



# B&B Bulletin

## June 2021

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# Computer-implemented simulations and designs – a comparison of case law at the EPO and in Germany

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Decision G1/19 of the EPO's Enlarged Board of Appeal has recently caused some turmoil in the field of computer-implemented simulations and beyond. We provide a comparison of how computer-implemented inventions can be protected in Europe and in Germany.

## Decision G1/19 of the Enlarged Board of Appeal of the EPO

In 2019, a Board of Appeal of the European Patent Office (EPO) disagreed with the findings of the earlier – and to that date generally accepted – decision T1227/05, which had ruled that a computer-implemented simulation of an electronic circuit subject to 1/f noise does have technical character. In referral decision T0489/14, the Board demanded stricter minimum requirements for affirming the technical character of a simulation (or a design process). In the Board's view, a technical effect requires, at a minimum, a direct link with physical reality, such as a change in or a measurement of a physical entity, a view which goes significantly beyond the requirements of T1227/05.

In its decision on the referral, the Enlarged Board has now ruled that computer-implemented numerical simulations and designs of a system or process should not be treated any differently from any other computer-implemented invention, thereby rejecting the “extreme position” in referral decision T0489/14. While the Enlarged Board did not reject the earlier decision T1227/05 outright, the Enlarged Board indicated that the findings in T1227/05 would not be generally applicable, due to the specific facts of the case underlying T1227/05, and thereby deprived this earlier decision of its former landmark character.

The Enlarged Board considers the “de-facto standard” at the EPO for the assessment of inventions consisting of a mix of technical and non-technical features (the so-called COMVIK approach) to be also suitable for the assessment of computer-implemented simulations. According to the COMVIK approach, the decisive question for the assessment of which features of a simulation of a system or process are technical features, and thus relevant for the assessment of inventive step, is whether the simulation or design process contributes to the solution of a technical problem by producing a technical effect. Therefore, the technical considerations relevant for the assessment of inventive step are only those technical considerations that pertain to the invention, i.e., to the simulation of the device or process, rather than the simulated system or process.

Referring to its earlier decision G3/08, the Enlarged Board acknowledges that a simulation is necessarily based on the principles underlying the simulated system or process, and that technical considerations associated with the system or process to be simulated typically form the basis of the mental act of establishing the model of the technical device or process being used in the simulation. However, the Enlarged Board holds that such a mental act of

establishing the model (and equations/algorithms) underlying the simulation is devoid of technical character, because the technical considerations being used in establishing the model do not normally translate into a technical effect in the execution of the simulation. If technical considerations associated with the system or process being simulated were sufficient for the simulation to have technical character, then computer-implemented simulations would be privileged within the wider group of computer-implemented inventions, without any legal basis for such a privilege.

Along the same lines, the Enlarged Board also holds that a direct link with (external) physical reality, as demanded by T0489/14, is not a requirement for the technical character of a simulation or design process, even though such a link would likely be sufficient in most cases. However, it was held that only those technical effects that are at least implied in the claims should be considered in the assessment of inventive step, because if the claimed process results in a set of numerical values, whether a resulting technical effect can lend technical character to the claimed invention will depend on the further use of such numerical values.

## Lessons from G1/19

The Enlarged Board's finding that computer-implemented simulations and design processes are not to be treated differently from any other computer-implemented processes, and the Board's reliance on the COMVIK approach, are a renewed confirmation and manifestation of the EPO's established case law on computer-implemented inventions. While the good news for applicants is that the Enlarged Board did not follow the stricter approach of the referral decision T0489/14, the Enlarged Board confirmed the overall high standards of the assessment of computer-implemented inventions, which from now on will also apply to computer-implemented simulations and design processes. As simulation and design processes are often developed to run on conventional computer hardware, it will become even more difficult for applicants to claim and protect the simulation or design process independently of a particular and specific technical input or output or implied use of the results of the simulation or design process, e.g. for controlling a machine or manufacturing a product.

## “Logikverifikation” decision of the German Federal Court of Justice

On multiple occasions, decision G1/19 refers to the earlier (December 1999) “Logikverifikation” (“logic verification”) decision of the German Federal Court of Justice. The latter decision relates to the field of production of highly-integrated circuits.

