
Date: 12.12.2018
Court: Regional Court Düsseldorf
Panel: 4b. Civil Chamber
Type of decision: Verdict
Reference number: 4b O 15/17

ECLI: ECLI:DE:LGD:2018:1212.4B.O15.17.00

Tenor:

- I. The defendant is sentenced,
1. to refrain from doing so upon notification of a fine of up to € 250,000 to be set by the court for each case of infringement - or, alternatively, imprisonment for up to six months, or up to a total of two years in the event of repeated infringements,
- a) Image decoding devices that decode multiplexed information that has image signals of each unit,
- where the information to be decoded contains information common to the entire image signals and information relating to the image signals of each unit,
- to offer, place on the market or use in the Federal Republic of Germany or to import or possess for the aforementioned purposes, whereby the image decoding devices are present:
- a demultiplexing unit capable of demultiplexing the common information of the entire image signals and the information relating to the image signals of each unit from the multiplexed information;
- a multiple decoding unit capable of decoding the demultiplexed common information of the entire picture signals by using a plurality of decoding methods;

a common decoding unit suitable for decoding the demultiplexed information relating to the image signals of each unit by using an arithmetic decoding method common to each unit;

and/or

b) Image decoding devices (smartphones) suitable for an image decoding method for decoding multiplexed information having image signals of each unit,

where the information to be decoded contains information common to the entire image signals and information relating to the image signals of each unit,

to offer and/or deliver to customers in the territory of the Federal Republic of Germany,

where the image decoding method is characterized by:

a demultiplexing step of demultiplexing the common information of the entire image signals and the information relating to the image signals of each unit from the multiplexed information,

a multiple decoding step for decoding the demultiplexed common information of the entire picture signals by using a plurality of decoding methods, and

a common decoding step for decoding the demultiplexed information relating to the picture signals of each unit by using an arithmetic decoding method common to each unit;

2. to provide the applicant with information on the extent to which it has committed the acts referred to in paragraph 1 since 11. July 2014, stating the following

a) the names and addresses of manufacturers, suppliers and other previous owners,

b) the names and addresses of the commercial customers and the points of sale for which the products were intended,

c) the quantity of products manufactured, delivered, received or ordered and the prices paid for the products concerned,

whereby

copies of the relevant purchase documents (namely invoices, or alternatively delivery bills) must be submitted as proof of the information, whereby details requiring confidentiality outside the data subject to disclosure may be blacked out;

3. to account to the applicant for the extent to which it has committed the acts referred to in point 1. since July 11, 2014, stating:

a) of the individual deliveries, broken down by delivery quantities, times, prices and type designations as well as the names and addresses of the commercial customers,

b) of the individual offers, broken down by offer quantities, times, prices and type designations as well as the names and addresses of the commercial offerees,

c) of the advertising operated, broken down by advertising media, their circulation figures, distribution period and distribution area,

d) the prime costs broken down by the individual cost factors and the profit generated,

whereby

the defendant reserves the right to disclose the names and addresses of the non-commercial purchasers and the offerees instead of the plaintiff to a sworn auditor domiciled in the Federal Republic of Germany to be designated by the plaintiff and bound to secrecy towards it, provided that the defendant bears his costs and authorizes and obliges him to inform the plaintiff upon specific request whether a particular purchaser or offeree is included in the list;

4. to hand over the products referred to under 1. a) in its direct or indirect possession or in its ownership to a bailiff to be appointed by the plaintiff for the purpose of destruction at its expense;

5. to recall the products referred to under 1. a), which have been placed on the market since July 11, 2014, with reference to the patent-infringing condition of the item established by the court (judgment of the Düsseldorf Regional Court of December 12, 2018, 4b O 15/17) and with the binding undertaking to reimburse any fees and to bear any necessary packaging and transport costs as well as customs and storage costs associated with the return

and to take back the products.

II. It is established that the defendant is obliged to compensate the plaintiff for all damages that it has suffered and will suffer as a result of the acts referred to under I.1.a) and b) committed since July 11, 2014.

III. The defendant is ordered to pay the costs.

IV. The judgment is provisionally enforceable against the provision of security in the amount of EUR 30,000,000.00, whereby the following partial securities are fixed for the partial enforcement of the judgment:

Items I. 1., I. 4. and I. 5. of the operative part: EUR

23,000,000 Items I. 2. and I. 3. of the operative part: EUR

6,000,000

Item III. of the operative part: 110 % of the amount to be enforced in each case.

Facts of the case

The plaintiff is suing the defendant for infringement of the German part of patent EP X (patent in suit in conjunction with the corrected title page as B8 document, submitted as Annex K1, to which reference is made for details) for injunctive relief, information and rendering of accounts, destruction and recall as well as determination of the obligation to pay damages.

The patent in suit was registered by the plaintiff's legal predecessor on August 13, 2002 under Claiming a Japanese priority JP X dated 31.08.2001 (submitted as Annex VP8 NK 12 and in translation as VP8 NK 12Ü, to which reference is made for details). The application was published on 26.05.2004, the reference to the grant was published on 28.10.2009. In the meantime, the plaintiff is the proprietor of the patent in suit. The change in ownership was notified to the patent register on 11.07.2014 and registered on 21.08.2014. The patent in suit is in force. The defendant has filed a nullity action with the Federal Patent Court with the request that the patent in suit be declared null and void. No decision has yet been made on the nullity action.

Claims 1 and 7 of the patent in suit, as asserted by the plaintiff, read as follows limited version in German:

Image decoding method for decoding multiplexed information comprising image signals of a each unit, wherein the information to be decoded includes common information of the entire image signals and information relating to the image signals of each unit, the image decoding method being characterized by:

a demultiplexing step to demultiplex the common information of the entire image signals and the information relating to the image signals of each unit from the multiplexed information;

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a multiple decoding step to decode the demultiplexed common information of the entire image signals by using a variety of decoding methods; and	7
a common decoding step to decode the demultiplexed information, which concerns the image signals of each unit, by using an arithmetic decoding method common to each unit.	8
Claim 7:	9
Image decoding device which decodes multiplexed information, which decodes image signals of a10 each unit, wherein the information to be decoded includes common information of the entire image signals and information relating to the image signals of each unit, the image decoding apparatus comprising a decoding device for decoding the image signals of each unit:	
a demultiplexing unit suitable for demultiplexing the common information of the entire image signals and the information relating to the image signals of each unit from the multiplexed information;	11
a multiple decoding unit suitable for decoding the demultiplexed common information of the entire image signals by using a variety of decoding methods;	12
a common decoding unit which is suitable for decoding the demultiplexed Information relating to the image signals of each unit by using an arithmetic decoding method common to each unit.	13
The patent in suit relates to one aspect of compression methods for digital Videos.	14
Various image and video-specific compression methods are used, which ultimately convert the image signal into various digital values. The signal is then encoded using suitable fixed-length, variable-length or arithmetic coding. These are general digital data compression processes that are not image-specific.	15
The functional principle is based on the elimination of redundancies in the data stream by repeating data sequences are replaced by shorter code words. In the case of variable-length and fixed-length coding, these are obtained from a table. Data sections that repeat at a high frequency are assigned code words with a short length, while sequences that repeat at a low frequency are assigned codes with a longer length.	16
In the case of the considerably more efficient, but also more computationally intensive arithmetic 17 coding, probabilities are used that correspond to the tables.	
The International Telecommunication Union (ITU) developed In 2001, the ITU group joined forces with MPEG-Visual and continued the development together. The aim of the project was to develop a compression process that would reduce the required data rate by at least half compared to previous standards, both for mobile applications and in the TV and HD sector, while maintaining the same quality. In 2003, the standard was adopted by both organizations with identical wording. The ITU designation is	18

H.264. At ISO/IEC MPEG, the standard is referred to as MPEG-4/AVC (Advanced Video Coding). It is the tenth part of the MPEG-4 standard for ISO/IEC No. 14496-10 (eighth edition 01.09.2014; excerpt submitted as Annex K 5, excerpt submitted in German translation as Annex K 5a, hereinafter referred to as the AVC standard). This is a standard that deals with video and audio data compression.

