

**Düsseldorf Higher Regional Court, 2 U 27/21**

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**Date:** February 7, 2022  
**Court: Panel:** Düsseldorf Higher Regional Court  
**Type of decision:** 2nd Civil Senate  
**Reference** Judgment  
**number: ECLI:** 2 U 27/21  
ECLI:DE:OLGD:2022:0207.2U27.21.00

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**Previous instance:** Düsseldorf District Court, 4c O 73/20

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**Tenor:**

- I. On appeal, the judgment of the 4c Civil Chamber of the Düsseldorf District Court pronounced on July 15, 2021 is amended:
  1. The preliminary injunction issued by the 4c Civil Chamber of the Düsseldorf District Court on December 14, 2020 (Case No.: 4c O 73 /20) is revoked.
  2. The request for relief is rejected as inadmissible.
- II. The costs of the proceedings at first and second instance shall be borne by the plaintiff for the injunction.
- III. The amount in dispute for the appeal proceedings is set at € 500,000.

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**Reasons:**

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**I.**

The injunction plaintiff sues the injunction defendants, which are companies of the A. Group with headquarters in China, by way of interim relief with the aim of prohibiting them from conducting legal proceedings, in particular in China, in which it is requested that the injunction plaintiff be prohibited from enforcing its patent rights in the main proceedings pending before the Düsseldorf District Court ("anti-suit-injunction") or from enforcing any court decisions obtained in these proceedings ("anti-enforcement-injunction"), insofar as it is not guaranteed that it will be given the opportunity to state its position in such foreign proceedings before a decision is made.

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In the patent infringement actions pending before the Düsseldorf District Court (Case No. 4c O 49 /20 and 57/20), the injunction plaintiff is asserting claims against the injunction defendants of the German part of patents EP ... 318 (hereinafter: EP '318) and EP ... 245 (hereinafter: EP '245), which it claims are essential for the H. 265/MPEG-H High Efficiency Video Coding (HEVC) standard. 3

There are no pending proceedings on the merits by the injunction defendants against the injunction plaintiff to determine a FRAND license for the use of EP '318 or EP '245 in a jurisdiction that recognizes the legal institution of the anti-suit-injunction or anti-enforcement-injunction, such as China. The injunction defendants have also not filed a request for an anti-suit-injunction or an anti-enforcement-injunction against the injunction plaintiff in China or any other country. 4

In its written statement of December 11, 2020, the injunction plaintiff filed a request for a preliminary injunction, which the District Court issued on December 14, 2020, in accordance with the request. 5

Upon the objection of the injunction defendants, the District Court upheld the preliminary injunction by judgment dated July 15, 2021, in a modified version compared to the order. The operative part of the preliminary injunction in the version of the judgment reads as follows: 6

*"The injunction defendants are prohibited by way of preliminary injunction, ..., 7*

*from bringing and/or continuing any legal proceedings in the People's Republic of China claiming that the injunction plaintiff be prevented 8*

*a) to enforce its patent rights in the Federal Republic of Germany against the injunction defendants in the main action pending before the Board under the court file numbers 4c O 49/20 / 4c O 57/20, 9*

*b) to enforce any judicial decisions obtained by the injunction plaintiff in the proceedings referred to in I.1.a) above against the injunctive defendants, 10*

*if it is not ensured that the injunctive plaintiff will be given the opportunity to comment in such proceedings before a decision is made." 11*

The injunction defendants appeal against this. 12

Pursuant to Sections 540 (2), 313a (1) sentence 1, 542 (2) sentence 1 of the German Code of Civil Procedure (ZPO), no further description of the facts of the case is provided. 13

## II.

The admissible appeal of the injunction defendant is successful. The preliminary injunction is to be set aside because the request for its issuance is inadmissible. 14

1. 15

There is no need for legal protection for the issuance of the preliminary injunction sought by the plaintiff. 16

