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Standard-essential patents as an infrastructure facility

Following the "Orange Book Standard" judgement from 2009[1] , the judgement in the Sisvel v Haier dispute from spring 2020[2] is the first decision of the *Bundesgerichtshof* in many years on the competition law[3] licensing claim of a user of a standard-essential invention who has been sued for patent infringement and the first since the Huawei v ZTE judgement of the Court of Justice of the European Union from 2015.[4] It was followed at the end of 2020 by a further judgement[5] between the same parties, which addresses some of the objections to the first judgement in the Sisvel v Haier case. At the heart of these proceedings appears to be an antagonism between patent law and competition (antitrust) law, and any decision in favour of one party or the other runs the risk of being seen as "taking sides" in favour of the area of law whose values are supposedly favourable to the other party. At least in the minds of some, patent law fights for the patent holder and against the infringer, and competition law fights against the market dominator and for the victim of an abuse of its market power.[6]

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[1] BGH 6 May 2009 - KZR 39/06, BGHZ 180, 312 - Orange Book Standard.
[2] BGH 5 May 2020 - KZR 36/17, BGHZ 225, 269 - FRAND-Einwand I (Sisvel v Haier I).
[3] In this article, competition law refers to both national and European Union competition law; the term is used synonymously with the term antitrust law.
[4] CJEU, 16 July 2015, C-170/13, GRUR 2015, 764 - Huawei v ZTE. The abbreviation CJEU stands for Court of Justice of the European Union and appears more appropriate than the traditional ECJ.
[5] BGH, 24 November 2020 - KZR 35/17, BGHZ 227, 305 - FRAND-Einwand II (Sisvel v Haier II).
[6] For example, *Körber*, NZKart 2020, 493: "For a long time, this abuse of claims was fuelled by a practice of some German patent courts that misjudged antitrust law, until the ECJ put a stop to it on 16 July 2015 in its Huawei v ZTE decision". See already *Meier-Beck*, Orange Book Standard revisited, Festschrift für Klaus Tolksdorf, 2014, 115 (117 seq.) with further references.

This notion facilitates the subjective categorisation of decisions, but is quite incorrect and causes some confusion. This article attempts to counteract it.

I. The right to access essential infrastructure

The owner of an infrastructure facility, the use of which is necessary for the provision of services on a specific market and which cannot be duplicated or reproduced or can only be duplicated or reproduced with completely uneconomical effort ("*essential facility*"), therefore holds a dominant position. It does not dominate that services market, but it does dominate access to it, and therefore the use of the infrastructure and the conditions of this use, if they are in principle open, regularly form a separate market that is dominated by the infrastructure operator. As a monopolist, it alone authorises the use and, if they are not directly determined or regulated by law, the conditions of use must be negotiated with it.

1. Standard essential patents as an infrastructure network

Classic examples are network structures, such as electricity and gas networks or railway networks, and facilities that are necessary for their use, such as railway stations or harbours. The *Bundesgerichtshof* dealt with access to the Puttgarden ferry harbour, for example, several years before the "Orange Book Standard" and again ten years later in a decision.[7] However, the focus of this article will not be on these classic examples, but on patents whose technical teaching is required for the manufacture of products that comply with a certain technical standard set by a standardisation organisation and which cannot be successfully sold on the relevant product market without this standard compatibility. Such patents are called standard-essential because the use of the standard is not possible without the use of the patents, but they are also "product-essential", so to speak, because

[7] BGH 24 September 2002 - KVR 15/01, BGH 24 September 2002 - KVR 15/01, BGHZ 152, 84 - Fährhafen Puttgarden I; BGH 11 December 2012 - KVR 7/12, WuW/E DE-R 3821 - Fährhafen Puttgarden II.

the product cannot actually be manufactured and sold without the use of the standard and thus without the use of the standard-essential patents.

At first glance, the comparison between standard-essential patents and network structures may seem far-fetched[8] and it does not even seem to be about the use of an infrastructure to provide services, but about its use for the production of goods. But the first impression is deceptive.

This is because what the standard regulates are functions that are realised by a mobile communication device ("*smartphone*"), for example, and the means by which these functions can be implemented in the device, such as a certain predefined format for data coding, compression, transmission or storage. The individual functions in turn are typically assigned to (technical) services and thus enable the provision of services, such as the provision of voice telephony or video transmissions via a mobile network (which in turn is networked with other telecommunications networks).[9] The services are therefore made available to the consumer by implementing those technical functions in the mobile network and in the mobile devices connected to it that enable the service to be provided - usually in a fully automated form.

The mobile phone network - which is only of marginal interest to us - is not the only infrastructure network. The actual interest is in the network that is woven from the individual technical functions that only in their interaction make up the functional and communicative mobile device[10] and form a micro-infrastructure in each individual device, parts of which are defined by a specific standard, whereby different standards can interlock. Access to

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[8] However, on the relationship between licensing requests and access to essential infrastructure facilities, see already *KK-KartR/Busche*, 2016, Art. 102 TFEU para. 184, and *Busche*, GRUR 2021, 157 (161).

[9] Cf. *Säcker*, NZKart 2020, 569 (572) on charging infrastructure for electric vehicles as an offer for downstream services.

[10] Cf. *BerlKommEnR/Säcker*, 4th ed. 2019, Section 1 EnWG para. 79 on the function of individual energy grid installations or consumption installations, which cannot be determined in isolation but only in consideration of all other grid elements.

these micro-infrastructures opens up the market for "implemented" services.

2. Legal and de facto access to the infrastructure network

No patent holder, no matter how many patents they hold, can control these micro-infrastructures alone. The use of the individual invention, which is protected by a standard essential patent, is a necessary but not a sufficient condition for the implementation of the standardised technical functions. Only the complementary utilisation of all patents required for the standard compatibility of a technical device provides access to the use of the standard and thus to the service market. The creation and utilisation of the micro-infrastructure in each individual mobile phone or other electronic terminal device, the sum of which in turn results in a (single) macro-infrastructure of communicating micro-infrastructures, is therefore a necessary prerequisite for the provision of the information technology and telecommunications services that are increasingly determining technical development in almost all branches of industry and which can only be provided by means of this infrastructural substrate.