The standard stipulates that full frames from the video sequence are broken down into one or more slices, which in turn consist of macro blocks. 19

The image information of the macroblocks is processed by means of a "Context-Based Adaptive Binary Arithmetic Coding" (hereinafter referred to as "CABAC") if the parameter "entropy_coding_mode_flag" is set to 1. 20

This parameter refers to one or more slices and all macroblocks contained in them. It remains valid for all subsequent slices until it is set to 0. 21

The defendant is a German subsidiary of the China-based Group A, which is based in China. manufactures mobile devices, so-called smartphones, which can play video content encoded according to the AVC standard. 22

The Defendant carried these devices, including the P9, P9 Plus, P9 Lite, GX8, Mate S and Mate 8 (attacked embodiment), entered the Federal Republic of Germany during the period in question, offered it here and sold it. 23

The patent in suit is part of an AVC/H.264 patent pool (hereinafter: patent pool). The patent pool currently comprises around 5,000 patents, which, including the applicant of almost 40 patent proprietors (see Annex K 10 - Exhibit C, Exhibit D). The pool is managed by the company X, LLC (hereinafter: X). 24

On its website (www.C.com), X has published Exhibit K 10 - Exhibit G/G-a as a standard license agreement (hereinafter: standard license agreement). More than 2,000 licensees have currently concluded this license agreement with X, although it is disputed in detail whether each of these licensees has concluded the specific standard license agreement referred to. Concordance lists/cross reference charts (Annex K 10 - Exhibit E), which assign the relevant standard passages to the pool patents, can be accessed via the aforementioned website. A list of licensors is also available (Annex K 10 - Exhibit D). 25

The standard license agreement contains the following provisions in German, among others Translation: 26

"[Präambel] 27

[...] 28

Jeder Lizenzgeber verpflichtet sich hiermit dazu, Einzelpersonen, Gesellschaften oder sonstigen Rechtsträgern einzelne Lizenzen bzw. Unterlizenzen nach sämtlichen AVC wesentlichen Patenten zu maßvollen, angemessenen, nicht diskriminierenden Bedingungen entsprechend den hier vereinbarten Geschäftsbedingungen zu erteilen, die vom Lizenzgeber (ohne Zahlungen an Dritte) erteilt werden können. 29

Jeder Lizenzgeber gewährt dem Lizenzverwalter eine weltweite, nicht-exklusive Lizenz und/oder Unterlizenz an allen vom Lizenzgeber lizenzierbaren oder unterlizenzierbaren für AVC wesentlichen Patenten, um es dem Lizenzverwalter zu ermöglichen, weltweit nicht-exklusive Unterlizenzen an allen diesen für AVC wesentlichen Patenten gemäß der Bestimmungen dieses Vertrages zu gewähren.

[...] 31

Nichts aus der vorliegenden Vereinbarung untersagt den einzelnen Lizenzgebern, die Rechte aus den einzelnen AVC wesentlichen Patenten zur Herstellung, Verwendung, zum Verkauf oder zum Angebot eines Verkaufs zu lizenzieren oder als Unterlizenzen zu vergeben, zu denen auch unter anderem die Rechte gehören, die nach der AVC-Patentportfolio-Lizenz vergeben werden. 32

[...] 33

2. Gewährung durch den Lizenzverwalter 34

2.1 35

AVC Produkte(e). Vorbehaltlich der Bestimmungen der vorliegenden Vereinbarungen (einschließlich, jedoch nicht beschränkt auf Artikel 3 und 7), gewährt der Lizenzverwalter hiermit einem Codec-Lizenznehmer eine gebührenpflichtige, weltweite, nicht ausschließliche und nicht übertragbare Unterlizenz nach allen AVC wesentlichen Patenten im AVC Patentportfolio, ein AVC Produkt herzustellen, herstellen zu lassen, zu verkaufen oder zum Verkauf anzubieten und [...]. 36

[...] 37

3. 38

Gebühren und Bezahlung 39

3.1 40

Gebühren für die Lizenzen zu den AVC wesentlichen Patenten im AVC-Patentportfolio. Für die Lizenzen, die in Artikel 2 dieser Vereinbarung nach den AVC wesentlichen Patenten im AVC Patentportfolio gewährt werden, muss der Lizenznehmer dem Lizenzverwalter zugunsten der Lizenzgeber für die Laufzeit der vorliegenden Vereinbarung die im Folgenden festgesetzten Gebühren entrichten: 41

3.1.1. 42

AVC Produkt(e). Vorbehaltlich der Beschränkung aus Artikel 3.1.9. ist in jedem Kalenderjahr für die nach Absatz 2.1 der vorliegenden Vereinbarung gewährte Unterlizenz bei einem Verkauf nach dem 31. Dezember 2004 eines AVC Encoders, eines AVC Decoders oder eines AVC Codec (die nachstehend in diesem Artikel als „Einheit“ bezeichnet werden) und unabhängig davon, ob eine oder mehrere Einheiten in ein einziges Produkt integriert sind, die folgende Gebühr zu entrichten: 43

Verkauf von Einheiten in einem beliebigen 44

Kalenderjahr nach dem 31. Dezember 2004 zu entrichtende Gebühren 45

Einheit	0 bis 100.000 Einheiten	0,00.	46
	100.001 bis 5.000.000 Einheiten	0,20 \$ pro	47
	mehr als 5.000.000 Einheiten	0,10 \$ pro Einheit	48

Die Gebühr für die nach Absatz 2.1 der vorliegenden Vereinbarung gewährte Unterlizenz übersteigt jedoch keinesfalls die nachstehend aufgeführten Beträge für den kombinierten Verkauf von AVC Produkten eines Lizenznehmers und seiner Tochtergesellschaften: 49

nach	Kalenderjahr	Zu entrichtende Gebühr	50
		<u>Unternehmen pro Jahr</u>	51
	Verkauf 2005 und 2006	3.500.000 \$	52
	Verkauf 2007 und 2008	4.250.000 \$	53
	Verkauf 2009 und 2010	5.000.000 \$	54
	Verkauf zwischen 2011 und 2015	6.500.000 \$	55
	Verkauf 2016	8.125.000 \$	56
	Verkauf zwischen 2017 und 2020	9.750.000 \$“	57

Further regulations on the scope of the license granted are set out in Section 2.2 - Section 2.10 is provided for in section 2.9: 58

"Subject to Article 3.1.7, the rights referred to in paragraphs 2.1 - 2.7 of this Agreement does not authorize the Licensee to grant sublicenses. The License Administrator is willing to grant an AVC Patent Portfolio License to each subsidiary of the Licensee." 59

Finally, as a "Codec Licensee" pursuant to Section 1.17 of the Standard License Agreement means a person or entity that sells an AVC Product to (i) a Codec Licensee Customer (see Section 1.18 of the Agreement) or (ii) an End Customer. 60

In all other respects, reference is made to the standard license agreement due to its further content taken. 61

Since 2009, initially "D USA", which, like the defendant, operated a Ltd is a group company of the Chinese parent company A Co. Ltd (hereinafter: parent company), conducted license negotiations with X, in which the parent company was later also involved. The negotiations initially only concerned the MPEG 2 standard. A key point on which the parties did not reach an agreement was the licensing of the regional market of the People's Republic of China (hereinafter: PRC). The parent company favored worldwide licensing with the exception of the PRC, while X insisted on the inclusion of the Chinese market. 62

In an e-mail dated September 6, 2011 (Exhibit K 10 - Exhibit A, A-a), X again contacted D USA regarding the AVC standard at issue. The German translation reads:

„Lieber E , 64

F hat mir empfohlen, mich mit Ihnen in Verbindung zu setzen, da Sie bei D für Patentlizenzierungsfragen zuständig sind. Daher möchte ich mich zunächst vorstellen und Sie zudem auch um Ihre Hilfe bei einer Angelegenheit betreffend einiger Produkte von D bitten. 65

Wie wir gehört haben, bietet D nun auch mobile Handapparat- und Tablet-Produkte an, die eine [...] AVC/H.264-Funktionalität [...] umfassen. Daher müssen diese Produkte gemäß Patenten lizenziert werden, die für diese Technologien essentiell sind, und ich möchte D in diesem Zusammenhang auf unsere Lizenzen für das [...] AVC-Patentportfolio hinweisen. 66

Zum Hintergrund: [...] unsere Lizenz für das AVC-Patentportfolio [umfasst] mehr als 1000 essentielle AVC-Patente von 25 Patentinhabern [...]. 67

[...] 68

Zur Durchsicht übersende ich Ihnen heute Kopien unserer [...] AVC-Lizenz [...]. Die Lizenzunterlagen sollten Ihnen in den nächsten Tagen per FedEx zugehen. Anbei übersende ich Ihnen zur einfacheren Durchsicht auch eine .pdf-Version aller Lizenzen. [...]“ 69

D USA responded to this by e-mail dated September 15, 2011 (Annex B 23, 23 a) through Mr. G , called E , in which he asked for a telephone call to discuss the further details of this matter. In an email dated February 10, 2012, E confirmed receipt of the license documents, which had previously been sent to the address of his previous office by mistake. 70

In the ensuing communication - as was the case in the negotiations on the MPEG-2 standard - whether licensing was only possible to individual Group companies without affecting the Chinese parent company or the Chinese market. The talks ended in November 2013, before a new meeting was held in July 2016 to discuss the licensing of the AVC standard, among other things. However, licensing did not take place. 71

In the context of the present legal dispute, the defendant submitted the following in its statement of defense a first counteroffer dated August 29, 2017 (Annex B4, B4a). The first counteroffer was submitted to the plaintiff by A Co Ltd, based in the PRC. The offer took over the scale according to the number of units from the standard license agreement, but with different license rates for different regional markets (USA: 2.6 US cents/1.3 US cents; EU 0.7 US cents/0.3 US cents and PRC and others 0.4 US cents/0.2 US cents). According to paragraph 1, the definition of "PRC and others" includes China and the rest of the world with the exception of Europe and the USA. The plaintiff did not accept this offer. 72

