

WITTEWELLER NEWS III/2021

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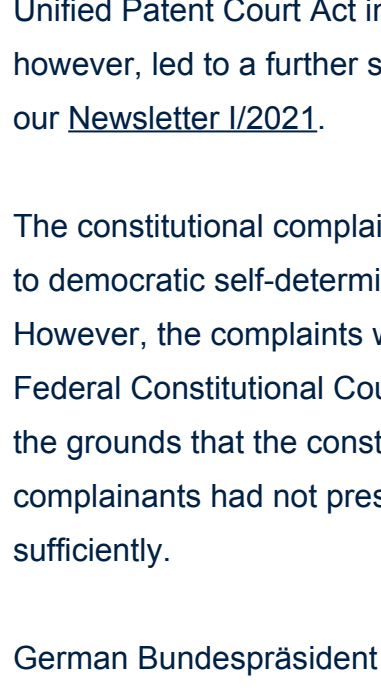
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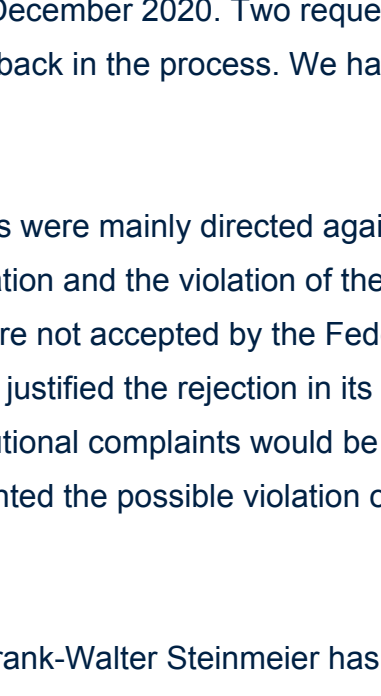
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## Green Light for the European Unitary Patent: German Federal Constitutional Court rejects constitutional complaints

After years of struggle, the path seems to be cleared for the long-awaited European Unitary Patent.

The German Bundestag and the German Bundesrat approved the decision on the Unified Patent Court Act in December 2020. Two requests for interim injunction, however, led to a further setback in the process. We had reported about this topic in our [Newsletter I/2021](#).

The constitutional complaints were mainly directed against the violation of the right to democratic self-determination and the violation of the principle of the rule of law. However, the complaints were not accepted by the Federal Constitutional Court. The Federal Constitutional Court justified the rejection in its [decision of June 23, 2021](#) on the grounds that the constitutional complaints would be inadmissible as the complainants had not presented the possible violation of fundamental rights sufficiently.

German Bundespräsident Frank-Walter Steinmeier has already signed the ratification bill which had been passed in November and December 2020 and was published on 12 August 2021.

At the moment, preparations are running to establish the capability of the Unitary Patent Court. Judges, for instance, have to be selected and appointed and, in particular, the Rules of Procedure, have to be established. As soon as the preparatory work is completed, the Unitary Patent Court can enter into force. Currently, it is estimated that operations will start by mid-2022.

### Further information

[PRESS RELEASE](#) of the Federal Constitutional Court of July 09, 2021

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## Patents and the Fourth Industrial Revolution (4IR)

The so-called Fourth Industrial Revolution (4IR) is synonymous with a tremendous breakthrough in the technological field comprising almost all economic sectors. It can particularly be attributed to the advanced digitalization, more specifically the so-called 4IR.

Industry 4.0 comprises the digitalization of production where the Internet represents one of the core technologies. Data and connectivity are essential parts of the 4IR.

The global networking of companies has contributed considerably to the strongly accelerating digitalization of production, and enabled the Internet of Things (IoT), machine-to-machine communication, development and implementation of Artificial Intelligence (AI) to come into force. All these driving technological developments can be attributed to 4IR technologies.

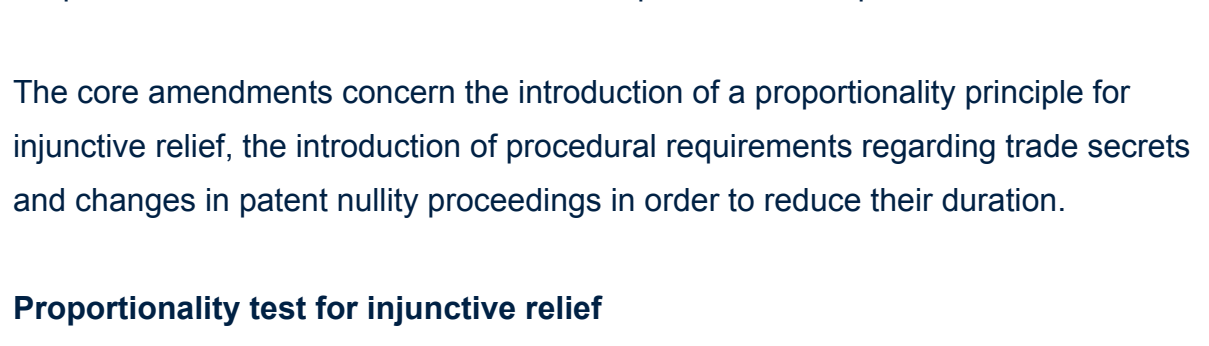
Further development of 4IR requires a solid communication infrastructure for constant exchange of big data volume. Technology standards such as 5G, WiFi 5 or WiFi 6, Bluetooth, NFC or RFID are essential technical requirements.