Nevertheless, there are practically no legal disputes in which a claim for access to this infrastructure has been (actively) asserted in court.[11] To the best of my knowledge, no competition law proceedings have been initiated to date, as in the case of the Puttgarden ferry port, with the aim of forcing the dominant company to relinquish access to the infrastructure. The reason for this is that the users of the infrastructure under discussion are not in fact - at least initially - dependent on the granting of an access right in order to be able to use the infrastructure.

The subject matter of a granted patent is - contrary to the impression conveyed by the term "substance patent" - immaterial in nature. The protected invention is a teaching (an instruction) for technical action which, once recognised and disclosed, can be carried out as often as desired and by anyone to whom it is known and who has the necessary technical knowledge to carry it out.

[11] Likewise *Kühnen*, GRUR 2019, 665 (666).

However, apart from rare exceptions that are not of interest here, it is in principle known to everyone, because the patent specification describing and explaining the teaching of the invention and thus enabling its application is published when the patent is granted, which establishes the exclusive right of the patent proprietor (Art. 98 EPC; Sec. 58 (1) Patent Act [PatG]). The - at first glance seemingly paradoxical - connection between the "socialisation" of the knowledge gained by the inventor and the "monopolisation"[12] of its use for the benefit of the patent proprietor embodies the very essence of patent law.

In fact, anyone who has the necessary material and financial resources can therefore utilise the invention and thus the subject matter of a patent without having to rely in any way on the cooperation of the patent proprietor. However, this infringes patent law, because according to Section 9 PatG, the patent has the effect that only the patent proprietor is authorised to use the patented invention (within the framework of the applicable law); this is prohibited to any third party, and claims for injunctive relief can therefore be asserted against anyone who nevertheless does so in accordance with Section 139 (1) PatG; essentially corresponding provisions exist in almost all countries.

3. Patent proceedings as an atypical access dispute

However, judicial enforcement is not so simple, and this applies in particular if, as in the case of the subject of our discussion, it is not the infringement of a single patent that is at issue, but the infringement of a large number of patents, which can be measured in three or four figures, which together form the infrastructure that allows the use of telecommunications functions for the provision of services. Even the judicial examination of the infringement of an individual patent is regularly time-consuming and expensive, and the effort and costs are at least doubled if the

[12] In patent law terminology, "monopoly" sometimes refers to the exclusive right of the patent holder to utilise the invention. In terms of competition law, this right naturally only constitutes a monopoly if it makes the patent proprietor the monopolist on a correspondingly narrowly defined market.

infringing defendant questions the validity of the patent and, as required under German law, brings an action for revocation of the patent before the competent Federal Patent Court. In addition, the patent is only valid for the territory of the state that granted it.[13] The legal protection of the infrastructure, which is typically protected worldwide, at least in all important industrialised countries, therefore not only consists of a large number of individual property rights, but these property rights in turn only exist for a specific territory and therefore only add up to a worldwide network of legally protected inventions.[14] Each patent, even if it relates to the same invention, must be considered separately; there are regularly differences in the wording of the patent claim between a European, US, Chinese, Japanese and Korean patent - to name just the most important ones - for an invention, and the substantive and procedural standards of the respective national laws for examining infringement and the validity of the patent differ considerably, despite the long history of efforts to achieve global harmonisation.

These circumstances explain why the claim for infrastructure access is practically never actively asserted, but is raised as an objection in patent infringement proceedings, in which the patents constituting the infrastructure (at the national level chosen for the proceedings) are also not actively asserted, but are reduced to a single patent or at most a small, still practically manageable number of these patents, which are held by the plaintiff, who, as mentioned above, is typically only one of the

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[13] This also applies to a European patent which, although granted by the European Patent Office on the basis of a unitary grant procedure, is then legally broken down into individual national parts which are enforced in the member states of the European Patent Convention for which the patent in question is granted and, if necessary, must also be reviewed for validity in these member states. This would only change (to a limited extent) if the Agreement of 19 February 2013 on a Unified Patent Court were to enter into force. On 26 November 2020, the Bundestag approved the Federal Government's (second) draft bill for a ratification act, now with the two-thirds majority required following the decision of the Federal Constitutional Court of 13 February 2020 (GRUR 2020, 506).

[14] See also *R. Arnold*, GRUR 2021, 123.

companies that hold the standard essential patents required for the lawful use of the infrastructure.

This typical procedural situation is likely to obscure the conflict of interests that must be managed in such a legal dispute.

4. The Huawei v ZTE judgement

However, there is a second factor that is likely to obscure the view of the conflict to be overcome. This second factor is - without this being an accusation against the Court of Justice or even a suggestion of one - the Court of Justice of the European Union or, more precisely, the aforementioned judgement that it handed down on 16 July 2015 following a referral from the Düsseldorf *Landgericht* (Regional Court)[15] in case C-170/13 (Huawei v. ZTE).

The judgement is more familiar to the patent law public than to the competition law public. Its content will therefore be briefly explained in order to illustrate its view-obscuring potential.

Huawei brought an action against ZTE for infringement of the (German part of) European patent 2 090 050, which related to a "method and device for establishing a synchronisation signal in a communication system" and had been identified by the referring Regional Court as essential for the implementation of the LTE standard[16] . Huawei had declared to the standardisation organisation European Telecommunication Standards Institute (ETSI) that it was willing to license this patent - like all other standard essential patents - on fair, reasonable and non-discriminatory (FRAND) terms, as required for the inclusion of a patented technical solution in the standard. From November 2010 to the end of March 2011, the parties "engaged", according to the

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[15] LG Düsseldorf 21 March 2013 – 4b O 104/12, NZKart 2013, 256.

[16] LTE stands for "Long Term Evolution" and is a term for the fourth generation mobile communications standard, which retains the basic scheme of the Universal Mobile Telecommunications System (UMTS, 3G) but, unlike UMTS, supports different bandwidths (1.4; 3; 5; 10; 15 and 20 MHz). More than 4,700 patents were declared essential for the implementation of this standard (CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 40 - Huawei v ZTE).

judgement, "in discussions concerning, inter alia, the infringement of patent EP 2 090 050 and the possibility of concluding a licence on FRAND terms" for standard-compliant ZTE products. The judgement also states that Huawei stated what it considered to be a reasonable royalty and that ZTE sought a cross-licence; however, no offer relating to a licensing agreement was finalised.[17] Elsewhere, the judgement also states that ZTE only wanted to take a licence for products for which a patent infringement could be established.[18] Nevertheless, ZTE used the protected technology and therefore infringed the patent; Huawei therefore filed a lawsuit at the end of April 2011.