In a letter dated December 14, 2017, the defendant provided the plaintiff with an irrevocable bank guarantee from the Industrial and Commercial Bank of China for an amount of up to USD 2,071,014 (Annex B 56, 56a). In a letter dated March 1, 2018, it settled the license fees owed from January 2009 to December 2017 (Annex B 57, 57a). 73

In a statement dated October 30, 2018, the defendant submitted a second counteroffer (Exhibit B 84), which it sent to the plaintiff in a letter dated October 29, 2018 (Exhibit B 86), as well as a statement of license fees for the period from January 2009 to December 2017 (Exhibit B 85). In contrast to the first offer, the group companies of the defendant A Co, Ltd, D Device (H) Co Ltd and D Device (I) Co Ltd now offer a worldwide uniform license in the amount of 4.57/2.28 US cents without regional differentiation, but only for all patents of the plaintiff essential for the AVC standard at issue. The defendant calculated the license rate pro rata from the amount which, in the defendant's opinion, the plaintiff is entitled to according to the number of its patents in relation to the number of all patents in the patent pool, including a surcharge of 19% for the plaintiff's additional expenses due to licensing outside the pool. The effective date of the agreement is determined by the plaintiff's acceptance. Infringing acts in the past are to be remunerated on the basis of the license rates offered. At the hearing, the plaintiff also rejected this offer. 74

Apart from the legal dispute here, proceedings by the plaintiff here against B Deutschland GmbH is pending before the chamber (case no. 4b O 16/17). Other pool members (X) are also conducting legal disputes against the defendant. In these proceedings, the defendant also declared its willingness to conclude individual portfolio license agreements. 75

The applicant is of the opinion that the joint information of the entire image signals in the AVC standard would be represented by the slice header information, which, according to the standard, contains common information relating to all macro blocks of the respective slice. 76

The term "decoding procedure" is to be interpreted in such a way that both fixed-length as well as variable-length methods are meant, as the independent subclaim 4 also makes clear. 77

The applicant is further of the opinion that the AVC standard also includes a multiple decoding step using a variety of decoding methods. This is shown by the AVC standard in section 7.2, according to which the slice header contains three variables or descriptors - $se(v)$, $u(n)$ and $ue(v)$ - which each refer to different decodings. Section 9.1 shows that the decodings differ in each case. 78

The applicant is of the opinion that the AVC standard also provides for a common decoding step for decoding the demultiplexed information relating to the picture signals of each unit by using a variable length decoding method common to each unit by using an arithmetic decoding method. This is done by the CABAC provided for in the standard. 79

Practical experience also shows that there is widespread agreement that smartphones cell phones and not computers, all major manufacturers of smartphones, including X Mobile and various other companies, have acquired licenses, which the defendant also denies with ignorance. 80

The plaintiff claims in connection with the antitrust compulsory license objection, it had contacted all companies subject to AVC that had not yet taken out a license with serial e-mails, including the Chinese competitors of the defendant X Co Ltd. The plaintiff alleges that X is authorized or empowered to act on behalf of the 81

plaintiff with regard to the patent in suit. It further claims that all members of the pool have always and exclusively refrained from granting licenses via the pool and that none of the pool members has granted an individual license to property rights directly and outside the pool. The entire submission is disputed by the defendant with ignorance.

The plaintiff also disputes with ignorance that the chances of success in the enforcement in Chinese patent infringement proceedings are lower. 82

The applicant is of the opinion that the principles laid down by the ECJ in the decision "D /B" were not applicable in this case, but rather the principles established by the BGH in the "Orange Book" decision should be applied. There is a standard license agreement in the electronics industry that has been offered for years and is well-known in the industry, so that there was no information asymmetry, as was the basis of the "D /B" decision of the ECJ. In this respect, the defendant should have submitted an offer immediately after the start of use of the AVC technology and issued an invoice on an ongoing basis. 83

The plaintiff as well as the other members of the patent pool had given X the mandate and the granted a simple license to conclude the standard license agreement in its name. It was obvious that X was a license administrator and therefore granted the license in the name and on behalf of the pool members, including the plaintiff. 84

The global activities of the D -Group on the one hand and the global coverage of the AVC-standards or the pool patents would require licensing discussions with the Group's top management. Otherwise, there would also be a risk of abuse that the cell phones at issue here would also be sold as volatile goods in unlicensed countries. Apart from that, the parent company is the manufacturer, so that it is the actual source of the infringing distribution, which makes licensing necessary. 85

Already in the e-mail dated September 6, 2011 (Annex K 10 - Exhibit A, A-a), a sufficient notice of infringement because reference was made to the specific acts, the sale of cell phones and tablets. In addition, the content requirements for the infringement notice set by the defendant were merely a formality because the defendant, as a leading IP company with one of the largest patent departments in the PRC, was very familiar with the technology at issue. The request for claim charts or a Proud List was first raised in the meeting in July 2016. 86

Furthermore, there was also a written FRAND offer from the plaintiff. The e-mail The standard license agreement transmitted on 6 September 2011 was the agreement that had been concluded almost 1,400 times unchanged without any exceptions, and the note "sample" did not change this. This information had also been provided to the plaintiff at an early stage. The only open point was the regulation for the license debts of the D group of companies for the past. 87

The defendant used the Essentiality Cross Reference Charts to distinguish itself from the standard essentiality of the pool patents, and would have been able to do so without further ado as a company with one of the largest patent departments in contact with all renowned IP law firms worldwide. In any case, the defendant could have obtained external expert advice. 88

All previous licensees of the patent pool would have considered the demonstration of essentiality On the basis of the aforementioned charts to be sufficient, which is already conclusive evidence of this. The charts were part of the business practice in the AVC industry of interest here for the purpose of proving essentiality. 89

According to an antitrust assessment, the agreement of several patent proprietors to sell their The Commission has stated in one of its most recent communications that it is expressly in favor of promoting the creation of patent pools and that it is unobjectionable to include standard-essential patents in a patent pool and to offer third parties a uniform license to all pool patents - either itself or through a pool administrator (patent pool license). For the use of the AVC technology, the standard license offered by the plaintiff in the dispute had prevailed. The thousandfold licensing proves that it is an established licensing practice for the AVC industry and that no other forms of licensing are seen as necessary. It also serves the interests of license seekers that they are offered a license to use the entire standard from a single source at uniform conditions, because they are thus relieved of the necessity and burden of having to apply for a license from each individual property right holder. 90

The standard license agreement had always been granted with the same content without exception. Independent, neutral experts have come to the conclusion that the patents in the pool are SEPs. This is also proven by the fact that almost 1,400 globally operating companies had taken the standard license and none of these companies had accepted an over-declaration. In view of the essentiality cross reference charts and the patents in suit from the parallel proceedings, there is no need for the submission of a so-called "proud list". There would be no risk of over-declaration to X because the patents would only be included in the patent pool if the independent expert examination confirmed the standard essentiality. A unilateral, unverified declaration in accordance with ISO/ITU/IEC rules therefore plays no role. 91

All licensees, without exception, would benefit from seasonal licensing and the royalty cap. The defendant's group has already reached the royalty cap since 2014 through sales outside of China, which account for 80% of the group's global sales. According to its functionality, a smartphone is not just a mobile phone, but also a video player. The video coding technology is licensed. An obligation to treat unequal companies equally is not covered by the prohibition of discrimination. 92

A numerical flat rate without an adjustment clause is justified because the pool licensing benefits considerably from the initial pool licensing of all initially existing pool patents. 93

A large number of non-Chinese licensees, such as X, are active in the Chinese market. successfully and paid license fees for this. A globally active global group, to which the defendant belongs, calculates its profits globally and assesses its sales activities globally. In this respect, it is the globally averaged price and not a possibly artificially reduced price in an individual sales territory that is important. The uniformly globally determined pool license therefore serves the equal treatment of all licensees. 94

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The PRC is one of the most patent-rich nations in the patent pool, meaning that there is no unequal geographical weighting of the pool patents. There are also no serious price differences between the USA, the PRC and Europe.

