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**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

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© Law Business Research Ltd 2020  
No photocopying without a CLA licence.  
First published 2007  
Fifteenth edition  
ISBN 978-1-83862-353-1

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Intellectual Property & Antitrust 2021

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Lexology Getting The Deal Through is delighted to publish the 15th edition of *Intellectual Property & Antitrust*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Peter J Levitas and Matthew A Tabas of Arnold & Porter Kaye Scholer LLP, for their assistance with this volume.



London  
November 2020

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This article was first published in December 2020  
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# Germany

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## INTELLECTUAL PROPERTY

### Intellectual property law

1 | Under what statutes, regulations or case law are intellectual property rights granted? Are there restrictions on how IP rights may be enforced, licensed or otherwise transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

Most intellectual property rights in Germany are governed by dedicated statutes, the most relevant being:

- the German Patent Act (GPA);
- the German Act on Utility Models;
- the German Act on Trademarks and Signs (TMA);
- the German Copyright Act (GCA);
- the German Design Act (GDA);
- the German Act on the Protection of Topographies of Microelectronic Semiconductors;
- the German Act on Plant Varieties;
- the German Trade Secrets Act (TSA);
- the European Patent Convention (EPC);
- EU Regulation 469/2009 on supplementary protection of medicinal products;
- EU Regulation 6/2002 on Community Designs (CDR);
- EU Regulation 2017/1001 on the European Union Trademark (EUTMR);
- EU Directive 2001/29 on the harmonization of certain aspects of copyright and related rights;
- EU Directive 2019/790 on copyright and related rights in the Digital Single Market, amending Dir. 2001/29/EC; and
- EU Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

European and German Patents as well as German utility models are granted for technical instructions that are new and involve an inventive step. With a Supplementary Protection Certificate the term of patent protection (which is 20 years from filing) can be extended by up to five years for pharmaceutical products.

Trademark law protects the commercial use of signs with distinctive character for specific products and services. Protectable signs may include characters, designs, colours, shapes of goods or sounds.

Besides trademarks, the German Trademark Act also covers commercial names (company names, domain names etc), work titles (movie names, magazine titles etc), collective marks and indications of geographic origin. It also contains provisions on the enforcement of EU trademarks and World Intellectual Property Organization (WIPO) trademarks.

The German Copyright Act protects personal intellectual creations of any form (literary, musical, artistic etc) and contains provisions for a number of specific copyright-related IP rights. These rights include protection of databases as well as computer programs (software).

Community designs and German designs protect the appearances of products that are new and of individual character.

Alongside codified IP rights, the German Act on Unfair Competition (UCA) provides for supplementary protection of work results with 'individual commercial character' against imitations.

The Trade Secrets Act provides for the protection of confidential business information in a way similar to the protection of Intellectual property rights. That is, the owner of the trade secret may claim injunctive relief, redress and compensation of damages as a result of an illicit use or disclosure of trade secrets.

Being a member state of the EU, the Treaty of the Functioning of the European Union (TFEU) and all EU Regulations apply directly in Germany. IP rights established by EU law, such as EU trademarks and community designs, have the same legal status and protection in Germany as IP rights established by national law.

Most, but not all, IP rights require registration to come into force. Unregistered IP rights include rights protected under the copyright act, commercial names (section 5 of the TMA), signs publicly recognised as a trademark (section 4(2) of the TMA), and non-registered community designs (article (2a) of the CDR).

In principle, IP rights may be freely transferred, assigned and licensed. Due to its personal nature, copyright may not be transferred, but only licensed. Transfer and licensing generally follows the rules on the assignment of rights and claims under the German Civil Code (BGB). While there is no statutory form requirement for these kinds of agreements, parties are strongly advised to use the written form and ideally agree on German law to govern the agreement, as this will help when enforcing IP rights in court. Article 72 of the EPC stipulates the written form for assignments of European patent applications. Equally, assignments of EU trademarks will require the written form pursuant to article 20(3) of the EUTMR.

Germany has implemented TRIPs, yet the scope of IP right protection under German law usually exceeds the minimum TRIPs requirements. German civil courts may turn to the provisions of the TRIPs agreement to interpret the scope of protection and remedies in case of IP infringement.

### Responsible authorities

2 | Which authorities are responsible for granting, administering or enforcing IP rights?

The German Patent and Trademark Office (GPTO) is responsible for granting and administering German trademarks, patents, utility models, designs and semiconductor topographies. The GPTO administers the German designations of European patents and processes applications for WIPO trademarks and designs.

The GPTO is the first instance venue for revocation actions involving German trademarks, utility models, German designs and German designations of international designs. The GPTO is not an exclusive venue in that respect, however, as the validity of these IP rights can also be challenged before the civil courts.

German patents can be challenged with a motion for revocation ('opposition') before the GPTO within a period of nine months after grant of the patent.

Decisions of the GPTO can generally be appealed to the German Federal Patent Court (FPC). The FPC is also the exclusive venue for invalidity actions against German patents and German parts of European patents (provided, no opposition is pending against the patent or the opposition period has lapsed). It should be noted that German civil courts are not competent to decide on the validity of patents, but may only stay patent infringement proceedings, pending a nullity attack before the FPC, GPTO or EPO where a revocation of the patent is highly likely ('bifurcated system'). Decisions of the FPC in patent matters can be appealed to the German Federal Supreme Court (FSC).

The European Patent Office (EPO) is competent for administering applications for European patents. Similar to the German system, an opposition can be filed with the EPO within a term of nine months after grant of the patent.

EU trademarks and community designs are granted and administered by the European Office for Intellectual Property (EUIPO), which is also competent to hear revocation actions with respect to these rights.

