



Düsseldorf local division
UPC_CFI_1696/2025

Order
of the Court of First Instance of the Unified Patent Court
issued on 12 October 2026
concerning EP 3 802 413 B1

APPLICANT:

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RESPONDENTS:

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2. **Josef Kerner Energiewirtschafts-GmbH**, represented by the managing director Josef
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PATENT APPLICATION:

EUROPEAN PATENT NO. EP 3 802 413 B1

PANEL:

Panel 1 of the Düsseldorf local division

JUDGES:

This order was delivered by the presiding judge Thomas, the legally qualified judge Dr Schumacher as judge-rapporteur, and the legally qualified judge Agergaard.

LANGUAGE OF THE PROCEEDINGS: German

SUBJECT-MATTER: Rule 333 of the RoP – Review of procedural orders

SUMMARY OF THE FACTS:

1. On 21 November 2025, the applicant filed an application for an order to carry out an inspection and to secure evidence at the registered office and production site of the first respondent, as well as at the registered office and on the premises of the second respondent.
2. On 25–26 November 2025, the Düsseldorf local division ordered the measures requested.
3. The inspection and preservation of evidence took place on 26 November 2026. It was carried out on the premises of the second respondent by the expert Harlacher and on the premises of the first respondent by the expert Solf.
4. On the premises of the first respondent, the expert Solf found a unit in a grey container, hereinafter referred to as 'Pilot 1':



Abbildung 75 - Foto des grauen Containers auf dem Betriebsgelände der SYPOX GmbH

5. On 30 December 2025, the experts Solf and Harlacher submitted their detailed description, together with the annexes, to the case file. Pages 65–114 of the detailed description, as well as Annexes L1A–L1D and L2–L12B, relate to the installation ‘Pilot 1’.
6. On 25 December 2025, the first respondent filed an application for a review of the order for inspection and preservation of evidence pursuant to Rule 197.3 of the RoP.
7. The oral hearing took place on 23 March 2026.
8. On the same day, following the hearing, the Chamber ordered that, pending a decision on the application for review, the reactor of the hydrogen production plant might only be opened subject to the prior provision of security in the amount of EUR 500,000.
9. On 4 May 2026, the Chamber confirmed the order requiring the provision of security and, for the rest, dismissed the application for review. No appeal was lodged against this order.
10. Irrespective of the arguments put forward in the examination proceedings under Rule 197.3 of the RoP, the respondents were given the opportunity to assert confidentiality interests. Respondent 1 availed itself of this opportunity by a document dated 2 February 2026 and further submitted arguments in pleadings dated 12 March 2026 and 25 June 2026.
11. On 21 August 2026, the judge-rapporteur instructed the first respondent to redact certain parts of the detailed description. According to the operative part of the order, the redacted detailed description, together with the applicant’s annexes, is to be disclosed, with access restricted to specific individuals. Specifically designated annexes, including those relating to ‘Pilot 1’, are also not to be disclosed. For further details, reference is made to the order of 21 August 2026 (hereinafter: the contested order).
12. Following the contested order, the parties exchanged further pleadings regarding the necessary scope of the Confidentiality Club. Most recently, the first respondent submitted its views on this matter in a document dated 4 September 2026.
13. By a document dated 7 September 2026, the first respondent, represented by a legal representative appearing for the first time in these proceedings, filed an application for the panel to review the contested order.
14. The formal checks for the application for review were completed on 21 September 2026.
15. On 18 September 2026, the judge-rapporteur ordered the release, subject to confidentiality, of the versions redacted by the first respondent for the annexes ‘H-200’ and ‘Pilot 0’. Annex ‘Pilot 1’ is not the subject of this order.

