



# FEDERAL SUPREME COURT

## IN THE NAME OF THE PEOPLE

### JUDGMENT

X ZR 123/20

Delivered on:  
January 24, 2023  
Schönthal  
Judicial Employee as  
Clerk of the Court

in the litigation

Reference book:       yes  
BGHZ:                    yes  
BGHR:                    yes

CQI Report II

Code of Civil Procedure (ZPO) § 138 para. 4

In patent infringement litigation, the party against whom a claim is asserted may generally be required to respond specifically to the opponent's submissions on the technical features of the embodiments under attack.

German Patent Law (PatG) § 14

- a) The question of whether and to what extent rights from a patent are exhausted by the marketing of products is to be assessed according to the law of the country of protection (supplement to BGH, judgment of February 22, 2022 - X ZR 103/19, GRUR 2022, 1209 para. 42 - Bakterienkultivierung).
- b) A covenant not to sue generally results in the exhaustion of rights with respect to products placed on the market on that basis.
- c) For the question of whether a covenant to be sued last leads to exhaustion, it is of particular importance whether the contracting party, in the course of events normally to be expected, must fear being held liable by the patent proprietor for infringement of the patent.
- d) Consent to the marketing of a product may be deemed to be consent to the marketing of a major device equipped with it if that is the only commercially reasonable use.
- e) Consent to the marketing of a product may lead to exhaustion of rights with respect to a larger device equipped with it if all the properties and functions defined in the patent are realized by the product covered by the consent and the other components of the larger device are of no significance in this respect.

BGH, judgment of January 24, 2023 - X ZR 123/20 - OLG Karlsruhe  
LG Mannheim

ECLI:DE:BGH:2023:240123UXZR123.20.0

The X. Civil Senate of the Federal Supreme Court, at the hearing on January 24, 2023, by the Presiding Judge Dr. Bacher, the Judges Hoffmann and Dr. Deichfuß, the Judge Dr. Marx and the Judge Dr. Crummenerl

ruled:

On appeal by the defendant, the judgment of the 6th Civil Senate of the Karlsruhe Court of Appeal of November 25, 2020 is set aside.

The matter is referred back to the Court of Appeal for a new hearing and decision, including on the costs of the appeal.

By law

Facts of the Case:

1           The plaintiff has been recorded in the patent register since July 3, 2014, as the owner of European Patent 2 294 737 (patent in suit), which was filed on April 2, 2009, and was granted with effect for the Federal Republic of Germany.

2           The patent in suit relates to a method for receiving a control channel signal from a base station as well as to a mobile terminal for carrying out this method. Claim 1, to which seven further claims are referred back, protects a method. Claim 9, to which six further claims are referred back, protects a mobile station and reads in the language of the method:

A mobile terminal comprising  
a receiver adapted to receive a control channel signal from a base station, wherein the control channel signal comprises a Modulation and Coding Scheme, MCS, Index, information on resource blocks used for the transmission from the mobile terminal to the base station, and a channel quality information trigger for triggering a transmission of an aperiodic channel quality information report to the base station,  
characterized in that the terminal further comprises  
a processor adapted to determine whether the channel quality information trigger is set and whether the control channel signal indicates a predetermined value of the MCS Index and indicates a number of resource blocks that is smaller than or equal to a predetermined resource block number, and  
a transmitter adapted to transmit the aperiodic channel quality information report to the base station without multiplexing the aperiodic channel quality information report with Uplink Shared Channel data, in case the determining step yields a positive result.

3           The nullity action brought by the defendant, among others, against the patent in suit was unsuccessful (BGH, judgment of January 18, 2022 - X ZR 14/20, GRUR 2022, 546 – CQI-Bericht).

4           The defendant sells mobile communications devices in Germany that it describes as compatible with the "Long Term Evolution" (LTE) Standard. The plaintiff claims that the sale of these devices infringes the patent in suit.

