

IP Report

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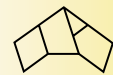
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1. „Interpretation of Patents in Europe – Application of Art. 69 EPC“ – a new IP book by Dr. Jochen Pagenberg and Professor William Cornish

Art. 69 of the European Patent Convention (EPC), together with its Interpretation Protocol, is the central interpretation rule for determining the scope of European patents. Dr. Jochen Pagenberg and Prof. William R. Cornish have now published the IP book „Interpretation of Patents in Europe/Application of Art. 69 EPC“ in which the case law of eight EPO member countries is presented by leading and well-known authors: judges, litigators and academics.

Presently, decisions on the application of Art. 69 EPC diverging from country to country are the norm although efforts have been made to change this situation. For more than twenty years conferences of European judges have been held in order to offer a forum for discussion of patent law issues. These certainly had positive effects: Judges started looking across borders and even cited cases from other countries when applying common rules of patentability and

claim interpretation. Still it proved difficult to achieve complete harmony. National procedures remain different, as do rules of evidence. Likewise, the attitude of judges, due to separate legal traditions, is sometimes different when they interpret identical provisions. Two litigation systems for European patents have been under discussion for some time, the Community Patent Regulation (CPR) and the European Patent Litigation Agreement (EPLA). The CPR would offer a more centralized approach with a single court of first instance. The EPLA would be based on a voluntary international agreement of member states of the European Patent Organization and would provide local first instance courts (with patent law experience) in each country, and a central Court of Appeal which shall have the final word on patent interpretation. The EPLA would constitute the enforcement system for the about 700 000 granted European patents which at present have to be litigated in national courts. Central legal rules have been elaborated for each system, although they still have to be adopted. The aim of both systems is to achieve less contradictory decisions when identical patents are litigated.



In order to achieve an acceptable degree of predictability and legal certainty, it is crucial that EU and EPC countries should observe the same key rules and interpret basic patent law principles in the same way. These include the definition of the skilled person, which is important as a yardstick for the interpretation of patents; the so-called equivalence principle; the treatment of the prosecution history; the question of partial protection; and the relevance of prior art for the scope of protection, to name only the most important. However, in the application of the law litigation procedures also need harmonization. Merely by adopting a specific procedural requirement, the outcome of an action may be predetermined, e.g. a seizure procedure or the appointment of a court expert. It could therefore deviate from the result in another system using a different approach. Since Art. 69 EPC will remain the central rule of interpretation in national patent laws as well as for the European system – the new book of Pagenberg/Cornish tries to find a sound and practicable compromise of interpretation which may serve as a guide for judges and litigators in this field. In view of the recent initiative of the EU Commission with its Questionnaire on the future system of litigation, the publication of the book constitutes a valuable contribution to the discussion.

2. Federal Supreme Court on features characterizing operating states in product claims (“Driving Mechanism for a Trolley”/“Rangierkatze” – X ZR 14/02)

The Federal Supreme Court decided that a patent infringement is given if the structural features of a product claim are realized and the attacked embodiment is objectively suitable to achieve the properties and effects of the invention. It does not matter if the device is usually operated differently and the customers regularly do not use the invention for this purpose. It also does not matter that the defendant has explicitly recommended a different use of the device, provided that using the invention is possible.

In the decided case, asserted claim 1 was directed to a driving mechanism for a trolley which was characterized by a (pneumatic) driving motor in which incoming fresh air and discharged air can be blocked simultaneously for both rotational directions when the

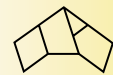
braking mechanism is supplied with pressurized air. According to the invention, a safe downhill movement of a trolley, in particular a trolley which is used in mining, should be achieved by the braking effect of the driving motor by (partly) blocking the inlet and outlet valves of the driving motor in a controlled manner. During such a downhill movement, the braking mechanism is to be supplied with pressurized air in order to maintain the braking mechanism in a released state so that the braking effect is only controlled by the inlet and outlet valves of the driving motor.

According to the undisputed submission of the defendant, the attacked driving mechanism had two braking mechanisms, namely a first braking mechanism for braking operations during the movement of the trolley and a second braking mechanism as parking brake. During a downhill movement of a trolley, the driving motor indeed exerted a braking effect; however, the first braking mechanism was not supplied with pressurized air.

