



KATHER · AUGENSTEIN
RECHTSANWÄLTE

Regional Court Munich I

21st Civil Chamber

21 O 1910/22

Final Judgement 19.04.2023

The defendants are ordered,

1. to cease and desist upon notification of an administrative fine of up to 250,000 euros due for each case of infringement, or alternatively up to 6 months' imprisonment or up to 6 months' imprisonment, in the event of a repeat offence up to 2 years' imprisonment, whereby the imprisonment is to be enforced on the respective Chief Executive Officer of the first defendant or on the respective Managing Director of the second defendant,

from to offer, place on the market and/or use or to import and/or possess for the aforementioned purposes in the Federal Republic of Germany

a) mobile terminals

comprehensive [...]

whereby: [...];

(direct infringement claim 54)

b) mobile terminals

comprehensive [...]

,

whereby [...]

(direct infringement claim 75)

c) mobile terminals

comprehensive [...]

whereby [...];

(direct infringement claim 90)

d) mobile terminals



comprehensive [...]

whereby [...]

(direct infringement claim 91)

e) mobile terminals,

[...],

whereby [...];

(indirect infringement claim 1)

f) mobile terminals,

the set up [...],

whereby [...]

(indirect infringement claim 39)

2. To inform the plaintiff of the extent to which they (the defendants) have committed the acts referred to in paragraph 1 above since 27 September 2019, specifying
 - a) the names and addresses of manufacturers, suppliers and other previous owners,
 - b) the names and addresses of the professional buyers and the points of sale for which the products were intended,
 - c) the quantity of products delivered, received or ordered and the prices paid for the products concerned,

3. give the plaintiff an account of the extent to which they (the defendants) have committed the acts referred to in paragraph 1 above since 27 September 2019, stating:
 - a) of the individual deliveries, broken down by delivery quantities, times, prices and type designations as well as the names and addresses of the buyers,
 - b) of the individual offers, broken down by offer quantities, terms, prices and type designations as well as the names and addresses of the recipients of the offers,
 - c) the advertising carried out, broken down by advertising medium, its circulation, distribution period and distribution area as well as, in the case of internet advertising, the internet addresses, the placement periods and the access figures,
 - d) of the prime costs broken down by the individual cost factors and the profit achieved,

whereby the defendants reserve the right, at their discretion, to disclose the names and addresses of the non-commercial purchasers and the offerees instead of the plaintiff to a certified public accountant domiciled in the Federal Republic of Germany to be



designated by the plaintiff, who is bound to secrecy vis-à-vis the plaintiff, provided that the defendants bear the costs of the certified public accountant and authorise and oblige him to inform the plaintiff upon specific request whether a certain delivery or a certain purchaser or offeree is included in the list;

4. to recall the products referred to in point 1. a) above which have been in the possession of commercial customers since 27 September 2019;
 5. only the 2nd defendant: to destroy the products in the direct or indirect possession or ownership of the 2nd defendant in the Federal Republic of Germany in accordance with section 1.a) to d), or to hand them over to a bailiff to be commissioned by the plaintiff for the purpose of destruction at the expense of the 2nd defendant;
- II. It is hereby declared that the defendants are jointly and severally liable to compensate the plaintiff for all damage which she has suffered and will suffer as a result of the acts referred to under I.1. committed since 27 September 2019.
- III. The defendants are jointly and severally liable to pay the costs of the proceedings.
- IV. The judgment is provisionally enforceable against security in the amount of
- 950,000.00 € uniformly for items I.1., I.4. and I.5.,
 - 50,000.00 € uniformly for items I.2. and I.3. as well as
 - 110% of the respective amount to be enforced for item III.

Facts:

The plaintiff is the proprietor of European patent 1 509 903 (Exhibit (C) WKS 2, hereinafter: patent in suit) and claims the defendants for direct and indirect patent infringement.

The patent in suit was filed on 30.05.2005 and claims a priority of 31.05.2002 (CA 23884/39).

[...]

[...]

The first defendant offers smartphones compatible with the LTE (4G) mobile radio standard for private and commercial end customers in Germany, in particular smartphones with the model designation ... (hereinafter: attacked devices), distributes them and imports them from abroad into Germany. The attacked devices are advertised, for example, on the website The second defendant is the German subsidiary of the first defendant, which is based in China, and supports the first defendant in its sales activities in Germany.



Reasons for decision:

The complaint is admissible (A.). It is also founded. The defendants use the subject-matter of the patent in suit (B.). The plaintiff is therefore entitled to the claims pursued against the defendants. The defendants' FRAND objection is not successful (C.). The proceedings are not to be stayed pursuant to § 148 ZPO (D.).

A.

The complaint is admissible.

[...]

B.

The complaint is well founded.

[...]

[...]

Pursuant to Section 139 (1) sentence 3 German Patent Act, the claim for injunctive relief is excluded if the claim would lead to disproportionate hardship for the infringer or third parties not justified by the exclusive right due to the special circumstances of the individual case and the requirements of good faith.

The objection of disproportionality under Section 139 (1) sentence 3 German Patent Act is limited to special exceptional cases. This takes into account the fact that the injunctive relief is the logical consequence of the exclusive right. With the grant of the patent, absolute rights arise in the patented invention which, in addition to their attribution content, have an exclusion content, so that the owner of the right can in principle exclude anyone from using the patented teaching. In particular, they allow - within the framework of the other legal requirements, especially those under patent and antitrust law - the exclusion of third parties from the use of the patented teaching. In order to enforce his exclusive right, the patent proprietor generally has to rely on injunctive relief.

In the explanatory memorandum to the second PatModG, the legislator made it clear that a limitation of the injunctive relief can only be considered in special exceptional cases. Injunctive relief is the regular sanction under patent law for patent infringement. The burden of proof for



disproportionality lies with the defendant. A limitation of the right to injunctive relief can only be considered in particularly exceptional cases (BT-Drs. 19/25821, p. 53).

If the patent infringer presents special circumstances that may constitute unjustified hardship in the individual case, it may exceptionally be relevant within the framework of an overall assessment of all circumstances of the individual case and a careful weighing of all circumstances, taking into account the requirement of good faith and the fundamentally overriding interests of the infringed party in enforcing its claim for injunctive relief, whether the infringed party itself manufactures products or components that compete with the infringing product or whether the patent proprietor's primary plan is to monetise its rights (BT-Drs. 19/25821, S. 53). Moreover, economic effects of the injunction, the complexity of products, subjective points of view on both sides and third party interests may have to be taken into account. For example, a lack of licensing willingness can be seen to the detriment of the obligated party (BT-Drs. 19/25821, p. 54).

(2)

Applying these standards, the objection of disproportionality raised by the defendant is not valid. Taking into account all the circumstances of the legal dispute between the parties and their relevant interests, the defendant has not demonstrated that the injunctive relief is disproportionate.