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The Board agrees in principle with the opinion of the Munich courts, which consider an injunction directed at prohibiting the request for an anti-suit injunction ("anti-anti-suit injunction") to be possible [see a)]. However, this applies with the proviso that both the basic admissibility of such an injunction and the determination of its substantive limits are questions of the need for legal protection and that an anti-anti-suit-injunction can only be considered there, only then and only to the extent that this is objectively necessary to ensure effective legal protection of the patent proprietor before German courts [see b)]. Such a necessity must be denied in the case to be decided here, in which there is no request for the issuance of an anti-suit injunction and also no valid indications for an intention of the injunction defendant to this effect and in which there are not even any pending main proceedings of the injunction defendant against the injunction plaintiff, for the protection of which an anti-suit injunction could be meaningful [see under c)].

a) 18

The (OLG) Munich Higher Regional Court (judgment of December 12, 2019, Ref.: 6 U 5042/19, GRUR 2020, 379) as well as the (LG) District Court Munich I (judgment of October 2, 2019, Ref.: 21 O 9333/19, BeckRS 2019, 25536; judgment of February 25, 2021, Ref.: 7 O 14276/20, GRUR-RS 2021, 3995; judgment of June 24, 2021, Ref.: 7 O 36/21, GRUR-RS 2021, 17662) have seen in the conduct of anti-suit-injunction proceedings an unlawful interference with the property-like rights of the owner of a standard-essential patent (hereinafter: SEP) affected by the foreign litigation prohibition and have ruled in its favor, based on Sections 1004 para. 1, 823 (1) German Civil Code (Bürgerliches Gesetzbuch, BGB), prohibiting the injunction defendant from seeking an anti-suit injunction in another jurisdiction (in the cases decided there, the USA and China, respectively) or, if such proceedings have already been instituted, from pursuing them further. 19

The conditions under which such an anti-suit injunction can be issued if the injunction defendant has not yet applied for an anti-suit injunction are discussed in particular by the LG München I and the question in question is located in the context of the risk of first occurrence necessary for a preventive injunctive claim (GRUR-RS 2021, 3995 Rz. 89 et seq, where the risk of first occurrence is discussed in the context of the reason for the injunction as the relevant point in time for the beginning of the period of urgency; GRUR-RS 2021, 17662 para. 33 et seq.). In the case decided by the Munich Higher Regional Court, a request for an anti-suit injunction filed in the USA (albeit later withdrawn with reservations) already existed, which is why the issue is only briefly addressed there, albeit also from the perspective of the risk of first appearance (GRUR 2020, 379, para. 56). 20

District Court Munich I states that the previous case law on the justification of a risk of first occurrence in the context of the risk of a request for and the issuance of a worldwide ban on legal action must be further developed. According to the previous case law of the Federal Supreme Court, the assumption of a risk of a first action requires serious and tangible factual indications that the defendant will behave unlawfully in the near future. This could not be fully accepted in the case of threatened anti-suit injunctions, in particular if they were issued without reference to a judicial measure of the patent proprietor. Finally, FRAND cases are characterized by very special circumstances which justify a different assessment of the risk of first infringement, specifically its moderate temporal advance in favor of the patent proprietor. Therefore, the user of an SEP can be required not only to prove its qualified willingness to license after receipt of the infringement notice, but also to make a binding declaration that it will not file an anti-suit-injunction against the patentee. If the 21

patent user had not promised in text form within the short time limit set by the patentee not to file a request for an anti-suit-injunction, a risk of first refusal was given. The constellation in question represents a category of cases which, in the future, will regularly justify the assumption of a risk of first refusal and thus the issuance of an anticipatory anti-suit injunction (GRUR-RS 2021, 3995, para. 90 et seq.; GRUR-RS 2021, 17662, para. 34 et seq., see also the other categories of cases of risk of first refusal developed by LG München I).

