

# Provisional measures and the risk of patent invalidity—*Phoenix Contact* and the German approach to interlocutory injunctions

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## 1. Introduction

Developments in the German patent landscape are of high interest to the international patent community. German courts deal with more patent litigation than any other court system in Europe.<sup>1</sup> This is largely because the German legal framework provides for rapid and effective enforcement mechanisms. The bifurcation of the German patent system, for example, prohibits defendants from challenging the validity of a patent in infringement proceedings,<sup>2</sup> thereby allowing courts to hand down judgments on infringement in a comparably short time.<sup>3</sup> Defendants must attack the patent's validity in a different forum with an opposition or an action for nullity.<sup>4</sup> This and other patentee-friendly features<sup>5</sup> create a legal basis which entices patentees to consider litigating their cases in Germany.

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1 For data on the litigation in Germany, the UK (England and Wales), France and the Netherlands and their comparison see K Creemers et al., 'Patent litigation in Europe' [2017] *Eur. J. Law Econ.* 1, 16–33.

2 See already Federal Court of Justice, I ZR 93/57, [1959] GRUR 320, 323–324—*Moped-Kupplung*.

3 Creemers et al. (n 1) 13 ('proceedings before the LG [=regional court] tend to be relatively speedy with the first) oral hearing scheduled after 6–12 months, and judgment 1–3 months after the (second) oral hearing'); H Deichfuß, 'Die Prüfung des Rechtsbestands des Patents im einstweiligen Rechtsschutz. Anmerkungen zum Vorlagebeschluss des LG München I "Rechtsbestand im Verfügungsverfahren"' [2022] GRUR 33, 35 (1 year or less); M Stief and C Meyer, 'Originator vs. Generika—Pharmapatente im Spannungsfeld des einstweiligen Verfügungsverfahrens' [2022] PharmR 425, 426 (12–15 months).

4 In essence, the system allows the filing of oppositions at the respective patent office (German Patent and Trademark Office or European Patent Office) within 9 months after the publication of the grant. Thereafter, one can file an action for validity at the Federal Patent Court.

5 K Creemers et al., 'Invalid but infringed? An analysis of the bifurcated patent litigation system' [2016] *J. Econ. Behav. Organ.* 240–241 (the German bifurcation generates additional costs for alleged infringers and benefits for patent holders); Deichfuß (n 3) 35 (stating that the German patent system is rather patentee-friendly and referring to the bifurcation); RM Hilty and M Lamping, 'Trennungsprinzip—Quo vadis, Germania' in A Bender et al. (eds) *50 Jahre Bundespatentgericht: Festschrift zum 50-jährigen Bestehen des Bundespatentgerichts am 1. Juli 2011* (Carl Heymanns 2011) 255, 272 (bifurcation generates overprotection of patentee).

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## Abstract

- The Regional Court, Munich I referred the German practice in proceedings for interlocutory injunctive relief in cases of patent infringement to the Court of Justice of the European Union (CJEU).
- The referral and the preliminary ruling by the CJEU triggered a controversial discussion in the German patent community.
- This article explains the background to these discussions and addresses the uncertainties as to whether 'Phoenix Contact' will have an impact on the German practice of granting interlocutory injunctions.

The somewhat unusual characteristics of the interlocutory<sup>6</sup> IP enforcement practice, however, can be to the detriment of patentees when enforcing their rights in Germany. Provisional patent injunctions can have a substantial impact on the business of the defendant,<sup>7</sup> and

6 The paper uses the terms interim, interlocutory, preliminary and provisional as synonyms.

7 T Kühnen, *Handbuch der Patentverletzung* (14th edn, Carl Heymanns 2022) G, para 44; R Hauck, 'Hält doppelt wirklich besser? Der Rechtsbestand eines Verfügungspatents und die Vorgaben des europäischen Rechts' [2021] GRUR-Prax 127, 127. See also the reasoning of the Düsseldorf Higher Regional Court: *Harnkathederset* (n 11) para 15; Düsseldorf Higher Regional Court, I-2 U 61/18, [2020] GRUR 272 para 4—*Hydroxysubstituierte Azetidinone*.

patent quality has become a controversial issue in Germany.<sup>8</sup> Studies have pointed out that up to 80 per cent of the patents challenged in German invalidation proceedings are at least partially invalid.<sup>9</sup> Recent legal-economic scholarship suggests that a similar rate of invalidity applies also to patents that have not been subject to invalidation proceedings.<sup>10</sup> In other words, according to this literature, up to 80 per cent of all granted patents effective in Germany are invalid or partially invalid. Against this backdrop, the German higher regional courts (Oberlandesgerichte) have started to become increasingly cautious in granting interlocutory injunctive relief.<sup>11</sup> Their stricter approach makes it substantially harder to obtain an interim injunction when the patent has not gone through a contradictory proceeding to determine its validity.<sup>12</sup> Christoph Ann coined the term ‘survivor patents’<sup>13</sup> for rights that withstood such a ‘battle test’. The practice to ask for a contradictory challenge in a different forum before handing out a preliminary injunction is closely linked to the bifurcated framework in Germany. It deviates substantially from the approach taken in various other European jurisdictions where the presumption of validity is regularly a sufficient basis for a preliminary injunction unless the defendant manages to rebut it.<sup>14</sup>

8 C Ann, ‘Patentqualität—was ist das, und warum ist Patentqualität auch für Anmelder wichtig?’ [2018] *GRUR International* 1114; H Ullrich, ‘Patentqualität: Ein rechtliches Systemdilemma?’, MPI Discussion Paper No. 15, 2020; MR McGuire and D Skiebe, ‘Digitalisierung und Patentqualität: Vom Störfaktor zum Tool?’ [2022] *ZdiW* 119. See also *Elektrische Anschlussklemme* (n 11) para 68 where the court states that various patents have been invalidated after the grant of interlocutory relief.

9 J Henkel and H Zischka, ‘How many patents are truly valid? Extent, causes, and remedies for latent patent invalidity’ [2019] *Eur J Law Econ* 195; P Hess, T Müller-Stoy and M Wintermeier, ‘Sind Patente nur “Papiertiger”?’ [2014] *Mitt.* 439; T Müller-Stoy, A Giedke and J Große-Ophoff, ‘Aktuelle Vernichtungsquoten im deutschen Patentnichtigkeitsverfahren’ [2022] *GRUR* 142, 152. See also A Hüttermann, ‘Patente – Papiertiger oder wirkliche Tiger?’ [2016] *Mitt.* 101 (critical regarding the methods of earlier studies).

