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Higher Regional Court Düsseldorf

I-2 U 13/21

Judgment dated 15 May 2022

I. The appeal against the judgment of the Civil Chamber 4b of the Düsseldorf Regional Court of 11 May 2002 is dismissed, with the proviso that Nos 1 and 2 of the operative part of the judgment of the Regional Court are replaced by the following:

1. The defendants are ordered to pay a fine of up to EUR 250,000.00 - to be determined by the court - for each infringement - instead of imprisonment - or imprisonment for up to six months, in the case of repeated infringements up to a total of two years, whereby the imprisonment is to be imposed on the respective managing director, to refrain from offering or supplying smartphones and tablets for implementing a method of synthesising a first and a second audio output signal from an input signal for use in the Federal Republic of Germany, if the method comprises the following steps

- filtering the input signal to produce a filtered signal
- obtaining a correlation parameter indicative of a desired correlation between the first and second output signals
- obtaining a level parameter indicative of a desired level difference between the first and second output signals; and
- transforming the input signal and the filtered signal by a matrix process into the first and second output signals, the matrix process being dependent on the correlation parameter and the level parameter, and

wherein the matrix process comprises a usual rotation around a predetermined angle of the first and second output signals in a space encompassed by the input signal and the filtered input signal, and wherein the predetermined angle is dependent on the level parameter.

2. The defendants are ordered to pay a fine of up to EUR 250,000.00 - to be determined by the court - for each infringement - instead of imprisonment - or imprisonment for up to six months, in the case of repeated infringements up to a total of two years, whereby the imprisonment is to be imposed on the respective managing director, to refrain from offering, placing on the market, using or importing or possessing arrangements for synthesising a first and a second audio output signal from an input signal in the Federal Republic of Germany for the aforementioned purposes, if the arrangements include the following:

- Filtering means for filtering the input signal to produce a filtered signal,
- means for obtaining a correlation parameter indicative of a desired correlation between the first and second output signals
- means for obtaining a level parameter indicative of a desired level difference between the first and second output signals; and



- means for transforming the input signal and the filtered signal into the first and second output signals by a matrix operation, the matrix operation being dependent on the correlation parameter and the level parameter, and

wherein the matrix process comprises a usual rotation about a predetermined angle of the first and second output signals in a space comprised by the input signal and the filtered input signal, and when the predetermined angle is dependent on the level parameter;"

that paragraphs 3 to 6 of the operative part of the decision of the Regional Court are now referred back to this version of the operative part,

that in paragraph 6 a. E. of the judgment at first instance, the words "and to remove them definitively by the second defendant taking back those products or causing them to be destroyed at the premises of the respective owner" are deleted.

and that the remainder of paragraphs 3 to 7 of the operative part of the judgment of the Regional Court remain unchanged.

- II. The Defendants have to pay the costs of the appeal.
- III. This judgment and the judgment of the Regional Court are provisionally enforceable.
- IV. The Defendants may oppose enforcement by providing security in the amount of EUR 1,000,000.00 unless the plaintiff provides security in the same amount prior to enforcement.
- V. The revision is not admitted.
- VI. The amount in dispute for the purposes of the appeal is set to EUR 1,000,000.00.

Facts

The Plaintiff claims against the Defendants for infringement of the German part of the European patent EP 1 B1 (hereinafter: patent in suit) for injunction, provision of information and rendering of accounts, determination of the liability for damages on the merits and - with regard to a direct patent infringement - only against the second Defendant for recall.

[...]

The patent in suit bears the designation "Signal Synthesizing". Its patent claim 1 is formulated in the version upheld by the Federal Patent Court.

[...]



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The Plaintiff is an electronics company that holds, among other things, patents in the field of audio and video compression that are essential to the MPEG-4 Advanced Audio Coding (hereinafter: AAC) standard (hereinafter: AAC standard or standard). It made a statement to the International Organization for Standardization ("ISO") and the International Electrotechnical Commission ("IEC"), which adopted the standard, that it was willing to grant licenses to its AAC-related patents on fair, reasonable and non-discriminatory terms ("FRAND" or "FRAND" terms): FRAND or FRAND terms = "fair, reasonable and non-discriminatory"). The patent-in-suit is also covered by the declaration.

The AAC standard follows a modular concept, which provides for the extension of the basic concepts by so-called tools. Certain configurations or tools are combined into profiles in the AAC standard. The AAC standard comprises three profiles: the general AAC profile, the "High Efficiency AAC Profile" (HE AAC) and the "High Efficiency AAC v2 Profile" (HE AAC v2). The parametric stereo coding relevant in this litigation is the subject of HE AAC v2. For the details of the "Parametric Stereo Tool" standardized in the standard, please refer to Section 8.6.4 of Subpart 8 of the applicable standard.

The AAC standard represents a compatibility requirement for G.'s "A." system in that its implementation is necessary to obtain certification for so-called "G. Mobile Services" (GMS). This in turn is required in order to use "G. applications", in particular (...).

The patent in suit is part of a licensing program set up by V., a subsidiary of the Plaintiff's group, for patents considered essential for the implementation of the AAC standard. The pool comprises more than 3600 patents. When concluding licensing agreements with third parties, V. acts as the administrator of the AAC licensing program (hereinafter also referred to as the AAC pool) and as the non-exclusive representative of the patent owners whose patents are stored in the AAC pool. In addition to licensing via the AAC pool, the individual pool patent owners, which, in addition to the Plaintiff, also include (...) (cf. on the pool members as a whole the list with the heading "AAC Licensors" submitted with the annex), can also grant licenses to their patents via bilateral agreements.

The AAC pool has more than 800 licensees, including (...). The licensing of the AAC pool patents takes place via a standard license agreement, in which the license fees are regulated



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as follows according to the publication on the website of the V. (cf. screenshot Annex K 1 b, there headed "AAC License Fees"):

[...]

In addition, it is also possible in principle to conclude a bilateral agreement with the Plaintiff on licensing its AAC-relevant patents. Other patent holders also grant licenses on the basis of bilateral agreements. For example, such an agreement exists between D. and the company (...) responsible for the TV division within the Defendant's group.

