



# Newsletter July

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## **Back to the roots. With Dr. Alexander Bayer, LL.M., Preu Bohlig gains an "old friend" as a partner in the areas of soft IP and cyberlaw.**

Dr. Alexander Bayer, LL.M. has returned at Preu Bohlig since the beginning of July 2021. Dr. Bayer was already an associate in the Munich office of our law firm from 2003-2007. He then moved to various Anglo-American and British law firms. Most recently, he was a partner at the international commercial law firm Pinsent Masons. Now he has decided to return to his roots, which we are very pleased about.

Dr Bayer advises and represents clients in all areas of intellectual property law with a focus on trade mark, copyright and competition law. He has developed particular expertise in the areas of software and information technologies (cyberlaw), including data protection. He advises national and international clients, including start-ups, whom he legally assists in their product development and the associated protection of their know-how.

Following the addition of Dr Jan Peter Heidenreich in our Hamburg office at the beginning of this year, we have now also been able to add another partner in soft IP in Munich in the person of Dr Bayer. Following the recent additions in patent and pharmaceutical law, we are now also increasing our clout in this third core area of intellectual property law. With Dr. Bayer, the number of professionals in our firm grows to 35, further strengthening our position as one of the largest IP units in Germany.

"We have come full circle. Clearly, Alexander is a professional enrichment for our firm. But it is even nicer that a good friend is back on board," Andreas Haberl, Konstantin Schallmoser and Dr Axel Oldekop, who started their careers with Alexander Bayer at Preu Bohlig and Partners in Munich, are pleased to say.

Preu Bohlig & Partner is a partnership of lawyers. At its offices in Munich, Berlin, Düsseldorf and Hamburg, as well as in Paris and in association with

renowned law firms abroad, Preu Bohlig provides advice in the areas of commercial law for national and multinational companies and institutions. The firm focuses on intellectual property law, competition and copyright law, pharmaceutical law, press and media law as well as commercial and corporate law.



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## "On the effectiveness of a non-challenge agreement and its relevance for proceedings before the EUIPO"



By decision of 19.11.2020, the Federal Court of Justice referred two questions to the ECJ in the proceedings with reference number: I ZR 27/19. The first question concerns whether an obligation not to file an application for revocation against an EU trade mark is effective. The second question is whether - if such a non-challenge undertaking is valid - a national court can order the defendant to withdraw an application for revocation of an EU trade mark already filed with the EUIPO. The decision of the BGH is reproduced, for example, in WRP 2021, p. 331 et seq.

Contracts concerning industrial property rights often contain non-challenge clauses. In delimitation agreements concerning trade mark law there is regularly a clause according to which the owner of the younger trade mark undertakes not to attack the earlier trade mark and its subsequent applications. In licence agreements for patents or trade marks, there is often a provision according to which the licensee undertakes not to take action against the IP right (patent or trade mark) that is the subject matter of the agreement.

In the present case, the first defendant as seller had transferred the word mark "Leinfelder" for the goods "watches and time measuring instruments; leather and imitations of leather as well as goods made of these for

watches and time measuring instruments" to the plaintiff in a partial trade mark transfer agreement. This contract stated, inter alia, as follows:

"The seller undertakes neither to attack the sub-brand himself nor to assist third parties in attacking the sub-brand."

Further, the 1st defendant as seller and the plaintiff as buyer entered into an asset purchase agreement which stated, inter alia, as follows:

"The seller undertakes not to attack both (i) registered intangible assets and (ii) the use of intangible assets itself, nor to assist third parties in such attack."

The applicant applied for three EU trade marks with the element "Leinfelder" for the aforementioned goods.

On 10.8.2016, Dr S., a lawyer, filed applications for revocation for non-use against the applicant's EU trade marks with the EUIPO in his own name as the defendant's "straw man".

The plaintiff then brought an action before the Munich courts against the vendor as defendant 1) and its managing directors and shareholders as defendants 2)



to 4), according to which the defendants were to be ordered to instruct Dr S. to withdraw the applications for revocation of the plaintiff's EU trade marks which he had filed with the EUIPO on 10 August 2016. Furthermore, the court should declare that the defendants were jointly and severally liable to compensate the plaintiff for any damage it had suffered and would suffer in the future as a result of Dr S's applications for revocation of the EU trade marks.

The Munich Regional Court dismissed the action. The Munich Higher Regional Court dismissed the plaintiff's appeal, referring in particular to a judgment of the ECJ of 16 November 2017, according to which national courts have no power under national law to order that an application for revocation of an EU trade mark filed with the EUIPO be withdrawn (cf. the aforementioned "Carrera" decision of the ECJ printed in GRUR-RR 2018, p. 68 et seq.).

In the appeal proceedings, the Federal Supreme Court had to assume that the non-challenge agreement reproduced above would result in an obligation of the first defendant not to file an application for revocation with the EUIPO against the plaintiff's EU trade marks either. Therefore, the first question for the Federal Supreme Court was whether such an obligation in a non-challenge agreement is effective.

In case law and literature, the extent to which a non-challenge agreement is effective is disputed.

As far as can be seen, there is agreement that the owner of a right may undertake not to proceed on the basis of that right. In a delimitation agreement under trade mark law, the proprietor of the earlier trade mark typically undertakes not to take action against the younger trade mark and to tolerate the use of the younger trade mark in the course of trade for certain goods/services. Such an obligation is effective according to unanimous opinion. However, it is disputed whether attacks against a trade mark or other protective rights can be waived which are in the public interest and can be asserted by anyone, such as applications for revocation of a trade mark, for invalidity of a trade mark due to absolute grounds for refusal or - in patent law - for filing an action for revocation. With regard to a delimitation agreement under trade mark law, the Düsseldorf Higher Regional Court in particular took the view that obligations not to file an application for revocation of a trade mark or for a declaration of invalidity due to initial absolute grounds for refusal were inadmissible and thus void. Such applications predominantly served the public interest of cleaning up the register and were therefore not subject to party disposition (see OLG Düsseldorf, NZKart 2015, 109). The BGH agrees with the opposing opinion according to which such obligations are also effective (cf. also OLG Munich, judgement of 6.11.2014, Beck RS 2015, 18978; Ströbele/Hacker/Thiering, Kommentar zum Markengesetz, on Section 55, marginal no. 54 et seq.). Trade mark law had subordinated the enforcement of the compulsory use to the initiative of the parties.

## Managing IP 2021

### IP STARS 2020 rankings of the leading firms.

Preu Bohlig & Partner is listed in „Patent Contentious“ (Tier 2, 2021) and „Trademark“ (Tier 3, 2021).