5           The District Court ordered the defendant to provide information and to  
render account and found the defendant liable for damages. It dismissed the  
further action for injunctive relief, destruction and recall. On appeal by the plaintiff,  
the Court of Appeal granted the claims in full. It dismissed the appeal of the  
defendant.

6           In its revision, which was allowed by the Court of Appeal, the defendant  
continues to seek dismissal of the action.

Reasons for Decision:

7           The admissible revision is well-founded. It leads to the reversal of the  
contested decision and to the remittal of the case to the Court of Appeal.

8           I.     The Court of Appeal gave the following main reasons for its decision:

9           The devices under attack made use of the teaching of claim 9 of the patent  
in suit. They operate according to the LTE Standard. This standard specifies that  
the information about the allocated resource blocks (N<sub>PRB</sub>) is not transmitted  
directly. Instead, the number of resource blocks can be calculated from a  
Resource Information Value (RIV) transmitted by the base station using a formula  
laid down in the standard. This was sufficient to realize the features of claim 9.  
The defendant had not disputed the relevant submissions of the plaintiff. Contrary  
to the view of the defendant, the patent claim also does not exclude that other  
events are also understood as a command to send a CQI report without  
multiplexing.

10           The defendant could not successfully invoke exhaustion. The contracts that the plaintiff had concluded with various manufacturers of chipsets did not prevent it from asserting the claims pursued in the action. In the contracts with the two manufacturers of the chipsets used in the mobile devices under attack, the plaintiff had agreed not to assert claims against the chipset manufacturers until after all third parties who could be challenged for infringing acts. Even an agreement not to sue the other party for patent infringement (covenant not to sue) cannot be classified as consent to the marketing of patented products. This applies all the more to an agreement of the content in question here (covenant to be sued last), by which an action against the contracting party is not excluded, but only postponed.

11           Finally, the enforcement of the claims arising from the patent in suit is not precluded by the prohibition of abuse of a dominant position under Article 102 TFEU.

12           II.    This decision does not withstand legal review in one crucial respect.

13           1.    The Court of Appeal did not err in law in assuming that the defendant makes use of the technical teaching according to claim 9 of the patent in suit by offering and marketing the devices under attack that comply with the specifications of the LTE Standard.

14           a)    The patent in suit deals with the signaling of control signals in a mobile radio system.

15           aa)   In such a system, user data and control signals are exchanged between the mobile terminal and the base station via an air interface. By means of the control signals, the mobile station can request the allocation of resources and the base station can allocate such resources. As the patent application describes, at least some of the resources are dynamically allocated to the various terminals.

16           The quality and speed of the transmission depend, among other things, on the coding rate and modulation. The base station informs the mobile station which coding and which modulation is to be selected in each case by informing it of a Modulation and Coding Scheme (MCS) via a control signal. An MCS index can be used for this purpose, the values of which each represent a specific combination of modulation and coding.

17           The channel quality is important for the selection of the modulation and coding scheme. If this is high, the coding rate requirements can be reduced and the degree of modulation increased. The terminal informs the base station of the channel quality it has determined in the form of a Channel Quality Indication report (CQI report). A CQI report can be transmitted via the Physical Uplink Shared Channel (PUSCH), for example. This report may be periodic or aperiodic. The patent in suit deals with the aperiodic CQI report.

18           The base station can request an aperiodic CQI report by means of a corresponding control signal (CQI trigger) via the Physical Downlink Command Channel (PDCCH). This is to be done with as little effort as possible (para. 44). As the patent application states, the aperiodic CQI report is normally transmitted in multiplex, i.e. together with user data (para. 41), unless the data buffer of the mobile terminal is empty. This increases the risk of a transmission error.

19           bb) With this in mind, the technical problem is to enable the request for an  
aperiodic CQI report with low signaling overhead and to reduce the risk of an error  
in the transmission of such a report.

