



**Procedural Order
of the Court of First Instance of the Unified Patent Court
delivered on 09/09/2026
(R9.1, R61, R361 and 362 RoP)**

CLAIMANTS

1-BYD Company Ltd

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Represented by Charlotte LE BIHAN

and other representatives from the Law Firm
BIRD & BIRD (France)

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4-BYD France SAS

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5-BYD Automotive GmbH

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6-BYD Mobility GmbH

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DEFENDANT

BMS Innovations, LLC
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Represented by Marie KEUP and other
representatives from the Law Firm WINSTON
TAYLOR (Brussels)

PATENT AT ISSUE

<i>Brevet no.</i>	<i>Proprietor</i>
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EP2937706	BMS Innovations, LLC
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DECIDING JUDGE

Judge-rapporteur

Carine Gillet

LANGUAGE OF PROCEEDINGS: English

ORDER

1. On 19 December 2025, BMSI, the proprietor of the Patent-in-suit, brought an infringement action before the Paris Local Division (UPC_CFI_2070/2025), against seven BYD entities, now six – after it was ruled that the Court had no jurisdiction over BYD UK.
2. On 18 May 2026 and 22 July 2026, respectively, BYD filed its Statement of Defence and a counterclaim for revocation (UPC_CFI_1744/2026) and BMSI filed its reply to the SoD.
3. On 06 July 2026, BYD filed a statement for a Declaration of Non-Infringement (hereafter DNI) (UPC_CFI_2437/2026), which was served to the BMSI's representative on 13 July 2026. In this context, on 17 July 2026, BYD asks the Court to join all three actions. In its comments on 27 July 2026, BMSI has objected to this, pending any objections regarding the DNI.
4. On 13 August 2026, taking the view that Rule R.61.1 RoP had not been complied with, and that this breach could not be remedied, BMSI asks the Court that:
 - (a) BYD's DNI Action should be dismissed under Rule 61(1), 361 and/or 362 RoP and in the alternative under Rule 9 RoP.
 - (b) Alternatively, if the Court does not dismiss BYD's DNI action, it should be stayed under Rule 9 RoP pending conclusion of the following steps or further order:
 - (i) BYD shall provide full particulars of the acts in question to BMSI as required by Rule 61(1)(a) RoP and request acknowledgement of non-infringement;
 - (ii) BMSI shall respond to the request within one month; and
 - (iii) in the event of no acknowledgment of non-infringement by BMSI, BYD shall file its Amended Statement for a Declaration of Non-Infringement.

In addition, BMSI asks respectfully the Court to render a decision on this application prior to the deadline for the BMSI's Statement of defence in the DNI action, expected on 14 September 2026.

5. On 31 August 2026, as requested by the Judge-rapporteur on communication via CMS on 13 August 2026, BYD filed its written comments, asking the Court to dismiss BMSI's application in its entirety, including the alternative request for a stay, in view of Rules 9, 61 (1), 361 and 362 of the RoP and in view of the supporting exhibits.

GROUND FOR THE ORDER

-parties' arguments

6. Referring to R.61.1 RoP and the case law (LD The Hague, 10 October 2025, UPC_CFI_386/2024 HL Display v Black Sheep Retail, paras 6.1-6.2), R 361 and R.362 RoP, BMSI contends that BYD fails to provide one month before filing its action for a declaration of non-infringement, full precise and comprehensive particulars, as required by the first above-mentioned rule, so as to enable the patent holder to assess whether the act in question is non-infringing. The 2-page letter dated 18 May 2026, sent by BYD, contains only limited and inadequate information regarding a 'different battery design' and mentions one exception, namely the plastic rivet, which is not recited in the claim. The letter does not give any explanation about the manufacturing process, the status of the design, the presence of holes in the nickel sheets, the green shape and its functions, compared to the teaching of claim 1. The additional information given in the statement of DNI remains insufficient and demonstrates that BYD failed to provide comprehensive information in its initial letter.

It is irrelevant that BMSI did not reply to BYD's letter sooner, given that the patent holder is under no obligation to do so. BYD's action for non-infringement was brought with a view to disrupting BMSI's defence in the infringement proceedings, five months after the filing of the infringement action.

That's why, according to BMSI, the DNI action must be dismissed for the above-mentioned grounds, or alternatively, because the contents of the statement of DNI differ from the information given in BYD's letter of 18 May 2026, or because the statement of DNI still lacks full particulars of the acts of non-infringement. Allowing the DNI applicant to act in this way would be contrary to the purpose of R.61.1 RoP.

In addition, given to BMSI, the action suffers from an absolute bar, or BYD's approach would lead to abuse of the system and must be declared inadmissible in accordance of R.361 RoP and R. 362 RoP, due to this irremediable defect, or the Court should dismiss the DNI action, by way of procedural order under R.9 RoP.

7. BYD, in its comments dated 31 August 2026, asks for the dismissal in its entirety of BMSI's request, as the latter's arguments are devoid of any merit or alternatively, opposes a stay of the proceedings in the DNI case.

Given to BYD, DNI's action is not manifestly bound to fail, because the present case does not fall within any of the three situations referred to in R.361 RoP (lack of jurisdiction on the part of the Court; an action that is manifestly inadmissible without further examination; an action that is manifestly lacking any basis in law), adding that the question whether any claim has been sufficiently argued and substantiated in a SoC is not a matter to decide under R361 RoP (CoA 18 September 2024, UPC_CoA_265/2024, Volkswagen v NST). This issue requires an examination on the merits and is not manifestly bound to fail.

BYD contests that its letter does not comply with the requirements of R61.1 RoP. Contrary to BMSI's claims, the letter contains information regarding the status of the "Battery Design"; the letter has been sent to the patentee in the context of an infringement action and BMSI had all the information it needed to form its opinion, within one month.