### Proceedings to enforce IP rights

**3** | What types of legal or administrative proceedings are available for enforcing IP rights? To the extent your jurisdiction has both legal and administrative enforcement options for IP rights, briefly describe their interrelationship, if any?

German law provides for civil law and administrative proceedings to enforce IP rights, although enforcement before civil courts is generally prevalent.

All German IP statutes provide for the exclusive first-instance jurisdiction of the district courts for all matters involving IP rights, irrespective of the value in dispute. The same holds true for claims based on the German antitrust rules (ie, the Act on Restraints of Competition (GARC)). The district courts maintain dedicated divisions, specialising in disputes involving trademarks, patents, designs, unfair competition and antitrust law, respectively. The same goes for the appeal courts and the FSC.

Some federal states have concentrated competence for IP matters at certain venues that have gained significant expertise and experience over the years. If the act of infringement takes place in the whole of Germany (eg, for a product offered on the Internet), the IP owner may freely elect the venue that suits him or her best.

Enforcement measures at the administrative level include border seizure actions based on trademarks, designs, patents or utility models. The EU and national rules on border seizure allow for stopping potentially IP-infringing goods from entering the EU market. The German Customs Offices have set up a specialist unit (ZGR; [www.zoll.de/EN/Home/](http://www.zoll.de/EN/Home/)) to administer and enforce border seizure requests filed in Germany. As the wilful infringement of IP rights (counterfeiting, product piracy) is a criminal offence, the IP owner may start criminal proceedings and avail itself of seizure measures inland, which may be of particular help in fighting product piracy at trade fairs etc.

IP owners are free to conduct civil court actions and administrative enforcement measures in parallel.

### Remedies

**4** | What remedies are available to a party whose IP rights have been infringed? Do these remedies vary depending on whether one utilises judicial or administrative review or enforcement?

The remedies available to the IP owner are, to a broad extent, harmonised in the German IP statutes, following implementation of the provisions of Directive 2004/48/EC (Enforcement Directive) into German law.

Injunctive relief is the prevailing remedy in German IP infringement litigation, allowing the IP owner to forbid the future manufacturing, importation, offer, and use of infringing products and patented methods. The claim for injunctive relief is not subject to discretion or equity under German law, but will be granted if infringement is established. Further, the infringer can be ordered to recall and destroy infringing products. Of course, the IP owner is entitled to damages, which he or she may calculate according to one of the three following methods: lost profits, licence analogy or claiming infringer's profits. To substantiate the claim for damages, the IP owner can request the infringer to disclose information on sales, prices, turnover and profits generated with the infringing product. Under German law, the exclusive licensee of an IP right has automatic standing to sue for the said claims and may enforce its rights together with, or independently of, the IP owner.

In urgent cases (eg, presentation of infringing products at trade fairs), the claim for injunctive relief may be enforced in preliminary injunction proceedings, which can result in an enforceable title within days from filing the request. If IP infringement appears likely, but is not fully apparent from the facts available to the IP owner, civil courts may order an inspection of the infringing embodiment, allowing an expert to inspect the product at the premises of the potential infringer and to gather information on the product's operation. The right to inspect may even include going through data on computers and looking into software code.

In cases of wilful IP infringement, criminal courts can impose fines, sentence to terms in prison and sequester infringing goods and illicit profits. Subject to the pertinent provisions, the German Customs Offices have the authority to destroy counterfeited goods legitimately seized.

### Nexus between competition and IP rights

**5** | Do any statutes, regulations or case law in your jurisdiction address the interplay between competition law and IP law?

While German statutory provisions do not expressly address the nexus between competition law and IP rights, there is ample German and EU case law dealing with the intersection between both legal concepts. Most relevant intersections include: the exhaustion of rights principle, agreements on IP involving restraints to competition and abuse of dominance.

### Patent cooperation treaties and other agreements

**6** | Does your jurisdiction participate in any patent cooperation treaties or other similar agreements?

Germany is a member of the WIPO and has ratified the WIPO Patent Cooperation Treaty, the WIPO Trademark Treaty, the WIPO Copyright Treaty and the WIPO Patent Treaty. Germany is also a signatory to TRIPs, the Paris Convention and the International Patent Convention. However, at the time of writing, Germany has not ratified the Agreement on a Unified Patent Court, pending review of the relevant provisions by the German Constitutional Court.

## Remedies for deceptive practices

### 7 | With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices?

Yes. The German act on unfair competition (UCA) provides for remedies against misleading and deceptive marketing and advertising practices. Section 5(2) of the UCA prohibits commercial conduct that leads to a likelihood of confusion with the products or trademarks of competitors. Remedies for violations of section 5(2) of the UCA are not reserved to the trademark holder, but may also be enforced by competitors and other interest groups having standing to sue under the UCA.

## Technological protection measures and digital rights management

### 8 | With respect to copyright protection, is WIPO protection of technological protection measures (TPMs) and digital rights management (DRM) enforced in your jurisdiction? Do statutes, regulation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Has TPM or DRM protection been challenged under the competition laws?

Germany has implemented the provisions of article 11 of the WIPO Copyright Treaty and article 6 of EU Directive 2001/29/EC in section 95a of the GCA, which forbids the wilful circumvention of technological protection measures for works protected by copyright. With respect to computer programs, section 69f(2) of the GCA allows for the destruction of means to circumvent TPMs. However, section 95b of the GCA obliges the copyright holder to provide those who have a legitimate right to use the works with the means to disable the TPMs. Section 95b of the GCA features an enumerative list of the cases of 'legitimate use rights' (eg, the user's right to a backup copy).

As TPMs have the potential to restrict competition and go against the spirit of the copyright exhaustion principle, the FSC added an unwritten feature to section 95a of the GCA, requiring the IP owner to proactively demonstrate that the TPM in question is a proportional measure, which does not unduly limit legitimate forms of use (FSC, docket I ZR 124/11 – *Gaming Consoles II*; applying reasoning of CJEU, C-355/12, *Nintendo/PC Box*).