10 Henkel/Zischka (n 9) 195.

11 Cf Düsseldorf Higher Regional Court, 2 U 126/09, [2010] *GRUR-RS* 15862—*Harnkathederset*; Munich Higher Regional Court, 6 U 4009/19, [2020] *GRUR* 385—*Elektrische Anschlussklemme*.

12 See, for example, the assessment by T Wuttke, ‘OLG München: Strengste Anforderungen an den Rechtsbestand bei einstweiligen Verfügungen in Patent- und Gebrauchsmustersachen’ [2020] *GRUR-Prax* 106. For the respective case law, see, for example, *Harnkathederset* (n 11) and *Elektrische Anschlussklemme* (n 11).

13 C Ann, *Patentrecht. Lehrbuch zum deutschen und europäischen Patentrecht und Gebrauchsmusterrecht* (8th edn, CH Beck 2022) § 36, para 102.

14 No other jurisdiction is known to the author that requires a prior ‘battle test’ before issuing an interlocutory injunction. To the contrary, some jurisdictions grant provisional injunctive relief in a very early phase of the lifespan of a patent, some even before. In a recent decision of 3 June 2022, the President of the Paris High Court accepted the admissibility of a request for a preliminary injunction based on a mere patent application after the Boards of Appeal of the European Patent Office had ordered the Examining Division to grant the patent on the basis of one of the claims submitted by the applicant. However, in a related litigation in Denmark, the Danish Maritime and Commercial High Court dismissed the application for preliminary injunctive relief. For the general practice in

The new approach pursued by the higher regional courts prompted the Regional Court, Munich I (Landgericht München I) to refer the case *Phoenix Contact* to the Court of Justice of the European Union (CJEU).<sup>15</sup> It asked the CJEU, in essence, whether it is compatible with Article 9(1) of Directive 2004/48/EC<sup>16</sup> (IPRED) to refuse to grant interim measures for patent infringement, in principle, to patents that have not been battle-tested.<sup>17</sup> In April 2022, the CJEU ruled that the Directive must be interpreted as precluding such a concept.<sup>18</sup> Currently, German practitioners and academics are discussing how best to react to this decision. Various prominent judges have already declared that they will not change the existing practice<sup>19</sup> which might strike patent lawyers as a surprise, especially those not familiar with the history of this referral and the debate raging in German circles since January 2021.

This article gives an overview of the German background to the referral of *Phoenix Contact* to the CJEU (part 2), outlines the discussion on the decision of the Regional Court, Munich I to refer the case (part 3) and summarizes the decision made by the CJEU (part 4). It also describes the uncertainties as to how the preliminary ruling is to be interpreted and whether it is applicable to the current German practice (part 5). Thereafter, it will demonstrate that the criterion of a prior ‘battle test’ should only be used in the framework of a balancing test if German courts are reluctant to seek further clarification from the CJEU (part 6). The article concludes with an outlook on potential future developments (part 7).

## 2. The background to the referral

The applicable statutory law for interlocutory injunctive relief in German patent cases is found in §§ 916 et seq. of the German Code of Civil Procedure (GCCP). These

France, see T Gisclard and E Py, ‘France’ in JL Contreras and M Husovec (eds) *Injunctions in Patent Law* (CUP Cambridge 2022) 124, 134. For the general practice in the Netherlands, see WA Hoyng and LE Dijkman, ‘Netherlands’ in JL Contreras and M Husovec (eds) *Injunctions in Patent Law* (CUP Cambridge 2022) 218, 221–222. For the general practice in Finland, see M Norrgård, ‘Finland’ in JL Contreras and M Husovec (eds) *Injunctions in Patent Law* (CUP Cambridge 2022) 97, 112–116.

15 The referring decision: Regional Court, Munich I, 21 O 16782/20, [2021] *GRUR* 466—*Rechtsbestand im Verfügungsverfahren*.

16 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of IP rights. In the following ‘IPRED’ or ‘the Directive’.

17 See the wording of the original question referred in *Rechtsbestand im Verfügungsverfahren* (n 15) para 22.

18 The preliminary ruling by the CJEU: Judgment in *Phoenix Contact GmbH & Co. KG v HARTING Deutschland GmbH & Co. KG, Harting Electric GmbH & Co. KG*, Case C-44/21, ECLI:EU:C:2022:309.

19 H Deichfuß, ‘Nochmals: Die Prüfung des Rechtsbestands des Patents im einstweiligen Rechtsschutz. Besprechung zu EuGH ‘Phoenix Contact/Harting’, [2022] *GRUR* 800, 802. Cf the discussion of various judges at ‘Carl Heymanns Patenttage 2022’ on 8 July 2022 in Osnabrück and the talk by T Kühnen at ‘Düsseldorfer Richergespräche’ on 10 August 2022.

sections allow some leeway for interpretation. Although, generally, the Federal Court of Justice (Bundesgerichtshof) is the court of last resort in all matters of private law in Germany, the final appellate jurisdiction for interlocutory injunctive relief is vested in the higher regional courts. These courts decide in matters of provisional measures in the last instance and have the final word on the application of §§ 916 et seq. of the GCCP. Various differences in the interpretation of the law have evolved in the practice of the different circuits involved.<sup>20</sup>

About 15 years ago, the Düsseldorf Higher Regional Court, one of the most prominent courts for patent litigation in Europe, raised the threshold for obtaining provisional injunctive relief in German patent litigation. The rationale behind doing so was to try to avoid situations in which it would hand down interlocutory relief, and the competent patent office or Federal Patent Court would invalidate the patent, effective *ex tunc*, afterwards. The Düsseldorf Court considered that a decision to grant a patent right was, in principle, an insufficient basis on which to issue an interlocutory injunction, even if the competent patent office—the German Patent and Trademark Office or the European Patent Office—had examined the subject matter beforehand and raised no concerns. The court ruled in its 2010 decision *Harnkathederset* that, in principle, only patents which had already survived an opposition or nullity proceeding could be accepted as being sufficiently likely to be deemed valid and could be considered fit as a basis for an interlocutory injunction.<sup>21</sup> This approach was supposed to relieve the court, at least to a certain extent, from having to assess the validity of the patent based on specific grounds for opposition during regular interim proceedings. Since a German infringement court is not a competent forum to attack a patent's validity, there are no technical judges on the bench. In *Harnkathederset*, the court argued that the infringement courts were not in charge of conducting a concrete assessment of patent validity during the proceedings for interlocutory injunctions.<sup>22</sup> For this reason, the court took the view that a competent instance for opposition or nullity proceedings, equipped with technical expertise, had to reach a positive decision on the validity beforehand for the patent to be suitable as a basis for provisional measures.<sup>23</sup>

The Düsseldorf Higher Regional Court allows for certain exceptions to that general rule in special cases.<sup>24</sup> In *Harnkathederset*, it presented four exemplary constellations in a non-exhaustive list:<sup>25</sup> (i) when the defendant has already been involved with objections in the procedure before granting the patent (such a proceeding is equal to a contradictory proceeding according to the court); (ii) if the patent in question is well-recognized as valid, which can be proven, for example, by prominent licensees; (iii) when an exemption applies, according to the Higher Regional Court, if the grounds for opposition are insufficient already after a cursory assessment and (iv) when a prior 'battle test' is not necessary under exceptional circumstances in which it would be unreasonable for the applicant to wait for the outcome of the opposition or nullity proceedings.