R362 RoP for its part, deals with straightforward procedural issues relating to the principle of res judicata, generating an obvious bar to the proceedings, without there being any need to determine whether there is an absolute procedural obstacle precluding the continuation of the proceedings.

Lastly, BMSI's argument based on an alleged abuse of system is not relevant, because it is in BYD's best interests to protect a product that is under threat of a broad injunction application.

-Court's opinion

8. In accordance with R.61.1 RoP, the Court may make a declaration that the performance of a specific act does not, or a proposed act would not, constitute an infringement of a patent if:
 - (a) that person has applied in writing to the patentee or licensee for a written acknowledgement to the effect of the declaration claimed, and has provided him with full particulars in writing of the act in question; and
 - (b) the proprietor or licensee has refused or failed to give any such acknowledgement within one month.
9. R.361 RoP states: "Where it is clear that the Court has no jurisdiction to take cognisance of an action or of certain of the claims therein or where the action or defence is, in whole or in part, manifestly inadmissible or manifestly lacking any foundation in law, the Court may, after giving the parties an opportunity to be heard, give a decision by way of order".
10. R. 362 RoP states: " The Court may at any time, on the application of a party or of its own motion, after giving the parties an opportunity to be heard, decide that there exists an absolute bar to proceeding with an action, for example because of the application of the principle of res judicata".

11. Pursuant to R61.1 RdP, any person wishing to ascertain whether their acts are likely to infringe a patent must provide, in writing, full particulars of the acts in question, so that the patent holder may make an informed assessment as to whether or not the acts in question constitute infringement and provide an informed response within one month.
12. BMSI disputes the sufficiency and completeness of the information provided by BYD on 18 May 2026 (BB22), a point it had already contested in its reply of 18 June 2026 (BB24).
13. In the case at hand, it is not disputed that BYD, which is being sued for infringement by BMSI, has a legal interest in bringing its claim of non-infringement in respect of products ('Battery Design') which it considers to be similar to those alleged to be infringing ('BYD 12V Starter Battery'), because it faces a threat to its products and has an interest in clarifying its position on this point.
14. The letter of 18 May 2026 sent by BYD to BMSI reproduces a photograph of the 'Battery Design' and describes the product at issue which BYD considers not to infringe and which is described as similar to the products alleged to infringe, except for the absence of a plastic rivet engaged through the hole provided in the nickel sheet; In the letter, BYD refers to the patent, which it considers not to be reproduced by the 'Battery Design' – in particular feature 1.8 ('one or more fastening holes, through which each [nickel sheet] is fixed to the cover of the battery module') – and BYD identifies the acts (letter para .7) which it considers not to constitute infringement.
15. In view of this information, BMSI cannot seriously argue, under R. 61.1 RoP, that it did not have sufficiently precise and comprehensive information to enable it to take a position, given that, on the one hand, BYD's letter of 18 May 2026 was sent in the context of a pending infringement action between the same parties and relating to the same patent, and on the other hand, although claiming to be insufficiently informed, it did not request any further technical information in its response.
16. Moreover, BYD's action for a declaration of non-infringement is not manifestly 'bound to fail' on the basis of R. 361 RoP, as the present case does not correspond to any of the scenarios covered by that provision and, as the Court of Appeal held, this provision is "reserved for clear-cut cases and does not require a full exchange of arguments and evidence or further in-depth analysis" (CoA 21 August 2024 UPC_CoA_363/2025, Microsoft v Suinno; CoA 18 September 2024 UPC_CoA_265/2024, Volkswagen v NST).
17. Indeed, this is not a matter of the Court lacking jurisdiction. The DNI action is not 'manifestly inadmissible', as the ground for inadmissibility is not "clearly recognisable without further examination" (BB1, Unified Patent Protection in Europe, Tillman & Plassman, p. 2419) or "evident, clear and obvious, (...) without the need for in-depth analysis" (LD Lisbon, 26 May 2026, UPC_CFI_850/2026, Shenzhen Transsion v Ericsson).
18. The DNI action is not "manifestly lacking any foundation in law", as BYD fulfils the requirement of R. 61.1 RoP.
19. Nor does the DNI action fall within the scope of R. 362 RoP, which is limited to the scenario of an "absolute bar to proceeding with an action, for example because of the application of the principle of res judicata", meaning an absolute procedural obstacle precluding the continuation of the proceedings (LD Munich, 11 September 2024, UPC_CFI_149/2024

Headwater v Motorola), which is not the case here, where the bar is neither obvious, nor absolute, nor irremediable.

20. The filing of a DNI action, at the same time as a counterclaim for revocation, does not constitute an abuse. It constitutes the exercise of a right, which is, moreover, expressly provided for in R. 77 RoP.
21. For all these reasons, there are no grounds for declaring BYD's DNI action inadmissible. BMSI's requests must be dismissed.
22. Nor are there any grounds for granting the alternative request to order a stay of the DNI action pending the submission of further information by BYD and the response to be provided by BMSI within one month. Indeed, BMSI was in a position to respond or to request further information upon receipt of the letter of 18 May 2026, which it clearly failed to do.

For all these reasons,

The judge-rapporteur

-Rejects the BMSI's request to declare BYD's Declaration of non-infringement inadmissible,

-Rejects the BMSI's alternative request for a stay,

The costs and expenses relating to this request will be dealt with as part of the main proceedings.

Delivered in Paris, on 09 September 2026.

C. GILLET, Judge rapporteur

This decision may be reviewed in accordance with the provisions of R333 RoP.

ORDER DETAILS

UPC number: UPC_CFI_2437/ 2026

Action type: Declaration of non-Infringement

Related case: UPC_CFI_2070/ 2025 and 1744/2026

Date : 09 /09/2026