The fact that some licensees for mobile devices only use a few selected profiles of the AVC standard applies equally to all licensees. In this respect, there is no unequal treatment. The HEVC standard is not relevant. It is a different technology and the licensing program is not offered by X. 96

Deviating page numbers in the more than one thousand license agreements concluded resulted from adjustments due to changes in the patent holders and pool patents and changes in the designation of the AVC standard. 97

The agreement with NTT I relates exclusively to NTT I's 3GPP patent portfolio. Furthermore, it is unclear whether the licensee's option right also relates to the AVC products subject to licensing here. Irrespective of this, the defendant had not yet made use of this option right and X had already stated in the negotiations that, if necessary, the share of the license fees attributable to NTT I under the standard license agreement could be refunded on the instruction of the patent holder. 98

The granting of installment payments for license debts in the past or a repayment plan is not equivalent to a discount. These measures are also offered to all licensees. 99

The defendant's alleged selection criterion of only taking a license to patents of a plaintiff pool party is arbitrary and cannot be justified either under antitrust law or technically. The thousands of licenses prove that a license to the pool patents of the non-plaintiff pool members is also required for AVC-standard compatible products. In this context, the offer of an individual license is "unfrand". In this respect, deviations from the standard pool license would undermine the own pool license program and the pool patent holders would run the risk of being accused of discrimination under antitrust law by granting corresponding individual deviations. 100

With regard to the first counteroffer, it is not clear why the defendant differentiates the license rates between the USA, the EU and the PRC, whereby the PRC, together with all other countries worldwide, constitutes a sales territory. 101

The plaintiff is of the opinion that Fig. 3 of the patent in suit does not constitute novelty-destroying prior art for the patent in suit, and that no conclusion can be drawn for the patent in suit from the rejection of the parallel application. 102

US X (submitted as Annex B 44/NK 6, hereinafter referred to as NK 6) also does not disclose a length-variable coding method, but *several different* methods by means of which the data of the individual image units are coded. 103

The plaintiff is of the opinion that the draft for a standard development of the AVC standard submitted as "JVT-D017draft1" (submitted as B 59/NK 8, hereinafter referred to as NK 8) had not been published before the filing date. It denies with ignorance that the NK 13 was prepared in preparation for a standardization meeting in Klagenfurt from 21 to 26 July 2012 and was also discussed at the meeting, because the defendant does not state to whom exactly the document was submitted, nor that there was no 104

confidentiality agreement.

Moreover, it is not clear from NK 8 when it was published, as the date of preparation does not indicate this - which also applies to the other documents submitted in connection with the meeting in Klagenfurt. In terms of content, NK 8 could also be a summary in response to the discussions in Klagenfurt. It is also unclear whether D017d1, which is mentioned in the other documents relating to the meeting named by the defendant, is actually "JVT-D017 draft 1" in the form of NK 8. 105

In any event, however, in the applicant's view, NK 8 is not prejudicial to novelty. Feature 3 can only be fulfilled if the descriptors ue(v), me(v) and se(v) are regarded as indicators for several decoding methods. 106

The plaintiff is further of the opinion that for the document produced after the meetings in Klagenfurt "JVT-D157" (submitted as Annex B 63/NK 12, hereinafter referred to as NK 12), which is a further draft standard which has been further developed compared to NK 8, does not show that it was published at all before the application for the patent in suit was filed. This is not apparent from the creation date, which is only three days before the application was filed. 107

The applicant claims that the Court should, 108

- as recognized - 109

The defendant requested 110

that the action be dismissed, 111

in the alternative, to stay the legal proceedings until a final decision on the nullity action 112

pending before the Federal Patent Court in respect of the patent in suit has been reached

alternatively, to allow her to avert enforcement against the provision of security (bank or savings bank guarantee). 113

The defendant is of the opinion that the AVC standard in its current version does not require the use of the technical teaching of claims 1 and 7, if only because the patent in suit provides in both claims that common information of the overall image signal is processed. The plaintiff refers to the standard to realize this feature and believes that this common information in the standard occurs in the slice headers which are processed. In doing so, it fails to recognize that an overall image within the meaning of the claim always consists of at least two slices. The header information processed in the slice header therefore did not concern the overall image within the meaning of the claim. 114

The defendant is of the opinion that the plaintiff has not shown that the standard does not use a variety of decoding methods in a multiple decoding step. 115

The passages referred to by the plaintiff showed that the same decoding method was always used.

The defendant is of the opinion that it would prevent the asserted claims from being realized if several different coding processes were applied to the data of the image signals of the individual units. However, this is precisely what the AVC standard provides for and therefore leads out of the claim. 116

117

The applicant relies on the implementation of the CABAC procedure, which, however, is not applicable if the mode "entropy_coding_mode_flag" is "0". However, the fact that the value must also be set to 1 according to the standard has not been demonstrated. In addition, this shows that the CABAC procedure is therefore used for "entropy_coding_mode_flag" equal to "0" is indisputably not applied, but another coding method, so that not only one method is applied, but several.

The patent in suit could also be understood to mean that context-dependent methods - such as CABAC is - are not admissible, because switching between tables should be avoided. Ultimately, CABAC is not a coding system but, since it works context-dependently, a multitude of arithmetic coding methods. Moreover, it is a highly complex and computationally intensive system, whereas the patent in suit requires a particularly simple system. The CABAC system was not able to be used on mobile devices at the time of priority. 118

Finally, the CABAC process also provides a bypass mode which, depending on certain conditions, bypasses the actual CABAC process and switches to simple, binary, arithmetic coding. This means that CABAC is ultimately a combination of two coding systems. 119

The exceptions referred to by the plaintiff also showed that other coding procedures were ultimately applied if certain conditions were met. 120

The defendant is also of the opinion that a prohibition for the worse is disproportionate, since an economically reasonable, patent-free use of the attacked embodiment can be considered. 121

With regard to the compulsory license objection under antitrust law, the defendant claims that the figures it submitted concerning the distribution of the standard license agreement in the mobile communications industry for the period 2017 up to and including the second quarter of 2018 originate from the database of the International Data Corporation (IDC). Furthermore, the employees of X had analyzed the entire AVC pool, Ms. J had identified and analyzed those AVC pool patents that had been published in English. The plaintiff disputes the entire submission with ignorance. 122

The defendant disputes with ignorance that all other submitted license agreements concern the same portfolio and are therefore comparable. It also disputes that the scope and standard of proof of the US proceedings X are comparable with German court practice, so that the judgment of the US District Court of Washington at Seattle of 25 April 2013 makes no statement about the FRAND conformity of the standard license of X for the proceedings here. 123

The defendant is of the opinion that the assertion of the claims for injunctive relief, recall and destruction by the plaintiff is contrary to antitrust law because the plaintiff did not follow the procedure established by the ECJ in the "D /B" decision. 124

The defendant had not been in contact with the plaintiff in any way before the action was brought. However, X had also not sufficiently informed "D USA" and the parent company about the infringement. 125

126

The plaintiff itself had not acted. In this respect, it does not fit together that X should be able to conclude licenses in the name and on behalf of the pool patent holders - in which case it would be acting on behalf of them - or grant rights of use by way of a single sublicense, in which case it would be a matter of granting a license to third parties in its own name. However, if X acted as licensor with the power to grant sublicenses, this would exclude an attribution of action to the plaintiff. The dialog envisaged by the ECJ would be severely disrupted if negotiations were first conducted with the pool.

There was no notice of infringement. The mere reference to the distribution of the defendant's products, which were to work according to the AVC standard, and the sending of a patent list attached to the standard license agreement were not sufficient. 127

At no time was a list of representative patents (so-called proud list) including a comparison of the individual patent claims with the corresponding passages of the standard sent. With a reference list of 5,000 patents, it was also impossible for an expert familiar with the technology to independently examine the specific patent claims asserted and their infringement. This applies all the more to the defendant, which itself does not have any AVC-essential property rights and is therefore not familiar with the technology on which the patent in suit is based. 128

The sending of the standard license agreements, particularly in February 2012, did not constitute an effective offer to conclude a contract. These were merely sample contract terms that did not contain a signature and did not specify the licensee. In this respect, this constituted an invitatio ad offerendum at best. Moreover, the essential considerations on the basis of which X considered its proposed remuneration parameters to be FRAND were not explained. This applies even if the essentiality of the (vast majority of) IP rights for the asserted standard is not in dispute, but applies all the more if - as here - there is reason to assume that the vast majority of all portfolio IP rights bundled in the pool are actually not essential. There is an inadmissible "bundling". The joint licensing of essential and non-essential patents by the pool leads to a prohibited price cartel between the pool members. The standard pool license offers massive incentives to over-declare. The ISO/ITU/IEC rules applicable to the AVC standard hardly take any precautions that would be suitable for preventing an inappropriate inflation of SEP portfolios. 129

The defendant is also of the opinion that it is being discriminated against, both with regard to sales in China and because of disproportionately degressive effective license rates/unit in relation to large-volume multi-product suppliers and pool members. 130

No license agreement for the AVC technology at issue had been concluded with a Chinese manufacturer of mobile devices that also covered sales in the PRC. The licenses of existing licensees did not cover sales by group companies in the PRC. 131

The offer does not take into account that there are very different sales prices and therefore different license levels in different sales markets. The turnover achieved in the PRC is significantly lower than outside the PRC. If the licensing did not take this into account, this would result in a clearly excessive total license fee in relation to the sales price. The fact that despite larger 132

volumes in the PRC, sales generated there remained significantly lower is evidence of the more favorable prices in the PRC. As can be seen from the English judgment in the "K /D" proceedings, a factor of 50% of what could still be regarded as FRAND in other markets should be used to calculate the FRAND license rate in China.

