

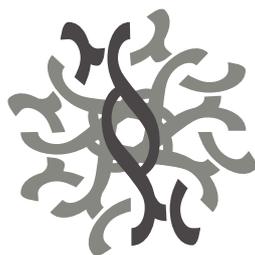


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ECJ rejects „Harnkatheterset“ line of case law of German courts - preliminary injunctions from patents also possible without prior contentious proceedings

Discussion on publication practice of the Unified Patent Court



M I C H A L S K I • H Ü T T E R M A N N
P A T E N T A N W Ä L T E

ECJ rejects “Harnkatheterset” line of case law of German courts - preliminary injunctions from patents also possible without prior contentious proceedings

In a spectacular [decision](#),¹ the European Court of Justice followed the referral of the Munich Regional Court² and ruled that case law requiring prior contentious proceedings for the granting of an interim injunction was not compatible with the Enforcement Directive.

It is spectacular not least because the decision was made in an accelerated procedure, i.e. bypassing the normal procedure in which an opinion is first issued by the Advocate General. Since the submission of the Munich Regional Court, only about 15 months have passed.

This decision overturns the previous line of the German courts, starting with the “Harnkatheterset” decision and further decisions of the LG/OLG Düsseldorf,³ which was subsequently followed by the courts in Mannheim/Karlsruhe⁴ and Munich,⁵ according to which the granting of an interim injunction requires prior successful litigation or at least other indications that the validity of the patent is beyond question.

In its reasoning, the ECJ states that, according to the tenth recital of the Directive, its objective is

Preparation courses for the C- and D-part of the European Qualifying Examination

If the pandemic situation allows, our office will offer two free two-day preparatory courses for the C and D parts of the European Qualifying Examination (EQE) in 2022. The courses will be held on Thursday/Friday, November 24/25, and Saturday/Sunday, December 10/11, 2022. Both courses are identical in content, so attendance at one course is sufficient.

The course content is mainly focused on appropriate exam techniques as well as strategies to avoid mistakes in order to successfully approach the C and D part of the EQE exam with these skills. We have made the experience that well-prepared exam materials significantly increase the chances of success. Therefore, we want to provide the participants with the necessary methodological knowledge in this course. In this respect, the course is to be understood as a supplement to the participants' own preparation of the legal fundamentals of the EPC. Instead, participants will learn how to convert their technical knowledge of the EPC into as many points as possible for passing the C and D parts of the EQE examination. The courses take place in Düsseldorf at our premises in Kaistrasse 16A and are free of charge, language is German. Speakers of the course are Dr. Torsten Exner, Dipl.-Ing. Andreas Gröschel and Prof. Dr. Aloys Hüttermann.

Registration is now possible (please state your full name and employer) at eqe@mhpatent.de.

¹ EuGH Decision of 28 April 2022, C-44/21

² S. cf our Newsletter [2/2021](#), Referral of LG München I in the case 21 O 16782/20 of 19 January 2021, GRUR 2021, 466

³ OLG Düsseldorf, InstGE 12, 114 – **Harnkatheterset**, cf *Böhler*, GRUR 2011, 965 and OLG Düsseldorf, Decision of 30 September 2010 – I-2 U 47/10 – **Gleitsattelscheibenbremse II**, a **critique on this practice is found here**; *Wenzel*, Mitt. 2016, 481

⁴ OLG Karlsruhe, GRUR-RR 2015, 509 – Ausrüstungssatz

⁵ OLG München, Decision of 12 December 2019 - Az. 2 U 4009/19 – Leiterklemme

“ to approximate the legislative systems of the Member States so as to ensure a high, equivalent and homogeneous level of protection in the internal market”⁶

It is true that individual member states could provide stronger measures for property right holders, but not weaker ones. However, this was the case in the present case, because:

“A national procedure aimed at the immediate termination of any infringement of an existing intellectual property right would be ineffective and, consequently, would disregard the objective of a high level of protection of intellectual property, if the application of that procedure were subject to a requirement such as that laid down by the national case-law [asking for a contentious procedure upfront]”⁷

The ECJ points out⁸ that the Enforcement Directive provides for numerous measures to counteract abuse of an application for an interim injunction, viz.

- the possibility of compelling the patent proprietor to proceed to the main action,
- the imposition of security, and
- the remission of damages should the preliminary injunction subsequently be revoked.

