

Decision
of the Court of First Instance of the Unified Patent Court
delivered on 31 Oktober 2024
concerning EP 1 793 917

Headnotes:

1. The claim must not be limited to the scope of preferred embodiments. The scope of a claim extends to subject-matter that the skilled person understands as the patentee's claim after interpretation using the description and drawings. A claim interpretation which is supported by the description and drawings as a whole is generally not limited by a drawing showing only a specific shape of a component.
2. Pursuant to Art. 69(1) S. 1 EPC, the extent of the protection conferred by a European Patent shall be determined by the claims. It is therefore the claim that defines the outer limit of the scope of protection. Nevertheless, the description and the drawings shall be used to interpret the claims. Prior art is not mentioned there. The limitation to the description and the drawings as interpretation material serves the purpose of legal certainty, since the scope of protection can be conclusively determined from the patent itself. This does not mean that prior art is irrelevant to the definition of the scope of the patent and thus to claim construction. If this prior art is discussed in the description of the patent in suit, the relevant considerations must be taken into account. If the patent distinguishes itself from the prior art in a particular way, an interpretation that negates that distinction must be avoided.
3. The right of publication includes a further element of punishment. Publication should therefore only be granted if the protection of the Claimant is not provided effectively and sufficiently ensured by other measures ordered.

Keywords:

Interpretation of claim; preferred embodiments; Gillette-Defense; order of publication of decisions

CLAIMANT:

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DEFENDANT:

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PATENT IN SUIT:

European patent n° 1 793 917

PANEL/DIVISION:

Panel of the Local Division in Düsseldorf

DECIDING JUDGES:

This decision will be delivered by Presiding Judge Thomas, by the Legally Qualified Judge Dr Thom acting as judge-rapporteur and the Legally Qualified Judge Kupecz.

LANGUAGE OF THE PROCEEDINGS: English

SUBJECT OF THE PROCEEDINGS: Patent infringement action

DATE OF ORAL HEARING: 15 October 2024

SUMMARY OF THE FACTS:

The Claimant – who has changed its name into the current name “SodaStream Industries Ltd.” – is the proprietor of European Patent 1 793 917 B1 (Exhibit HL 4, hereinafter: patent in suit) and alleges infringement against the Defendant.

The application for the patent in suit, which claims the priority of the EP 04023182 of 29 September 2004, was filed on 23 August 2005. It was published on 13 June 2007. The mention of the grant of the patent was published on 20 January 2010. The patent in suit has been granted with effect for Austria, Belgium, Finland, France, Germany, Italy and Sweden, where the respective national parts are in force. To date, the patent in suit has not been subject to any invalidity proceedings.

Claim 1 of the patent in suit reads as follows:

„A device (1) for carbonating a liquid (L) contained in a container (10) with a pressurized gas (G) comprising:

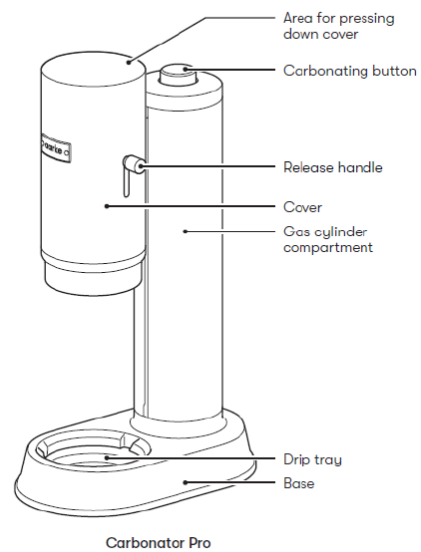
- *a flask (20) for receiving said container*
- *a filling head (30) having means for adding said gas (G) into a liquid (L) in said container (10),*

characterized in that *said receiving flask (20) and the filling head (30) are movable in relation to each other between an insertion position (I) and a carbonating position (C),*

- *wherein in the insertion position (I) the filling head (30) is spaced away from said receiving flask (20) such that said container (10) can be placed in said flask (20),*
- *wherein in said carbonating position (C) a contact surface of said receiving flask (20) and a contact surface (32) of said filling head (30) are in contact with each other to form a substantially closed cavity (9),*
- *and wherein the filling head (30) and the receiving flask (20) are provided with locking means (23, 33) for interlocking connection there between, preferably with a bayonet connection.“*

The Defendant is offering, distributing and importing for this purpose a product of the “Aarke Carbonator Pro” line in various colours (hereinafter: the challenged embodiment) within the territorial scope of the UPCA (including Germany) for which the Claimant seeks protection.

The design of the challenged embodiment is illustrated in exhibits AA 25 and AA 26, which are shown in minimised format below (the labels originate from the Defendant):



In its Statement of claim, the Claimant chose German as the language of the proceedings. However, at the request of the Defendant, the President of the Court of First Instance, by order of 16 January 2024, changed the language of the proceedings from German to English.

The Defendant also requested security for costs, which the Judge-Rapporteur rejected by order of 5 August 2024. The request for a penal review was rejected by the Court by order of 6 September 2024. The Defendant appealed against this order on 23 September 2024. The Court of Appeal has not yet decided on the appeal.

At the oral hearing, the challenged embodiment was demonstrated by the parties and left with the Court by the Defendant as an exhibit.

INDICATION OF THE PARTIES REQUESTS:

The Claimant requests,

- I. to declare that the Defendant has infringed patent EP 1 793 917 B1 by offering, placing on the market, using, importing and possessing for said purposes the products marketed under the name "Aarke Carbonator Pro" within the scope of the UPCA in Austria, Belgium, Germany, Finland, France, Italy and Sweden;
- II. to order the Defendant,
 1. on pain of fine to be imposed for each case of violation, the amount of which is left to the discretion of the court, to cease and desist from
 offering, manufacturing, placing on the market, using, importing or possessing for said purposes, in Austria, Belgium, Germany, Finland, France, Italy and Sweden,
 a device for carbonating a liquid contained in a container with a pressurized gas comprising:

- a flask for receiving said container
 - a filling head having means for adding said gas into a liquid in said container,
- characterized in that said receiving flask and the filling head are movable in relation to each other between an insertion position and a carbonating position,
- wherein in the insertion position the filling head is spaced away from said receiving flask such that said container can be placed in said flask,
 - wherein in said carbonating position a contact surface of said receiving flask and a contact surface of said filling head are in contact with each other to form a substantially closed cavity,
 - and wherein the filling head and the receiving flask are provided with locking means for interlocking connection there between, preferably with a bayonet connection.

(Claim 1 of the Patent-in-Suit),

in particular, sparkling water makers for glass bottles, which are marketed under the name "Aarke Carbonator Pro" as shown below



2. to provide the Claimant with information on the extent to which they have committed the acts referred to in paragraph 1 since January 20, 2010,

stating the following

- a) the origin and distribution channels of the infringing products,
- b) the quantities produced, manufactured, delivered, imported, received or ordered and the prices paid for the infringing products; and
- c) the identity of all third parties involved in the manufacture or distribution of infringing products, manufacturers, suppliers and other previous owners, as

well as commercial buyers and sales outlets for which the products were intended;

3. to surrender at its own expense the products in its direct or indirect possession or ownership referred to in paragraph 1. or – at its choice – to hand them over to a bailiff to be appointed by the Claimant for the purpose of destruction at the expense of the Defendant;
 4. to recall the products referred to in paragraph 1, which have been placed on the market from the commercial customers, with reference to the patent-infringing condition of the item found by the Court and with the binding promise to refund any fees and to assume any necessary packaging and transport costs as well as customs and storage costs associated with the return and to take back the products;
 5. to allow the Claimant, at the Defendant's expense, to publicly announce all or part of the Court's decision in five public media and trade journals of its choice;
- III. to declare that the Defendant is liable to compensate the Claimant for all damage that the Claimant has suffered and will continue to suffer as a result of the acts referred to in paragraph II.1 carried out since February 20, 2010;
 - IV. to order the Defendants to pay to the Claimant provisional damages, the amount of which is left to the discretion of the Court, covering at least the anticipated costs of the damages proceedings on the part of the Claimant and suggesting an amount of at least EUR 250,000.00;
 - V. to order the Defendant to pay the costs of the litigation, including the costs of the relief sought in paragraph II above;
 - VI. to issue with the decision an order for immediate enforcement,
- in the alternative, to permit the Claimant to provide security in the form of a bank or savings bank guarantee in the event that a security is ordered and to determine the amount of the security separately for each claim awarded and for the basic costs decision,
- in the alternative, to allow the Claimant to avert enforcement of the costs against security.

