



KATHER · AUGENSTEIN
RECHTSANWÄLTE

Karlsruhe Higher Regional Court

6 U 212/22

Decision from 14.9.2022

Operative Part

The Defendant's request to temporarily suspend enforcement of the decision of the Regional Court of Mannheim of 5 July 2022, docket number 2 O 75/21, is dismissed.

Reasons

A.

The Defendants seek interim suspension of enforcement of a decision to cease and desist, destroy and recall, as well as to provide information and render accounts, based on patent infringement, which has been declared provisionally enforceable against individually determined security deposits totalling EUR [...] and is contested by the Defendants' appeal.

The action is based on the German part of the European patent EP [...] (hereinafter: patent in suit) which is in force. A cross-license agreement of [...] with the companies of the Defendant's group (hereinafter: [B.]) concerning the patent in suit and the other patents of the [...] portfolio of the Plaintiff's group (hereinafter: [K.]) expired on [...]. The action is based on the fact that beyond that date Defendant 2), with the support of Defendant 1) in the [B.] group, offers, distributes and imports from abroad smartphones of the "[B.]" brand compatible with the LTE (4G) and NR (5G) mobile communication standard (hereinafter: attacked devices) to private and commercial end customers in Germany.

The Regional Court stated analogously in support of the decision: The attacked devices realised the teaching of claim 1 of the patent in suit. The Defendants could not oppose the justified claims because [B.] had not shown (serious) willingness to license after [K.] had pointed out the (imminent) patent infringement. A stay of the legal proceedings until the decision on the nullity action pending before the Federal Patent Court concerning the German part of the patent in suit was not required.

In support of their request filed when filing the statement of grounds for appeal - to temporarily suspend the Plaintiff's enforcement of the decision of the Regional Court Mannheim of 5 July



2022, docket no. 2 O 75/21, if necessary against security, the amount of which is left to the discretion of the Senate, until the conclusion of the appeal instance – the Defendants argue that the Regional Court, in the required summary examination, assumed in a manner that was no longer justifiable that the claims asserted could not be countered by the objection of compulsory licensing under antitrust law; furthermore they argue that it considered the facts of infringement to be fulfilled in an incorrect manner based on an interpretation of the patent in suit that was evidently erroneous in law. The Plaintiff opposes the request.

B.

The admissible request to temporarily suspend enforcement is unsuccessful on the merits.

Pursuant to Section 707 par. 1 s. 1, Sec. 719 par. 1 s. 1 of the German Code of Civil Procedure (ZPO), if an appeal is lodged against a decision that has been declared provisionally enforceable, enforcement of the decision may be temporarily suspended upon request, in particular against or without the provision of security. The suspension of enforcement without security, which is primarily sought here, is also subject to the restrictions under Sec. 707 par. 1 s. 2 and Sec. 719 par. 1 ZPO. According to this provision, enforcement is only permissible if the debtor can credibly show that it is not in a position to provide security and that enforcement will cause a disadvantage that cannot be compensated. The Plaintiff has not demonstrated this. In all other respects, and in particular also with the alternative request to temporarily suspend enforcement against the provision of security, the request is unsuccessful because the Senate does not consider a suspension of enforcement to be appropriate.

I. Within the framework of the discretionary decision to be made for this purpose, the court of appeal has to weigh the conflicting interests of the creditor on the one hand and the debtor on the other hand (cf. only FCJ, SchiedsVZ 2018, 193 marginal no. 2; Senate, GRUR-RR 2015, 326). In doing so, it has to observe the value decision of the legislator, according to which, in principle, the interests of the enforcement creditor have priority. It can be inferred from the provision of Sec. 709 s. 1 ZPO that the enforcement debtor is generally already sufficiently protected by the security to be provided by the creditor prior to enforcement. It is therefore in line with established case law that in general in cases where - as here - the contested decision is provisionally enforceable against the provision of security, a suspension of enforcement can only be considered in exceptional cases under special circumstances (Senate, InstGE 13, 256 [juris para. 4]; GRUR-RR 2010, 120; GRUR-RR 2015, 50). Moreover, the creditor's interest