A study published by the European Patent Office (EPO) in December 2020 shows that the pace of global innovations has accelerated rapidly in the field of 4IR technologies. Patent applications in 4IR technologies have increased by more than 350% since 2010. The increase is growing almost exponentially.

It is estimated that more than 29 billion devices connected to the Internet will be in use by 2023, most of them produced in real-time.

### Speed-up pace of innovation

It is clearly shown in the EPO study that the pace of innovation has accelerated considerably. The amount of international patent applications in the technology field and related to linked intelligent objects comprising IoT, Big Data, 5G and AI show an annual growth rate close to 20% from 2010 to 2018, which is five times faster than the average growth of international patent families (IPFs) of all technology fields. Notably, 40,000 new international patent families (IPFs) were filed in 2018 alone. This accounts for 10% of total global patenting activity in that year.



Particularly striking is the growth in patenting activity in the areas of connectivity and data management. The field of connectivity, which comprises protocols, near field and distance communication, and which accounts for the largest area of all 4IR technologies, shows remarkable growth rates. This increase is mainly connected to the development of 5G.

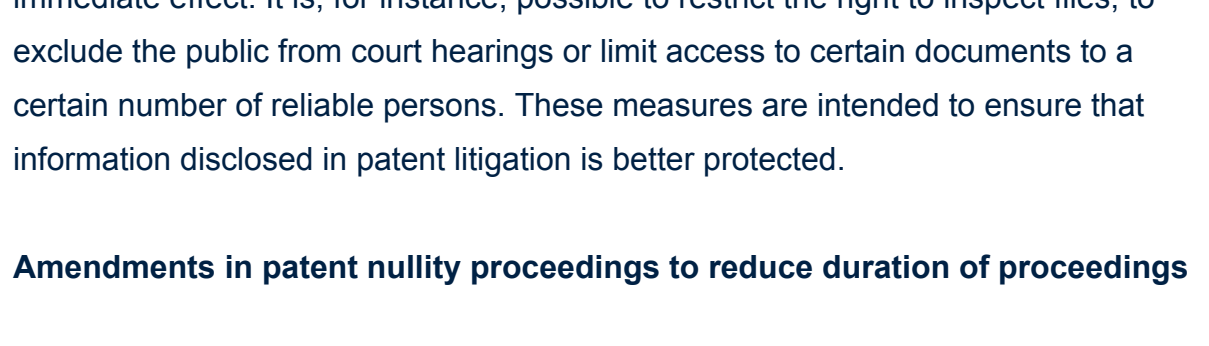
### Leading countries in the field of 4IR

According to the EPO study, the U.S. has remained the world leader in 4IR technologies and accounted for nearly one third of all inventions worldwide between 2000 and 2018.

Asia has gained speed within the period of time searched by the EPO and has shown increased growth figures. The growth rates in China and South Korea in the period from 2010 to 2018 amounted to around 40% and around 25%, respectively, on an annual average.

The average growth rate in Europe, however, has diminished compared to other global 4IR innovation countries. About 20% of all IPFs in Europe refer to the 4IR field.

29% of all IPFs in the 4IR field in Europe filed by companies or inventors between 2000 and 2018 are attributed to Germany. This is more than twice the IPFs filed in the UK (14,3%) and France (12,5%). The average growth rate of 4IR inventions was below the world average (19,7%) between 2010 and 2018. Some of the smaller countries in Europe like Finland, Sweden and Switzerland show a remarkable international increase in productivity as well as high growth rates.



The top patent applicants in the field of 4IR technologies are Samsung and LG (both South Korea), followed by Qualcomm (US), Sony (Japan), and Huawei (China). In total, the ten leading applicants from 2010 to 2018 account for a quarter of all IPFs in the field of 4IR. German and Japanese applicants, in contrast, lost ground to competitors like the US, South Korea and China.