The Federal Supreme Court held that it is sufficient for a patent infringement if there is a (second) braking mechanism which can be supplied with pressurized air during a controlled downhill movement, namely the parking brake. This possibility gives reason to sentence the defendant although he has explicitly recommended a different use of the device. Claim 1 makes no mention of whether or not there is an additional (first) braking mechanism. Therefore, the presence of such an additional braking mechanism is irrelevant.

This decision of the Federal Supreme Court is also to be regarded against the background of method features in product claims. As a result, a patent infringement is given if the structural (constructional) features of a product claim are realized with the attacked product, and if the attacked product is (generally) suitable for achieving the required method aspects and/or operation states.

Reported by Dr. Frank Peterreins



3. Federal Supreme Court on damage claims of the alleged infringer due to unjustified assertion of patent rights („Detection Device II“/“Detektionsvorrichtung II“ – X ZR 72/04)

A patentee may be liable for damages if he sends a warning letter with a cease and desist declaration to an alleged infringer or to the customers of an alleged infringer under the precondition that the warning letter is not justified, e.g. because the patent is not infringed or turns out to be invalid. The patentee may also be liable to pay damages to an alleged infringer if the patentee files an infringement action or if he requests a preliminary injunction versus a customer of the alleged infringer.

The German Federal Supreme Court has decided a case on liability for damages, because a patentee had asserted patent rights against a clock manufacturer as alleged infringer and against his customers.

The clock manufacturer shipped radio clocks to trading companies in Germany which distributed the radio clocks on the market. The patentee regarded this as an infringement of his German patent. The clock manufacturer filed a nullity action against the patent-in-suit with the Federal Patent Court. Subsequently, the patentee sent a warning letter to the trading companies which were in contractual relationship with the clock manufacturer. Since this was without effect, the patentee filed requests for preliminary injunctions against two trading companies. The proceedings were terminated due to a settlement agreement with the trading companies.

Shortly thereafter, the clock manufacturer researched a novelty-anticipating prior art document and mailed this document to the patentee. Notwithstanding this, the patentee also sent a warning letter to the clock manufacturer and subsequently filed a request for a preliminary injunction as well as an infringement action against the clock manufacturer. Finally, the patent was declared invalid in the nullity proceedings regarding claims 1 and 2 of the patent-in-suit due to the new prior art which led to the infringement action against the clock manufacturer being rejected.

In a further lawsuit, the clock manufacturer asserted damage claims against the patentee. In these proceedings, the Federal Supreme Court held that the patentee is liable to pay damages to the clock manufacturer due to the following acts:

- (1) Sending a warning letter to the trading companies which were in contractual relationship with the clock manufacturer,
- (2) filing requests for preliminary injunctions against the trading companies (the same would have applied in case of infringement actions against the trading companies), and
- (3) sending a warning letter to the clock manufacturer. These acts were unlawful, because the patent was later declared invalid *ex tunc* in nullity proceedings.

Contrary to the above unlawful acts of the patentee, filing an infringement action against the clock manufacturer was not unlawful, because this act is covered by a procedural privilege: If a patentee files an infringement action, he initiates a legally instituted and well-regulated procedure in which the alleged infringer is sufficiently protected by the court system. Therefore, an additional protection by possible damage claims in favor of the alleged infringer is not justified if it turns out that the patent is not infringed or not valid. However, it has to be noted that this procedural privilege only applies to the relationship between the parties of a lawsuit.

As a result, it may in many cases be advisable to directly file an infringement action against both an infringing manufacturer and his trading companies. Even if this infringement action is finally not successful, the patentee does not have to fear liability for damages (besides the fact that he has to bear the costs of the proceedings according to the German statutes). Of course, it should in any case be carefully checked whether or not the patent is really valid and infringed before an infringement action is filed.

Reported by Dr. Frank Peterreins

4. Federal Supreme Court decides 13 year-long battle on patent infringement – BMW vs. VW (“Automobile Side Mirror”/“Seiten-spiegel” – X ZR 76/04)

A more than thirteen-year-long battle between BMW and Volkswagen has led to a decision by the German Federal Supreme Court confirming the infringement of BMW's patent by VW for an automobile rear-view mirror which was applied for already in 1970 and had expired in 1988 (BGH decision of 11 October 2005 – X ZR 76/04 – 2006 GRUR 131). The litigation concerning BMW's patent started in 1984, but this specific case was launched in 1992.