It is not entirely clear whether, according to the case law of LG München I, the foreign main action for the FRAND license must be pending or whether it can itself be waived. It is true that the groups of cases assumed by the LG München I to constitute a risk of first infringement - in particular that of a lack of a "waiver" declaration by the patent user - do not necessarily require proceedings in the main action; nevertheless, the main action pending in the (potential) issuing state of an anti-suit injunction plays a decisive role in the derivation of an advanced risk of first infringement. Since all categories of cases are based on the actions of the patent user, it is in the user's own hands to prevent the risk of first infringement from arising in the first place or to eliminate it. It could also be expected to do so, since the requests for the issuance of an anti-suit injunction that have become known so far were based on the fact that a main action pending in the issuing state was to be protected. Such main proceedings - directed at the conclusion of a FRAND license agreement or an abstract determination of FRAND license conditions - have in common the argumentation that the patent user is willing to license. If this is true, the patent user will also refrain from filing a request for an anti-suit injunction, which he must assure the patent proprietor. If it refuses to do so, the assumption of an initial risk of conduct contrary to the license is justified (GRUR-RS 2021, 3995 para. 94; GRUR-RS 2021, 17662 para. 37).

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Whether, in view of these reasoning considerations, an advance shift of the risk of first instance is to be assumed even if, at the time of the request for an anti-suit injunction, there is not yet a main action (to be protected) for a FRAND license, has not been a matter of discussion so far, because in each of the aforementioned decisions main action proceedings were actually pending. However, if the foreign procedural law allows the anti-suit-injunction request to be filed at the same time as the main action, it would be consistent with the previous case law to allow an anti-suit-injunction even without a main action already pending abroad.

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b)

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The Board agrees with the basic assumption that the institution of proceedings directed to the issuance of an anti-suit-injunction constitutes an encroachment on the absolute and even constitutionally protected rights of the patent proprietor and that legal protection must be granted against this. However, both the fundamental admissibility of a preliminary injunction directed against a foreign prohibition of litigation (anti-suit injunction) and the determination of the factual limits of such a countermeasure are not questions of substantive law, but rather the question of the existence of a need for legal protection. In this sense, the OLG Munich (GRUR 2020, 379, para. 59; differently LG München I, BeckRS 2019, 25536, para. 71 et seq.) has already correctly emphasized that an anti-anti-suit injunction constitutes a prohibition of litigation that is per se foreign to German law, for the imposition of which there is in principle already no need for legal protection. However, it is to be affirmed (exceptionally) if the prohibition of litigation imposed with an anti-suit-injunction to the detriment of the patent proprietor contradicts principles of the rule of law and is therefore

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unacceptable. Constitutional reasons allow and require an anti-anti-suit-injunction here, but only there, only then and only to the extent that this is objectively necessary to ensure effective legal protection for the patent proprietor. In the case of purely preventive requests, this is in any case generally not the case.

In detail: 26

aa) 27

The issuance of an anti-suit injunction is - within its limits to be discussed under bb) - justified and required on constitutional grounds. 28

(1) 29

In principle, everyone is constitutionally free to seek judicial protection for its interests (Article 2 (1) of the Basic Law in conjunction with the principle of the rule of law), and a request by the opponent to prohibit such action (prohibition of litigation) therefore lacks the requisite legal protection. 30

(a) 31

This applies to domestic situations in principle without exceptions. 32

It is recognized that the unimpeded conduct of state-regulated proceedings should not be impeded more than absolutely necessary in the interest of the parties involved in them, but also in the public interest (BGH, GRUR 2013, 305, 306 - Honorarkürzung). The judicial assertion of claims is privileged, i.e. the legal defense also against unjustified claims has to take place in the pending proceedings themselves, which at the same time represent a sufficient safeguard for the challenged party (Ingerl/Rohnke, Markengesetz, 3rd ed., pref. to Sec. 14-19d para. 418). The judicial examination of a claim, even an alleged one, cannot be prevented (BGH, GRUR 2005, 882, 884 - Unberechtigte Schutzrechtsverwarnung) and court-ordered prohibitions of litigation are therefore fundamentally incompatible with German law (see also Schroeder, EuZW 2004, 468, 470; Becker, EWiR 2009, 265, 266). Due process of law is only guaranteed if the parties involved can submit to the court without any restriction all facts which they consider necessary for the assessment and can file the motions which are necessary according to the state of the proceedings (Düsseldorf Higher Regional Court, decision of January 10, 1996, Ref.: 3 VA 11/95, BeckRS 1996, 940). 33

