



Federal Patent Court

Tasks | Organisation



Foreword

Dear reader,

This brochure is intended to provide information about the tasks and organisation of the Federal Patent Court. It does not aim to meet the high academic standards of jurisprudence, but rather to be easily understandable for interested members of the public. For this reason, we have largely refrained from citing regulations and providing detailed references. Furthermore, due to the nature of a brochure, many topics remain limited to an initial overview, even though the tasks and structure of the Federal Patent Court have a number of special features that would merit a more in-depth presentation. This applies in particular to the composition of the Court's judges, which is unique in Germany. It is no exaggeration to say that the equal cooperation between legally qualified judges and technically qualified judges at the Federal Patent Court has proven to be an extremely successful concept. The technically qualified judges are particularly knowledgeable in their chosen fields of technology, which means that the Court does not have to rely on the services of external experts, even for complex technical issues. This not only ensures cost-effective and efficient proceedings, but also the high quality of the Federal Patent Court's decisions, which is widely acknowledged internationally.

We hope you find the brochure both interesting and informative.

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Tasks and Status of the Federal Patent Court

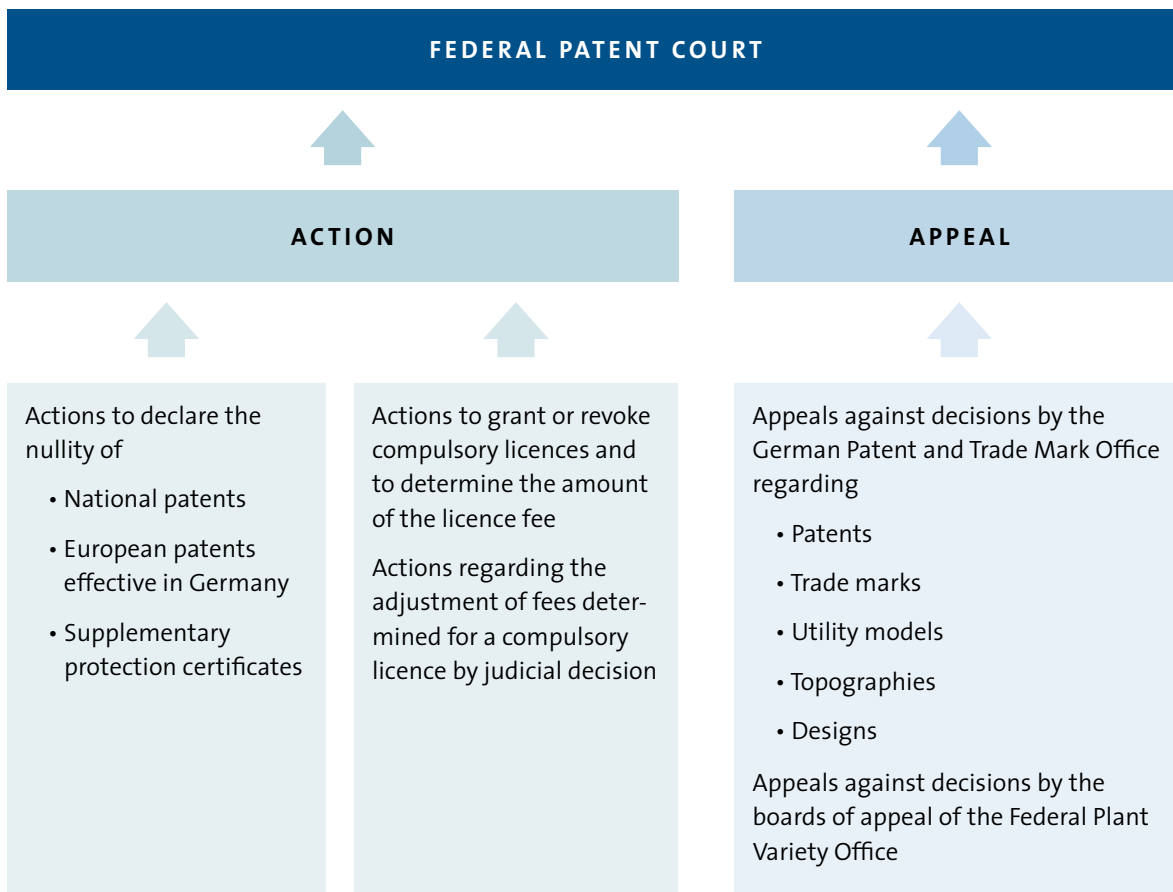
The Federal Patent Court was established on 1 July 1961.