Obviously, other circuits were not required to follow the approach of the Düsseldorf Higher Regional Court.<sup>26</sup> Notably, the Munich Higher Regional Court did not implement a 'battle test' requirement as a prerequisite for interlocutory relief. If an opposition or nullity proceeding was pending or expected, the court continued to allow the right holder to demonstrate that such an action would not succeed.<sup>27</sup> If the patentee managed to do so, the court granted interlocutory injunctions although the patent had not undergone such proceedings.

However, December 2019 marked a turning point. The Munich Higher Regional Court had to decide on appeal about an interlocutory injunction issued by the Regional Court, Munich I.<sup>28</sup> In its ground-breaking decision, *Elektrische Anschlussklemme*, it overturned its earlier approach and followed the approach of the Düsseldorf Higher Regional Court.<sup>29</sup> The court pointed out that, in the recent past, it had issued interim injunctive relief in multiple cases after a positive analysis of a patent's validity, but the rights were eventually invalidated.<sup>30</sup> This shift in the Munich circuit led the Regional Court, Munich I to involve Luxembourg. It referred the new practice of its own appellate instance to the CJEU when Phoenix Contact sought a preliminary injunction prohibiting the companies HARTING Deutschland and Harting Electric

20 M Zigann, 'Die Patentstreitsache' in M Haedicke and H Timmann (eds) *Handbuch des Patentrechts* (2nd edn, CH Beck Munich 2020) § 15, para 340; Stief/Meyer (n 3) 427.

21 *Harnkathederset* (n 11) para 20.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 See, however, High Regional Court, Karlsruhe, 6 U 52/15, [2015] GRUR-RR 509 para 41—*Ausrüstungssatz*.

27 Munich Higher Regional Court, 6 U 1260/12, [2012] BeckRS 16104—*Gesicherter Rechtsbestand des Verfügungspatents* (explicitly dissenting *Harnkathederset*).

28 *Elektrische Anschlussklemme* (n 11).

29 *Ibid.*, para 67–69.

30 *Ibid.*, para 68.

from infringing its patent.<sup>31</sup> The patent in the referred case had not been subject to an opposition or nullity proceeding before the application for interlocutory relief.<sup>32</sup>

### 3. The referral by the Regional Court, Munich I

The Regional Court, Munich I was convinced that a court could not require a patent to withstand a first-instance opposition or nullity proceeding before granting interlocutory relief.<sup>33</sup> Hence, the judges referred the following question to the CJEU:

Is it compatible with Article 9(1) of [the Directive] if German higher regional courts (Oberlandesgerichte), which have jurisdiction at last instance in proceedings for interim relief, refuse, in principle, to grant interim measures for patent infringement if the validity of the patent in dispute has not been confirmed in opposition or invalidity proceedings at first instance?<sup>34</sup>

After the Regional Court, Munich I decided to refer the case to the CJEU, prominent Judge Kühnen (Presiding Judge of the Düsseldorf Higher Regional Court)<sup>35</sup> as well as prominent Judge Deichfuß (Federal Court of Justice)<sup>36</sup> sharply criticized the presentation of the practice of the higher regional courts provided in the referral. Judge Kühnen opined that the referring court had failed to address the high rates of invalidated patents and the overly complex validity assessment for purely legally trained judges.<sup>37</sup> Both judges criticized the Regional Court, Munich I for stating that the established practice was based on an actual principle subject to only four enumerative exceptions.<sup>38</sup> In their opinion, the four cases were mere examples of the general exception and did not constitute an exhaustive list.<sup>39</sup> The presiding judge of the referring court, Judge Pichlmaier, responded in a paper

that the Munich Higher Regional Court, unlike the Düsseldorf Court, understands the list of four exceptions to be exhaustive.<sup>40</sup>

On a factual level, both judges criticized the Regional Court, Munich I for referring the case despite its specific facts, since an exception to the general rule might have been applicable even in the framework of the higher regional courts.<sup>41</sup> One defendant had filed a third-party observation during the prosecution proceedings that might have triggered the application of an exception.<sup>42</sup> Moreover, the patentee had filed the application for the preliminary injunction straight after the patent had been granted, while the defendant had reacted instantly with an opposition.<sup>43</sup> Nevertheless, it is rather unclear whether the Munich Higher Regional Court would have accepted these grounds as an exception to the general rule in the end, as admitted also by Judge Kühnen and Judge Deichfuß.<sup>44</sup>

Most notably, although not mentioned by either judge,<sup>45</sup> the Regional Court, Munich I had stated in the referral that it considered the patent to be valid.<sup>46</sup> As already mentioned, in line with the case law of the higher regional courts, a preliminary injunction can be granted despite the lack of a prior contradictory proceeding on its validity if the grounds for opposition have already been deemed insufficient after a cursory assessment. The Regional Court, Munich I mentioned this exception in the referral<sup>47</sup> but did not specify why it did not apply. The only explanation appears to be that the court found the grounds for opposition insufficient only after an extensive analysis and not a mere cursory assessment.

### 4. The CJEU's preliminary ruling on *Phoenix Contact*

When deciding to refer the question to the CJEU, the Regional Court, Munich I requested to apply the expedited procedure pursuant to Article 105 of the Rules of

31 *Rechtsbestand im Verfügungsverfahren* (n 15) para 10–12.

32 Only 4 days before the Regional Court's decision to refer the case to the CJEU, one of the defendants had filed an opposition with the European Patent Office.

33 *Rechtsbestand im Verfügungsverfahren* (n 15) para 20–21. See also NA Gajec, 'Justizgewährung und rechtliches Gehör im patentrechtlichen Eilverfahren (Teil 2)', [2021] GRUR-Prax 97, 98 (arguing before the referral that the practice of the higher regional courts is not in line with the IPRED).