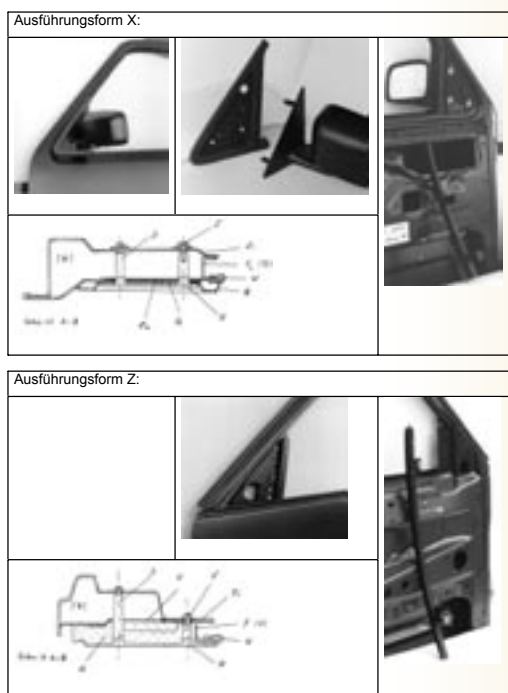
The Invention

The inventor had found that the triangle formed by the frame of the door in the forward corner of the window opening was the ideal place for the mirror. BMW had filed a patent application in 1970. The patent was the subject of fierce litigation from the beginning. Most of BMW's competitors who have been using this invention over the last 30 years did not want to accept that such a “simple idea” can be patentable.

The features of the claim are as follows

- (1) The mirror is placed in the forward area of the forward side door.
- (2) The door comprises a guide groove for the window.
- (3) The door has a window opening formed by the upper edge of the door and the frame of the window.
- (4) The window covers only a part of the window opening.
- (5) The forward guide groove for the window and the upper part reach above the upper edge of the door.
- (6) The forward guide groove is connected with the forward part of the window frame.
- (7) The forward area of the window opening which is not covered by the movable window pane and which is free of glass is covered by a connecting tool for the mirror which has the shape of a triangle to cover the opening.

The following photographs show the attacked embodiments which have become part of the court file and may illustrate the invention.



Ping-pong in the grant and opposition procedure

The patent had only been filed in Germany, Switzerland and Italy. The German Patent Office first rejected the invention for lack of inventive step; the Federal Patent Court, however, affirmed its validity. Competitors opposed the patent, and it was again invalidated by the Patent Office; the Federal Patent Court, however, again affirmed the inventive step.

Two revocation actions reached the Supreme Court – Experts got it all wrong

a) While more than a dozen automobile manufacturers then signed the proposed license agreement, a few refused, and BMW decided to file infringement proceedings. The first lawsuit was filed in Munich by way of a cross-border action which included in addition to Germany also Italy and Switzerland, but was limited to damages, since the patent had already expired. The patent was then attacked by a revocation action before the Federal Patent Court, and contrary to the former two decisions by the same court in the granting and oppositions proceedings, the Nullity Chamber revoked the patent *ex tunc*.

BMW filed an appeal with the Federal Supreme Court. The court-appointed expert regarded the patent as invalid. Also two experts for Italian and Swiss law who had been already appointed by the



infringement court had come to the same conclusion. In the hearing, the Supreme Court judges informed the parties that they regarded the patent as valid. The Court recommended a settlement which was then concluded during the hearing. Afterwards, a number of other manufacturers agreed to settle.

- b) Three manufacturers refused to pay damages. Two of them were then attacked before the Munich District Court; one of them settled immediately afterwards; this was in 1992. With respect to Volkswagen, BMW had set off its damage claims against claims of VW for the use of one of VW's patents. Volkswagen refused to accept the set-off and took the initiative by filing an action in September 1992; BMW countersued and asked for the payment of damages. This explains why BMW appears as the defendant in the judgment of the Supreme Court. So two infringers remained, and one of them (not VW) filed again a revocation action with the Federal Patent Court. Based on the same prior art as in the first revocation case and in spite of the favorable comments of the justices at the Supreme Court about patentability, the Federal Patent Court revoked the patent again. The two infringement actions were then stayed by the infringement court.