The Federal Patent Court is a higher federal court with jurisdiction in industrial property matters relating to the granting, denial or revocation of registered property rights. It was established on 1 July 1961. With currently about 100 judges, it is the second largest federal court after the Federal Court of Justice.

Until the establishment of the Federal Patent Court, the decisions of the German Patent Office (now the German Patent and Trade Mark Office) on the registration or cancellation of registered industrial property rights were reviewed by so-called boards of appeal. From an organisational point of view, these boards were part of the Patent Office, i.e. they were staffed by civil servants of that office. Decisions of these boards of appeal could not be challenged. Although this practice was considered appropriate at the time, it became untenable following the entry into force of the Basic Law of the Federal Republic of Germany, which guarantees in Article 19 (4) sentence 1 that anyone whose rights have been violated by a public authority may have recourse to independent courts. In its judgment of 13 June 1959, the Federal Administrative Court held that the German Patent Office's boards of appeal did not constitute "courts" within the meaning of the Basic Law; the decisions of these boards were deemed to be administrative acts which could be challenged before administrative courts.

Following an amendment to the Basic Law, the Federal Patent Court was established as an independent federal court with effect from 1 July 1961. Like the German Patent and Trade Mark Office, it is located in Munich and falls under the remit of the Federal Ministry of Justice. The Federal Patent Court is a court of ordinary jurisdiction, as its decisions are reviewed by the Federal Court of Justice on appeal. It is therefore not an administrative court, even though it essentially decides on the legality of state action in connection with the registration or cancellation of industrial property rights.

Overview of the Jurisdiction of the Federal Patent Court



As the chart shows, there are two different types of proceedings: appeal proceedings and nullity proceedings.

In **appeal proceedings**, the Federal Patent Court acts as a court of judicial review and decides on appeals against decisions of the German Patent and Trade Mark Office concerning patents, trade marks, utility models, topographies and designs. It also decides on appeals against decisions pertaining to plant variety protection rights by the Federal Plant Variety Office. This means that the Federal Patent Court examines whether an industrial property right (patent, trade mark, utility model, topography, design or plant variety protection right) has been rightly granted or denied, or whether, if the Office receives a request for cancellation, an already registered property right must be deleted from the register. Appeal proceedings before the Federal Patent Court are therefore always preceded by a decision of the German Patent and Trade Mark Office or the Federal Plant Variety Office.

Nullity proceedings concerning patents and supplementary protection certificates, on the other hand, are not directly preceded by a decision of the German Patent and Trade Mark Office. An action for a declaration of nullity can only be filed after the registration procedure has been completed and the opposition period following the publication of the registration has expired. Nullity proceedings are separate from the patent granting and opposition proceedings. They are independent proceedings for the cancellation of a valid German patent or supplementary protection certificate, or a European patent granted with effect for the Federal Republic of Germany. In this respect, the Federal Patent Court decides as the court of first instance. As in civil litigation, the parties in nullity proceedings act as claimant and defendant. An action for a declaration of nullity may be brought by any person at any time (popular action). The nullity boards at the Federal Patent Court also decide on actions concerning the granting or revocation of compulsory licences and the determination of the corresponding licence fees.

The Federal Patent Court does not, however, have competence over disputes relating to the infringement of industrial property rights – these fall within the jurisdiction of specialised regional courts in the first instance and higher regional courts of the federal states (Länder) in the second instance. In these infringement proceedings, the civil courts may not question the validity of the registered industrial property rights in dispute, provided that the conditions for granting protection have been examined in the proceedings for the registration of the right. This applies in particular to trade marks and patents. The difference in jurisdiction between the Federal Patent Court on the one hand and the regional courts and higher regional courts on the other hand is known as the “principle of separation”. Lawmakers in Germany have so far not made use of the possibility under Article 96 (1) of the Basic Law to grant the Federal Patent Court jurisdiction over infringement proceedings as well.



Judges of the Federal Patent Court

At present, there are about 100 judges working at the Federal Patent Court. Just over half of these have technical and scientific training, while the others have a legal background. The legally trained members of the boards must be qualified to hold judicial office under the German Judiciary Act. This is achieved by passing two sets of state examinations in law. In addition, they can only be appointed as judges at the Federal Patent Court if they have qualified for this court through many years of practical experience either in another judicial branch or at the German Patent and Trade Mark Office.