Andreas Haberl, Dr. Alexander Harguth and Prof. Dr. Christian Donle are named as „Patent Star 2021“.

Since the relevant provisions did not contain a mandatory prohibition to keep trade marks in the trade mark register that were not used in a manner that preserved the rights, a private-autonomous agreement on the assertion of the non-use of a trade mark had to be possible in principle. In addition, the fact that trade mark law grants everyone the right to have a trade mark cancelled due to revocation does not mean that a contracting party who agrees not to make use of this right violates a statutory prohibition pursuant to Section 134 of the German Civil Code or acts immorally pursuant to Section 138 of the German Civil Code. The ECJ's decision on this question remains to be seen.

If the non-challenge agreement in the present case is valid and accordingly contains an obligation according to which the defendants may not attack the plaintiff's EU trade marks or have them attacked by a third party, the question further arises whether a national court may order the defendant to withdraw an application for revocation of an EU trade mark that has been filed. Indeed, in the above-mentioned decision, on which the Munich Upper District Court had relied, the ECJ denied such a power. In the case decided by the CFI, an EU trade mark had also been challenged with an application for revocation. The proprietor of the challenged EU trade mark had invoked a non-challenge agreement with the applicant and at the same time applied for a stay of the proceedings before the EUIPO on the grounds that litigation was pending before the Munich I Regional Court on the obligation not to proceed against the challenged trade mark. The ECJ ruled that a non-challenge covenant could not be taken into account in revocation proceedings before the EUIPO on the grounds of revocation. Furthermore, a national court could not order that an application for revocation of an EU trade mark filed with the EUIPO be withdrawn. The BGH takes the opposite view,

according to which a national court may well order a defendant to withdraw an application filed with the EUIPO on the basis of a corresponding contractual obligation. The ECJ's answer to this second question also remains to be seen.

The author agrees with the BGH. If there is an effective contractual agreement that an EU trade mark may not be challenged, there must also be the possibility of enforcing this obligation in court in the event of a breach of such an obligation. If the view of the ECJ in the "Carrera" decision were correct, it would not be possible to take action against such a breach of contract.



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## Best Lawyers Germany 2022 – Technology Law

Christian Kau is listed as „Lawyer of the Year in Technology Law“

## "Radio Rotkäppchen"



By decision of 25.03.2021 (file number: 26 W (pat) 523/19, the Federal Patent Court upheld an opposition arising from the word/figurative mark

*Rotkäppchen*

and a word mark "Rotkäppchen" against the word/figurative mark reproduced below



rejected.

The opponent has been selling sparkling wines under the sign "Rotkäppchen" since the middle of the 19th century. The trade mark "Rotkäppchen" was first applied for in respect of sparkling wines on 20 February 1895 and registered on 15 July 1985 under number 8311.

In the present proceedings, the opponent did not rely on this mark, but on the word/figurative mark

"Rotkäppchen" applied for on 09.06.2011 and registered on 22.07.2011 for goods in classes 30, 32 (in particular non-alcoholic beverages) and 33 (alcoholic beverages (except beers)), opposition mark No 1). Furthermore, the opponent based the opposition on the word mark "Rotkäppchen", applied for on 12 December 2013 and registered on 25 February 2014 for a variety of goods and services, but not for goods in classes 32 and 33, i.e. in particular not for alcoholic and de-alcoholised sparkling wines, opposition mark No. 2.

The contested mark "Radio Rotkäppchen" was also registered for a variety of goods and services, in particular for the broadcasting of radio programmes.

The proprietor of the contested trade mark raised the objection of non-use with regard to the opposition trade mark to 1).

The opponent was able to prove use of the opposed trade mark No. 1) for the goods wines, mixed alcoholic beverages and dealcoholised wines. The Federal Patent Court held that these goods were not similar to the goods and services for which the contested mark was registered. Accordingly, the Federal Patent Court rejected a likelihood of confusion within the meaning of Section 9(1)(2) MarkenG.

When examining the likelihood of confusion between the word mark "Rotkäppchen" (opposition mark No. 2) and the contested mark, the Federal Patent Court concluded that the respective goods and services applied for were partly identical, partly similar and partly dissimilar. For the goods and services claimed, the word mark "Rotkäppchen" had partly average and partly below-average distinctiveness. Above-average distinctiveness for the sign "Rotkäppchen" only exists for sparkling wines. However, the opposing mark No. 2 had not been applied for for this product. When comparing the signs, the Federal Patent Court assumed that the contested sign would maintain a sufficient distance from the word mark "Rotkäppchen".

Taken as a whole, the comparison marks



and

*Rotkäppchen*

are very clearly distinguished by the striking graphic design of the younger word/figurative mark and the word element "radio", which is not present in the opposing mark. The contested mark is not characterised by the element "Rotkäppchen". The element "Rotkäppchen" is indeed reproduced in red and thus clearly distinguishes itself from the other elements which are reproduced in black. However, this difference was cancelled out by the fact that a frame was drawn around all the word elements, which conveyed a sense of unity, especially as the word element "Radio" was placed above the word element "Rotkäppchen" and was written in a font twice as large. In addition, there was the graphic element at the edge of the picture in the form of a stylised wolf with its mouth wide open. The contested mark is also not characterised

phonetically by the word element „Rotkäppchen“. The target public would not limit the contested mark to the word "Rotkäppchen" when naming it, but would always add the word "Radio" as well. The word element "Rotkäppchen" also did not have an independent distinctive position in the contested mark. Although the word element "Rotkäppchen" had been completely incorporated into the younger mark, the combination with the word element "radio" to designate a radio station as well as the graphic linking in connection with the relevant goods and services, which have no relation to sparkling wines, would have the effect that the public would not assume a business, economic or organisational relationship with the opponent.

Due to the lack of likelihood of confusion between the challenged trade mark and the opposition trade marks No. 1 and No. 2, the Federal Patent Court held that the ground for cancellation under Sections 42 (2) no. 1, 9 (1) no. 2 Trade Mark Act, old version, did not exist.

The Federal Patent Court further examined whether the ground for cancellation under Sec. 42 (2) No. 1, 9 (1) No. 3 Trade Mark Law (old version) (special protection of the trade mark with a reputation) existed. As a result, the Federal Patent Court did not consider this ground for cancellation to exist either.

