For many years, German courts would, in principle, only grant a preliminary injunction in a patent case, if the patent in suit had “gone through the fire” in the sense of having survived an adversarial opposition or nullity proceeding at first instance. This case law was based on the consideration that it can be extremely difficult for an infringement court to verify the validity of the patent in suit within a few days or even hours involving the risk of causing irreparable damage to the infringement defendant. Statistically, despite expert examination, only one in three granted patents withstands a challenge on validity.

With judgment of 28 April 2022, Case C-44/21 – Phoenix Contact, the European Court of Justice (ECJ) declared this practice incompatible with EU Directive 2004/48/EC
The additional “requirement” for granting a preliminary injunction imposed by the German courts deprived patent owners of their right under the Directive to obtain injunctive relief, even though the patent in suit is, according to the national court, valid and infringed. German case law gave rise to a situation where potential infringers would knowingly decide to abandon a challenge to the validity of the patent in order to prevent it from enjoying full legal protection. The standard applied by the German courts disregarded the aims of the Directive to ensure a high level of protection of intellectual property rights throughout the EU.

The judgment is based on a referral by the District Court Munich I. In the pertinent case, the judges considered the patent in suit, which had just been granted by the European Patent Office, as valid and infringed, but did not see themselves in the position to issue the requested injunction in view of the established case law of the Munich Court of Appeals. The referring decision has been subject of heated discussions amongst patent experts in Germany. This does not only apply to the correctness and completeness of the presentation of German case law (which very well acknowledged other scenarios in which a court could grant preliminary relief) and its underlying considerations, but also to the formulation of the question submitted to the ECJ. It therefore remains to be seen how the ECJ’s decision will exactly play out in Germany and other EU member states as well as before the Unified Patent Court.

In any event, the chances for patent owners to obtain a preliminary injunction before a German court have significantly increased over night, which will make Germany an even more attractive venue for patent enforcement. The other side of the coin is that a preliminary injunction puts the defendant under immense pressure to settle. In the event of a cease and desist letter, it is therefore becoming even more important to immediately set up a suitable defense strategy.

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