## Industry standards

### 9 | What consideration has been given in statutes, regulation or case law to the impact of the adoption of proprietary technologies in industry standards?

Owing to their potentially pro-competitive effects (providing interoperability, encouraging development etc), agreements on industrial and technological standards are usually considered permissible under antitrust law, provided, however, that access and use of the standardised technologies is open to everyone on fair and non-discriminatory terms. In light of this, major standard-setting organisations (the European Telecommunications Standards Institute, the International Telecommunication Union or the Open Mobile Alliance) request contributors to the standard to declare their willingness to grant a licence on fair, reasonable and non-discriminatory (FRAND) terms under their IP rights included in the standard.

As a consequence, the owner of a patent that is essential to the standard (standard-essential patent, SEP) and for which a FRAND declaration has been given may be barred from enforcing his or her claim for injunctive relief against an implementer, who has declared its willingness to take a licence on FRAND terms. The Court of Justice of the European Union (CJEU) has developed a negotiation regime that includes obligations for both, the SEP patent owner and the implementer, on how to reach a licence agreement on FRAND terms (CJEU,

docket C-170/13 – *Huawei/ZTE*). Based on the CJEU decision, German civil courts have rendered a string of rulings on how the individual steps of this roadmap need to be implemented to comply with the provisions of the CJEU. However, to date, no German court has confirmed a specific licence offer to be FRAND. Instead, cases have been decided on whether or not the parties to the proceedings have duly and in timely manner followed their obligations under the Huawei/ZTE regime.

It is suggested that the Huawei/ZTE regime should likewise be applied to cases involving patents that are essential, but have not been notified to the standard ('patent ambush'), so that no FRAND declaration is given. The recent decision of the FSC in the case *Sisvel v. Haier* (case ID: KZR 36/17) seems to support this position for Germany. The highest German court interprets the FRAND objection exclusively from a competition law perspective and considers a FRAND declaration given for the patent-in-suit to be of minor relevance for adjudicating a case involving a patent relevant to an Industry standard.

## COMPETITION

### Competition legislation

#### 10 | What statutes set out competition law?

The German Act against Restrictions on Competition (GARC) contains the substantive rules on cartels, abuse of market dominance, merger control and public procurement. It features civil law claims to remedies for parties infringed by anticompetitive behaviour and bestows the Federal Cartel Office (FCO) with competence to investigate markets and sanction anticompetitive behaviour.

At the EU level, articles 101 and 102 of the TFEU are the focal provisions of competition law. Articles 101 and 102 of the TFEU are flanked by a number of Commission Regulations and Commission Guidelines, setting out how EU antitrust law is to be applied in practice.

The GARC provisions have been widely harmonised with EU competition law (whereby sections 1ff of the GARC correspond to article 101 of the TFEU and sections 19ff. GARC correspond to article 102 of the TFEU). In cases that could potentially effect trade between EU member states, the FCO and civil courts will decide based on EU competition law provisions. Today, this is likely the majority of cases involving competition law matters.

The FCO regularly publishes investigation status reports and decisions on mergers and abuse of dominance, as well as guidelines on how the FCO will assess relevant product markets. Decisions and guidelines are available from the FCO website.

### IP rights in competition legislation

#### 11 | Do the competition laws make specific mention of any IP rights?

The GARC does not specifically address IP rights. However, EU Regulation 316/2014, exempting certain agreements on technology transfer from the cartel prohibition of article 101(1) of the TFEU (TT Block Exemption Regulation), is specifically directed to agreements involving IP. Regulation 316/2014 applies to agreements involving the assignment and licensing of patents, utility models, designs, rights to software and technical know-how. EU Regulation 1217/2010 exempting certain categories of agreements of research and development (R&D Block Exemption Regulation), and EU Regulation 330/2010 exempting certain vertical agreements from the prohibition of article 101(1) of the TFEU (Vertical Block Exemption Regulation), are equally relevant for agreements involving IP rights.

## Review and investigation of competitive effects from exercise of IP rights

### 12 | Which authorities may review or investigate the competitive effect of conduct related to exercise of IP rights?

The FCO is competent to enforce German antitrust law. In accordance with EU Regulation 1/2003 (Regulation on the implementation of articles 101 and 102 of the TFEU), the FCO will apply the provisions of EU competition law where national cases are likely to affect trade between EU member states. The FCO may start investigations of specific market sectors. It has the power to seize information and material, order undertakings to stop anticompetitive behaviour and fine infringers. Mergers and acquisitions are reviewed by the European Commission if the turnover thresholds of Regulation 139/2004 (Merger Control Regulation) are met. Below these thresholds the FCO will assess, clear or prohibit mergers on a national level.

The Court of Appeals in Düsseldorf has exclusive competence to handle appeals against decisions of the FCO. A further appeal to the FSC on grounds of law is possible.

It is expected that Council Directive (EU) 2019/1, empowering the national competition authorities to enforce the competition law rules more effectively, will foster harmonisation of competition law enforcement across EU member states, particularly as regards the standards of imposing sanctions and fines on non-compliant entities.

## Competition-related remedies for private parties

### 13 | Can a private party recover for competition-related damages caused by the exercise, licensing or transfer of IP rights?

Under section 33a of the GARC, a private party may claim damages caused by the anticompetitive exercise of transfer of IP rights. In refusal to license cases, the claim to damages can take the form of a claim to a licence on fair and non-discriminatory terms. A claim for injunctive relief against anticompetitive behaviour may be invoked by competitors and other market participants affected by the anticompetitive behaviour.