Against this background, the case law of the Federal Supreme Court denies, for example, the need for legal protection to actions which are directed at the omission or removal of statements which serve the purpose of legal prosecution in legal proceedings (BGH, GRUR 1998, 587, 589 - Bilanzanalyse Pro 7; GRUR 2010, 253, 254 - Fischdosendeckel; GRUR 2013, 305, 306 - Honorarkürzung; GRUR 2013, 647, 648 - Rechtsmissbräuchlicher Zuschlagsbeschluss). This is based on the consideration that the course of proceedings governed by the rule of law should not be influenced and its outcome should not be prejudiced by restricting the freedom of expression of a party to these proceedings by claims for injunctive relief or removal (BGH, GRUR 2010, 253, 254 - Fischdosendeckel; GRUR 2013, 305, 306 - Honorarkürzung; GRUR 2013, 647, 648 - Rechtsmissbräuchlicher Zuschlagsbeschluss). The relevance of the argument is to be clarified solely in the original proceedings which are subject to its own order (BGH, GRUR 2010, 253, 254 - Fischdosendeckel; GRUR 2013, 305, 306 - Honorarkürzung; GRUR 2013, 647, 648 - Rechtsmiss- 34

bräuchlicher Zuschlagsbeschluss). The only consequence that may be associated with unjustified prosecution is, in principle, that of dismissal of the action with costs.

(b) 35

Prohibitions on litigation are also inadmissible within the European Union. Those are incompatible with the principle of mutual trust underlying the Brussels Convention (ECJ, EuZW 2004, 468, 469 - Turner/Grovit et al.; NJW 2009, 1655, 1656 - Allianz SpA vs. West Tankers Inc.; judgment of May 13, 2015, Ref.: C-536/13, para. 13 at juris; MüKo ZPO-Gottwald, 6th ed., Art. 29 Brussels la Regulation para. 28; Rauscher-Mankowski, Europäisches Zivilprozess- und Kollisionsrecht, 5th ed., Preliminary Note to Art. 4 para. 50; Becker, EWiR 2009, 265, 266). 36

(c) 37

With regard to litigation that is to be prohibited outside Europe, it may be understood as an expression of our principle of the rule of law not to limit access to state courts for anyone in general (at home or abroad). Whether this should exclude legal proceedings that are not conducted under the rule of law, and whether for such cases - by way of exception - a noteworthy interest in judicial enforcement should be denied, can be left open. A certain (such as the request for an anti-suit injunction) does not at any rate deserve the stamp of a lack of rule of law merely because it is alien to German and/or European law. 38

(2) 39

In the context of SEP litigation, however, it is not a matter of prohibiting the patent infringer from bringing an action in its home courts for a decision on FRAND licensing. The subject matter of the protective order of the German court is not the foreign licensing action of the infringement defendant, but only the accompanying litigation prohibition for the SEP holder, the anti-suit injunction. Such a prohibition cannot be accepted, if only because, from the point of view of the rule of law, not only the infringement defendant must have free access to the courts of its choice, but the same right is naturally also due to the SEP holder, who can accordingly claim institutional protection for its litigation in Germany (cf. Art. 47 EU Charter of Fundamental Rights). This applies all the more beyond considerations of the rule of law, as granted patents enjoy the unlimited property protection of the Basic Law (BVerfG, decision of January 15, 1974, Ref.: 1 BvL 5/70, BeckRS 1974, 104366 Rz. 21; Sachs, Grundgesetz, 9th ed, Art. 14, para. 24) and the EU Charter (cf. Art. 17 (2) EU Charter of Fundamental Rights; also von der Groeben/Schwarze/Hatje-Wollenschläger, Europäisches Unionsrecht, 7th ed., Art. 17 GRC, para. 39), and it is virtually a core element of the property guarantee that the owner of the property right can effectively enforce his rights to prohibit the patent against third parties. For it is precisely in these rights that the actual value of the monopoly right associated with the grant of the patent is embodied. In this respect, a judicial component is inherent in the property protection to be granted by the state, which requires that a system of granting rights be provided that guarantees the owner (or the other entitled party) effective patent enforcement thanks to its personnel and material resources, through its set of rules and their application by the courts. The principle of the rule of law and the constitutional protection of property rights also require a defense against external interference in the patent infringement process. 40

bb) 41

The fact that in principle a need for legal protection for the patent proprietor's request to prohibit the patent user from instituting proceedings directed to the issuance of an anti-suit injunction is to be recognized does not mean, however, that a need for legal protection can be affirmed without restriction. In order to be justified for reasons of the rule of law and the protection of property, the issuance of an anti-suit-injunction must rather be objectively necessary for the granting of effective legal protection in favor of the patent proprietor. 42

