

IP Report

Procedural Law



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Procedural right to equality of arms and hearing respondents in preliminary injunction proceedings – German Federal Constitutional Court, decision dated June 3, 2020, case no. 1 BvR 1246/20

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With its decision dated June 3, 2020, the German Federal Constitutional Court (FCC) confirms and consolidates its previous case law, according to which the procedural right to equality of arms – which is equivalent to a fundamental right – is infringed if a respondent is not given sufficient opportunity to comment on the accusations made in a request for a preliminary injunction – possibly prior to the proceedings (cf. decisions by the 3rd Chamber of the 1st Senate of the FCC dated September 30 2018, case nos. 1 BvR 1783/17 and 1 BvR 2421/17).

Moreover, the FCC explicitly clarified that taking into account the response of a respondent to a warning letter issued by an applicant prior to proceedings can only constitute an equal replacement of hearing the respondent in the context of the proceedings for a preliminary injunction if the preceding warning letter covers the entire submission made in the request for the preliminary injunction. The FCC holds that the warning letter and the submission do not entirely coincide, for example, if the request for the injunction responds to the letter of response exchanged prior to the proceedings and brings new arguments, or includes new requests, or if additional and/or clarifying content is subsequently added.

1. Facts of the case

The matter on which the First Senate of the FCC ruled on June 3, 2020 was an *ex parte* preliminary injunction which had been issued by the District Court of Berlin. The District Court had issued an injunction against the respondent in those proceedings without having given the respondent any opportunity to comment on the request for the injunction. The case specifically pertained to a matter covered by the freedom of speech. However, the principles confirmed and defined in more detail in that decision also apply to other legal areas, particularly to IP and copy right law.

Specifically, the dispute between two police trade unions underlying the preliminary injunction related to a statement made in the context of elections to the staff committee of the German Federal Police. The statement in dispute was triggered by the understanding by one trade union that holding upcoming elections as planned would be possible in spite of the COVID-19 pandemic. The factual claims made by the respondent in that context – which were wrong, according to the applicant – caused the applicant to issue a warning letter drafted by an attorney-at-law to the respondent.

The respondent rejected the warning letter by means of an attorney's letter. In addition to content-related arguments (and as a precaution), it submitted that respondents



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in proceedings for an injunction must be heard before a decision is rendered because of the procedural right to equality of arms, according to the case law of the German FCC. Moreover, it deposited a protective brief, making reference, inter alia, to the out-of-court attorney's letter, with the Central Register for Protective Briefs.

On April 22, 2020, the applicant, in turn, requested that the District Court of Berlin issue a preliminary injunction. The request for the injunction did admittedly include the entire content of the warning letter; however, the statement of fact was further supplemented and the arguments which had been asserted in the response to the warning letter were also discussed. A few days later, the applicant made further additions to its request, now also requesting in the alternative that the respondent be ordered to refrain from making other statements which had not been attacked in the warning letter.

The District Court of Berlin issued a preliminary injunction on April 30, 2020, without having heard the respondent. The request for the injunction as originally filed was indeed dismissed, but part of the auxiliary request was granted. The respondent filed an opposition against the preliminary injunction and also submitted a request for the preliminary stay of the enforcement proceedings. In reaction to the opposition, the District Court of Berlin scheduled an oral hearing, but only for July 7, 2020.

The respondent was of the opinion that its fundamental procedural rights were violated by the preliminary injunction and, therefore, filed a constitutional complaint combined with a request for the grant of a

preliminary order by the FCC. Other means of appeal were not available. The abuse of procedural rights by a District Court cannot be appealed to any specialized court, which means that filing a constitutional complaint directly against the preliminary injunction itself was possible in the present case as an exception (cf. decisions of the 3rd Chamber of the First Senate of the FCC dated June 6, 2017, case no. 1 BvQ 16/17, case no. 1 BvQ 17/17, case no. 1 BvR 764/17, case no. 1 BvR 770/17). In this respect, the fact that District Court had not rendered a decision on the opposition and the request for a preliminary stay of the enforcement proceedings by the respondent was not relevant either. The FCC admitted the constitutional complaint on June 3, 2020. The decision of the FCC is also noticeable insofar as it simultaneously ordered that the effectiveness of the preliminary injunction was to be suspended until a decision would be rendered on the constitutional complaint in the proceedings on the merits or until a new decision would be taken by the District Court, or for a period of six months, whichever occurred first.