APPLICATIONS BY THE PARTIES:

16. The first respondent requests that,

1. that, pending a decision on the present application for review pursuant to R. 9.1, R. 333.4, R. 335 and R. 336 of the UPC RoP, the implementation of the order of 21 August 2026 be provisionally suspended insofar as it provides for the release of information concerning 'Pilot 1';
2. that the order of 21 August 2026 be amended in accordance with Rule 333.4 of the UPC RoP so that confidential information relating to 'Pilot 1', in particular technical information concerning the electrically heated reformer/e-SMR located there, which the technical documentation of the Technical University of Munich (TUM) identifies as having been manufactured by it, is not disclosed to the applicant;
3. irrespective of the extent to which the application under point 2 is granted, to restrict access to all confidential information to be released pursuant to Article 58 of the UPC Agreement and Rule 262A of the UPC RoP, on the applicant's side, to the applicant's external UPC procedural representatives and to a single, specifically named natural person from the applicant's legal department who does not exercise any technical or other competitive decision-making function.

17. The applicant requests that

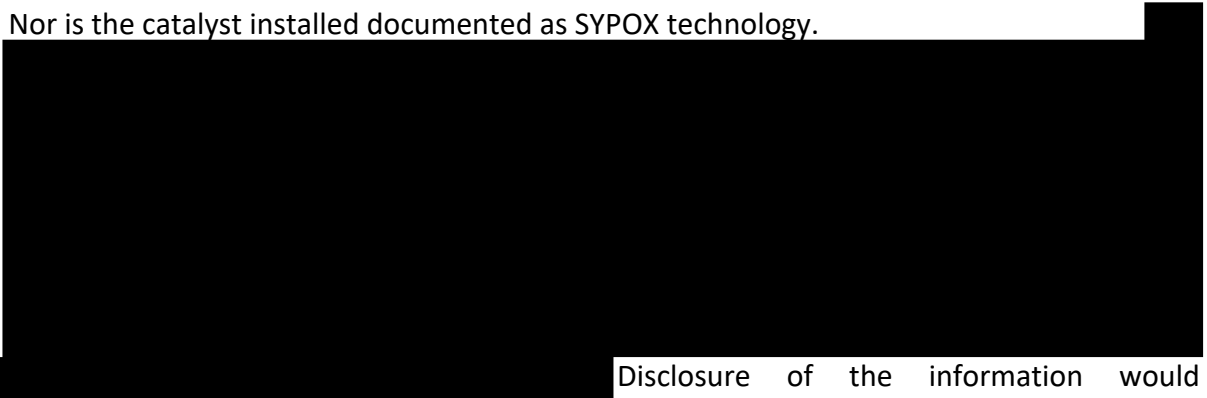
1. that the application for review pursuant to Rule 333 of the RoP filed by the first respondent on 7 September 2026;
2. that the first respondent should not be classified as a small enterprise within the meaning of Commission Recommendation 2003/361/EC of 6 May 2003 and that it should not be granted a reduction in court costs;
3. to grant the following persons access to the unredacted detailed description and annexes relating to 'Pilot 1', as set out in paragraph 1 of the order of 21 August 2026:
 - a) any UPC representative of the applicant in the present proceedings and in future proceedings on the merits against the first respondent and/or the second respondent arising from the patent in suit;
 - b) any external technical expert engaged by the applicant for the purpose of advising the applicant and its UPC representatives in future proceedings on the merits against the first respondent and/or the second respondent, arising from the patent in suit; and
 - c) the following natural persons on the claimant's side:
 - [REDACTED], Technology Product Manager
 - [REDACTED], Senior IP Strategy Counsel,

- [REDACTED] Senior Legal Counsel

FACTUAL AND LEGAL ISSUES:

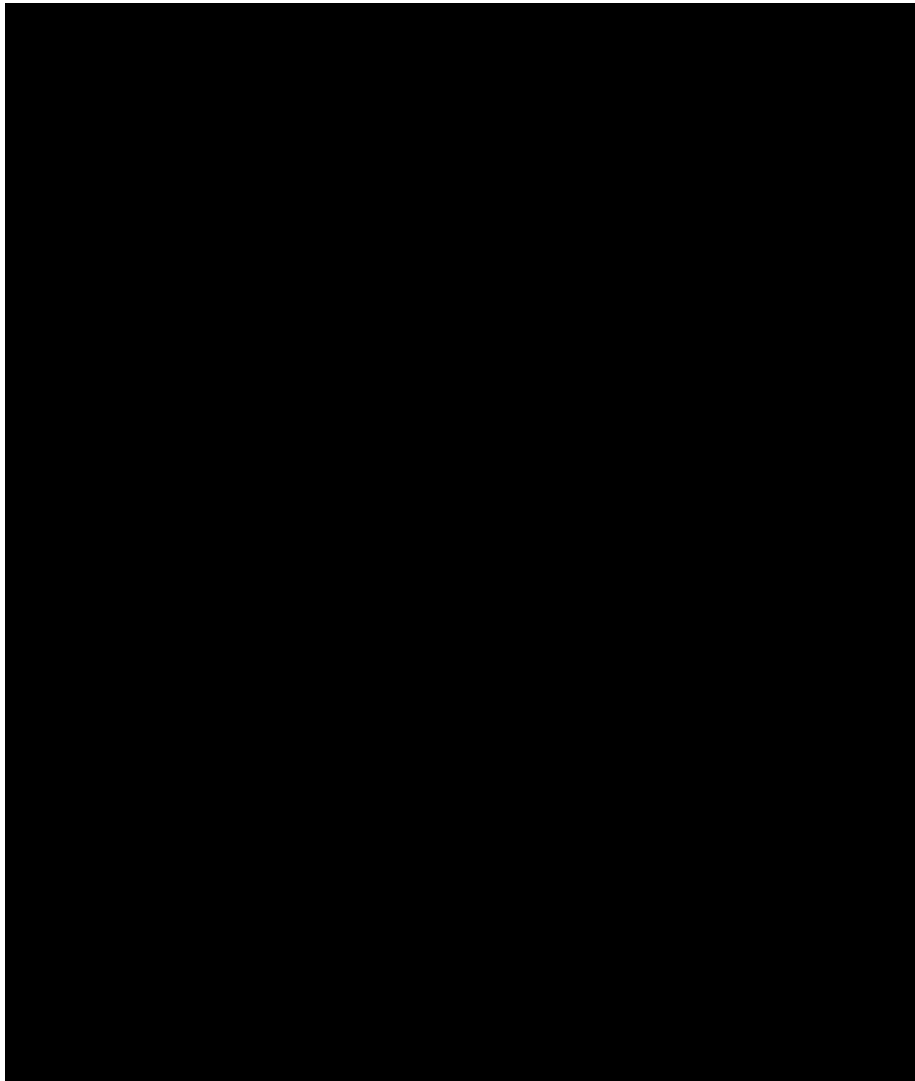
18. The first respondent submits:
19. The contested order confuses the name of the plant with the subject matter of the ordered inspection. It is not decisive that 'Pilot 1' does not bear the designation 'H-200' or 'H-400'. Rather, what matters is that 'Pilot 1' was not a hydrogen production plant within the meaning of the operative part at all, but an experimental plant for the production of syngas.
20. The inspection order of 25 November 2025 covers the installed hydrogen production plant as a complete plant and expressly names the reformer, the water-gas shift (WGS) reactor and the pressure swing adsorption (PSA) unit(s) as its physical components. 'Pilot 1' does not, in fact, fall within this category of facility. The EReTech documents explicitly referred to 'Pilot 1' as an *"e-SMR multipurpose pilot plant"* and listed, amongst other sub-systems, the e-SMR, heat recovery, condensate separation and a *"syngas flare"*. 'Pilot 1' was intended to serve the validation of the reactor and catalyst at TRL 6. It was only on the basis of these trials that the design of a *"small-scale H₂ producing plant"* was subsequently to be developed. This downstream H₂ plant was "Pilot 2", for which a separate inspection order was later revoked. 'Pilot 1' is therefore neither a hydrogen production plant in its own right, nor does Plant D1 feature any of its components as part of a commercial hydrogen production plant.
21. The applicant itself confirmed in its document of 7 August 2026 that 'Pilot 1' was not yet a hydrogen production plant. This is the crucial point: the inspection order does not cover individual components of a hydrogen plant that may be constructed in the future, but rather the hydrogen plant as such, as specified in the operative part.
22. [REDACTED]
23. The actual inspection carried out by the experts cannot retroactively justify the lack of scope in the order. The scope of the court order is not determined by the experts' assessment or approach.
24. Nor had the matter already been decided by the order of 4 May 2026. In that order, the Chamber had expressly distinguished between the question of a possible patent infringement and the preliminary question of whether a plant was 'covered at all by the operative part of the order'. It had deliberately left open, in the context of the examination for bias,

. This distinction is decisive for the present decision on disclosure.