20           cc) To solve this object, claim 9 provides a mobile terminal whose features  
can be divided as follows:

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9	A mobile terminal comprising	Mobiles Endgerät, umfassend
9.1	a receiver, adapted to receive a control channel signal from a base station, wherein the control channel signal comprises	einen Empfänger, der ausgelegt ist zum Empfangen eines Steuerkanalsignals von einer Basisstation, das umfasst:
9.1.1	a Modulation and Coding Scheme Index,	einen Modulations- und Codierschema-Index,
9.1.2	information on resource blocks used for the transmission from the mobile terminal to the base station,	Information über Ressourcenblöcke, die zur Übertragung von dem mobilen Endgerät an die Basisstation verwendet werden,
9.1.3	a channel quality information trigger for triggering a transmission of an aperiodic channel quality information report to the base station;	einen Kanalgüteinformationsauslöser zum Auslösen einer Übertragung eines aperiodischen Kanalgüteinformationsberichts an die Basisstation;
9.2	a processor adapted to determine	einen Prozessor, der ausgelegt ist zu bestimmen,
9.2.1	whether the channel quality information trigger is set and	ob der Kanalgüteinformationsauslöser gesetzt ist und
9.2.2	whether the control channel signal indicates a predetermined value of the MCS-Index and	ob das Steuerkanalsignal einen vorbestimmten Wert des MCS-Index anzeigt und
9.2.3	a number of resource blocks that is smaller or equal to a predetermined resource block number;	eine Anzahl von Ressourcenblöcken, die kleiner oder gleich einer vorbestimmten Anzahl ist;



9.3	a transmitter, adapted to transmit the aperiodic channel quality information report to the base station without multiplexing the aperiodic channel quality information report with Uplink Shared Channel data, in case the determining step yields a positive result.	einen Sender der ausgelegt ist, den aperiodischen Kanalgüteeinfor-mationsbericht an die Basissta-tion ohne Multiplexen mit Uplink-Shared-Channel-Daten zu sen-den, falls der Bestimmungsschritt ein positives Ergebnis zeitigt.
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22            dd) The resource blocks addressed in features 9.1.2 and 9.2.3 are, according to the description of the patent in suit, the smallest units of resources available for transmitting data over the air interface.

23            The base station allocates a certain number of such blocks to the terminals depending on the available capacities and the prevailing conditions. The terminal checks whether the control channel signal contains a CQI trigger and a specific value for the MCS index and whether the communicated number of resource blocks is less than or equal to a predetermined comparison value. If this check leads to a positive result, the terminal understands this as an instruction to transmit an aperiodic CQI report, regardless of whether the data buffer of the terminal is empty and without multiplexing with Uplink Shared Channel Cata.

24            b) Without success, the revision challenges the decision of the Court of Appeal that the devices under attack fulfill all features of claim 9.



25           aa) The Court of Appeal rightly decided that the defendant cannot  
effectively dispute the plaintiff's submission on the functioning of the devices under  
attack with ignorance.

26           (1) Pursuant to Section 138(4) of the Code of Civil Procedure, a declaration  
of ignorance is admissible only in respect of facts which are neither the party's own  
acts nor the subject of the party's own perception.

27           In the case of legal entities, the actions and perceptions of their legal  
representatives are decisive in this respect. In addition, according to the case law  
of the Federal Supreme Court, a party has the obligation to obtain the information  
necessary for a qualified denial, insofar as it concerns events in the area of  
persons who have acted under their guidance, supervision or responsibility (cf.  
only BGH, judgment of January 8, 2019 - II ZR 139/17, NJW-RR 2019, 747 para.  
34; judgment of April 19, 2001 - I ZR 238/98, GRUR 2002, 190, 191 - DIE PROFIS;  
judgment of November 15, 1989 - VIII ZR 46/89, BGHZ 109, 205, 209).

28           (2) Accordingly, it is generally not sufficient for a party offering or marketing  
a product that is attacked as infringing to deny with ignorance concrete arguments  
of the opposing party regarding its technical features.