may be increased in individual cases by the fact that the creditor is urgently dependent on enforcement or that further waiting would jeopardise or frustrate the realisation of the claim to be enforced (Senate, Order of 12 February 2021 - 6 U 130/20, juris para. 35; BeckOK-ZPO/Ulrici, July 2022, Sec. 707 para. 20). The debtor's interest in the suspension to be weighed against this is decisively shaped by the prospects of success of the main remedy to be secured as well as the disadvantages threatening the debtor if enforcement is not suspended. Low prospects of success can compensate for a greater extent of the threatened disadvantages and vice versa (Ulrici, loc.cit. Sec. 707 marginal no. 19 with further references).

Accordingly, it is recognised that the suspension of enforcement can be considered if it can already be determined at the time of the decision on the request for suspension during the summary examination required in the proceedings pursuant to Sec. 707, 719 ZPO that the contested decision is unlikely to stand (Senat, GRUR-RR 2015, 50; GRUR-RR 2015, 326; order of 12. 6 U 130/20, juris, marginal no. 36), namely if the conviction is manifestly incorrect (see Senate, InstGE 13, 256 [juris, marginal no. 7]). The summary examination is regularly limited to obvious errors that can be determined without a more in-depth examination (Senate, Order of 12 February 2021 - 6 U 130/20, juris marginal no. 38).

Furthermore, the suspension of enforcement can be considered if the debtor can demonstrate and credibly prove the risk of special damage that goes beyond the general effects of enforcement (see Senate, GRUR-RR 2015, 50; GRUR-RR 2015, 326; order of 29 August 2016 - 6 U 57/16, juris para. 27, 40; order of 12 February 2021 - 6 U 130/20, juris para. 36; HRC Düsseldorf, InstGE 9, 173 [juris para. 2] with further references). This requires at least that the enforcement would lead to an extraordinary damage that could not be remedied or at least not with the help of the previously provided security (see Senate, Order of 29 August 2016 - 6 U 57/16, juris marginal no. 41). Disadvantages that regularly accompany the enforcement of a title cannot regularly justify a suspension of enforcement (Senate, decision of 19 February 2014 - 6 U 162/13, juris marginal no. 15). The suspension of enforcement is not without further ado required because its consequences cannot be eliminated even if the appeal should be successful. The mere fact that enforcement would anticipate the outcome of the proceedings is not an irreparable disadvantage (Senate, Order of 28 January 2020 - 6 U 116/18, unpublished; cf. Senate, Order of 29 August 2016 - 6 U 57/16, juris marginal no. 42 with further references). Moreover, even to the extent that the threat of irreparable disadvantage speaks



in favour of a suspension of enforcement, there must at least not be a lack of prospects of success of the appeal (Senate, Order of 28 January 2020 - 6 U 116/18, unpublished; cf. FCJ, SchiedsVZ 2018, 193 marginal no. 2; MünchKommZPO/Götz, 6th ed., ZPO section 707 marginal no. 12; cf. on section 719 (2) ZPO: FCJ, NJW 2002, 1090; Order of 11 October 2016 - VIII ZR 203/16, juris marginal no. 5 with further references).

II. Taking these standards into account, the Senate exercises its discretion not to (at least) provisionally suspend enforcement of the appealed decision against the provision of security.

(1) A manifest unlawfulness of the contested decision to such an extent that the disadvantages of the Defendant regularly associated with any such enforcement would at least have to be averted cannot be established in the required summary examination.

a) The final assessment of whether the determination of the scope of protection of the patent in suit, on which the Regional Court based the decision, is correct, is to be reserved for the appeal decision pending after oral proceedings on the merits. The appealed decision, which is based on correct principles of patent interpretation, is - which is decisive here - not evidently incorrect.

[...]

b) The assessment of the Defendant's objection to the claims under antitrust law also does not reveal any infringement of the law requiring the temporary suspension of enforcement upon the required summary examination.