The Court further states that, in the referring court's view, the outcome of the dispute pending before it depends on the question of whether the action brought by Huawei constitutes an abuse of its dominant position. The enforcement of the claim for injunctive relief could be precluded by the "mandatory nature of the grant of the licence" under Article 102 TFEU if the assertion of that claim by Huawei were to be regarded as an abuse of its (assumed) dominant market position.

Various approaches could be considered to determine such an abuse by bringing an action for an injunction. The *Bundesgerichtshof* established various conditions for the assumption of abuse, including an unconditional offer by the defendant patent infringer to conclude a licence agreement, i.e. not subject to a reservation of infringement, to which the defendant considers itself bound and which the plaintiff may not refuse without unduly hindering the defendant or violating the prohibition of discrimination.[19] In contrast, according to a press release on a statement of objections addressed to Samsung

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[17] The German version of the decision reads: "Lizenzvertragsangebote ergingen jedoch nicht". The French text is more comprehensible: "Toutefois, aucune offre relative à un contrat de licence n'a été finalisée" (CJEU, C-170/13 para. 25 - Huawei v ZTE [insofar GRUR 2015, 764 reprinted without marginal numbers]).

[18] CJEU, C-170/13 para. 33 - Huawei v ZTE.

[19] BGH 6 May 2009 – KZR 39/06, BGHZ 180, 312 - Orange Book Standard.

regarding patent infringement actions filed by this company in the mobile phone sector, the Commission took the view that the enforcement of a claim for injunctive relief is (already) abusive within the meaning of Art. 102 TFEU if the patent infringer is willing to negotiate in the event of an infringement of a standard-essential patent and a FRAND declaration by the patent proprietor.[20] The referring Regional Court favours the approach of the *Bundesgerichtshof* in the interests of a balanced solution.

The Court of Justice of the European Union prefaces its answer to the - as usual summarised[21] - questions referred with the statement that in order to assess the legality of the infringement action "against an infringer with which no licensing agreement has been concluded",[22] the court must strike a balance between maintaining free competition - in respect of which primary law and, in particular, Art. 102 TFEU prohibit abuses of a dominant position - and the requirement to safeguard that proprietor's intellectual-property rights and its right to effective judicial protection, guaranteed by Art. 17(2) and Art. 47 of the Charter, respectively.[23]

As a general answer to the remaining primary question on the conditions for an abuse of market power, the Court then states that a refusal by the patent proprietor to grant a licence on FRAND terms can in principle constitute an abuse within the meaning of Art. 102 TFEU and that *it follows*[24] that the abusive nature of such a refusal may, in principle, be raised in defence to actions for a prohibitory injunction or for the recall of products.[25]

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[20] See Commission, MEMO/12/1021 of 21 December 2012 - *Samsung*; see also Commission, IP/13/406 of 6 May 2013 - *Motorola Mobility*.
[21] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 44 - Huawei v ZTE.
[22] in French: "contre un contrefacteur avec lequel aucun accord de licence n'a pu pu être trouvé".
[23] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 42 - Huawei v ZTE.
[24] Emphasis by the author.
[25] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 53 seq. - Huawei v ZTE.

In the following, the Court of Justice elaborates on this by stating that, in such a constellation, in order to prevent an action for a prohibitory injunction or for the recall of products from being regarded as abusive, the proprietor of an SEP must comply with conditions which seek to ensure a fair balance between the interests concerned, taking due account of the specific legal and factual circumstances in the case.[26] After a renewed reference to the patentee's right to legal protection, which must not be negated[27], the Court formulates these "conditions" in general terms to the effect that the infringement does not relieve the patentee from the prohibition to seek injunction and other remedies aimed at preventing market access against the alleged infringer without notice or "prior consultation".[28] This is then concretised:

- Firstly, before asserting such claims in court, it is for the SEP-holder to alert the infringer of the infringement complained about by designating the SEP and specifying the way in which it has been infringed.[29]
- Secondly, after the infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, it is for the SEP-holder to present to the infringer a specific, written offer for a licence on FRAND terms, specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated.[30]

The European Court of Justice then turns to the infringer's obligations. It is up to the infringer to respond diligently to the patent proprietor's offer, in accordance with recognised commercial practice in the field and in good faith, a point which

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[26] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 55 seq. - Huawei v ZTE.
[27] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 57 seqq. - Huawei v ZTE.
[28] The German text also seems rather unfortunate here: The French reads: "sans préavis ni consultation préalable du contrefacteur allégué."
[29] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 61 - Huawei v ZTE.
[30] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 63 - Huawei v ZTE.

must be determined on the basis of objective factors and implies, inter alia, that no "delaying tactics" are pursued.[31] Should the infringer not accept the SEP holder's offer, it may rely on the abusive nature of an action for injunctive relief or recall of products only if it has submitted to the SEP holder, promptly and in writing, a specific counter-offer that corresponds to FRAND terms; in addition, the infringer must provide security.[32]

Finally, the Court points out, that if no agreement on the details of the FRAND terms had been reached after the infringer's counter-offer, the parties would have the possibility to "request"[33] by mutual agreement that the amount of the royalty be determined by an independent third party.[34]

It is for the referring court to determine whether those criteria are met, in so far as, in the circumstances of the case, they are relevant to the resolution of the dispute in the main proceedings.[35]

5. The reception of the Huawei v ZTE judgement

The reception of this application of Art. 102 TFEU to the case of a refusal to licence standard-essential patents has focused strongly on a "step" or "stage sequence" of the fulfilment of (both sides') duties of conduct allegedly prescribed by the CJEU, which must in principle be "worked through" before claims arising from the patent are asserted in court, whereby "catching up" on omitted steps in the proceedings may be considered.[36] In the literature,