The sign "Rotkäppchen" was indeed a well-known trade mark for alcoholic and de-alcoholised sparkling wines within the meaning of Section 9 (1) No. 3 MarkenG. However, this reputation only extended to these goods and to closely related products such as wines or alcoholic mixed drinks, but not to the goods and services for which the contested mark claimed protection. The relevant public would not associate the younger mark with the one



with the trade mark "Rotkäppchen", which is known for sparkling wines. The mental association required for the protection of reputation under Section 9(1)(3) MarkenG was therefore not present.

Accordingly, the Federal Patent Court rejected the opposition based on opposition marks 1) and 2).

Indeed, the target public will not think of the trade mark "Rotkäppchen" for sparkling wines when they hear the name "Radio Rotkäppchen", but rather of the well-known fairy tale character, whereby this mental association with the fairy tale character is supported by the addition of the wolf with its mouth wide open.



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## Deutschlands Beste Anwälte 2021<sup>®</sup> – Handelsblatt Rating in Cooperation with Best Lawyers

Andreas Haberl, Dr. Axel Oldekop, Konstantin Schallmoser, LL.M., Jürgen Schneider, Dr. Ludwig von Zumbusch, Prof. Dr. Christian Donle and Daniel Hoppe are named in **Intellectual Property**.

Dr. Christian Kau is named in **Technology Law**.

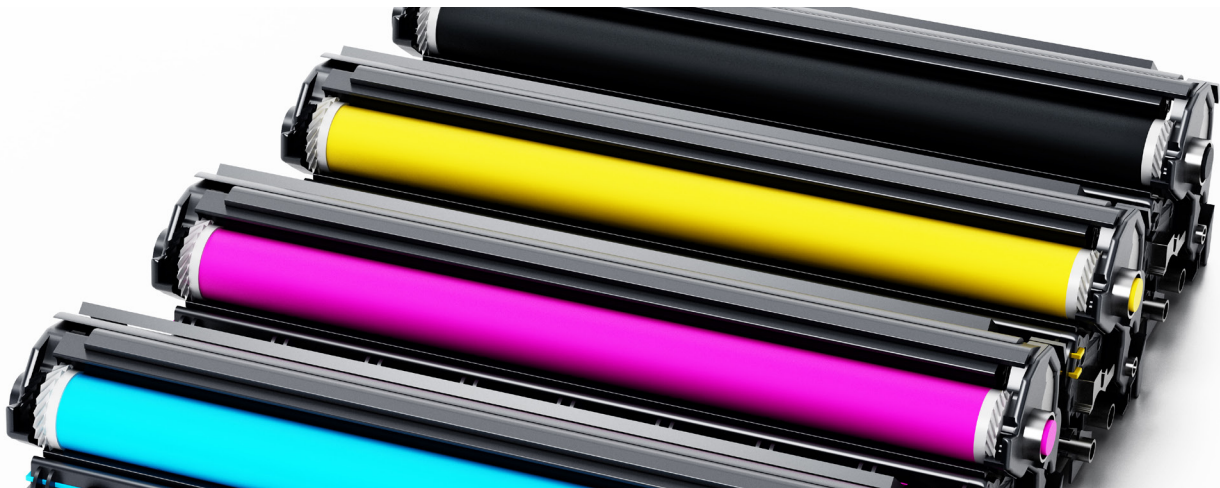
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## Best Lawyers Germany 2022 – Intellectual Property Law

Andreas Haberl, Daniel Hoppe, Jürgen Schneider, Ludwig von Zumbusch, Christian Donle, Konstantin Schallmoser and Axel Oldekop are listed as „Best Lawyer in Intellectual Property Law“.



## Responsibility for the change of an offer presentation by the Amazon algorithm; judgement OLG Frankfurt a. M. - Druckertoner



In its decision of 18.03.2021, the OLG Frankfurt a. M. (Higher Regional Court of Frankfurt) ruled that a seller on the Amazon Marketplace is liable for an infringing product image which was not added by himself but automatically by the Amazon algorithm. The OLG Frankfurt a. M. therefore imposed a penalty fine on the seller. The decision of the OLG Frankfurt a.M. is printed in the journal GRUR-RS 2021, 7658 - Druckertoner.

Background to the decision is a special feature of the Amazon Marketplace. In contrast to many other platforms, the Amazon Marketplace does not provide a separate offer presentation per offered product, but there shall basically exist only one offer presentation for all identical products offered by different sellers on the Marketplace. For this purpose, a so-called "ASIN" (Amazon Standard Identification Number) will be assigned once per product and each seller of this product will be listed in the so-called "buy-box" of this offer presentation (so-called "attaching" to an offer). The offer can be modified by the listed sellers or by Amazon itself, also automated by the Amazon algorithm.

In a series of decisions, the BGH (Federal Court of Justice) has ruled that the sellers listed in the buy-box are generally responsible for the content of the offer, even if it has been modified by third parties without their

knowledge (e.g. BGH GRUR 2016, 936 – Angebotsmanipulation bei Amazon [for trademark law] and BGH GRUR 2016, 961 – Herstellerpreisempfehlung bei Amazon [for competition law]). The BGH has set the limit of this liability for the attribution of incorrect customer reviews (BGH GRUR 2020, 543 – Kundenbewertungen auf Amazon). Those should not be attributable to the sellers listed in the buy-box, as they did not initiate those and customer reviews were not in the responsibility of the seller from the perspective of the users of the platform and also does not create the impression that the seller identified with the reviews.

In the facts underlying the decision of the OLG Frankfurt a.M., the issue was whether the defendant had violated a preliminary injunction of the LG Hanau (District Court of Hanau). With the preliminary injunction, the LG Hanau had prohibited the defendant from "attaching" to an Amazon Marketplace offer for printer toners containing a product picture of the toner in the original packaging provided by the manufacturer, if the defendant did not sell the printer toners in the original packaging (but in a neutral outer packaging).

The defendant then created a new product offer with its own ASIN for printer toners in neutral outer packaging and added its own accurate product image.

Subsequently, the Amazon algorithm changed the product image to that of the printer toner in original packaging without the defendant's intervention and knowledge. The applicant thus applied for an penalty against the defendant for breach of the preliminary injunction. The LG Hanau dismissed the request, because the infringement, which was "committed" by the Amazon algorithm, was not attributable to the defendant.

The OLG Frankfurt a.M. overturned this decision and imposed a penalty fine, albeit a small one. The court ruled that the defendant was aware of the possibility of an automated modification of offers by the Amazon algorithm.

Moreover, he had been warned about the use of product images by the previous injunction. It would be tolerable for him to regularly check "his" offer to evaluate whether infringing changes had been made. The OLG Frankfurt a.M. did not accept the defendant's objection that after creating his own offer with his own ASIN (printer toner in neutral outer packaging) he did not have to expect that the Amazon algorithm would change the (correct) product image to one of a printer toner in original packaging. The court obviously assumes that a seller on the Amazon Marketplace must expect any change to his offer at any time.