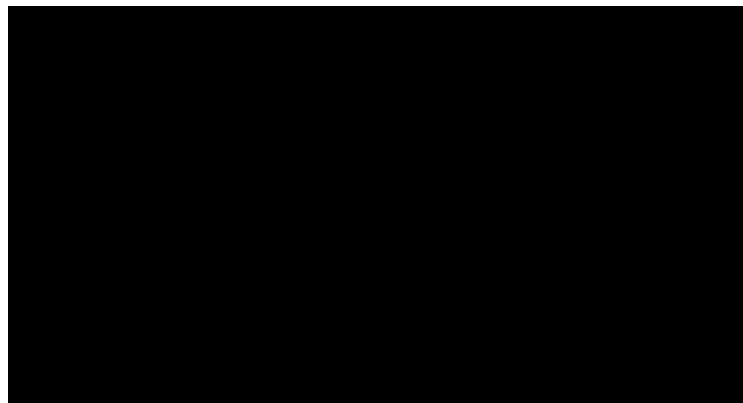
25. The relevance of information on which the disclosure order is primarily based cannot remedy the insufficient scope of the inspection. Information not covered by the wording of the inspection order does not become admissible evidence simply because it is subsequently included in the detailed description or is regarded as relevant to a possible infringement.
26. Finally, the disclosure concerns detailed technical information on an experimental reformer which the experts' detailed description already explicitly attributes to the Technical University of Munich (TUM). In Fig. 107 of the detailed description (p. 88), the 'Technical University of Munich' is explicitly stated under 'Make/Manufacturer' for the 'reactor (e-SMR)'. The designation of the reactor (Annex L3) also identifies TUM as the 'client' and refers to the project as the 'TUM-H2 reactor'. A definitive clarification of the civil law ownership structure is not required in this regard. Article 58 of the UPC Agreement also protects confidential information belonging to third parties.
27. The attribution to TUM is further confirmed by the EReTech documents. For instance, Annex D1 (p. 40) states: "TUM is now building the Pilot 1". WP2 ("Integrated design of the catalytic electrically-heated reactor", p. 9) and WP3 ("Scale-up and validation of the reformer at TRL6", p. 10) were led by TUM, and the deliverable D3.3 "Procurement and construction of e-SMR pilot" (p. 25) was also attributed to TUM. The project documents showed TUM costs of EUR 400,000 for the e-SMR and EUR 394,000 for the remaining prototype costs (p. 40).
28. Nor is the catalyst installed documented as SYPOX technology.

Disclosure of the information would therefore not provide any reliable evidence of a possible patent infringement by the first respondent, whilst at the same time revealing confidential information belonging to a third party not involved in the proceedings and infringing that party's confidentiality interests protected under Article 58 of the UPC Agreement.
29. Nor is this a new argument. Rather, she, the first respondent, had already pointed out in a document filed on 25 June 2026 that confidential third-party information from collaborations and projects had also been obtained during the inspection, and had requested that all information be treated as confidential, irrespective of the scope of the inspection (para. 2, 9, 10).
30. Finally, her own document of 4 September 2026, as the first respondent, does not contradict the aforementioned account. The confidentiality interests asserted therein related to the entire body of information to be disclosed

. This did not imply that all 'Pilot 1' information was technologically attributable to the first respondent. The present classification of the 'Pilot 1' reactor information as TUM-related third-party information specifies its technical origin.