The Regional Court relied on the fact that the Defendant was not willing to take a license according to the standards applicable in this respect in the sense that the enforcement of the claim could not be abusive within the meaning of Article 102 TFEU or Sec. 19, 20 Act against Restraints of Competition (GWB). In this respect, it is not the task of the summary examination required under Sec. 707, 719 ZPO to subject the correspondence submitted in the proceedings or, in general, the exchange on the licensing issue resulting from the parties' factual submissions to a comprehensive assessment detached from the assessment in the contested



decision. Rather, an incorrect assessment must be obvious (see Senate, Order of 12 February 2021 - 6 U 130/20, juris para. 39). This is not the case here.

aa) The request to suspend enforcement argues unsuccessfully that the Regional Court wrongly assessed the infringer's conduct in the license negotiations unilaterally, without taking into account that the SEP holder must also be continuously willing to grant a license and that it has a duty to actively promote the license negotiations.

It must be conceded to the appeal that the considerations of the Federal Court of Justice on the question of the assessment of the infringer's willingness to license are initially based on the consideration that there is a mutual willingness to license and an obligation to engage in a constructive exchange (see BGHZ 227, 305 paras. 59, 65 - FRAND Objection II) and that the infringer's willingness to license is only an upstream question in the examination under antitrust law, which ultimately asks whether the patentee is abusing its (assumed) dominant position. Furthermore, it correctly points out that the assertion of legal claims may be abusive in particular if the infringer has not (yet) agreed to conclude a license agreement on certain reasonable terms, but the patentee is to be blamed for not having made sufficient efforts to meet the special responsibility associated with the dominant position and to make it possible for an infringer who is in principle willing to license to conclude a license agreement on reasonable terms (BGHZ 225, 269 marginal no. 72 - FRAND Objection I). 72 - FRAND Objection I).

However, the Regional Court set out the legal standards for assessing the infringer's willingness to license that are consistent with these considerations, as formulated in the case law of the Senate (most recently GRUR 2022, 1145, 1149 et seq.), and based the appealed decision on them. It also explained in detail and in a comprehensible manner its assessment that [B.] was not willing to license (in the required manner). In doing so, it also took into account that the requirements for the conduct of the patentee and the conduct of the user of the invention are mutually dependent (Senate, GRUR 2022, 1145, 1150). Furthermore, in accordance with the case law of the Senate (GRUR 2022, 1145, 1151), the Regional Court pointed out that it does not completely relieve the license seeker of its obligation to cooperate in the negotiation process if a license offer of the patentee obviously does not comply with the FRAND requirements and assumed the latter in favour of the Defendant (decision of the



Regional Court (LGU) 56, 60). The objection that the Regional Court ruled without taking into account the conduct displayed on the part of the Plaintiff and its significance for the requirements to be imposed on the infringer cannot be accepted, at least on summary examination. The license seeker is only completely released from the duty to react and thus also from the duty to name all obvious objections at the same time if an offer is contrary to FRAND to such an extent that, when objectively assessed, it appears not to be meant seriously and thus as a refusal to conclude a license agreement on FRAND terms. However, it is not sufficient in all cases that a single clause of an offer is obviously contrary to FRAND, even if the entire offer does not appear to be FRAND as a result, but it depends on an overall assessment of all circumstances (Senat, GRUR 2022, 1145, 1151). Whether a final consideration of the conduct of both parties, in particular also of the Plaintiff, will lead to a different assessment of the Defendant's willingness to license or at least of the abusiveness of the assertion of the claim, is reserved for the appeal decision.

bb) Nor is an evident error in the appealed decision discernible insofar as the suspension request argues that the Regional Court failed to take into account the fact that [K.] and [B.], with a view to the intended cross-licensing in the present case, each negotiated in the role of both the SEP proprietor and the license seeker and that [K.] did not fulfil the requirements of a patent user.