The Defendant requests,

- I. the action be dismissed; and
- II. the Claimant bears the costs of the proceedings.
- III. in the event, the Claimant's request I, to declare that the Defendant has infringed patent EP 1 793 917 B1, is upheld, that the Defendant be ordered to pay pecuniary compensation instead of a permanent injunction, surrender or destruction, and recall as per Claimant's request II 1, 3-4;

- IV. in the event, the Claimant's requests I, to declare that the Defendant has infringed patent EP 1 793 917 B1, and II 2, to provide information, are upheld, that the information to be disclosed, only be disclosed to certain named persons and be subject to appropriate terms of non-disclosure (R. 191 and 190.1 second sentence RoP).

POINTS AT ISSUE:

The parties dispute about different aspects.

Interpretation of the claim

- „receiving flask“

The Claimant argues that an interpretation of the word „flask“ based solely on its literal wording ignores the principle that the patent is its own dictionary and that its terms must be interpreted in the light of the description and the drawings, which must always be used as explanatory aids to interpretation. An interpretation of flask as a bottle with a long neck is contrary to the flasks shown in all the embodiments in the drawings of the patent in suit, which have a neck wider than the base. Moreover, the technical function of the flask is to receive the bottle, which it could not do if it had a long narrow neck like a bottle. The second function of the flask is to serve as a breakage protection. The appropriate size and shape of the flask must be consistent with these functions and result in an improvement over the prior art by providing a flask for bottles larger than 0.33 litres.

Neither the drawings of the patent in suit nor the users' manual of the Claimant's product limit the interpretation of the term flask to a strictly bottle-like shape. Nor does the change in the claim structure to a two-part shape made during the application process allow the features to be interpreted restrictively.

The Defendant argues that the contested patent refers to a "bottle-like receiving unit" when it refers to a receiving flask. The literal origin of the term „flask“ is the latin word „flasco“. Literally, the term is usually used to describe a small container, usually with a wide base and a narrow neck. A synonym for flask is bottle. According to the Defendant, the term refers to an item which has the shape of a bottle and which, moreover, is a stand-alone object intended to store or keep something, i.e. to cover securely and directly a material which is inserted in it. The German translation of the claim is therefore misleading. The ambiguity of the term flask cannot and should not be used to the advantage of the Claimant. An understanding of the term flask in a technically sensible manner is a bucket-like object which is configured to receive, accommodate and hold a substantial part of the container (bottle) such that it serves the intended function of effective anti-burst protection for liquid containers (bottles), in particular those with a volume of more than 0.5 litres. The appropriate size and shape of the flask cannot be interpreted to mean any size or shape. It must be construed to mean a flask-like object which is configured to receive, accommodate and hold a substantial part of the bottle such that it serves the intended function of effective anti-burst protection.

In respect of the grant procedure, publication US 4,610,282 (exhibit AA-21-22) can be used as an aid to interpretation to understand what is meant by a flask for receiving said container. There is shown a casing that receives the bottle, so that the casing corresponds to the flask of the preamble of claim 1, which the Claimant decides to put into a two-part form.

The Defendant's understanding is entirely consistent with the specification of the patent in suit, since it allows the bottle to be genuinely received and to construe the formation of a cavity together

with the filling head, while at the same time providing a breakage protection.

- *„flask and filling head moveable in relation to each other between insertion and carbonating position“*

The Claimant argues that the wording of the claim does not require both parts to be moveable. The phrase „in relation to each other“ cannot be equated with both. A moveable element may be moveable in relation to a fixed element, so that the distance between the two elements may change in relation to each other. The wording of the claim „moveable in relation to each other“ does not prescribe which elements are moveable as long as one of them is. It is to be understood in such a way that both components can be in two positions, the insertion position and the carbonating position. In order to move between the two positions, at least one component must be moveable, because the positions are different in relation to the space between the flask and the filling head: in the insertion position, the filling head must be positioned away from the flask, whereas in the carbonating position, both components must be in contact with each other.

The Defendant argues that the patent in suit clearly claims only one option of moveability of the components flask and filling head. The description shows three options of designs to move: the filling head is designed to move, the receiving flask is designed to move or both are designed to move. The skilled person realises that the claimed feature deals only with the third option. It is clear from the wording that both components are referred to „said receiving flask and filling head are moveable in relation to each other“, using the plural.

- *„in the insertion position the filling head is spaced away from the receiving flask such that said container can be placed into said flask“*

The Claimant argues that the technical function of this feature contains the necessary possibility to safely place the container into the device in a way that it can be used in the carbonating position. Therefore, a tiltable mounted flask is neither necessary nor required by the patent claim or the description as long as there is enough space between the flask and the filling head to place the container into the flask.

The Defendant argues that, in the light of the description and the drawings, a claimed device must be construed in such a way that the receiving flask is tiltable mounted on the stand.

- *„the filling head and the receiving flask are provided with locking means for interlocking connection there between, preferably with a bayonet connection“*

The Claimant argues that the claim is not limited to a bayonet connection. Rather, any interlocking connection performed by locking means of the filling head and the receiving flask is covered by the patent in suit.

The Defendant argues that the patent in suit teaches a direct connection in the form of a bayonet connection, although the claim only states „preferably“. Otherwise, a person skilled in the art would not be able to reduce the claimed invention into practice without unreasonable effort in order to achieve the problems which the patent in suit is intended to solve.

Infringement

The Claimant considers that the challenged embodiment is infringing the patent in suit.

- *„receiving flask“*

The Claimant asserts that the patent in suit does not specify the design of the receiving flask in terms of shape or height. It is only intended to serve as a protection after locking with the filling head. The patent in suit specifies the height of the receiving flask only as a preferred embodiment. The unit of the three components hard plastic ring, rubber seal and drip tray (metal bowl) together constitute the receiving flask as they perform the functions of the receiving flask. It is sufficient for the elements to be stacked on top of each other or to be integral with the base portion.

The Defendant argues that the challenged embodiment does not have a receiving flask. A drip tray, a rubber seal and a plastic ring are fixed to and are integral with the base portion via long screws. The drip tray is an integral part of the base and not a stand-alone component. The burst protection is mainly provided by the cover and the drip tray is not required for the fixed locking of the cover. None of the components has the internal or external shape of the claimed receiving flask. Only the innermost circular section of the drip tray serves to receive the bottle. The plastic ring and the base portion are responsible for holding the cover in place, the drip tray and the rubber are irrelevant for this. Therefore, it is nothing different than the connection of a burst shield to the base portion. Safe protection is primarily provided by the secure anchoring in the base.

The Defendant contests the Claimant's measurement of the challenged embodiment. Since the patent in suit does not refer to height in relation to any liquid-filling part, the measurements are misleading. The height of the drip tray is only about 3 cm. Hence, it cannot accommodate and hold a substantial part of the container so as to serve the function of effective anti-burst protection for liquid containers.

- *„flask and filling head moveable in relation to each other between insertion and carbonating position“*

The Claimant asserts that the challenged embodiment has two fixed positions of its cover, which is the filling head. In the upper position of the cover, the container can be placed in the receiving flask. In the lower position, the filling head is locked to the receiving flask. The filling head can be moved from the upper to the lower position. So, the filling head is movable relative to the flask.

The Defendant argues that only the cover is moveable and the drip tray cannot and shall not be moved in any direction which does not match the teaching of the patent in suit.

- *„in the insertion position the filling head is spaced away from the receiving flask such that said container can be placed into said flask“*

The Claimant asserts that when the cover/filling head of the challenged embodiment is in the upper position, the filling head and the receiving flask (unit of plastic ring, rubber and drip tray) are spaced apart such that the container (glass bottle) can be positioned in the receiving flask.

- *„the filling head and the receiving flask are provided with locking means for interlocking connection there between, preferably with a bayonet connection“*

The Claimant asserts that the challenged embodiment shows the claimed locking means. As can be seen from the figures provided by the Defendant, the two elements get into contact. The cover is clamped under the plastic ring of the base which is an integral part of the flask. The contact surface of the cover has pins as integral locking means and the hard plastic ring is provided with grooves.