Having acknowledged that establishing personal damage from anti-competitive behaviour often proves difficult in practice, Germany has introduced a class action for a declaratory judgments. This procedural tool shall encourage individuals to pool their individual damages claims like claims under section 33a GARC.

## Competition guidelines

### 14 | Have the competition authorities, or any other authority, issued guidelines or other statements regarding the overlap of competition law and IP?

To date, the FCO has not published specific guidelines on IP. However, the FCO will apply the Commission Guidelines in the field of competition law. The guidelines on technology transfer agreements (OJ 2014 C89/3) and the guidelines on vertical restraints (OJ 2010, C130/1) include detailed guidance on how articles 101 and 102 of the TFEU are to be applied to cases involving IP.

## Exemptions from competition law

### 15 | Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

No. While the CJEU recognises the IP owner's right to exclude third parties from use as the distinctive feature or 'specific subject-matter' of IP rights (CJEU, docket C-267/95 – *Merck*; CJEU, docket C-170/13 – *Huawei/ZTE*), the exercise of IP rights in general will be subject to review by the competition law authorities, particularly where the IP holder is dominant in the respective markets. However, when applying

competition law, antitrust authorities and civil courts are required to take the specific characteristics of IP rights into account.

## Copyright exhaustion

### 16 | Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws?

Yes. The doctrine of copyright exhaustion is stipulated in section 17(2) of the German Copyright Act (GCA), and specifically codified for computer programs in section 69c(3) of the GCA. In fact, the exhaustion principle is an overarching concept of EU and national IP law: if a product is put on the market under the control and with consent of the IP owner, the rights under the IP are exhausted with respect to that specific product item. Accordingly, the IP owner may not prohibit the onward sale of this product item within the European Economic Area (EEA) (the EU, Norway, Iceland and Liechtenstein).

In contrast to the US 'first sale' concept, the EU principle provides for EEA-wide exhaustion only. This allows rights owners to establish dedicated distribution systems for EEA and ex-EEA markets and use their IP rights to keep products out of the EU. However, rights owners should keep in mind that products labelled with the CE mark (indication of compliance with pertinent EU regulations) may be considered to indicate that the IP owner expects, and tacitly consents, to the marketing of the product item in the EU (CoA Düsseldorf, docket I-15 U 68/15).

The European Court of Justice has handed down significant rulings with respect to the 'exhaustion of copyrights'. In the *UsedSoft* case, the CJEU held that the owner of rights to a software program cannot prohibit the buyer, who has downloaded the software program from a link provided by the rights owner, from reselling its copy of the software to a third party, as the rights to the originally downloaded copy have exhausted with the first sale. The copyright holder may, however, oblige the buyer or reseller to delete all remaining copies of the software code at his or her end (CJEU, docket C-128/11, *UsedSoft III*).

According to a recent decision of the CJEU, this would not apply with respect to eBooks downloaded from a platform of the copyright holder. eBooks would be different to paperback books and also to software programs. If the rights to an electronic copy of an eBook would exhaust with the first download the legitimate interests of the copyright holder would be more seriously affected (CJEU, docket C-263/18, *NUV v. Tom Kabinet*). It is suggested that the same would apply to downloaded music files.

## Import control

### 17 | To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

Given the principle of EEA-wide exhaustion of IP rights, the IP holder has limited options to prevent unauthorised distribution of its products once they have been marketed in the EEA with its consent. However, article 15(2) of the EU Trademark Directive and section 24(2) of the TMA provide for exemptions from the exhaustion of rights under a trademark, if the trademark owner has 'legitimate reasons' to object to the further distribution of the products. Legitimate reasons may be given where the branded product has been modified after first sale or marketed under conditions that are detrimental to the functions and the image of the trademark. Based on the 'change of product' objection, the CJEU and the FSC have developed detailed standards for the relabelling and repackaging of pharmaceutical products for re-imports from other EU countries. Thus, re-importing of repacked products can be prohibited under certain conditions (eg, where the originally labelling or packaging has been impaired).

Owners of patents for pharmaceutical products may object to imports from some Eastern European countries under the 'special

mechanism'. This legal principle provides for an exception from exhaustion of patent rights if pharmaceutical products are imported from countries where no comparable patent protection was available to the IP holder at the time of filing the patent.

Given that rights under a patent can only exhaust with respect to the product as specified in the patent claim, the IP holder's rights under its patent will not exhaust through the mere sale of components of that product. That is, depending on the circumstances of the case, grey imports of components may constitute contributory patent infringement under German law.

### Jurisdictional interaction between competition laws and IP rights

18 Are there authorities with exclusive jurisdiction over IP-related or competition-related matters? For example, are there circumstances in which a competition claim might be transferred to an IP court to satisfy subject matter jurisdiction? Are there circumstances where the resolution of an IP dispute will be handled by a court of general jurisdiction?

As the GARC and the dedicated IP statutes each establish exclusive jurisdiction of specialised divisions within the district courts, cases involving matters of IP and competition law will not be heard by lower courts or courts of general jurisdiction. The civil court decides ex officio if another court and division is competent. If so, it may dismiss or, upon request of plaintiff, defer the case to the competent division.

There are overlaps, however. If a competition law defence (such as the FRAND defence) is raised in an IP infringement case before a specialised IP division of the civil court, the IP division will decide on the competition law issue and not defer the case to the competition law division.

In 2019, a new senate was established at the German Federal Supreme Court, who will be competent to hear all cases involving issues of competition law and public procurement law. It is hoped that this new senate will harmonise and consolidate German case law in the fields of competition law and, in particular, provide guidance for the lower courts on the handling of FRAND cases.

## MERGER REVIEW

### Powers of competition authority

19 Does the competition authority have the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Yes. The FCO and the EU Commission (when competent under Regulation 139/2004) will review mergers, including those involving IP rights.