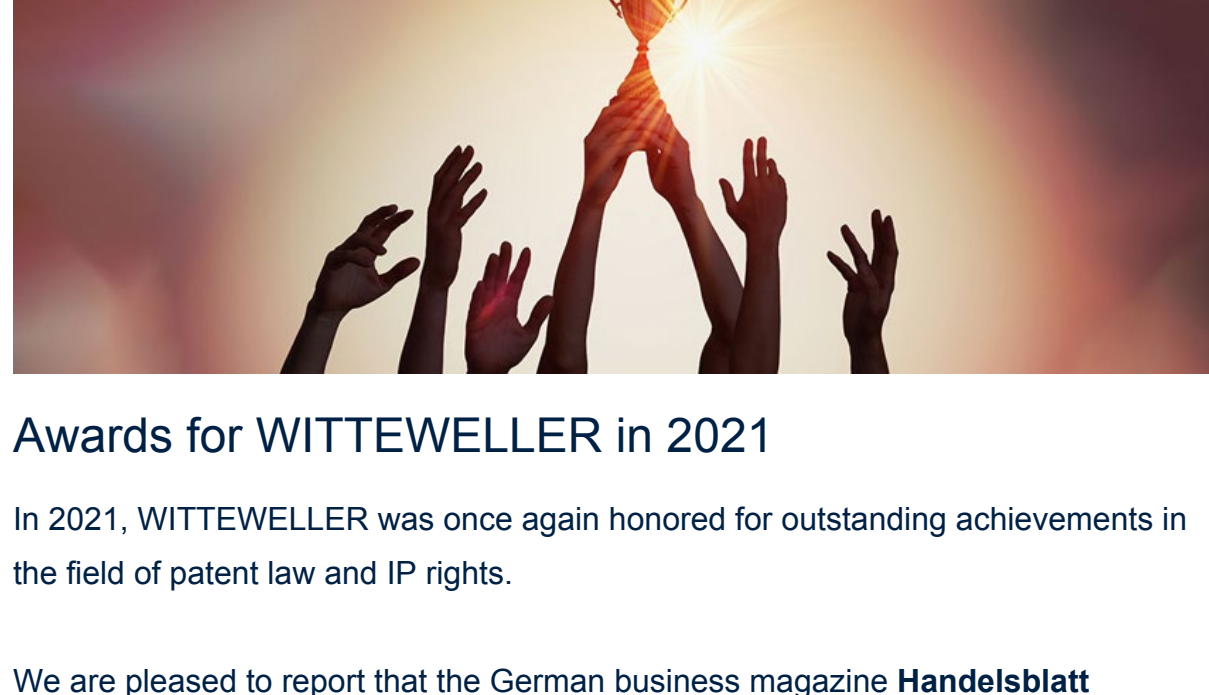
### Outlook

4IR technologies have become an essential part of our economy. Even if the connectivity market is new territory for many companies, the question should be addressed of how to pave the way in order to be successful in the long run.

### Further information

[FULL STUDY \(EPO\)](#)

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## EGC Decision – No Registration of a Sound Mark in Audio Format

The sizzling sound when opening a beverage can followed by silence and a fizzing sound cannot be registered as a sound mark for beverages and containers of metal for storage and transport due to lack of distinctiveness.

In the decision of 7 July 2021 (T-668/19), the European General Court (EGC) ruled on the registration of a sound mark in audio format. According to former EU law, the signs to be registered had to be suitable for graphic representation. Since October 2017, the requirement of graphic representability has been dropped; the filing of an audio file for the application of an EU sound mark has been possible since then.

The EGC clearly stated in its decision that the sound from the audio file has to serve as indication of origin. Consequently, the same requirements have to be applied as to other types of marks. The sound has to provide a certain resonance which enables a person to recognize it as a trade mark and not as a functional element or indicator without any characteristics.

In the present case, the EGC concluded that the opening sound of a beverage is a purely functional element which cannot provide any indication of a specific manufacturer of beverages or beverage cans. Rather, the relevant consumer would associate the fizzing sound with the beverage itself.

In the view of the EGC, the sound elements contained in the audio file were not sufficiently distinctive to be perceived as an indication of their operational origin. Even the special sound feature that the fizzing sound only occurred with a time delay after opening the can did not lead to a differing assessment in the view of the EGC. The deviation would not be significant enough to attribute this sound to a specific manufacturer.

### Further information

[PRESS RELEASE EGC](#) of July 7, 2021

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## German Second Patent Law Modernization Act adopted

On 17 August 2021, the Second Patent Law Modernization Act concerning the simplification and modernization of German patent law was published.

The core amendments concern the introduction of a proportionality principle for injunctive relief, the introduction of procedural requirements regarding trade secrets and changes in patent nullity proceedings in order to reduce their duration.

### Proportionality test for injunctive relief

The newly introduced Sec. 139(1) 3 Patent Act states that a patent infringement does not necessarily trigger an injunctive relief. However, an injunctive relief could be limited in exceptional cases for reasons of proportionality. This principle had already been recognized in case law and has now been codified for the first time in the course of the Patent Act modernization. In utility model law, there is a provision corresponding to the new Section 139 (1) sentence 3 Patent Act. The new provision has already entered into force on August 18, 2021.