After connection, the cavity formed is substantially closed, allowing water and carbon dioxide to

escape as long as glass shards will do not leave the cavity, which they do not.

Finally, the „push-to-lock“ mechanism of the challenged embodiment is to be understood as a bayonet. The Claimant asserts that the contact surface is rotated by the bias into engagement with the receiving connection means of the flask. The locking means of the flask are provided with an inclined side (guide means) so that the rotation takes place automatically without the force of a user. The Defendant describes this locking mechanism in its own patent applications protecting the technology of the challenged embodiment as „a bayonet-fitting manner“ (US 2024/001313 A1, exhibit HL 24) or „similar to a bayonet fitting“ (US 2024/001314 A1, exhibit HL 25; SE 2150296 A1, exhibit HL 26).

The Defendant instead asserts that the challenged embodiment has a non-enclosed cavity and that the challenged embodiment allows for better controlled pressure-relief during a burst the escape of water and gas. In its Statement of defence, the Defendant first stated that the cover of the challenged embodiment will serve as the main burst protection and glass shards will be gathered in the cavity formed by the cover when interlocked with the base of the challenged embodiment. In its Rejoinder, the Defendant however stated that some glass particles may leave the cavity through the thin gap between the base and the cover. Finally, at the oral hearing, the Defendant asserted that small glass particles would escape through the gap.

The cited patents cannot serve as a basis for an alleged bayonet connection of the challenged embodiment. The skilled person will understand „similar to“ not as a bayonet connection, but as similar to such a connection.

So-called „Gillette“-Defense

The Defendant raises the Gillette Defense, but would like to understand it as meaning that there is no literal infringement if patent claim 1 is properly construed and interpreted. According to the Defendant, this means that claim 1 cannot be interpreted so broadly as to cover also the free state of the art corresponding to the base and the moveable cover forming the burst protection. The Defendant has no reason to claim that the patent is invalid.

The Claimant argues that the Gillette defense, which originates from a 1913 UK decision, is not in accordance with the UPCA and is therefore not admissible before the UPC in general or in the present case. Allowing a Gillette Defense would mean that the Division would have to examine whether the asserted claim of the patent in suit is patentable in the light of the prior art. This is contrary to the UPCA which does not provide for a Gillette defense to be raised in infringement proceedings, but for a *numerus clausus* of means – namely revocation action or EPO opposition – if a Defendant wishes to assert that the patent is invalid.

Legal Consequences

The Defendant argues that it acted unintentionally and without negligence, having taken all reasonable actions to prevent infringement of third-party rights prior to the launch of the challenged embodiment. Since the challenged embodiment only targets a small group of design-orientated customers who pay a relatively high price, the ban from the market would not make these customers to purchase the products of the Claimant. The Defendant further denies that the request for infor-

mation is proportionate because it would require the Defendant to provide trade secrets for a dominant company. In the event of an order for disclosure of all or part of the information, the Defendant therefore requests that confidential information is protected by disclosure to certain named persons and that it be permitted to redact any confidential information which is not necessary for the advancement of the Claimant's case. The request for the publication of the decision would only be punitive and should be rejected. The Defendant argues that it did not knowingly infringe the patent in suit and that at least the damages should be limited in accordance with Art. 68(4) UPCA. The Defendant further argues that the Claimant's request for interim award of damages is unsubstantiated.

GROUND:

The action is held admissible and judgement is given in favour of the Claimant.

I. International Jurisdiction and Competence

The Düsseldorf Local Division has international jurisdiction on the basis of Article Art. 7(2) in conjunction with Art. 71b(1) of the Brussels I recast Regulation as the challenged embodiments are offered and distributed (also) within Germany. The Düsseldorf Local Division is furthermore competent according to Art. 31, 32 (1) (a), 33 (1) (a), UPCA.

II. Prior Art and Claim Construction

The invention relates to a device for carbonating water and/or other liquid contained in a container with a pressurized gas.

According to the patent in suit, the claimed invention relates to a device for carbonating water and/or another liquid contained in a container with a pressurized gas (para. [0001]; following paragraphs without citation are those of the patent in suit). Paragraphs [0002] and [0003] describe that carbonating devices which enable carbon dioxide to be dissolved in water are widely used for home applications to prepare carbonated beverages at home. Common carbonating devices are provided with a carbonating head to which a container containing the liquid is sealed prior to the release of carbon dioxide into it. The filling head is connected to a pressurized carbon dioxide cylinder.

As drawbacks of such known devices, paragraph [0004] of the description sets out that in order to establish a good seal between the container containing a liquid and the carbonation head, the container mouth must be brought to the filling head and by such means the two are connected by, for example, screwing one to the other so that a perfect seal is achieved. This manual action is inconvenient and time-consuming according to the patent in suit.

In addition, the description mentions (para. [0005]) that current devices mainly use containers which are made from ductile plastic (e.g. PET) in order to minimize the risks which might result if, upon pressurization of a more brittle material, such as glass, were to shatter. In case of over pressurization of the container, a ductile bottle will expand rather than shatter into many pieces. However, glass bottles are generally preferred because they can be more easily washed, particularly at high temperatures, whereas plastic may very often deform and lose its important physical properties. Glass is also considered more aesthetic. Glass bottles in excess of over 0,33 litre are generally not used by the manufacturers of carbonating devices in view of the risk of bursting in case of over pressurization.

Paragraphs [0006] and [0007] of the description relate to prior art documents US 4,323,090 (exhibit AA 5; hereinafter the 1982 patent) and US 4,342,710 (exhibit AA 11; hereinafter US 710). Therein, it had been suggested to provide a carbonating device with a burst protection shield for the liquid container and with a mechanism for forming a sealing connection between a carbonating head and the container without the need of screwing the bottle into the carbonating head. According to the patent in suit, these solutions have, however, certain drawbacks when used with bottles in excess of 0.33 litre because of the upward and downward thrust caused by the bursting of a larger bottle,

which are sufficiently high to demolish the carbonating device releasing shards of glass from beneath the shield. US 4,342,710 or the 1982 patent do have a certain burst protection. This protection, however, may be ineffective in case of ballistic energy that is released upon the failure of a glass bottle of 0.5 litre volume. In particular, the shield which comes over the bottle, upon the occurrence of a burst bottle, may be lifted upwardly thus opening a gap between the lower end of the shield and the stand of the machine onto which the bottle is placed. Through this gap, glass particles, which are not contained by the protective shield, are likely to be released and injure the user. The locking mechanisms locking the shield to the body of the machine may not be sufficiently strong to protect the components of the carbonating device, especially in the event of an empty bottle failure. Usually, the device is blown apart into many pieces if the bottle has a volume in excess of 0.5 litres.

In US 4,610,282 a security mechanism is included which detects the level of liquid in the bottle and only allows pressuring the bottle when a predetermined level of liquid is present in the bottle.

It is the aim of the invention to overcome the disadvantages of the prior art, especially to provide a carbonating device allowing the use of glass bottles even with a relatively large volume such as 0,5 or one litre. It is another object of the invention to provide a carbonating device allowing easy connection of the container with the device and easy removal of the container from the device. (para. [0009]).

As a solution the patent in suit provides device of claim 1. The claim can be structured by following features:

A device (1) for carbonating a liquid (L) contained in a container (10) with a pressurized gas (G) comprising:

1. a flask for receiving said container (10);
2. a filling head (30) having means for adding said gas (G) into a liquid (L) in said container (10);
3. said receiving flask (20) and said filling head (30) are movable in relation to each other between an insertion position (I) and a carbonating position (C),
 - a) wherein in the insertion position (I) the filling head (30) is spaced away from said receiving flask (20) such that said container (10) can be placed into said flask (20),
 - b) wherein in said carbonating position (C) a contact surface (21) of said receiving flask (20) and a contact surface (32) of said filling head (30) are in contact with each other to form a substantially closed cavity (9),
4. and wherein the filling head (30) and the receiving flask (20) are provided with locking means (23, 33) for interlocking connection there between, preferably with a bayonet connection.

III. Claim construction

The interpretation of several claim features is in dispute between the parties and will be discussed below to the extent relevant for the question of infringement.