### Analysis of the competitive impact of a merger involving IP rights

20 Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The analysis of mergers involving IP rights follows the general rules. However, the FCO will take specific account of IP rights involved in the merger when assessing whether a dominant position is likely to be created or intensified, or whether access to a protected technology will be impeded or foreclosed through the concentration of IP involved in the merger (FCO decision, docket B5-84/08, *Stihl*; CoA Berlin, docket Kart 6/89, *Linde*).

Section 18 of the GARC, which sets out the guidelines to assess market dominance, specifically provides that competitive pressure resulting from innovation needs to be taken into account when

assessing market dominance. Under this provision, the FCO will have to assess whether market dominance indicated by a high market share may be mitigated, and even countered, by a high pressure to innovate in very dynamic technology markets.

### Challenge of a merger

21 In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights? Does this differ from the circumstances in which the competition authority might challenge a merger in which IP rights were not a focus?

There are no specific rules for challenging a merger focused on IP. As in non-IP-related cases, the parties to an intended merger must notify the FCO when the relevant revenue thresholds are exceeded. The parties may execute the transaction only after the FCO has cleared the merger.

### Remedies to address the competitive effects of mergers involving IP

22 What remedies are available to address competitive effects generated by a merger when those effects revolve around the transfer of IP rights?

The FCO can request the parties involved to divest parts of their business prior to clearing a merger. Such divestments may involve the sale of IP or the grant of licences to third parties (FCO decision, docket DE-V 861 – *BASF/Bayer Crop Science*).

## SPECIFIC COMPETITION LAW VIOLATIONS

### Conspiracy

23 Can the exercise, licensing or transfer of IP rights create price-fixing or conspiracy liability?

An agreement that has the effect of limiting a party's commercial behaviour by fixing prices or limiting output or use of technology is likely to fall under the cartel prohibitions (article 101(1) of the TFEU, section 1 of the Act on Restraints of Competition (GARC)). Agreements between direct or potential competitors will be subject to more intense scrutiny, than those between non-competitors active in different markets (eg, producer-distributor). Regulation 316/2014 on certain technology transfer agreements and Regulation 330/2010 on vertical agreements provide for exemptions from the cartel prohibitions for certain forms of IP agreements or terms of agreements. The EU Commission's Guidelines on technology transfer agreements (OJ 2014, C89/3) and the Guidelines on vertical agreements (OJ 2010, C130/1) include detailed guidance on how the provisions of the said regulations are to be applied in practice.

### Scrutiny of settlement agreements

24 How would a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective? What are the key factors informing such an analysis?

Paragraphs 235 et seq. of the EU Commission's Guidelines on Technology Transfer Agreements (OJ 2014, C89/3) generally recognise settlement agreements as a commercially reasonable and legitimate means to end IP infringement disputes. Still, the specific terms of a dispute settlement will be subject to scrutiny under article 101(1) TFEU. That is, settlement agreements wherein the technology in question is licensed or cross-licensed in order to enable the parties to use the technology, are unlikely to be considered anti-competitive as they safeguard market access to that technology. Also, the obligation of a party to discontinue

offering a certain product is likely to fall outside of article 101(1) TFEU within the context of a dispute settlement, provided that the parties to the settlement recognise the validity of the asserted IP right and there is a considerable risk that the product in question makes use of that right. This assessment may be different, of course, where a standard-essential patent (SEP) is concerned. Here, the settlement agreement will likely have to involve a license under the SEP on FRAND terms in order for the settlement to be compliant with article 101(1) TFEU.

Paragraph 242 of the Guidelines stipulates that obligations not to challenge the validity of an IP right ('non-challenge clauses') in a settlement agreement will normally be considered to fall outside the scope of article 101(1) TFEU, recognising that non-challenge clauses are regularly a precondition for the IP owner to accept such a settlement. If, however, the asserted IP right is very likely not valid, a non-challenge clause may be considered to have an unlawful anti-competitive effect as the non-challenge provision is prolonging the existence of an unjustified statutory monopoly and maintaining an obstacle to free trade between member states in this case. In principle, the same applies to a right to terminate a contract in case of a validity attack on the licensed IP right, as such a right to termination would have the same adverse effect on competition as an express non-challenge clause. Further guidance on IP dispute settlement agreements can be taken from the Reports on the Monitoring of Patent Settlements, which are regularly published by the EU Commission (current: 8th Report of March 2018).

Settlement agreements terminating an IP Infringement dispute sometimes involve the acceptance of a judgment that is finding for infringement of the concerned IP right. This acceptance is usually taken the form of waiving all legal remedies to the instance infringement decision, with the result that the decision becomes final. In a case where such a waiver was made but the involved patent was later declared invalid by the Federal Patent Court, the Court of Appeals Munich (CoA Munich, docket 29 U 2134/19 Kart) ruled that the waiver would not violate Sections 1 and 19 GARC. The waiver of rights would be 'neutral' under competition law aspects, if the defendant had reasonable grounds to believe that he would lose also in the final instance. The revocation of the patent-in-suit would not change this, as the decision of the Federal Patent Court was not final and it may be the case that the appeals court would uphold the validity of the patent.

### Reverse payment patent settlements

#### 25 | How have the competition laws been applied to reverse payment patent settlements in your jurisdiction?

Paragraphs 238 of the Guidelines on Technology Transfer Agreements (OJ 2014, C89/3) stipulates that any dispute settlement which involves a value transfer in consideration of a limitation on entry or expansion of the market of the other party, will closely be scrutinised under article 101(1) TFEU. Accordingly, if a settlement of a patent dispute involves payments that are not made in reasonable consideration of a right to use a patent, but are aimed at accepting a non-challenge clause and delaying market entry or otherwise restricting the commercial behaviour of a party to the agreement, such a settlement will be caught by, and likely violate, article 101(1) of the TFEU. Hence, the Court of First Instance ruled in its *Lundbeck* decision (docket T-472/13) that a payment by a pharmaceutical company with the object of delaying the market entry of a generic drug is a restriction of competition by object under article 101(1) of the TFEU. Any agreement including a provision to that effect will automatically be invalid under article 101(1) TFEU in conjunction with Section 134 of the German Civil Code (BGB).