Furthermore, X grants the pool licenses regionally differently, so that the parent company and/or all group companies are not necessarily licensed in every case. From the point of view of equal treatment, the Chinese parent company of the defendant could then also be excluded from licensing. 133

The capping of the volume-based graduated license rate disproportionately favors large-volume licensees with high sales figures. The defendant is particularly disadvantaged compared to multi-product suppliers, as they reach the cap much faster with TV sets etc. and benefit from discriminatory effective license rates. The greater the delta between the actual unit numbers of a licensee and the unit numbers required to reach the maximum amount alone, the greater the spread of the applicable effective license rates 134

Moreover, the defendant suffers competitive disadvantages because the standard ultimately consists of different sub-standards (profiles), not all of which are supported by the defendant's devices. And even with the supported profile ("baseline"), there are optional features whose support is not mandatory for the realized profile (such as FMO, ASO, RS, data partitioning and SI/SP slices and which are not actually realized in the defendant's devices. The successor standard H.265 or HEVC provide for different rates depending on the extent to which a licensee's products make use of the standard's profiles. 135

The economic value of the patent pool no longer corresponds to that which the pool still had in 2004. In addition to the decrease in the essentiality rate, the agreement also does not take into account the fact that the standard as a whole has decreased in importance and thus in economic value. Rather, it is applied schematically over a period of years. 136

The vast majority of patents managed by the pool are in force in the USA (16%) and Japan (13%), with only 5% originating from the PRC. The application of the standard license rates also for the PRC leads to a comparatively disproportionate weighting of territorially underrepresented property rights. 137

The standard license agreement has not prevailed in competition with alternative license offers on the market, as there are simply no such offers. The licensing practice of the patent pool is aimed exclusively at the standard license, while at the same time the pool members refuse individual portfolio licenses. 138

The licensing practice is highly selective. Licensing in the relevant product market of cell phones is decisive. Looking at this relevant market on a global basis in terms of unit sales, 56% was not licensed in the period from 2017 up to and including the second quarter of 2018. Of the 44% of the licensed market, 42% is attributable to members of the X Pool. This means that only 2% of the market are licensees and pool members at the same time. Such a licensing practice is not meaningful and no reliable conclusions can be drawn for the market acceptance of X's standard license. 139

The contracts submitted were unsuitable to prove the FRAND character.

For example, the ZDF contract submitted refers to a specific order with which the contract alone applies (Annex B 65 to Annex K 38, Annex K 37 to Annex K 39), which is not comprehensible. Some contracts were only incomplete or with page deviations - not all contracts had 32 pages. Changes to the content could therefore not be ruled out. Any renewal notifications were not available. Appendix 1 to the standard license agreement, which contains information on licensors and licensed patents, apparently defines the subject matter of the license. The fact that it had only been submitted for a single contract indicated that individually deviating agreements existed. The comparison of the submitted Annex 1 with the currently available patent list shows a completely different picture and considerable differences. The overview submitted by the plaintiff in Annex K 14 shows at least four different types of contract in the third column "Associated Contracts", with each type being assigned amounts of US \$ (\$ 0.35 to \$ 2.50), some of which differ considerably. This also argues against all license agreements having been concluded with the same content. 141

Finally, the fact that group companies of the defendant have concluded an individual license agreement with NTT I Inc., which is also a pool member, covering the entire portfolio of 3GPP/3GPP2-essential patents, also speaks against the assumption that the standard license agreement is so widespread in the market. The agreement provides for a style maintenance agreement, according to which NTT I cannot successfully assert claims from other SEPs, namely those that can be read on the AVC standard, against the defendant's group companies. In this case, the group companies had the option of entering into a license with regard to these other SEPs by unilateral declaration to NTT I (so-called "pick right") if NTT I asserted the corresponding patents. 142

However, any license fee claims from these other SEPs were already settled with the payments for the 3GPP/3GPP2. The conclusion of a license agreement on substantially different terms - as here - could therefore conflict with the FRAND character of the plaintiff's offer.

Since X had also raised the possibility of installment/one-off payments including discounts, this suggested that such differentiated arrangements had also been made with other licensees. 143

Since the possibility of individual licenses with the individual pool members must continue to exist, the individual license and the standard license agreement for the patent pool stand side by side as alternatives, both of which are FRAND-compliant. 144

The first counteroffer takes into account the regional distribution of the pool patents, the plaintiff's share of all essential-declared pool patents, the share of those profiles and features that are typically not supported by mobile devices, namely those of the defendant or the defendant's group, and the differences in the price level and effectiveness of patent enforcement in China compared to the US and the EU, as well as the 50% discount applied under English case law. 145

Finally, the defendant considers that the patent in suit is not legally valid. NK 6 discloses all the features of the patent in suit. Several different coding methods are applied to macroblock headers and a single, length-variable method is applied to the image data of the individual blocks. 146

The provision of an arithmetic coding method in feature 4 cannot establish novelty either, even if an arithmetic coding method is not disclosed in NK5 and NK6. The priority application did not disclose such a method either, so that priority could not be claimed in this respect. However, the use of arithmetic coding had been disclosed in the standard-setting organization even before the application for the patent in suit was filed. Thus, arithmetic coding as a method for coding the individual picture elements had already been disclosed in the H.264 draft standard with NK 8. This document had been drawn up in preparation for the standardization conference from 22 to 26 July 2002 in Klagenfurt, on 16 July 2002, and was also available on the Internet from the ITU server. It is also apparent from the agenda for the meeting in Klagenfurt (submitted as Annex B 60/NK 9) that it was proposed at the meeting that the changes discussed in NK 8, including the arithmetic coding, be incorporated into the standard. Finally, the report on the course of the meeting in Klagenfurt shows that NK 8 was actually discussed there (submitted as Annex B 61/NK 10) and was proposed as the basis for future further development.

NK 12 also anticipates the invention covered by the patent in suit to the detriment of novelty. The date of creation also predates the application. 148

In addition, the patent had been impermissibly extended compared to the original application by the undisputed amendment of the word "frame" to "unit" during the grant proceedings. 149

File 4b O 16/17 has been included and was the subject of the oral hearing. 150

Reference is made to the written submissions exchanged between the parties and the documents submitted for the file for further details of the facts and the dispute. 151

Reasons for the decision 152

The admissible action is well-founded. 153

The plaintiff is entitled to claims against the defendant for injunctive relief, information and accounting, recall, destruction and a declaration of liability for damages on the basis of Article 64 (1) and (3) EPC in conjunction with Sections 139 (1) and (2), 140a (1) and (3), 140b PatG, Sections 242, 259 BGB. 154

I. 155

The patent in suit deals with the encoding/decoding of the image data to be transmitted in video compression processes and makes the following statements on the state of the art and the technical problem arising from this: 156

In prior art image decoding such as H.263 and MPEG-4, a variety of signal conversions/compressions are performed on an image signal to convert such an image signal into various types of values. Thereafter, either fixed length coding or variable length coding is performed in accordance with code tables appropriately selected according to the meaning of each converted value. In general, a compression ratio is increased during coding by assigning a code word with a short code length to a code with a high frequency of occurrence and by 157

Assignment of a codeword with a long code length to a code with a low frequency of occurrence. Since values converted by signal conversion/compression processing differ in their occurrence frequency depending on the meaning indicated by such values, a compression ratio of image coding is increased by an appropriate selection of code tables describing codewords corresponding to such values. In conventional image decoding, which is performed together with conventional image encoding, proper decoding is performed using the same code table as that used for image encoding (para. [0007]; unreferenced passages are taken from the patent-in-suit). The patent in suit considers it a problem that the prior art image encoding apparatuses use a plurality of code tables to increase a compression ratio because the processing for switching code tables is complicated, which poses a problem especially when encoding/decoding is performed in a mobile terminal or the like with small memory/low computing power. The switching of code tables is particularly complicated when it is performed according to a syntax structure signal in the code table selection unit of an image encoding apparatus or image decoding apparatus (para. [0021])

With regard to variable-length coding, the patent in suit states that there are two types 158
- Huffman encoding, in which encoding is performed using a relatively easy-to-decode code table, and arithmetic encoding, which involves complicated encoding/decoding but provides highly efficient compression. Arithmetic coding is a type of variable-length coding, and a probability used for encoding/decoding in arithmetic coding corresponds to a code table. However, when Huffman encoding and arithmetic encoding coexist in the same stream in a complicated manner, there is a problem that it is difficult for the above-mentioned mobile terminal to realize this because the processing for switching between Huffman encoding and arithmetic encoding in the course of encoding and decoding is highly complicated (par. [0022]).