1. Basic principles of claim interpretation

According to the case law of the UPC (CoA, order of 26 February 2024 - UPC_CoA_335/2023 App_576355/2023, NanoString Technologies and others v 10x Genomics and others, p. 24; Order of 25 September 2024 – UPC_CoA_182/2024, APL_21143/2024, para 82 et.seq.; CFI CD Munich, UPC_CFI_1/2023, Decision of 16 July 2024, para 6.6) the following principles of interpretation of the patent are relevant:

The claim is not only the starting point but also the decisive basis for determining the scope of the protection conferred by the European patent. The claim must not be interpreted solely on the basis of the literal meaning of the wording used, but the description and the drawings must always be consulted as aids to interpretation and not only to resolve any ambiguities in the patent claim. This does not mean, however, that the claim serves only as a guide and that its subject-matter extends to what is revealed as the patentee's claim after examination of the description and drawings. A feature in a patent claim must always be interpreted in the light of the claim as a whole. From the function of the individual features in the context of the patent claim as a whole, it must be deduced what technical function these features actually have individually and as a whole. The description and the drawings may show that the patent specification defines terms independently and in this respect may represent a patent's own lexicon. Therefore, even if the terms used in the patent deviate from common usage, it may therefore be that the meaning of the terms resulting from the patent specification is ultimately authoritative. The patent claim must be interpreted from the point of view of a person skilled in the art.

2. Skilled person

The skilled person is a person with a degree in mechanical engineering and several years' experience in design of mechanical household devices, with at least 3 years' specific experience in the design of carbonating devices for household use.

3. „receiving flask“ (feature 1) and formed substantially closed cavity (feature 3b)

The skilled person will understand that the receiving flask can be any container of a size and shape which is capable of receiving a (glass) container/bottle and which, together with the connected filling head, is capable of forming a burst protection in case of bursting of the glass bottle. The flask is one of three claimed components (flask, filling head, locking means) contributing to the burst protection. As long as it contributes to the burst protection and a container can be placed into it, the patent does not restrict its design in any other way.

Looking first at the wording of the claim, the mere literal meaning of „flask“ is a bottle-like object with a wide base and narrow neck, such as is often used as a container for chemical experiments. As the invention is not based on chemistry, the skilled person may understand the word „flask“ to literally mean a bottle-like container having a certain height to partially enclose a liquid container, as it is shown as an example in the drawings Fig. 1, 2a-c, Fig. 3b and 3c. However, the skilled person is skilled in the art. It will therefore not stop at the literal meaning. It will determine the meaning of the word "flask" in the context of the patent claim as a whole. In doing so, the skilled person will turn to the technical function of the flask given by the individual feature and in the context of the other features.

Having read the claim in its entirety, the skilled person knows that the flask receives a container containing a liquid for carbonation with a pressurised gas (see feature I). According to feature 3a, the flask must be designed to allow a liquid container to be placed into it. Further, there is a complex

of features describing an interaction with the component flask. In particular, the skilled person learns from feature 3b) that, in the carbonating position C, the receiving flask and the filling head are in contact with each other to form a substantially closed cavity. Feature 4 describes locking means for providing an interlocking connection between the filling head and the receiving flask.

Therefore, the flask fulfils two main technical functions:

- receiving a container containing liquid and
- forming a substantially securely closed cavity in cooperation with the filling head when interlockingly connected to the filling head.

The flask is the third component, in addition to the filling head and the locking means, which contributes to the burst protection in the event of a breaking of the liquid container. The claim does not specify a certain size or a certain height that the flask needs to have. Besides the fact that the flask is designed in a manner that a container can be placed into it, the claim does not require anything more than that the flask contributes to an efficient burst protection. The understanding of the claimed component “flask” is therefore not limited to components having a bottle-like shape, but includes all components capable of receiving a container and forming a (substantially closed) cavity with the filling head.

The general description also supports this understanding of the skilled person. The skilled person is taught that the device is provided with a receiving flask into which a container or bottle may be inserted (para. [0010]). According to para. [0012] the reason, why glass bottles as liquid containers can be used, is that a substantially securely closed cavity is formed. In the event of a bursting, the flask and shroud of the carbonating head – the patent uses this term equally for the filling head (see para. [0010], „a carbonating or filling head“) – form a burst protection. It should be noted that part of the filling head is the shroud as described in the description and shown in the drawings. Therefore, the component filling head (30) is not to be reduced to a single component but includes all components shown, i.e. in Figure 1.

The interrelation between the flask, the filling head and the locking means is also described in paragraph [0014]: By means of an axial interlocking connection between the filling head and the receiving flask, a very secure cavity and thereby a secure anti-burst protection is formed. Because of the direct connection between the flask and the filling or carbonating head in an axial direction, the cavity will resist high internal forces which may be created in case of bursting of the glass bottle. The description explicitly points out that the flask can be of any appropriate size and shape and be designed so as to fit to a receiving platform on the device and to directly interlock with that platform so that it remains in a constant position for the purposes of inserting a container and in a second position during the carbonation process, when it is locked to the shroud of the carbonating head (para. [0015]). Paragraph [0026] refers to the material of the flask by describing a material with dimensions sufficient to withstand internal forces such as to form an anti-burst protection. Stainless steel is cited as an example. In this context, the specific design is at the skilled person’s discretion. In particular, it is neither required that the flask is monobloc nor a stand-alone object or comprising of different components.

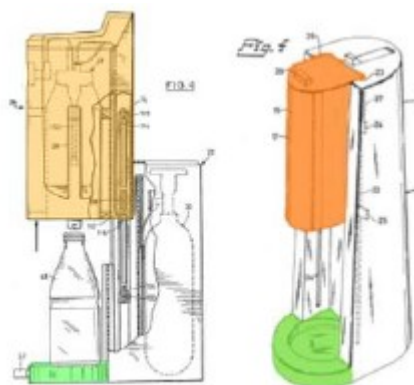
Also, the general description does not prescribe a specific height for the container, which is mandatory to receive a glass bottle and fulfil its protective function. Although paragraph [0016] refers to the fact that the invention is intended or designed for a specific size and type of containers, a specific height of the flask is not claimed in claim 1. Only sub-claim 2 requests a certain height of the flask having „a wall having a height (h) of at least 50% of the height (H) of said container“. This is also in line with a preferred embodiment demanding the receiving flask to be preferably sufficiently high

to contain the container which is inserted to it, e.g. at least 50% of the height of the container (para [0016]). Another preferred embodiment in the drawings shows a flask with a corresponding height to about 70% of the height of the container (see para. [0035], figure 1).

But the claim must not be limited to the scope of preferred embodiments. The subject-matter of the claim extends to what is disclosed as the patentee's claim after examination of the description and drawings. However, the scope of a patent claim must not be limited to the preferred embodiments. The scope of a claim extends to subject-matter that the skilled person understands as the patentee's claim after interpretation using the description and drawings. A claim interpretation which is supported by the description and drawings as a whole is generally not limited by a drawing showing only a specific shape of a component.

Looking at paragraph [0016], therein a preferred embodiment is described according to which a flask should “preferably” be sufficiently high to „contain“ the container which is inserted therein. The skilled person will recognize the broader wording of claim 1, according to which the flask only should only „receive“ the container (feature 1) and the container can be „placed“ into the flask while being moved into the insertion position (feature 3a). The skilled person understands that the receiving flask may need a certain height in relation to the bottle to contain respectively enclose it. But this is not necessary if the flask only needs to receive it and keep it in place. The latter is sufficient according to the claim. Furthermore, the second function of providing burst protection is not achieved solely by the flask itself but always in connection with the filling head and the locking means. So, if the structure of the filling head or its cover is, for example, larger with respect to its size, the flask can be smaller as long both connect in a way forming a cavity together which is substantially closed. From the claim and the general description, the skilled person will understand that the appropriate size and shape of the flask may vary depending on the size and shape of the cover of the filling head. Neither claim 1 nor the general description demand a certain amount of contribution to the burst protection as long as the (overall) burst protection is efficient. By forming the secure cavity together with the filling head, the patent in suit also does not require a specific height of the flask, but a height that allows a bottle to be accommodated and that contributes to burst protection. Whether this contribution to the protection plays only a minor role in the connection with the filling head because of the lower height of the flask, does not matter.