(1) 43

In this context, it must be considered in the starting point that the protective order, should it become necessary with regard to the issuance of an anti-suit-injunction, can be obtained by the patent proprietor by way of interim legal protection - and thus at very short notice, if necessary even by way of a decision. In order to answer the question whether a protective order subsequent to the anti-suit-injunction sufficiently protects the interests of the SEP proprietor or whether it is constitutionally required to intervene already in the run-up to an anti-suit-injunction in order to avoid unreasonable disadvantages for the SEP proprietor, two possible sequences of events must be taken into account: 44

(a) 45

It is possible that the injunction court accepts the court order for the protection of the patent infringement process which is contrary to its own anti-suit-injunction and complies with it by refraining from sanctions against the SEP proprietor who continues the infringement process because of it. In this case, there is no need for an anticipatory protective order based on conjecture, because a protective order that sufficiently safeguards the SEP holder in its legal prosecution can also be issued in good time after an anti-suit injunction has been issued. 46

(b) 47

If the injunction court cannot be prevented from sanctioning infringements of its prohibition to conduct proceedings by a protective order - which it considers to be foreign - the SEP holder also has nothing to gain from the fact that it is granted a protective order in anticipation of a merely feared anti-suit injunction. This is because the injunction court will disregard it in the same way as it would disregard such a protective order that is issued only after an anti-suit injunction and upon which the injunction court (at the request of the infringer) issues an anti-anti-anti-suit injunction order and, based on this, sanctions the continuation of the infringement proceedings - despite the anti-anti-suit injunction that has been issued in the meantime. Insofar as the prohibition of litigation is tied to an application, however, an anticipatory protective order conveys protection for the patent proprietor insofar as a request in violation of the prohibition enables the possibility of punishment with the means of order under Section 890 of the German Code of Civil Procedure (ZPO). Irrespective of whether every infringement defendant can actually be prevented from filing an anti-suit-injunction request, the suitability of the penalty order to exert an influence on the infringement defendant cannot be denied, at least in advance, with the result that the anticipatory protective order - under the special circumstances discussed - must be regarded as suitable in principle to ensure the undisturbed conduct of the patent infringement proceedings. 48

Although this is the case, it is important not to stop at these considerations, which unilaterally reflect the interests of the patent proprietor alone. Rather, it must be kept in mind that in view of the large number of disputes arising from standard-essential patents the 49

request for, and issuance of an anti-suit injunction is the rare exception. This finding prohibits the issuance of a protective order without the existence of substantive evidence solely because of the purely abstract possibility for the infringement defendant to avail itself of it. For it is also an expression of the principle of the rule of law that the rights of another (here: the defendant in the injunction) may only be interfered with if there is a reason justifying the state intervention. And this cause presupposes a factual situation which, in an overall consideration of all circumstances, permits the sufficiently certain conclusion that a request for an interdiction interfering with the patent infringement process is to be seriously expected in the near future. Otherwise, the legal position of indeterminate patent users would be interfered with indiscriminately, which obviously contradicts the principle of proportionality. Under this principle, a fair balance is required between the legitimate concern of the SEP holder to be able to continue the patent infringement process undisturbed and the countervailing interest of the infringement defendant not to be burdened with a protective order without sufficient cause on the basis of mere presumptions.

