

GERMANY



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vide more time to applicants to correctly assign priority rights without endangering the validity of the priority claim.

Priority right is independent of application

According to the German Patent Act, an applicant or his successor in title may file within 12 months from the filing date of an earlier patent or utility model application a later patent application in Germany, claiming the priority of the first. Under German legal practice, it has been clear for a long time that where the first application is a foreign application, the priority right could be assigned to the applicant of the later German patent application independently of the first foreign application, so without assigning the first. It was unclear whether this is also the case with a national first filing. There was commentary literature that in such cases the applicant (or legal successor) of first and later filing needs to be identical to validly claim a priority. In a recently decided case, the German Federal Patent Court made it clear that the national priority right is also an independent and freely assignable right, which can be validly transferred to a legal successor without assigning the first national application.

In addition, the Court emphasised that where the applicants of first and later filing are different, for a valid priority claim the priority right has to be assigned to the applicant of the later application before the priority is claimed. In practice, this means that the right to claim priority of a first filing has to be transferred at least one day before the later application is filed. However, according to section 40(4) of the German Patent Act a national priority can still be claimed within two months after filing of the later application. The Court therefore found that a national priority right may be validly transferred even after the filing date of the later application, provided that the priority right assignment occurs at least one day before the belated declaration of a priority claim is filed with the Patent Office.

While the latter has not yet been confirmed by the Federal Supreme Court, the legal arguments provided by the Federal Patent Court appear to be systematically correct and would pro-