In its decision, the court did not deal with the question raised by the BGH in the decision *Kundenbewertungen auf Amazon* as to whether the product images are attributed to a seller from the perspective of the users of the platform. In the meantime, a not inconsiderable number of users of the Amazon Marketplace are probably familiar with its structure and the allocation of different sellers to an offer. This question will become relevant if a product picture uploaded by a customer (e.g. in the

context of a review) contains infringing content. Such customer photos are also sometimes automatically added to the product images by Amazon.

Although the OLG Frankfurt only imposed a small fine, sellers should not rely on this. If a seller wants to avoid liability, he should regularly check and amend all his offers on Amazon Marketplace or, if necessary, "delist" from an offer as a seller. How this is to be achieved in practice with often several thousand offers per seller and the multitude of possible infringements of competition law, copyright law and trademark law is another question.



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## 2021 – Beste Wirtschaftskanzleien

Die besten besten Wirtschaftskanzleien in Deutschland 2021. Das große Ranking von statista  
Preu Bohligh & Partner is named in the category „Marken und Geschmacksmuster“ in Tier 1 and in „Patentrecht“ in Tier 2.

## Federal Patent Court: Contemporary "Obandln" takes place online



Did you know that the Bavarian word "O'bandln" means "to tie the knot of a perhaps not entirely serious love affair"? And that "contemporary O'bandln" - in keeping with the distance rules - naturally takes place online?

The Federal Patent Court (BPatG) has now made corresponding findings and, by decision of 18 March 2021, granted an application for cancellation of the word/figurative mark 30 2018 008 356



inter alia for "telecommunications services", "providing access to information on the internet about dating agencies" and "electronic exchange of messages by means of chat lines, chat rooms and internet forums" in class 38 because of the existence of absolute grounds for refusal.

The trademark division of the DPMA had previously rejected the request for cancellation: It is true that the word "Obandln" as a Bavarian variant for "Anbandeln" is known to large parts of the public even outside the Bavarian language area. However, this term did not describe the services claimed in class 38, as this class of goods only referred to the technical establishment and realization of communication connections and did not include the contents of the communication process itself.

However, the Federal Patent Court found a close descriptive relationship between the term "Obandln" and the goods or services applied for and, referring to the decisions of the Federal Court of Justice "Pippi Langstrumpf" and "HOT", affirmed the existence of absolute grounds for refusal within the meaning of Section 8 (2) Nos. 1 - 3 MarkenG.

According to the BPatG, the word element of the contested trademark "Obandln" was a variation of the verb "anbandeln" in written Bavarian dialect. In Bavaria, this word was quite common - and in this respect understandable not only to native Bavarians, but also to "newcomers".

<sup>1</sup>Az.: 30 W (pat) 19/20

<sup>2</sup>GRUR 2018, 301 Rn. 15

<sup>3</sup>GRUR 2014, 569 Rn. 10

However, the term "Obandln" is also understood beyond the borders of Bavaria, as it differs from the High German verb "anbandeln" only in the initial vowel and in the final syllable and large parts of the public know that in Bavarian language the syllable "An-" is often rendered as "O". The public had acquired relevant linguistic knowledge in particular through the annual broadcast of the opening of the Munich Oktoberfest, during which the incumbent mayor traditionally shouts "O'zapft is!" when tapping the first barrel of beer - and also uses the initial syllable "O'".

Taking into account the fact that the public is increasingly accustomed to descriptive advertising statements modified in dialect, a significant part of the general public targeted understands "Obandln" in accordance with its lexical meaning as "the initiation of a perhaps not entirely serious love affair".

With this meaning, the sign "Obandln" had a close descriptive relationship to the services in class 38 which were the subject-matter of the proceedings (which precluded distinctiveness under Paragraph 8(2)(1) of the Markengesetz) because it designated the content and subject-matter of these services, which were concerned precisely with the arrangement of partnership contacts - and thus with "Obandln".

Currently, "contemporary dating" often takes place online; the telecommunication services at issue in the proceedings merely create the technical prerequisites for this. However, in addition to the purely technical component, these services also included the provision and transmission of information in terms of content. There was such a close connection between the technical service and the provision of content that the public no longer distinguished between technology and content. In this respect, the public would infer from the term "offer" in connection with the services at issue in the proceedings that they were intended to create connections for "establishing a perhaps not entirely serious love affair".



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## Leaders League 2021 Germany

### Leaders League 2021 Germany – Best Law Firms for Patent Litigation

Preu Bohligh & Partner is listed in the category „Excellent“ in **Patent Litigation**.

