

**EIP**

# Coffee machine litigation leads to early defeat for patentee

## **CUP&CINO Kaffeessystem-Vertrieb GmbH & Co. KG v ALPINA COFFEE SYSTEMS GmbH, Order of 13 September 2023[1]**

In a case before the Vienna Local Division, the patent holder, CUP&CINO Kaffeessystem-Vertrieb GmbH & Co. KG alleged that Alpina Coffee Systems GmbH infringed a patent by offering and selling “Alpina Latte” coffee machines in Austria and sought **provisional measures**.

A notable aspect of the case was that shortly after the application for provisional measures was filed, a representative of the applicant had -allegedly without authorisation- filed an **opt-out** request, leading the respondent to argue that provisional measures could not be granted because the opt-out would prevent the applicant from filing a subsequent action on the merits with the UPC.

The Vienna Local Division decided that it was **competent to hear the case** despite the declared opt-out. According to the UPC, the opt-out was ineffective as the present application for provisional measures constituted an “action” brought before the UPC which effectively bars the possibility to opt out (cf. Art. 83(3) of the UPCA, “[u]nless an action has already been brought before the Court a proprietor of ... A European patent ... shall have the possibility to opt out from the exclusive competence of the Court.”, also see R. 5(6) of the Rules of Procedure (“RoP”)). In support of this, the Court referred to the English and French language versions of Art. 32(1) UPCA where the word “action” is used in the same way for both, actions for (non-)infringement (Art. 32(1) (a) and (b)), and actions for provisional measures (Art. 32(1) (c)). It added that the “blockade mechanism” laid down in the aforementioned provisions aimed to achieve that court proceedings

could no longer be removed from the jurisdiction of the court regardless of their type.

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The Local Division, however, **ultimately refused** the request for provisional measures as it did not consider the patent to be infringed.

Another interesting aspect about the case is the **cost setting**: As the applicant failed in obtaining the provisional measures they sought, the court decided that there was no ground (anymore) for a provisional cost reimbursement and therefore finally awarded the procedural costs to the prevailing respondent. In the present case, the defendant estimated its costs at EUR 25,600 and the court had no concerns regarding the appropriateness and reasonableness of these costs.

As the Vienna Local Division refused the request, it unfortunately did not have to decide on another notable aspect of the case, namely the question of under which circumstances the required **temporal urgency** of an application for provisional measures is to be denied.

[1] <https://www.unified-patent-court.org/en/node/480> (in German)