(a)

The fact that the plaintiff acquired its EVS portfolio for the purpose of monetisation does not itself establish a disproportionate nature of the injunctive relief. According to the previous legal position (cf. Werner in: Busse/Keukenschrijver, German Patent Act, 9th ed. 2020, Sec. 139 para. 92 with further references), which is agreed to by the legislative justification (see above), the mere fact that a patent exploiter asserts a claim for injunctive relief is not in itself suitable to classify it as disproportionate (established Regional Court case law, cf. Regional Court München I GRUR-RS 2022, 34498 - "keepawake-message").

(b)

The fact that the technical function underlying the patent in suit addresses only a partial aspect of the EVS standard, and that the attacked devices are highly complex products, does not in itself justify disproportionality either.

At least in the case of the assertion of standard-essential patents, disproportionality is generally out of the question. In principle, the user of an SEP has a claim to the conclusion of a licence



agreement on FRAND terms. The fact that the licence agreement has not yet been concluded is - as will be shown below under C. - the fault of the defendant. As explained above, the unwillingness to license may also have to be taken into account in a weighing of interests. A different result does not follow from the defendant's argumentation that the FRAND objection and the disproportionality objection are based on different dogmatic foundations. The fact that the defendant's group of companies in any case received an offer from the plaintiff - which was not absolutely unacceptable, see below - and did not accept it because it was unwilling to license (see C. below) does not limit the plaintiff's rights because of the complexity of the infringer's product. This is because the defendant's group of companies had and has the possibility to legitimise its patent-infringing actions. However, it has not (so far) made use of this possibility. It is then a logical consequence that the plaintiff must enforce its patent rights against a patent infringer who is unwilling to grant a license and is dependent on legal proceedings to do so. Within the framework of the required overall consideration, this does not justify the disproportionate nature of the injunctive relief.

This result is also in line with the prevailing opinion in legal literature: If the patent proprietor complies with its FRAND obligations, Section 139 (1) sentence 3 German Patent Act does not provide the infringer with an additional defence in the absence of further circumstances justifying disproportionality (cf. Ohly, GRUR 2021, 1229, 1236).

(c)

Even an overall view of the aspects raised against proportionality does not result in a different assessment.

[...]

C.

The antitrust compulsory license objection raised by the defendants (so-called FRAND objection) does not prevent the enforceability of the plaintiff's claims for injunction, destruction, recall and removal. It does not apply due to the lack of willingness to take a licence on the part of the defendant's group of companies.

It can be assumed in favour of the defendant that the plaintiff has a dominant position on the relevant market, so that it is the norm addressee of Article 102 TFEU. The plaintiff has sufficiently fulfilled the duties and obligations resulting from this special position. In particular, the defendant's group of companies has been made aware of the infringement. Contrary to the



defendant's assumption, however, there is no abuse of the dominant position. According to the circumstances of the specific individual case, the defendant's group of companies was not (sufficiently) willing to take a licence.

I.

A patent proprietor who has undertaken vis-à-vis a standardisation organisation to grant licences to a standard-essential patent (SEP) on FRAND terms (i.e. fair, reasonable and non-discriminatory terms) may abuse its dominant position conferred by the standard-essential patent by bringing an infringement action if and to the extent that it is likely to prevent products complying with the standard from entering or remaining available on the market (cf. CJEU GRUR 2015, 764 - Huawei Technologies/ZTE; BGH GRUR 2020, 961 para. 68 - FRAND-Einwand I). In this respect, claims for injunctive relief, recall and removal of products or destruction can generally be considered abusive (see BGH GRUR 2020, 961 para. 68 - FRAND-Einwand I with further references).

The Court of Justice of the European Union has ruled on the FRAND licence that the proprietor of a standard-essential patent standardised by a standardisation organisation, who has given an irrevocable undertaking to that organisation to grant a licence on FRAND terms to any third party, does not abuse his dominant position, by bringing an infringement action for an injunction to stop the infringement of his patent or for the recall of the products for the manufacture of which that patent has been used, if, firstly, he has notified the alleged infringer, before bringing the action, of the infringement of the patent of which he is accused, identifying and specifying the patent in question, infringement and, secondly, after the alleged infringer has expressed his intention to enter into a licence agreement on FRAND terms, he has made a specific written offer of a licence to the infringer on those terms, specifying in particular the royalty rate and the manner in which it is to be calculated, and that infringer, while continuing to use the patent in question, does not respond to that offer with diligence, in accordance with accepted commercial practices in the field concerned and in good faith, which must be determined on the basis of objective factors and implies, inter alia, that no dilatory tactic is being pursued (cf. CJEU loc. cit.). Furthermore, the Court of Justice of the European Union has ruled that the proprietor of a standard-essential patent with a FRAND declaration is in principle not prohibited from bringing an infringement action against the infringer of his patent for rendering of accounts in respect of past acts of use relating to the patent or for damages on account of those acts (CJEU loc. cit.).



The assertion of the claims for injunction, recall and removal as well as destruction by the patent proprietor by way of action may be abusive if the infringer has not (yet) declared its willingness to conclude a licence agreement on certain reasonable conditions in a legally binding manner, but the patent proprietor is to be blamed for not having made sufficient efforts to meet the special responsibility associated with the dominant position and to enable an infringer who is in principle willing to take a licence to conclude a licence agreement (BGH loc. cit. - FRAND Einwand I). The abuse of market power follows 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 willing to deviate even at the end of negotiations, i.e. the refusal to offer the licensee seeking the conclusion of a contract on FRAND terms as a result of a negotiation process those fair, reasonable and non-discriminatory conditions which the licensee can claim and on which it is willing to conclude with the patent proprietor (cf. BGH GRUR 2021, 585 para. 59 - FRAND Einwand II). An offer that does not comply with the FRAND conditions as such does not constitute an abuse of the patent proprietor's dominant position: An abuse is only constituted by refusing to allow the infringer to negotiate and conclude a FRAND licence agreement that is in line with the interests articulated in the negotiation process or making it impossible to do so and instead enforcing the patent or one of the patents to be licensed by taking legal action (BGH loc. cit. para. 78 - FRAND Einwand II).