### Leaders League 2021 Germany – Best Law Firms for Trademark Litigation & Trademark Prosecution

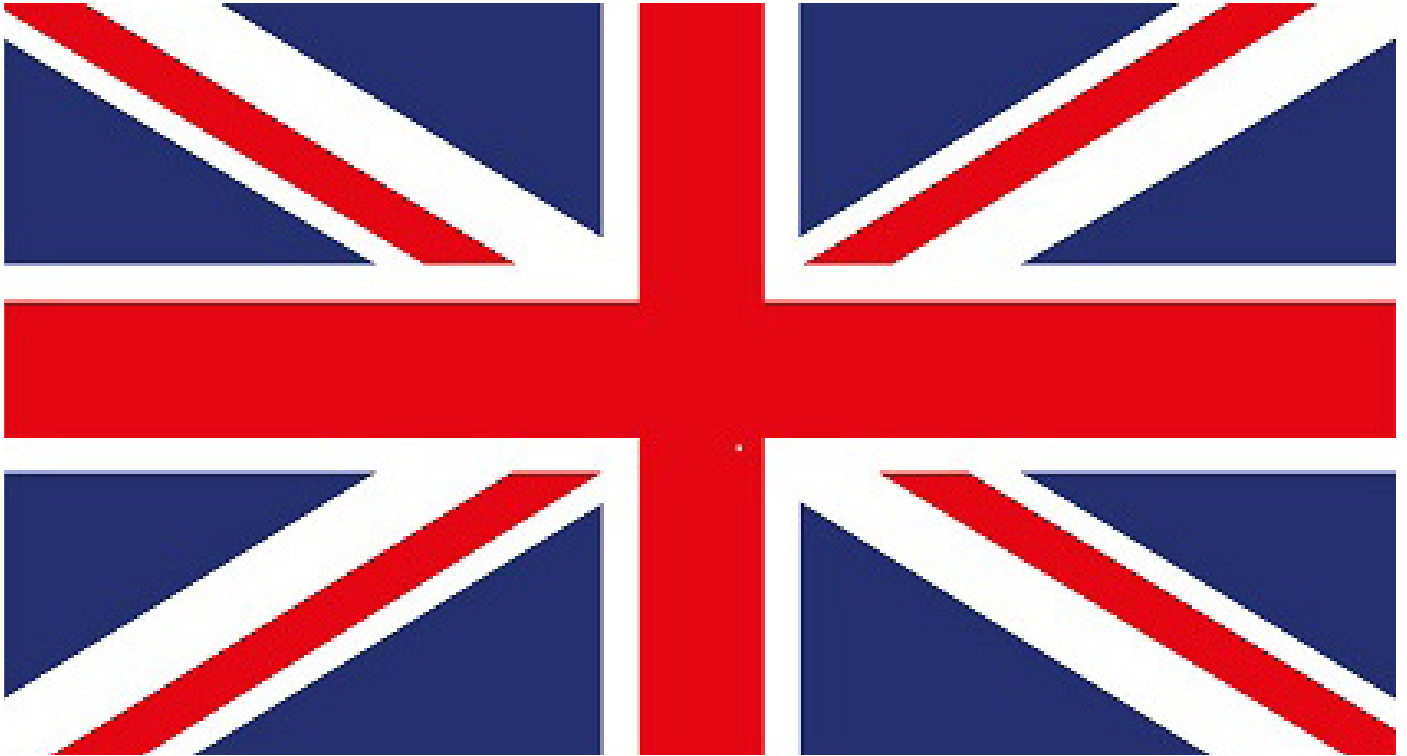
Preu Bohligh & Partner is listed in the category „Highly Recommended“ in **Trademark Litigation and Trademark Prosecution**.

### Leaders League 2021 Germany – Best Law Firms for IT & Outsourcing

Preu Bohligh & Partner is listed in the category „Recommended“ in **IT & Outsourcing**.



## Security for legal costs in civil actions in Germany brought by British companies



In case a plaintiff with registered office or habitual residence outside the European Union brings a civil action before a German court, the defendant(s) can often demand a so-called 'security for legal costs' pursuant to section 110 of the German Code of Civil Procedure (ZPO). Under the according legal provisions, non-EU plaintiffs must deposit a security for the expected litigation costs either in cash or as a bank bond. The non-EU plaintiff is only exempt from such security deposit if there are special agreements between Germany and the plaintiff's home country or if the plaintiff has real estate in Germany. The purpose of such security is to protect the defendant from a situation where the non-EU plaintiff disappears after a dismissal of the action and the defendant is left with the costs of the litigation despite having been successful in defending against the claim. This is why the court will usually proceed with the litigation only after the non-EU plaintiff has paid the security. If the plaintiff does not pay, the defendant can request that the action be declared withdrawn.

The obligation to provide a security for legal costs has already existed a long time for plaintiffs from well-known countries, such as Australia, China, Taiwan, South Korea, India, Canada, USA, UAE (sometimes with certain exceptions, which would be too much of a detail here). However, following Brexit, the obligation to provide a security now also includes companies based in Great Britain and Northern Ireland, as existing agreements between Germany and the United Kingdom are not relevant for an exemption from such security for various reasons.

In view of the decisions of the Federal Court of Justice (BGH) and the Federal Patent Court (BPatG) issued in the meantime, this also applies to ongoing court proceedings that were already pending before the completion of Brexit on 1 January 2021. According to the cases already decided, it does not matter how far the pending proceedings have progressed through the instances. In a decision of 1 March 2021 (docket no. X ZR 54/19),

the Federal Court of Justice (BGH) ruled that security for legal costs can also be demanded retroactively for a legal dispute that is already at the appeal stage. However, it should be noted that for such pending actions, there is actually a transitional provision in Art. 67(2)(a) of the EU-UK Withdrawal Agreement. According to this provision, the previous rules continue to apply to court proceedings instituted before 1 January 2021. This is likely to include the exemption from security for legal costs.

Anyhow, for all new lawsuits filed by a British company before a German civil court after 1 January 2021, it must be assumed that the plaintiff will be required to provide security for legal costs.



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## Chambers Europe 2021 – „Intellectual Property: Patent Litigation“ und „Trade Mark & Unfair Competition“

Preu Bohligh & Partner in der Kategorie „Intellectual Property: Patent Litigation“ und „Trade Mark & Unfair Competition“ gelistet:

### What the team is known for:

Well known for expertise in patent litigation, regularly acting for clients from the technology and manufacturing sectors. Represents clients in patent infringement and parallel validity proceedings and often advises on employee invention disputes. Assists with licence negotiations and trade secrets matters. Provides additional support in FRAND-related matters. Also offers capabilities in trade mark and unfair competition matters.

### Work highlights:

Supported ATT Automotive in the preparation of two patent infringement suits against Daimler and Renault relating to thermal management of combustion engines.

### Notable practitioners:

Andreas Haberl often leads litigation cases relating to technology patents. He also assists with IP matters relating to transactions.

Christian Donle acts primarily for telecommunications and IT companies on infringement proceedings including litigation defence against non-practising entities.

## Advertising with test ratings

On 15 April 2021, the Federal Supreme Court once again commented on advertising with test ratings (ref. no.: I ZR 134/20).

The subject matter was the advertising of a DIY store for the wall and ceiling paint "Alpinaweiß". The advertisement was designed as follows (excerpt from the original illustration from the judgement): Only the test rating with the heading "TESTSIEGER" was recognizable on the product in the advertisement, but not the source:



The plaintiff, Verband Sozialer Wettbewerb e.V., was of the opinion that the advertisement was unlawful because the product illustration indicated the test victory ("TESTSIEGER"), but not the source of the test.

Both the Regional Court of Cologne and the Higher Regional Court of Cologne upheld the action. The Federal Supreme Court dismissed the defendant's appeal. In its judgement, the Federal Supreme Court confirms the principles for advertising with test ratings. In particular, it confirms that the indication of the source of the test is material information within the meaning of Section 5a (2) UWG (Act against Unfair Competition), the withholding of which from the consumer constitutes an unfair act.

It is true that information is not material within the meaning of Section 5a (2) UWG merely because it may be of importance for the consumer's business decision, but only if its disclosure can be expected from the company, taking into account the interests of both parties, and if it is also of considerable weight for the consumer's business decision.