29           A party offering a product or placing it on the market may not evade  
responsibility for an infringement inherent therein by failing to take note of the  
product's characteristics and mode of operation. If such a party does not have the  
relevant information itself, it is obliged, as far as possible and reasonable, to obtain  
this information from third parties, for example by asking manufacturers and  
suppliers or by conducting its own investigations. In infringement disputes, the  
party against whom a claim is made can therefore generally be required to respond  
specifically to the opponent's submissions on the technical features of the  
embodiment under attack (Düsseldorf Court of Appeal, judgment of January 20,  
2017 - 2 U 43/12, juris para. 166; judgment of December 8, 2016 - 2 U 6/13, juris  
para. 75 et seq.; judgment of December 17, 2015 - 2 U 54/04, juris para. 144;

Mannheim District Court, Judgment of May 4, 2010 - 2 O 142/08, InstGE 12, 136, juris para. 214; Kühnen, Handbuch der Patentverletzung, 15th ed., chapter B para. 10; Ceph/Voß/Nielen, Prozesskommentar Gewerblicher Rechtsschutz und Urheberrecht, 3rd ed., § 138 ZPO para. 36; Musielak/Voit/Stadler, ZPO, 19th ed., § 138 para. 17).

30           Contrary to the opinion of the revision, this does not result in excessive requirements for the infringement defendant. Even before starting to sell a technical product, a company must check whether it falls within the scope of protection of third-party technical property rights (BGH, judgment of December 15, 2015 - X ZR 30/14, BGHZ 208, 182 para. 114 et seq. - Glasfasern II). If it fulfills this obligation, it is regularly in a position to respond to submissions on the properties of the product in the required manner. If it fails to comply with this obligation, this must not be to the detriment of the other party.

31           (3) In case of dispute, the defendant has merely contested with ignorance the argument concerning the calculation of the number of allocated resource blocks on the basis of the resource indication value (RIV). This dispute is irrelevant for the reasons explained above.

32           The revision refers to submissions by the defendant that a calculation of the number of resource blocks from RIV is not readily mathematically possible and that the plaintiff has not sufficiently substantiated its submission on the calculation of  $N_{PRB}$  from RIV.

33 This submission does not contain any substantive comments on the specific arguments of the plaintiff. It exhausts itself in casting doubt on the plaintiff's submission, but does not show from which concrete circumstances doubts could arise.

34 Contrary to the opinion of the revision, it is reasonable for the defendant, for the reasons explained above, to obtain more detailed knowledge about the functioning of the chips installed in the challenged devices and about the specifications contained in the LTE Standard if it wants to counter the plaintiff's argument. The fact that it and its affiliated companies were not involved in the development of this standard does not prevent this. Rather, the decisive factor is that the defendant sells devices that indisputably comply with the standard.

35 bb) Without success, the appeal challenges the assumption of the Court of Appeal that the devices under attack are capable of determining whether the transmitted number of resource blocks is less than or equal to a predetermined value within the meaning of feature 9.2.3.

36 The Court of Appeal explained in detail that the technical specification TS 136.213 (v.8.8.0) of the European Telecommunication Standards Institute (ETSI) provides for an instruction to the mobile station to carry out a corresponding test. The appeal does not identify any legal errors in this respect.

37 cc) Contrary to the opinion of the revision, it does not prevent the realization of feature 9.3 that the devices under attack transmit a CQI report without multiplexing not only under the conditions defined in feature group 9.2, but also in other situations, such as when the corresponding memory does not contain any user data or when the allocated resources are so scarce that these are only sufficient for the CQI report.

38 The interpretation taken by the Court of Appeal as a basis, according to which claim 9 does not exclude such transmission processes, is consistent with the understanding of the patent developed by the Senate in the nullity proceedings (BGH, judgment of January 18, 2022 - X ZR 14/20, GRUR 2022, 546 para. 33 et seq. - CQI report). The appeal does not point out any aspects that lead to a different assessment.