31. The applicant submits:
32. The application, which is based on the alleged ownership of the 'Pilot 1' facility, is precluded by the final and binding nature of the inspection order. The order of 4 May 2026, by which the Chamber rejected the first respondent's objections to the scope of the inspection, has become final and binding. In so far as the first respondent refers to paragraphs 97, 101 and 111 of the order of 4 May 2026, these are elements of the reasoning by which the challenges for bias against the experts were dismissed. The Chamber had therefore specifically not left open the question of whether the 'Pilot 1' facility was covered by the order. Furthermore, the first respondent had already raised the same arguments against the scope of the order – which are now being put forward in the application for review under Rule 333 of the RoP – in the review proceedings under Rule 197.3 of the RoP in pleadings dated 2 February 2026 (para. 61 et seq.) and 12 March 2026 (para. 87 et seq.). These were finally and conclusively decided upon with the rejection of the application for review under Rule 197.3 of the RoP and cannot be raised again 'under the guise' of a review of alleged confidentiality interests.
33. Irrespective of this, the first respondent in the present proceedings for the review of existing confidentiality interests is time-barred from raising arguments concerning alleged third-party interests of TUM in relation to 'Pilot 1' and is therefore prevented, pursuant to Rule 9.2 of the RoP, from asserting further confidentiality interests. It had been given the opportunity by the court to assert confidentiality interests and had done so in its pleadings of 2 February 2026 and 12 March 2026, without referring to TUM's alleged third-party interests. Even in the document of 4 September 2026 – following the issuance of the contested order – no such reference is to be found.
34. In any event, the 'Pilot 1' system is covered by the contested order. Whether the system found bears the designation 'H-200' or 'H-400' is irrelevant, provided that a technical connection can be established with the systems described on the website of the first respondent. Such a connection is already apparent from a comparison of the photograph of the eSMR shown on the first respondent's product page and the 'Pilot 1':



35. Furthermore, the 'Pilot 1' system was located on the premises of the first respondent in Langenbach, where [REDACTED] – the co-founder of the first respondent – willingly provided the expert witness Solf with information about the system. This, too, suggests that the system is connected to the business activities of the first respondent.
36. The 'Pilot 1' plant was predominantly developed and designed by the first respondent. It involves 'SYPOX technology'. This is evident from the plaque on the outer wall of the container, on which the plant is designated as 'SYPOX 250 kW Demo' and the first respondent's logo is displayed:



37. The reference to TUM on the plaque does not negate the liability of the first defendant. It is also irrelevant to whom the costs for the prototype were allocated within the framework of the EU-funded project. The fact that the systems within the framework of the EU-funded project involve Sybox technology is made clear by the project description.
38. It is also irrelevant that 'Pilot 1' does not constitute a complete hydrogen plant. The first respondent itself acknowledges that 'Pilot 1' serves to test an eSMR which is to be incorporated into a plant for the production of hydrogen. There is therefore a clear connection between 'Pilot 1' and the first respondent's hydrogen plants, the patent-infringing features of which are to be examined during the site inspection.

GROUNDS FOR THE ORDER:

39. The application for inspection is admissible, having been filed in due form and within the prescribed time limit, in particular pursuant to Rule 333.2 of the RoP. It also constitutes a 'procedural decision or order' within the broad meaning (see in this regard UPC_CoA_486/2023, order of 21 March 2024, para. 35 – Netgear v. Huawei) of Rule 333.1 of the RoP.
40. On the merits, however, the review by the panel is unsuccessful and does not result in the issuance of an amended order.

I. Scope of the review by the panel

41. The application for review by the panel relates to the disclosure of information to the applicant in so far as it concerns Annex 'Pilot 1'. In so far as the contested order also concerns the disclosure of information relating to Annexes 'H-200' and 'Pilot 0', the application is not directed against it.
42. Furthermore, the classification of the first respondent as a small enterprise (SME) – which has also been discussed between the parties – and the associated question of a fee reduction (see the applicant's application 2) are not the subject of the present order. This will be the subject of a separate review.
43. Finally, the protection of confidential information accompanying the disclosure, in respect of all information to be released, is also not the subject of this order (see Application 3 of the first respondent, Application 3 of the applicant). In so far as this concerns the 'H-200' and 'Pilot 0', a decision on this matter has already been made in the order of 18 September 2026. As regards 'Pilot 1', the release of the information subject to confidentiality will be the subject of a separate order.
44. Since, as just mentioned, the release of the information will take place by means of a separate order following the decision on the application for review, the application to suspend the release pending the decision of the panel (Application 1 of the first respondent) is without merit and requires no decision.