However, referring to its established case law, the Federal Court of Justice points to the obligation under Section 5a (2) UWG to indicate the source of the test publication

when advertising with quality assessments (see, inter alia, BGH GRUR 2010, 248 paras. 29-31 - Kamerakauf im Internet – purchase of a camera on the internet; BGH GRUR 1991, 679, 680 – Fundstellenangabe – Indication of the source). There is a considerable interest of the consumer to know how the evaluation fits into the environment of the other tested products and to compare the test results of the advertised product with those of the other tested products (para. 14, with further references).

The duty to inform about the source of the test publication does not cease to apply because the test victory recognizable on the product's picture is not particularly emphasized. It is irrelevant whether a test result is advertised by means of a separate addendum or merely on a product packaging depicted in the advertisement. The consumer's interest in being able to examine an advertisement with a test result for the purpose of making an informed business decision and, in particular, to be able to place it in the overall context of the test, does not depend on the intensity of the advertising of the test result, but solely on whether the test result is recognizable in the advertisement. In the specific case, the defendant could be expected to refer to the source of the test publication, for example, with a footnote in the brochure.

The Federal Supreme continues to confirm that the source had also been withheld from consumers. A company withholds information from the consumer if the consumer does not receive it or does not receive it in such a way that he can take it into account in his business decision (para. 19, with further references).

It is not sufficient that the test result can be easily researched. Verifiability of a test winner advertisement, and thus the possibility for the consumer to ascertain what the content of the test has been, may only be assumed if the consumer can find the source without further intermediate steps. This requirement is not fulfilled if the consumer must find the reference on his/her own by means of an online search via a common

search engine. Rather, a source must be clearly indicated, easily accessible and allow an unambiguous allocation to a certain test in order to provide the consumer with a simple possibility to take note of the test himself (para. 21 with further references). Even if the indication of Stiftung Warentest's website had been recognisable in the test rating on the product image, this would not satisfy the requirements for indicating the reference of the test. This is because the test in question cannot usually be found directly on Stiftung Warentest's website, but must be found through further research (para. 24).

In the case decided, the source of the test (year of publication and issue) was correctly reproduced on the Stiftung Warentest's test seal affixed to the product itself, but not on the image of the paint bucket in the advertising brochure.

The Federal Court of Justice pointed out in this context that the reference to the source of the test on the actual product in the defendant's stores would not be "timely" (para. 24). This is because information is only timely if the consumer receives it before he/she can make a commercial decision based on the advertising. The term "business decision" encompasses not only the decision to purchase or not to purchase a product, but also directly related decisions such as, in particular, entering the shop.

Finally, the withholding of this material information was also "substantial" within the meaning of Section 5a(2) UWG.

As to liability for the infringement, the Federal Supreme Court confirmed the Court of Appeal's view that the defendant itself had advertised the test victory. It was not a matter of the defendant's duty to verify any manufacturer's (advertising) statements on the product image, but of the defendant's own duty to correctly inform the consumer based on the advertising brochure it published.

By publishing the advertising brochure, the defendant had acted in favour of its own company prior to the

conclusion of a business transaction; such act was objectively related to the promotion of the sale of goods and thus constituted an (own) commercial act within the meaning of Section 2 para. 1 no. 1 UWG. In the context of this advertising, the defendant had included the product image of the paint bucket in its advertising brochure in such a way that the test winner rating was recognisable, but not the source of the test. The defendant had thus itself withheld from consumers material information within the meaning of Section 5a (1) UWG.

The Federal Court of Justice distinguished the facts of this case from those underlying the "Customer reviews on Amazon" judgment (BGH GRUR 2020, 543). There, the subject matter were customer reviews that were available under a product offer of the defendant on Amazon's platform and which were objected to as misleading. There, the defendant had not adopted the customer reviews as own advertising because the customer reviews were marked as such, were found on the online trading platform separately from the defendant's offer and were not attributed to its sphere by the users.

The judgement of the Federal Court of Justice again confirms the importance of correct advertising with test seals.



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## Second Reform of German Patent Law adopted

On 10 June 2021, the German parliament (Bundestag) adopted the draft of the Second Law on the Simplification and Modernisation of the Patent Law. The draft included some final amendments suggested by the parliament's Legal Affairs Committee. On 25 June 2021, the patent law reform has also passed the Federal Council (Bundesrat). The reform will be executed immediately, with the exception of the provisions described below in paragraph 2, which will only enter into force after a nine-month period.

In our newsletter from March 2020, we already reported on the planned patent law reform in Germany. The official aim of the reform is to simplify and modernise the German Patent Act as well as other IP laws. According to the Federal Ministry of Justice, the reform includes clarifications in patent and utility model laws with regard to injunctive relief. Furthermore, it will optimise and better synchronise the provisions (i) on patent infringement proceedings before the civil courts and (ii) on nullity proceedings before the Federal Patent Court (BPatG). In addition to that, the reform will improve the protection of confidential information in patent and utility model litigation. Finally, the reform aims to reduce the bureaucratic burden on applicants before the German Patent and Trademark Office.

Unofficially, the patent law reform is the result of extensive lobbying, especially by the telecommunications and automotive industries, to soften the enforcement of injunctive relief in certain cases and at the same time reduce the "injunction gap" existing in the German patent system. Accordingly, the focus is now on the proportionality test for injunctive relief, which was expressly introduced into the Patent Act, and the introduction of a (soft) six-month period for the Patent Court's preliminary opinion in nullity proceedings.

### 1. Proportionality test for injunctive relief

The injunctive relief in Sec. 139 (1) Patent Act will read as follows after the patent reform (bold = new):

"Any person who uses a patented invention contrary to sections 9 to 13 may, in the event of the risk of recurrent infringement, be sued by the aggrieved party for cessation and desistance. This right may also be asserted in the event of the risk of a first-time infringement. **The claim is excluded if it would lead to disproportionate hardship for the infringer or third parties not justified by the IP right due to the special circumstances of the individual case and the requirements of good faith. In that case, the aggrieved party shall be granted appropriate compensation in money. The claim for damages according to paragraph 2 of this section shall remain unaffected.**"

The Utility Model Act also contains a similar amendment.

The amendment now expressly provides for the possibility of excluding the right to injunctive relief if this would lead to unjustified hardship for the infringer himself or for third parties. If this exclusion takes effect, the infringer must pay reasonable compensation for the future use of the patent in addition to any damages for the past use. According to the recitals of the law, the amount of such compensation will initially be based on a royalty which is customary in the relevant market. However, it is possible to reduce or increase the compensation, e.g. depending on the legal status of the patent and the degree of negligence of the infringer.

