
Preliminary injunction proceedings in Germany: Equality of arms and hearing the respondent – German Federal Constitutional Court, orders dated September 30, 2018, 1 BvR 1783/17, 1 BvR 2421/17

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The decisions of the Federal Constitutional Court relate to the involvement of the respondent in preliminary injunction proceedings. Accordingly, the issuance of a preliminary injunction violates the respondent's right to procedural equality of arms equivalent to a fundamental right if the respondent has not been involved beforehand.

1. Regarding preliminary injunctions

A preliminary injunction – as opposed to principal proceedings – allows for fast enforcement – sometimes within a few days, depending on the case – in particular of the claim for injunctive relief. In the field of intellectual property, this is particularly relevant if infringing products are exhibited at a trade fair or launched on the German market for the first time.

2. Previous preliminary injunction practice

A request for issuance of a preliminary injunction is usually immediately presented to the Presiding Judge after receipt by the court. If the initial examination of the request by the court yields that it only has a low prospect of success, the court usually informally informs the applicant of this by telephone and recommends withdrawing the request or, if applicable, further substan-

tiating the submission or demonstrating it to the satisfaction of the court. In case of withdrawal of the request, the court fees are significantly reduced and the respondent is not informed of it. This limits the risk for the applicant.

If, after initial examination, the court considers the request justified, there are two alternatives: On the one hand, it can issue a preliminary injunction without hearing the respondent first (*ex parte*). To date, this is especially the case in trademark and design matters as well as in trade fair matters. In contrast to this, in matters under patent law, an *ex parte* injunction – in particular according to the case law of the important patent litigation courts of Düsseldorf and Mannheim – generally only comes into consideration in case of uncomplicated facts and circumstances where the infringement is evident and the legal validity is sufficiently certain or where a fast decision is obligatorily required to avert irreparable damage, as the preliminary injunction after hearing the adversary would regularly be too late. The last aspect is particularly affirmed by case law in pharmaceutical cases dealing with the question of patent infringement by early market entry of generics companies. In all other cases, the court as a rule schedules an oral hearing to provide the adversary with the opportunity to comment on the matter (*inter partes* proceedings).



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3. The decisions of the German Federal Constitutional Court

3.1. Facts and circumstances

The subject matters of the decisions of the German Federal Constitutional Court were an order for preliminary injunction by the Regional Court of Cologne as well as a preliminary injunction to print a counter statement by the Higher Regional Court of Hamburg, both in press matters.

In the first injunction proceedings, by its request for preliminary injunction filed with the Regional Court of Cologne, the applicant requested the respondent, a journalistic / editorial research network, to cease and desist from reporting about a supervisory board meeting of the applicant without having issued a warning to the respondent first. The Regional Court granted the request for preliminary injunction without providing a reasoning or hearing the respondent first.

In the second injunction proceedings, the applicant repeatedly requested before the Regional Court of Hamburg that the respondent, a press publisher that reported about letterbox companies of the applicant, be obliged by way of a preliminary injunction to print a counter statement. The applicant did issue a warning to the respondent prior to the proceedings; however, it did not present the respondent's rejection letters to the court. After the Regional Court of Hamburg had rejected the request – without the respondent being informed of this – the Higher Regional Court of Hamburg issued the requested order to print a counter statement

in accordance with the request without first involving the respondent. The respondents respectively filed constitutional complaints against the preliminary injunctions before the German Federal Constitutional Court. The Federal Constitutional Court found for the parties filing the constitutional complaints in both cases.

3.2. Grounds for the decision

As a reasoning, the German Federal Constitutional Court stated that the issuance of the two preliminary injunctions without a prior warning or hearing in court proceedings violates the respondents' right to procedural equality of arms equivalent to a fundamental right laid down in Art. 3 (1) German Basic Law in conjunction with Art. 20 (3) German Basic Law. This principle is further said to be related to the right to a fair hearing pursuant to Art. 103 (1) German Basic Law, which represents a specific manifestation of the procedural equality of arms.