The second Defendant is a subsidiary of T1, which in turn is a subsidiary of T2 (...). The second Defendant operates the German-language website of the trademark A. (...), through which smartphones and tablets are advertised for German customers, including the smartphone (...) or the tablet (...). The website links to online retailers where customers can purchase the devices directly. Furthermore, the second Defendant supplies smartphones of the trademark B. to the Federal Republic of Germany, including the smartphone with the designation (...). Finally, the second Defendant is also responsible for the website (...), on which smartphones of the trademark C. are advertised, which T2 supplies to the Federal Republic of Germany. The website names retailers from which the devices can be ordered. Likewise, once a customer has selected a device, the "Buy Now" button indicates where it can be purchased. Further links take the customer directly to the pages of the relevant retailers. The first Defendant is a subsidiary of the second Defendant. It operates the German Facebook presence of the A. (...) trade mark, on which the smartphone (...) or tablet (...) are also displayed. There is also a link to the website of the Defendant's trademark A. of the second Defendant. The first Defendant is a company that is limited to local marketing support measures for the trademarks of the T. Group and is otherwise not involved in the distribution of smartphones and tablets of the trademark A. in the Federal Republic of Germany. The aforementioned T2 will be referred to below - albeit somewhat abbreviated in relation to the first and second Defendants - as the "parent company".

In July 2005, the parent company responsible for licensing issues in the "Smartphone" area had already acquired an AAC pool license in the form of the standard license agreement in force at that time. However, this agreement was terminated prematurely by V. in a letter dated 2 March 2007. Whether and to what extent further discussions took place between T. and the



Plaintiff is disputed between the parties. It is undisputed that, at any rate, there was no personal contact between the Plaintiff or V. and the Defendants with regard to taking out a license until 2020. After the action was filed, the parent company contacted the Plaintiff in a letter dated 25 March 2020 and stated that T. was willing to take a license from the Plaintiff on FRAND terms. This letter was followed by two additional letters dated 26 May 2020 and 9 July 2020, in which the parent company again requested the submission of a bilateral offer. The Plaintiff responded by letter dated 14 July 2020, in which it expressed doubts about T's willingness to take a license and referred to licensing via the AAC pool. Furthermore, the Plaintiff stated that it saw no reason to submit a bilateral offer to T. and, in this context, to submit copies of already concluded license agreements. In a letter dated 17 August 2020, T. announced that it would contact V. with regard to the pool license, but otherwise maintained that a bilateral contract offer was desired by the Plaintiff. In this context, T. also expressed concerns with regard to non-discriminatory behavior on the part of the Plaintiff due to the granting of bilateral licenses to its portfolio. By letter of the same date, T. contacted V. and requested additional information. V. responded by letter dated 26 August 2020. In a letter dated 5 October .2020, the Plaintiff stated that it considered the possibility of taking up a pool license to be a sufficient offer within the meaning of the FRAND conditions. In a letter dated 3 November 2020, T. again stated that it was willing to take a license, but continued to request a bilateral offer from the Plaintiff. Finally, the Defendants requested a bilateral contractual offer in an e-mail dated 15 March 2021, which the Plaintiff in turn rejected in an e-mail dated 18 March 2021. The parent company submitted a counteroffer to the Plaintiff by e-mail dated 1 April 2021. The Plaintiff rejected the acceptance in the first-instance oral hearing dated 9 April 2021. The Defendants then did not provide any security.

The Plaintiff objects to the offer and sale by the Defendant of all cell phones and tablets that make use of the "HE AAC v2" profile of the AAC standard (hereinafter: attacked devices), including the smartphones (...) or (...) and the tablet (...). The Plaintiff considers the offer and sale of the attacked devices in the Federal Republic of Germany to be a literal infringement of the patent in suit. In its opinion, a decoder that has implemented the "HE AAC v2" profile and, in particular, the "Parametric Stereo Tool" of the AAC standard and is compatible with the standard is necessarily suitable for the application of the method protected by claim 1 of the patent in suit. Moreover, such a decoder realizes the technical teaching protected by patent claim 7 as granted. The attacked devices are such decoders. In addition, the Plaintiff had also



proven an infringement of the patent in suit by the attacked devices through tests carried out by it on a smartphone of the Defendants purchased by it. The Defendants were passively entitled and could not rely on the objection of exhaustion. Moreover, the Plaintiff was also entitled to the asserted claims with regard to the standard essentiality of the patent in suit. The objection of compulsory licensing under antitrust law raised by the Defendant was not valid. The patent in suit does not confer a dominant position on market. In addition, the Defendants were in particular not willing to take a license.

The Defendants, who have asked for the action to be dismissed or, in the alternative, for a stay of proceedings, have already denied an infringement of the patent in suit at first instance and, moreover, have taken the view that the patent in suit will not prove to be legally valid in the nullity proceedings. Furthermore, the Defendants are not entitled to file a suit. Furthermore, the Defendants could successfully invoke the exhaustion defense. Furthermore, both the recall and the destruction of the attacked devices are disproportionate. Finally, the objection to compulsory licensing under antitrust law, which had already been raised in the first instance, was valid in favor of the Defendants. The patent in suit conveys a dominant position on the market for smartphones and tablets. Without the use of the invention, no marketable product could be put on the market. The Defendant and its parent company were ready for licensing. In contrast, the Plaintiff had not fulfilled its obligations. In particular, it had not submitted an offer for a bilateral license to the Defendants.

In its judgment dated 11 May 2021, the Regional Court Düsseldorf (GRUR-RS 2021, 27668) affirmed infringement of the patent in suit as granted. In its reasoning, the Regional Court essentially stated: The enforcement of the claims for injunction, recall and destruction was not prevented by the compulsory license objection under antitrust law. The patent in suit gives the Plaintiff a dominant position on the relevant market for "smartphones" and "tablets". The patent in suit is an essential patent for the implementation of the AAC standard. Despite technical alternatives, no competitive product could be provided on the smartphone or tablet market without this standard. The standard ensures compatibility with applications that are important from the perspective of the end user in connection with the "A." operating system. The implementation of the AAC standard is specified by G. as the operator of the market-leading "A." operating system, without an alternative operating system being available or capable of being developed. The smartphone manufacturer cannot be instructed to develop its own operating system or to switch to an operating system other than "A.". The "A." operating system