The person who wants to use the patent or has already used it and has brought patent-compliant products onto the market, although he does not have a licence, must be prepared to take a licence to this patent on reasonable and non-discriminatory terms (BGH loc. cit. para. 70 - FRAND-Einwand I). This is because even the patent proprietor with market power cannot impose the taking of a licence on anyone; although the potential licensee can demand that he conclude a licence agreement, the patent proprietor is dependent on enforcing claims for patent infringement against anyone who wants to use the patented teaching but does not want to conclude a licence agreement in this respect (see BGH loc. cit. para. 82 - FRAND-Einwand I). The infringer must therefore clearly and unambiguously declare his willingness to conclude a licence agreement with the patent proprietor on reasonable and non-discriminatory terms and must also subsequently participate in the licence agreement negotiations in a targeted manner, because "a willing licensee must be one willing to take a FRAND licence on whatever terms are in fact FRAND" (BGH loc. cit. para. 83 - FRAND-Einwand I). Under which circumstances a lack of license readiness on the part of the patent infringer exists is a question of the individual case (BGH loc. cit. para. 78 - FRAND Objection II).



An abusive refusal by the dominant patentee necessarily presupposes a continuing demand by the infringer for the conclusion of a contract on FRAND terms and his willingness to cooperate in the conclusion of such a contract, without which a "refusal" by the patentee would come to nothing (BGH loc. cit. para. 66 - FRAND Einwand II). The licence readiness is indispensable because an appropriate result balancing the conflicting interests of both parties can usually only be achieved as the result of a negotiation process in which these interests are articulated and discussed in order to achieve a fair and appropriate balance of interests desired by both parties. The requirements for the conduct of the patent proprietor and the conduct of the user of the invention are mutually dependent. The standard of review is what a reasonable party interested in the successful conclusion of the negotiations in a manner that is in the interests of both parties would do to promote this plan at a certain stage of the negotiations (BGH loc. cit. para. 59 - FRAND Einwand II). An objective willingness to conclude a FRAND licence agreement is regularly shown by the active promotion of the negotiations oriented towards the common plan of a successful conclusion. The negotiation steps of parties interested in concluding a contract build on each other. A duty to promote therefore always exists if and to the extent that the next negotiating step is to be expected according to business practice and the principles of good faith (BGH loc. cit. para. 68 - FRAND Einwand II).

If one party initially fails to cooperate as required in the conclusion of a licence agreement on FRAND terms, this is generally to its detriment. Depending on the circumstances, the party may be obliged to compensate for the omissions as far as possible. This corresponds to the usual practice of persons interested in concluding a contract who, in the event of a delayed reaction to a corresponding offer to negotiate, must normally expect that the other party is no longer interested in concluding a contract (BGH loc. cit. para. 60 - FRAND Einwand II).

In particular, the infringer may not delay the negotiations (CJEU loc. cit. para. 66, 71). In contrast to contractual negotiations, which a company willing to take a licence seeks prior to commencement of use, the interest of the infringer may also be - solely or at least primarily - to delay the patent proprietor as far as possible until the expiry of the term of protection of the patent in suit, because then he is no longer threatened with an order to cease and desist (BGH loc. cit. para. 82 - FRAND Einwand I). A delaying tactic typically consists in not simply rejecting a licence agreement on FRAND terms, but in ostensibly seeking it, but in pushing back the finding of an appropriate solution in detail or at least postponing it as long as possible (BGH loc. cit. para. 67 - FRAND Einwand II). The assessment of whether a delaying tactic is being pursued, which is to be made on the basis of objective aspects, should also take into account



the further conduct of the infringer in response to a notice of infringement or an offer by the patentee (BGH loc. cit. para. 77 - FRAND Einwand II).

If the patent infringer is not willing to take a licence, the Federal Court of Justice has ruled that it can be left open whether the patent proprietor's offer (in terms of content) complies with FRAND conditions (BGH loc. cit. para. 82, 101). The only case in which the licence seeker is completely released from the obligation to respond and therefore also from the obligation to state all objections at the same time is if an offer is contrary to FRAND to such an extent that it appears to be utterly unacceptable when assessed objectively, is therefore to be assessed as not being meant seriously and in fact represents a refusal to conclude a licence agreement on FRAND terms according to the objective recipient's horizon (see BGH loc. cit. para. 71 - FRAND Einwand II).

According to the case law of the Regional Court Munich I, the defendant patent user generally bears the burden of presentation and proof for the merits of his antitrust compulsory license objection according to the usual standards of civil procedure. The FRAND objection is a defence of the defendant and he must in principle set out and, if necessary, prove the circumstances favourable to him. This applies both to the circumstance that the conduct (offer) of the patent proprietor is absolutely intolerable and to the patent user's complaint that the contractual terms offered to him discriminate against him compared to other licensees of the patent proprietor. To substantiate this claim, the patent user must at least provide plausible evidence. Depending on the individual case, this may lead to the licensor having to provide more detailed information in the context of his secondary burden of proof (Regional Court Munich I, judgement of 17.02.2023, 21 O 4140/21 - "untergeordnete Mehrbaum-Unterteilungsinformation", intended for publication). If a patent user claims that the licence offered to him is not FRAND because it is worse than the contractual terms of the competition, he must, in order to be considered willing to take a licence, be willing to conclude the licence agreement at least on these (allegedly more advantageous) terms and objectively express this willingness by his conduct (Regional Court München I *ibid.*). In negotiations on a FRAND licence agreement, both parties are required to contribute in a manner appropriate to the situation and in accordance with the principles of good faith in order to find a reasonable, fair and appropriate balance. This includes, in particular, negotiating in an expeditious, conducive and constructive manner, articulating one's interests in order to achieve concrete progress in negotiating the terms of the licence agreement. The licensing willingness of the patent owner suing for infringement usually involves offering the patent user a licence agreement on such



fair, reasonable and non-discriminatory terms as the patent user can claim in the course of the negotiations and after the patent user has responded substantively. This licensing willingness does not generally exist if the patent proprietor insists on discriminatory or arbitrary conditions and is not willing to depart from them even at the end of the negotiations (Regional Court Munich I loc.cit.).

If the patent user is reluctant to negotiate the terms of the licence, he usually expresses his unwillingness to licence (delaying tactics). If a patent user constantly requests further information from the patent proprietor without the information provided resulting in progress in the negotiation, this behaviour may prove the patent user's unwillingness to license. It is true that a patent user may in principle request as much information and may - within the limits of procedural law - procedurally dispute as much with ignorance as he wishes. However, after several years of negotiation and after repeating this behaviour several times, this is in any case no longer conducive and constructive (Regional Court Munich I loc.cit.).

II.

According to these standards, the defendant's group of companies is not sufficiently willing to take a licence, taking into account all the circumstances of the individual case and the relevant overall conduct of the parties. Contrary to the defendants' assumption, the plaintiff's conduct, in particular its last offer of ..., is not absolutely intolerable (under 1.). The defendants, on the other hand, are unwilling to license (under 2.).

1.

The plaintiff's conduct and in particular its last offer of ... are not absolutely unacceptable. The plaintiff has made sufficient efforts to meet the special responsibility associated with the dominant position in order to enable an infringer willing to take a licence to conclude a licence agreement.