The technically trained members of the boards have a university degree in one of the natural sciences or a technical subject and have subsequently passed a state or academic examination. They have many years of practical career experience and special legal expertise, which they have generally acquired while working as technical examiners at the German Patent and Trade Mark Office. Like the legally trained members of the Federal Patent Court, they have the status of professional judges appointed for life. They are, therefore, not merely technical experts or internal court specialists, nor are they lay judges like those in other branches of the court system. On account of their status as professional judges appointed for life, the technically trained judges are unique in the German judiciary. Even by international standards, they are still something of a rarity, although some other countries, such as Sweden, have now followed the German example and appointed technical judges.

Like the judges in the other branches of the court system, the judges of the Federal Patent Court enjoy professional and personal independence. They are bound only by law. They are not bound in their decision-making by any instructions or recommendations. Nor may they be disadvantaged on account of the content of their decisions or, as a matter of principle, be removed from office or transferred without their consent. They are subject to disciplinary supervision only to the extent that their professional and personal independence is not impaired.

At the Federal Patent Court, the percentage of female judges is significantly lower than in other court branches. Of the 99 judges at the Federal Patent Court in September 2022, 72 were men and only 27 were women. This imbalance can mainly be attributed to the group of technical judges, as the group of legally trained judges is almost evenly balanced between men and women. Ultimately, the composition of the Federal Patent Court's judges reflects the fact that women are – still – severely under-represented in the fields of technology and natural sciences.

Professional and personal independence of the judges

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Presidium and Allocation Procedure

At the Federal Patent Court, as at all other courts, the question of which judge has jurisdiction over which cases is answered on the basis of two fundamental principles of German constitutional and judicial law: the “principle of the lawful judge” and the “principle of judicial self-administration”. The first principle is that of the constitutionally guaranteed lawful judge, which states that no one may be removed from the jurisdiction of the judge designated for him or her by law. This means that for any legal dispute, it must be determined in advance which court and which judge have jurisdiction. This is ensured both by statutory provisions and by means of an annual allocation plan which determines which incoming actions and appeals are to be assigned to which board, how cases are to be distributed among the judges, and how the judges are to be allocated to the boards. The allocation plan, which is always issued in advance for a period of twelve months, and which can only be amended pursuant to legally specified criteria, is publicly available on the website of the Federal Patent Court (www.bundespapentgericht.de).

The allocation plan determines the allocation of the judges to the individual boards and their responsibilities.

Furthermore, one of the other principles of German law specifies that the aforementioned tasks, in particular that of deciding on the allocation plan, are to be performed not by the President, but rather by the Presidium of the Court. The Presidium is the central organ of judicial self-administration, which takes the decisions falling within its mandate independently and without being subject to the instructions of another authority. The Presidium of the Federal Patent Court consists of ten of the Court’s judges (including at least one legally trained member), who are each elected for a period of four years, and the President, who is the Presidium’s legal chair.

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Composition of the Boards

*Tasks of the Federal
Patent Court's boards and
their registry offices*

The Federal Patent Court currently has 23 panels (boards) issuing judicial decisions. Depending on their jurisdiction, these boards have varying numbers of judges with different backgrounds. At present, the Federal Patent Court comprises 1 juridical board of appeal, 7 nullity boards, 8 technical boards of appeal, 4 boards of appeal for trade marks, 1 board of appeal for trade marks and designs, 1 board of appeal for utility models and 1 board of appeal for plant variety cases. In order to define the tasks of each board, taking into account the principle of the lawful judge, the members of each board must jointly determine at the start of each business year the rules governing their involvement in the proceedings (board-internal rules of procedure). Each board is assigned its own registry. The registry is responsible for registering incoming proceedings and administers the files. It is also responsible for issuing summonses, serving documents, establishing the record and drawing up decisions.

The **juridical board of appeal** sits with three legally trained members and rules on requests from the Patent Office to determine administrative and coercive measures against witnesses or experts; on decisions regarding objections to judges if the board concerned becomes inquorate on account of the withdrawal of the judge objected to; on appeals against the decisions of the German Patent and Trade Mark Office regarding the determination of costs; and on appeals contesting the election of members of the Presidium. As a fall-back jurisdiction, it also rules on appeals against decisions of the German Patent and Trade Mark Office insofar as no other board is responsible according to the allocation of business.

The **nullity boards** sit with five judges, with a legally trained member acting as the presiding judge. The nullity boards comprise one other legally trained member and three technically trained members specialising in the technical field at issue in each individual case.