In the further paragraphs [0023] to [0026], the patent in suit describes printed matter and documents which disclose (de)coding methods and (de)coding apparatuses which each use their own compression and switching methods. 159

Against this background, the patent in suit is based on the task (the technical problem) of providing image coding methods which allow mobile terminals and similar devices with small memory/low computing power to perform data compression comparable to conventional data compression (para. [0027]). 160

In order to solve the technical problem, the patent in suit proposes a decoding method and a decoding device with the features of claims 1 (method) and 7 (device), which are asserted only to a limited extent in the case in dispute and which can be structured as follows: 161

Claim 1: 162

(1) Image decoding method for decoding multiplexed information that has image signals of each unit, 163

164

(1.1) wherein the information to be decoded includes common information of the entire picture signals and information relating to the picture signals of each unit,	
where the image decoding method is characterized by:	165
(2) a demultiplexing step of demultiplexing the common information of the entire image signals and the information relating to the image signals of each unit from the multiplexed information;	166
(3) a multiple decoding step for decoding the demultiplexed common information of the entire picture signals by using a plurality of decoding methods; and	167
(4) a common decoding step for decoding the demultiplexed information relating to the picture signals of each unit by using an arithmetic decoding method common to each unit.	168
Claim 7:	169
(1) Image decoding device that decodes multiplexed information having image signals of each unit,	170
(1.1) wherein the information to be decoded includes common information of the entire picture signals and information relating to the picture signals of each unit,	171
wherein the image decoding device comprises:	172
(2) a demultiplexing unit (21) adapted to demultiplex the common information of the entire image signals and the information relating to the image signals of each unit from the multiplexed information;	173
(3) a multiple decoding unit (22) adapted to decode the demultiplexed common information of the entire picture signals by using a plurality of decoding methods;	174
(4) a common decoding unit (61) adapted to decode the demultiplexed information relating to the picture signals of each unit by using an arithmetic decoding method common to each unit.	175
The patent in suit proposes in para. 0062 for the case of using the highly efficient arithmetic coding that the "header information", which is particularly important and diverse, should continue to be coded with the "ordinary" variable-length coding, since this data is particularly important and the error correction works much better with the conventional coding than with the otherwise more efficient arithmetic coding, which should then be applied to the user data.	176
II.	177
1.	178
The parties' dispute gives rise to an initial interpretation of claim 1 and its individual features.	179
a)	180

Feature group 1 first shows the general application of the claimed method. According to feature 1, it is a decoding method for multiplexed information which includes image signals of each individual unit, the information to be decoded containing, on the one hand, common information of the entire image signal and, on the other hand, information relating to the image signals of each unit. 181

It is clear from the claim itself that the use of the term "Multiplexed" in the patent in suit means that the two types of information described are present in a common signal or data stream when the claimed method is used to decode this data stream. 182

The parties' dispute gives rise to an interpretation of feature group 1, particularly with regard to the meaning of the term "overall image signals" or "overall image signals". 183

The plaintiff and the defendant proceed from an understanding according to which the entire image or the overall image refers to an individual image from a sequence of individual images, which ultimately form the moving image signal, and are thus based on the language used by the skilled person in the general context of video compression. 184

It is clear from feature 1 that the term "image signal" also refers to the image signal of each individual "unit". Feature 1 shows that the individual "units" are in any case only parts of the multiplexed data stream to be decoded, namely - because we are talking about image signals - parts containing image data. The exact properties of these units are not specified. The term "image signal" is therefore not a reference to an entire individual image from the video, but refers to the type of units that are not further defined, which are not arbitrary content, but contain image data. 185

From the use of the term "total" - whether in the form of "total image signals" or "overall image signals" - a functionally oriented interpretation shows that this is not a reference to an entire individual video image, but merely to the entirety of the units that share "common data" in the data stream within the meaning of feature 1.1. 186

This is also shown by the description of the patent, which in this respect is its own lexicon (see BGH, GRUR 1999, 909, 912 - Spanschraube). It shows that the entire image information or overall image information can and should also refer to so-called slices - irrespective of the question of how many slices an image contains. Thus, it is stated in para. 0045 that the invention should also relate to the slice structure already used in the MPEG-1 and MPEG-2 standard. The description initially indicates that the "common data" are those of the so-called "frame headers": 187

"In the stream structure shown in Fig. 6A, the frame header FrmHdr of the frame data FrmData is described as common information of the entire image signals." 188

In a first step, the entire image is therefore equated with the frame. 189

However, as the patent in suit further explains in para. 0045, it should be noted that in the slice structure according to MPEG-1 and MPEG-2 as well as the video package structure of MPEG-4, a frame is created by combining macroblocks. Such a frame composed of macroblocks is called a slice. Consequently, the patent in suit equates frame with slice and thus with "overall picture". The header of the combination of macroblocks can be described as 190

common information of the entire image signals is configured and different data (image data) is encoded by means of the individual code table. This shows that the patent in suit ultimately uses "slice" and "entire image" synonymously in the description. In this respect, the patent in suit does not differentiate according to the link for the proposed method according to the fact that it must relate to a complete single video image, but instead uses the classification as found in the respective standards in order to separate the common data contained in the larger unit, possibly a single image, but also a slice or even a frame, from the respective different single image data of the smaller unit in order to then be able to treat them differently.

Even from a functional point of view, it does not appear necessary to refer to overall images in the sense of "complete single image" or "still image" in order to enable the functioning of the patent in suit.

This is made clear once again by para. 0046 of the patent in suit, which states, with reference to Fig. 6B, that the slice header information is to be the common information within the meaning of the patent in suit. Para. 0034 also shows that the understanding of the patent-in-suit is not bound to the terminology for image parts, nor to the exact division of the images. Rather, it is made clear that the patent is also intended to relate to an interlace method in which fields are used instead of frames.

Subclaims 5 and 6 show nothing to the contrary. Subclaim 5 makes it clear that the invention can also be applied to a slice system at a higher level, in that the header information relates to the entire still image and the image signals are the slice data. This shows all the more that the patent in suit claims to be applied wherever possible, irrespective of terminology, which is always the case when there is superordinate common information and subordinate individual image information in a multiplexed data stream. This applies to the relationship between the entire still image and the individual slices of which it consists, as well as to the relationship between slice and macroblock. This also applies to common data within a macroblock, which therefore relates to all the individual blocks contained in it, as shown in paragraph 0045 of the description.

Claim 6 represents an extension of this scope to cases in which an intermediate level exists: Then the common header data can refer to the level of the overall image and thereby include slice headers, whereas the lower level, which is only encoded by means of a code table, is still the macroblocks.

The fact that the total image signals or total image signals, on the other hand, must relate to a complete individual video image is not apparent from the way in which the technical teaching functions, nor are there any indications of such a restrictive understanding from the description and examples of embodiments.

b)

In feature 2, it is provided that the common information contained in the data stream of the entire image signal understood in the sense of feature 1 and the information of the individual image elements are demultiplexed. This involves undoing the multiplexing of the signal, which the patent in feature 1 presupposes as being received as multiplexed. In the process step according to feature 2, the common

information of all the units on the one hand, and the image information relating to the individual units from the overall data stream on the other.

c) 198

The method step according to feature 3, which presupposes that according to feature 2, the common information of the individual units is decoded after its restoration by demultiplexing according to feature 2 in a multiple decoding step by using a plurality of decoding methods. In this context, "multiple" or "plurality" means "at least two". The feature does not formulate any qualitative or further functional requirements for decoding; in particular, the wording of the claim does not presuppose or claim that compression effects must occur as a result of the encoding and decoding, even if this forms the background to the invention. 199

A decoding method is initially any method that reverses the encoding of data. The encoding of data ultimately represents, according to the understanding laid down in the patent in suit, any type of conversion of the original data into other data by means of a specific, reversible procedure. According to the wording, the claim is not limited to certain types of methods, nor are qualitative or quantitative requirements for encoding or decoding methods specified. In the description, fixed-length and variable-length encodings are mentioned in the most general form as being known in the prior art, cf. para. 0022. 200

However, due to the lack of content specifications, feature 3 is not covered by any form of coding./decoding system without the need for code tables or compression effects.

d) 201

Feature 4 provides a common decoding step for decoding the information relating to the image signals of each individual unit. The preceding demultiplexing is logically assumed. It can also be seen from feature 4 that it is intended to be a common arithmetic coding/decoding method which is applied equally to all the image information of all the individual units. 202

The term "arithmetic coding method" is defined in para. 0022 of the patent in suit to the extent that it is, on the one hand, a variable-length coding. It is further distinguished from Huffman coding, which is also variable-length coding, and is described as being considerably more efficient than Huffman coding, but also more complex in the sense of being more complicated. Corresponding information can also be found in para. 0062 in the description of the second embodiment. Moreover, it is also described in para. 0022 that arithmetic coding works with probabilities which correspond to code tables. The patent in suit thus pursues a concept of arithmetic coding which corresponds to the general, technical understanding of the term in the points relevant here and according to which arithmetic coding is a form of entropy coding and - as with any entropy coder - probabilities are used. 203

The fact that "a" probability corresponds to "a" table in variable-length coding is meant as a rough functional equivalent: arithmetic coding works with a list of probabilities that define how often certain characters or character sequences ("symbol") occur in the data material to be coded. This is ultimately a table that contains these probabilities, which represent the 204

form the starting point for the coding. The symbol is then inferred from the respective probability of occurrence. Accordingly, paragraph 0022 of the patent in suit is not intended to imply that arithmetic coding refers to the use of a probability in the sense of a number "one" or that the use according to the patent in suit should be limited to the use of a single probability. This is because a limitation to a single probability is not reasonably possible in view of the mode of operation of arithmetic coding, since this is based on the fact that a plurality of probabilities for the occurrence of a plurality of respective symbols are assigned in the material to be coded.