II. Objection: 'Pilot 1' is not covered by the contested order

45. The first respondent objects to the contested order on the grounds that the 'Pilot 1' facility was not the subject of the inspection and site visit order dated 25–26 November 2025.

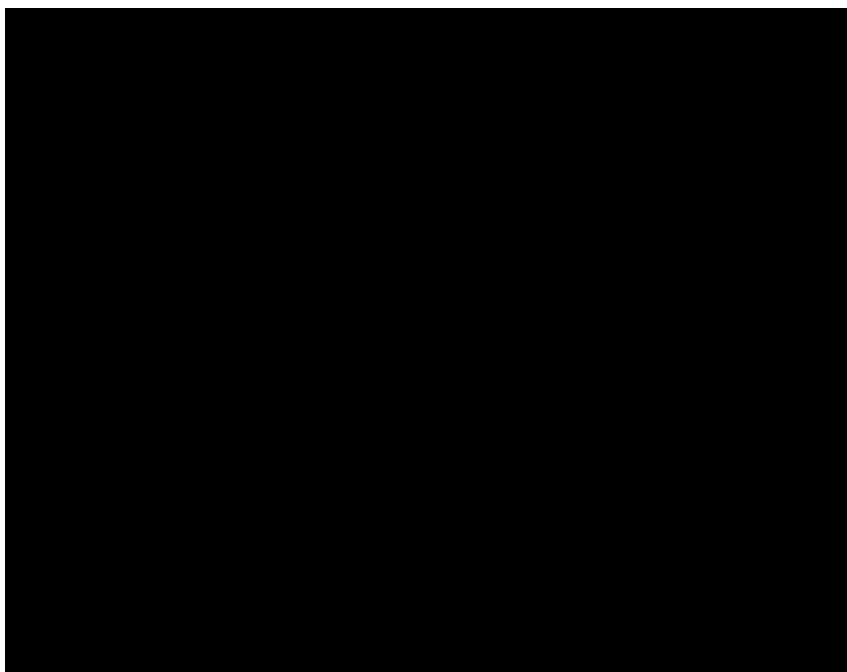
1. Relationship to the examination procedure under Rule 197.3 of the RoP

46. Contrary to the applicant's view, the fact that the order of 4 May 2026, which ruled on the application for examination under Rule 197.3 of the RoP, has become final does not preclude consideration of this objection from the outset.
47. As set out in the order of 4 May 2026 (paragraphs 126–130), the court, in the context of the application under Rule 197.3 of the RoP, examines – with reference to the date on which the order under review was issued – whether it was correct to issue an ex parte order for inspection and preservation of evidence. However, the review does not extend to the enforcement of the order for inspection and preservation of evidence, the outcome of such enforcement, or any information (evidence) obtained during the enforcement.
48. Against this background, in the context of the review of the application under Rule 197.3 of the RoP, there is in principle no scope for the objection that the inspected facility was not covered by the operative part of the order for inspection and preservation of evidence. For this reason, the finality of the order cannot, from the outset, preclude its subsequent consideration in the release proceedings.

2. Interpretation of the operative part of the order

49. On the merits, however, the objection raised by the first respondent is unsuccessful. The panel shares the view of the judge-rapporteur that the 'Pilot 1' plant was covered by the operative part of the order of 25–26 November 2025.
50. The order relates to the inspection of a 'hydrogen production plant, normally designated SYPOX H-200 or SYPOX H-400' and corresponding documents (see sections I.1 and III of the operative part of the order of 25/26 November 2026).
51. The fact that the 'Pilot 1' plant is not designated 'H-200' or 'H-400' does not preclude this. As correctly stated in the contested order, the addition of the word 'normally' makes it clear that such a designation is precisely not mandatory.
52. Since the plant found on the premises of the first respondent in Langenbach did not bear the expressly mentioned designation, an interpretation of the operative part of the order was required. This interpretation was to be carried out by the expert on the basis of all discernible circumstances on site. The court cannot subsequently replace this interpretation with its own assessment, taking into account the parties' submissions. Rather, the court's review is limited to determining whether the expert exceeded the bounds of her discretion in making the interpretation.
53. It cannot be decisive whether the inspection reveals that components are missing which might be necessary for fulfilling the patent claim or for the assessment as a (finished) 'hydrogen production plant'. Nor can it be decisive whether the parties can subsequently provide documentary evidence of the absence of such components. Rather, the assessment must be carried out prior to the inspection and – provided that the limits of the discretion have not been exceeded in the process – must be conclusive.