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was dominant on the smartphone market alongside "i.". Together, they account for a market share of almost 100%. Other operating systems could at best open up a niche market. Abuse of this dominant position by the Plaintiff could not be established. While the Plaintiff could not be accused of violating the European Court of Justice case law applicable in the present case, the Defendants had not shown any willingness to take a license up to the end of the oral hearing. In the overall view, the Defendant revealed a user behavior that was initially characterized by simply ignoring attempts to enter into contractual negotiations. There was no reaction at all until after the present action had been filed, and there was no constructive cooperation in the subsequent period aimed at bringing about a license agreement. Against this background, special efforts were required on the part of the user to promote the conclusion of a license agreement and thus to express the fact that - which must be conceded to a user in principle - a willingness to take a license had now arisen. The Defendant did not meet these requirements. Even at the time of the conclusion of negotiations, T. was still unwilling to take a license. The Defendant or its parent company failed to sufficiently address the content of the pool license agreement offered to the parent company in April 2017. In a letter addressed to V. dated 17 August 2020, T. had stated that a license via the AAC pool was still being examined, without the license via the pool having been noticeably advanced. The Defendants' submissions in the proceedings also lacked any substantive discussion of the pool license agreement. Eight days before the oral hearing at first instance, the Defendants had for the first time objected to the FRAND compliance of the license agreement offered to the parent company, claiming that it discriminated against them in comparison with other licensees. A user who begins to discuss the content of FRAND conformity immediately before the oral hearing thus documents his unwillingness to take a license. To the extent that T. had requested a bilateral contract offer from the Plaintiff in various letters, neither the Defendant nor its parent company had indicated a sufficiently concrete interest in a bilateral license. A user actually willing to take a license could be expected to have weighed up both alternatives to a certain extent after a period of more than three years since becoming aware of a pool license and the possibility of concluding a bilateral agreement, and to provide information on the basis of specific group relationships as to why taking out a bilateral license was preferable. Against the background that the "GMS" certification required the AAC standard, it had to be assumed that the parent company was basically dependent on the entire AAC infrastructure. After all, it had already taken a pool license in 2005. Why the parent company nevertheless opted for the model of bilateral licensing with regard to the entire standard relevant here was not sufficiently



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explained. In this context, the Defendants could not initially refer to their previous business practice. So far, no bilateral agreements had been concluded with other owners of AAC-relevant patents, although acts of use by T. had been pending since the termination of the pool license agreement with the parent company and thus since 2007. Neither the parent company nor the Defendant had named such pool licensors with whom they were at least in serious licensing negotiations. This was also the case after the Defendants had justified their interest in a bilateral licensing practice for the first time in the first-instance quadruplicate by stating that they were interested in "using their own portfolio in the context of cross-licensing". Moreover, the Defendants could not justify their interest in a bilateral license solely on the grounds that the Plaintiff had already concluded such agreements with other licensees. The conclusion of the parent company of the Defendants, linked to this objection, that any license offer for (...) AAC patents can only be FRAND-compliant if it is made on a bilateral level, shows that a substantive discussion of the royalty systems of pool and portfolio licensing actually does not take place. A "regularity" such that the existence of one license model leads to FRAND infringement of the other does not exist. Rather, it is also conceivable that two licensing systems coexist which both prove to be FRAND-compliant. In the required overall assessment, the counteroffer dated 1 April 2021 submitted by the parent company eight days before the first-instance oral hearing could also not be interpreted as an expression of a willingness to take a license which now existed. The terms and conditions of the counteroffer were based on the license agreement that the Plaintiff had concluded with the parent company at the end of 2020 for the Plaintiff's 3G/LTE SEP portfolio. They provide for the exemption of acts of use prior to the effective date of the agreement, without the parent company (or the Defendant in the context of the present proceedings) having disclosed the order of magnitude of the sales volumes achieved in the past. Nor did the parent company provide any justification for the full exemption provided for in the counteroffer. Moreover, the lump sum license amount was based on IDC figures that were not valid. The high demands made by the Chamber on the parent company's willingness to take a license were not excessive because the Plaintiff, for its part, had not shown itself willing to conclude a license agreement on FRAND terms. From the point of view of abuse, the Plaintiff cannot be accused of not having complied with the parent company's requests to submit a bilateral license offer. With the pool license agreement, the parent company had in any case received a contractual offer which had been accepted in this form by other market participants. In any case, this opened up the possibility of gaining access to the technology that would give it a dominant position on the market. The fact that the Plaintiff



announced to the parent company in a letter dated 12 December 2016 the fundamental possibility of concluding a bilateral agreement does not indicate otherwise. This communication did not have a legally binding effect. Rather, the Plaintiff had thereby referred to its fundamentally existing license agreement practice. In response to a question at the first-instance oral hearing, it described this practice in such a way that it grants bilateral licenses to licensees who already have bilateral contractual relationships with other licensors or for whom a pool license would prove inappropriate for other reasons. The parent company had not disclosed any such interest. Finally, there was no reason for a stay of proceedings, neither taking into account the order for reference of the 4c. Civil Chamber (NZKart 2021, 61 = MMR 2021, 276 Ls.), which is also concerned with patent infringement proceedings, nor against the background of the ongoing proceedings on the existence of a right.

The Defendants have appealed against this judgment and are pursuing their unsuccessful claim before the Regional Court for the action to be dismissed and, in the alternative, for a stay of proceedings.

The appeal was unsuccessful.

Grounds

II. The Defendant's appeal is admissible, but is unsuccessful on the merits. The Regional Court rightly considered the offering and distribution of the attacked devices in the Federal Republic of Germany to be a literal use of the patent in suit and ordered the Defendant to cease and desist, to provide information and to render accounts and - with regard to the direct infringement - to recall the product (only the second Defendant) due to direct and indirect patent infringement and determined the Defendant's obligation to pay damages. The Plaintiff is entitled to corresponding claims also taking into account the interim limitation of the scope of protection from Art. 64 I EPC in conjunction with Sec. 139 I and II Patent Act, Sec. 140 a III Patent Act, Sec. 140 b I and III Patent Act in conjunction with Secs. 242, 259 German Civil Code.

Insofar as the Chamber denied a claim for recall against the first Defendant and claims for destruction against both Defendants, this remained unchallenged in the appeal proceedings, which is why the partial dismissal of the action in this regard is upheld.



1. There are no objections to the fact that the Plaintiff now bases its claims solely on an infringement of the patent in suit in the limited version maintained.

Such an adjustment of the applications to a limited maintenance of the claim that has been carried out in the meantime in the proceedings on the existence of rights does not constitute an amendment of the action within the meaning of Sec. 263 Code of Civil Procedure, but - if one wants to see an amendment of the application at all and not only a concretization of the application - at most a limitation of the application pursuant to Sec. 264 no. 2 Code of Civil Procedure (established case law, cf. Higher Regional Court Düsseldorf GRUR-RS 2021, 6714 marginal no. 38 – Lifting Saws; Higher Regional Court Düsseldorf GRUR-RS 2021, 8206 marginal no. 41 – Holder Frames II; Higher Regional Court Düsseldorf GRUR-RS 2022, 2110 – Stirring Vessel; BeckOK PatR/Voß, 23rd ed. 15 January 2022, Sec. 139 ff. marginal no. 47 Patent Act; Cegl/Voß/Zigann/Werner, 2nd ed., Code of Civil Procedure Sec. 253 marginal no. 105), which is also admissible in appeal proceedings without further ado because Sec. 533 Code of Civil Procedure does not apply (cf. BGHZ 158, 295 = NJW 2004, 2152; NJW-RR 2010, 1286 = WM 2010, 1142). This follows from the fact that the cause of action remains identical if features of the claim are added, in that the Plaintiff continues to base its claim on the same facts of life and the same property right. It continues to pursue the objective of the action, namely to have the offer and sale of the attacked devices prohibited due to infringement of the same patent (Higher Regional Court Düsseldorf GRUR-RS 2021, 30324 – Sliding Roof; Higher Regional Court Düsseldorf, GRUR-RS 2022, 2110 – Stirring Vessel).