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[31] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 65 - Huawei v ZTE.
[32] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 66 seq. - Huawei v ZTE.
[33] in French: "demander".
[34] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 68 - Huawei v ZTE.
[35] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 70 - Huawei v ZTE.
[36] The Düsseldorf Higher Regional Court (OLG) 30 March 2017 - I-15 U 66/15, GRUR 2017, 1219 (1223), e.g., speaks of "catching up on steps of the licensing procedure to be taken prior to the proceedings". Similarly, *Kühnen* (Festschrift 80 Jahre Patentgerichtsbarkeit in Düsseldorf, 2016, 311 (313) describes the "things" that the patent proprietor has to "do

there is even the view that the Court of Justice has derived from Art. 102 TFEU "a kind of 'preliminary procedure' that must be carried out" before the SEP holder may bring an action for infringement seeking injunction or recall.[37] The actual aim of the Court's reasoning, namely to formulate requirements for the successful negotiation of the conditions of an "infrastructure access right" and to deny the dominant undertaking the right to enforce patent claims in court if and only if it can be accused of the failure of such a negotiation and therefore of having *refused* this infrastructure access either outright or by demanding conditions that hinder or discriminate against the undertaking of the other side of the market, has largely been lost sight of.

Such a view is favoured by a not infrequent tendency to cling too closely to the wording of the Court of Justice's answers to a question referred and to neglect the normative and case-specific context in which that answer was given.[38]

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before bringing an action" in order to "make the injunctive relief claim suitable for court proceedings (i.e. enforceable by way of action)"; before it can sue for injunctive relief and recall, it must, among other things, submit a written licence offer on FRAND terms (whereby the infringement court seised must conclusively and not only summarily clarify "whether the licence offer is FRAND"; loc. cit. fn. 12 with reference to OLG Düsseldorf 13 January 2016 - I-15 U 66/15, NZKart 2016, 139).

[37] *Körber*, WRP 2015, 1167 (1169).

[38] See also *Meier-Beck*, Festschrift für Joachim Bornkamm, 2014, 699 (705 seqq.). This may allow the interpreter to derive a statement on Union law that is considered desirable from a sentence of a CJEU ruling that has no connection whatsoever with the Union law provision supposedly interpreted by the Court. An instructive example of this is the judgment of 9 November 2017 (C-489/15, EuZW 2018, 74 - CTL Logistics), in which the Court of Justice ruled, following a referral from the Berlin Regional Court, that the provisions of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of driving time are not to be interpreted in any way. February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification by a regulatory body, whose decisions are in turn subject to (administrative) judicial review, precludes a national provision (such as that of Section 315 (3) BGB) according to which the same usage fees are reviewed by the courts for fairness in civil proceedings (and thus

A case-specific aspect is directly related to this. It seems to have had an effect that the Court of Justice only mentions at the beginning of the Huawei v ZTE judgement that the abuse does not lie in the assertion of the patent legal claims as such, but in the fact that a requested licence is refused and *therefore* the infrastructure user who continues to act in a patent-infringing manner in the absence of a licence is exposed to claims arising from the patent in suit. The CJEU does not return to this starting point in the following.[39] This has led to a focus on the plaintiff's claims, although the focus under competition law must be on the claim of the infringing defendant, who can only counter the plaintiff's claims with a claim for the grant of a patent licence, which it could also assert in an active lawsuit as a claim to remedy a violation of the prohibition on abusing a dominant market position by refusing to grant a licence. The fact that the patent infringer does not actively assert such a claim, but uses it as a defence - because the SEP holder takes the lack of a licence agreement entitlement to use one of its patents as an opportunity to take legal action - cannot lead to the patent infringer being able to assert further

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subjected to a kind of parallel or substitute regulation). It has been inferred from this (primarily, but not only by the railway infrastructure company favoured by this thesis) that the CJEU sees a contradiction between the Directive and the award of damages for abusively excessive charges by the cartel (civil) courts without prior rejection of the charging system by the regulatory body. Anyone who is even roughly familiar with the working methods of the Court of Justice in general and in particular when responding to requests for preliminary rulings must consider it absolutely impossible that the Court of Justice of the European Union could decide *en passant* to restrict a "sanctuary of Union law" such as the claim for damages in the event of a breach of Art. 102 TFEU or even just its enforcement, about which it has not been asked at all (on the unrestricted applicability of competition (civil) law, see BGH 29 October 2019 - KZR 39/19, WuW 2020, 209, para. 18-22 - Trassenentgelte; BGH 1 September 2020 - KZR 12/15, juris paras. 19-41 - Stationspreissystem II [in this respect NZKart 2021, 51 not printed]; BGH 8 December 2020 - KZR 60/16, juris para. 20 - Stornierungsentgelt II).

[39] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 53 seq. - Huawei v ZTE.

licence claims than it, like all other members of the other side of the market, is entitled to anyway.[40]

II. Licensing claim versus "FRAND defence"

This differentiation only superficially concerns a mere detail. If we change our perspective, various questions appear in a different light.

1. The patent infringer's willingness to licence

The first of these questions concerns the patent infringer's so-called willingness to licence or declaration of willingness to licence. The terms in question have their origins in the controversy raised in the Huawei v ZTE decision as to whether the patent infringer must have submitted an offer to the SEP holder in order to successfully defend against the patent infringement claims, which the SEP holder "may not reject" in compliance with its obligations arising from market dominance (according to the *Bundesgerichtshof* in the "Orange Book Standard"), or whether (at least according to the Commission's original view) the general willingness to negotiate and conclude a licence agreement on FRAND terms is sufficient for this purpose. The unease about the obligation under the "Orange Book Standard" - which may be difficult to fulfil and does not properly cover all factual constellations - has led to a reduction - approved to a certain extent by the CJEU - of the requirements for the contribution to the licence agreement demanded of the patent infringer. This reduction results from the required infringement notice[41], but in particular from the "first serve", i.e. the initial offer that is expected from the SEP holder due to its knowledge advantage in this respect and its declared willingness to licence on FRAND terms.[42]

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[40] Likewise *Kühnen*, GRUR 2019, 665 (667).
[41] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 60 seq. - Huawei v ZTE.
[42] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 63 - Huawei v ZTE.