The Chamber considers this last offer by the plaintiff to be sufficiently serious and directed towards the conclusion of negotiations with the defendant's group of companies in the interests of the defendant. In the case, contrary to the defendant's assumption, it does not mean a refusal to conclude a licence agreement with the defendant's group of companies on FRAND terms. The plaintiff did not insist on discriminatory (on this under a) or arbitrary (under b) conditions until the end of the oral proceedings. Similarly, during the negotiations it has been



willing to accommodate the defendant's justified demands and to adapt its conduct accordingly. The Chamber's reasoning essentially follows the defendant's line of argument.

a)

In particular, the defendant's main objection to the plaintiff's conduct does not hold water. This objection is essentially aimed at the accusation of discrimination. However, the defendants have not sufficiently demonstrated such discrimination. Since the defendants received sufficient insight into the plaintiff's licensing practice from the plaintiff, they were in principle able to do so. Nevertheless, they have not established discrimination.

The defendants complain that the plaintiff did not (sufficiently) prove that the licence conditions offered did not discriminate against the defendants. It had only made individual contracts available to the defendants in the electronic data room as of However, contracts were missing. These included in particular the contract ... The plaintiff had only made this available with redacted passages and, despite the defendant's request, had not provided evidence that the licence payment agreed therein had actually been fulfilled by The plaintiff only disclosed the ... contract about six months after it had been concluded. In doing so, it had delayed the negotiation process and made the defendant's legal defence more difficult.

Contrary to the defendant's assumption, in the present case it is not up to the plaintiff to prove the defendant's non-discrimination, but it is the defendant's task in the first step to show the discrimination it complains of (see above Regional Court München I, judgement of 17.02.2023, 21 O 4140/21 - "untergeordnete Mehrbaum-Unterteilungsinformation", intended for publication). If the licence seeker asserts as an allegation of discrimination that the patent proprietor licences at different prices, the licence seeker must as a rule provide concrete evidence, based on examples from the patent proprietor's licensing practice, that he is specifically discriminated against, against whom and why.

In detail:

aa)

The plaintiff has provided the defendants with sufficient insight into its licensing practices, thereby creating transparency to the extent initially required.



For this purpose, the plaintiff made licence agreements with a total of ... groups of companies in an electronic data room. These are the following licence agreements with the following lump sums:

...

These existing contracts, together with the further information provided by the plaintiff in the electronic data room, provide sufficient insight into its licensing practices. From this knowledge, the defendants could and should at least have derived indications as to why the plaintiff licenses at different prices, if they complain of discrimination or insufficiently proven non-discrimination. In particular, the defendants would have had to raise a concrete allegation of discrimination in order to sufficiently substantiate their complaint.

As a licence seeker, a patent user who is willing to take a licence must in principle be informed about the essential factors for the assessment of the licence fee to be paid. For this purpose, he must generally have the licence fee offered to him explained on the basis of the essential factors for the price. If a lump sum licence fee is agreed for uses in the past and in the future, a lower standard may apply in accordance with the purpose of the lump sum payment. The more licence agreements have been concluded, the more likely it is that the explanation of the factors can be limited to a comparison of the specific fee offered with the agreed licence fees in already concluded licence agreements. However, disclosed licence agreements with third parties together with further explanatory information provided by the patent proprietor, for example, in an electronic data room, generally provide a patent user who is willing to take a licence with sufficient insight into the licensing practice of the patent proprietor.

bb)

The plaintiff also disclosed to the defendants the ... contract to the defendants. Contrary to the defendant's complaint, the specific circumstances of the disclosure do not show that the plaintiff's conduct was grossly unacceptable (under (1)). From the comparison of the ... contract with the last offer made to the defendant's group of companies does not show any discrimination against the defendant (under (2) and (3)).

(1)

Before the defendants gained access to the content of the text of the contract, the plaintiff disclosed the essential content of the contract to the defendants in close temporal relation to the conclusion of the contract. Insofar as the defendants argue that the contract was not fully



disclosed to them until approximately six months after it was concluded and shortly before the oral hearing in these proceedings, it does not follow from this that there was discrimination or any other aspect under which the plaintiff's conduct appears to be unacceptable as a matter of bad faith.

(2)

That the differences asserted by the defendants in the plaintiff's contract with ... as well as with other licensees in the assumed development of future sales figures (forecast of the experts vs. content of the agreement of the parties) as well as in further assumptions, e.g. for the "EVS voice share" or in the "EVS shipment", to the offer made to them does not lead to discrimination in comparison with the defendants in view of the content of the licence agreements, which contains a lump-sum licence fee for the past and the future.

(a)

Even if, when calculating down the flat fee, differences between individual contracts could arise in this respect, as far as the "effective licence fee" is concerned, which, however, is neither part of the existing licence contracts nor of the offer, these made-up price differences do not constitute discrimination, because the price determination may not be considered in such a small way. Rather, what is decisive is whether the licence fees previously agreed with third parties and the licence conditions offered to the defendants are in an overall structure that is in conformity with competition law and serves to establish, guarantee and safeguard an internal market and whether the flat-rate licence offered does not discriminate against the defendant licence seeker in market access. Discrimination could exist, for example, if a competitor of the defendant comparable to the defendant would have received more favourable conditions to a not insignificant extent, i.e. would have had to pay a not insignificantly lower flat fee based on comparable assumptions of the respective price-forming factors. If a patent user claims that the licence offered to him is not FRAND because it is worse than the contractual terms of the competitor, he must, in order to be considered willing to take a licence, be willing to conclude the licence agreement at least on these (allegedly more advantageous) terms and objectively express this willingness by his conduct (Regional Court Munich I loc.cit.).

Even in the case of a possible variance in the previous pricing of the patent proprietor, which, however, does not constitute such a significant unequal treatment that it cannot be resolved by negotiation between two partners willing to take a licence, a reasonable party interested in



the successful conclusion of the negotiations in line with his interests would see this circumstance as an opportunity and try (nevertheless) to reach a reasonable, appropriate and interest-oriented conclusion of the contract. This applies in particular with regard to individual finesses in the figures, which only become apparent when the flat fee is calculated downwards.

(b)

Therefore, the defendants' objection is not valid when they derive a lack of uniformity in the plaintiff's entire licensing system from existing differences between the individual mathematical factors of the respective contracts. In this respect, the comparison of the present case with the ... Contract is instructive: for the defendants, although they had previously emphasised their comparability with ... the defendants did not claim that the agreed flat-rate licence fee of ... discriminated against them. This is because this amount is in the same order of magnitude as that most recently offered by the plaintiff to the defendant's group of companies. A competition-distorting discrimination is therefore ruled out.