Again, an appeal with the Supreme Court was filed by BMW against the nullity decision. In the meantime, some of the justices who had encouraged a settlement in the first revocation case had already retired. Again, a – different – expert was appointed by the Supreme Court, and he also came to the conclusion that the patent had wrongly been granted and lacked inventive step. But also the new members of the Court confirmed the patentability of the mirror patent and, rather than recommending a settlement again, this time decided by way of a judgment – again against the opinion of the – new – court expert.

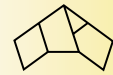
The Infringement Story

- a) Now two defendants, one of them VW, remained, and both contested that they were using the patent. The most contested feature was no. 7, namely that the forward area of the window opening ... is free of glass. Both defendants argued to persuade the Court that this feature must

be read “should be free of anything ... also of metal sheet” with the argument that the patent wanted to avoid the fixing of the mirror on a sheet of metal of the door to avoid corrosion. In reality, as was clear from the drawings, the patent did not want to fix the mirror on the (vibrating) sheet metal plate below the window frame like in the prior art. This had the disadvantage that, when the screws and bolts rusted, the whole painted metal sheet of the door had to be replaced, often even the whole door.

Two separate chambers in the first instance were dealing with the two actions. The case of the other defendant was decided first, and, surprisingly, that chamber – among other things – regarded a fixation of the mirror on a metal sheet in the triangle of the forward area of the door as not covered by the teaching of the patent. BMW filed an appeal, and the presiding judge issued an interim order informing the parties that his chamber regarded the attacked embodiment (which was practically identical with the one of VW) as an infringement of the wording of the claim. The defendant in this case then immediately offered a settlement and paid damages. This was in 2001.

- b) BMW thought that this would also bring the second case against VW to a peaceful end. But far from that. The other first instance chamber did not take into account the higher instance opinion in the parallel case and found against BMW. BMW filed an appeal, and now an even more incredible story evolved. In the meantime, the former presiding judge at the Court of Appeal had retired who had held that there was an infringement of the wording of the claim. The new chamber took just the opposite view and after the exchange of a number of briefs announced that it had doubts that there was even an equivalent use; two infringement opinions that could not be further apart. And, in order to back up its interpretation, it appointed a court expert, a professor of a technical university. This was surprising in view of the easy technical questions to be decided, and it was even more surprising that the expert came to the conclusion that practically none of the features of the claim were present. BMW had no other choice but to engage a private expert, also a university professor



who had for years acted as an expert before the Federal Supreme Court and the Düsseldorf Courts. He came to the conclusion that there was a violation of the wording of the claim.

- c) The Court of Appeals ordered a second opinion by the same expert who came again to a negative result. BMW's party expert reviewed the opinion again with a clear positive result for BMW. The Court of Appeals then ordered a third opinion from the same expert which came again to a non-infringement result. Altogether the three opinions of the court expert covered 122 pages. In the last hearing where the expert was present and deposed for BMW, he corrected his opinion with respect to two features (no. 5 and 6), and while features no. 1 and 2 had not been contested, he maintained that features 3, 4 and 7 had not been infringed.

In its judgment, the Court of Appeals followed all arguments of the court expert and even disregarded that he had changed his opinion during the hearing. In its feature analysis the judgment followed the professor in all respects: it even followed the awkward order of discussion of the expert in his feature analysis, starting from no. 7, jumping to no.4, then no.3, then 6, and then 5. The request by BMW for an admission of an appeal on the law to the Supreme Court was rejected, since it did not see any questions of particular importance which needed clarification.

- d) BMW filed an appeal of the law nevertheless, and the case was accepted by the Supreme Court for review. Claim interpretation is regarded by the Supreme Court as a matter of law; therefore the Supreme Court can itself review the decision of the Court of Appeals as to this point and interpret the patent claim itself.

Already in the hearing, the Supreme Court judges made it clear that a number of basic errors of interpretation and case management had been committed by the Court of Appeals. Among the main points which the Court criticizes in its decision are the following.

- In its headnote, the Court emphasizes that the trial court has to interpret the patent

itself and cannot rely on the interpretation of the court expert.