However, in the reception of this "exoneration" of the patent infringer, it is not uncommon to lose sight of the fact that this does not make the patent proprietor the claimant or petitioner, who would have to ask the patent infringer to take a licence, which the latter may (or may not) then agree to do.[43] As the *Bundesgerichtshof* stated in its FRAND-Einwand I judgement (Sisvel v Haier I), the patent proprietor's obligations aimed at drawing the infringer's attention to the need to take a licence and facilitating the conclusion of a licence agreement by making an initial offer and explaining it to the infringer are, on the contrary, merely a consequence of the special responsibility of the market dominator, who may not simply leave the patent infringer to the difficulties of finding out which conditions it may not reject because they are neither obstructive nor discriminatory, and conversely which conditions it does not have to accept because they are obstructive or discriminatory.[44] However, this "assistance" owed by the patent proprietor as market dominator does not alter the fact that it is and can only ever be about the patent infringer's claim to a licence and that, accordingly, a "willing licensee" can only be someone who wishes to pursue its claim to a licence and conclude a licence agreement with the patent proprietor. The *Bundesgerichtshof* has formulated this, taking up a formulation of the England and Wales High Court (J *Birss*)[45] to the effect that "*a willing licensee must be one willing to take a FRAND licence on whatever terms are in fact FRAND*".[46]

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[43] However, this is what it sounds like when *Kühnen* (Festschrift 80 Jahre Patentgerichtsbarkeit in Düsseldorf, 2016, 311 (312) writes: "Before he (scil. the patentee) may pursue his claim for injunctive relief ... in court, he must do preliminary work by endeavouring to conclude a FRAND licence agreement on the patent in suit in accordance with his licensing commitment to the infringer against whom the claim is asserted."

[44] BGH 5 May 2020 - KZR 36/17, BGHZ 225, 269 para. 72, 76 - Sisvel v Haier I. The *Bundesgerichtshof* had already considered this aspect, albeit less clearly, in "Orange Book Standard"; see *Meier-Beck*, Festschrift für Klaus Tolksdorf, 2014, 115 (124 seq.).

[45] EWHC 5 April 2017, [2017] EWHC 711 (Pat) para. 708 - Unwired Planet v Huawei.

[46] BGH 5 May 2020 - KZR 36/17, BGHZ 225, 269 para. 83 - Sisvel v Haier I.

The significance of the "licence request" is therefore not limited to not requiring the patent proprietor to make the unnecessary effort of submitting an offer if the patent infringer has no interest in doing so. The assumption that no high requirements are to be placed on the expression of "willingness to licence"[47] and that the legal position of the reluctant party does not deteriorate significantly[48] as long as no serious and final refusal to conclude a licence agreement on FRAND terms is apparent,[49] does not do justice to the simple core of the matter: Even a dominant patent holder is only obliged to grant a licence to those who seek it, and against those who do not, the patent holder is not abusing its market power if it sues them for patent infringement. What infringers do not seek cannot be denied to them.[50]

This may become clearer if one considers the (rather hypothetical) case of active litigation, in which a patent infringer, who is genuinely willing to take a licence, makes a claim against the SEP holder for the conclusion of a licence agreement on terms that do not unfairly hinder and discriminate against it. It is obvious that such a plaintiff, if it wants to be taken seriously with its petition, must request such a contract without any ifs and buts, even if it knows nothing more about the fair conditions of this desired contract than that they do not correspond to the conditions that the SEP holder has so far been prepared to offer; this is precisely why the implementer brings the action.

2. The subject matter of the licence claim

This leads us to a second point, namely the question of the subject matter of the licence claim that the infringer can assert against the dominant patentee.

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[47] See for example OLG Düsseldorf 30 March 2017 - I-15 U 66/15, GRUR 2017, 1219 para. 152.
[48] OLG Düsseldorf 30 March 2017 - I-15 U 66/15, GRUR 2017, 1219 para. 157.
[49] OLG Düsseldorf 30 March 2017 - I-15 U 66/15, GRUR 2017, 1219 para. 164.
[50] BGH 24 November 2020 - KZR 35/17, BGHZ 227, 305 paras. 54, 59, 66, 76 - Sisvel v Haier II.

An unbiased view of this question is in turn made more difficult by the fact that the patent infringement action is only based on a single or at most a few patents. This can lead to the misunderstanding that it is readily assumed that this patent or these patents are also the subject of the infringer's licensing claim and that it is therefore questionable or at least in need of justification to grant the patent proprietor the right to license the patents in question only within the framework of a patent portfolio licence or even to grant only a worldwide licence including the corresponding portfolios granted in other parts of the world. The correct question, on the other hand, must be which licensing claim follows from the prohibition to be observed by the patent proprietor to abuse its dominant market position.[51]

If one looks at things from the perspective of a licence seeker who is seeking a licence to those patents which it needs in order to be able to lawfully provide those technical functions in the countries in which it offers products or services which are necessary for marketability and, in particular, the standard compatibility required by the market, it becomes clear that the interest of such a licence seeker is neither directed towards the licensing of an individual patent or individual patents nor typically towards licensing for an individual national market. Rather, such a licence seeker is - at least as a rule - only served by a licence that allows it to use the infrastructure of technically interwoven functions described above.

However, if the licence seeker is only served by a comprehensive licence in this sense, it is difficult to justify why it should have a claim for licensing against the owner of one of the standard essential patents concerned, even if the latter is market-dominant, exclusively for that one patent and possibly also only for one of the countries for which that (European) patent has been granted. If this is the case, however, this finding is not altered by the fact that it is not the licence seeker who asserts its licensing claim, but rather the owner of that patent, because it is infringed by the user

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[51] See EWCA [Lord *Kitchin*, LJJ *Floyd, Asplin*] 23 October 2018 [2018] EWCA Civ. 2344 para. 58, 80 - Unwired Planet/Huawei; *R. Arnold*, GRUR 2021, 123 (124 seq.).

of the protected technology - for lack of licensing. If the infringer invokes its licensing claim in the legal dispute, the fact that it wants to take a licence exclusively on the patent in suit will rather lead to the conclusion that its "willingness to licence" is not far off and that its offer to conclude a licence agreement with such a limitation is not and cannot be an expression of the will to place its activity on the market on a lawful basis, but rather indicates that its interest is in fact directed exclusively towards defending against the injunction.

3. Conclusions for the abuse test

This insight is of central importance.