The recitals of the law as well as prominent judges in the field of patent law emphasise that the newly introduced limitation of the right to injunctive relief will be an absolute exception. Even though in the near future most defendants will certainly argue that an injunction is disproportionate in their case, the courts will be very strict. The possibility of limiting the injunctive relief within the framework of an - unwritten - proportionality test has already existed before. Nevertheless, there has been no significant softening of the right to injunctive relief so far. And it will not happen in the future. In this context, experts often mention the 'Waermetauscher' (heat exchanger) decision of the Federal Court of Justice (judgement of 10 May 2016, docket no. X ZR 114/13).

In that decision, the judges considered a delay for the infringer to cease and desist, but ultimately rejected such delay in that specific case.

If a defendant actually wants to have a real chance of limiting an injunctive relief, it will certainly not be sufficient to simply argue that a stop of production or sales constitutes a disproportionate hardship. This is even more true if the patentee is willing to grant a licence. Instead, the defendant will have to substantiate the allegation of disproportionality with figures and data, e.g. with business figures on the challenged product and on the defendant's company as a whole (for example, in the case of an existential threat posed by an injunction). The question of disproportionality may also play a role in the case of a low value of a patent-infringing component, which is essential for the function of a complex product though. The exclusion of the right to injunctive relief could also become relevant in the field of public supply as well as in pharmacy and medical technology, for example in the case of a patient risk due to a supply stop if there are no alternative products on the market.

## 2. Streamlining the nullity procedure

Many experts criticise the long duration of patent nullity proceedings (approx. 24 to 26 months in the first instance at the Federal Patent Court). This is even more relevant in view of the fact that the civil courts usually conclude the infringement proceedings in the first instance within 12 to 18 months. In order to reduce the resulting "injunction gap" and the extra pressure on the defendant, the reform aims to shorten the nullity proceedings. According to a new provision, a nullity action shall be served upon the patent proprietor more quickly and that the patent proprietor must reply to the nullity arguments within two, max. three months. Within six months after service of the nullity action, the Federal Patent Court shall issue its "qualified note" in which the court gives a preliminary opinion on its view of the validity of the attacked patent.

The idea behind this streamlining of the proceedings is that at the date of the oral proceedings at the infringement court, a document is available in which a tech-

nical judge at the Federal Patent Court has at least provisionally dealt with the validity of the patent under dispute. This is why the preliminary opinion of the Federal patent Court will play a major role in the decision to stay the infringement proceedings, because this document is often the only neutral assessment of the validity of the patent. However, it remains to be seen whether the Federal Patent Court will try to respect the six-month time limit. It is only a soft deadline, i.e. there are no consequences if the deadline is missed. The lack of judges at the Federal Patent Court has been criticised for a long time, and this deficit cannot be compensated for by a new deadline. Against this background, it also remains to be seen what the quality of the preliminary opinion prepared within such rather short time limit will be.

In this context, it should be noted that an early draft of the patent law reform provided for the possibility to file a nullity action with the Federal Patent Court even though the opposition period was not over yet. However, this aspect was not implemented in the final reform.

## 3. Protection of trade secrets in infringement proceedings

A new Sec. 145a Patent Act is introduced, which reads as follows:

**"In patent litigation, with the exception of independent proceedings for the taking of evidence and compulsory licensing proceedings under Section 81 [...], Sections 16 to 20 of the Act on the Protection of Trade Secrets [...] shall apply mutatis mutandis. All information introduced into the proceedings by the plaintiff and the defendant shall be deemed to be a trade secret within the meaning of [...] the Act on the Protection of Trade Secrets."**

A provision with the same content is also introduced as Section 26a in the Utility Model Act.

The new provision will make it easier for courts to take measures to preserve trade and business secrets in patent infringement proceedings. In this way, the courts

can restrict access to the court files, exclude the public from court hearings or limit access to specific documents to a certain number of reliable persons. In this way, the law responds to the need to better protect information disclosed during patent litigation (for example, information about how a defendant carries out a manufacturing process that is different from the method protected in the patent under dispute).

The second sentence of the new Section 145a (according to which all and any information introduced into the proceedings can be classified as trade secrets) was added only in the final draft. This is to clarify that not only technical information on the infringement, but also all other information may constitute a trade secret.

The exceptions provided for in Section 145a (independent proceedings for taking evidence and compulsory licensing proceedings) do not limit the protection of trade secrets in these proceedings. Rather, especially the so-called "Dusseldorf practice" during the taking of evidence remains in place. This means that the plaintiff or patent proprietor do not have direct access to the information collected during an inspection at the defendant's premises.



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## Federal Constitutional Court clears the way for Unified Patent Court - start on 1 January 2023 at the latest

In its decision of 23 June 2021, published on 9 July 2021, the Federal Constitutional Court rejected the urgent applications for a temporary injunction against the Act Approving the Ratification of the Agreement on a Unified Patent Court (UPC). A decision in the main proceedings is still pending. However, the FCC leaves no doubt that the constitutional complaints will be rejected on the merits. For, according to the order (para. 45), they are inadmissible. The complainants were not able to show in a sufficiently substantiated manner that their fundamental rights were violated. This applies in particular against the background of the first decision of the Federal Constitutional Court on the UPCA of 13 February 2020 (FCCE 153, 74).

After these first proceedings, the main question was how the Federal Constitutional Court would assess Art. 20 UPCA, which had been regarded as critical. Art. 20 UPCA postulates the primacy of EU law over the provisions of the Agreement itself, as a reaction to Legal Opinion 1/2009 of the Court of Justice of the European Union, which had found the predecessor project of the UPCA not to be in conformity with EU law. The UPCA signed in February 2013 therefore had to make clear that the UPCA cannot override EU law. This unconditional reservation of EU law had been critically questioned in the FCC's decision of 13 February 2020 (para. 166), without a decision being required at the time.

It is therefore all the more gratifying that the FCC has now taken a clear position on this. First of all, it elaborates (paras. 74, 75) that in almost all EU states there are "reservations of control under European constitutional law" which oppose an "unrestricted primacy of application of Union law". Very clearly, the FCC states: "The [...] requirements of the Basic Law bind all constitutional bodies [...] and may neither be relativised nor undermined.

For the understanding of Art. 20 UPCA, the FCC then explains (para. 77) that it "is intended to dispel doubts as to the compatibility of the Agreement with Union law, but it is not a matter of regulating the relationship between Union law and national constitutional law beyond the status quo". The FCC comes to the convincing conclusion that "Art. 20 UPCA does not concern the relationship between Union law and national constitutional law [...]."