2. 205

The above remarks apply mutatis mutandis to the features of the correspondingly formulated claim 7, which as a device claim has as its object a device which carries out the process steps of claim 1. 206

III. 207

By offering and selling the attacked embodiment in the Federal Republic of Germany, the defendant infringes the patent in suit. This is because the attacked embodiment indisputably complies with the requirements of the AVC standard, which in turn presupposes the use of the teaching of the patent in suit (see 1.). This constitutes both a direct infringement of claim 7 of the patent in suit and an indirect infringement of claim 1 (see 2.). 208

1. 209

The implementation of the requirements of the AVC standard presupposes the realization of the features of claims 1 and 7 of the patent in suit: 210

a) 211

The AVC standard describes a process that reads a bitstream and derives decoded images from it (section 3.44 of the AVC standard). The bitstream is a sequence of bits that forms the representation of coded images and associated data that form one or more coded video sequences (section 3.14 of the AVC standard). A picture is divided into slices and macroblocks, whereby a slice is a sequence of macroblocks or a sequence of macroblock pairs (section 6.3 of the AVC standard). There is a syntax element slice_header() for each slice and the syntax element slice_data() for the actual macro block data (Section 7.3 with 7.3.3 to 7.3.5). This means that feature group 1 is realized, since, if interpreted correctly, the slice header (or macroblock header) also represents common information within the meaning of the patent in suit. 212

b) 213

The fact that feature 2 is fulfilled is rightly beyond dispute between the parties. 214

c) 215

The AVC standard also presupposes the realization of feature 3 of claim 1 of the patent in suit, because the elements of the slice header are decoded by at least two different decoding methods. On the one hand, this is done by using the 216

Descriptors $ue(v)$ and $se(v)$, because the descriptors lead - undisputedly in this respect - to different decoding, because the descriptor $ue(v)$ refers to coding/decoding only by means of Table 9-2, while the descriptor $se(v)$ additionally and subsequently requires decoding by means of Table 9-3.

Whether the focus is on the first step is irrelevant, as is the question of the extent to which the basis of both steps or the respective tables is the so-called exponential Golomb method. The only decisive factor is that the two descriptors determine that decoding takes place in different ways, i.e. according to different rules, and that these rules are not compatible with each other. 217

Whether the descriptor $u(n)$ also refers to a further coding procedure, as the plaintiff believes, can be left open at this point, since in any case two different codes are used. 218

d) 219

The slice data is decoded according to the specifications of the AVC standard using Context-Adaptive Binary Arithmetic Coding (CABAC). This is a uniform arithmetic (de)coding method within the meaning of feature 4. The patent in suit does not contain any qualitative limitation with regard to the complexity of the method to be used. 220

Rather, it follows from paragraph 0022 of the patent in suit that arithmetic, context-dependent coding methods using probabilities were known in the prior art. There is no indication that feature 4 of the patent-in-suit claim was intended to fall short of this. The CABAC provided for in the AVC standard has the properties which arithmetic coding also has according to the description of the patent in suit. It is expressly mentioned that this arithmetic method is considerably more complex than Huffman coding. Accordingly, the technical problem to be solved is not seen in the complexity of the arithmetic coding expressly described with these properties and expressly claimed in feature 4, and thus the solution to the technical problem is not seen in its avoidance. Rather, according to paragraph 0022, the coexistence of Huffman coding and arithmetic coding, which is described as very complicated, is to be avoided in the sense of the patent in suit. A decision should therefore be made in favor of one method. 221

This is precisely what feature 4 provides. Corresponding information can be found in paragraphs 0062 and 0063 of the patent in suit, where it is again described that arithmetic coding provides a more complicated but also more efficient coding, but is somewhat more error-prone than Huffman coding, for example. Switching between arithmetic and ordinary, variable-length coding, on the other hand, is particularly complicated and should therefore be avoided.

It remained undisputed between the parties at the oral hearing that the term "arithmetic coding" also includes the context adaptivity of arithmetic coding according to the understanding of the patent in suit - as the description in para. 0025 shows by the use of the term "dynamic arithmetic coding" - as also provided for by CABAC. 222

The fact that the CABAC procedure provides an internal bypass mode for certain internal CABAC program sections does not change this. Nevertheless, it is a standardized procedure with a standardized canon of rules to which the bypass mode belongs. 223

This means that all data fed in can be decoded using the standardized CABAC process. Contrary to the defendant's view, the "actual" CABAC process is therefore not bypassed, but the bypass is part of this actual process. The "Bypass" only bypasses parts of the "full" CABAC procedure in order to make the CABAC procedure leaner. In particular, however, it does not provide for the bypassed steps to be replaced by others, e.g. set pieces from other coding procedures. The plaintiff substantiated this in the oral hearing without contradiction with reference to the article "Context-based adaptive binary arithmetic coding in the H.264/AVC video compression standard" by Marpe, Schwarz and Wiegand (submitted as Annex K23a in proceedings 4b O 16/17). According to this, the bypass mode, as explained in detail on p. 639 of Annex K 23a to proceedings 4b O 16/17, has the function of switching off certain parts of the regular CABAC process in order to make the process less complex for certain data symbols and ultimately to work more efficiently and thus speed it up.

In so far as the defendant originally took the view that the plaintiff had not shown that there were any cases at all in which the situation arose in which a slice "entropy_coding_mode=1" was set and no macroblock of type I_PCM was present in the slice, the plaintiff argued that the analysis of video material from the defendant's website itself showed that this material was encoded in exactly the same way. Thus, "entropy_coding_mode=1" was set and the entire video did not contain a block of type I_PCM. The defendant no longer contested this. 224

2. 225

Due to the AVC standard compatibility of the attacked devices, the offer and distribution of the attacked embodiment constitute a direct infringement of the patent in suit in the form of patent claim 1 pursuant to Section 9 No. 1 PatG. The attacked embodiment is capable of performing the method for decoding standard-compatible video content protected by claim 1 of the patent in suit and thus realizes all the features of claim 7 of the patent in suit (device claim). 226

Furthermore, the defendant also indirectly infringes the patent-in-suit in the form of claim 1 (method claim) within the meaning of Section 10 (1) PatG. 227

If the challenged embodiment is a means with which the patented process can be carried out in the first place, it also relates to an essential element of the invention. This is the case if the means is suitable for interacting functionally with an essential element of the invention, namely one mentioned in the patent claim, in such a way that the idea of the invention is realized (BGH, GRUR 2004, 758, 760 - Flügelradzähler; GRUR 2005, 848, 849 - drive pulley elevator; GRUR 2006, 570, 571 - extracoronar attachment). In the case in dispute, the decoding method according to the patent in suit can be implemented by the challenged embodiment because the challenged embodiment is appropriately programmed or set up to be compatible with the AVC standard. 228

In any case, it is also obvious to the defendant on the basis of the circumstances that the attacked embodiment is suitable and intended for the application of the protected process. In this respect, the decisive factor is whether, at the time of the offer or delivery, the impending patent infringement was so clearly recognizable from the point of view of the offeror or supplier that an offer or delivery was not possible 229

is equivalent to knowingly jeopardizing a patent (BGH GRUR 2007, 679, 683 f. - Haubenstretchautomat). It is sufficient if, from the third party's point of view, there is a sufficiently certain expectation from an objective view of the circumstances that the customer will use the offered or supplied means to infringe the patent (BGH GRUR 2006, 839, 841 - Deckenheizung).

In the case in dispute, the establishment of AVC standard compatibility is the result of the targeted and purposeful implementation by the defendant. The playback of AVC video content is only possible in a patent-infringing manner. The fact that the defendant subjectively expects that it is practically certain that users will play AVC videos is obvious because it provides users with this function in a targeted and purposeful manner by providing the corresponding compatibility. 230

Even from the perspective of a third party, it is practically certain that users will also play AVC content. Experience from everyday life can be used to determine this element of the facts (BGH GRUR 2005, 848, 851 - Antriebsscheibenaufzug). Accordingly, playing video content on cell phones is now one of the core functions of modern smartphones, which, according to general experience, almost every smartphone user makes use of. Since the most common video format by far is indisputably the AVC format, the use of the patented method by the customers of the attacked embodiment is certainly to be expected. 231

IV. 232

The antitrust compulsory license objection asserted by the defendant does not apply. 233

The Chamber cannot establish that the plaintiff has abused its dominant position (see 1.) (see 2.). 234

1. 235

The plaintiff has a dominant market position. 236

a) 237

In this context, market dominance is understood to mean economic power that allows a company to prevent effective competition on the relevant market (in terms of time, territory and product) and to behave independently towards its competitors, customers and consumers to an appreciable extent (OLG Düsseldorf, Urt. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219, 1221 - Mobiles Kommunikationssystem m.w.N.). In the opinion of the Düsseldorf Higher Regional Court, the necessary exact definition of the (product and geographic) market on which companies compete can be carried out using the so-called demand market concept. The competitive forces to which the companies concerned are subject must be taken into account. Furthermore, those companies are determined which are actually in a position to set barriers to the behavior of the companies involved and prevent a withdrawal from competitive pressure. It is necessary to clarify which products or services are functionally interchangeable from the point of view of customers. The same product market is defined as that which, due to the respective characteristics, prices and intended uses, cannot be replaced by other products or services from the point of view of the customers. 238

services are substitutable. A combination of several factors (such as market share; company structure; competitive situation; behavior on the market; but generally not price) must be taken into account. Individual factors do not necessarily have to be decisive on their own. In this respect, the territory of the Federal Republic of Germany - like every Member State - also constitutes a substantial part of the common market (cf. in particular OLG Düsseldorf, Urt. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219, 1221 - Mobiles Kommunikationssystem).