On the one hand, it makes it clear that this constellation of an infringer unwilling to take a licence does not involve a conflict between patent law and competition law, which should not be resolved unilaterally in favour of patent law. If, in such a constellation, the action against the infringer unwilling to take a licence is dismissed as a result of a misinterpretation by Huawei v ZTE (for example, because the patent proprietor has failed to conduct the "preliminary proceedings" properly and to make the infringer a FRAND offer that is "blameless" in every respect), it is not only the asserted patent right that falls by the wayside. The dismissal also - and completely - fails to achieve the objective of protecting competition between users of standard-essential patents, which standardisation is intended to enable and promote, from an abuse of market power by the dominant patent holders. Instead of a "level playing field" for these users, the dismissal of the action by which the patent proprietor seeks to force the conclusion of a licence agreement with the infringer unwilling to take a licence results in the creation of a "free licence", which in case of doubt distorts competition between users to a much greater extent than differences in the amount of the royalties between licensees with essentially similar interests could do.

Secondly, the focus on the licensing claim under competition law makes it clear that its examination - irrespective of whether it is asserted in an active lawsuit or held up as an defence to a claim under patent law - cannot be about whether the patent proprietor

has made a "FRAND offer" to the (real or alleged) licence seeker. Rather, the question must be whether the patent proprietor has refused the licence seeker a licence agreement on FRAND terms.

III. The refusal to grant a licence as a criterion of abuse

This does not mean that a refusal to grant a licence could only lie in the rejection of the licence offer known from the "Orange Book Standard", which the patent proprietor "may not reject". However, it again means two things:

1. Once again: The atypical access dispute

Firstly, a licence can only be denied to those who request it. In the "normal cases" of denied access to an infrastructure facility, this is quite self-evident because in these cases it is the company seeking and requiring access that either asserts the relevant claim under civil law or - as in the "Puttgarden ferry port" case - lodges a complaint with the cartel authority so that it can order the market dominator to cease its abusive refusal to fulfil the access claim. However, nothing else can apply if the company dependent on access has already obtained this access itself - through patent infringement. For it is precisely in this case and against the background of the restrictions imposed on the patentee dominating the market in the enforcement of its patent rights that the infringer's interest in concluding a licence agreement is not self-evident, since the conclusion of the licence agreement is linked to the obligation to pay appropriate remuneration for the use of the invention that has already taken place. It is precisely because of this interest, which differs from the "normal cases" of denied access to infrastructure, that the CJEU emphasised that the infringer should not pursue "delaying tactics",[52] and, following the "Orange Book Standard", considered the infringer to be

[52] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 65 - Huawei v ZTE; see also BGH 24 November 2020 - KZR 35/17, BGHZ 227, 305 para. 67 - Sisvel v Haier II.

obliged to provide security for the patent proprietor's royalty claim if the invention is used without a licence agreement.[53]

2. FRAND licensing as a process

Secondly, it does not constitute an abuse of market power if the patent proprietor makes the infringer a contractual offer that does not or at least does not fully comply with the requirements for fair, reasonable and non-discriminatory contractual conditions. This goes without saying if the patent infringer is not even interested in a FRAND licence agreement. But even if the infringer wants to pursue its claim to a licence agreement on FRAND terms, nothing else applies in principle.

Negotiations on the contractual conditions would be pointless if the patent proprietor were expected to open these negotiations with an offer that immediately meets the conditions that it must offer the licence seeker in order not to abuse its market power, but which it also does not have to go beyond in favour of the licence seeker because they are neither obstructive nor discriminatory.[54] In such a case, it may also be possible to make a counter-offer that contains deviations from the offer of the patent holder and nevertheless also fulfils FRAND conditions. However, the patent proprietor would not have to agree to this.[55]

Not unlike in other cases of negotiated infrastructure access conditions, the purpose of the negotiation process is precisely to articulate the interests of both sides in the negotiation process, to put them up for discussion and to achieve an appropriate

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[53] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 67 - Huawei v ZTE.

[54] BGH 24 November 2020 - KZR 35/17, BGHZ 227, 305 para. 73 - Sisvel v Haier II.

[55] *Kühnen* (Festschrift 80 Jahre Patentgerichtsbarkeit in Düsseldorf, 2016, 311 (315) believes that if there are two FRAND offers that differ from each other and the patent proprietor does not want to respond to the infringer's counter-proposal, the determination by a third party referred to by the CJEU is mandatory. However, it is not recognisable from which a corresponding obligation of the patent proprietor should arise (cf. *Kellenter*, Festschrift 80 Jahre Patentgerichtsbarkeit in Düsseldorf, 2016, 255 (271 et seq.).

balance.[56] Even the first element of this triad is of central importance. Only the articulated interests, which may not be recognisable to the (future) contractual partner at all or only vaguely,[57] which are relevant to the competitive position, can be made tangible in a rational process of presentation and discussion, examined for their justification as a factor to be weighed up and finally, insofar as they stand up to this examination, taken into account in the actual weighing up of interests. This is all the more important the more complex the interests involved and the more diverse the points of view that can (reasonably) be brought into the discussion. In view of the complexity of the issues that arise in a licence agreement for a large number of standard essential property rights, it seems unrealistic that one side could succeed in anticipating everything that the negotiation process is supposed to make possible as the final result of this process.[58]

3. Indirect refusal through "playing for time"

This does not exclude the possibility that an offer by the dominant patent proprietor may turn out to be a refusal to grant a licence seeker the (lawful) infrastructure access sought. Similar to the licence seeker's willingness to licence, the infrastructure owner's willingness to licence can also be feigned if it makes an offer that is not meant to be serious and is unsuitable from the outset to serve as the basis for negotiating FRAND terms. However, the special circumstances of access to the use of standard-essential patents mean that, unlike in the "normal cases" of infrastructure access, no special attention needs to be paid to this constellation:

The non-serious offer of the dominant patent holder, like the non-serious offer of the licence seeker, is an expression of an attempt to play for time; in the words of the CJEU, it is the result of a

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[56] See BGH 24 September 2002 - KVR 15/01, BGHZ 152, 84 (96 seq.) - Fährhafen Puttgarden I; BGH 24 November 2020 - KZR 35/17, BGHZ 227, 305 para. 71 - Sisvel v Haier II.