The prior art discussed in the patent does not lead to another interpretation. Compared to the prior art documents patent 1982 and the US 710, discussed in paragraphs [0006] and [0007] of the patent, it is enough that there is a receiving flask which has such a height to receive the bottle and therefore contributes to the burst protection function in cooperation with the filling head. As can be seen in the figures below, the prior art documents only provide bases where the liquid container can be but on but no separate structure into which the liquid container can be placed and which contributes to burst protection as described above.



The left figure 4 is part of the 1982-patent, the right figure 4 is part of the US 710. The figures are taken from the Defendant's PowerPoint presentation, as is the colouring. The use of a(ny) flask which forms an interlocking connection with the filling head and which contributes to burst protection by forming a substantially closed cavity together with the filling head rather than putting the liquid container only on the base station itself, distinguishes the patent in suit from the prior art.

In relation to the 1982 patent and US 710 the patent states in paragraphs [0006] and [0007] that these prior art documents disclose a certain burst protection including a shield which comes over the bottle. This shield may be lifted upwardly thus opening a gap between the lower end of the shield and the stand of the machine onto which the bottle is placed. Through this gap, glass particles, which are not contained by the protective shield, are likely to be released to injure the user. The locking mechanism locking the shield to the body of the machine may not be strong enough to protect the components of the carbonating device. Therefore, the only limitation that the skilled person derives from this is that claim 1 cannot be interpreted as covering a design in which only the filling head acts as a burst protection and the flask does not contribute in any way, resulting in the risk of a gap and glass particles escaping.

As mentioned in the description of the drawings, the cavity does not have to be absolutely gas tight sealed (see para. [0036]). The sealing contact is described as being made in such a way that no glass particles can leave the cavity (para. [0036]). The skilled person will understand that such a substantially closed cavity serves the main purpose to protect the user from flying glass particles in an uncontrolled manner. Compared to the prior art, the described structure avoids that a burst can cause an opening gap of the substantially closed cavity.

Contrary to the Defendant's argument, the Court does not find the fact that the claim is drafted in the so-called two-part form relevant. Apart from the fact that the Court does not rely on the grant procedure as interpretative aid because the procedure is not mentioned in Art. 69 EPC, the Defendant's argument also fails on the merits. Whether or not the patentee chooses to claim the invention in a two-part form, this does not have any implication for the interpretation of the claim with respect to the scope of protection regarding infringement issues. As the claim must be interpreted as a whole, generally every feature – no matter where in the claim structure it appears – has to be taken into account.

4. „flask and filling head are moveable in relation to each other between insertion and carbonating position“ (feature 3)

The claim requires that the receiving flask and the filling head are movable relative to each other between two positions, the insertion position and a carbonating position.

The wording of the claim requires a moveability of either receiving flask or the filling head or both of them. The Court does not agree with the Defendant's opinion that this wording exclusively covers the third option such that both components are moveable in relation to each other. This understanding is not mandatory, let alone that the claim would be limited to specifically the third option, whereby both the receiving flask and the filling head would be moveable. The skilled person will understand that a sole movement of the flask in relation to the filling head or a sole movement of the filling head in relation to the flask is also claimed. It is not necessary to equate the wording „in relation to each other“ with „both“. A moveable element can be moveable relative to a fixed element thus allowing the distance between the two elements to change „in relation to each other“. The technical reason is to change two mentioned positions which are described more in detail in

features 3a) and 3b). In the insertion position, the filling head is spaced away from the flask and the container can be placed into the flask. In the carbonating position, a contact surface of the flask and a contact surface of the filling head are in contact with each other to form a substantially closed cavity. As both positions differ in space between the components either one of each can be moved in relation to each other or both components can be movable to one another. Therefore, the function does not contradict the Court's interpretation either.

This understanding is supported by the description. Paragraph [0011] states that the filling head, the flask or both could be designed to move. The claim is not limited by a preferred embodiment shown in paragraph [0017] and also in [0035] where the flask can be mounted rotatably around an axis which is substantially parallel to the movement direction of the flask and/or of the filling head.

5. in the insertion position the filling head is spaced away from the receiving flask such that said container can be placed into said flask (feature 3a)

The skilled person realizes that the insertion position covers any spacing between the filling head and receiving flask which allows to place a liquid container into the flask. The skilled person will understand that an appropriate spacing depends on the type of the flask and the container used and the skilled person will accordingly not see this feature as any special limitation, particularly not as to the mounting of the flask.

The claim does not specify any special requirements how the filling head respectively the flask has to be mounted to reach the spacing. The patent in suit names embodiments where the receiving flask can be pivotably mounted and interlocked on a place which is tilted in relation to the horizontal plane of the device (para. [0018]). Figure 2b) shows the device in an insertion position where the filling head (30) is arranged in a distance from the receiving flask (20) and the container (10). It is described that if the filling head (30) is in the insertion position, the hinge (26) allows tilting of the receiving flask (20) around the axis B (shown in Figure 1) until the receiving flask gets in contact with an inclined surface (13) of the stand (2) (para. [0042]). However, these arrangements are only examples, some of which are subject of sub-claims (i.g. claim 3 and 4). It follows that claim 1 also covers other possibilities for spacing away the filling head from the receiving flask such that a container can be placed into the flask.

6. „the filling head and the receiving flask are provided with locking means for interlocking connection there between, preferably with a bayonet connection“ (feature 4)

Feature 4 and Feature 3b will not be considered by the skilled person in isolation, but rather in their mutual technical functional context.

The relation between the “interlocking connection” and the “substantially closed cavity” (Feature 3b) is apparent to the skilled person from the technical function of both features as illustrated in the description. Paragraph [0014] explains that by means of an axial interlocking connection between the filling head and the receiving flask, a very secure cavity and thereby a secure anti-burst protection is formed. Because of the direct connection between the flask and the filling or carbonating head in an axial direction, the cavity is able to resist high internal forces which may be created in case of bursting of a glass bottle, even if it is empty.

The cavity formed by connecting the receiving head and the receiving flask is intended to be “secure” so that in the event of a burst, the cavity provides a good protection against glass particles flying around (in addition to paragraph [0014] above, see e.g. par. [0012], “securely closed cavity”, par. [0036] “no glass particles can leave the cavity”).

The Court does not agree with the Defendant’s interpretation of feature 4 as being limited to a connection in form of a bayonet. The skilled person will interpret this feature in accordance with its plain meaning, i.e. that any interlocking connection that is achieved by locking means of the filling head and the receiving flask is covered by the patent (and only preferably a bayonet connection). No technical reason has been put forward as to why the skilled person would see this otherwise. The Defendant’s assertion that otherwise the skilled person cannot reduce the claimed invention into practice without undue burden is not substantiated by any facts. The description to the contrary explicitly mentions in paragraph [0013] that “[o]ther locking means...would be conceivable” and mentions a few examples of such other means. Apart from the bayonet connection, a threaded connection or locking mechanism with a movable latch like element are mentioned in the description (see para. [0015]).

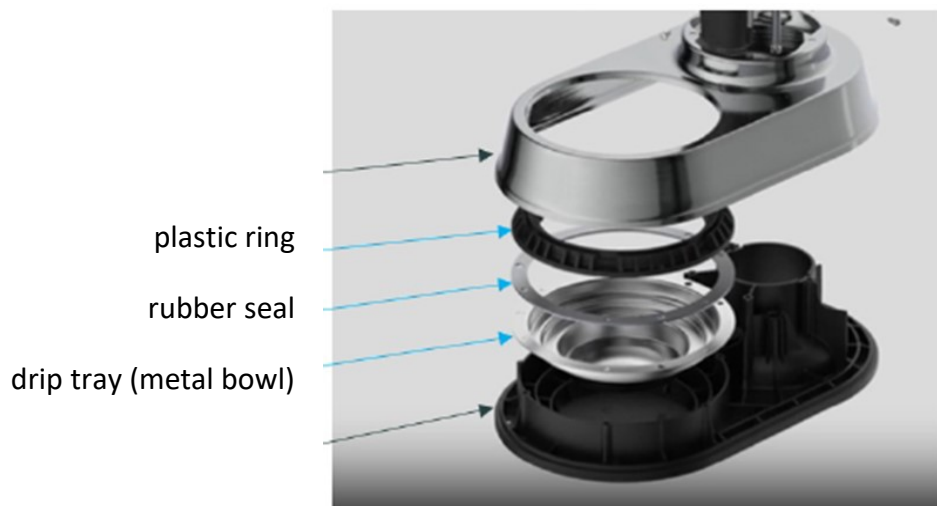
As stated above, the skilled person will realise that the “interlocking connection” is part of overcoming what has been identified as a drawback of the prior art, namely that the locking mechanisms locking the shield to the body of the machine may not be sufficiently strong to protect the components of the carbonating device, in particular in the event of an empty bottle failure (see para. [0007]). From the above, the skilled person will understand that an “interlocking connection” must be “direct”, “in axial direction” and of a nature to allow the formation of a substantial closed cavity.