At present, it does not appear to have been clarified by the Higher and Federal Courts whether and, if so, what significance this circumstance of cross-licensing, which may be required or sought, has for the question of whether one of the negotiating partners is prepared to take a license to the patent-in-suit on FRAND terms within the meaning of the recent case law of the FCJ cited above. In this case, this fundamental decision must be reserved for the appeal decision, if any.

According to established principles, the decisive factor is the expressed intention of the user seeking a license to the patent in suit to conclude a license agreement on FRAND terms, whatever FRAND terms may actually be (see BGHZ 225, 269 para. 83 - FRAND-Einwand I; Senate, GRUR 2022, 1145, 1150). Accordingly, [B.] may not be in a position to condition its willingness to take a license to [K.]'s patents on the agreement of a cross-license and [K.]'s willingness in this respect. Even on summary examination, it is not obvious that - as the



Defendants suggest - the Regional Court misjudged the fact that a cross-license agreement existed between the parties in its assessment in a way that was relevant to the decision. In any event, the Regional Court derived its view that [B.'s] counter-offers did not comply with the FRAND conditions in a manner that was not evidently erroneous from, inter alia, the terms of the license previously agreed between the parties and the Regional Court's findings on the market conditions at the time and their further development. Nor is it obvious that the legal effect of the license agreement, which is limited in time until 1 July 2021, is that [B.]'s willingness to license is (essentially) to be assessed only on the basis of the efforts [B.] has made after that date to promote purposeful negotiations for a new license, and that the decision of the Regional Court - ultimately based on an overall assessment of the conduct displayed up to the end of the oral hearing - would be evidently incorrect in this respect.

cc) The Defendants incorrectly consider the provisional suspension of the enforcement to be necessary with regard to an allegedly obvious error of the Regional Court not to take [K.'s] conduct into account or to take it into account incorrectly. In this respect, too, no tangible incorrectness of the contested decision can be discerned upon summary examination.

It is questionable whether the appeal will obviously succeed with the objection that the draft referred to by the Regional Court as a "concrete license offer", which was enclosed with the [...] offer submitted by [K.] dated [...] (Exhibit [...] - K[...] 16) as Exhibit A ("Patent License Agreement") together with Exhibit A ("Patent License Agreement Terms and Conditions"), is not an acceptable license offer as a mere annex to an offer for alternative dispute resolution. This mere formal classification may not be relevant. The prerequisites for denying an abuse of market power do exist, in particular, in a case where the patentee has made the patent infringer - after the latter has expressed its will, to conclude a license agreement on FRAND terms - a specific offer of a license on such terms, indicating in particular the license fee and the way in which it is to be calculated, and the infringer, although continuing to use the protected technical teaching, does not respond to this offer with diligence, in accordance with accepted commercial practices and in good faith (cf. ECJ, GRUR 2015, 764 para. 71 - Huawei/ZTE; BGHZ 227, 305 para. 64 - FRAND-Einwand II). However, the Regional Court already denied the Defendant's willingness to license and did not require it to react to the Plaintiff's offer of [...] (for example, by submitting a counter-offer) in a way that would correspond to diligent conduct of the patent user, especially in the case of a license offer by the patentee on FRAND terms. Insofar as the



Regional Court based its denial of the Defendant's willingness to license in particular on a reaction of [B.] to the "license offer" which - in its view - was indicative of delaying tactics, it does not seem unreasonable, at least, to agree with the Regional Court that it is an indication of the lack of willingness to license whether, when and in what way [B.] raised constructive objections to the structure of the license conditions put forward for discussion by the Plaintiff in the [...] offer. Such exchanges to promote the conclusion of a contract can possibly be expected to demonstrate at least the will to license, irrespective of whether - as the Regional Court (LGU 56) moreover even believes - the licensing conditions pointed out by the patentee were formally dressed in the form of a contractual offer directed towards acceptance and accessible to such acceptance.