Waiting for tangible indications of the risk of an anti-suit injunction is all the more acceptable for the SEP holder as any user of an SEP who obtains a litigation prohibition against the SEP holder, which cuts off the latter's possibility of legal protection against this at the place of the infringement action, is to be regarded as obviously unwilling to license with the consequence that he is to be ordered to cease and desist without further ado. An infringement defendant which takes the aforementioned route therefore assumes a considerable litigation risk, which it will reasonably weigh carefully in advance. It may be that SEP holders doing business in China face sanctions there that make it impossible for them to continue German infringement litigation for reasons of economic rationality, so that the lack of willingness to license associated with the enforcement of the foreign litigation prohibition by the infringement defendant cannot work in their favor. The legal protection provided to the SEP holder may be considered inadequate in view of this. However, the said inadequacies have nothing to do with the question of whether it is possible to intervene against a foreign litigation prohibition in advance or in retrospect, but are simply a consequence of the realities arising from Chinese judicial practice.

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(2)

Against this background, an objective necessity for a purely preventive anti-suit-injunction cannot be recognized if there is no anti-suit-injunction already requested or no concrete indication of a plan to that effect by the patent user - for example in the form of a serious threat - and if there are not even proceedings on the merits pending between the parties in a jurisdiction that provides for the legal institution of the anti-suit-injunction. In such a case, the patent proprietor can and must be expected to wait for the further conduct of the patent user, taking into account the considerations outlined under (1).

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Contrary to the opinion of the LG Munich I, it is also not to be required of the user of an SEP after receipt of the infringement notice that it not only declares its willingness to license but also assures the SEP holder that it will not request an anti-suit-injunction. Whether and under what precise conditions the lack of response to any inquiries can be taken into account when assessing the objective necessity of an anti-suit injunction because the SEP user has certain duties (or obligations) to declare, does not require a

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fundamental decision in the present case. In any case, it cannot be demanded of the SEP user and possible license seeker to declare without cause in response to a merely insinuating inquiry whether it is willing to waive requests for an anti-suit injunction during the duration of the infringement proceedings. If a license seeker were to be required to answer such inquiries at all, it would at least have to be possible to establish concrete and reliable indications of its intention to make use of the anti-suit-injunction remedy as soon as possible. The legal possibility of such requests in some jurisdictions of the world alone does not mean that the license seeker will resort to them.

c) 54

In the case to be decided, there is no objective necessity for the issuance of an anti-suit injunction and thus no need for legal protection. 55

This is a purely precautionary request by the injunction plaintiff, which is not based on any concrete indications for the issuance or even a corresponding request by the injunction defendant, and which is not necessary to ensure effective legal protection. 56

aa) 57

Thus, there is not only a lack of an issued or even only requested prohibition of litigation. 58  
There are also no indications that the injunction defendants intend to apply for an anti-suit injunction against the injunction plaintiff. After all, there is not even a main action for the protection of which such a remedy could be useful and helpful. Without such, it cannot be determined why - as assumed by the District Court - China of all places should be the jurisdiction in which the injunction defendants could resort to the remedy of an anti-suit-injunction.

This assessment is not affected by the fact that affiliated companies of the injunction defendant in a single case (decision of the Intermediate People's Court of Hunan Province, City of Wuhan of September 23, 2020 in the case A. vs. B., Exhibit ES 4) have successfully applied for an anti-suit injunction in China. In this regard, neither the statements of the injunction defendant regarding the previous, allegedly unfair conduct of B. nor the arguments of the injunction plaintiff regarding the central control of such decisions within a corporate group are relevant. The decisive factor is that the request there was based on a completely different set of facts. Thus, an action on the merits by the applicants there (different companies of the A. group from the defendants in the injunction) was already pending in China for determination of a global FRAND rate when the defendants there (B.) applied in India for a temporary and permanent injunction against A. for patent infringement (see Annex ES 4). There are no indications that the injunction defendants in the present case - without prior pendency of such an action on the merits - intend to apply for an anti-suit injunction against the injunction plaintiff. 59

Insofar as the District Court based its decision on the fact that the group of companies of the injunction defendant had already resorted to the legal construct of the anti-suit injunction on several occasions in order to comprehensively protect its interests in China and thereby bring other foreign legal proceedings to a standstill (cf. p. 18 of the judgment under appeal), this is not comprehensible. The decision of the British High Court of Justice of October 26, 2020 (submitted in English as Annex ES 7) is reproduced by the District Court 60

to the effect that this decision prohibited A. from applying for an anti-suit injunction. The starting point for this decision had been, among other things, the anti-suit injunction of October 23, 2020 in favor of A. against B. and it had been concluded from this that A. had the potential inclination to file such a request also there in the (British) proceedings.