39 2. However, with the reasoning given by the Court of Appeal, an exhaustion of the rights from the patent in suit cannot be denied.

40 a) As the Court of Appeal correctly assumed, the question of which effects arise from contractual agreements between a patent owner and third parties is to be assessed according to the law of the country of protection, i.e. in the case in dispute according to German law (BGH, judgment of February 22, 2022 - X ZR 103/19, GRUR 2022, 1209 para. 42 - Bakterienkultivierung; Busse/Keukenschrijver/McGuire, PatG, 9th edition, § 15 para. 17).

41 The same applies to the question of whether and to what extent rights under a patent are exhausted by putting products on the market. In this respect, too, it is a question of the protective effects of the patent vis-à-vis third parties.

42 b) The considerations made by the Court of Appeal do not support the conclusion that a covenant to be sued last does not lead to exhaustion with regard to products which have been put on the market on the basis of such an agreement.

43 aa) Contrary to the opinion of the Court of Appeal, a covenant not to sue generally leads to the exhaustion of rights with regard to products placed on the market on this basis.

44 (1) According to the established case law of the Federal Supreme Court, the exclusive right under a product patent is exhausted with respect to those copies of the protected product which have been put on the market by the patent owner or with its consent by a third party. The lawful acquirers as well as subsequent third party acquirers are authorized to use these products as intended, to sell them to third parties or to offer them to third parties for one of these purposes (BGH, judgment of November 8, 2022 - X ZR 10/20, GRUR 2023, 47 para. 41 - Scheibenbremse II; judgment of October 24, 2017 - X ZR 55/16, BGHZ 216, 300 para. 35 - Trommeleinheit).

45 If the patent owner has exercised the powers associated with the exclusive right by placing the patented subject matter on the market by itself or with its consent by a third party, there is no longer any reason according to the meaning and purpose of the patent law to give it any further possibilities to influence the further fate of the protected subject matter. Disposing of this object is now a matter for the acquirer who has lawfully acquired the object in relation to the patent owner (BGH, judgment of September 26, 1996 - X ZR 72/94, GRUR 1997, 116, 117 - Prospekthalter; judgment of December 14, 1999 - X ZR 61/98, BGHZ 143, 268, 271 = GRUR 2000, 299 - Karate).

46 (2) In the case of products which are put on the market by third parties, the occurrence of the exhaustion effect does not necessarily require that an effective license has been granted to the third party. Rather, exhaustion in this constellation is also a mandatory legal consequence of putting the subject matter covered by the patent protection into circulation with the consent of the patent owner.

47           Therefore, restrictions which a patent owner agrees in a license agreement with regard to the authority to use products which are put on the market on the basis of the license have, in principle, no influence on the occurrence of the exhaustion effects (BGH, judgment of November 21, 1958 - I ZR 129/57, GRUR 1959, 232, 234 - Förderrinne).

48           (3) Against this background, an agreement in which the patent owner undertakes not to assert any claims against the contracting party based on the patent generally leads to exhaustion with respect to products placed on the market on the basis of this agreement.

49           (a) In this context, it is basically irrelevant whether such an agreement is to be qualified as a license agreement under German law or under the contract statute relevant for the effects under the law of obligations. The decisive factor is rather that the patent owner makes it sufficiently clear that it will not assert any rights from the patent against its contractual partner.

50           With an effective obligation of this content, the patent owner expresses in a manner sufficient for the occurrence of the exhaustion effect that it has fully exercised its rights with respect to sales acts of the contracting party, i.e. that the latter's products enter the market with its consent (see also Hauck, ZGE 2013, 203, 218; Busse/Keukenschrijver/McGuire, PatG, 9th ed., § 15 para. 123).

51           (b) If these prerequisites are met, a reservation nevertheless declared to assert claims against the contracting party's customers for infringement of the patent is in principle of no significance in relation to third parties.