Whether the correctness of this assessment of the Regional Court is called into question by the submission of the appeal that [K.] made [B.] further license offers, each directed at a cross-license, in particular on the same day ([...]) with a separate email (Exhibit [...] (cart) 33), which provided for the same per-unit license fee as option 2 of the draft annexed to the mediation and [...] offer as an alternative to a lump sum license fee, and [B.] responded to this by email of the same day (Exhibit [...] (cart) 34), can only be assessed after a closer examination in the appeal proceedings and a comprehensive discussion with the parties. The same applies in particular to the question of whether - as the appeal suggests - [B.]'s failure to deal with the draft license agreement in the Exhibit to the [...] offer considered by the Regional Court is not an indication of [B.]'s conduct aimed at delay, because according to the appeal's assessment the parties are otherwise said to have exchanged views primarily on the terms and conditions of a (cross-)license which, according to the Plaintiff's proposal (dating from the same day), was also supposed to contain a [...] clause.

Nor is it to be found on the required summary review that the Regional Court - as the Defendants suggest - failed to take into account that [K.]'s license offers from [...], [...] and [...] were all already evidently contrary to FRAND because they provided for the grant of a [...] on [B.]'s portfolio or did not even begin to explain the calculation of the fees for the license and the grant-back license and, moreover, did not contain a [...] clause in relation to the unlicensed patents. In any event, the Regional Court assessed [B.]'s response in the light of the Plaintiff's draft license agreement annexed to the [...] offer of [...] and found, without evident error, that it did not provide for a "free" [B.] (re-)license. The Regional Court also expressly assumed that



the Plaintiff may not have submitted a license offer that complied with the FRAND conditions. In line with the case law of the Senate (GRUR 2022, 1145, 1151), it did not see this as an obstacle to denying the patent user's willingness to license on the grounds that it had not fulfilled its obligation, which is not completely suspended even in this case, to participate in the negotiation process and, in particular, to communicate the reasons why it considered the offer to be evidently non-compliant with FRAND conditions. In this respect, the Regional Court dealt precisely with whether and in what way [B.] raised objections to [K.] regarding the exclusion of a possible contribution of [B.]'s patent portfolio, the calculation of fees and the question of a [...] clause (for example, implicitly through counter-offers). In this respect, contrary to the Defendant's view, it cannot be found to be obvious that the Regional Court misjudged an alleged "refusal" by the Plaintiff, in particular with regard to a [...] clause and a consideration of the [B.] portfolio in terms of value.

dd) Finally, the appeal is also not evidently well-founded insofar as the request for suspension asserts that the Regional Court misjudged [B.]'s considerable efforts to reach a consensual solution by interpreting them as an expression of a delaying strategy and comes to the conclusion, on the basis of an erroneous finding of fact, that [B.]'s counter-offers by [...] and [...] do not comply with FRAND conditions. Whether the patent user is willing to license in the sense that this can justify an abuse objection is a question of the individual case, which must be assessed in an overall assessment of all circumstances (see BGHZ 227, 305 paras. 78, 96 - FRAND Objection II). That this overall assessment, in particular of [B.]'s entire conduct, must necessarily lead to a result that deviates from the appealed decision and that the decision of the Regional Court would be evidently wrong is not to be inferred from a summary examination in the present case. Whether another decision could also be justified on the same factual basis is just as irrelevant for the decision to be made here as the question of whether the senate would have reached the same decision on this basis.

This applies in particular insofar as the Regional Court did not unreasonably consider, inter alia, the extent to which [B.'s] counter-offers appear to be an expression not of a willingness to license but rather of an intention to delay due to a failure to comply with the FRAND corridor. In particular, the Regional Court did not justify a lack of willingness to license (solely) on the grounds that the counter-offers were contrary to FRAND. Rather, in the overall view, it saw a lack of interest in a (speedy) license, which in its view was already shown by the hesitant



objection to the Plaintiff's offer, decisively confirmed by the FRAND-incompatibility of the counter-offers assumed by it (see also Senate, order of 12 February 2021 - 6 U 130/20, juris, marginal no. 45 f).

