



# Newsletter Edition 7/2022

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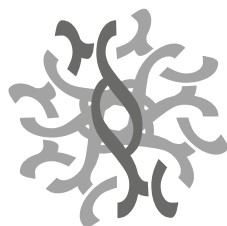
World Trade Organization decides to restrict patents on CoVid-19 vaccines

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BGH (again) on the issue concerning submissions in nullity appeal proceedings “Fahrerlose Transporteinrichtung”

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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 T T O R N E Y S

# World Trade Organization decides to restrict patents on CoVid-19 vaccines

In the course of the [12th Ministerial Conference](#) of the World Trade Organization (WTO) from June 12 to 17, 2022 in Geneva, a restriction of patent rights on CoVid-19 vaccines was decided under the so-called "TRIPS" [agreement](#), for which the WTO is responsible. This so-called "[TRIPS waiver](#)" represents the first restriction of patent rights under the TRIPS agreement and was possible after the EU, which had initially rejected a restriction of patent rights, submitted a compromise proposal.

This "TRIPS waiver" now allows individual member states to amend their national patent laws and to restrict patents on CoVid-19 vaccines, in some cases compulsorily. Some aspects of this agreement are particularly worth mentioning:

- The agreement refers only to developing countries, although it should be mentioned that China, India and South Africa, among others, are listed as developing countries by the WTO. In this regard, there is a passage whereby developing countries that have already established production capacity for CoVid-19 vaccine production are encouraged to make a binding declaration that they will not participate in the waiver; however, this is voluntary.
- The restriction applies to all patents protecting ingredients or processes necessary for the production of CoVid-19 vaccines. Thus, not only direct CoVid-19 patent applications - none of which have been granted yet anyway<sup>1</sup> - are affected, but also patents on precursors.
- The "waiver" is based on Art. 31 TRIPS, i.e. according to Art. 31 (h) a compensation of the patent owners is foreseen, thus it is rather a compulsory license than a general release. However, the compensation shall take into account the specific situation of the respective country

## 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](mailto:eqe@mhpatent.de).

<sup>1</sup> cf. our Newsletter [6/2021](#) and *Storz* Expert Opin. Ther. Pat. 2021, 1177-1188 as well as *Storz* on Qeios, <https://www.qeios.com/read/8QZ8K1>

- The individual member states that make use of the “waiver” are to ensure as far as possible that no re-export of the vaccine takes place; this was an important point at the time when the release of drugs for HIV was being discussed.
- Initially, the waiver applies only to vaccines; at a later date, it will be decided whether patents on diagnostics or therapeutics should also be included.

As a result, the “TRIPS waiver” is less drastic than the one originally proposed by India and South Africa.<sup>2</sup> However, the fact that no patents have yet been granted on a CoVid-19 vaccine seems not to have played a role here either.

It remains to be seen which countries will make use of the “waiver” and to what extent this will have an impact in the end. In any case, this agreement is the first explicit restriction of patent rights under the “TRIPS” agreement and can therefore already be described as historic.

Our firm has again been included in the [list](#) of “Europe’s Leading Patent Law Firms” by the Financial Times.

## BGH (again) on the issue concerning submissions in nullity appeal proceedings “Fahrerlose Transporteinrichtung”

After the recent decision “[Windturbinenschaufelmontage](#)”<sup>3</sup> / “Wind Turbine Blade Assembly”, discussed in our last [newsletter](#), the Federal Supreme Court (BGH) has, in the decision “[Fahrerlose Transporteinrichtung](#)”<sup>4</sup> / “Driverless Transport Device”, again commented in a very short time on the issue concerning submissions in nullity appeal proceedings, this time on the defendant’s side.

In the corresponding nullity proceedings, the Federal Patent Court had expressed its opinion in the qualified note that the patent in suit was patentable. Thereupon, the nullity plaintiff had submitted further documents within the deadline set before the oral proceedings, which led to a maintenance in amended scope.

In response to this, the defendant had in turn submitted further auxiliary motions in the appeal proceedings, and not only with the grounds of appeal, but thereafter. Nevertheless, these auxiliary requests were accepted by the Federal Court of Justice on the following grounds:

- Due to the qualified reference, the defendant had no reason to already submit new auxiliary requests in response to this reference.
- Although the defendant had a duty to examine the newly submitted documents, *“If a large number of technical aspects prove to be potentially relevant in this context, however, it cannot be regarded as negligent without further ado if the defendant failed to take account of a single aspect by its first-instance auxiliary requests.”*<sup>5</sup>

<sup>2</sup> Cf. here <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>

<sup>3</sup> BGH, Urteil vom 15. März 2022 - X ZR 45/20 - Windturbinenschaufelmontage

<sup>4</sup> BGH, Urteil vom 15. März 2022 - X ZR 45/20 - Windturbinenschaufelmontage

<sup>5</sup> Headnote b) of the decision

The Federal Court of Justice considered this to be the case here.

- Based on the course of the oral proceedings, the defendant would actually have had the duty to submit new auxiliary motions already in the statement of grounds of appeal. However, the Federal Court of Justice took these new requests into account because they did not delay the resolution of the legal dispute.<sup>6</sup>

As a result, the patent was upheld on a limited basis due to one of the newly submitted auxiliary requests.

In this respect, the decision deviates from the general line of the Federal Court of Justice, according to which each party must respond to a new factual situation at the next opportunity.<sup>7</sup> This would have been the grounds of appeal in this case. The fact that the Federal Court of Justice also accepted auxiliary requests at a later date thus represents a generous concession to the patent proprietor. Whether and how this will become a new practice remains to be seen; for the time being, patentees will be well advised to assume that this is an exception and thus to react at the very next opportunity.

## 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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<sup>6</sup> Headnote c)

<sup>7</sup> cf *Hüttermann*, Mitt. 2017, 193.