In the invention underlying the “Logikverifikation” decision, a hierarchically structured logic diagram of a chip is designed as a first step. Then, depending on this hierarchically structured logic diagram, a physical layout of the chip is designed. The physical layout of the chip specifies an exposure mask used for the actual chip production. This design process, at the time, was only partially carried out by a machine, i.e. a computer. Therefore, a crucial step in the design process

(which lend its name to the decision) is the verification of the correct conversion of the hierarchically structured logic diagram into the corresponding physical layout.

To solve the problem at hand, the invention taught and claimed a method for hierarchical logic verification of highly integrated circuits, in which a hierarchical layout circuit obtained from a physical layout of the respective highly integrated circuit is compared to a hierarchical logic layout circuit determined by a logic layout. When the claimed comparison method yields that the compared layouts are identical to one another, the circuits are considered verified. Based on this verification result, silicon chips can be manufactured which complied with the desired specification. Notably, however, the step of manufacturing a chip was not recited in the claim under review.

The Federal Court of Justice found that there is a connection (not direct but indirect) to the manufacture of highly integrated circuits, because in subsequent stages of the integrated design and manufacturing process the masks, and ultimately the semiconductor integrated circuits, are created from the verified layout data stored in the memory of the data processing apparatus.

On that basis, the Federal Court of Justice ruled that the claimed invention relates to an intermediate step in a process which ends with the manufacture of silicon chips. Thus, the claimed teaching can be used to ensure that the chip to be manufactured consists of verified circuits. Therefore, according to the intended purpose of the claimed teaching, the teaching is part of a recognized field of technology.

## Case Law of the German Federal Patent Court

In line with decisions 19 W (pat) 63/03, 19 W (pat) 314/05, 19 W (pat) 5/06, 21 W (pat) 46/07, 19 W (pat) 7/08, and 17 W (pat) 20/14, it appears that simulations in the field of Computerized Numerical Control are generally recognized to have technical character. This can be seen from the fact that in these decisions, the issue of technical character has not been questioned at all.

However, quite remarkably, the German Federal Patent Court considered that a system for traffic simulation did not provide a technical contribution. The Court found that the claimed simulation program would allow insights into the effect of road design measures on traffic flow and allow users to study ways to ease traffic congestion. However, the Court reasoned that the claimed teaching would be merely a planning aid and would have neither an outwardly directed controlling effect nor a monitoring effect (23 W (pat) 8/10).

Further, in 17 W (pat) 26/06 a method for generating a hierarchical netlist for simulating a circuit with a plurality of electronic components was considered not to provide any technical contribution. This reasoning was based on the finding that the actual contribution of the claimed teaching would be to arrange and compare already available information on components and sub-circuits in such a way that, in the netlist of components, sub-circuits could be detected with the aid of rules, and then replaced by substitute components, wherein the process was largely automated by a computer. This was considered mere data processing without a technical contribution.

In summary, the case law of the German Federal Patent Court appears, for the most part, to be consistent with the Logikverifikation decision of the German Federal Court of Justice: if a recognized field of technology is simulated, the claimed simulation can contribute to the technical character of the invention. On the other hand, some diverging decisions have been issued by the German Federal Patent Court as well.

## Key Differences between EP practice and German practice

The German Federal Court of Justice generally accepts a technical contribution even if a computer-implemented simulation method only specifies an intermediate step of a process in a recognized technical field. In contrast, the EPO demands that technical effects can only be considered when assessing inventive step if these technical effects are at least implicitly defined in the claimed subject-matter. This difference requires extra effort and careful consideration when drafting claims for computer-implemented inventions in general, and simulations in particular.

In the area of computer-implemented simulations, the jurisprudence of the Federal Court of Justice in Germany has essentially been in agreement in recent years with the previously established case law by the EPO Boards of Appeal, which has provided more room for the patenting of such inventions compared to the standards now defined by G 1/19. Applicants may thus want to consider the filing of applications pertaining to such inventions in Germany in addition to or instead of filing at the EPO.