In this context, the Regional Court's assessment of the aforementioned counter-offers within the framework of the summary examination indicated here does not reveal any error, especially since the assessment of the court of first instance as to whether an offered license fee complies with FRAND conditions can regularly in the proceedings pursuant to Sections 707, 719 ZPO only be examined as to whether the appealed decision started from obviously incorrect requirements or applies correctly recognised requirements in an obviously incorrect manner (see Senate, Order of 12 February 2021 - 6 U 130/20, juris para. 40). The Regional Court first dealt with the [...] offer and [B.'s] counter-offer, both dated 11 June 2021, and found them to be non-compliant with FRAND. The motion to suspend is based without success on the fact that the Regional Court then also assessed the further counter-offers of [...] and [...] submitted after the action was filed as not complying with the FRAND conditions.

The Regional Court criticised the counter-offer of [...] on the grounds that the offered lump-sum license payment of just under US \$ [...] and thus an increase of approximately [...] % compared to the license fee for the [K.] portfolio from [...] of US\$ [...] lagged noticeably behind the development of [B.]'s sales figures and sales prices. The objections raised by the appeal against the considerations of the Regional Court on which this is based do not, at least not on summary examination, hold. They relate in particular to partially marginal (alleged) deviations in the estimation of the sales price development. Furthermore, the appeal takes up, inter alia, the Defendant's assertions regarding [K.]'s ideas of the sales figures at the time of the conclusion of the license agreement of [...], which the Regional Court (LGU 59) did not follow after having dealt with the Defendant's submissions and, in particular, [B.]'s emails of 16 August 2018 (Exhibit [...] - K[...] 17) and [K.]'s of 28 August 2018 (Exhibit [...] (cart) 14). Whether the considerations of the Regional Court in this regard prove to be sustainable will only have to be assessed after final examination with the decision on the appeal. The same applies to the forecasts of [B.]'s sales figures for the period from [...] onwards, which are based by the Regional Court mainly on the second half of 2021, and the criticism of this made by the appeal with reference to the Defendant's oral presentation on the further trend. Nor is it sufficiently foreseeable that the submission on the more recent development of sales figures, which was



supplemented at first instance after the conclusion of the oral hearing, will lead to a different assessment in the appeal proceedings, for example pursuant to Sec. 531 para. 2 ZPO.

The Regional Court did not take the counter-offer of [...] as a basis for its decision because it was only presented to the court (and even submitted to the Plaintiff) after the conclusion of the oral proceedings at first instance. The appeal does not raise any objections against this treatment by the Regional Court, which is obviously correct pursuant to Sec. 296a ZPO, nor against the fact that the Regional Court exercised the discretion granted to it pursuant to Sec. 156 para. 1 ZPO to refrain from reopening the oral proceedings.

The appeal merely states that even if the Regional Court had "justifiably rejected" the counter-offer of [...] and the most recent sales figures from [...] as late pursuant to Sec. 296a ZPO, this submission would in any case have to be taken into account in the appeal pursuant to Sec. 531 para. 2 ZPO. The fact that [B.]'s - late - counter-offer will lead to the fact that [B.]'s willingness to license will have to be affirmed in an appeal decision that may have to be made on a corresponding new factual basis is at least not already recognisable upon summary examination in view of the aspects addressed by the Regional Court in its auxiliary considerations.

(2) In the absence of an expected success of the appeal already on summary examination, the interest of the Plaintiff in enforcement outweighs the opposing interest of the Defendants in the case at issue, which the law generally gives priority to. Such far-reaching and beyond the consequences of any (in particular injunctive) enforcement and, moreover, serious irreversible disadvantages of the enforcement for the Defendants on the one hand, that they outweigh the considerable enforcement interest of the Plaintiff on the other hand, are not to be expected.

a) Without success, the Defendants argue that the Plaintiff's interest in enforcement follows solely from the objective of obtaining patent license fees.