However, in another recent *Perindopril* case (T-684/14), the Court of First Instance had to decide about a patent licence granted as a part of a dispute settlement agreement. The licence allowed the generics company to enter the market, however at a date agreed with the patent

owner. The Court opined that absent of factual evidence, it cannot be assumed that the generics company would have entered the market without the settlement agreement and the licence deal. It can be followed from this that regard must always be had to the specific factual circumstances and market situation in the case at hand, when assessing anti-competitive objects or effects of IP dispute settlements.

### (Resale) price maintenance

#### 26 | Can the exercise, licensing, or transfer of IP rights create liability under (resale) price maintenance statutes or case law?

Measures of resale price maintenance are considered a core restriction of competition and are thus prohibited, regardless of whether IP is involved in the transaction. Prohibited measures include the setting of minimum prices and other means that have an equivalent effect. However, setting maximum sales prices or giving resale price recommendations can be permissible in IP licence agreements between non-competing companies (article 4(2a) of EU Regulation 316/2014).

There are a limited number of sector-specific exceptions. Pursuant to section 30 of the GARC, certain forms of resale price maintenance are permissible for print media.

### Exclusive dealing, tying and leveraging

#### 27 | Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to exclusive dealing, tying and leveraging?

In general, the IP owner is free to grant licences under its IP rights to limit its use for certain products or to allocate rights for active sales into certain territories. However, prohibiting licensee/resellers from passive sales into territories, which the licensor reserved to other licensees, will violate article 4 b(ii) Reg. (EU) 330/2010 and will, thus, be in breach of article 101(1) TFEU. Accordingly, the European Commission fined Nike (Com. dec. of. 25.3.2019 - Ancillary sports merchandise) for imposing restrictions on its licensees regarding passive sales of trademark-licensed goods to certain territories. Such a partition of national markets within the EU Common Market will go beyond the specific subject-matter of the licensed IP right and, therefore, cannot be justified on grounds of differing IP rights protection in the affected EU member states.

In a similar scenario, the EU Commission fined Guess (Com. dec. of 17 December 2018, *GUESS*) for obliging their licensees to block access to their online shops from certain countries ('geoblocking'). Also, obligations to exclusively source a certain product or technology from the licensor will violate article 101(1) of the TFEU in most cases (CJEU, docket C-85/76, *Hoffmann-LaRoche*). Obligations to buy products alongside IP products may be permissible if economically justified. This may be the case where the tied product is a supplementary part to the IP-protected product. Tying will be subject to scrutiny under article 102 of the TFEU where the supplier has a dominant market position, as tying involves the risk of leveraging market power to the market of the tied product.

A right to terminate a license agreement in case the licensee attacks the validity of the licensed IP, is seen very critically by EU competition law. This is because such a right to terminate could keep licensees from attacking IP rights, which are invalid, which would prolong their anti-competitive and exclusionary effects within the EU Common Market. Article 5(1)(b) of EU Regulation 3016/2014 provides for an exemption from this rule. The provision allows for a right to terminate an exclusive licence, if the licensee attacks the validity of the licensed IP.

## Abuse of dominance

### 28 Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to monopolisation or abuse of dominance?

Given that the right of the IP owner to exclude third parties from its use is the characteristic 'subject-matter' of any IP right (CJEU, docket C-267/95 – *Merck*), a refusal to deal and license the IP right is generally permissible, even if the IP owner is market-dominant. A refusal to license may amount to an abuse of a dominant position only under 'exceptional circumstances' (CJEU, docket C-241/91P – *Magill*; CJEU, docket C-170/13 *Huawei/ZTE*). Exceptional circumstances may apply, for instance, where the use of the IP right is 'indispensable' for offering a new product so that the IP owner, by refusing to deal, has the power to foreclose the market and prevent the development and offer of a new product for no justifiable reason (CJEU, docket C-241/91P – *Magill*).

If the owner has already granted licences to its IP, he or she will be obliged to apply comparable and non-discriminatory licence terms to all licensees if he or she has a dominant position in the relevant technology market (article 102(c) of the TFEU). Accordingly, the FSC acknowledged that enforcing the claim for injunctive relief for patent infringement might amount to an abuse of a dominant position, if the patent owner is under the obligation to grant a licence to the patent on fair and non-discriminatory terms (FSC, docket KZR 40/02 – *Standard-Bucket*; FSC, docket KZR 39/06 – *Orange Book Standard*). Similarly, the CJEU ruled that the market-dominant owner of a standard essential patent (SEP) may not claim injunctive relief against an implementer if a FRAND declaration was given for the SEP and the implementer has declared willingness to take a licence on FRAND terms (CJEU, docket C-170/13 *Huawei/ZTE*).

## Refusal to deal and essential facilities

### 29 Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to refusal to deal and refusal to grant access to essential facilities?

Under exceptional circumstances, an IP right can be considered an 'essential facility' if it is indispensable to practice a certain technology or offer a certain product, and therefore enables the owner to foreclose all competition in the market for that technology (CJEU, docket C-241/91P – *Magill*, CFI, docket T-167/08 – *Microsoft*). This reasoning is relevant for cases involving SEPs if the technology protected by the patent must be used to offer a competitive product. However, ownership of an IP right alone does not necessarily afford the IP owner a dominant position on the product market. Apart from this, not every SEP is indispensable to offering a competitive product. Whether or not this is the case will require a legal assessment on a case-by-case basis.