[57] *Kellenter*, Festschrift 80 Jahre Patentgerichtsbarkeit in Düsseldorf, 2016, 255 (266).

[58] BGH 24 November 2020 - KZR 35/17, BGHZ 227, 305 para. 74 - Sisvel v Haier II.

"delaying tactic". The conclusion of a contract is not rejected outright, but ostensibly sought in order to avoid the consequences of an open refusal. It therefore depends on who benefits from playing for time. The consequence of an open refusal is the conviction of the market dominator in the active process of the licence seeker, whereas in the patent infringement process with FRAND defence it is the conviction of the patent infringer. That one must first fight for access, the latter already has it. Successfully playing for time normally benefits the market dominator in the case of requested infrastructure access, who escapes the consequences of its covert refusal and can continue to block access to the infra structure it dominates. In the FRAND defence in patent infringement proceedings, the successful play for time with an alleged willingness to take a licence benefits the patent infringer, who escapes the consequences of its concealed refusal and can continue to infringe the standard essential patents to which it successfully pretends to want to take a licence and thus use them free of charge.[59] In both cases, the other side has nothing to gain by playing for time.

4. Offer of the patent proprietor versus offer of the infringer?

However, this only applies without restriction if it is taken into account that the requirements placed on the behaviour of both sides in the negotiation process are mutually dependent. As explained, the CJEU expects the infringer to make a counter-offer "that complies with FRAND conditions" if it does not accept the (first) offer expected from the patent proprietor. However, not unlike the patentee's offer, there is nothing to be said in favour of an overly literal understanding of this obligation to make a counter-offer. Rather, the aim must be to promote the desired result of a FRAND licence agreement in a targeted manner with the offer and counter-offer, as with all further negotiation steps. The closer the patent holder's first offer comes to this goal, the greater the efforts that can be expected from the patent infringer in its counter-offer. Conversely, the further away the patent proprietor's first offer is from this goal, the lower the requirements

[59] See *R. Arnold*, GRUR 2021, 123.

for the infringer's response. If necessary, it must be sufficient to point out the most serious deficiencies in the patent proprietor's offer as proof of willingness to take a licence.

However, it should also be recognised that the obligation imposed by the CJEU on the patent proprietor to make an offer to the patent infringer willing to take a licence is not only a burden but also an opportunity. Like in other negotiations, the addressee of this initial offer must in principle "work through" it; it must either get involved in its details or try to show why the offer is not suitable for such "detailed work" from its point of view. However, the latter gives him the opportunity to gain the upper hand with its own offer. Accordingly, the *Bundesgerichtshof* has already emphasised in "Orange Book Standard" that the patent proprietor who does not wish to accept the licence seeker's offer may not merely say "no" to this offer, but is obliged to offer contractual terms that are compatible with its competition law obligations in place of those it does not accept.[60]

5. Dynamic instead of static view

Contrary to first appearances, the conditions defined in the "Orange Book Standard" for an abuse of market power by the patent proprietor have not been decisively changed by the CJEU in Huawei v ZTE by the fact that the (first and) decisive offer was expected by the *Bundesgerichtshof* in that decision from the patent infringer, but by the CJEU in this decision from the patent proprietor. Rather, the main benefit of the Huawei v ZTE decision lies in the replacement of the "static" consideration of a single offer by the "dynamic" consideration of a process aimed at achieving an appropriate balance of interests. One could say that the Huawei v ZTE judgement builds a bridge between the "Orange Book Standard" and the "Fährhafen Puttgarden I" case, in which the *Bundesgerichtshof* for the first time relied on an open negotiation process - initiated by the cartel authority if necessary - as a means

[60] BGH 6 May 2009 – KZR 39/06, BGHZ 180, 312 para. 31 - Orange Book Standard.

of establishing appropriate access conditions.[61] If the focus were to be narrowed again to the isolated consideration of an individual offer, be it from the patent holder or the patent infringer, we would fall behind the level of legal development achieved.

IV. The incentivising effect of the abuse standard

If a patent infringer (not only allegedly, but genuinely) willing to take a licence meets an owner (not only allegedly, but genuinely) willing to licence a (larger) number of standard-essential patents, there is every indication that a licence agreement on FRAND terms can be negotiated between these two parties. This is because the costs and uncertainties of years of legal disputes in the style of a patent infringement lawsuit with FRAND defence are so huge that the "litigation yield" can only appear attractive to the party whose goal is not to achieve a licence agreement on reasonable terms. If the negotiation model of the CJEU is turned into a "preliminary procedure" for patent infringement proceedings, this is exactly what you get and in any case you do not achieve a legally compliant solution to the conflict over lawful access to the patent infrastructure.

1. The wrong focus of patent infringement proceedings

This is strikingly illustrated by of the enormous discrepancy between the subject matter and "themes" of these proceedings and what they should actually be about.

The first main issue in patent infringement proceedings with a FRAND defence is the infringement of the patent in suit or the (few) patents in suit; in parallel, the invalidity of this patent or these patents asserted by the infringer is typically disputed before the Federal Patent Court and in patent revocation appeal

[61] BGH 24 September 2002 - KVR 15/01, BGHZ 152, 84 (94 seq.) – Fährhafen Puttgarden I. The limitation of the (first) intervention of the cartel authority to an order to conduct negotiations instead of the determination of concrete contractual terms in the decided case is described by the Bundesgerichtshof with reference to a constitutional court decision as a "postulate of freedom" (loc. cit. p. 92).

proceedings before the *Bundesgerichtshof*. However, since the use of the standard typically requires the use of a large number of patents, it is generally not practically possible to examine each of the relevant patents individually for its standard essentiality (and thus its infringement in the absence of licensing) and for its validity. This applies all the more if the parallel patent rights in other parts of the world (which are generally not identical, but only more or less similar, especially when taking into account the differing national legal standards) are included. In order to avoid disproportionately high transaction costs, reasonable contracting parties can therefore only be satisfied with estimates for which, for example, lists of the patents in a portfolio ("Proud Lists") considered to be particularly important and valuable by the patent proprietor are used as an aid.[62] The focus of the patent infringement proceedings and complementary patent revocation proceedings is therefore wrong from the perspective of the licensing claim (asserted as a defence).