Even if the limitation of the claim - as asserted by the Defendants at the hearing on 12 May 2022 - were to be seen as an amendment to the claim, the result would not be different. If the Plaintiff is successful in the first instance with his main request following the granted version of the claim and only the Defendant files an appeal, the auxiliary request "in particular" submitted for decision in the first instance will be submitted for decision in the appeal proceedings without further ado and namely without a cross-appeal by the Plaintiff if the appellate court comes to the conclusion that the main request is not justified due to the partial destruction of the patent in suit in the meantime (JC GRUR 2021, 1519 - Uli-Stein-Cartoon).

[...]



5. The Plaintiff is not restricted in enforcing its rights in court because the patent in suit is a standard essential property right for which a FRAND declaration has been made (Article 102 Treaty on the Functioning of the European Union).

a) The Regional Court rightly and correctly found that the Plaintiff had a dominant position on market.

aa) A dominant position on market within the meaning of Article 102 Treaty on the Functioning of the European Union means the position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors and customers (ECJ NJW 1978, 2439 (2440) - United Brands v. Commission; ECJ EuZW 2012, 741 para. 38 = WRP 2012, 680 - Tomra; BGHZ 170, 299 = GRUR 2007, 520 marginal no. 19 - National Geographic II; FCJ NZKart 2017, 242 marginal no. 25 = WRP 2017, 563 - VBL-Countervalue II; FCJ, GRUR 2020, 961 marginal no. 55 - FRAND-objection).

As the Chamber has already correctly pointed out, the dominant position on market of a patent proprietor does not result solely from the fact that he can exclude any third party from using the technical teaching of his patent by virtue of the exclusive right granted to him. The exclusive rights to which the owner of an intellectual property right is entitled cannot alone establish the dominant position (ECJ EuZW 1995, 339 marginal no. 46 - Magill TV Guide; BGHZ 160, 67 (74) = GRUR 2004, 966 – Standard Bung Barrell; FCJ, GRUR 2020, 961 marginal no. 56 - FRAND-objection). A dominant position generally results from the concurrence of several factors, each of which need not be decisive in itself (ECJ NJW 1978, 2439 (2440) - United Brands v. Commission). In this context, the determination of the relevant market is of essential importance (ECJ GRUR Int 1999, 262 marginal no. 32 = WRP 1999, 167 - Oscar Bronner/Mediaprint; BGHZ 160, 67 (73) = GRUR 2004, 966 – Standard Bung Barrell). The determination of a relevant supply market basically follows the demand market concept. According to this concept, the relevant product or service market comprises all products or services which, due to their characteristics, are particularly suitable for satisfying a constant demand and which are interchangeable with other products or services only to a limited extent (cf. ECJ GRUR Int 1999, 262 marginal no. 33 = WRP 1999, 167 - Oscar Bronner/Mediaprint; BGHZ 160, 67 (73 f.) = GRUR 2004, 966 – Standard Bung Barrell). If an industrial standard or another set of rules (de facto standard), which is observed by customers like a standard,



specifies a standardized design of a product which is protected by property rights and which cannot be substituted by another product from the point of view of the other party to the market, the granting of rights which enable potential suppliers of this product to place it on the market in the first place regularly constitutes a separate market which is upstream of the product market (BGHZ 160, 67 (74) = GRUR 2004, 966 - Standard-Bung Barrell; cf. ECJ GRUR 2004, 524 marginal no. 44 = WRP 2004, 717 - IMS Health; ECJ GRUR 2020, 961 marginal no. 57 - FRAND objection).

The assumption of such an independent license market thus requires first of all that it is a standard-essential patent, i.e. that the use of the patent-protected teaching is indispensable for the implementation of a standard (standardized by a standardization organization or enforced on the market) (BGHZ 160, 67 (74) = GRUR 2004, 966 - Standard-Bung Barell), so that it is generally not technically possible to circumvent it without losing important functions for the product market (cf. ECJ GRUR 2015, 764 marginal no. 49 = WRP 2015, 2783 - Huawei/ZTE; European Commission 29.04.2014 - C (2014) 2892 marginal no. 52 - Motorola). In addition, a prerequisite for an independent license market is that the technical teaching corresponding to the patent and the standard cannot be substituted by another technical design of the product (cf. ECJ GRUR 2004, 524 marginal no. 28 - IMS Health; BGHZ 160, 67 (74) = GRUR 2004, 966 - Standard bung barrel; FCJ, GRUR 2020, 961 marginal no. 58 - FRAND objection).

The burden of proof for the prerequisites of market dominance lies with the license seeker. The licensee must present concrete facts on the basis of which it can be established that the relevant product and geographic market is dominated. As potential end users, the members of the Senate can determine the relevant market perception themselves without the need to resort to (court-initiated) market investigations (Higher Regional Court Düsseldorf, GRUR 2017, 1219 (1222) – Mobile Communication System).

bb) On the basis of these principles, there are no reasonable doubts that the Plaintiff has a dominant position due to its capacity as owner of the patent in suit.

(1) Even though the "A." operating system is free software which can be freely used and modified by device manufacturers, the use of the AAC standard and in particular the "HE AAC v2 profile" is a prerequisite for the GMS certification of G. Smartphones or tablets require this



in order to pre-install the application package "G. Mobile Services ("GMS"), which contains the central applications of G. (...). The fact that an "A." smartphone that does not support these services is not marketable not only corresponds to the Senate members' own perception, but is also supported by the article submitted by the Defendants. According to this article, 70% of the approximately 1000 users surveyed (as of 3 April 3 2020) stated that they would refrain from purchasing the new H. smartphone (...) if G. applications were not installed on it. Insofar as the Plaintiff draws the conclusion with reference to this article that another 30% of those surveyed would make a purchase decision even without G. apps, the Senate does not share this conclusion. In this context, it should not be lost sight of the fact that the market is currently dominated by "A." to approx. 74.6% and "i." to 24.8%, whereby the latter is not licensed by X.. According to general life experience - the members of the Senate are part of the target group - it is not only questionable that a significant proportion of potential buyers within the "A." market would actually opt for a smartphone without the support of G. Services, but the Plaintiff has also failed to demonstrate this in any detail.