IV. Infringement

The challenged embodiment makes use of the technical teaching of the patent in suit. The Claimant bears the initial burden of presentation and proof with respect to infringement in the first place. In order to substantially rebut the Claimant’s allegations, it is up to the Defendant to present contradicting facts in a specific and concrete manner.

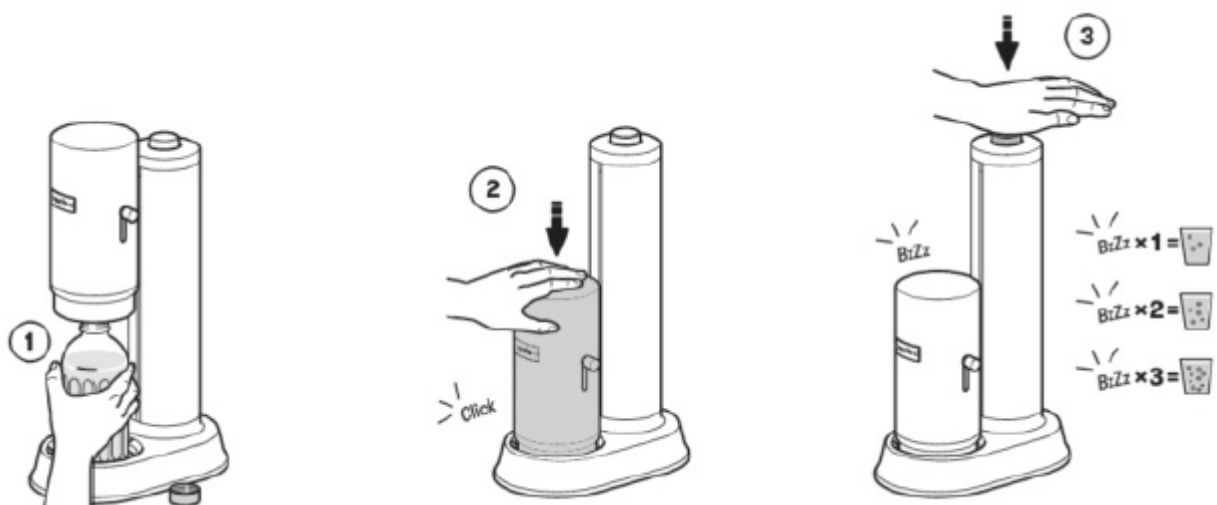
1.

The challenged embodiment comprises a flask for receiving liquid container meaning a glass bottle (feature 1). The slightly reduced image of the attacked embodiment is taken from the statement of claim and labelled by the Court.



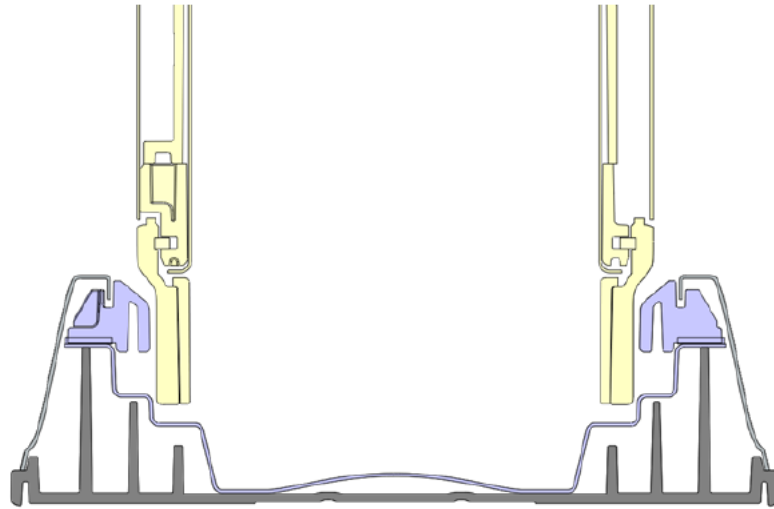
As shown in the exploded view above, a drip tray (metal bowl), a rubber seal and a plastic ring are fixed to and are integral with the base portion of the challenged embodiment. All three parts are fixed to the base portion via long screws which are not shown in this picture. Drip tray, rubber seal and plastic ring together form one unit which forms the receiving flask. It is sufficient that the elements are stacked on top of each other respectively. It does not matter that they are integrally fixed with the base portion. This construction is also present in the challenged embodiments which were used for demonstration at the oral hearing and were left at the Court.

According to the Court's interpretation, the specific height of the receiving flask is not crucial as long as the flask is able to receive a bottle. That is certainly the case and can be seen in the figure 26 (sparkling process) in the User Manual of the challenged embodiment (exhibit HL 16, p. 28; shown below). It is possible to place the bottle in the flask (step 1). In this context, it does not matter that an empty bottle may fall out if someone knocks on it, as was shown in the demonstration during the oral hearing. It is also not relevant for the infringement, that the drip tray as one part of the unit „flask“ also serves the purpose to catch and collect drips or excess water, during the carbonation process.



It can also be seen that both, the flask and the filling head which also has a cylindric cover, are in

contact with each other to form a substantially closed cavity when brought in carbonating position (see step 3; also figure 27, exhibit AA 43).



The filling head has an extension that goes beyond the locking pins. The filling head is in very close contact with the drip tray and the plastic ring (both parts of the flask). The locking pins are in contact with the plastic ring. The extension of the filling head dives deep into the flask. There is only a marginal gap between the filling head and the wall of the drip tray. Therefore, the filling head and the flask are in contact with each other to form a substantially closed cavity. It is undisputed that the the challenged embodiment clearly offers burst protection. As it can be seen on the photo series on the photograph sequence of exhibit AA 44, showing a burst test on the challenged embodiment (displayed in minimised format below), in case of burst there is no upwards-movement of the filling head. It does not affect the infringement that water can get out, because the patent in suit does not require a gas-tight seal, but only a substantially closed cavity.



With respect to function of preventing the release or escape of glass shards, the Court cannot find

that glass particles which can injure the user can escape through the marginal gap. In the oral hearing the Claimant substantially stated in reference to exhibit AA 43 that it is impossible that any glass particles bypass the wall of the drip tray. Even if glass particles bypass the marginal gap they would lose momentum and change direction by finishing their way into the flask.

The Defendant does not substantially rebut this. Even if one might argue otherwise, the statements would have to be rejected because these statements could and should have been made earlier in view of the front-loaded character of UPC proceedings (Preamble RoP 7 and Rule 9.2 RoP).

The Defendant asserted that the device comes with the similar disadvantages as the prior art and referred to its briefs. In the Statement of defence it had stated glass shards will be gathered in the cavity formed by the cover when interlocked with the base of the challenged embodiment. In its Rejoinder the Defendant however stated that some glass particles may leave the cavity through the thin gap between the base and the cover. These are contradicting statements as such. Finally, the Defendant stated for the first time in the oral hearing that small glass particles will escape from the gap without any further explanation or evidence. Considering the front-loaded character of UPC proceedings, as *inter alia* follows from the Preamble of the RoP and Rule 9.2 RoP, the Court disregards this argument as, without justification, it has not been submitted in the proceedings before. At least in the Rejoinder, the Defendant could and should have made this argument and explained it in substance. By raising the argument this late in the proceedings, neither the Court nor the Claimant could prepare adequately which is exactly what the front-loaded character aims to avoid.

2.