Likewise, the defendants have not declared that they are prepared to make any changes according to the terms of the ... Contract, adjusting to the specific circumstances in detail prevailing at the defendants' group of companies. A reasonable party interested in the successful and fair conclusion of the negotiations would see this variance in pricing cited by the defendants as an opportunity and try (nevertheless) to reach a reasonable, appropriate and fair conclusion of the contract. Instead, the defendants have insisted on information from which their non-discrimination can be inferred, which is in any case not sufficient for the required demonstration of the discrimination claimed.

The other contradictions, inconsistencies and deviations which the defendants cite in the comparison of their offer with ... do not exceed a certain level of detail. It is not a question of the whole of the contract, but of individual finesses in the figures, which, in the absence of a significant effect on the total amount of the agreed lump-sum licence, cannot justify such significant unequal treatment of the defendants in comparison with ... that they cannot be resolved by negotiation between two partners willing to take a licence. In any case, they are neither sufficiently demonstrated nor apparent to the Chamber.

(3)



When the defendants state that in the contract with-, this does not show discrimination against the defendants. In any case, at the end of the negotiations, the plaintiff is prepared to abandon discriminatory conditions (assumed in favour of the defendants).

...

cc)

With regard to the ... group of companies ... it is undisputed that the plaintiff made parts of the contract available to the defendants in the electronic data room in blacked-out form. The plaintiff has explained the redacted content and shown the basis for calculating the licence fee agreed therein. From these statements by the plaintiff and in particular the licence fee of ... there is in any case no evidence of discrimination against the defendants.

In addition to this information, the plaintiff also did not need to post the redacted part of the contract text in the data room in the specific individual case. The specific content of the overall contract may be of interest to the defendants. However, the disclosure of this overall contract is not decisive for the merits of the objection.

In any case, it is not clear from the defendant's submissions that the conditions granted to are relevant from the point of view of the discrimination complained of. Even if the contract were to be presented to the defendants in its entirety, it is still not shown, nor is it apparent, how discrimination against the defendants could result from this, because the defendants themselves do not state that they are comparable to ... and do not themselves claim that their products and services are equivalent to those of ... on the market. However, the presentation of a concrete unequal treatment with another person is a prerequisite for discrimination. However, this is lacking. In this respect, it does not help the defendants when they claim in the oral hearing, with reference to a case law of the Higher Regional Court Karlsruhe, that a comparable licensee is any company that sells smartphones. This does not result in any concrete unequal treatment.

In the absence of further relevance, it is also irrelevant for the Chamber here whether the plaintiff actually paid the licence fee in the amount agreed, which the defendants have denied with ignorance. In any case, the defendants do not show any evidence to justifiably doubt this. Therefore, the question can be left open, as it were, as to whether the disclosure of the contract is at all precluded by the confidentiality obligations cited by the plaintiff and denied by the defendants, as well as irrespective of whether the accusation raised by the defendant that the plaintiff in this lawsuit has presented contradictory information on the US procedure for the



implementation of ... would prevail with the consequence alleged by the defendants that the plaintiff must provide transparency and disclose the contract with

dd)

Insofar as there may be further licence agreements for the patent at issue which date from a time before the plaintiff acquired the patents, this also does not result in discrimination because it is neither apparent nor shown why this could result in unjustified unequal treatment by the plaintiff compared to the defendants.

ee)

Moreover, there is no discrimination against ... if this company has been granted

Firstly, the plaintiff offered the defendants a licence agreement with ... which the defendants' group of companies did not accept (for other reasons). Secondly, there is an objective reason for differentiating between ... and the defendants' group of companies, ...

b)

Contrary to the defendant's complaint, the licence fee offered by the plaintiff to the defendant's group of companies is not arbitrary.

aa)

A violation of the prohibition of arbitrariness may exist if the patent proprietor cannot explain its pricing in a sufficiently plausible manner. However, it should be noted that an offer that does not comply with FRAND conditions does not in itself constitute an abuse of the patent proprietor's dominant position. Rather, an abuse only lies in refusing or making it impossible for the patent infringer to negotiate and conclude a FRAND licence agreement that is appropriate in view of the interests articulated in the negotiation process and instead enforcing the patent or one of the patents to be licensed by taking legal action (see BGH loc. cit. para. 78 – FRAND Einwand II).

The requirements to be met by the explanation are primarily determined by the specific circumstances of the individual case. The patent seeker willing to take a licence must be informed about the essential factors for the assessment of the licence fee. For this purpose, he must generally be given an explanation of the licence fee offered to him on the basis of the essential factors for the price. The more licence agreements have been concluded, the more



likely it is that the explanation of the factors can be limited to a comparison of the specific fee offered with the agreed royalties in licence agreements already concluded. The explanation serves to protect the patent user who is willing to take a licence. The latter should be given an insight into and overview of the amount and calculation of the licence fee demanded in order to be in a position to negotiate his licence with the patent proprietor in a sufficiently informed manner on the basis of the information obtained. An exception to the obligation to explain may exist if the patent user is already sufficiently informed about the patent proprietor's licensing practice (whether from public sources or from his own experience).

bb)

To conclude from the amount of the demanded licence fee that it is unreasonable and from its unreasonableness that it is arbitrary is, at least in cases in which the antitrust compulsory license objection (so-called FRAND objection) is raised as a defence against a patent infringement, i.e. in passive proceedings, only possible in (very well justified) exceptional cases, if in the individual case such high licence demands are made that they appear to be devoid of any reason and are thus arbitrary.

As a rule, a high licence demand alone does not make the plaintiff's offer arbitrary. In principle, further penal aspects must be added in order to assess the patent proprietor's conduct as utterly intolerable or to classify it as not seriously meant with the consequence that objectively no reaction of the patent user is required. Apart from that, it is the task of the negotiations between the parties to find a solution to the price issue and to level out a possibly unreasonably high asking price of the patent proprietor to an objectively reasonable, interest-based and appropriate level. This means that, as a rule, a reaction of the patent user seeking a licence to the patent proprietor's offer is necessary in order to clarify the factors for the appropriate price determination through negotiations in the individual case. In the Chamber's experience, if the parties negotiate seriously, expeditiously and constructively, they can usually resolve their differing ideas on the price amicably. If the parties do not succeed in doing so, they can seek support from third parties (e.g. through arbitrator's expert opinions, conciliation or arbitration proceedings or mediation). If the parties still cannot find a solution, they can take legal action. In principle, the patent user can either actively claim the licence from the patent proprietor in court or use the antitrust compulsory licence objection as a legal defence in patent infringement proceedings instigated by the patent proprietor (for example, via § 242 BGB *dolo agit*, see BGH GRUR 2009, 694 para. 24 - Orange Book Standard) against the patent infringement, so



that the patent litigation chamber has to examine whether (in particular) the claim for injunctive relief under patent law is opposed by a claim under antitrust law of the patent user for an injunction against the abuse of the dominant position (especially from the point of view of refusal of access) (BGH loc. cit., FRAND Einwand II, para. 54).