54. It should also be borne in mind that the very purpose of the inspection and preservation of evidence proceedings is to examine the realisation of all the features of the patent claim. If it transpires that certain components are missing, the result of the detailed description may be a failure to realise a feature. However, a subsequent assessment to the effect that the plant was not covered by the order does not justify this.
55. Furthermore, a different view would mean that the absence of components – and thus also the patent infringement – would still have to be conclusively established during the inspection and preservation of evidence proceedings. However, this would likewise run counter to the purpose of the inspection and preservation of evidence proceedings. The assessment of whether or not a patent infringement has occurred is reserved for the main proceedings.
56. It cannot be concluded that the expert Solf exceeded the limits of her discretion in her assessment that the ‘Pilot 1’ was covered by the order and was to be inspected, exceeded the limits of her discretion. The plant was located at the site in Langenbach expressly mentioned in the operative part and was externally identifiable as belonging to the first respondent, as indicated by the type plate (see Fig. 76, p. 63 of the detailed description):



57. In the detailed description (p. 61 et seq.), the expert Solf described the events on site: According to her account, the co-founder of the first respondent, [REDACTED], was present on site and handed the expert documents relating to ‘Pilot 1’ on a USB stick. [REDACTED] stated that these were documents relating to the ‘Pilot 1’ temporary pilot plant for hydrogen production and that the relevant plant was located in the container found on site. Against this background, the expert reasonably assumed that the ‘Pilot 1’ plant falls within the scope of the operative part of the order.
58. The first respondent argues in its application under Rule 333 of the RoP that ‘Pilot 1’ is an experimental plant for the production of syngas and therefore not a ‘hydrogen production plant’. [REDACTED]

[REDACTED] Consequently, 'Pilot 1' produces syngas, not the purified hydrogen product – which the applicant itself distinguished from syngas in its application for an inspection and which is relevant for hydrogen production. Furthermore, the first respondent emphasises, with reference to Annex D1, that 'Pilot 1' was intended to serve, over approximately 1,500 operating hours, to validate the reactor and catalyst at TRL 6, and that the design of a separate hydrogen production plant – namely 'Pilot 2' – was to be developed only on the basis of these trials.

59. However, with this line of argument, the first respondent does not demonstrate that the on-site experts' assessment—that the plant should be regarded as falling within the scope of the order and should therefore be inspected—was incorrect. It cannot be inferred from the submissions that these circumstances were even apparent before the inspection began. Rather, the fact that, according to the first respondent's submissions, components are missing should be taken as an indication that there is no patent infringement. However, as explained above, this objection is reserved for any proceedings on the merits.

III. Objection: TUM's confidentiality interests

60. The first respondent further argues, in the context of the application under Rule 333 of the RoP, that the information to be disclosed relates to a reformer which is already identified in TUM's detailed description. TUM is referred to therein as the client or manufacturer. The ERe-Tech project documents also confirm this and do not refer to the catalyst as SYPOX technology.

1. New arguments in the context of the application under Rule 333 of the RoP are inadmissible

61. In the context of the application under Rule 333.1 of the RoP, the order in question is 'reviewed by the panel'. This expressly involves a review of an order that has already been issued, not a new set of proceedings.
62. It follows that a statement of facts which not only elaborates on previous submissions but also introduces new facts into the proceedings for the first time cannot, in principle, lead to the issuance of an amended order. Whether a different rule applies if the new facts were not previously known to the defendant or if circumstances have changed in the meantime may be left open. The first respondent does not herself claim that she was previously unaware of TUM's role. On the contrary, she relies on the detailed description itself and on project documents that have already been discussed in the approval proceedings.
63. The fact that the first respondent has appointed a different legal representative for the present proceedings does not, either, justify the submission of new facts. The first respondent must be held responsible for the actions of all its legal representatives. This therefore also applies to the fact that the alleged status as client, manufacturer or 'technology owner' was not raised in the present authorisation proceedings. Even after the contested order was issued on 4 September 2026, the previous legal representative submitted a document concerning the Confidentiality Club, in which he also examined the nature of the information to be disclosed. No mention was made in this document

document. It was not until the present application for review by the new representative, filed on 7 September 2026 (a Monday), that this issue was raised for the first time.