It is true that when weighing the interests pursuant to Sec. 707, 719 ZPO in the context of a request for temporary suspension of enforcement of an injunction based on patent infringement, it may have to be taken into account if the Plaintiff is a patent exploitation company that neither manufactures its own products of the type at issue nor is in any other



way a market participant in the market for offering such products. Such a Plaintiff does not protect its own market position on the market for devices protected by the patent with the asserted injunctive relief. It has no substantial interest in the actual omission of the manufacture and supply of patent-compliant devices; on the contrary, from its point of view the greatest possible market diversity is desirable in order to achieve the highest possible sales of protected products. The Defendant's sales, which continue to be made possible with the cessation of enforcement, are then, unlike in the normal case, not at the expense of the Plaintiff's market shares. If - which is to be reviewed in the context of the appeal proceedings - the asserted claim for injunctive relief exists and is enforceable, the continued deliveries give rise to claims for damages by the patentee, which the latter can enforce in the usual manner, especially since the security to be fixed in the context of a suspension of enforcement provides it with extensive protection against the risk of a deterioration in the Defendant's ability to pay (see Senate, GRUR-RR 2010, 120, 122; GRUR-RR 2015, 326, 329 et seq.). Under such special circumstances, the interest situation may already justify a provisional suspension of enforcement against provision of security if the appeal is not without prospects of success on the basis of a summary examination because it is likely that the injunctive relief will be opposed by the Defendant's objections based on an abuse of a dominant position, for example (see Senate, GRUR-RR 2010, 120, 121 et seq.). However, it must not be lost sight of the fact that the patentee is obliged to license to all market participants and persons interested in market access. For these, in particular for those who have already taken a license and pay the license fees, it can be of considerable importance that the patentee prevents the market participation (market entry) of another company with the help of the injunctive relief resulting from the standard essential patent, because the license fees are costs that are included in the calculation of the price and can significantly influence competition on the downstream product market.

Moreover, as the Regional Court has already pointed out, the Plaintiff cannot be compared to a (pure) patent exploitation company because, according to its uncontradicted submission, it (not only) develops IP rights itself, but furthermore even continues to have its own economic interest in the market for terminal devices due to the licensing of its trademark "[K.]" for smartphones. Nothing to the contrary can be inferred from the unsubstantiated assessment of the Defendants in the request for suspension that the Plaintiff's group of companies is "practically only present on the market with its own products in the field of network equipment".



The fact that the Plaintiff also justifies its action with the fact that it could not conduct research without license income does not justify the conclusion that it merely wants to use the injunctive relief as a means of exerting pressure to enforce high license demands. However, the Plaintiff may well assert its exclusive right against the patent users - who, on summary examination, have so far not been evidently willing to license - for the motive of persuading them to take a license after all, which the Plaintiff considers appropriate, or at least to secure the value of its patent portfolio. Such motives may not constitute a decisive interest of the Plaintiff for the weighing of interests required here (see also Senate, decision of 12 February 2021 - 6 U 130/20, juris, marginal no. 66). However, such a means-purpose relationship is also approved by the legal system (see Senate, GRUR-RR 2010, 120, 122) and thus at least not an illegitimate objective that would devalue the interest in defending the Plaintiff's position as a trade mark licensor in the market for patented devices that is also present in the present case. Moreover, it does not in itself, i.e. irrespective of the success of the appeal to be expected upon summary examination, mean that the weighing of interests within the framework of Sec. 707, 719 ZPO must be to the detriment of the SEP Plaintiff if the latter merely exploits a patent pool (cf. Senate, decision of 29 August 2016 - 6 U 57/16, juris marginal no. 43 with further references; cf. HRC Düsseldorf, decision of 20 July 2021 - 15 U 39/21, juris marginal no. 43 with further references).