The challenged embodiment also realises feature 3. According to the Court's interpretation, it is sufficient if one component is moveable in relation to the other. As can be seen in the picture of the User Manual above in the second step, the filling head is moveable in relation to the flask as it is pushed down from the insertion position (step 1) into the carbonating position (step 2). The filling head is pressed down to the flask. The same could be seen during the demonstration of the challenged embodiment in the oral hearing.

3.

The challenged embodiment infringes feature 3a) as well. When the covered filling head is in upper position (see picture of User Manual above, step 1), the filling head and the receiving flask (unit of plastic ring, rubber and drip tray) are spaced apart such that the container (glass bottle) can be positioned in the receiving flask. The same could be seen during the demonstration of the challenged embodiment in the oral hearing.

4.

The challenged embodiment finally realises feature 4. Given the interpretation of the Court that locking means for a direct, interlocking connection in axial direction that allows the formation of a substantial closed cavity are required, the used spring lock is such a claimed locking means.

The Court cannot find that the „push-to-lock“ mechanism, as put forward by the Claimant, is technically functioning as a bayonet, because the rotation of the contact surface happens automatically without the force of the user by the bias into engagement with the receiving connection means of the flask. Further, the Claimant's argument, that Defendant itself describes the locking mechanism in its own patents as „similar to a bayonet fitting“ (US 2024/001314 A1, exhibit HL 25; SE 2150296 A1, exhibit HL 26) or „as bayonet-fitting manner“ (US 2024/001313 A1, exhibit HL 24), fails due to obvious reasons. As the challenged embodiment did not have to be construed exactly like it is shown in the patents, this deduction cannot be made. In addition, similar or in a manner, is not exactly the same as a bayonet fitting.

However, this does not affect the result of infringement because the bayonet connection is only named as one preferred locking means in the claim.

5.

For this purpose, the Defendant offers, distributes and imports the challenged embodiment within the territorial scope of the UPCA, for which the Claimant seeks protection by this claim.

V. So-called „Gillette-Defence“

The “Gillette-Defence” raised by the Defendant is not successful.

The Court understands Defendant's argument to mean that the claim construction cannot be so broad as to cover the prior art corresponding to the base and movable cover forming the burst protection in the 1982 patent. In particular, Defendant argues that its defence does not entail a comparison between the patent in suit and the patent 1982 but instead, it entails a comparison between the challenged embodiment and the prior art.

In this context, it is important to acknowledge that, pursuant to Art. 69(1) S. 1 EPC, the extent of the protection conferred by a European Patent shall be determined by the claims. It is therefore the claim that defines the outer limit of the scope of protection. Nevertheless, the description and the drawings shall be used to interpret the claims. Prior art is not mentioned there. The limitation to the description and the drawings as interpretation material serves the purpose of legal certainty, since the scope of protection can be conclusively determined from the patent itself. This does not mean that prior art is always irrelevant to the definition of the scope of the patent and thus to claim construction. If this prior art is discussed in the description of the patent in suit, the relevant considerations must be taken into account. If the patent in suit distinguishes itself from the prior art in a particular way, an interpretation that negates that distinction must be avoided. In the case at hand, as it can be seen above, in interpreting the claim, the Court took into account the discussed distinction from the prior art in detail. Therefore, there is no additional room for a Gillette defence understood in the way the Defendant presented it.

VI. Legal Consequences

1. Declaration of Infringement

As it has been pointed out before, the Court finds that the patent in suit is infringed. Upon request the Court will therefore make a declaration of infringement (see Art. 63 (1) UPCA).

2. Injunction

The Applicant is entitled to obtain an injunction against the continuation of the infringement under Art. 25(a) UPCA in conjunction with Art. 63(1) UPCA.

a)

The Defendant is not allowed to continue the commercial activities listed in Art.25(a) UPCA in the Contracting Member States which are covered by the Claimant's request

b)

The Defendant argues that the injunction should be refused on the grounds of disproportionality.

The Defendant asserts that it did not act negligently because the challenged embodiment was an attempt to circumvent the patent in suit, having been aware of the Claimant's US patent and having sought the advice of a patent attorney. The question can be left open whether a non-negligent behaviour can be a reason for considering an injunction to be disproportionate at all. The email of the patent attorney (exhibits AA 3-4) is very brief and only contains legal opinions without any further explanation. This behaviour alone, and the conclusion drawn by the Defendant from it, does not remove negligent culpability. The challenged embodiment could have been exactly designed as the Patent 1982 invention. Instead, the Defendant opted for the actual design of the challenged embodiment, where not only a simple base portion is implemented, but opted for a design that comprises the claimed flask unit, which supports the inserted bottle in a manner to receive it and, together with the filling head, forms a substantially closed cavity to ensure an efficient burst protection.

Moreover, even assuming that both parties address different customers and different markets, this is also not a reason to refrain from an injunction. The patent proprietor has the exclusive right to use the technical teaching protected by the patent in suit. It has a legitimate interest in an injunction in order to create market opportunities for itself. It is irrelevant whether the Claimant can attract customers who normally buy carbonators in higher price segments. Moreover, it does not seem unlikely that the Claimant will win over the Defendant's former customers if it is the only one to sell carbonators for glass bottles which will not injure anyone if they burst. This is all the more true as people nowadays want to avoid PET and plastics for environmental reasons.

Finally, the replacement with a pecuniary compensation requested by the Defendant cannot be issued. The Claimant is able to claim for damages anyway (Art. 68 UPCA, see VI.6). A replacement would result in completely ignoring the right to an injunction which is not justified.

c)

The threat of a penalty payment for non-compliance (Art. 63(2) UPCA) does not give rise to any concerns. This is also true with regard to proportionality. The threat of a penalty payment of up to EUR 250,000.00 per infringement gives the local division the necessary flexibility to take into account the respective circumstances of the individual case, including the behaviour of the infringer, and on this basis to determine an appropriate penalty payment in accordance with Art. 82(4), 2nd sentence UPCA.

3. Information

The right for information is based on Art. 25 (a) UPCA in conjunction with Art. 67 UPCA. The Claimant only desires the presentation of the information, but no presentation of documents. The Defendant does not indicate any valid reason why the order for information is disproportionate. The fact that a patent proprietor usually is a competitor is a common situation in infringement proceedings. The mere fact that the Claimant is an industry dominant party does not change the right for information of the extent of the infringing acts. The fact that this information may be a trade secret is also common in infringement proceedings. Besides that, the Defendant did not substantiate this assertion. It could also be known in the market which suppliers are the Defendant's customers. Therefore, the Court sees no room for a confidentiality order. Furthermore, it is not clear why the Court should grant the possibility of redaction. According to the order, the Defendant is obliged to actively give information. So it can leave out any confidential information which has nothing to do with the infringement case by itself. From the Court's point of view in this case there is no need for a possibility

of redaction.

4. Destruction

As the right for destruction is not substantially disputed by the Defendant, the order finds its basis in Art. 64(2)(e), (4) UPCA.

5. Recall

Since the right for recall is not substantially disputed by the Defendant either, the order finds its basis in Art. 64(2)(b), (4) UPCA.

6. Publication

The Court has exercised its discretion to the effect that it rejects the request for publication pursuant to Art. 80 UPCA. After weighing the interests of both parties, the Claimant's interests are already satisfied by the effects of the other orders made by this decision on the merits.

The right of publication includes a further element of punishment. Publication should therefore only be granted if the protection of the Claimant is not provided effectively and sufficiently ensured by the other measures ordered. This is not the case here. The Court does not agree with the Claimant that the consumer market is not highly sophisticated and that publication is the only way to inform them. There is no indication that there was a greater public interest at stake in this case. Moreover, it is not apparent, nor have the parties argued, that the patent infringement has so far caused any lasting uncertainty among the customers which publication in the public media is intended to remove. On the contrary, it is argued in favour of the Defendant that a smaller group of customers is affected who are interested in higher-priced carbonatores with elaborate design. Therefore, the Court holds that the effect of the other measurements contained in this decision is to protect the Claimant's rights effectively and sufficiently.

7. Damages

The declaration of entitlement to damages on the merits is based on Art. 68(1) UPCA. The Defendant should have been aware, through the exercise of due diligence, that its actions infringed the patent in suit. Reference is made to the remarks in VI.2 b). The question whether the Court can make the order of recovery of profits or the payment of compensation (Art. 68(4) UPCA) now, or whether this has to be done in the second proceedings on the amount of damages, can therefore be left open.