64. There would have been all the more reason to mention this circumstance in the disclosure proceedings, given that TUM's alleged ownership status was the subject of discussion in the proceedings UPC_CFI_1849/2025 concerning the 'Pilot 2' annex, in which the request for examination under Rule 197.3 of the RoP, involving TUM in the proceedings, was heard orally in person. The submission on precisely this point – TUM's position – which the Board deemed insufficient, ultimately led to the annulment of the order made in that case. The legal representative of the first respondent in those proceedings made it clear from the outset that TUM is the owner and operator of the 'Pilot 2' Plant 2.
65. In so far as the first respondent refers to paragraphs 2, 9 and 10 of its document dated 25 June 2026 and argues that reference had already been made therein to the protection of confidential third-party information arising from collaborations and projects, and that this therefore does not constitute new submissions, the panel does not agree. At none of these points is there even the slightest mention of any relevant role played by TUM in the 'Pilot 1' plant – or indeed of TUM at all.

2. Objection on the merits unfounded

66. However, even if the aforementioned objection were deemed admissible, it would not lead to a variation of the order. Even on the basis of the arguments put forward by the first respondent, it remains unclear exactly what role TUM plays in the 'Pilot 1' plant and on what grounds this is supposed to preclude the disclosure of the information as a whole. The first respondent refers to a designation of TUM as 'client' in Annex L3 to the detailed description and to a reference to it as 'make/mannufacturer' in Fig. 107 (p. 88) of the detailed description. Further on, there is mention of an 'association with TUM', which is said to be confirmed by the EReTech documents, for example by the quote "TUM is now building the Pilot 1" (p. 40 of Annex D1). Furthermore, the project documents listed TUM costs in this context. None of this clearly indicates what role TUM played at the time of the inspection of the plant, nor the reasons why this precludes authorisation. If, for example, TUM were – as suggested by application 2 in the present proceedings ('... confidential information concerning "Pilot 2" ... which the technical documentation of the Technical University of Munich (TUM) attributes to ... as the manufacturer ...') – the manufacturer of 'Pilot 2', a clear explanation would have been required as to why this status is said to preclude the disclosure of information.
67. In so far as the first respondent states that a definitive clarification of the civil law ownership structure is not necessary, and that Article 58 of the UPC Agreement also protects confidential information of third parties, this argument is also unsuccessful. The first respondent confines itself to this general objection and does not elaborate further on any confidentiality interests. Given that the parties have discussed the confidentiality interests in detail during the disclosure proceedings, and that the contested order itself deals extensively with the details of the information to be disclosed regarding the 'Pilot 1' annex (pp. 31–46 at the top of the contested order), such a blanket reference is insufficient. The first respondent does not even address the fact that, pursuant to the contested order, certain passages of the detailed description relating to 'Pilot

1’ in the detailed description, as well as certain annexes, are not to be disclosed under the contested order.

ORDER:

The order of the judge-rapporteur dated 21 August 2026 is upheld.

Issued on 12 October 2026 NAMES AND SIGNATURES

Presiding Judge Thomas	Digitally signed Thomas Ronny 9 October 2026 19:13:34 +0200 Unified Patent Court Einheitliches Patentgericht Jurisdiction unifiée du brevet
Legally qualified judge Dr Schumacher	Digitally signed Schumacher Jule Kathrin 12 October 2026 08:54:01 +0200 Unified Patent Court Einheitliches Patentgericht Jurisdiction unifiée du brevet
Legally qualified judge Agergaard	Digitally signed Agergaard Peter Juul 10 October 2026 15:46:10 +0200 Unified Patent Court Einheitliches Patentgericht Jurisdiction unifiée du brevet