- The Court criticizes that the court expert obviously had misunderstood his role. He should not replace the judge; his task is limited to explaining to the judge what the knowledge and skill of the average person in the art are and how the skilled person works when solving technical problems of his relevant field of activity.
- The Court of Appeals had totally disregarded the rules which the Supreme Court had laid down repeatedly over the years: that any claim interpretation has to start with a definition of the subject matter of the invention, namely the teaching of the inventive features as seen through the eyes of the patentee, not by referring to the infringing embodiment. In order to demonstrate this approach, the Supreme Court cites over two pages of its own definition of the subject matter of the invention from the second revocation case which the Court of Appeals – like the expert – had entirely disregarded. In fact, the decision of the Supreme Court had not been cited once, although it had been referred to frequently during the appeal procedure by the parties.
- The Court and the court expert had committed a severe violation of the rules of patent interpretation by interpreting several of the claim features on the basis of the allegedly infringing embodiment(s) and not the patent specification.
- A Court can never accept an expert opinion when it tries to interpret the claim as “established facts” with respect to the claim features, which was repeatedly done by the Court of Appeals.
- The Trial Court (which includes under German law the Court of Appeals) has the task to carefully review an expert opinion and examine whether it is a reliable source for the facts on which the court wants to rely.
- The Supreme Court reviewed all features of the claim and came to the conclusion that they were all given and consequently an infringement of the wording of the claim had to be affirmed; a severe misinterpretation of the second instance.



- Although the Supreme Court does not expressly criticize the fact that the Court of Appeals had appointed a court expert at all, considering the easy technology involved as it had done in a number of other decisions in the past, one can read between the lines that it did not believe that the expert opinion was necessary when criticizing in detail that the Court of Appeals had relied on it.

Referring to its prior case law that claim interpretation is a matter of law, it did not send the case back to the Court of Appeals but formulated itself the order for information on sales, profits and costs with respect to all models of cars and types of mirrors in order to enable the patentee to calculate the amount of damages. Only the amount of damages would be have to decided by the Trial Court if the parties were not willing to settle the case now.

Altogether this was a very unusual case merely with respect to the length of time, and particularly rare with respect to the severe critical and partly harsh remarks of the Supreme Court with respect to the handling of the case by the Court of Appeals.

Dr. Pagenberg, who has dealt with the entire litigation for BMW around this patent since 1984 had always remained optimistic: "I have written so much on obviousness and claim interpretation, therefore I was always convinced that the Supreme Court would find the right answers with respect to validity as well as claim interpretation. And it helped me a lot that the people at BMW did not lose their confidence in my forecast over such a long period of time and in view of some incredible decisions in the lower courts. This case shows also that it is not without reason when litigators today try to avoid courts which appoint experts frequently; with experts, patent cases become unpredictable, in particular if the judges follow expert opinions blindly. Patent litigation in Germany and in Europe requires experienced patent judges who stand for predictable and sound decisions."

5. Federal Supreme Court on "cherry picking" regarding original disclosure of technical features ("Coke Oven Door"/ "Koksofentür" – X ZR 17/02)

During patent prosecution proceedings, the applicant has the possibility to restrict an independent claim as originally filed by means of a single feature "picked" from an embodiment described in the application documents. In order to comply with the requirement of original disclosure, it is, however, not necessary to further limit the independent claim by beneficial features disclosed in context with this embodiment.

In the decided nullity case, the Federal Supreme Court has reversed a decision of the Federal Patent Court which declared a patent-in-suit invalid due to lack of original disclosure. The patent-in-suit is directed to a coke oven door with a sealing. According to the claimed invention, the sealing comprises a sealing blade which is pressed against the door frame by a clamping frame.

In the first instance, the Federal Patent Court ruled that the patent-in-suit is not originally disclosed, because the sealing blade has only been disclosed in context with an embodiment which also comprises a supporting means for pressing the sealing blade against the door frame. However, a supporting element is not mentioned in claim 1 so that the subject-matter of the patent-in-suit is – according to the opinion of the Federal Patent Court – unduly broadened.

In appeal proceedings, the Federal Supreme Court held that the applicant/patentee must have the possibility to limit an independent claim as originally filed by a single feature of an embodiment. In the decided case, it is thus possible to introduce the limitation of a sealing blade in claim 1, because this feature is disclosed in an embodiment of the description. However, it is not necessary to further limit claim 1 by introducing the supporting element which supports the sealing blade according to this embodiment. Such a burden would not comply with the justified flexibility of the applicant/patentee to amend claims during patent application proceedings.