34 *Rechtsbestand im Verfügungsverfahren* (n 15) para 22.

35 T Kühnen, 'Anmerkung zu *Rechtsbestand im Verfügungsverfahren*' [2021] GRUR 468.

36 Deichfuß (n 3) 36–39.

37 Kühnen (n 35) 469.

38 Kühnen (n 35) 469; Deichfuß (n 3) 37–38. See also Hauck (n 7) 128 (stating that the actual practice is more differentiated than described in the referral).

39 Kühnen (n 35) 469; Deichfuß (n 3) 37–38.

40 T Pichlmaier, 'Die Bedeutung der Patenterteilung für die Bestandsprognose im einstweiligen Rechtsschutz' [2021] GRUR 557, 557.

41 Kühnen (n 35) 469–470; Deichfuß (n 3) 38–39.

42 Kühnen (n 35) 469–470.

43 Deichfuß (n 3) 39.

44 Cf Kühnen (n 35) 469–470 who argues that the Munich Higher Regional Court might not apply an exception in such cases or Deichfuß (n 3) 38–39 stating that the Regional Court, Munich I should have tried to convince the Munich Higher Regional Court by advancing a respective reasoning.

45 See, however, P v Cettritz, 'Was sind die Folgen der EuGH-Entscheidung vom 28. 04. 2022 (Az.: C-44/21) im Verfügungsverfahren in Patentsachen?' [2022] PharmR 501, 503 (making the point that the Regional Court, Munich I might have been able to issue the injunction based on this consideration).

46 *Rechtsbestand im Verfügungsverfahren* (n 15) para 9.

47 *Ibid.*, para 17.

Procedure of the Court of Justice. The President of the CJEU decided to dismiss the request, in essence, since the economic sensitivity of the case or its economic interests could not in themselves justify an expedited procedure.<sup>48</sup> Although the President heard the Advocate General (AG) on the request for such a procedure,<sup>49</sup> the AG was not asked to deliver an opinion on the question referred.

The CJEU delivered its decision on 28 April 2022. After interpreting the question referred, it ruled that Article 9(1) IPRED precluded national case law under which applications for interim relief for patent infringement must, in principle, be dismissed where the validity of the patent in question has not been confirmed, at the very least, by a decision given at first instance in opposition or invalidity proceedings.<sup>50</sup> Based on the indications of the referring court, the CJEU pointed out that German statutory law was in line with this interpretation, but the case law of the higher regional courts was not.<sup>51</sup> The CJEU indicated that it is for the referring court to ensure that Article 9(1) IPRED is given full effect, if necessary, by refusing its own motion to apply national case law where it is not compatible with that provision.<sup>52</sup>

The CJEU reached this conclusion after making three points. Firstly, Article 9(1)(a) IPRED, read in conjunction with Recitals 17 and 22 of the Directive, requires Member States to provide, in their national law, for the possibility of the competent national judicial authorities to adopt an interlocutory injunction following an examination of the specific features of each individual case and in compliance with the conditions laid down in Article 9.<sup>53</sup>

Secondly, according to the CJEU, Article 9(1)(a) IPRED read in conjunction with Recital 22 prescribes that the provisional measures available under national law must enable the infringement of an IP right to be immediately terminated, without awaiting a decision on the merits.<sup>54</sup> The court laid out that those measures are particularly justified where any delay would cause irreparable harm to the holder of such a right.<sup>55</sup> The 'time' factor is of particular importance for the purposes of effective enforcement of IP rights, according to the court.<sup>56</sup>

Therefore, a requirement forcing the national court to deny an interlocutory injunction until the patent has been confirmed by a decision given at first instance in validity proceedings, even though the court itself finds it valid and infringed, would deprive Article 9(1)(1) IPRED of any practical effect.<sup>57</sup> Referring to the written observations made by the patent holder in the national proceedings, the CJEU stated that such a requirement would be likely to give rise to a situation in which competitors of the proprietor of the patent in question, as potential infringers, knowingly decide not to challenge the validity of a patent in order to prevent it from enjoying effective judicial protection.<sup>58</sup>

Thirdly, according to the CJEU, the objectives of the IPRED aim at a high, equivalent and homogenous level of protection,<sup>59</sup> which requires effective legal remedies designed to prevent, terminate or rectify any infringement of an existing IP right.<sup>60</sup> Requiring a confirmation of the validity of the patent in the form of a first-instance decision on the validity would be ineffective and disregard the objective of ensuring a high level of protection.<sup>61</sup> The court emphasized that European patents enjoy a presumption of validity and the full scope of protection from the date of their publication.<sup>62</sup> As regards the risk that the defendant may suffer harm as a result of the adoption of interim measures, the court pointed out that Article 3(2) IPRED requires courts to apply the measures, procedures and remedies in such a way as to avoid the creation of barriers to legitimate trade and to provide safeguards against their abuse.<sup>63</sup> The EU legislator has provided for legal instruments which make it possible to comprehensively mitigate this risk, according to the CJEU.<sup>64</sup> The court referred to Article 9(5), (6) and (7) IPRED. The paragraphs guarantee that provisional measures cease to have effect after a reasonable period of time if no decision on the merits was initiated by the right holder.<sup>65</sup> They allow the court to make provisional measures, subject to the lodging of adequate security, and to stipulate appropriate compensation for the defendant where provisional measures have been revoked or have lapsed or where an infringement or threat thereof was denied subsequently.

48 *Phoenix Contact* (n 18) para 15–18.

49 *Ibid*, para 18.

50 *Ibid*, para 54.

51 *Ibid*, para 51.

52 *Ibid*, para 53.

53 *Ibid*, para 31.

54 *Ibid*, para 32.

55 *Ibid*, para 32.

56 *Ibid*, para 32.

57 *Ibid*, para 34.

58 *Ibid*, para 35.

59 *Ibid*, para 37.

60 *Ibid*, para 39.

61 *Ibid*, para 40.

62 *Ibid*, para 41.

63 *Ibid*, para 42.

64 *Ibid*, para 44.

65 *Ibid*, para 45–48.