2. Grounds for the decision

In the grounds for the decision, the FCC first makes reference to its two earlier decisions on the necessity of involving respondents in preliminary injunction proceedings pertaining to matters covered by press law and the freedom of speech (decisions of the 3rd Chamber of the First Senate of the FCC dated September 30, 2018, case no. 1 BvR 1783/17 and case no. 1 BvR 2421/17; see our [IP Report of December 10, 2018](#) as well as our [IP Insights of November 28, 2019](#)). According to the principles laid down in those decisions, the *ex parte* preliminary injunction violated the respondent's proce-

dural right to equality of arms – being equal to a fundamental right – in the present case as well (Art. 3(1) in conjunction with Art. 20(3) German Constitution (Grundgesetz, GG)). This is because, according to said principles, involving respondents generally is required even if the court wants to render a decision without any oral hearing because of a particular urgency. The principles stipulate that hearings prior to a decision may only be omitted in narrowly defined exceptions, namely if a hearing thwarts the purpose of the preliminary injunction. For example, this applies to seizure proceedings under the German Code of Civil Procedure, ordering a custody pending trial, or searches (cf. FCC, decision of the 3rd Chamber of the First Senate dated September 30, 2018, case no. 1 BvR 1783/17, marginal nos. 14 et seqq.).

Additionally, the Court again clarifies:

The purpose pursued by the procedural principle of equality of procedural arms, i. e. granting adversaries their right to be heard and, thus, to influencing the court's decision before a decision, granting a request, is rendered, generally may also be satisfied without an oral hearing. Adequate inclusion of a respondent can, for example, be achieved in that the adversary had the opportunity of commenting on all of the applicant's accusations prior to the proceedings, for example by responding to a warning letter issued prior to the proceedings. For this purpose, however, the entire content of the warning letter issued prior to the proceedings has to coincide with that of the request for the injunction. If, however, the request for the injunction deviates from the warning letter, courts are obligated to

grant the other party the opportunity of commenting on the request. Such opportunity is to be provided, for example, if the request for the injunction is supplemented by an auxiliary request, the line of argument is extended in the request for the injunction, or is presented in an essentially more comprehensive and/or differentiated manner, or if the request replies to the response to the warning letter.

Ultimately, the FCC determines: If, in exceptional cases, a court grants a preliminary injunction without having heard the respondent and if such preliminary injunction is appealed, the court has the particular obligation to schedule prompt oral hearings. The FCC continues that this also applies to the case at hand, even though operations were generally hampered because of the measures for containing the COVID-19 pandemic.

Comments

The FCC further defined the right to equality of procedural arms which does not only apply to cases governed by press law and the freedom of speech: It is a general fundamental right under procedural law which courts also have to adhere to – *ex officio* – in other legal areas, specifically also in intellectual property and copyright law (expressly of the same opinion regarding competition law: Higher District Court of Duesseldorf, judgment dated February 27, 2019, case no. 15 U 45/18, marginal no. 5).

This decision rendered by the FCC further improves the standing of respondents in injunction proceedings in terms of procedural law. According to the present decision, even the deposition of a protective brief does not automatically result in the fact that respondents do not need to be heard prior to a decision on a request for an injunction.

Applicants striving to obtain an *ex parte* decision, will have to demonstrate and argue in even more detail why the purpose of the preliminary injunction would be

thwarted if the respondent was heard before the preliminary injunction is issued. Additionally, applicants will have to pay more attention to warning letters issued prior to proceedings. What seems a bit peculiar in this regard is that applicants will seemingly have to anticipate potential arguments of defense and refute them already in the warning letter, according to the present decision: If arguments of defense included in the response to the warning letter are only addressed in the request for the injunction, the invoked court might feel compelled to give the respondent an opportunity to respond again.

Under no circumstances, however, should the present decision be misunderstood to mean that *ex parte* injunctions will be ruled out *per se* in the future.