(2) That a manufacturer of smartphones, in view of the market penetration of "A." and "i.", must not allow itself to be referred to the development of its own operating system, which has not yet been established, for lack of prospects of success Higher Regional Court Düsseldorf: Requirements for the willingness to take a license in FRAND cases - Signal Synthesis II (GRUR 2022, 1136) 1140 has already been correctly stated by the Regional Court. The same applies with regard to the lack of fulfillment of the traffic expectation by other app stores. To avoid repetition, the Senate refers to the statements made in this regard. There is no evidence that, contrary to life experience, the expectations of potential users can also be satisfied without using the "G. Services" and solely through the use of alternative app stores that have so far enjoyed a niche existence.

(3) Contrary to the opinion of the Plaintiff, its dominant position on market is also not the sole consequence of the business policy of G. It is not G. that helps the AAC standard to achieve its considerable distribution. Rather, it is so widespread that G. has made it a prerequisite for "GMS" certification and thus for the use of its services in order to ensure compatibility. That this is the case is made clear by a look at "i.". The AAC standard is also implemented there.

b) The Senate is unable to establish any abuse of this dominant position on market on the part of the Plaintiff.



aa) The applicability of the principles developed by the European Court of Justice in the "Huawei/ZTE" decision (GRUR 2015, 764) to the present case is no longer explicitly questioned by the Defendants at second instance, so that no additional comments are required in this regard against the background of the correct considerations in the judgment at first instance. The criteria developed by the European Court of Justice in this decision on the question of when a proprietor of a standard-essential patent, who is in a dominant position on market vis-à-vis of a standardization organization to grant a license to any third party on FRAND terms, abuses its dominant position on market when it brings a patent infringement action for injunction, recall or destruction, are applicable to the present case.

bb) A market-dominating patent proprietor who - like the Plaintiff - has undertaken vis-à-vis a standardization organization to grant licenses on FRAND terms cannot only abuse its market power by refusing to conclude a corresponding license agreement with an infringer who is willing to take a license and by bringing an action against the infringer for injunction, recall and removal of products from the distribution channels or for destruction of patent-infringing products. Rather, an abuse may also be present if the patent proprietor is to be blamed for not having made sufficient efforts to meet the special responsibility associated with the dominant position on market and to make it possible for an infringer who is in principle willing to take a license to conclude a license agreement on reasonable terms (BGHZ 225, 269 = GRUR 2020, 961 marginal no. 74 - FRAND-objection; FCJ GRUR 2021, 585 marginal no. 53 – FRAND-objection II).

In both cases, the action is abusive because (and only because) the infringer who is willing to take license has a claim that the patent proprietor contractually permits him to use the protected technical teaching on FRAND terms. An abuse of the dominant position on market of a patent proprietor therefore does not in principle result from contractual terms offered by the patent proprietor before or at the beginning of negotiations as such, which, if contractually agreed, could unfairly hinder or discriminate against the licensee. Rather, the abuse of market power follows - not unlike in cases of refusal to supply or refusal of access to an infrastructure facility of the market dominator - only from the refusal of a requested access to the invention per se or from unreasonable conditions for a requested access from which the patent proprietor is not prepared to deviate even at the end of negotiations (cf. BGHZ 152, 84 (94) = GRUR 2003, 169 – Driving Port Puttgarden I), i.e. the refusal to offer the license seeker seeking the conclusion of a license agreement on FRAND terms, as a result of a negotiation process, those



fair, reasonable and non-discriminatory contractual terms which the latter can claim and on which he, for his part, is willing to conclude with the patent proprietor (FCJ, GRUR 2021, 585 (589 f.) - FRAND-objection II).

cc) It follows from the obligation to refrain from such misuse and the special responsibility of the dominant patentee that he must first point out the infringement of the patent in suit to the infringer if the latter is (possibly) not aware of making unlawful use of the teaching of the standard-essential patent by implementing a technical solution required by the standard (ECJ GRUR 2015, 764 para. 60-62 = WRP 2015, 1080 - Huawei/ZTE; FCJ GRUR 2020, 961 marginal no. 73 f. - FRAND objection; FCJ GRUR 2021, 585 marginal no. 55 - FRAND objection II). That the letter of the Plaintiff dated 12 August 2016 is such an infringement notice has already been established by the Chamber. The correct considerations have remained unchallenged in the appeal proceedings, so that in this respect, in order to avoid repetitions, reference can be made in full to the relevant statements in the judgment at first instance.

c) The Senate cannot recognize any serious willingness on the part of the Defendant to conclude a license agreement on FRAND terms. Therefore, there is still a lack of a sufficient license request by the Defendant which would have justified further obligations of conduct on the part of the Plaintiff.

aa) The request for licensing may be made in a general and informal manner and consequently also implicitly. However, the conduct in question must nevertheless clearly indicate to the opponent the general willingness to take a license (Higher Regional Court Düsseldorf GRUR 2017, 1219 - Mobiles Communication System). Irrespective of the question as to which exact requirements are to be placed on the infringer's willingness to take a license, a merely verbally expressed request for the granting of a license is not sufficient in any case if the rest of the declarant's conduct, when viewed objectively, unequivocally testifies to the fact that the request for a FRAND license is mere lip service, which is obviously not supported by a serious intention to take a license, but serves the sole purpose of stalling the patent proprietor, delaying his legal prosecution and thus being able to continue the actions using the patent undisturbed. It is true that even an infringer acting in this way may change his mind, so that a license request articulated by him later may be taken seriously. However, in view of the stalling history, it is necessary that his new license request is accompanied by circumstances which clearly show his inner turning away from the previous attitude of refusal. The formulation of a separate



license offer may be sufficient in this sense; however, it is not sufficient if - as in this case - the content of the offer is un-FRAND to such an extent that it clearly does not open a new chapter in the licensing efforts, but - on the contrary - continues the previous delaying tactics (Higher Regional Court Düsseldorf GRUR 2021, 1498 (1499) – Signal Synthesis).

bb) As early as July 2005, the Defendant's parent company, which is responsible for licensing issues in the "smartphone" sector, acquired an AAC pool license in the form of the standard license agreement valid at that time, although this agreement was terminated by V. in 2007 (see Regional Court judgment). Regardless of whether and to what extent discussions then took place between T. and the Plaintiff, almost 10 years passed between the termination of the original license agreement and the letter dated 12 December 2016, which was classified by the Regional Court as sufficient evidence of infringement, without the Defendant or its parent company having clearly signaled their willingness to take a new license or having clearly indicated to the Plaintiff or V. that they would refrain from using the AAC standard in the future despite having taken up a license in the past.

cc) T. did not comment on the infringement notice of the Plaintiff and the willingness to conclude a bilateral license agreement expressed in this context. Nor did T. reply to the offer to conclude a standard license agreement sent by V. in a letter dated 13 April 2017. Such silence in response to the attempts made by the Plaintiff or V. to find an out-of-court solution allows only one conclusion, namely that the Defendants are in fact not interested in taking a license and lack the willingness to license.

dd) The letters sent to the Plaintiff only three years after the infringement notice and after the infringement action was filed are not capable of eliminating this impression. They are not an expression of the Defendant's purified insight into the necessity and willingness to take a license, but continue the Defendant's previous attitude of refusal and delaying strategy.