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# Patent infringement – German court practice on preliminary injunctions put to the test before the Court of Justice of the European Union

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In the event of infringement of a patent, German courts regularly refuse preliminary legal protection (“preliminary injunctions”) if the validity of the patent has not yet been confirmed in opposition or nullity proceedings. The Munich Regional Court would now like the Court of Justice of the European Union (CJEU) to check whether this practice is compatible with higher-ranking European law.

Preliminary injunctions are of enormous importance for the protection of intellectual property rights. In urgent cases, owners of intellectual property rights can apply for a preliminary injunction instead of or in parallel with proceedings on the merits. German courts act quickly: In trademark, design and competition matters, courts regularly issue preliminary injunctions within a few days, sometimes even within hours, and usually without hearing the opposing party beforehand. Germany is both envied and feared abroad for this legal practice.

## “Scrutinized” patents as a prerequisite for preliminary injunctions

However, the situation is different in the case of patent infringement: the issuance of a preliminary injunction generally requires – in addition to the proven infringement of the patent and a particular urgency of the case – that the validity of the patent has been sufficiently established. According to the current case law of the higher regional courts (Germany’s appeal courts), it is not sufficient for the granting authority to have granted the asserted patent after a thorough examination. On the contrary, most courts, especially the highly-esteemed courts in Dusseldorf and Karlsruhe, require that the patent has survived first-instance opposition or revocation proceedings before a preliminary injunction can be issued.

As a result, patentees generally only receive interim legal protection if their patent has obtained the “seal of approval” of having survived adversary validity proceedings. The courts apparently do not fully trust the patent offices to have reliably assessed patentability in the granting procedure alone.

## Munich Regional Court: Court practice is contrary to EU law

A patent litigation chamber at Munich Regional Court considers this interpretation to be contrary to European Union law, and therefore has recently referred the matter to the Court of Justice of the European Union (LG München I, order of January 19, 2021 – 21 O 16782/20). According to Art. 9(1) of the European Enforcement Directive 2004/48/EC, EU Member States must ensure

that a provisional injunction may be ordered against a patent infringer in order to prohibit the continuation of a patent infringement. However, according to the established case law of the higher regional courts outlined above, this is oftentimes not possible, because a patent which has only just been granted – as in the present case – may not yet have been subject to validity proceedings.

## In-depth technical examination before issuance

The Munich judges point out that even patents granted a long time ago have often not yet been tested in such adversary validity proceedings at the time of the application for a preliminary injunction. The patent proprietor naturally has no influence on whether his patent is attacked in opposition or nullity proceedings after it has been granted. Therefore, even in acute infringement cases, provisional injunctions can only be issued once validity proceedings have been concluded at first instance. This could take many months or even years. The continuation of the patent infringement would have to be accepted during this time according to the case law put up for review, despite the fact that patents – unlike other intellectual property rights – are subject to a detailed technical examination before they can be granted.

## Systemic Weaknesses of Interim Legal Protection in Patent Disputes

No matter how the European judges in Luxembourg may judge the current German legal practice, their decision will most likely not cure all the existing weaknesses of the system of preliminary injunction proceedings. The examination of a patent infringement, namely the exact determination of the patent-protected subject-matter and the infringement analysis, is difficult even for experienced judges, and often hardly suitable for preliminary injunction proceedings, in which only a summary examination can ever be carried out in the shortest possible time. However, judges do not have the option to refuse to issue a preliminary injunction merely because the subject-matter and factual issues to be addressed are too complex. As a result, wrong decisions are inevitable. The courts are also bound by the legal status of the patent and cannot refuse to issue a preliminary injunction even where reasonable doubts exist, unless opposition or nullity proceedings are already pending. It is true that the courts may require a security bond from the patent proprietor for the execution of a preliminary injunction. However, the damage caused by a wrongfully issued preliminary injunction is usually irreparable: if a manufacturer is prevented from presenting their product innovation at a leading trade show because of alleged patent infringement, it is of little use to him if the preliminary injunction is lifted months or years later. The product will no longer find a buyer.