## 5. Uncertainties about the interpretation of the preliminary ruling and its applicability to the German practice

The Regional Court, Munich I understands *Phoenix Contact* as a confirmation of its own interpretation of Article 9(1) IPRED. The decision of the CJEU demonstrates, according to the official press release of the Regional Court, Munich I and an article published by Presiding Judge Pichlmaier, that the approach of the higher regional courts was not in line with EU law.<sup>66</sup> Some commentators share this opinion.<sup>67</sup>

Naturally, one would assume that the respective higher regional courts would have to change their practice now. However, the statements of prominent German judges<sup>68</sup> and various practitioners<sup>69</sup> published in the aftermath of the preliminary ruling have raised substantial doubts as to whether *Phoenix Contact* will indeed mark a turning point. For Judge Deichfuß, it is clear that the CJEU's decision did not give any reason to depart from the existing German case law.<sup>70</sup> Three aspects with regard to legitimacy are currently being discussed.

### (a) Are the German main proceedings already providing for provisional injunctions?

The first argument is linked to a point Judge Deichfuß put forward before the decision of the CJEU was issued. He noted critically that the referral did not indicate the speed of German main proceedings in infringement cases.<sup>71</sup> In fact, German courts decide on the substance in about 1 year or less.<sup>72</sup> Regularly, a plaintiff will obtain an injunction with provisional enforceability through the main proceeding on infringement before the proceeding on the validity in a different forum has been completed.<sup>73</sup> This situation is known as the German 'injunction gap'.<sup>74</sup> The

reasoning of Judge Deichfuß insinuates that Germany might already fulfil its obligation arising from the Directive with its fast and effective main proceedings. According to his logic, §§ 916 et seq. GCCP are supplementary and offer the right holder additional measures to enforce his/her IP that is no longer subject to Article 9(1) IPRED.<sup>75</sup>

Since decisions in the main proceedings for infringement are often issued before the decision on the validity of the patent, they might be considered as 'taken without awaiting a decision on the substance of the case' in the sense of Recital 22 of the Directive. However, it is questionable whether a proceeding that takes about 1 year and issues an injunction that is intended to become final (permanent injunction) can be understood as provisional in the sense of Article 9(1) IPRED. Furthermore, the referral of the German court and the reasoning of the CJEU indicate clearly that the ruling was linked to interim proceedings based on §§ 916 et seq. GCCP.<sup>76</sup> Moreover, the Directive appears to presuppose that the national law offers right holders two procedures to enforce their rights and not just one: a main proceeding *and* a provisional/precautionary proceeding.

### (b) Is the preliminary ruling subject to the condition that the patent is considered valid by the court?

For some experts, the fact that the referring court was satisfied with the validity of the patent in question<sup>77</sup> serves as an argument to disregard the CJEU's preliminary ruling.<sup>78</sup> Reading the reasoning in *Phoenix Contact*, it is unclear whether this finding of the referring court was decisive for the CJEU's ruling. On the one hand, the considerations of the CJEU mentioned that aspect before going on to criticize the principle to award preliminary injunctions only based on 'survivor patents'.<sup>79</sup> Hence, the fact seems to be significant to the court when assessing the

66 See [www.justiz.bayern.de/gerichte-und-behoerden/landgericht/muenchen-1/presse/2022/12.php](http://www.justiz.bayern.de/gerichte-und-behoerden/landgericht/muenchen-1/presse/2022/12.php) (accessed 31 July 2022) and the paper by the Presiding Judge of the referring court: T Pichlmaier, 'Patentbestand und Patentverletzung—einfach unzertrennlich' [2022] Mitt. 241, 247.

67 M Schmitz and T Zilliox, 'Erleichterter einstweiliger Rechtsschutz in Patentsachen' [2022] GRUR-Prax 314; R Hauck and K Werner, 'Die Durchsetzung von Patenten nach der "Phoenix Contact/HARTING"-Entscheidung des EuGH' [2022] GRUR-Prax 335, 336–337; Stief/Meyer (n 3) 432.

68 See sources in n 19.

69 v Cettritz (n 45) 503; Stief/Meyer (n 3) 432.

70 Deichfuß (n 19) 802.

71 Deichfuß (n 3) 36.

72 Ibid, 35.

73 Ibid, 36.

74 The 'injunction gap' is considered a substantial problem in the German framework (from a perspective of fundamental rights, LE Dijkman, 'Does the Injunction Gap Violate Implementers' Fair Trial Rights Under the ECHR?' [2021] GRUR International 215 and also LE Dijkman, 'Does the

Injunction Gap Violate Implementer's Fair Trial Rights Under the Charter?' [2022] GRUR 857). A reform of the statutory law in 2021 tried to address this issue but more amendments might follow (see A Ohly and M Stierle, 'Unverhältnismäßigkeit, Injunction Gap und Geheimnisschutz im Prozess. Das Zweite Patentrechtsmodernisierungsgesetz im Überblick' [2021] GRUR 1229, 1238–1239). For some data and an economic assessment about the injunction gap, see F Gäßler, *Enforcing and Trading Patents. Evidence for Europe* (Springer Berlin 2016) 79–89.

75 Cf Deichfuß (n 3) 36–37.

76 See *Rechtsbestand im Verfügungsverfahren* (n 15) para 6–7 and *Phoenix Contact* (n 18) para 9–10. The courts specifically refer to § 935 and 940 GCCP.

77 *Rechtsbestand im Verfügungsverfahren* (n 15) para 9.

78 See M Grosch, 'Einstweiliger Rechtsschutz in Patentsachen beim UPC (vor dem Hintergrund der EuGH Entscheidung Phoenix Contact)', presentation at '14. Mannheimer IP-Forum', 24 June 2022. See also v Cettritz (n 45) 503.

79 *Phoenix Contact* (n 18) para 33–34. See also para 40.

practice in a critical light. On the other hand, the court emphasized that European patents enjoy the full scope of the IPRED's protection from the date of publication of their grant.<sup>80</sup> The logic of this argument stands against any principle that requires patents to become subject to an invalidity challenge in a different forum before serving as the basis of interlocutory relief.

Ultimately, there have been no indications that the CJEU understands Article 9(1) IPRED in a way which would prohibit a principle to dismiss applications for interim relief only in cases where the validity of the patent has not been confirmed in a contradictory proceeding *and* where the court asked to grant interim injunctive relief is convinced about the validity of the patent. Such an understanding would dramatically limit the scope of the decision. One must assume that the CJEU would have mentioned such a substantial limitation in the preliminary ruling itself, although a ruling must be read in light of its reasoning.<sup>81</sup> However, also the reasoning is not clear in this regard.