(1) Although the letters addressed to the Plaintiff contain a general declaration of willingness to license and request the sending of a bilateral license offer, in the overall context they represent a continuation of the attempt to obstruct the enforcement of the patent in suit. After all, the Plaintiff had already offered to conclude a bilateral license agreement and to send a draft of such an agreement more than three years earlier, without the Defendant or its parent company having responded. Similarly, T. did not comment on the standard license agreement



sent by V. in a letter dated 13 April 2017 in the run-up to the infringement proceedings. Accordingly, T. initially did not express its rejection of a pool license, nor did it explain its sudden desire for an individual license in more detail. The expectation expressed by the Chamber that a user actually willing to take a license would already have weighed both alternatives against each other to a certain extent after a period of more than three years since becoming aware of the offer of a pool license and the possibility of concluding a bilateral agreement and would have provided information on the basis of specific group relationships as to why he considers taking out a bilateral license in particular to be preferable and advisable is therefore not objectionable and is shared by the Senate. This applies all the more if the infringer or its parent company responsible for licensing issues - as in this case - had already taken a pool license once without questioning the pool license model per se.

(2) The Defendants did not even begin to succeed in presenting comprehensible reasons for their request for a bilateral license, expressed for the first time years after the sending of the pool license agreement offer of the Plaintiff. Its insistence on a bilateral license agreement offer therefore does not prove to be a serious declaration of willingness to conclude a license agreement, but rather a further attempt to prevent the enforcement of the rights of the Plaintiff.

(a) The Defendants cannot justify their insistence on a bilateral license agreement offer solely by stating that the Plaintiff is - undisputedly - prepared to conclude bilateral license agreements with third parties.

(aa) In principle, the patent proprietor is not obliged to offer the license seeker a bilateral license in addition to a pool license. It regularly serves the well-understood interest of possible license seekers that they are offered a license to use the entire standard or essential parts thereof from a single source under uniform conditions, because they are thus relieved of the necessity of having to apply to each individual patentee for a license to the latter's IP rights (Kühnen GRUR 2019, 665). If it is a license seeker who not only uses the property rights of the Plaintiff, but also the patents of the other pool members, there is nothing to be recalled against a compulsion to take a license from the pool as a whole (Regional Court Düsseldorf GRUR-RS 2018, 33825 marginal no. 223 - Decoding device; Kühnen Patent Infringement,- HdB, 14th ed., Sec. E marginal no. 519).



(bb) Likewise, it is not objectionable per se that the SEP Holder chooses a license model with a coexistence of pool and bilateral licenses. The prohibition of discrimination merely prohibits and prevents unequal treatment which is not objectively justified. Identical licensing situations may not be treated unequally (Higher Regional Court Düsseldorf GRUR 2019, 725 Ls. = GRUR-RS 2019, 6087 - Improving Handovers; Higher Regional Court Düsseldorf GRUR 2021, 1498 (1501) - Signalsynthese). Such unequal treatment does not exist even if both licensing models coexist if access to both models is granted in a non-discriminatory manner on the basis of objective criteria (Higher Regional Court Düsseldorf GRUR 2021, 1498 (1501) – Signal Synthesis).

(cc) Based on this, there are no indications of discrimination in the present case.

The Plaintiff has explained its licensing practice by stating that it only grants bilateral licenses in special cases where the pool license would not be appropriate due to license agreements between the licensee and other licensors in the pool or where complex license agreements have been concluded which include a number of other technologies in addition to AAC. In addition, bilateral licensing could be considered if a pool license proved to be inappropriate for other reasons.

Such a licensing practice, which is based on objective criteria, focuses on the pool license and accepts bilateral agreements only in justified exceptional cases for the protection of the licensee, is not objectionable in itself. It is not evident that the Plaintiff would have granted a bilateral license to third parties who - like the Defendant - are not licensed under any single AAC-relevant patent and, in particular, have not been licensed by any other participant in the AAC license pool so far and who also do not have any AAC-relevant patents of their own. Therefore, there can be no question of discrimination against the Defendant. This applies all the more after the Plaintiff or V. even offered T. a bilateral license with the infringement notice, without T. having accepted this offer within a reasonable period for consideration.

(b) Against this background, the Defendants cannot derive a general bilateral licensing claim solely from the fundamental willingness of the Plaintiff to grant bilateral licenses in justified individual cases. Rather, it would be up to them to name reasons that make a pool license appear inappropriate in their case and thus - based on the licensing model practiced by the Plaintiffs - open the door to the conclusion of bilateral license agreements in the first place.



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However, the Defendants did not do justice to this. Their mere denial with ignorance does not help them due to their burden of presentation and proof.

(aa) The reasons stated in the letter dated 3 November 2020 are also obviously not sufficient for this. There it states, inter alia (in German translation): "[...]".

Neither individually nor in their entirety are these points capable of justifying a serious interest on the part of the Defendant in a bilateral license. Since the Defendants merely refer to the granting of bilateral licenses to third parties by the Plaintiff in the third point, reference can be made to the above statements in this respect. For the rest:

(aaa) As far as the Defendants refer to the fact that "a bilateral license between P. and T. would completely cover the allegedly unauthorized use of P. patents and completely satisfy the interests of both parties", this is no more than a phrase. The Defendants do not give any reasons why a bilateral license should be in the interest of both parties.