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## The FRAND Saga Continues: A Further Referral to the European Court of Justice

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Following the decision by the German Federal Court of Justice KZR 36/17 – “FRAND-Einwand” (“FRAND Defense”), one did not have to wait long for new developments. The principles of this decision had been controversially discussed by lawyers and judges alike and it did not come as a surprise when the District Court of Düsseldorf handed down a further referral decision to the Court of Justice of the European Union (CJEU), seeking clarification regarding the criteria for the defendant’s willingness to license. The court also referred to the CJEU the much-debated question CJEU as to whether the producer of an end product can, as a defendant in patent litigation, raise an objection of abusive conduct by the owner of a standard-essential patent if a license on FRAND terms to its suppliers had been requested, but was refused. The decision of the CJEU will have a significant impact on licensing practices not only in the automotive industry, but also in fields like the Internet of Things or autonomous systems.

The decision KZR 36/17 – “FRAND Defense” of May 5, 2020 (see B&B Bulletin of November 30, 2020) was the second basic decision on standard-essential patents rendered by the German Federal Court of Justice (FCJ). Now the CJEU has got involved again. In the decision 4c O 17/19 of November 26, 2020, the District Court of Düsseldorf referred the question to the CJEU as to whether a company at a downstream production level can rely on a claim of one of its suppliers, under competition law, to a license on FRAND terms as a defense in infringement proceedings. At the same time, it referred further questions to the CJEU seeking a review of principles established by the Federal Court of Justice in its decision KR 36/17. Whereas a referral to the CJEU by a district court is unusual, this decision was not unexpected, considering that even parts of the judiciary had called for a timely resolution of the question of whether the decision of the Federal Court of Justice can be reconciled with the principles of the decision of the CJEU in C 170/13 – Huawei v ZTE of July 16, 2015.

The proceedings before the District Court of Dusseldorf concerned a patent that was essential for the LTE mobile communications standard, which is administered by the European Telecommunications Standards Institute (ETSI). The applicant of the patent had made a so-called FRAND declaration to ETSI, in which it undertook to grant licenses on FRAND (Fair, Reasonable And Non-Discriminatory) terms. A special feature of the case was that the defendant, a German car manufacturer, claimed that its suppliers were entitled to a license which had been denied to them, contrary to the provisions of European competition law. According to the defendant, the granting of such a license would have led to an exhaustion of the rights from the patent with regard to the products supplied to it. Accordingly, as argued by the defendant, seeking an injunction against it constituted an abuse of a dominant position.



The plaintiff had indeed not offered an individual, comprehensive license to the tier 1 suppliers, i.e. those suppliers that deliver directly to the car manufacturer (OEM), but had only offered a license model according to which the OEM is granted a license with the right to have the licensed products manufactured by third parties, to be paid for by the supplier, and according to which the supplier is only granted a limited license of its own, essentially restricted to research and development. The majority of the tier 2 suppliers did not receive a license offer at all. The plaintiff took the position that it was free to license at any level of the production and supply chain, and even considering its dominant position in the market, it was not under an obligation to grant a comprehensive license to suppliers, provided the various tiers in the supply chain were given access to the standardized technology. It furthermore argued that licensing at an upstream production level does not lead to exhaustion at a downstream production level.

The court referred the following questions to the CJEU on this issue:

- (1) Can an enterprise that is at a downstream stage in the production process counter a complaint of patent infringement seeking an injunction with the accusation of an abuse of a dominant position within the meaning of Art. 102 TFEU, if the patent is essential for a standard issued by a standard setting organization (SEP), the patent owner has made an irrevocable commitment to this organization to grant a license on FRAND terms to any third party, the standard for which the patent is essential, or parts thereof, is already implemented in an intermediate product acquired by the defendant whose suppliers are willing to take a license, and the patent owner refused to grant an unrestricted license directly to those suppliers for all types of use relevant under patent law on FRAND terms for products implementing the standard?
- (2) Does the prohibition of an abuse under competition law require that the supplier be granted an unrestricted license of its own for all types of use relevant under patent law at FRAND terms for products implementing the standard, in the sense that the final distributors (and the upstream purchasers, if applicable) do not require a further separate license of their own from the owner of the SEP in order to avoid patent infringement where the supplied product is used as intended?
- (3) If the answer to question 1 is in the negative: Does Art. 102 TFEU impose specific qualitative, quantitative and/or other requirements on a standard-essential patent owner's decision as to against which potential patent infringers, at different levels of the same production and commercialization chain, it will bring a claim for injunctive relief?

