Germany: Federal Court Confirms Respondents Should be Heard in Preliminary Injunction Requests

By Robin N. Baydurcan

Gewerkschaft der Polizei – Bundespolizei v. Deutsche Polizeigewerkschaft (case no. 1 BvR 1246/20)

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Germany is known as a jurisdiction where *ex parte* preliminary injunctions are relatively easy to obtain. But in a June 3, 2020 decision (*case no. 1 BvR 1246/20*), the German Federal Constitutional Court ("FCC") highlighted the importance of allowing a respondent to be heard in response to a request for a preliminary injunction ("PI"). The FCC held that the "procedural right to equality of arms," equal to a fundamental right, is fulfilled only if the respondent has an opportunity to comment on the allegations made in the PI request. For example, if the arguments presented in the PI request differ from those in a prior warning letter, then the respondent's response letter cannot be the only submission under consideration. In other words, if the prior warning letter set forth the full scope of the petitioner's arguments, then a full and complete response thereto would be a fair representation of the respondent's arguments, essentially replacing the need to be heard in court. But if the prior warning letter differs from the arguments raised in the PI request, then it would be unfair not to hold a hearing, since under that scenario the respondent has not been heard on the differing content.

The case reached the FCC after the District Court of Berlin, in a freedom-of-speech case filed by a union of the German police, issued an *ex parte* preliminary injunction against the respondent without giving it an opportunity to comment on the request. The matter began with a warning letter regarding public statements that had been made by the respondent, to which the respondent replied with substantive arguments. The respondent also filed a protective brief in anticipation of the complaining party (the applicant) filing a PI request. The applicant then filed a PI request with the District Court of Berlin, which mirrored the contents of the warning letter, except the statement of facts was further supplemented, and the arguments that were asserted in the respondent's letter were also discussed. The applicant then made an alternative request that the respondent be ordered to refrain from making additional public statements that had not already been challenged in the initial warning letter. The District Court issued a preliminary injunction. The respondent filed an objection and requested that the enforcement proceedings be stayed. In response, the District Court scheduled an oral hearing more than two months away.

The respondent considered the injunction and the delayed oral hearing to be a violation of its fundamental procedural rights and thus filed a constitutional complaint with the FCC. The FCC had issued two earlier decisions referencing the procedural right to equality of arms in the freedom-of-speech context, thus highlighting the need to involve respondents in PI proceedings, even if the court wants to reach a decision quickly and without oral hearings. The present decision is essentially a consolidation of the FCC's prior decisions, confirming that a court may only forego a hearing in very limited circumstances, namely, if a hearing would thwart the purpose of the PI, such as in the search-and-seizure context.

The FCC decision does not mean that a hearing will always be granted, however. The respondent may be "heard," for example, if the respondent had the opportunity to respond to the applicant's claims before the proceedings but did not do so. In such cases, however, the warning letter must match the contents of the injunction request. But an opportunity to be heard must be granted if the PI request is supplemented by another request, if the arguments are expanded upon or presented in a more comprehensive and/or different manner, or if the PI request replies to the points raised in the respondent's reply (if any).

The take-away is that those seeking *ex parte* injunctions will need to articulate why the purpose of the injunction would be thwarted if action were delayed until an oral hearing is held, and they will need to

carefully draft their warning letters to anticipate the potential arguments that their adversaries might raise so that those very arguments can be "refuted in advance" within the warning letter itself. If arguments raised in the responsive letter are only addressed in the PI request, a court may be obligated to give the respondent another opportunity to respond, and hence, may order an oral hearing.

By the same token, those on the receiving end of a demand letter should take care to articulate their response in a way that does not necessarily "give away" all of their points (i.e., if their defenses fail to fend off a PI, the respondent will want to have something in reserve for any further proceedings, without committing itself only to the arguments raised in the responsive letter—which may perhaps have already been anticipated by the applicant in the warning letter). However, the respondent will need to include enough substance for a court to believe there is more than meets the eye – in this way, the responsive letter could be considered a bit of a "teaser" that would cause a court to think very carefully before issuing a PI. The respondent will want the judge to think, "This point is interesting, and I want to know more about this argument. Therefore, I will not issue a PI without first holding a hearing."

What this decision represents is something of a battle between the FCC and the lower courts, the latter of which have traditionally refrained from holding hearings so as to keep their caseloads moving along. As noted above, the FCC had stated in earlier decisions that the right to be heard in court is a fundamental right that could be violated upon the issuance of *ex parte* injunctions. However, the lower courts had not complied with those decisions, arguing that a simple PI motion should be decided quickly and efficiently. Following this decision, the FCC is likely to accept complaints against the issuance of an *ex parte* PI based on violation of the respondent's right to be heard. In practical terms, therefore, the lower courts now know that they must bring themselves into compliance with the right to be heard. The next several months may see the lower courts trying to find ways to avoid delays in their cases, and it will take some time to see how litigants absorb these new standards of conduct vis-à-vis demand letters and responses thereto.

Primary Contacts

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