As a rule, it is not a matter of actual access to the patented technology, which regularly exists. Therefore, the refusal of access is about the legal access to the use of industrial property rights (cf. Bechtold/Bosch, GWB, 10th edition 2021, Section 19 para. 67). This access is usually achieved (without wanting to decide the discussion "access to all" vs. "licence to all") by concluding a licence agreement. If the patent user is refused the conclusion of the requested licence agreement, if the patent proprietor demands an unreasonably high fee for the licence or if he imposes other unreasonable conditions, this may constitute a refusal of access (see BGH loc. cit. para. 59 - FRAND-Einwand II; Bechtold/Bosch, GWB, 10th edition 2021, Section 19 para. 68).

Under antitrust law, the cases of refusal of access can overlap with those of abuse of prices or conditions and, due to the uniform standard of reasonableness (in particular the application of the comparative market concept), cannot be clearly distinguished. Thus, there may be prices whose demand concerns both the case group of refusal of access and the case group of price abuse.

However, in cases where the antitrust compulsory license objection is asserted against claims of patent infringement, the Chamber is convinced that the distinction between refusal of access and price abuse is crucial.

In order to assess price abuse, knowledge of the cartel price is generally required. As a rule, the parties and the court in patent infringement proceedings do not have this knowledge. In most cases, there is often only knowledge of the conditions at which the patent user's competitors have gained market access. The infringement proceedings in which the "FRAND objection" is asserted are also not aimed at determining the correct price under antitrust law. Due to the procedural situation in which both sides try to hold each other responsible for the failure to conclude the licence agreement so far, it is rather not the contractual terms that comply with FRAND that are determined, but the terms that are not FRAND (on the whole Meier-Beck, FS Säcker, 2021, pp. 275, 289/290).

The determination of the antitrust-compliant price is therefore regularly only possible for the court - provided that sufficient facts are presented - by means of a time-consuming and cost-intensive expert opinion. In the meantime, the patent proprietor is (de facto) prevented from



enforcing his patent and the infringer can continue to use the patent without interference. The infringer thus obtains, at least temporarily, a de facto licence (on the idea of licence in a different context Meier-Beck, FS Säcker, 2021, pp. 275, 285). This shows that in a review of price abuse, there is an imbalance to the detriment of the patent proprietor, who, in view of the limited life of current cutting-edge technology and the limited term of patents in general, urgently needs a quick decision on patent infringement. Therefore, the aspect of price abuse can only be held against the claim for injunctive relief under patent law in particular if the assertion of price abuse does not constitute an abuse of rights in the constellation of the specific individual case.

The fact that the infringer cannot rely without restriction on the rights to which he is entitled under Articles 101, 102 TFEU is emphasised in the supreme court case law of the European Court of Justice and the Federal Court of Justice: not only the patent proprietor, but also the patent user is subject to obligations (CJEU GRUR 2015, 764, 767, para. 63 et seq. - Huawei/ZTE; BGH loc. cit. para. 56 et seq. - FRAND-Einwand II). He can also behave dishonestly (cf. BGH loc. cit. para. 61 - FRAND Einwand II). A decisive aspect here is that the infringer must not pursue delaying tactics (see below). However, if the patent user asserts a price abuse in such a way that the examination of the merits of the price abuse objection - after possibly several years of unsuccessful negotiations - would lead to a (further procedural) delay, this objection must generally be denied to him in the infringement proceedings.

Again, the above consideration is relevant here: A party who is genuinely interested in the conclusion of the licence agreement will raise objections regarding the price at an early stage. As also explained above, a high (initial) asking price by the patentee also leads to a duty to negotiate. The correct price, like the other terms of the contract, can only be determined through negotiations between the parties. Insofar as a party willing to take a licence recognises that the patent proprietor is not willing to substantially deviate from a price that is too high (from the infringer's point of view), it will as a rule not behave unlawfully and possibly punishably and simply use the patent, but will as a matter of principle actively pursue the setting of the correct price in court, in particular already before filing the infringement action. Therefore, the objection of price abuse in infringement proceedings, as explained at the beginning, is only to be considered in blatant cases.

This is not accompanied by a substantial limitation of the patent user's rights. In many cases, the parties and the infringement court know the terms of settlement agreements and compare the offers exchanged between the parties with the terms there. In any case, these prices do



not in principle lead to a refusal of access. For example, if they are largely established and accepted by the market, they appear to be in line with competition and not restrictive of access despite ignorance of the cartel price.

In addition, the patent user seeking a licence who has not reached an agreement with the patent proprietor on the price of the licence can react in such a way that, in a first step, he concludes the licence agreement with comparable conditions to his competitors and thus obtains the coveted (legal) access to the market. Subsequently, if he (still) considers the agreed price to be abusive, he is at liberty, if necessary (with the support of the antitrust authorities), to seek clarification of the appropriate price for the licence under antitrust law from a antitrust litigation chamber specialising in such disputes (cf. Meier-Beck, loc.cit., pp. 275, 291). Another possibility could in principle also be an offer under Section 315 of the German Civil Code (see Higher Regional Court Karlsruhe GRUR-RS 2021, 9325; Meier-Beck, loc.cit., pp. 275, 290/291; Osterrieth, Patentrecht, 6th ed. 2021, para. 920; Bukow in: Haedicke/Timmann, Handbuch des Patentrechts, 2nd edition 2020, Sec. 13 para. 384; Regional Court Mannheim GRUR-RS 2021, 6244 critically in individual cases).

Even if one seeks an appropriate balance between the patent owner's position under patent law on the one hand and the patent user's position in competition granted by cartel law on the other hand by way of "practical concordance", this appears to be given by the aforementioned possibilities of the patent user. By means of the above-mentioned possibilities, the patent user can adequately defend himself in the context of an infringement action and obtains the possibility to have the correct price under antitrust law determined elsewhere. At the same time, the patent proprietor is given the opportunity to have the infringement proceedings conducted within a reasonable time frame.

cc)

By these standards, the royalty offered by the plaintiff to the defendants is not arbitrary. The plaintiff has sufficiently explained the factors for the prices and provided the defendants with the necessary information for this. The overviews posted in the electronic data room are in principle sufficient for this purpose to enable the defendants to negotiate with the plaintiff in an informed manner about the licence fees appropriate for them, knowing the conditions of third companies.

(1)



Insofar as the defendants argue that the figures used in particular for ... is arbitrarily chosen by the plaintiff and has nothing to do with the actual circumstances, this does not constitute arbitrariness. Even if the Chamber assumed here in favour of the defendants that this was so, the defendants are at liberty to request the plaintiff by way of negotiation to offer it comparable conditions in order to gain access to the market by concluding a licence agreement. Instead, the defendants have insisted on their offers (see above on the allegation of discrimination) and complained about the arbitrary fixing of sales figures and other values as well as the inconsistent explanation.