In the opinion of the ECJ, all this is sufficient to prevent abuse.

As a result, this overturns a practice of the German courts of instance that has lasted for more than ten years. Although individual courts, including the Düsseldorf courts,⁹ had already previously not always required contentious proceedings as a prerequisite for the granting of an injunction, the hurdle was usually almost insurmountable if this was not the case. Whether and to what extent this will lead to a more generous granting of preliminary injunctions arising from patents remains to be seen, however.

This decision is of great importance to the unitary patent system as well, because in the current version of Rule 209 it is laid down that the UPC, in deciding whether to grant a preliminary injunction, shall consider whether.

“the patent has been maintained in opposition proceedings before the European Patent Office or has been the subject of proceedings before another court;” (Rule 209.2)

Since, according to Art. 20 UPCA, European law takes precedence, this passage is now defused to the point of possible insignificance and it would make sense to delete it entirely in the final version of the Rules of Procedure.

Prof. Dr. Aloys Hüttermann will be a speaker at the 2022 [IPO European Conference](#) on June 10, 2022 in Munich on a session concerning Rule 30 of the Rules of Procedure of the Unified Patent Court.

⁶ Para 37 of the decision

⁷ Para 40 of the decision

⁸ Paras 44-47 of the decision

⁹ Examples are e.g. LG Düsseldorf, Decision of 8 May 2014, 4a O 65/13 (not published) in which an Italian private opinion was deemed sufficient, as well as the preliminary injunction out of the German Utility model DE 20 2007 019 528 U1, cf. <http://www.juve.de/nachrichten/verfahren/2015/06/gebrauchsmuster-ampersand-setzt-fuer-hettich-einstweiliges-verfuegung-durch&/tr>

Discussion on publication practice of the Unified Patent Court

In the course of finalizing the Rules of Procedure of the Unified Patent Court, a discussion has arisen about a possible new version of Rule 262.

So far, Rule 262 provides that, in principle, all submissions, orders and decisions of the court are public unless a party requests that certain passages be excluded from inspection of the file:

„[...]written pleadings, written evidence, decisions and orders lodged at or made by the Court and recorded by the Registry shall be available to the public, unless a party has requested that certain information be kept confidential and provided specific reasons for such confidentiality.”¹⁰

For this purpose, a procedure was envisaged according to which, in particular in the case of own submissions, the respective party was to submit two versions, namely once a complete version and once a version intended for inspection of the files, blackened or otherwise edited. At the request of any third party, it would then be examined whether inspection of the complete version should be granted.¹¹

Now it became known¹² that a change of the rule is planned, according to which judgments are to be anonymized on request, the corresponding passage is to read:

„[decision and orders] shall be available to the public, upon reasoned request to the Registry following, where applicable, anonymisation of personal data within the meaning of Regulation (EU) 2016/679.”

The reason is that since the last version of the Rules of Procedure the General Data Protection Regulation has entered into force and due to the primacy of European law according to Art. 20 UPCA the Rules would have to take this into account. A dispute has now erupted as to what the words “upon reasoned request” in particular mean - does this mean that judgments should in principle only be published upon reasoned request?

The Preparatory Committee has tried to smooth the waters here and in fact the relevant passage - of which it is not yet at all certain whether it will really be included in the rules - can also be read in such a way that anonymization should only take place upon request, otherwise the judgment will be published non-anonymized.

¹⁰ Rule 262.1

¹¹ Rules 262.2 – 262.6

¹² <https://www.juve-patent.com/news-and-stories/legal-commentary/upc-member-states-must-commit-to-maximum-transparency-of-judgments/>

It should be noted that it intended to introduce a Rule 262A, according to which in exceptional cases certain contents of a submission can not only be excluded from the public, but even withheld from the opposing side, so that true “in-camera proceedings” become possible, in which only the representatives of one side are fully informed.¹³

In the end, it remains to be seen what the court practice will be. However, the discussion on this aspect shows that the eminent importance of the Unified Patent Court is now recognized by more and more interested circles. The adoption of the final version of the Rules of Procedure is expected for July 2022.

In our own affairs

We wish your relatives, employees, colleagues and, of course, yourself all the best for the current, still difficult time.

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¹³ *Tilmann* in *Tilmann/Plassmann* Rule 262A for a text and a discussion, cf. also *Hüttermann* GRUR Int 2019, 1148