This wrong focus continues when the defence itself comes into view. For if the negotiations - and otherwise the parties would not meet in patent infringement proceedings - on a licence agreement have either not even started properly or have failed, typically with positions far removed from each other, it must be the litigation goal of both parties to assign responsibility for this failure to the other side. This is because the patent proprietor can only win the infringement lawsuit if it succeeds in doing so, and conversely, only if it succeeds in assigning responsibility for failed negotiations to the patent proprietor can the patent infringer obtain dismissal of the action even if it cannot successfully deny either the infringement or the validity of the patent in suit. In other words, the examination of the FRAND defence is not aimed at determining what fair, reasonable and non-discriminatory contractual terms are or at least could be, but at the opposite: finding as many reasons as possible why something "does not work", why the other side is accused of having demanded unfair, inappropriate or discriminatory terms or, conversely, of having

[62] BGH 24 November 2020 – KZR 35/17, BGHZ 227, 305 para. 125 - Sisvel v Haier II.

favoured itself without objective reason. Any understanding of the positions of the other side is dangerous, and the procedural "catching up" of "negotiation steps" typically does not serve to bring about a negotiation result that could also be achieved without litigation, but rather to ensure one's own success in the court proceedings.[63] The litigation objective therefore also unleashes a tremendous amount of destructive creativity in this respect - and in principle on both sides. As a result, the legal dispute does not produce the knowledge of what FRAND conditions are or would have been in the event of a dispute, but rather the knowledge of what "non-FRAND" is, and thus leaves all questions unanswered that need to be answered if a licence agreement on FRAND terms is to be concluded at the end of the dispute, which enables a legal use of the patentee's standard essential property rights.

2. The function of patent infringement proceedings in licence disputes

If, therefore, the patent infringement process with FRAND defence is structurally unsuitable, or at best only suitable under particularly favourable conditions, for bringing about the state of regulated use of standard-essential patents on reasonable terms that competition law seeks, it must concentrate on the task of sanctioning the party whose (unalterable) position on a particular issue has caused the conclusion of the contract to fail. This is precisely the aim of the CJEU with the negotiation programme from Huawei v ZTE, which is not intended as a regular prelude to patent infringement proceedings with FRAND defence or even as an instruction manual for these proceedings, but rather serves to make the decision of these proceedings - as far as the FRAND defence is concerned - dependent on the identification of the party who - by refusing appropriate contractual conditions or by unfairly playing for time - has not made the contribution to the conclusion of a licence agreement that it was expected to make.

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[63] BGH 24 November 2020 – KZR 35/17, BGHZ 227, 305 paras. 101, 126 - Sisvel v Haier II.

This is the only way to set the right incentives for the negotiation process. This is also the only way to achieve the goal of not issuing a carte blanche to the patent infringer by "containing" the market power of the dominant patent holder through the conditions outlined in Huawei v ZTE for the enforcement of injunctive relief, but rather to create suitable conditions for the negotiation of a licence agreement on FRAND terms if both parties are willing to do so.

3. Effects of incentivisation

The incentives set in this way are the right ones because, on the one hand, as mentioned above, if both parties are willing to take a licence, there should be almost every indication that an appropriate licence agreement can be negotiated, and because, on the other hand, if this is not possible, it should at least be possible to determine the difference that the parties were unable to overcome despite their mutual goodwill.

The importance of identifying such a (residual) difference at the end of a negotiation process - and not a sham negotiation to accompany patent infringement proceedings with FRAND defence - can hardly be overestimated.

Firstly, it allows the parties to (re)consider whether this difference is worth risking patent infringement proceedings, the focus of which, as shown, is on completely different issues. If the parties cannot overcome the difference by negotiating, it will be reasonable in case of doubt not to risk patent infringement proceedings, at the end of which it is all or nothing, but to agree on a different solution model. This can be a right of determination in accordance with Section 315 Civil Code (BGB), as the *Bundesgerichtshof* has already addressed in Orange Book Standard.[64] This can be the resolution of the difference by a third party such as an arbitration tribunal or an arbitrator, as suggested

[64] BGH 6 May 2009 – KZR 39/06, BGHZ 180, 312 para. 39 - Orange Book Standard.

by the CJEU in Huawei v ZTE.[65] This may be a right of reclaim or a right of additional claim, which a licence agreement concluded despite the remaining difference reserves for either the licensee or the licensor and which may be the subject of litigation, but which is then also precisely and only the issue on which the parties could not agree. Other solutions and interim solutions are conceivable, and in case of doubt, any solution is better than no solution at all.

Even if it nevertheless comes to patent infringement proceedings in which the defence of improperly refused licensing is raised, the identification of the (residual) difference because of which the parties did not succeed in bringing the negotiation process to a successful conclusion has the great advantage that the court can concentrate on examining the question, whether the position on which the patent proprietor insisted was incompatible with its obligation not to unreasonably hinder or discriminate against the licence seeker or, conversely, whether the licence seeker was not prepared to pay appropriate remuneration for the use of the intellectual property protected in the standard-essential patents.[66]

This is a question that will be answered by the courts if necessary and which it is to be hoped they will be asked rather rarely in future.

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[65] CJEU 16 July 2015 - C-170/13, GRUR 2015, 764 para. 68 - Huawei v ZTE. See also *R. Arnold*, GRUR 2021, 123 (125 seq.), who points out that this can in particular also avoid divergent decisions by different national courts on the question of which contractual terms are (not) fair, reasonable and non-discriminatory, and can also counteract the land plague of court decisions which, at the request of one party, prohibit the other from seeking legal protection in another jurisdiction ("anti-suit injunction", "anti-anti-suit injunction" and so on). It should also be considered whether the patent holder could fulfil its obligations under competition law by offering to settle a dispute that cannot be resolved by negotiation through such arbitration - what could be linked to the ETSI FRAND declaration understood as an offer to negotiate an agreement (see *P. Tochtermann*, GRUR 2021, 377 [379 seq.]).

[66] BGH 24 September 2002 - KVR 15/01, BGHZ 152, 84 (97) - Fährhafen Puttgarden I; BGH 24 November 2020 - KZR 35/17, BGHZ 227, 305 para. 74 - Sisvel v Haier II.