52           As explained above, the consequence of exhaustion is that the patent owner loses its possibilities of influencing the further fate of the protected subject matter as conveyed by the patent. This legal consequence cannot be excluded by contract in relation to third parties.

53

However, a contract in which the patent owner declares that it does not wish to assert any rights arising from the patent but expressly reserves the right to assert such rights may, in individual cases, be interpreted as meaning that the patent owner does not wish to relinquish its rights.

54 In view of the significance of its effect, the consent must be expressed in a manner that indicates with certainty an intention to waive the right to prohibit third parties from making use of the technical teaching of the patent (with regard to trademark law, ECJ, judgment of November 20, 2001 - C-414/99 et al., GRUR Int. 2002, 147 para. 45 - Zino Davidoff; BGH, judgment of February 3, 2011 - I ZR 26/10, GRUR 2011, 820 para. 21 - Kuchenbesteck-Set). Non-intervention against patent infringing acts or their mere tacit toleration is not sufficient (BGH, judgment of June 3, 1976 - X ZR 57/73, GRUR 1976, 579, 581 - Tylosin). Therefore, it must always be carefully examined whether an agreement contains such consent. This is a question of contractual interpretation, which is generally incumbent on the judge of the facts.

55 However, if an agreement makes it sufficiently clear that the patent owner undertakes not to raise any objections based on the patent against the marketing of products by its contracting party, this is usually sufficient to affirm a consent leading to exhaustion. According to the understanding of the Senate, a declaration of this content is typically associated with a covenant not to sue. A reservation of rights vis-à-vis third parties is then merely an ineffectual attempt to limit the scope of exhaustion.

56 bb) This removes the basis for the conclusion drawn by the Court of Appeal that a covenant to be sued last can certainly not cause exhaustion.



57           Contrary to the opinion of the appellate reply, the statements of the Court of  
Appeal on the effects of a covenant not to sue do not constitute an obiter dictum.  
As the revision rightly asserts, these considerations rather form the fundamental  
basis for the assumption of the Court of Appeal that a covenant not to be sued  
cannot lead to exhaustion either.

58           The Court of Appeal did not distinguish between the two types of contract  
mentioned, but attributed the same effect to both. On this basis, the exhaustion  
effect cannot be denied even in the case of a covenant not to sue.

59           c)    The contested decision does not prove to be correct in its result for other  
reasons (§ 561 ZPO).

60           aa)  According to the findings of the Court of Appeal, the plaintiff concluded  
a contract with each of the two manufacturers of the chipsets with which the mobile  
devices under attack are equipped, in which it undertook to assert claims for  
infringement of the property rights covered by the contract against these  
manufacturers only in the event that it had previously asserted claims against all  
third parties in question.

61           The Court of Appeal left open whether the patent in suit is covered by the  
agreement reached with the two chip manufacturers.

62           Therefore, it must be assumed for the purposes of review that the agreement  
also relates to the patent in suit.

63           bb)  The Court of Appeal did not make any findings on time limitations of the  
agreements made.

64           For the assessment under the law of revision, it must therefore be assumed  
that the agreement covers all acts of use challenged in the action.

65           cc)  On the basis of the findings made, an exhaustion effect cannot be  
denied because the chip manufacturers, with which the plaintiff has concluded

the contracts, do not sell mobile telephones, but only components for them.

66 (1) However, the exhaustion effect is in principle limited to the product which has been put on the market with the consent of the owner of the property right. It does not extend without further ado to devices which contain such a product as one of several components.

67 (2) In case of a dispute, however, a different assessment may result from the defendant's submission - which is to be assumed as correct for the appellate instance in the absence of deviating findings - that the only economically sensible use of the chipsets in question is their installation in mobile terminal devices.

68 (a) This circumstance could lead to the fact that a consent of the plaintiff to the distribution of the chipsets is to be interpreted as an implied consent to the distribution of mobile devices equipped with them.