The **technical boards of appeal** rule on appeals against decisions by the examining sections and the patent departments of the German Patent and Trade Mark Office where they concern the rejection of a patent application or the granting, upholding, revocation or restriction of a patent in their specialist field. The technical boards of appeal sit with four judges. The presiding judge and two associate judges are technically trained members; the third associate judge is a legally trained member. Sitting with four judges means that tied votes are possible. The law therefore provides that, in such cases, the presiding judge has the deciding vote.

The **boards of appeal for trade marks** and the **board of appeal for trade marks and designs** rule on appeals against decisions of the trade mark sections and departments of the German Patent and Trade Mark Office. As these cases usually concern legal rather than technical issues, the members of these boards, including the presiding judges, are legally trained judges.

The **board of appeal for utility models** is responsible for ruling on appeals in cases involving utility model and topography protection. This board sits with three judges, with a presiding judge who must be a legally trained member. The associate judges are legally or technically trained members, depending on whether the case refers to technical or legal issues.

The **board of appeal in plant variety cases** is responsible for ruling on appeals against decisions by the boards of appeal at the Federal Plant Variety Office. It generally sits with four judges: two technically trained and two legally trained members. Its presiding judge is a legally trained member. Since sitting with an even number of members may lead to a tied vote, the law once again provides that the vote of the presiding judge is decisive. When the board has to rule on appeals against decisions by the Federal Plant Variety Office concerning changes to the variety denomination in accordance with section 30 of the Plant Variety Protection Act, it sits with three legally trained members.



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Procedural Principles

The procedural rules applicable to proceedings before the boards of the Federal Patent Court are primarily determined by the special provisions of the Patent Act, the Utility Model Act, the Semiconductor Protection Act, the Designs Act, the Trade Mark Act and the Plant Variety Protection Act. In addition, the provisions of the Courts Constitution Act and the Code of Civil Procedure apply accordingly, but only where the specifics of IP law proceedings do not provide otherwise. The main aspects of this are set out below.

*Regulations and specifics
of patent law proceedings*

Principle of Decisions Based on an Application

Unlike administrative law proceedings, IP law proceedings do not involve a representative of the public interest. Proceedings are not initiated *ex officio*, but rather on the filing of the application by one of the parties (principle of decisions based on an application). The parties may also terminate proceedings by withdrawing their application (principle of party disposition). The only exception to this is the withdrawal of opposition to the granting of a patent, which only ends the participation in the proceedings of the party who filed the opposition, but does not terminate the opposition proceedings themselves. In other cases, the Federal Patent Court is prevented from ordering the deletion of an industrial property right that is not (or is no longer) eligible for protection if the corresponding application for cancellation is withdrawn. Furthermore, in accordance with the general rules of civil procedure, the subject matter of the proceedings is determined by the application. In this respect, the general civil procedural principle of *ne ultra petita* applies, i.e. the court may not award the claimant more than the claimant has requested.

Principle of Investigation

Appeal proceedings before the Federal Patent Court are mainly governed by the principle of *ex officio* investigation. This means that the Court is not limited to taking into consideration the facts as submitted by the parties (so-called principle of the production of facts as, for instance, applies in civil law proceedings). Rather, the Court must investigate the facts *ex officio* within the framework of the applications submitted and is not bound by the parties' submissions or their applications for the hearing of evidence. However, the parties are required to assist in clarifying the subject matter by making full and truthful statements regarding the facts and circumstances. Only in matters relating to very specific facts which lie outside the register and outside generally accessible sources of knowledge does the principle of the production of facts apply before the Federal Patent Court. Such facts may, for example, concern the question of whether a trade mark is being used in such a way as to ensure the relevant industrial property right is maintained.

Representation by a Lawyer not Mandatory

The parties may be represented before the Federal Patent Court by a lawyer or a patent attorney as their legal representative. However, legal representation is not mandatory. The parties may also represent themselves in the proceedings. Unlike proceedings before the regional and higher regional courts, there is no obligation to be represented by a lawyer. Where certain conditions are met, other natural and legal persons are also allowed to function as authorised representatives. Only parties who do not have a place of residence or branch office in Germany are required to hire a patent attorney or lawyer (a so-called domestic representative) in order to participate in proceedings before the Federal Patent Court. Lawyers or patent attorneys from other EU Member States or Contracting States to the Agreement on the European Economic Area may also act as domestic representatives.