6. Federal Supreme Court: No claim for destruction in case of contributory patent infringement („Extracoronaral Attachment“/“Extracoronales Geschiebe“ – X ZR 79/04)

The Federal Supreme Court held that according to Section 140a German Patent Act, a claim for destruction is not allowed in case of contributory patent infringement.

According to Section 10 German Patent Act relating to contributory infringement a patent has the effect that any third party is prohibited, without the consent of the patentee, to offer or deliver in the territory of this Act to any others than to the parties which are entitled to use the patented invention, means which refer to an essential element of the invention for using the invention in the territory of this Act, if the third party knows, or if it is obvious due to the circumstances, that these means are suitable and intended to be used for the invention.

However, since products which may constitute a contributory infringement can also be used for other than infringing acts (e.g. use for other purposes than for the patented invention or shipment into another country without corresponding patent protection), the claim for destruction according to Section 140a German Patent Act does not cover such products.

Reported by Dr. Frank Peterreins

7. OHIM changes practice as to „cooling-off period“

As of March 1, 2006, the OHIM will apply a new practice on the so-called „cooling-off period“, the two months' period before the actual start of adversarial opposition proceedings. The parties to an opposition may jointly request extensions of this period. By a change of the Implementing Regulation in July 2005, the cooling-off period was limited to a maximum of 24 months in total, that is the cooling-off period can be extended for a maximum of 22 months. Before that change, the cooling-off period could be extended without any limitation.

While the extension will always be for the maximum period, each of the parties may terminate the period by „opting out“, i.e. by sending a letter to the OHIM advising the OHIM of its intention to stop the cooling-off period.

Upon receipt of such a communication from one of the parties, the OHIM will immediately let the adversarial part of the opposition proceedings commence.

Reported by Peter Munzinger

8. European Court of Justice confirms case law on the criteria pertaining to three-dimensional marks

In its decision of January 12, 2006 (Deutsche SiSi-Werke GmbH & Co. Betriebs KG vs. OHIM – Case C-173/04 P), the Court of Justice of the European Community (“ECJ”) rejected an appeal of the German company Deutsche SiSi-Werke GmbH & Co. Betriebs KG (“Sisi-Werke”) which had been filed against the decision of the Court of First Instance (“CFI”) on January 28, 2004. In its judgement, the CFI had ruled that the Community trademark applications of Sisi-Werke whose subject matter were various shapes of stand-up pouches for packaging drinks, filed in respect of the goods “fruit drinks and fruit juices” in class 32, were not sufficiently distinctive to serve as an indication of origin.

In its ruling, the ECJ first of all reiterated the criteria for assessing the distinctive character of three-dimensional marks consisting of the shape of the product itself. Whilst the criteria are not different from those applicable to other categories of trademarks, the relevant public's perception for considering the distinctive character under Article 7 (1) (b) of the Community Trademark Regulation (“CTMR”) in cases of three-dimensional trademarks is not necessarily the same as with regard to word or figurative marks whose subject matter is unrelated to the appearance of the product it designates. The ECJ held that with regard to marks consisting of the shape of a product or its packaging, the norm or custom in the business sector at issue is the relevant area for assessing the distinctiveness of the mark. The average consumer who is accustomed to seeing various products from different undertakings packed in the same type of packaging does not necessarily associate a type of packaging with a specific undertaking. In subsequence, only those packaging shapes that “significantly depart” from the normal custom in the sector in question have a distinctive character.



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In the appeal proceedings before the CFI, SiSi-Werke had argued that the sector to be taken into account was only the fruit drinks and fruit juice sector, whereas the ECJ followed the view of the CFI who held that the sector in relation to liquids for human consumption in general was decisive. Furthermore, the ECJ took the position that, in any event, this aspect was not a point of law but a point of fact which could not be reviewed on appeal.

This decision complies with the CFI's most recent case law on the interpretation of the grounds for refusal set forth in Article 7 (1) (b) CTMR regarding three-dimensional marks (BIC, S.A. vs. OHIM – Case T-262/04) and clearly shows that the applicant must take care to properly define the relevant sector and produce sufficient evidence to show that the shape at issue “significantly departs” from other shapes used in the sector at hand.

Reported by Claus Eckhartt

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