69 This could be supported in particular by the fact that the plaintiff's consent might be largely meaningless for its contractual partners if these were able to distribute the chipsets but had to point out to their customers that these must not be put to their only economically sensible use. A different assessment might suggest itself if the chip manufacturers have excluded liability in this respect vis-à-vis their customers.

70 (b) Even if the contracts with the chip manufacturers are to be interpreted as meaning that the plaintiff does not agree to the installation of the chipsets in mobile devices, exhaustion is possible if the technical effects of the patent in suit are essentially brought about by the chipsets and all other components of the mobile devices are of no decisive importance in this respect.

71 However, such an effect cannot be considered if installation in mobile devices is the only economically viable option for using the chipsets.

Rather, it is necessary that the consent of the patent owner relates to the placing on the market of the entire device. The consent to the placing on the market of individual components can at most be equivalent to this if these components fulfill all the functions provided for in the patent. In the case in dispute, this could be assumed if all the properties and functions defined in claim 9 are realized by the chip sets covered by the agreement with the chip manufacturers and the other components of the mobile devices under attack are of no significance in this respect.

72           d)    The matter is not ready for final decision (§ 563 para. 3 ZPO).

73           aa)   The Court of Appeal has not yet made any findings on the concrete content of the agreements between the plaintiff and the chip manufacturers. This will have to be made up for.

74           bb)   On the basis of these findings, the Court of Appeal will have to examine whether the contracts cover the patent in suit.

75           cc)   If the contract is relevant for the patent in suit, the Court of Appeal will have to deal with the question whether the plaintiff has expressed to its contracting parties that it will not assert any rights from the patent in suit against them.

76           The assessment of this question will not be based solely on theoretically conceivable courses of events. Rather, the question will have to be in the foreground whether the contracting parties, in the course of events that can usually be expected, have to fear that the plaintiff will file a claim for infringement of the patent in suit. Should this question be answered in the negative, exhaustion cannot be denied merely because the plaintiff wanted to reserve the right to take action against customers of its contractual partners. As already explained above, such contractual restrictions of the exhaustion effects in relation to third parties are irrelevant.

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dd) Should the Court of Appeal then affirm that the plaintiff consented to the sales activities of the chip manufacturers, it will also have to examine whether this consent also relates to the sale of mobile devices or whether the consent to the sale of the chipsets also leads to exhaustion with regard to mobile devices equipped with them, because all the properties and functions provided for in claim 9 are realized by the chipsets covered by the agreement with the chip manufacturers and the other components of the mobile devices under attack are of no significance in this respect.

78 ee) Should the Court of Appeal affirm a consent leading to exhaustion, it will finally have to examine whether this consent relates to all sales activities of the chip manufacturers or whether it is limited in terms of subject matter or time. Should the consent have been granted only with effect from a certain key date, it will have to be clarified in addition whether the plaintiff intended to reserve claims for damages, information, invoicing, destruction and recall with regard to products placed on the market before the key date. It may no longer be possible to derive a claim for injunctive relief from such acts because future acts of distribution are covered by the consent.

79 ff) To the extent that the claims for injunctive relief, destruction and recall from the distribution channels thereafter prove to be well-founded, the Court of Appeal will have to re-examine the justification of the defendant's antitrust objections in the light of the supplemented findings in accordance with the standards developed in this regard by the Federal Supreme Court (BGH, judgment of May 5, 2020 - KZR 36/17, BGHZ 225, 269 - FRAND-Einwand I; judgment of November 24, 2020 - KZR 35/17, BGHZ 227, 305 - FRAND-Einwand II).

Bacher

Hoffmann

Deichfuß

Marx

Crummenerl

Lower courts:

LG Mannheim, decision dated September 28, 2018 - 7 O 165/16 -

OLG Karlsruhe, decision dated November 25, 2020 - 6 U 104/18 -