Involvement of the Presidents of the German Patent and Trade Mark Office and the Federal Plant Variety Office

Unlike administrative court proceedings, in which the authority which issued the challenged administrative act takes on the position of a participant in the proceedings, neither the German Patent and Trade Mark Office nor the Federal Plant Variety Office automatically participate in appeal proceedings concerning their decisions. If considered appropriate due to a legal issue of fundamental importance, the Federal Patent Court may provide the President of the German Patent and Trade Mark Office with the opportunity to join the appeal. The President of the Federal Plant Variety Office may join an appeal at any time. If one of the Presidents joins the proceedings, he or she thereby acquires the full rights of a party to the proceedings, which means that he or she may also file an appeal on points of law against a decision of the Federal Patent Court.

Course of Proceedings

Actions or appeals filed with the Federal Patent Court are assigned a file number and then submitted to the competent board in accordance with the allocation plan. After all of the parties have had the opportunity to make submissions, the board member designated as the reporting judge under the board-internal rules of procedure usually draws up a written opinion. This opinion summarises the facts and status of the dispute and includes a proposal for a decision by the board. The other board members, after studying the files and the written opinion, then make their (written) submissions. Following preliminary deliberations within the board, which may also take place in writing, the presiding judge sets a date for the oral hearing, if necessary. Very often, the board issues a written notice to the parties before or together with the summons to this hearing, in which it states its preliminary legal opinion. In nullity proceedings, the law specifies that the board should issue such a notice (a so-called qualified notification) within six months of service of the action. If an oral hearing is held, all parties are given the opportunity to present their arguments there in detail. If the board decides in written proceedings, the parties are given the opportunity to comment on the board's opinion in writing. Both in oral hearings and in written proceedings, the board indicates to the parties all issues that are essential for the decision. In patent proceedings, it is not uncommon for the parties to modify their applications at this stage in order to avoid losing the case or to at least obtain a limited version of the industrial property right. After the conclusion of the oral hearing, the board reaches its decision in secret deliberations and then announces its decision directly thereafter or in a separate hearing. Instead of an oral announcement, the decision may also be served on the parties in writing. In any event, the board must provide written grounds for its decision.

The boards of appeal issue decisions. The nullity boards issue judgments.

Oral Hearing

The nullity boards of the Federal Patent Court usually render their judgments following oral hearings. A decision may be handed down without an oral hearing if the parties waive the right to a hearing or if the defendant does not make submissions on the action in due time. The boards of appeal of the Federal Patent Court generally conduct proceedings in writing, i.e. they render their decisions without oral hearings. However, an oral hearing will take place if one of the parties so requests, if evidence is to be taken, or if the Court deems an oral hearing to be pertinent.

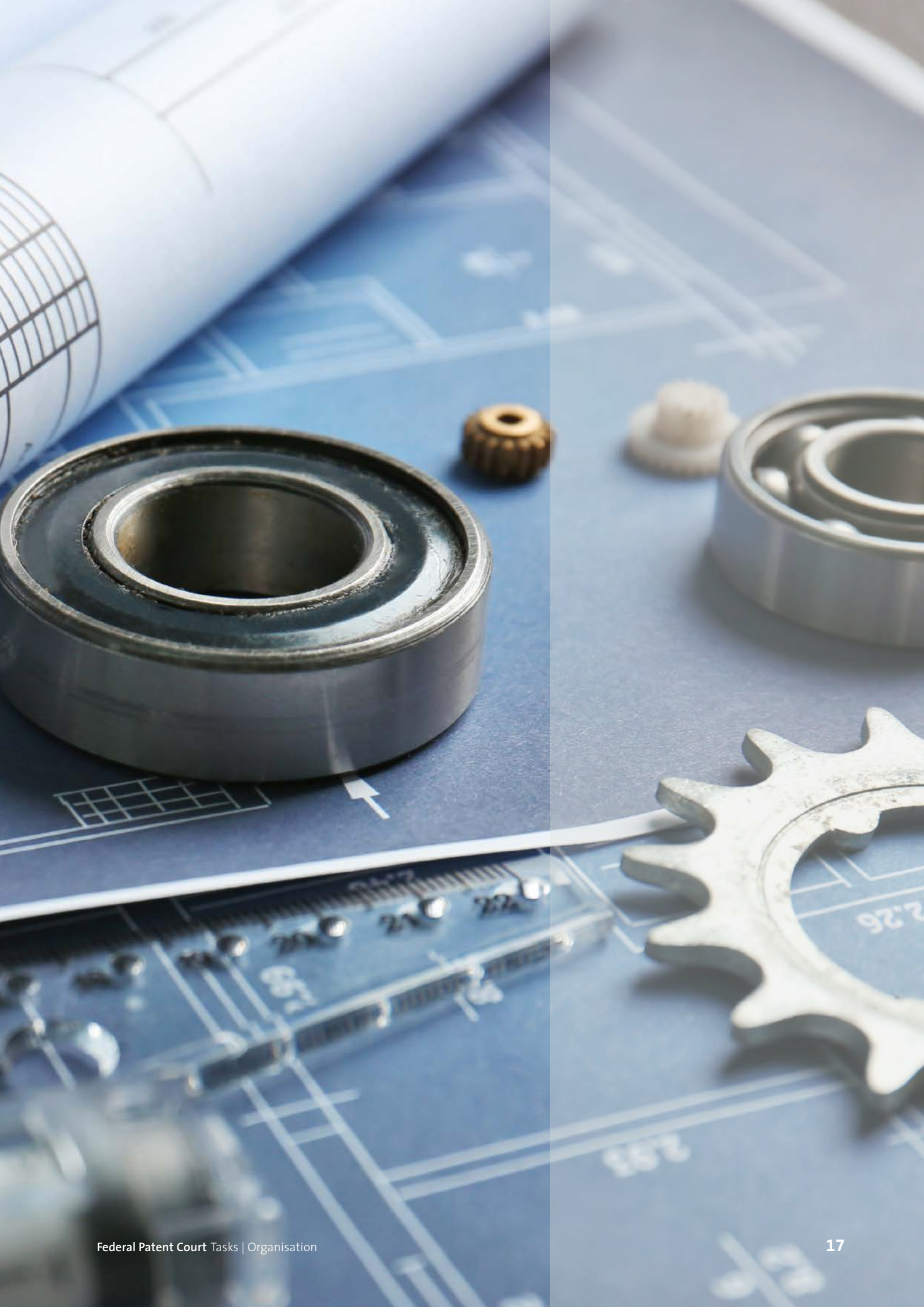
*Course of proceedings before
the Federal Patent Court - Step
by step*