### (c) Did the CJEU rule about a principle that is subject to no exceptions?

Finally, and most notably, various authors and judges have criticized the Regional Court, Munich I for having presented the higher regional courts' approach in its referral in a distorted manner. The CJEU could therefore not have gleaned a proper impression of the functioning of the actual German practice.<sup>82</sup> Consequently, the wording of the CJEU's preliminary ruling neither describes nor addresses the way the higher regional courts deal with interlocutory injunctive relief.<sup>83</sup>

Ultimately, this argument relates to the accurate understanding of the term 'in principle'. In German, which was the language of the case, the term used is 'grundsätzlich'.<sup>84</sup> Various commentators of the judgment read 'in principle' as referring to a condition or requirement that is not subject to any exception.<sup>85</sup> Indeed, such an interpretation would not mirror the practice of the German higher regional courts where exceptions exist

and have been applied.<sup>86</sup> The framework of the higher regional courts follows a principle-exception approach whereby courts explore, at the first level, whether the patent has already survived a contradictory proceeding to determine its validity. If not, they dismiss the case based on this fact (principle) *unless* the patentee manages to establish that an exception must apply.<sup>87</sup>

The wording of the referral suggests that the Regional Court, Munich I intended to refer to the CJEU a principle subject to exceptions. The referring court argues that the principle to require a 'battle test' is not in line with the IPRED, even if exceptions to this general rule are provided.<sup>88</sup> In such situations, the principle-exception framework might generate a decision in line with Article 9(1) IPRED, but this outcome does not change the fact that the mere principle applied as a first step is already violating EU law according to the referring court. Moreover, two journal articles written by the Presiding Judge of the Regional Court, Munich I support this understanding of the referring court's intention.<sup>89</sup>

However, the interpretation that the CJEU was referring to a principle subject to no exceptions is strongly supported by the fact that the reasoning of the decision does not mention any exceptions. In particular, one would have expected a reference to the exceptions in paragraph 26 of *Phoenix Contact*. In addition, even though the referral elaborated on the exceptions in national practice in four paragraphs,<sup>90</sup> when applying these to the given case, the referring court stated that they remained theoretical due to the restrictive interpretation of the exceptions applied by the higher regional courts.<sup>91</sup>

On the other hand, the term 'in principle' in legal language regularly hints at an understanding of a principle-exception test.<sup>92</sup> This is especially true in German, the language of the proceeding under review here. In legal German, 'grundsätzlich', as used by the referring court and the CJEU, is almost exclusively applied to indicate that the general rule following the term 'grundsätzlich' is subject to exceptions. Moreover, 'in principle' or

80 Ibid, para 41.

81 For the interpretation of a preliminary ruling in the light of its reasoning, see Judgment of 16 March 1978, Case C-135/77, *Robert Bosch GmbH v Hauptzollamt Hildesheim*, ECLI:EU:C:1978:75.

82 *v Cetritz* (n 45) 503; N Keßler and C Palzer, 'Die (vermeintliche) deutsche Gerichtspraxis der patentrechtlichen Unterlassungsverfügung auf dem Prüfstand des EuGH—Luxemburg locuta, causa finita?' [2022] *EuZW* 562, 566.

83 *v Cetritz* (n 45) 503.

84 Ibid, 502–503.

85 Deichfuß (n 19) 802.

86 Cf P Rastemborski, 'EuGH-Vorlage zu einstweiligem Rechtsschutz in Patentsachen' [2021] *GRUR-Prax* 109 with references to respective decisions.

87 See for example *Harnkathederset* (n 11) para 22–24.

88 *Rechtsbestand im Verfügungsverfahren* (n 15) para 16. See also Gajeck (n 35) 98 and Hauck (n 7) 129 (stating that such an approach is not in line with the IPRED).

89 Pichlmaier (n 40) 560; Pichlmaier (n 66) 246–247.

90 *Rechtsbestand im Verfügungsverfahren* (n 15) para 16–19.

91 Ibid, para 18. See also the critique by Deichfuß (n 19) 802 and Keßler/Palzer (n 82) 566.

92 See, for example, *Hydroxysubstituierte Azetidinone* (n 7) 7, where the Düsseldorf Higher Regional Court described its own practice that, as a principle ('prinzipiell'), only battle-tested patents are eligible, but a court can derogate from this condition ('Erfordernis') in exceptional cases.

‘grundsätzlich’ would not have been a necessary phrase in the wording of the CJEU’s interpretation of the referred question or its preliminary ruling if the court had intended to address a requirement which is not subject to exceptions. The word could have been omitted. Refraining from using the term would have made it clear that the preliminary ruling addresses a practice which establishes an additional condition subject to no exceptions.

#### (d) Interim result

In sum, there are legitimate doubts as to whether the preliminary ruling addresses the actual German practice. Most notably, it seems unclear whether the ruling refers to a principle-exception framework as it had been implemented in the practice of the German higher regional courts.

Nevertheless, German courts that intend to keep up the existing approach are well-advised to refrain from disregarding *Phoenix Contact* based on one interpretation of the preliminary ruling, while ignoring other possible readings. Both the referral and the preliminary ruling were at least meant to address the actual German practice. It would shed a negative light on judicial cooperation if German courts were to ignore the decision outright without seeking clarification. The CJEU has the final say in the interpretation of the Directive<sup>93</sup> and, therewith, the EU patent enforcement framework.

Despite the uncertainties about the correct interpretation of *Phoenix Contact*, there is a certain spirit of the CJEU’s decision that questions the current practice of the German higher regional courts. Even if the court addressed only a framework which does not foresee actual exceptions to the general rule, the reasoning in *Phoenix Contact* suggests an interpretation of Article 9(1) IPRED that does not allow national courts to deny provisional injunctive relief solely based on the ‘battle test’ requirement even if there are various exceptions to this general rule. A new referral is necessary to clarify the understanding of the CJEU.

## 6. Considering the character as a survivor patent within a balancing test

The Munich Higher Regional Court explained in the pivotal *Elektrische Anschlussklemme* decision that it had misjudged in the past the validity of patents based on an analysis of the specific grounds for opposition.<sup>94</sup> Hence, the court started to refer to the requirement of a prior ‘battle test’ to be able to rely on the guidance given by

the competent bodies after a contradictory proceeding on validity. This aspect relieved the Munich Higher Regional Court of the need to assess the validity in detail before deciding whether or not to grant interlocutory injunctive relief.