The FCC also comments - albeit very briefly - on other points of attack of the constitutional complaints. With regard to the six-year term of office of the judges at the UPCA and the possibility of their re-election, the FCC states (para. 60) that terms of office limited in time with the possibility of re-election are the rule at international courts. This had to be taken into account, so that that the complainants did not sufficiently argue as to which minimum constitutional requirements had to be met. In the view of the FCC, breaches of Union law by the UPCA cannot be challenged by means of a constitutional complaint (para. 70). Insofar as the complaint was that the Agreement could not be brought into force with the withdrawal of the United Kingdom from the EU, this only concerned the interpretation of the Convention and not possible requirements of the Basic Law (margin note 71).

As a result, the FCC thus approves the UPCA and significantly strengthens it. Admittedly, a considerable and regrettable delay had occurred due to the two proceedings pending since 2017. On the other hand, the UPCA can now start without constitutional doubts preventing users from filing actions with the Unified Patent Court. This is undoubtedly an outstanding starting advantage.

According to the Preparatory Committee, Germany will now ratify the Protocol on Provisional Applicability of



Institutional Provisions in the autumn. Two more member states are still missing, but they will probably follow in autumn, at the latest at the beginning of 2022. The Preparatory Committee expects the provisional phase to start at the beginning of 2022. This phase is expected to last eight months. In the course of this phase, the so-called "sunrise period" will also begin, during which opt-out declarations can be submitted to the registry.



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## **Hartington with Preu Bohlig successful at the Federal Administrative Court on the demarcation of medical devices from presentation medicinal products (BVerwG decision of 20.05.2021, ref. 3 C 9.20)**



### **I. Introduction**

As is well known, medicinal products and medical devices have, by definition, the same intended purpose. Both serve the purpose of detecting, preventing, monitoring, treating or alleviating diseases. Section 2 AMG defines medicinal products and distinguishes between presentation medicinal products according to subsection 1 number 1 AMG and functional medicinal products according to subsection 1 number 2 a AMG as well as diagnostic products according to subsection 1 number 2 b AMG.

Section 2(5) of the MPG determines, inversely to Section 2(3) of the AMG, what does not belong to the scope of the Medical Devices Act, namely medicinal products as defined in Section 2 of the AMG, whereby the decision as to whether a product is a medicinal product or a medical device is made taking into account, in particular, the principal mode of action of the product, unless it is a medicinal product as defined in Section 2(1)(2)(b) of the Medicinal Products Act (diagnostics).

For years, the case law of the Administrative Court of Cologne and the Higher Administrative Court of North Rhine-Westphalia (OVG NRW) has been that medical devices containing substances are not subject to the medicinal product regime according to objective scientific criteria, but with the argumentation that they present themselves like a medicinal product and since the mode of action cannot be sufficiently clarified, they are to be subject to the medicinal product regime via the rule of doubt.

In fact, the concept of the presentation medicinal product was developed by the ECJ in order to be able to make a distinction in the area of foodstuffs and medicinal products. When differentiating between medicinal products and medical devices, however, the presentation of the therapeutic effect cannot be the decisive factor and a product that is correctly labelled in accordance with the provisions of the MPG cannot be subjected to the medicinal product regime by means of the concept of a medicinal product for

presentation. Rather, when differentiating between medicinal products and medical devices, the main effect of the product in dispute must be scientifically clarified.

In an oral hearing on 20.05.2021, the Federal Administrative Court has now decided to suspend the proceedings and to submit the questions to be decided here - 4 in total - on the demarcation of substance-based medical devices from medicinal products to the ECJ for a preliminary ruling.

## II. Facts of the case

The subject matter of the present proceedings is a declaratory decision of the Federal Institute for Drugs and Medical Devices (BfArM) pursuant to Section 21 (4) of the German Medicines Act (AMG), according to which the nasal spray marketed by the plaintiff as a medical device was a medicinal product subject to authorisation.

The BfArM regarded the preparation in question as a presentation medicinal product within the meaning of section 2(1)(1) of the AMG and thus subjected it to the medicinal product regime, which in the opinion of the plaintiff was an inappropriate distinction from a medical device within the meaning of section 3(1) (a) of the MPG.

The actions brought against this were unsuccessful both before the Administrative Court of Cologne and the Higher Administrative Court of North Rhine-Westphalia (OVG NRW) on the grounds that the term "presentation medicinal product" under Section 2(1)(1) of the German Medicines Act (AMG) also applies if the product in question is placed on the market as a material medical product under Section 3(1)(a) of the MPG.

The decision of the OVG NRW is based on the finding that the product in dispute is a presentation medicinal product according to its presentation and that the term presentation medicinal product according to § 2 para. 1 no. 1 AMG also applies if the product in question is placed on the market as a material medical product according to § 3 para. 1 letter a) MPG.

## III. Decision

Against the background of the questions under European law, the BverwG has now suspended the proceedings in the appeal proceedings and submitted the following four questions to the ECJ:

1. Can the main intended effect of a substance also be pharmacological within the meaning of Article 1(2)(a) of Directive 93/42/EEC if it is not based on a

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receptor-mediated mode of action and the substance is not absorbed by the human body either but remains on the surface of, for example, mucous membranes and reacts there? In such a case, what criteria are to be used to distinguish between pharmacological and non-pharmacological, in particular physico-chemical, agents?

2. Can a product be regarded as a medical device containing substances within the meaning of Article 1(2)(a) of Directive 93/42/EEC if, according to the state of scientific knowledge, the mode of action of the product is open and it is therefore not possible to determine conclusively whether the principal effect intended is achieved by pharmacological or physico-chemical means?

3. In such a case, is the classification of the product as a medicinal product or medical device to be made on the basis of an overall consideration of its other properties and all other circumstances or, if the product is intended for the prevention, treatment or alleviation of disease, is it to be regarded as a medicinal product for presentation within the meaning of Article 1(2)(a) of Directive 2001/83/EC, irrespective of whether or not a specifically medicinal effect is claimed?

4. Does the priority of the medicinal product regime also apply in such a case under Article 2(2) of Directive 2001/83/EC?

The ECJ decision can be awaited with anticipation, as there is hope that the long-standing controver-

sial question of the applicability of the presentation medicinal product to medical devices as well as the question of the applicability of the doubtful case regulation in such cases will then be resolved.

It is possible that the ECJ will also deal with a definition of a pharmacological effect, which is still not suitable for finding a uniform and satisfactory solution to numerous borderline cases.

Perhaps there will also be further demarcation criteria for the future if the previous definitions and demarcation criteria do not offer any further help, because the questions will remain relevant under the MDR.



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