Nullity action before the Federal Patent Court as a result of patent infringement proceedings before a regional court

Nullity Proceedings

An action for the declaration of a patent's nullity at the Federal Patent Court is usually the result of infringement proceedings before a regional court. The defendant against whom the patent holder has brought an infringement action cannot challenge the existence of the patent before the regional court. The objection that the patent is invalid is irrelevant in civil proceedings. If an action for a declaration of nullity is pending and there are any doubts as to the validity of the patent, it lies within the duty-bound discretion of the court hearing the infringement case to await the final and binding decision in the nullity proceedings before issuing its own decision.

Of all the proceedings before the Patent Court, nullity proceedings come closest to civil actions. The nullity action is served on the defendant, who is requested to comment within one month. Where the defendant does not comply with this request, a decision may be taken immediately without an oral hearing. Where conclusive facts are submitted, each fact put forward by the claimant may be deemed to have been proven. This rule is similar to that applied in default proceedings before the civil courts. Where opposition is raised in good time – as is generally the case – the Court clarifies all the facts and then, as a rule, renders its preliminary assessment of the action's prospects of success in the form of a qualified notification six months after receipt of the court action. The qualified notification frequently sounds the bell for a second round of challenge and defence between the parties, who will attempt to influence the outcome of the litigation to their advantage by submitting new information on the state of the art or by making further auxiliary motions. Where the nullity action is dismissed, the decision applies only to the parties to the proceedings. However, a declaration of whole or partial nullity has retroactive effect and the patent is revoked or restricted for and against everyone. The declaration of a patent's nullity or its restriction is noted in the patent register and published in the Patent Bulletin.



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Legal Remedies

Judgments of the Federal Patent Court's nullity boards can be challenged by means of an appeal on points of fact and law against a judgment (Berufung), and decisions of the Federal Patent Court's boards of appeal can be challenged by means of an appeal on points of law against a decision (Rechtsbeschwerde). The appellate instance is always the Federal Court of Justice. As the Federal Court of Justice is also the final instance in infringement proceedings, the uniformity of rulings is ensured.