The court added supplementary questions to the first question regarding whether and to what extent it is relevant that, according to common practice in the industry sector concerned, the supplier undertakes to resolve IP issues by taking a license and whether there is an overriding obligation to license with regard to suppliers at each level of the supply chain or only with regard to the tier 1 suppliers.

The District Court of Düsseldorf took the view that the FRAND declaration implies an obligation to grant a license to the standardized technology to any interested party, and therefore also to any suppliers, to such an extent that it enables this

party to unrestricted competition on all product markets on which it intends to be active, both at present and in the future. This goal could only be achieved by an independent unrestricted license, but not by means of a limited right derived from a car manufacturer. It acknowledged that an unrestricted license would not necessarily lead to exhaustion outside the European Union or in the case of method claims. Since, however, the purpose of a FRAND declaration is to enable everyone to participate in the commercialization of the standardized technology in the product market, at fair conditions and without any discrimination, in such cases the license on FRAND terms has to be without geographic limitations and, with regard to method claims, has to put the customers in a position to use the product for its intended purpose, thereby de facto providing for exhaustion.

According to the court, a right to a license at the component supplier level does not only correspond to the customary practices in the automotive sector, but is also adequate. It would need considerable efforts of a car manufacturer to determine infringement by e.g. a NAD (Network Access Device), even more by a chip required for a NAD. On the other hand, in order to create innovations independently of the OEMs, the suppliers invest considerable sums in research and development of their own and therefore need economic and legal freedom with regard to such investments.

According to the court, licensing at lower levels of the production chain would also not lead to a disadvantage for the patent owner, since the license fee is not determined by the profit of the respective licensee, but by the profit that is made at the end of the exploitation chain through the sale of an end product according to the patent. Other disadvantages related to licensing at supplier level, as were asserted by the plaintiff, could be addressed by adequate contractual provisions.

In the second set of referred questions, the court sought further clarification of the requirements set out in the decision C 170/13 – Huawei v ZTE of the CJEU. In this regard, the District Court of Düsseldorf submitted the following questions, which it complemented by additional questions related to specific scenarios:

- (1) Notwithstanding the fact that the owner of the SEP and the user of the SEP have certain mutual obligations to act prior to the start of court proceedings (notice of infringement, request for a license, offer of a FRAND license, license offer to the supplier to be licensed with priority), is it possible to make up for obligations to act that were not met in the pre-trial phase during the course of court proceedings, so as to preserve the rights of the respective party?
- (2) Can a serious request for a license by the patent user only be assumed if, based on a comprehensive assessment of all circumstances of the case, it is clearly and unambiguously apparent that the user of the SEP is willing and ready to conclude a licensing agreement on FRAND terms with the owner of the SEP, independently of what these FRAND terms (which, due to the absence of a license offer at this point in time, are as yet impossible to foresee) may look like?

The first question essentially relates to the issue of whether the declaration of the willingness to take a license by the alleged infringer and a licensing offer compliant with FRAND by the patentee can still be made after the complaint has

been brought. The majority opinion at the time of the decision was that this was indeed possible, but this had not yet been finally decided. In its recently published decision KZR 35/17 – FRAND-Einwand II (“FRAND defense II”) of November 24, 2020, the Federal Court of Justice showed a tendency to affirm this as a rule. This question is therefore not likely to be overly controversial.