Irrespective of whether the correct interpretation of the preliminary ruling in *Phoenix Contact* addresses the existing principle-exception practice, German courts can continue to check whether a patent withstood contradictory proceedings before the interim proceedings if this aspect is just one factor among others used in a balancing test.<sup>95</sup> In such a test, the fact that the patent has been or has not been subject to contradictory proceedings is just one of several factors considered by the court before granting or denying preliminary injunctive relief. A balancing test does not explore, as a first step, whether the patent has already survived a contradictory validity proceeding, before requiring the right holder, as a second step, to give further arguments as to why an interlocutory injunction should be granted. Hence, even if *Phoenix Contact* had to be interpreted as precluding any kind of principle-exception scheme,<sup>96</sup> a balancing test would be completely in line with the preliminary ruling of the CJEU.

Such a balancing test would also allow the courts to consider certain other relevant aspects when assessing the validity of a patent while, at the same time, not relying exclusively on a self-assessment of the specific grounds for opposition. Other factors could include, for example, whether the Federal Patent Court, without having reached a decision on validity, has already given a qualified indication of the likelihood of nullification during a pending proceeding on the validity of the patent (§ 83 of the German Patent Act),<sup>97</sup> whether foreign courts have already upheld or nullified the patent, whether the right is well-recognized in the market (proven, for example, by prominent licensees)<sup>98</sup> or whether the patent was granted in the framework of the Collaborative Search and Examination scheme of the IP5.<sup>99</sup>

<sup>95</sup> Arguing in this direction, also Hauck (n 7) 129.

<sup>96</sup> Cf Hauck (n 7) 129 (stating that such an approach is not in line with the IPRED).

<sup>97</sup> See also Stief/Meyer (n 3) 433. According to § 83 of the German Patent Act, the Federal Patent Court is supposed to inform the parties and the infringement court as early as possible about the main issues during the proceedings, at the latest within 6 months after service of process.

<sup>98</sup> This aspect refers to one of the exceptions provided for in *Harnkathederset* (n 11) para 20.

<sup>99</sup> IP5 is a forum of the five largest intellectual property offices in the world. They are the US Patent and Trademark Office (USPTO), the European Patent Office (EPO), the Japan Patent Office (JPO), the Korean Intellectual Property Office (KIPO), and the National Intellectual Property Administration (CNIPA) in China. This collaborative scheme implemented in the framework of a pilot between June 2018 and July 2020 consisted in the five offices performing a search of the international

<sup>93</sup> Article 19(3)(b) EU, Article 267(1)(b) TFEU.

<sup>94</sup> *Elektrische Anschlussklemme* (n 11) para 68.

When reading *Phoenix Contact*, one could get the impression, however, that the CJEU suggested in its reasoning a quasi-automatic approach to interlocutory injunctions—a framework that would not allow the courts to consider such aspects before issuing injunctive relief.<sup>100</sup> According to paragraph 39 of the judgment, the IPRED requires the existence of ‘effective legal remedies designed to prevent, terminate or rectify any infringement of an existing intellectual property right’.<sup>101</sup> This reads as if an applicant always had a right to an injunction in case of infringement, particularly since the court advanced that Article 9(5), (6) and (7) IPRED are intended to ensure the protection of the defendant.<sup>102</sup> The CJEU did not mention at all that a court has to take the interests of the defendant into account *before* issuing an injunction and, accordingly, must check on the validity of the patent despite the presumption of validity.<sup>103</sup> Article 9(5), (6) and (7) IPRED provide only for an *ex post* protection when a court already issued an injunction that turned out to be unjustified.

In one of the first points and not closely related to the actual answer of the CJEU to the question referred, the reasoning in *Phoenix Contact* makes it however clear that the interests of the defendant have to be considered before issuing an injunction.<sup>104</sup> The decision refers to Article 9(1)(a) in conjunction with Recitals 17 and 22 IPRED and stipulates that the Member States are required to provide for the possibility of the competent national judicial authorities to adopt an interlocutory injunction following an examination of the specific features of each individual case.<sup>105</sup> Moreover, the proportionality principle enshrined in Article 3(2) IPRED and the freedom to conduct a business enshrined in Article 16 of the Charter of Fundamental Rights of the European Union require such

an approach.<sup>106</sup> Deichfuß also understands the CJEU in *Bayer Pharma*<sup>107</sup> to have required such an assessment.<sup>108</sup>

There are three reasons why this assessment can and should also include the likelihood of invalidity of the patent,<sup>109</sup> which is common practice in various Member States.<sup>110</sup> Firstly, when referring to the presumption of validity, the CJEU cites<sup>111</sup> by analogy paragraph 48 of its *Generics* decision, where the court stated that the presumption of validity sheds no light on the outcome of any dispute in relation to the validity of that patent.<sup>112</sup> Hence, the presumption does not exclude a validity assessment where such an assessment is required by the law (e.g. by the principle of proportionality in Article 3(2) IPRED). Secondly, validity is the core aspect of an examination of the specific features of an individual patent case. Where an IP right lacks validity, this will determine the final results of any IP litigation. Disregarding this core aspect will render the assessment of all other specific features of the individual case worthless. Thirdly, the CJEU’s earlier decision *Bayer Pharma* limits the possibility of defendants to claim compensation if they have complied with an interlocutory injunction and the patent was declared invalid thereafter.<sup>113</sup> If a defendant cannot claim damages if the patent is nullified, the court needs to be able to deny an injunction already *ex ante* in case the patent appears to be invalid. Otherwise, the defendant alone bears the full risk of patent invalidity. Fourthly, certain IP rights exist that enjoy a presumption of validity even where no office has ever examined whether the subject matter meets the

application and working jointly on the production of the international search report and written opinion. The IP5 offices are currently discussing implementing this scheme in a more permanent manner in the legal framework of the PCT. See also [www.fiveipoffices.org/activities/ws/pct/cse-pilot](http://www.fiveipoffices.org/activities/ws/pct/cse-pilot).

100 See M Stierle, ‘Anmerkung zu Phoenix Contact v Harting’ [2022] Mit. 277, 278–279.

101 Italics added by the author.

102 *Phoenix Contact* (n 18) para 44–48.

103 For a legal–economic framework where courts grant provisional injunctions quasi-automatically and the interests of the defendant are warranted by a financial compensation of compliance damages in case the injunction is not upheld, see RRW Brooks and WF Schwartz, ‘Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine’ [2005] 58 Stan. L. Rev. 381. See also C Heinze, *Einstweiliger Rechtsschutz im europäischen Immaterialgüterrecht* (Mohr Siebeck 2007) 346–355 (discussing whether the IPRED requires the assessment of interests before granting interlocutory relief).

104 Deichfuß (n 19) 801–802 understands the judgment in this sense, too.

105 *Phoenix Contact* (n 18) para 31.