(bbb) The Defendants have also not succeeded in specifying the "general business practice" referred to, which is characterized by licenses on a bilateral level. To date, they have not been able to name a single corresponding bilateral license agreement in the AAC area. Instead, the Defendants deny with ignorance that the other bilateral licensees of the Plaintiff have concluded license agreements with all other AACSEP holders. Such a denial is unhelpful. It is the Defendants who invoke a corresponding business practice to justify their interest in a bilateral license. It is therefore up to them to explain such a practice in detail. If they fail to do so and instead resort to an obviously unpromising denial, they once again express their lack of will to take a license. This applies all the more since the license negotiations with D. - the existence of which is assumed in favor of the Defendant - have not been concluded to date and thus not even 1 and a half years after the above-mentioned letter was sent. Moreover, it is undisputed that there has not even been any contact between D. and T. since June 2021. In contrast, the contract between T2 and D. referred to by the Defendant, which already expired in the summer of 2021, relates to the "television" sector and thus not only to a different market. Rather, it was also concluded by the company responsible for the TV division of the Plaintiff and thus not by the Plaintiff. No conclusions can be drawn from this for either party with regard to the licensing practice of the Plaintiff in the area of "smartphones and tablets". Both parties are free to adapt their licensing practice to the requirements of the respective market. Against



this backdrop, the Defendant's further reference to ongoing bilateral license negotiations between the parties regarding the 3G/LTE SEP portfolio of the Plaintiff does not lead anywhere. These also relate to a different market and are therefore irrelevant to the present case.

(cc) Insofar as the Defendants explained their licensing practice in more detail for the first time a few days before the oral hearing at first instance to the effect that they were striving to use their patent portfolio within the scope of cross-licenses (written statement dated 1 April 2021), they must ask themselves why there are no indications of this in the letter dated 3 November 2020 discussed above. Apart from that, according to its own information, the Plaintiff has no interest in a bilateral cross-license due to the lack of its own products and in the absence of its own AAC-relevant patents from T. The Plaintiff is not interested in a bilateral cross-license. There is therefore no basis for cross-licensing from the outset.

(c) The fact that the Defendants are not interested in an appropriate balance of the conflicting interests in the form of a license agreement on FRAND terms, but solely in delaying the enforcement of rights by the Plaintiff, is demonstrated once again by their further statements in the appeal proceedings: Although the Defendants have had an offer to conclude a pool license agreement submitted by V. for several years, they now retreat to the position that there is no offer of a license agreement by the Plaintiff. So far, only a third party, V., has submitted an offer for a comprehensive license for the AAC SEP pool. The Plaintiff now wants to sell the AAC pool license as "its" offer, although it itself has not made any move in the direction of the Defendant. It is precisely the nature of the pool to administer the property rights introduced into the standard and to grant any party interested in the standard-essential technology permission to use it on FRAND terms. The granting of a pool license is therefore inherently the responsibility of the pool and not of the individual patentee. By refusing this trivial insight and denying the Plaintiff the possibility to refer to the conclusion of a pool license agreement with the pool, the Defendants once again make clear their unwillingness to take a license, which never existed at any time.

(3) The fact that the Defendants did not even request the Plaintiffs to submit a bilateral license agreement one month before the oral hearing in the first instance and then submitted a license agreement offer themselves for the first time a few days before the oral hearing does not allow the conclusion that the Defendants are - in contrast to the previous situation - seriously willing



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to take a license. On the contrary, this offer also shows that the Defendant is not interested in concluding a license agreement, but only in delaying the infringement proceedings.

(a) There is absolutely no objective reason why the Defendants presented their offer so late in gross violation of their duty to promote the process, which is why neither the Plaintiff nor the Regional Court had sufficient opportunity to deal with the contents of the offer in the first instance in the required manner. It is obvious that such an offer could not be accepted by the Plaintiff without the possibility of a closer examination. Viewed in the light of day, the offer made by the Defendant is therefore nothing more than a continuation of its tactics practiced for years. tactics of stalling and delaying practiced..

(b) Apart from this, the content of the contract offer was also unacceptable to the Plaintiff.

(aa) Item 3.1. of the license agreement offer - which, contrary to the procedural orders of the Chamber and the Senate, was not submitted in German translation - provides for the payment of a lump sum of x USD until 30 June 2021.

(1) This amount is based on calculations, the starting point of which are alleged sales figures from 2020. In doing so, the Defendants do not use their actual sales figures as a basis, which would have been easily possible for them. Instead, they use the data of an economic service provider (hereinafter: I.), which, from the perspective of a reasonable licensor, can only be acceptable at all if the data in question are objectively reliable. However, the Plaintiff has disputed the general claim made by the Defendant in this connection that it is customary in the industry to have recourse to such external data. It would therefore have been up to the Defendant to substantiate its submission in this regard and to provide more detailed information on the customary practice in the industry as claimed by the Defendant. Otherwise, the expert evidence offered by them lacks a basis. The Defendants did not comply with this requirement. The mere reference to the statement of the Plaintiff, who unlike the Defendants only uses the I. figures in connection with the discussion of license fee payments of third parties (...), is recognizably not sufficient for this.

Moreover, the figures (relating only to the Corona year 2020, which is exceptional in many respects) are not comprehensible. The calculations are based on x smartphones sold. In contrast, no account is taken of the AAC-capable tablets, which are also the subject of dispute



and which, according to the figures presented by the Plaintiff, were also sold to a considerable extent (...). Also not taken into account are so-called "feature phones". Insofar as the Defendants want to disregard these on the grounds that they are "simple, traditional cell phones" for which AAC coding is of no significance, the Plaintiff (...) has named two cell phones which are "feature phones" and which make use of the AAC standard. These are therefore also subject to remuneration but are not taken into account in the calculations of the Defendant.

(2) In a second step, the Defendants multiply the figure of around x determined by them - which, as explained, is based on incorrect assumptions - by five, which in their view is intended to cover the contractual term of five years. Thus, the contract offer does not contain any compensation for past acts of use, although T., according to the I. sales figures submitted, sold more than x. cell phones in the years 2016 to 2020 alone.. At the same time, the Defendant's contractual offer also provides for a - thus gratuitous - release for the past. It is obvious that such a license agreement offer, in which the Defendants receive an exemption for the past as a "reward" for their continued infringing actions over years and their refusal to take a license for years, is not acceptable to the Plaintiff. Nor can the Defendants counter this objection by pointing out that the actual sales are below the I. figures, which would compensate for the sales from the past. If the Defendants wish to assert such a claim, it would be up to them not only to provide more details on the individual sales figures in the past, but also to explain at the same time why this actually provides adequate compensation for the infringements of the past. The naming of witnesses is unhelpful in this context. The examination of witnesses out of the blue is inadmissible (FCJ, NJW 2012, 2427 (2431); NJW 2020, 1740 (1741); BeckOK ZPO/Bacher, 44th ed. 1 March 2022, Code of Civil Procedure Sec. 284 marg. No. 40).