The second question, however, relates to the requirements regarding the request for a license and the conduct of the party seeking a license following the notice of infringement by the patentee. This means no less than a reassessment of the case law of the Federal Court of Justice on this point under the law of the European Community. In its decision KZR 36/17, the Federal Court of Justice had set very strict requirements in this regard, which essentially imply that from the objective perspective of the plaintiff the unconditional willingness of the alleged infringer to take a license on FRAND terms must be clearly and unambiguously discernable at every stage of the licensing process (cf. B&B Bulletin of November 30, 2020). In particular, the Federal Court of Justice found in this decision that the defendant was not willing to take a license even in view of concrete licensing negotiations between the parties. In contrast, the Düsseldorf courts take the view that the request for a license is not subject to any specific requirements, as long as the will to take a license is clearly apparent. According to the present decision by the District Court of Düsseldorf, one can only conclude a lack of willingness to take a license on FRAND terms if one must reasonably assume that in spite of verbal professions of willingness there is in fact, finally and without any prospect of change, only a willingness to take a license at specific terms that are not negotiable and that are evidently not FRAND. In this regard, the District Court of Düsseldorf distinguishes between the general willingness of the alleged infringer to take a FRAND license and its willingness to accept specific licensing terms that have turned out to be FRAND. According to the District Court of Düsseldorf, this latter, specific willingness will only be at issue after it has been found that the licensing offer of the patentee is FRAND.

These questions have to be considered in light of the fact that the decision KZR 36/17 – FRAND-defense received criticism from the judges of the Düsseldorf courts, especially with regard to the issue of whether this decision can be reconciled with decision C 170/13 – Huawei v ZTE of the CJEU. Referring these questions to the CJEU, the court sought a final clarification of this issue.

Whether the CJEU will address these questions will depend, among other things, on whether it sees a need, in view of decisions KZR 36/17 and KZR 35/17, to further elaborate on the criteria it has established, or whether it considers the questions referred to it as questions of the specific case, which are to be answered by the national courts. In its decision KZR 35/17, which was pronounced prior to the referral decision by the District Court of Düsseldorf, but rendered in written form only later, the Federal Court of Justice explained and set out in detail why its criteria are indeed compliant with decision C 170/13 – Huawei v ZTE, however without changing these criteria from those set out in its prior decision KZR 36/17. It is therefore possible that the CJEU will not take up the issue of the criteria for a willing licensee again, which would mean that the restrictive regime established by the Federal Court of Justice will remain in place for the foreseeable future.

A timely decision by the CJEU on both sets of questions would be beneficial for the further development of the case law. Regarding the first set of questions, it had already been decided in decision 2 O 34/19 of August 18, 2020 by the District Court of Mannheim and in decision 7 O 8818/19 of September 10, 2020 by the District Court of Munich I that a car manufacturer cannot rely on a claim of one of its suppliers to a license on FRAND terms as the basis for asserting an abuse according to Art. 102 TFEU. A decision by the CJEU would bring clarity and legal certainty to these and similar cases. The first set of questions is, however, not independent from the second set of questions. If the suppliers are not found to be willing to take a license according to the strict criteria established by the Federal Court of Justice in its decision KZR 35/17 – FRAND II, the question of whether the car manufacturer can rely on a claim to a license of its suppliers is irrelevant. The willingness to take a license may therefore prove to be the decisive issue. In its decision KZR 35/17, the Federal Court of Justice had once more comprehensively addressed this issue and rejected a request for referral to the CJEU on the grounds that the questions that were raised related to a balance of interests in the individual case, which falls within the jurisdiction of the national courts. As long as there is no clear indication from the CJEU that it considers this question to be of fundamental importance and that it will address this issue in its decision, the German courts are likely to adopt the assessment of the Federal Court of Justice and decide accordingly, unless they concur with the Düsseldorf courts' line of reasoning. In order to avoid a *fait accompli* a decision by the CJEU sooner rather than later would be welcome. Defendants can, however, avoid the issue of their willingness to take a license by offering the patent owner the option of determining a reasonable license fee at its discretion, which is subject to review by a court. In a recent decision by the Karlsruhe Court of Appeal (decision 2 U 130/20 of February 12, 2021) it was confirmed that such an offer by the defendant establishes the unconditional willingness of the defendant to take a license at FRAND conditions and thereby meets the criteria established by the CJEU. As this decision was rendered in summary proceedings and the Court of Appeal left the question open as to whether a belated offer of this kind still establishes the willingness of the defendant to take a license at FRAND conditions, defendants will be well advised to make such an offer early.



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