Despite the difference in the date of the addressed decision A. vs. B. (October 23, 2020 instead of September 23, 2020), the British judgment clearly addresses one and the same request of A. group companies, which has already been discussed and which is also interpreted by the District Court as the first recourse of the A. group to the legal institution of anti-suit injunction. Contrary to the opinion of the District Court, the multiple use of this remedy by group-affiliated companies of the injunction defendant cannot be established on this basis. 61

bb) 62

Against this background, it can be left open whether a request for the issuance of an anti-injunction could be filed successfully at all without previously pending proceedings on the merits in China, or whether such a request could be sufficiently determined with the possibilities of knowledge available in the course of interim legal protection. 63

However, it is certain that in the decisions of Chinese courts discussed by the parties, there were main proceedings for the protection of which the anti-suit injunction (A. vs. B., C. vs. D., E. vs. F.) or anti-enforcement injunction (G. vs. H.) was issued. The fact that this was not already pending beforehand, but was filed simultaneously with the request for the issuance of an anti-suit injunction, is only claimed by the injunction plaintiff for the case E. vs. F. (cf. the opinion of the Supreme People's Court dated April 23, 2021, Exhibit ES 19a). The exact chronological sequence, i.e., for example, the question of whether the main action had been served on the defendant there prior to the issuance of the anti-suit injunction, cannot be inferred from the submissions of the injunction plaintiff. This is also not apparent from the submitted opinion of the Supreme People's Court, which, moreover, contains only a brief summary of the case. 64

cc) 65

The injunction plaintiff also does not claim that the injunction defendants have threatened to file an anti-suit injunction or have otherwise specifically held out the prospect of doing so. Such cannot be inferred from the procedural conduct of the injunction defendants, which is limited to a defense against the request of the injunction plaintiff and the representation of the legal opinion of not being obligated to submit declarations. It is true that the injunction defendants have also not clearly stated that they would not make use of the means of anti-suit injunction. However, this does not provide any evidence for the objective necessity of an anti-suit-injunction, because the injunction defendants did not have to declare themselves without cause in response to an - in any case non-existent - express request by the injunction plaintiff setting a deadline or in response to the request of the District Court at the oral hearing. 66

d) 67

The above statements apply accordingly to the prohibition of a request for an anti-enforcement injunction sought by the injunction plaintiff. Moreover, such a prohibition is not objectively necessary a fortiori because it cannot be established on the basis of the submissions of the injunction plaintiff that a judgment has already been issued in the main 68

proceedings pending before the Düsseldorf District Court (Case No.: 4c O 49 /20 and 4c O 57/20), the enforcement of which could be prohibited by way of an anti-enforcement injunction.

2. 69

In view of the lack of a need for legal protection, it can be left open whether the admissibility of the request is not already precluded by the fact that the injunction defendants are only) to be prohibited from applying for an anti-suit injunction or anti-enforcement injunction "insofar as it is not guaranteed that the injunction plaintiff will be given the opportunity to comment in such proceedings before a decision is made". 70

a) 71

It is completely unclear whether the injunction defendants can exert any decisive influence at all to the effect that the injunction plaintiff is granted a hearing by the Chinese court prior to an anti-suit-injunction, or whether, if this is not the case, they are not inadmissibly being ordered by the court to do something that lies outside their sphere of influence. The injunction plaintiff also does not explain in what way exactly the injunction defendants could ensure the granting of a legal hearing in anti-suit-injunction proceedings. A mere right to file a request would only be relevant in this context if the Chinese court had to comply with the request as a matter of law or if it could be expected, at least as a rule, that the Chinese court would regularly exercise its discretion in the conduct of the proceedings to the effect that it would follow the suggestion of the petitioner. The submissions of the petitioner do not address either of these issues. 72