According to the court, the principle of procedural equality of arms, which also applies in press law and freedom of speech, requires that the court hears the adversary prior to finding for the plaintiff and hence gives it the possibility to affect the imminent court decision. It further stated that a previous hearing could only exceptionally be dispensed with if it were to obstruct the purpose of the preliminary injunction proceedings. As an example of this, the Constitutional Court mentioned the seizure procedure according to the principles of the German Code of Civil Procedure, the ordering of custody or apart-

ment searches. However, the German Federal Constitutional Court emphasized that the principle of procedural equality of arms does not obligatorily require an involvement of the respondent in an oral hearing. It explained that in preliminary injunction proceedings, a sufficient involvement of the respondent could also be ensured if the respondent has the possibility to respond to a pre-trial warning if it is, on the one hand, guaranteed that the request (in the second case the printing request) and the reasoning (in the second case the requested counter statement) are identical and, on the other hand, that the respondent's pre-trial responses were fully presented to the court. It is stated that this pre-trial possibility of rendering a statement can also be carried out by filing a protective brief.

Ultimately, the German Federal Constitutional Court found that an involvement of the respondent in conformity with fundamental rights also requires that the court does not only fully and comprehensibly document in the court file potential legal notes which it provides to the applicant, but also that it promptly informs the respondent of these before a decision is rendered.

4. Applicability to the field of intellectual property?

It is questionable whether the decisions of the German Federal Constitutional Court also apply to circumstances in the field of intellectual property. The fact that the German Federal Constitutional Court primarily focused on fundamental rights considerations in this respect, which are not specifically conditioned by press law, militates for this. What militates against this is that, other than in press law, in trademark, design and patent law a claim for provisional seizure of goods infringing intellectual property rights, which secures a possible claim for destruction in subsequent principal proceedings, is principally awarded besides the claim for injunctive relief. In this respect, it is acknowledged by case law that a previous involvement of the respondent could result in the possibility of the respondent removing its stocks concerned, in particular due to a warning, and thus obstructing the purpose of the seizure.

Consequently, it is to be awaited whether and how the case law of courts of lower instances will transfer the findings of the German Federal Constitutional Court to cases of intellectual property.

Comments

Should the courts assume applicability to the field of intellectual property, this would possibly have a major impact on the previous practice in particular in the field of trademark, design and competition law, as to date, *ex parte* injunctions without previous involvement of the respondent were the rule

in this regard. In this case, courts would – in the absence of a warning – henceforth have to at least hear the respondent first, either in written form or in an oral hearing. Moreover, courts would be obliged to place potential legal notes to the applicant on record and to forward these to the adversary such that the

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adversary would be informed of the pending request for preliminary injunction.

In contrast to this, the impact on the field of patent law is likely to rather keep within limits, as *ex parte* injunctions already have been the exception to date.

As regards trade fair matters, it is to be assumed that the findings of the German Federal Constitutional Court will likely not affect the field of intellectual property, as the German Federal Constitutional Court explicitly found that *ex parte* injunctions are still possible if the purpose of the proceedings is otherwise obstructed. This is assumed to regularly be the case in trade fair matters – in particular international, short trade fairs. Whether this exception also applies to pharmaceutical matters under patent law is assumed to currently still be open. However, in our opinion, an exception is to be made in this regard too, as the infringement of pharmaceutical patents by early market entry of generics companies can generally lead to very substantial and irreparable damage to the patent proprietors (original manufacturers), which can only be effectively prevented by means of issuance of an *ex parte* injunction within a few days after the request for preliminary injunction was filed.

In any event, these considerations would also be in line with the previous established case law of the Higher Regional Court of Düsseldorf, which in these cases assumes an exception to the demonstration to the satisfaction of the court of the sufficient certainty of legal validity of the patent-in-suit.

As regards protective briefs which are merely deposited at the Central Register for Protective Briefs in anticipation and without knowledge of the specific challenge in the request for preliminary injunction, the decisions of the German Federal Constitutional Court are assumed not to have an essential influence. In this context, we still recommend depositing protective briefs if (and only if) there are in fact good arguments for defending against a challenge by the applicant. This approach is assumed to be even more relevant now that the German Federal Constitutional Court has found that an involvement of the respondent in conformity with fundamental rights can be given even if the respondent has filed a protective brief. Consequently, it is to be assumed that courts will still issue *ex parte* injunctions in this case if they do not consider the arguments the respondent brings forward in the protective brief convincing.