## REMEDIES

### Remedies for violations of competition law involving IP

#### 30 What sanctions or remedies can the competition authorities or courts impose for violations of competition law involving IP?

Remedies may involve fines by the EU Commission or the Federal Cartel Office (FCO). Agreements, which involve provisions or clauses in breach of competition law provisions, are automatically invalid, as per article 101 I, 102 I TFEU, sections 1, 19 the Act on Restraints of Competition (GARC), in conjunction with section 134 of the German Civil Code (BGB). Aggrieved parties have claims to damages and, in cases of abuse of dominance, may claim a licence to IP rights on FRAND terms.

If patents are concerned, the German Federal Patent Court can order a compulsory licence to a patent pursuant to section 24 of the

German Patent Act (GPA) and will also fix a reasonable remuneration for the patent owner. This will require, however, that the person seeking the license has shown serious, however unsuccessful efforts to agree on a licence with the patentee and, more importantly, the desired licence is in the public interest, including in particular, in the interest of public health. In its *Isentress* decision (case ID: X ZB 2/17) the Federal Supreme Court (FSC) recently confirmed the grant of a compulsory licence under section 24 GPA for the first time. The facts of the case were special, however. The person seeking the license was able to convince the FSC that the patented medication was the only effective cure for a certain group of patients of a potentially deadly disease. These high thresholds have been confirmed in the *Alirocumab* decision of the FSC (case ID: X ZB 2/19, where the Court rejected the grant of another compulsory licence. In the eyes of the FSC, the party seeking the license failed to prove in that case that the patented medication had substantial benefits over comparable drugs. Also, a significant reduction of mortality rates was not sufficiently supported by clinical tests. That is, a prevailing public interest that would justify a curtailment of the patent owner's right of exclusive use was not sufficiently evidenced in this case.

## Competition law remedies specific to IP

### 31 Do special remedies exist under your competition laws that are specific to IP matters?

There are no IP specific remedies. The general rules apply.

## ECONOMICS AND APPLICATION OF COMPETITION LAW

### Economics

#### 32 What role has competition economics played in the application of competition law in cases involving IP rights?

Economics play a decisive role in the assessment of relevant markets, market dominance and appraisal of economic damages resulting from anticompetitive behaviour. The Federal Cartel Office (FCO) has taken into account on several occasions that market power conveyed by market share may be mitigated by appreciable innovative pressure as a form of potential competition. This aspect of mitigating market dominance is also expressly stipulated in section 18(3a) of the Act on Restraints of Competition (GARC).

## RECENT CASES AND SANCTIONS

### Recent cases

#### 33 Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

In its decision *Coty Germany GmbH/Parfümerie Akzente GmbH* (docket C-230/16) the CJEU ruled that it would not go against article 101(1) of the TFEU if the authorised distributors within a selective distribution system are banned from marketing the products via sales platforms like eBay or Amazon. On a side note, the CJEU suggests that sales bans for online market platforms may even not be in conflict with article 4(b) of regulation 330/2010 and, thus, may in any case be exempted from the scope of article 101 of the TFEU. Given that the *Coty* case involved luxury brands, where limitations on distributors may be justifiable more easily to preserve the exclusive image and allure of the products, it remains to be seen if German courts will apply the lenient approach of CJEU to bans of marketplaces in cases involving non-luxury products. Until now, German courts have taken different views on this question.

In May 2020, the FSC handed down its long-awaited decision in *Sisvel v. Haier* (case ID: K ZR 36/17). It is the first verdict of the highest German Court on FRAND after the CJEU's ruling in the dispute between

*Huawei v. ZTE* case in 2015. Unlike courts in other jurisdictions, the Federal Supreme Court (FSC) construes the FRAND-objection purely under competition law aspects. The decisive legal question is whether the enforcement of a standard-essential patent (SEP) against an implementer of the technical standard amounts to an abuse of a dominant market position under article 102 TFEU. The negotiation and conclusion of a FRAND licence is of secondary importance to the FSC. In the opinion of the FSC, the enforcement of a SEP may amount to an abuse of market dominance, if the technology covered by the patent-in-suit is essential for offering a competitive product on the relevant market. The onus to prove market dominance is with the Implementer, however.

The FSC also interprets the obligations, which the SEP owner and implementer need to follow according to the decision of the CJEU in re *Huawei v. ZTE* (docket C-170/13). Here, the FSC puts emphasis on the implementer's obligation to show willingness to take a license on FRAND terms. The FSC opined that declaring 'willingness' cannot be simple 'lip service'. Once the SEP owner has notified the implementer about his SEP, the implementer must react without undue delay by declaring its willingness to take a license. Further, the implementer needs to confirm its willingness 'by action' throughout the negotiation process. That is, the implementer needs to actively participate in negotiating FRAND licence terms. If the implementer fails to do so, he has to be considered 'unwilling' and his FRAND objection will fail. In that event, the SEP can claim an injunction under his SEP without violating article 102 TFEU.

Referring to the reasoning of the FSC in the *Sisvel v. Haier* case, the District Court of Mannheim handed down an injunction against car manufacturer Daimler based on a SEP relevant to the LTE standard (docket 2 O 34/19). The Mannheim judgement came down despite a formal request by the German Federal Cartel Office (case no. P-66/20) to stay the infringement proceedings and refer questions to the CJEU. The Court considered Daimler an 'unwilling licensee', because Daimler refused to accept license terms, which would take account of the benefits of the invention for the car as a whole. Against this background, the Mannheim Court considered Daimler to lack genuine willingness to engage in negotiations of license terms that would truly be FRAND.