Appeal on Points of Fact and Law (Berufung)

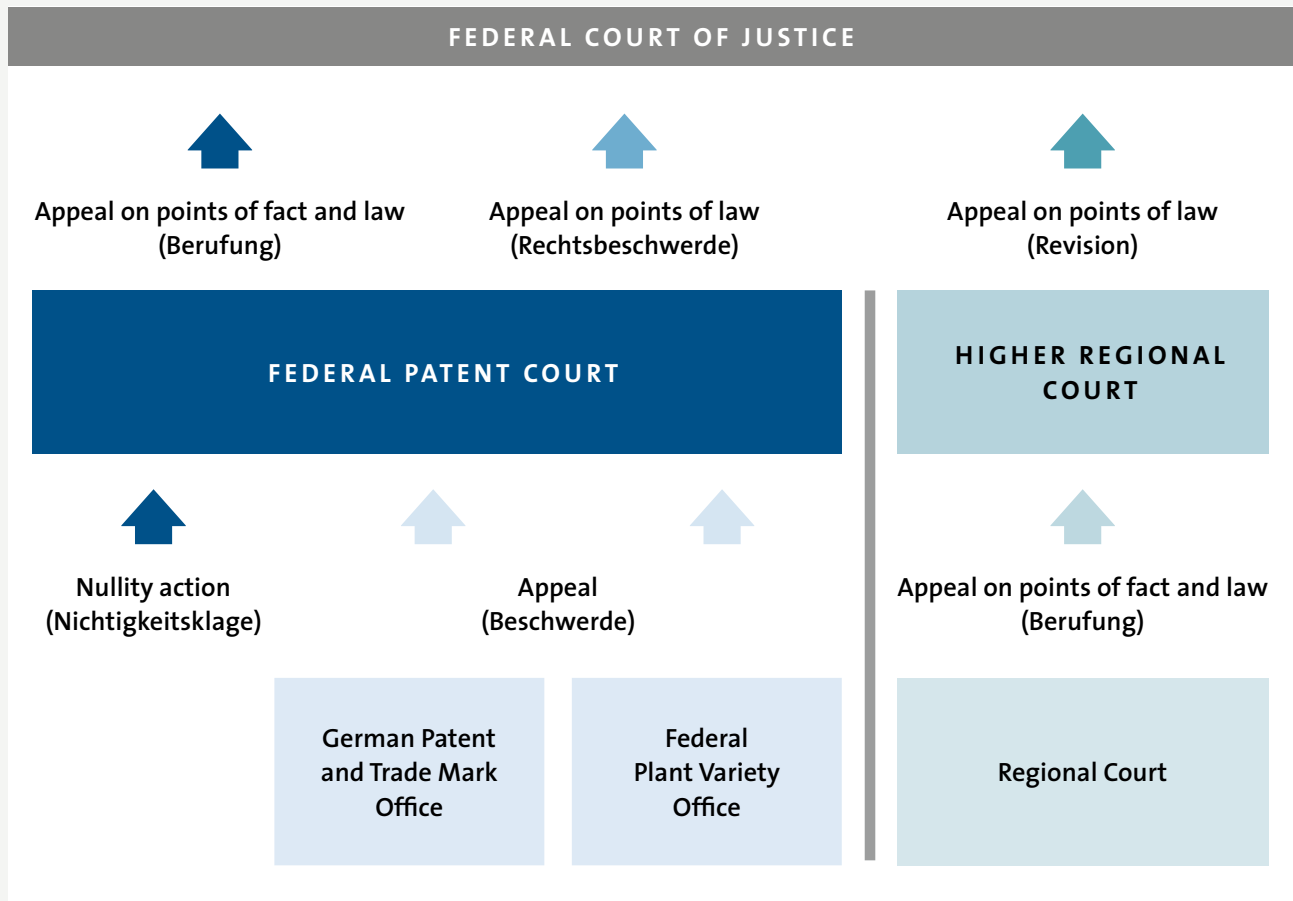
Appeals against first instance judgments of the nullity boards of the Federal Patent Court do not require special leave. In the appeal proceedings, the Federal Court of Justice exceptionally sits as a trial court, i.e. it reviews the challenged judgment not only in terms of the applicable law, but in terms of the facts as well. It may therefore – where necessary – also take evidence. Since the Federal Court of Justice does not have any technically trained members, it may have to draw on the services of external experts when assessing the technical facts, unlike the Federal Patent Court.

Appeal on Points of Law (Rechtsbeschwerde)

Appeals on points of law against decisions of the boards of appeal of the Federal Patent Court are comparable to appeals on points of law against judgments (Revision). Unlike appeals on points of fact and law in the case of nullity judgments, they only lead to a legal review of the contested decision. The Federal Court of Justice is, however, bound in principle by the factual findings of the Federal Patent Court. An appeal on points of law against a decision of the Federal Patent Court is only admissible under certain conditions, namely if the Federal Patent Court has explicitly admitted the appeal in its decision. The appeal must be admitted where a legal issue of fundamental significance is to be decided, or where the development of the law or the need to ensure uniform rulings necessitate a decision by the Federal Court of Justice. If the appeal board has not admitted the appeal, an appeal may still be filed if the appellant complains of a serious procedural error explicitly referred to by law. Such an appeal without prior admission can be used, for example, to argue that the Court was not properly constituted or one of the parties was denied the right to be heard.

