 2 m. However, it cannot be concluded that claim 2 has no substantial lower limit. The person skilled in the art generally assumes that minor deviations around the preferred values can still fall within the teaching of the patent. In addition, it understands from the description that such deviations relate to the longer rather than shorter values because the preferred value of 1.5 m indicates the upper end of the range mentioned. In any event, a line section of about 10 cm does not fall within this range.

Based on these premises, the contested embodiment does not have a line section (34) according to claim 2 of the patent in suit. This makes the

embodiment does not make use of its teaching. The knee connector and coupling part of the attacked embodiment, which together have a length of about 10 cm (see figure on page 7), are not a line section (34) according to the patent; feature (i) is not realised. It can be left open whether a knee connector and a coupling part at the end of the line leading to the outlet can be a line section (34) within the meaning of patent claim 2 at all. Even if one were to assume this, the length of this line section does not correspond to the specifications of the patent in suit. The length of about 10 cm is too far removed from the requirements that the patent in suit places on the line section (34); the minimum value of 0.5 m is also clearly missed.

As a result, there is no infringement of the injunction patent and the provisional measures aimed at this are therefore not justified. It is therefore no longer necessary to weigh up the respective interests of the parties.

C. and D.

The clarification of these disputed points could be left open due to the result that there was no patent infringement.

DECISION ON COSTS

Article 69 of the Agreement on a Unified Patent Court provides that the costs of litigation and other costs of the successful party shall, as a rule, be borne by the unsuccessful party to the extent that they are reasonable, up to an upper limit determined in accordance with the Rules of Procedure, unless there are equitable reasons to the contrary.

Rules 150 et seq. of the VerfO determine the procedure for cost assessment proceedings.

The Senate may order interim measures with regard to the application in accordance with rule 211.1 (d) VerfO can order a provisional reimbursement of costs.

Both parties submitted a bill of costs at the end of the hearing, which implies that, depending on the success of the case, they will be awarded the costs listed by them.

have applied for. No agreement was reached on a possible mutual cost rate.

As the applicant did not succeed with her application, the proceedings on the application for interim measures at first instance are terminated with the decision taken in this case, which means that there is no basis for a provisional reimbursement of costs. This is for the reason that the applicant cannot successfully claim the costs of these proceedings as the unsuccessful party, even if the proceedings on the merits are successful. It must therefore finally reimburse the defendant for the costs of the proceedings at first instance.

As the successful party, the defendant has quantified its costs at EUR 25,600. As there are no objections to the appropriateness and reasonableness of the costs listed, which were necessary for the appropriate prosecution of the case, no grounds of equity were raised against the amount, and the defendant has fully prevailed in these proceedings, they were to be awarded (finally) in accordance with the application.

Vienna on 13 September 2023

NAMES AND SIGNATURES

Presiding Judge Schober

Legally qualified judge: Haedicke and Kupecz

for the Deputy Registrar: Clerk Svetly

INFORMATION ABOUT THE APPOINTMENT

The applicant may appeal against this order within 15 days of its notification (Art 73(2)(a), 62 UPCA, Rule 220.1(c), 224.2(b) RP).

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

A certified copy of the enforceable judgment or order shall be issued by the Deputy Registrar at the request of the enforcing party, Rule 69 RegR.