8. Provisional Damages

The Court is entitled to order the Claimant to pay an interim award of damages which will at least cover the expected costs of the proceedings for the award of damages and compensation on the part of the Claimant pursuant to R. 119 RoP.

The Claimant referred to the limit according to the value in dispute and explained in the oral hearing that it orientated itself at Court fees between EUR 20.000,00 and EUR 30.000,00 and attorney fees between EUR 216,000.00 and EUR 423,000.00. The Claimant chooses then EUR 250.000,00 as median figure in between. As the Defendant did not dispute substantially to this, the Court considers the amount appropriate.

9. Costs

Pursuant to Art. 69(2) UPCA in conjunction with Rule 118.5 RoP, a decision on costs should be taken. Since the Claimant lost the case only to the extent of the publication request, which relates to just a small part of it, it is justified to order the Defendant to pay the costs in full. As requested the Court ordered that the Defendant also has to pay the cost that occurred while carrying out the ordered measurements in paragraph II. pursuant to Art. 64 (3) UPCA.

According to R. 152.2 RoP, costs shall be borne up to a ceiling set in accordance with the Rules of Procedure. In the case of an amount in dispute of EUR 3,000,000.00 the schedule of costs adopted by the Administrative Court on 24 April 2023 on the basis of R. 152.2 of the Rules of Procedure provides for an upper limit for reimbursable costs of up to EUR 400,000.00. In so far as the parties mutually recognised a reimbursable amount up to EUR 370,000.00 in the oral proceedings, there are no concerns regarding reimbursability in the procedure for cost decision (R. 150 ff. RoP).

10. Security of Costs

Pursuant to Art. 82(2) UPCA, R. 118.8, s. 2 RoP, the Court may make any order or measure it has to set subject to the provision of security.

a)

As is already clear from the wording of the aforementioned provisions, the Court has discretion in ordering a security, whereby the Claimant's interest in effective enforcement of its property right is to be weighed against the interest in the effective enforcement of possible claims for damages in the event of a later reversal of the judgment. Thus, a case-by-case examination is always required. The factors to be taken into account when considering whether to order a security include the financial situation of the Claimant, which may give rise to a legitimate and real concern that a possible claim for damages cannot be enforced and/or executed, or only with disproportionate effort, if the decision of the court of first instance is set aside or amended. Whether and to what extent such factors are present is to be determined on the basis of the facts and arguments put forward by the parties, in the same way as in the case of an application for security under Rule 158 RoP. If the Court makes an order or measure contingent upon the provision of security, this serves to protect the position and the potential rights of the Defendant. The Defendant's protection must be weighed against the burden imposed on the Claimant by the order for security. In this context, it is incumbent upon the Defendant to present facts and arguments as to why it appears appropriate in the specific case to make the order or measure subject to a security to be determined by the court in accordance with R. 118.8 RoP. If the Defendant has complied with this, it is incumbent on the Claimant to dispute these facts and reasons in a substantiated manner, especially since the Claimant generally has knowledge and evidence regarding his financial situation. It is also incumbent on the Claimant to explain, if necessary, why, despite the reasons put forward by the Defendant, his interest in enforcing his protective right takes precedence over the provision of security (see LD Düsseldorf, Decision of 10 October 2024, UPC_CFI 363/2024 with further references).

b)

After balancing the interests, Claimant's interests prevail. The same reasons apply as for the order for security for costs under Rule 158 RoP. The Claimant is financially able to comply with a claim on damages in case this decision is set aside by the Court of Appeal. It is confirmed by the Defendant that there is no insolvency risk at hand. Further, there is no indication that the Claimant would not comply with a decision regarding potential damages of the Defendant. In contrast, the Defendant did not substantiate its statement that a permanent injunction, recall and destruction would deliver "a severe blow" to the Defendant. This mere statement does not allow the Court to conclude that

the Defendant's interests outweigh the Claimant's interest in enforcement.

DECISION:

- I. The Court declares that the Defendant has infringed patent EP 1 793 917 B1 by offering, placing on the market, using, importing and possessing for said purposes the products marketed under the name "Aarke Carbonator Pro" within the scope of the UPCA in Austria, Belgium, Germany, Finland, France, Italy and Sweden.
- II. The Court orders the Defendant,
 1. to cease and desist from
offering, manufacturing, placing on the market, using, importing or possessing for said purposes, in Austria, Belgium, Germany, Finland, France, Italy and Sweden,
a device for carbonating a liquid contained in a container with a pressurized gas comprising:
 - a flask for receiving said container
 - a filling head having means for adding said gas into a liquid in said container,characterized in that said receiving flask and the filling head are movable in relation to each other between an insertion position and a carbonating position,
 - wherein in the insertion position the filling head is spaced away from said receiving flask such that said container can be placed in said flask,
 - wherein in said carbonating position a contact surface of said receiving flask and a contact surface of said filling head are in contact with each other to form a substantially closed cavity,
 - and wherein the filling head and the receiving flask are provided with locking means for interlocking connection there between, preferably with a bayonet connection,in particular, sparkling water makers for glass bottles, which are marketed under the name "Aarke Carbonator Pro" as shown below



2. in the event of a breach of the order under II. 1., to pay to the Court a penalty of up to EUR 250,000.00 to be imposed for each breach of this order;
 3. to provide the Claimant with information on the extent to which they have committed the acts referred to in paragraph II. 1 since 20 January 2010,
stating the following
 - a) the origin and distribution channels of the infringing products,
 - b) the quantities produced, manufactured, delivered, imported, received or ordered and the prices paid for the infringing products; and
 - c) the identity of all third parties involved in the manufacture or distribution of infringing products, manufacturers, suppliers and other previous owners, as well as commercial buyers and sales outlets for which the products were intended;
 4. to surrender at its own expense the products in its direct or indirect possession or ownership referred to in paragraph II 1. or – at its choice – to hand them over to a bailiff to be appointed by the Claimant for the purpose of destruction at the expense of the Defendant;
 5. to recall the products referred to in paragraph II. 1, which have been placed on the market, from the commercial customers with reference to the patent-infringing condition of the item found by the Court and with the binding promise to refund any fees and to assume any necessary packaging and transport costs as well as customs and storage costs associated with the return and to take back the products;
 6. to pay the Claimant the amount of EUR 250,000.00 as interim award of damages.
- III. The Court declares, that the Defendant is liable to compensate the Claimant for all damage that the Claimant has suffered and will continue to suffer as a result of the acts referred to in paragraph II.1. carried out since 20 February 2010.
- IV. As to the rest of the claims, the action is dismissed.

- V. The Defendant has to bear the costs of the litigation, including the costs of the relief sought in Section II. above.
- VI. The value in dispute is set at EUR 3,000,000.00.
- VII. The ceiling for the reimbursable representation costs is set at EUR 400,000.00.
- VIII. The Orders II.1. and II.2 to II.6. shall be enforceable only after the Claimant has notified the Court which part of the orders it intends to enforce, this notification has been served on the Defendant and a certified translation of the orders in the official language of a Contracting Member State in which the enforcement shall take place has been provided by the Claimant and served on the Defendant.

DETAILS OF THE ORDER:

Main file number: ACT_580849/2023

UPC-Number: UCP_CFI_373/2023

Proceeding: Infringement action

Delivered in Düsseldorf on 31 October 2024

NAMES AND SIGNATURES

Presiding Judge Thomas	
Legally Qualified Judge Dr Thom	
Legally Qulified Judge Kupecz	
for the Sub-Registrar Boudra-Seddiki	

INFORMATION ABOUT APPEAL

An appeal against the present Decision may be lodged at the Court of Appeal, by any party which has been unsuccessful, in whole or in part, in its submissions, within two months of the date of its

notification (Art. 73(1) UPCA, R. 220.1(a), 224.1(a) RoP).

INFORMATION ABOUT ENFORCEMENT (ART. 82 UPCA, ART. 37 (2) UPCS, R. 118.8, 158.2, 354, 355.4 RoP):

An authentic copy of the enforceable decision or order will be issued by the Deputy-Registrar upon request of the enforcing party, R. 69 RegR.

This decision has been read in open Court on 31 October 2024.

Presiding Judge Thomas