*Appeal on points of law
against the Federal Patent
Court's decisions before
the Federal Court of Justice*

Overview: The Court System in Industrial Property Law





Training Programme for Patent Attorney Candidates

The Federal Patent Court plays an important role in the training of patent attorney candidates. After up to three years of training at a patent law firm and two months of training at the German Patent and Trade Mark Office, patent attorney candidates complete the third part of their training at the Federal Patent Court. At the Court, they are assigned to a board of appeal for trade marks for two months and to a technical board of appeal for four months. During their training at the boards, they are given a unique insight into the daily practice of the Court. They are entrusted with the preparation of votes and take part in the oral hearings of the boards to which they are assigned. The candidates are also allowed to attend the deliberations of the boards, which are otherwise afforded special protection by the secrecy of deliberations provided for in the Courts Constitution Act. In addition to the training at the boards, the judges of the Federal Patent Court regularly offer in-depth courses on various topics of industrial property protection law, in particular on aspects of patent and trade mark law.

This training is a demanding task for the Federal Patent Court, but also a beneficial one. Since patent attorneys advise and represent their clients in the field of industrial property rights, they often represent them before the German Patent and Trade Mark Office and the Federal Patent Court. The training of patent attorneys at the Federal Patent Court thus promotes competent and at the same time collegial cooperation between the different judicial institutions.

As part of their training, candidates are given an insight into the work of the Federal Patent Court's boards.

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Electronic Legal Communication and Electronic Proceedings

In all proceedings, written submissions and their annexes as well as applications and statements to be filed with the Federal Patent Court may also be submitted electronically. As of 1 January 2022, lawyers, public authorities and legal persons under public law (but not patent attorneys) are even obliged to submit documents electronically. Further instructions on filing electronic submissions can be found on the website of the Federal Patent Court under the menu item “Rechtsprechung/Elektronischer Rechtsverkehr”. The court files at the Federal Patent Court are currently still kept in paper form. However, by 1 January 2026 at the latest, file management will be converted to an electronic system.

Electronic courtrooms facilitate oral hearings.

The Federal Patent Court is equipped with so-called electronic courtrooms, which allow the contents of the court files to be transmitted to a large number of monitors located throughout the courtroom. This means that the members of the board, the parties to the proceedings and the public can all view the same parts of the file at the same time. Flicking through paper documents, which can be tedious when dealing with very large files, is therefore largely unnecessary in oral proceedings. In addition, the parties to the proceedings can feed new documents not yet included in the files into the system via an HDMI interface. Even if this does not result in a formal submission of the documents in question to the files, the interface makes it possible to provide the other parties with supplementary documents quickly and easily.

The Federal Patent Court also has a number of courtrooms equipped for oral hearings via audiovisual link in accordance with section 128a of the Code of Civil Procedure. In such hearings, some or all of the parties may be present at a location other than the courtroom. Upon request, witnesses, experts or parties may also be heard via audiovisual link. However, the board and the public (if the hearing is open to the public) are always present in the courtroom. As the public can only attend the oral hearing in the courtroom, it is not possible to broadcast the oral proceedings to interested third parties. Recording the oral proceedings is also prohibited by law. At the Federal Patent Court, oral proceedings via audiovisual link are implemented using commercially available conferencing software.

Publications and Documentation

All judicial decisions of the Federal Patent Court since the year 2000 are published in an online database, which is continuously updated. The database of decisions and judgments can be accessed on the court's website www.bundespatentgericht.de/EN under "Decisions" and can be used free of charge for non-commercial purposes. In addition, many of the decisions rendered by the boards are prepared by the Federal Patent Court for the juris database and can be accessed there. The Federal Patent Court also publishes its own collection of decisions in printed form. The so-called Blue Volumes contain selected decisions of the boards. They are published by the Association of Judges at the Federal Patent Court. Furthermore, the Federal Patent Court regularly publishes annual reports, which are available in printed form and can also be viewed on the website of the Federal Patent Court under "Press/Publications". All annual reports from 2010 onwards are available in electronic form on the website of the Federal Patent Court. The annual reports are published in German and English.

Selected decisions of the boards of the Federal Patent Court are published in a special collection.



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