(2)

When the defendants argue that the plaintiff refused to offer the defendants a ... licence to the defendants, this in any case does not amount to arbitrariness. Firstly, the plaintiff unsuccessfully offered the defendants' group of companies a ... Licence to the defendants' group of companies (see above). Secondly, the defendants' group of companies has no claim to the plaintiff concluding the licence agreement submitted by them as a counter-offer with the specific conditions.

On the one hand, the plaintiff unsuccessfully offered the defendants a ... licence to the defendants (see above). On the other hand, all of the plaintiff's licence agreements have (...). In this respect, a justifiable reason is required to deviate from this practice. So far, the defendants have not sufficiently demonstrated such a reason. ... However, the defendants have not shown a concrete justified interest why the plaintiff should deviate in its favour from the hitherto established licensing model which, according to the plaintiff's submission, covers approximately 70% of the market. ... However, the defendants do not present a justified interest based on this.

...

(3)

When the defendants state that in the contract with ... the ...are, this does not result in arbitrariness on the part of the plaintiff, in accordance with the reasons given above for the allegation of discrimination.

c)

Finally, the fact that the plaintiff only presented the defendants with the licence agreement with ... in ... does not mean that the conduct of the defendants was unacceptable because the



defendants were not kept in the dark about the content of the contract concluded in ..., but were informed of it immediately after the conclusion of the contract (see point 3 below). In view of this, the defendants' suggestion that the proceedings should be suspended and that, in view of the disclosure of the ..., the parties should be able to negotiate without pressure, is not valid. There are no indications that this would change the defendants' previous restrained negotiating behaviour.

d)

Nor does it follow from the defendants' further complaints that the plaintiff's licence offer was absolutely intolerable and that the defendants were relieved of any duty to respond (especially the duty to state all objections at the same time).

2.

The defendant's unwillingness to license is evident in its reluctance to negotiate the terms of the licence.

The defendant's group of companies did not conduct the negotiations for the conclusion of the allegedly desired licence agreement in a goal-oriented manner. It was neither sufficiently determined nor sufficiently constructive in the negotiations for the conclusion of the allegedly desired licence agreement. On the contrary, the overall conduct of the defendant's group of companies demonstrates its lack of interest in reaching the conclusion of the licence agreement with the plaintiff in a timely manner. The Chamber is convinced that the defendant's group of companies is pursuing the plan of wanting to enforce its own (financial) licence conditions against the plaintiff. It also uses delaying tactics for this purpose. It is prepared to use the patent in suit without authorisation and without payment for as long as possible as a means of exerting pressure.

a)

The defendant's initial unwillingness to license arises objectively essentially from the hesitant and insufficiently conducive behaviour of the defendant's group of companies during the negotiations with the plaintiff, as described below. In particular, the defendant's corporate group did not declare its license readiness during the first year of negotiations. After the video conference and the plaintiff's offer in ... it also allowed too much time to elapse and thus did not react sufficiently promptly and constructively to the plaintiff's licence offer.



After the plaintiff had notified the defendant's group of companies of the infringement of, inter alia, the patent-in-suit on ..., the defendant's group of companies acknowledged receipt of the infringement notice on ... and informed the plaintiff of the contact person in its company. On ... the plaintiff sent the defendant's group of companies a draft non-disclosure agreement (NDA). The parties signed such an agreement on ... with the content, ...

At the plaintiff's request to hold a video conference on ... was held with the defendant's group of companies on ..., whereby the plaintiff made and explained to the defendant's group of companies a licence offer in the amount of ... and explained it. Following this conference, the plaintiff sent the defendants the presentation explaining the licence offer, sample licence agreements, a list of its standard-essential patents and IPEC reports on 14 US and 14 European patents. The defendants' group of companies acknowledged receipt of these documents on

More than half a year later, namely on ..., the defendant's group of companies asked for legal search reports on four of the 14 European patents in the plaintiff's portfolio and stated that its analysis of the portfolio was still ongoing.

After the NDA was signed on the plaintiff brought an action against the defendants before, inter alia, the 7th Civil Chamber of the Regional Court Munich I and filed an application for an anti-suit injunction against the defendants' group of companies, which was issued on ... and served on the defendant's group of companies on

b)

The Chamber is convinced that the defendant's group of companies' participation in the negotiation process after service of the action in the main proceedings is not sufficient to prove its willingness to take a licence.

The conduct of the parties described below, which reflects the essential circumstances (in particular, reference is made to the pleadings of the defendant of 19.08.2022 - statement of defence FRAND, of 19.12.2022 - rejoinder FRAND and of 13.01.2023 - quadruplicate FRAND as well as of the plaintiff of 19.10.2022 - Reply FRAND and of 09.01.2023 - Triplicate FRAND), makes it clear that the initially hesitant attitude of the defendant's group of companies continued after the action was filed in the main proceedings. The defendant's group of companies did not sufficiently promote the negotiations, although it could have done so, and likewise did not behave in a sufficiently constructive, but rather hesitant manner. In particular, the defendant's group of companies constantly demanded further information and clarification



from the plaintiff, without the information provided in response being reflected in sufficiently tangible progress in the negotiations.

aa)

After the plaintiff offered on ... to disclose to the defendant's group of companies licence agreements which the plaintiff had concluded with other companies, subject to a corresponding NDA, the defendant's group of companies asked on ... which the plaintiff sent to the defendant's group of companies on ... and which the defendant returned with amendments on ... so that the further NDA between the parties was concluded on

On ... the plaintiff asked the defendant's group of companies to name persons who should have access to the electronic data room where the plaintiff posts the licence agreements. On ... the defendant's group of companies named these persons to the plaintiff and on ... asked to discuss the terms of the plaintiff's offer and to post the plaintiff's complete licence agreement with Apple in the data room, to which the plaintiff agreed on ... and the parties held a video conference on

On ... the defendant's group of companies complained that the documents in the electronic data room could only be read online. Furthermore, the defendant's group of companies complained that two licence agreements of the plaintiff's legal predecessor were missing and that the plaintiff's complete licence agreement with ... is still not available in the data room.

On ... the plaintiff informed the defendant's group of companies that the data room was provided for in the NDA. Similarly, during the negotiations on the NDA, the defendant's group of companies never objected to the fact that the documents could only be read online. In addition, the plaintiff argued that of the ... (at the time) third party licence agreements concluded ... are available in full and without redacted passages in the electronic data room and that all relevant information on the plaintiff's licence agreement with ... the defendant's group of companies is also disclosed there. Furthermore, the plaintiff added that disclosure of the licence agreement with ... was not possible due to confidentiality requirements. Finally, the plaintiff again explained its licence offer, which has been on the table for more than a year and to which the defendants have not yet responded in substance, and sent an IPEC analysis of eleven Chinese patents.