b) In contrast, the Defendants claim - in a factually comprehensible manner - a considerable interest in avoiding the disadvantages to be feared in the event of enforcement, which would lie in weighty financial losses and a very considerable damage to their image. The enforcement of the injunction, which is based on an infringement of a patent essential for the LTE and NR standard, would irrevocably block [B.]'s access to the German market with regard to all its mobile phones. In view of the dynamics of the market shares described by the Defendants and, moreover, known to the Senate in its official capacity, which are distributed above all among a number of weighty mobile phone manufacturers who have successively joined or (re)ousted within a few years, it cannot be denied that the (temporary) enforcement of the injunction could potentially - beyond the loss of sales occurring during the enforcement - have a lasting adverse effect on the market position of a (moreover still rather young) smartphone brand in Germany.



c) In the concrete weighing of the interests of both parties, the Plaintiff's interest in enforcement outweighs that of the Defendant in its suspension.

It must first be noted that the cessation of the prohibited acts of infringement, including the resulting economic losses, namely losses in turnover, is one of the disadvantages regularly associated with enforcement and to be accepted by the debtor in the case of a claim for injunctive relief due to patent infringement. It is therefore not sufficient for the suspension of enforcement because it is the normal consequence of practically every enforcement of an injunction. The danger of special damage, which clearly goes beyond the general effects of enforcement, is generally only to be affirmed if there is a threat of extraordinary, practically irreparable disadvantages, as in the case of a threatened destruction of the Defendant's existence by enforcement. In this respect, no special features apply to the field of patent law. In particular, the above also applies in principle in the case of enforcement of a standard-essential patent (cf. HRC Düsseldorf, order of 20 July 2021 - 15 U 39/21, juris para. 41 with further references), although possibly with special features for the - here not present - case of an injunction of a pure patent exploitation company (see above). However, the general assertion that there is a risk of irreparable damage to customer relations is insufficient for this purpose (see HRC Düsseldorf, order of 20 July 2021 - 15 U 39/21, juris para. 42). The fact that the discontinuation of the supply of and, in particular, a recall of products classified as patent-infringing may lead to a loss of confidence among the debtor's customers is an inevitable consequence of the fulfilment of the claim. The disadvantages threatening the Defendants for their business relations in the event of enforcement before the enforcement title becomes final also do not in principle go beyond what is to be expected as a rule in the event of provisional enforcement from a corresponding title that is not final (HRC Düsseldorf, order of 18 December 2014 - 2 U 62/14, juris para. 20).

The Defendants argue, in connection with the above-mentioned impact on their interests, that the loss of reputation and market shares associated with an interruption of distribution can hardly be reliably quantified in later recourse proceedings pursuant to Sec. 717 para. 2 ZPO. This may also be true in principle. However, it is not evident that the quantification and liquidation of such damages would be practically impossible, at least to such an extent that such a part of the damage would remain uncompensated, which would appear as an extraordinary hardship of the compulsory enforcement and would outweigh the interest of the



Plaintiff to prevent an irreversible disregard of its exclusive right for the period of a suspension of the enforcement. Furthermore, it must be taken into account that, according to the Defendants, [B.'s] market shares were below [...] % until [...] and were still [...] %. According to this, the Defendants are in any case not threatened by the loss of a market position that has been built up and distinguished over the long term. Moreover, in view of the volatile market conditions and the increases at [B.] within a few years, there is nothing to prevent the Defendants from regaining lost market shares in the short term in the event of a change in the contested decision. Moreover, it cannot be seen that the market shares in Germany at issue here would threaten the existence of the Defendants in view of the sales opportunities abroad that exist alongside them. Apart from that, the Defendants do not explain how they reacted to the conviction, i.e. whether they continue to offer and market the attacked devices in Germany or have already stopped distribution, so that the associated loss of reputation could in any case no longer be fundamentally prevented by a cessation of enforcement. Since the Defendants, who have to demonstrate and substantiate the risk of special enforcement damages (cf. only Senate, GRUR-RR 2015, 326, 328 with further references), do not present any evidence on their current market behaviour, it is no longer relevant to the submission in this respect in the response to the application that [B.] had actually stopped marketing in Germany and had not resumed after the Plaintiff's provisional waiver of enforcement.

[...]