(3) Furthermore, the Defendants also calculate the license fee per unit incorrectly. V.'s fee table shows a degression; the license fees for the first (...) products subject to licensing are significantly higher (...) than the license fees charged for the products subject to licensing between (...) (...). Here, this table refers to sales per year, which is why the degression is set to zero each year. FOR x relevant product sales, as taken as a basis by the Defendants, royalties in the amount of x USD are incurred per year according to the royalty table. The license fee per unit is therefore x USD, resulting in a total license fee of x USD over five years. Assuming that the Plaintiff holds x% of the patents in the AAC pool - as assumed by the Defendants - the Plaintiff would be entitled to x. USD and thus a much larger amount than the offered x USD. Even if the license offer of the Defendants does not provide for an annual but



for a one-time license fee payment, there is no recognizable reason to deviate from the calculation model established by V. to the detriment of the Plaintiff solely due to the change of the payment modalities.

(4) With all these deficiencies, the Defendant's contractual offer does not constitute a suitable basis for negotiating a license agreement. Rather, it impressively demonstrates the continued unwillingness of the Defendant to enter into serious license negotiations with the Plaintiff. This applies all the more since - undisputedly - bilateral licenses are usually considerably more expensive than pool licenses due to the increased effort involved.

d) Since there is thus already a lack of a licensing request by the Defendant expressing a serious willingness to take a license, the Plaintiff is not obliged to submit a license agreement offer. The question widely discussed by the parties in the second instance as to whether the standard license agreement sent by V. is FRAND therefore does not require a decision.

aa) If the patent proprietor - such as the Plaintiff in this case - has made an (at least essentially complete) contractual offer to the infringer despite the latter's unwillingness to take a license, the fact that the patent proprietor's offer (e.g. with regard to the amount and calculation of the royalties) treats the infringer less favorably than other licensees without objective justification does not constitute an abuse of the dominant position according to the case law of the Federal Court of Justice (FCJ, GRUR 2021, 585 marginal no. 108 et seq. – FRAND-objection II).

In the case in question, it can be left open whether this point of view - in particular under factual constellations such as those on which the cited decision was based - is to be agreed with or whether it is not correct to distinguish between the infringer's fundamental (general) willingness to take a FRAND license and his will to accept concrete license conditions that have proven to be FRAND (concrete willingness to take a license) (Kühnen Patent Infringement-HdB Chap. E marginal no. 420), whereby at the level of the license request only his general will to become a licensee is significant and to be verified by the court, whereas his concrete willingness to take a license is only at issue if the license offer of the patent proprietor - which is to be undertaken for this reason - has been identified as FRAND. The consequence of this consideration is that if the infringer lacks the general willingness to take a license because his license request is obviously a not seriously meant lip service, a license offer of the patent proprietor which is nevertheless submitted (e.g. due to excessive procedural caution or other



reasons) is no longer to be examined with regard to its FRAND compliance. If the infringer has already sufficiently documented that he does not want to and will not take a license at all, it obviously does not make sense to confront him with concrete license conditions which were found to be fair and non-discriminatory during the judicial review of the submitted license offer and which are in any case of no use. Rather, the necessary conclusions are to be drawn immediately from the infringer's refusal to accept any license by ordering the Defendant to cease and desist. The situation is fundamentally different if the infringer merely lacks the concrete willingness to take a license. In this case, it makes sense and is therefore advisable to verify the license offer of the patentee as to whether it is fair and non-discriminatory and to confront the infringer with the said license conditions. If the license offer is un-FRAND, the patent holder - rightly - loses out, because he has not fulfilled his obligation to license FRAND and therefore the lack of concrete willingness to take a license on the part of the license seeker may not be the decisive factor. If, on the other hand, the license offer turns out to be FRAND, the infringer will lose out if (and because) he does not agree to the license terms submitted to him, which are in compliance with antitrust law.

In the case at hand, the Defendants - as explained - lack the fundamental (general) willingness to take a license, so that it is not necessary to examine whether the terms of the standard license agreement are FRAND. A lack of general willingness to take a license can also be inferred if the infringer - as in the present case the Defendant - categorically insists that it does not intend to enter into a certain, obviously appropriate licensing model (e.g. a pool license) and instead adamantly demands a bilateral individual license, although it cannot present any justifying reasons for this.

bb) Apart from this, the Defendants once again express their lack of interest in concluding a license agreement by their submissions on the pool license agreement.

(1) A bona fide user of a standard-essential patent with a serious interest in licensing this property right can be expected to deal with the content of a contractual offer which has been available to him for years promptly after its transmission and to provide information on the reasons why the offer is not FRAND from his point of view. The Defendants did not comply with this requirement. Neither before the court nor at the beginning of the infringement proceedings did they question the FRAND compliance of the standard license agreement offered by V. Instead, they retreated - albeit late - to the fact that they were entitled to a bilateral



license. From the point of view of the Defendant, there was therefore apparently no reason to deal in detail with the pool license agreement submitted by Via-Licensing.

For the first time in the quadruplicate, and thus immediately before the first-instance oral hearing, the Defendants complained that the AAC-SEP pool license offered by V. did not give the Defendants fair and appropriate access to the Plaintiff's AAC-SEP portfolio because it discriminated against the Defendants compared to other licensees. Even on this occasion, the Defendants did not specify their accusation in more detail but referred in general terms to their submissions in the parallel proceedings in the first instance. However, the Plaintiff was not a party to these proceedings. It goes without saying that, against this background, the Defendants could not merely make a general reference to these proceedings in support of their accusation and, moreover, request that the files be consulted. Insofar as the Defendants refer in this context to a confidentiality agreement with V. and D., which initially prevented them from making a more detailed presentation, it would have been up to them to work towards making it possible for them to make such a presentation in the present proceedings at an early stage. The reference to the fact that they had asked the Plaintiff to conclude an NDA in November 2020, i.e. one year after the filing of the action, is clearly not sufficient for this purpose. This applies all the more as the corresponding request, as submitted by the Defendants themselves, primarily served to persuade the Plaintiffs to enter into a bilateral license, to which the Defendants - as stated - have no claim.

(2) Insofar as the Defendants now for the first time in the second instance deal with the standard pool license agreement in more detail, this is not a serious signal to the Plaintiffs that they are now willing to take a license and request licensing, but merely a further attempt to delay the trial and a conviction. Not only that the Defendants at the same time continue to insist on a bilateral license and - as stated without any objective reason. Their submissions also do not even begin to indicate that they would be prepared to license under conditions such as those granted to (...), (...) or (...). All other licensees addressed by the Defendant were all prepared to conclude a pool license agreement on the basis of the standard pool license agreement, which was only modified in individual points. However, the Defendants categorically and without reason reject such a pool licensing from the outset.

[...]