b) 73

Insofar as the injunction plaintiff pointed out at the hearing that its aim with the request for an injunction was to obtain knowledge of a pending anti-suit injunction request by means of the requested comment period and thereby in turn to obtain the opportunity to apply for an anti-suit injunction in advance, which it would be prevented from doing if and as soon as the foreign prohibition of litigation is in place, because the anti-suit injunction in China is or could be coupled with the prohibition under criminal law. If it were to be possible to defend oneself against it, this request would not really be reflected in the request for an injunction pending before the court. The correct wording of the application should have been that the defendants are prohibited from filing an anti-suit-injunction request in China without first notifying the plaintiff of this in writing (if necessary, observing a certain deadline). Ultimately, however, the inadequacies in the wording of the request are irrelevant because a request to this effect cannot lead to success on the merits. 74

aa) 75

It is true that without the issuance of an anticipatory anti-suit injunction, a necessarily subsequent request for a protective order against the foreign litigation prohibition is required and that the prohibition to defend against the anti-suit injunction is violated in a sanctionable manner. However, the economic situation for the patent proprietor is not fundamentally different due to the fact that he obtains a protective order prior to the issuance of a litigation prohibition. There is no evidence whatsoever that a Chinese court can be deterred in any way from issuing and enforcing an anti-suit injunction against the 76

SEP proprietor by issuing an anti-suit injunction in advance. On the contrary, life experience speaks for the opposite. The SEP holder is therefore by no means protected by the anticipatory protective order of a German court from being prohibited from taking legal action. If an anti-suit-injunction - as claimed - is coupled with the prohibition to defend against it, it is in the logic and consequence of such a measure that the sanction provided for an infringement is not simply dropped in the case of an anticipatory anti-suit-injunction, but is linked to the obligation imposed on the patent proprietor by the subsequent anti-suit-injunction to withdraw the anti-suit-injunction request. In the one case as well as in the other, the owner of the property right has to face the same disadvantages (sanctions) if he legally opposes a Chinese ban on litigation in Germany. In view of this economically completely identical sanctioning situation, the SEP holder has no advantage from an anticipatory protective order and can therefore be expected to wait with the request for an anti-anti-suit injunction until a litigation prohibition against it is actually in the world (or, as the case may be, tangibly imminent).

bb)

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If it is assumed that, despite the anticipatory protective order, there can only be a prohibition of litigation with the sanctioning consequences indicated if the injunction defendants file a request to that effect with the court, then these are not subject to any restrictions (in particular those threatened by means of an order). Because if the injunction defendants have complied with their duty to notify, the anticipatory protective order sought by the injunction plaintiff does not prevent them from subsequently seeking a sanctionable anti-suit injunction.

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As a result of the notification, however, the injunction plaintiff is given the opportunity to seek a protective order prohibiting *this* request before the anti-suit injunction announced to it is issued. Even if the injunction plaintiff succeeds in obtaining the anti-suit-injunction in sufficient time so that the prohibited litigation constitutes an infringement to be sanctioned by means of an order, and even if the associated prospect of enforcement dissuades the injunction defendants from filing an anti-suit-injunction request, the aspect already discussed above must still be taken into account that the prohibition on filing a request, which is made subject to the condition of a duty to report, also represents an encroachment on the legal sphere of the injunction defendants, which requires sufficient justification. This encroachment may also not be indiscriminate and arbitrary, but requires tangible indications that the injunction defendant poses a serious risk of a ban on litigation at the relevant time of the decision. Whether such indications can be of lower importance than those circumstances which permit an immediate unconditional prohibition of the request can be left open. Those indications must at any rate not be exhausted by the consideration that the infringement defendant has the fundamental possibility to file an anti-suit-injunction request if - as in the case in dispute - there are no meaningful further indications that it will actually avail itself of this possibility in the foreseeable future.

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III.

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The decision on costs is based on Section 91 (1) sentence 1 of the German Code of Civil Procedure.

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There was no need for a ruling on provisional enforceability because the present judgment, as a second-instance decision in the proceedings for a temporary injunction, is no longer

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subject to appeal (Section 542 (2) sentence 1 of the Code of Civil Procedure) and is finally enforceable without any special ruling.

Source: [www.nrwe.de](http://www.nrwe.de)