The reform was triggered, for instance, by patent disputes between telecommunication companies, car manufacturers and their suppliers, arguing over licenses in the connectivity field. In these proceedings, the threat of a claim for injunctive relief had played an essential role.

Therefore, the new provision could be applied, for example, if injunctive relief is used as leverage to enforce significantly excessive (or disproportionate) license claims.

Sec. 139 (1) 3 Patent Act would also be applicable in the case that a patent by a subordinate element of a component (e.g. navigation system of a motor vehicle) for a complex overall product (motor vehicle) and the redesign of the element (navigation device) would cause a high expenditure of time and money, which would result in a longer discontinuation of the production of the complex product, which would be completely disproportionate to the value of the infringed patent.

The codification of the principle of balancing interests is therefore highly appreciated, particularly in the automotive industry.

The new provision provides that in the event of a partial or complete exclusion of the right to injunctive relief, the infringer party is entitled to a **claim for compensation** against the infringer. According to the new Section 139 (1) sentence 4 Patent Act, in this case the infringer party is still entitled to a further claim for damages against the infringer.

Due to its design as an **absolute exception**, it can be expected that the statutory regulation of the principle of proportionality will **not constitute a significant restriction of the right to injunctive relief under patent law**. Rather, it can be assumed that the courts will continue their previous restrictive handling of the principle of proportionality.

### Protection of trade secrets in proceedings: introduction of new Sec. 145a Patent Act

The newly introduced Sec. 145a Patent Act provides for improved protection of confidential information in patent and utility model disputes as well as in semiconductor protection disputes by applying certain provisions on protection of trade secrets in the German Trade Secrets Act correspondingly. For example, the defendant in patent infringement proceedings can only defend himself against a patent in the field of manufacturing process by revealing a production method previously kept secret in order to prove that he does not produce according to the patented method. It is intended to make it easier for courts to take measures in order to protect trade and business secrets in patent infringement proceedings with immediate effect. It is, for instance, possible to restrict the right to inspect files, to exclude the public from court hearings or limit access to certain documents to a certain number of reliable persons. These measures are intended to ensure that information disclosed in patent litigation is better protected.

### Amendments in patent nullity proceedings to reduce duration of proceedings

A further amendment to the Patent Act refers to the improved synchronization between infringement and nullity proceedings.

Until now, patent owners and potential patent infringers have been faced with the problem that patent invalidity proceedings take significantly longer than parallel infringement proceedings, and, thus, an injunction may be issued on the basis of a patent in which the invalidity of the patent is only determined after conviction in the infringement proceedings ("injunction gap").

The temporal discrepancy between the decision in infringement and nullity proceedings can be problematic in that a provisional injunction can lead to extensive market exclusion. In the event that the patent is subsequently declared invalid, there is indeed a claim for damages by the injunction debtor against the patent proprietor. However, the actual consequences of market exclusion (e.g. loss of reputation) can often not be compensated completely by these claims.

The new provisions of Sec. 82 and Sec. 83 Patent Act are intended to improve the temporal alignment of nullity and infringement proceedings by prescribing time limits for pleadings in nullity proceedings and by promptly transmitting the qualified notice of the preliminary opinion of the Federal Patent Court. The Federal Patent Court, which is entrusted with the nullity proceedings, shall send a notice to the infringement court ex officio within a period of six months after service of the nullity action. This is intended to facilitate the infringement court's summary examination of the prospects of success of the nullity proceedings. This provision will not enter into force until May 2022.

The text of the law is available [here](#).

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## Awards for WITTEWELLER in 2021

In 2021, WITTEWELLER was once again honored for outstanding achievements in the field of patent law and IP rights.

We are pleased to report that the German business magazine **Handelsblatt** awarded WITTEWELLER again as **Germany's BEST Lawyers** in the category IP rights. Handelsblatt particularly recognizes the expertise and work of patent attorneys Dr. Volker Heuckeroth, Stephan Keck and Mark Wegener.

The German news magazine **FOCUS** lists WITTEWELLER as one of the top ranked law firms in patent law. We are particularly pleased that our firm was highly recommended by our clients.

Furthermore, WITTEWELLER was again awarded by **JUVE** as one of the leading patent law firms in the category **"Patent Filing – Germany 2021"**.

According to the JUVE ranking, WITTEWELLER provides special expertise in the field of pharma and biotechnology, medical technology, electronics, mechanics, as well as process and mechanical engineering. Patent attorneys Christian Steil, Dr. Volker Heuckeroth and Stephan Keck are especially recommended in this context.

We highly appreciate these awards and consider them as confirmation and motivation to provide our clients with our expertise, knowledge and commitment.

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