## Remedies and sanctions

### 34 | What competition remedies or sanctions have been imposed in the IP context?

Sanctions can include compulsory licences or sales of IP as a precondition to get merger clearance. Civil courts will declare agreements or provisions of agreements void if they violate antitrust law.

Lately, a number of courts have dismissed claims for injunctive relief against infringers of standard-essential patents, as the patent owner failed to offer a licence to the implementer that, in the eyes of the court, was truly fair, reasonable and non-discriminatory. This is because, the failure to offer a license on FRAND terms, while enforcing a standard-essential patent against an implementer would amount to an abuse of a dominant market position and would, thus, be in conflict with article 102 TFEU. Given the most recent decision of the FSC in re *Sisvel v. Haier* (case ID: K ZR 36/17), the focus of the German courts is likely to focus less on the FRAND nature of the licence offered by the SEP holder, but on the implementer's genuine willingness to take a FRAND licence.

## UPDATE AND TRENDS

### Key developments

#### 35 | Are there any emerging trends or hot topics in the law of IP and antitrust policy? Have changes occurred recently or are changes expected in the near future that will have an impact on the application of competition law to IP rights?

Standard-essential patent (SEP) litigation and fair, reasonable and non-discriminatory (FRAND) licensing are currently dominating the legal debate in Germany. Emphasising the importance of this legal topic, the German Federal Cartel Office (FCO) has recently requested a number of District Courts to stay certain pending SEP cases and refer questions to the CJEU for clarification. In essence, the FCO seeks to clarify, whether it amounts to an abuse of a dominant position under article 102 TFEU if a holder of a SEP for which a FRAND-declaration has been given, refuses to license a willing supplier, while at the same time enforcing its claim for injunction against the end-product manufacturer. Commentators expect the District Court of Düsseldorf to follow the FCO's request and ask the CJEU for clarification of whether the SEP owner, who has given a FRAND declaration, is free to choose who to license within the supply chain.

Besides that, the debate about what is actually 'FRAND' continues. The District Courts of Mannheim and Munich recently endorsed the plaintiff's approach to calculate a FRAND license rate based on the benefit of the invention to the end-product, while the 'smallest sellable unit' approach is considered as unFRAND by the said courts. While it remains to be seen, whether these lower court decisions will hold on appeal, it is safe to say that the German patent infringement courts are rather SEP-holder friendly and are less likely to disallow license terms suggested by the patent owner in the future, provided that these terms are not outright unfair or discriminating against the implementer.

Anticipating that more SEP cases will go up to the German Federal Supreme Court (FSC) in the near future, the highest German civil court recently established a dedicated antitrust law senate. This body will not only decide on SEP and FRAND cases at highest level, but on all cases involving competition law, compulsory licensing and public procurement issues.

Meanwhile, the Unified Patent Court (UPC) and the Unitary Patent (EU Regulation 1257/2012), which are aimed to provide users with a uniform patent protection in the 24 participating European member states and, thereby, reduce distortion of competition, continue to be on hold. Germany is the last EU member state required to ratify the UPC Agreement. Ratification is expected for the end of 2020; however, experts await a further complaint to the German Constitutional Court against the German ratification bill. If this complaint is filed, a stay of the ratification process is very likely for at least another year. Apart from this, the start of the UPC and the Unitary Patent will require an amendment of the UPCA Agreement and an understanding of the remaining member states where to relocate the London-based Central Division of the Court, after the UK has left the system.

With respect to copyright protection, Germany (like the other EU member states) will need to implement EU Directive 2019/790 into national copyright law by April 2021 at the latest. Many aspects of the Directive, such as the need for 'upload filters', are subject to vital public debate as they are feared to limit freedom of speech on the Internet. Copyright holders are therefore advised to closely follow the legislative process.

**Coronavirus**

36 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The German economy (like many others) was severely hit by the lock-down measures taken by the German Federal Government in an attempt to slow down the spread of covid-19. In response to the economic hardships following from lock-down, the German Federal Government (GFG) adopted an economic stimulus programme with an unprecedented value of €130 billion (the largest since World War II). A prevalent aim of the programme is to foster 'green technologies' in the battle against climate change. In addition, the GFG allocated €750 million for the development of a vaccine and new medication to fight the virus.

The most recognisable shift in the German business landscape probably was the widespread implementation of remote working tools and use of virtual meetings, which many commentators see as an important and welcomed aspect of the digital transformation, which businesses are undergoing in the 21st century. German administrative bodies and courts quickly adapted to this. As of now, a number of courts are offering streamed online hearings. This includes, inter alia, the patent and cartel senates of the German Federal Supreme Court.

While many industries (in particular the service sector) are struggling, the covid-19 pandemic has also accelerated innovation in many fields, including in particular, the telecoms, pharma and medical devices sector. The German 'Corona App' (which is tracking and following-up a user's personal contacts with covid-19-infected persons) may serve as an example. The app was developed on behalf of the GFG by a joint venture of Deutsche Telekom and SAP within just a view months. Further, German pharma companies BionTech and Curevac are international front-runners in the race for an effective vaccine against covid-19.

Once, vaccines and more effective medication is available against the virus, it will be interesting to see, if and how the pertinent legal instruments will be used to safeguard national health care in the fight against the virus. Compulsory licensing of patents may be an interesting topic to watch. So is a potential first-time use of section 13 of the German Patent Act (GPA), which gives the GFG power to disallow the enforcement of a certain patent to the benefit of social welfare and national health. While section 13 GPA has never been applied before, the covid-19 pandemic may be the first use case for this provision, if the supply of vaccines and medication cannot be safeguarded otherwise.

Other than that, no particular legal programmes are planned in the IP or competition law field to date. The pertinent rules will be applied by the competent public authorities and courts.

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