On ... the defendant's group of companies submitted a counter-offer to the plaintiff with a lump sum payment of ... whereby ... The defendant's group of companies has explained its counter-



offer. In addition, the defendant's group of companies has criticised the fact that the licence agreement with ... has still not been fully disclosed.

On ... the plaintiff rejected the counteroffer and submitted a new offer. In order to accommodate the defendant's request ... the plaintiff made a further licence offer to the defendants in a videoconference and by e-mail dated ... the plaintiff submitted a further licence offer, which provided for a payment of For this, the plaintiff used figures for sales and forecasts and asked the defendants' group of companies to correct them if they were incorrect.

On ... the group of companies explained its offer to the defendant once again in a video conference on ... and in continuation of the video conference on ... offered to ... Furthermore, the group of companies informed the defendant On ... the defendant's group of companies increased its licence offer

In May 2022, the defendant's group of companies sent emails criticising the plaintiff's figures regarding the calculation of royalties in existing licence agreements and asked for an explanation as to why ... should pay according to the licence agreement, whereas according to the spreadsheet ... and asked for feedback on the counter-offer and for a meeting.

Thereupon, the plaintiff rejected the last counter-offer of the defendant's group of companies by e-mail dated ... and made a new offer in the amount of ... by e-mail dated 18.05.2022. In addition, the plaintiff made a further licence offer of ... in the course of a video conference on The defendant's group of companies responded to the plaintiff's offer in a videoconference on ... and increased its counter-offer to

In ... the plaintiff informed the defendant's group of companies that it had concluded a licence agreement with another smartphone manufacturer, namely, It also informed the defendant's group of companies of the key points of the licence agreement with ... (term, subject matter of the licence, amount of the lump sum licence payment and calculation of the licence fee).

In ... the parties then discussed in e-mails and video conferences the expected sales figures of the defendant's group of companies as well as the economic comparability of the defendant's group of companies with ... on the basis of a presentation by the plaintiff.

On ... the plaintiff gave a presentation on the current market situation in the course of a video conference and, in view of the licensing agreement concluded with ... and the settlement reached between the defendant's group of companies and this group, the plaintiff submitted a licence agreement offer for ... and sent it by e-mail.



By e-mail dated ... the plaintiff reminded the defendant's group of companies of the offer of ... to which the defendants responded on and the parties agreed on a video conference for In this conference, the defendants' representatives stated, among other things, that ...

bb)

The defendant's group of companies thus participated in the licensing negotiations too late and in a manner that was not conducive to the conclusion of a licensing agreement. In particular, it did not behave in such a way that sufficiently concrete progress was made for this purpose. A licence seeker seeking the successful conclusion of a licence agreement would - in contrast to the defendants' group of companies - have endeavoured to conclude the desired licence agreement through continuous negotiation and supportive and constructive cooperation. In particular, the defendants only submitted their counter-offers late in the negotiation process and, in the end at any rate, were not prepared to increase them significantly, although it is clear from the plaintiff's submissions (most recently in the triplicate of 09.01.2022) that the defendants' group of companies only offered a fraction of the payments agreed in the other licence agreements concluded by the plaintiff. Also, the last counter-offer by ... shows its unwillingness to license, because despite the basic comparability with ... only slightly more than ... of the amount paid by ... and the defendants have not explained which assumptions they have used for their own figures up to the year ... were based on. From the Chamber's point of view, it would rather have been expected that the defendants would have made a licence offer that was in line with the adjustments offered, but roughly in the order of magnitude in which their competitor ... reached an agreement with the plaintiff.

3.

This established unwillingness to license on the part of the defendants is not changed by their objection that the offer of the defendants' group of companies is the only written licence offer that fulfils the FRAND criteria, so that they cannot be regarded as unwilling to license.

a)

The defendant's group of companies basically relies on the fact that its offer of ... is FRAND, because the plaintiff demanded a final amount of ... for the total term until

b)



This objection is not valid because the defendants cannot claim a licence agreement on such terms from the plaintiff.

The precondition for the defendant's objection is that the plaintiff's offer of ... to ... and that a corresponding contract on these terms would be available at all, which is already not the case for lack of evidence of a justified interest of the defendant's group of companies vis-à-vis the plaintiff in ... (see above). Furthermore, the plaintiff's licence offer is designed in such a way that only sales up to ... are included in the pricing. are included in the pricing, with which sales up to ... are compensated. An arithmetical distribution of the ... to ... to ... to ... is therefore ruled out.

III.

Taking into account all the concrete circumstances of the individual case, the defendant's other objections and complaints do not show that the antitrust compulsory license objection is well-founded either.

In particular, the judgment of the UK High Court of 16 March 2023 in *Interdigital v. Lenovo* (Exhibit VP-Kart35), submitted in the written statement of 28 March 2023, does not lead to a different result, at least in the absence of transferability of the factual circumstances to this case.

IV.

The defendant's admissible application for production of documents must be rejected. It is unfounded.

1.

Having established the defendant's unwillingness to take a licence, the Chamber exercises the discretion granted to it under § 142 ZPO to the effect that the requested production of documents is not required. Further classified information need not be disclosed to a negotiating party unwilling to be licensed and the relevant documents need not be produced if they are not relevant to the proceedings.

That is the case here. No relevance for the proceedings arises from the concrete circumstances of the individual case. For the submission is not relevant to the decision. The defendants are not willing to take a licence. There are no indications that the requested



production of the documents could change this and that they would give up their delaying and unhelpful behaviour.

2.

Contrary to the defendants' assumption, the claim is also not justified because the defendants have only made the documents available for viewing online in the electronic data room, although it is not possible to print, save or otherwise secure the documents. This is because the defendants also have the opportunity to familiarise themselves with the content of the documents and to take note of it. Admittedly, this makes it more difficult for them to make these documents the subject of the proceedings and it must be admitted that the plaintiff exercises control over the data room. However, this sufficiently satisfies the defendant's interest in information in the individual case. For example, the defendant can easily "secure" the content of the documents by photographing the screen. Moreover, in the course of the proceedings it was (rightly) not objected that it could not defend itself accordingly. The fact that the contents of such data rooms cannot be regarded as electronic file contents may be true, but - probably contrary to Kühnen, Handbuch der Patentverletzung, 15th edition 2023, chap. E para. 598 - does not change the lack of an obligation to produce. The decisive factor is the need for information of the person concerned.

3.

By submitting the ...-contract, the plaintiff has fulfilled the request in part.

[...]