106 COM(2017) 708, part III.1. and COM(2017) 712, part 3.2. See also Keßler/Palzer (n 82) 566. For the UPC, Article 62(2) UPCA and Rule 211(2), (3) suggest such an approach as well. *Phoenix Contact* (n 18) para 42 cites Article 3(2) IPRED but refers only to the second half sentence (avoiding barriers to legitimate trade and providing safeguards against abuse) and not the first half sentence (inter alia, principle of proportionality) of this paragraph. See also Hauck/Werner (n 67) 336 (criticizing the CJEU for not working with the principle of proportionality enshrined in Article 3(2) IPRED).

107 Judgment in *Bayer Pharma AG v Richter Gedeon Vegyészeti Gyár Nyrt. and Exeltis Magyarország Gyógyszerkereskedelmi Kft.*, C-688/17, ECLI:EU:C:2019:722.

108 Deichfuß (n 19) 802.

109 See also Hauck (n 7) 129 and Stierle (n 100) 278–279.

110 For literature on the practice of the Member States, see (n 14).

111 *Phoenix Contact* (n 18) para 41.

112 Judgment in *Generics (UK) Ltd and Others v Competition and Markets Authority*, C-307/18, ECLI:EU:C:2020:52 para 48.

113 *Bayer Pharma* (n 107). The decision has been commented controversially: A Sztoldman, ‘Compensation for a Wrongful Enforcement of a Preliminary Injunction under the Enforcement Directive (2004/48/EC)’ [2020] 42 EIPR 721; HJ Ahrens, ‘Vom Ende der Risikohaftung des § 945 ZPO bei Verletzung von Rechten des Geistigen Eigentums’ [2020] WRP 387; W Tilmann, ‘Erforderliche Änderung der patentrechtlichen Rechtsprechung zu § 945 ZPO im Bereich von Art. 9 VII der RL 2004/48/EG’ [2021] GRUR 997. A Hungarian Court referred the question to the CJEU. For the reactions by the Hungarian legislator to the preliminary ruling, see A Cserny and D Geyer-Hirt, ‘Progress Over Time: Significant Changes in the Hungarian Patent Act and the Consequences Thereof’ [2022] *GRUR International* 353, 354–356.

requirements for protection.<sup>114</sup> Without the possibility to assess the validity of the IP right, the court would need to award an interlocutory injunction based on a mere registration.

The assessment of the patent's validity does not have to rely exclusively on the analysis of the specific grounds for invalidity. It can take into account the fact that the patent has gone through a 'battle test' and the other rather general aspects already mentioned.<sup>115</sup> When referring to the specific characteristics of the case, Recital 22 of the Directive also mentions the specific features of the IP right. This wording includes the procedural history of a specific patent *a fortiori*, in particular in a jurisdiction where 80 per cent of all patents which have not undergone a contradictory proceeding, have to be considered partially or completely invalid. Succeeding in such a challenge is a relevant factor in rebutting doubts regarding validity—at least in conjunction with other aspects.

## 7. Outlook

In the aftermath of *Phoenix Contact*, at least in the short term, patentees seeking provisional injunctive relief will file an action in Munich if their patent has not been subject to a prior 'battle test'.<sup>116</sup> The Regional Court, Munich I understands the decision as a confirmation of its interpretation of Article 9(1). However, it has been reported that the Munich Higher Regional Court is contemplating sticking to the old practice, just as many other higher regional courts intend to do.<sup>117</sup> Therefore, it appears unclear whether the referring court will manage to also refrain from using a 'battle test' requirement in the long run if the appellate court intends to rely on its old approach. It is very much hoped, however, that the Munich Higher Regional Court (or any other German court) will seek either a further clarification from the CJEU before persisting with the old practice or, at least,

transfer the rule-exception approach into a clear balancing test that allows for the consideration of other factors on an equal footing.

*Phoenix Contact* addressed an issue very specific to the bifurcated German legal framework. Time will tell whether this and similar issues will ease with future developments. The time gap between provisionally enforceable first-instance decisions by infringement courts in main proceedings and the first-instance decisions of the Federal Patent Court in invalidity proceedings is considered a substantial downside of the current system.<sup>118</sup> The tendency of infringement courts to rely predominantly on invalidity proceedings handled by a different body, instead of assessing the specific grounds to challenge the patents themselves, puts the bifurcated system under additional pressure. Judge Pichlmaier, the Presiding Judge of the Regional Court, Munich I, suggested repealing this framework and vesting exclusive jurisdiction in infringement and validity proceedings in the Federal Patent Court.<sup>119</sup> In recent decades, various other judges, including two Presidents of the Federal Patent Court,<sup>120</sup> sought to abolish the bifurcated structure.

Currently, the German system seems to be far from taking such a step. Some harmonizing effects are however expected from the establishment of the Unified Patent Court (UPC). It remains uncertain whether these will lead to legislative action, such as a technically trained judge being added to the bench of infringement courts<sup>121</sup> or even to the mitigation or abolishment of the bifurcation,<sup>122</sup> but one can be certain that various smaller non-legislative steps will materialize. The vast majority of the UPC's judicial staff will work part-time. It is unlikely that a judge deciding on an action for revocation at a panel of the UPC in the morning, will claim, in the afternoon's proceeding on interlocutory injunctive relief at a German infringement court, that he/she lacks technical training to assess a patent's validity based on specific grounds for opposition.

114 See, for example, the presumption of validity for German designs according to § 39 German Design Protection Act.

115 Dissenting, Pichlmaier (n 40) 558–559.

116 This should be the case, although the Presiding Judge Pichlmaier has transferred on his own request from the referring court, the 21st Civil Chamber of the Regional Court, Munich I, to the 37th Civil Chamber of the Munich court, where he will deal mostly with competition law.

117 Cf the discussion of the judges at 'Carl Heymanns Patenttage 2022' on 8 July 2022 in Osnabrück.

118 See (n 74).

119 Pichlmaier (n 66) 248.

120 EK Pakuscher, 'Zur Zuständigkeit des Bundesgerichtshofs und des Bundespatentgerichts in Patentnichtigkeitsverfahren' [1995] GRUR 705, 707; A Sedemund-Treiber, 'Strukturen einer europäischen Patentgerichtsbarkeit?' [1999] Mitt. 121, 123 (bifurcation as historical failure).

121 See already A Sedemund-Treiber, 'Braucht ein europäisches Patentgericht den technischen Richter?' [2001] GRUR 1004, 1008–1009.

122 See also Dijkman (n 74) [2022] GRUR 857, 863.