In connection with the rights claimed here under the patent in suit, a distinction is made with regard to the licensing market. The supplier is the patent proprietor, the buyer is the user interested in the protected technology. In principle, each patent leads to a separate relevant product market, unless an equivalent technology is available for the same technical problem. However, market dominance can only be assumed in other circumstances if the patent holder can prevent effective competition on a downstream product market on the basis of the patent. Such a downstream product market exists for goods/services subject to licensing on the basis of the patent. Standard essentiality alone is not sufficient for this. However, this is the case if a competitive offer would not be possible without a license for the standard essential patent-in-suit because the technology is not only of subordinate importance for the customer on the product market (cf. in particular OLG Düsseldorf, Urt. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219, 1222 - Mobiles Kommunikationssystem). The defendant bears the burden of presentation and proof for market dominance (see OLG Düsseldorf, Urt. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219, 1222 - Mobiles Kommunikationssystem). 239

b) 240

As the owner of the patent in suit, the plaintiff undisputedly holds a dominant market position. As seen, the focus here is not on the licensing market, but on the downstream product market. Therefore, it is not a question of AVC-compatible products in general, but rather a further differentiation must be made between individual AVC-compatible products, each of which may constitute a separate product market. In the present case of the mobile devices challenged here alone, these form a separate product market. 241

According to the defendant's uncontradicted submission, virtually all marketable mobile devices are currently equipped with the claimed AVC standard. This is also apparent from Exhibit B 43, in which the features of ten well-known models from various manufacturers are considered by way of example and are all described as AVC-compatible. In times in which video formats of all kinds (streaming services; media libraries; short films in news apps, users' own short films in messenger apps, etc.) exist and are also widely used, the decoding technology for playing MPEG-4 files is a "must-have" for the average user of mobile devices, especially smartphones. This relevant product market does not include other MPEG-4-capable recording, playback or transmission devices such as televisions, notebooks, PCs, etc., which may constitute a separate product market. This is because a customer who wants to buy a smartphone with which he can also watch videos or news in media libraries on the move will not instead choose a television, a notebook and probably not even a tablet. These products are not interchangeable, as customers prefer smartphones precisely because of their manageable size, the ability to establish a telephone connection and the 242

longer battery life as a rule. Furthermore, the AVC standard is not interchangeable because the video format used in each case is defined by the content provider and not the manufacturer of the end device. Therefore, all end devices support different standards in order to ensure correct playback of the video in every case. The plaintiff therefore has a dominant position on the relevant product market of smartphones. The relevant geographic market is the worldwide market.

Smartphones are traded worldwide as so-called "volatile goods" and there are homogeneous competitive conditions. In particular, there are no regional peculiarities for the function of the (mobile) playback of image material at issue here. Customers worldwide will consider the different models of cell phones - especially with regard to the video function - to be interchangeable. Even if the core function of making phone calls is also considered to be decisive, a regional restriction is not imposed by the cell phone hardware, but - if at all - by the use of a corresponding SIM card.

This also applies to the technical function protected by the patent in suit. The plaintiff itself relies on the fact that the patent in suit is essential to the standard for the use of the AVC standard (see III. above). 243

2. 244

However, it cannot be established that the plaintiff is abusing its dominant market position by not following the "roadmap" set out in the "D /B" judgment (see ECJ, GRUR 2015, 764; summarizing the individual steps instead of all: OLG Düsseldorf, Urt. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219, 1223 - Mobiles Kommunikationssystem). 245

The purpose of the negotiation process outlined above is to achieve a situation that corresponds as closely as possible to that of free competition. The ECJ sets out minimum requirements that are intended to represent serious and balanced negotiations conducted by bona fide parties on both sides. This requires a notice of infringement by the SEP holder and an indication of the infringer's willingness to license a license offer by the SEP holder in accordance with FRAND principles, to which the infringer in turn must respond with a counter-offer in accordance with FRAND principles and - if the SEP holder rejects this - deposit a security and provide information for the past. 246

These standards (see a)) must be used to assess whether the parties intended to conclude a license agreement. 247

Since the defendant has shown itself willing to license after the infringement notification (see b) above) (see c) above), the plaintiff has submitted an offer that is reasonable, fair and non-discriminatory (FRAND; see d) above), but the defendant has not submitted a counter-offer that also complies with these principles (see e) above), the injunctive relief and the recall and destruction claim are enforceable. 248

a) 249

Insofar as the plaintiff is of the opinion that the principles of the D /B case law do not apply here, the Chamber is unable to take a closer look at this. The principles also apply to the case at issue. 250

251

The plaintiff's wording argument that para. 64 of the judgment states that, moreover, if neither a standard license agreement nor license agreements already concluded with other competitors have been published, the SEP proprietor is in a better position than the alleged infringer to check whether his offer meets the requirements of equal treatment and therefore, in the case of a standard license agreement, the prescribed negotiation pattern would not have to be complied with, is not convincing. The passage does not mark an exception, but is merely an additional argument for the patentee's proactive behavior. Similarly, even in the case of a standard license agreement, there may be a lack of information on the part of the defendant regarding the use of the plaintiff's SEP (see Düsseldorf Regional Court, judgment of 9 November 2018 - 4a O 17/17). This is aggravated by the fact that the demarcation criterion of the

"established licensing practice" and in practice leads to further demarcation problems with regard to the question of when a licensing practice is to be described as established (see LG Düsseldorf, judgment of 9.11.2018 - 4a O 17/17). The legitimate expectations that the SEP holder has raised with the FRAND declaration are ultimately reinforced if there is already an established licensing practice (see Düsseldorf Regional Court, judgment of 9 November 2018 - 4a O 17/17).

b) 252

There is sufficient notice of infringement on the part of the plaintiff. The notice of infringement can be seen in the e-mail dated September 6, 2011 (Annex K 10, Exhibit A). 253

aa) 254

It is irrelevant that the infringement report is made to a sister company (D USA) or to an employee there who is the main contact person for group-wide licensing matters. 255

For example, there is no obligation to notify if it can be assumed with certainty based on the circumstances that the alleged infringer is aware of the use of the patent in suit and his objection that the plaintiff did not notify him of this appears to be an abuse of rights (see OLG Düsseldorf, Urt. v. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219, 1224 - Mobiles Kommunikationssystem). In any case, the obligation to notify is already satisfied if information is provided to the parent company of the alleged infringer, as it can generally be assumed that the latter will inform the relevant subsidiaries in the individual countries in which the SEP is used (see OLG Düsseldorf, Urt. v. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219, 1224 - Mobiles Kommunikationssystem). The same situation must be assumed if a subsidiary or a specific employee there has played a leading role in years of license negotiations and has primarily negotiated with the relevant contact persons on the plaintiff's side. The subsidiary D USA had been in negotiations with X since 2009, initially only about the MPEG 2 standard, and later also about the AVC standard at issue here. Already since 2009, Mr. G, called E - to whom the email of 6 September 2011 was addressed (Annex K 10 - Exhibit A) - was involved there as the responsible employee, who was in contact with the other group companies of the defendant with regard to licensing. For example, the email of December 9, 2009 from E to Mr. F of X (Exhibit B 18, 18a) shows that E was in contact with the other regional branches outside of China as well as with the Chinese branch of the defendant and coordinated the licensing negotiations. Therefore 256

Mr. L of X also contacted E in September 2011 on the recommendation of Mr. M when he pointed out the infringement of the AVC standard by the defendant's cell phones and tablets and the resulting need for a license. Thus, he names E's role at the beginning of the email of September 6, 2011 ("I get in touch with you because you handle patent licensing matters at D ") and E also obviously felt obliged to continue the negotiations, as he suggested a telephone call in the email of September 15, 2011 (Exhibit B 23, 23a). In particular, E did not refer Mr. Rodriguez to another employee or to another group company.

bb) 257

In any event, the notice of infringement was given with the plaintiff's consent and thus constitutes a notice of infringement by the plaintiff. 258

The defendant denies with ignorance that the plaintiff granted any power of attorney to X or that X was and is authorized to conclude a pool license on behalf of the plaintiff, which also includes the patent in suit. Even if this denial in the case in dispute is specifically directed at the plaintiff's license offer, it also has effects in connection with the infringement notification, which must also be made by the plaintiff. 259

Both the license agreement offer (Annex K 10, Exhibit G) and the notice of infringement of 6 September 2011 (Annex K 10, Exhibit A) are to be regarded as those of the plaintiff. 260
The defendant does not prevail with its denial, as the Chamber is convinced in accordance with the principles of Section 286 ZPO that X acted with the knowledge and consent of the plaintiff (see (aaa)). Moreover, it appears questionable in principle whether in the present case a denial with ignorance is already ruled out due to bad faith (see (bbb)).

(aaa) 261
262

First of all, the denial with ignorance is admissible in principle, since the plaintiff was not personally present when the power of attorney or license was granted by the plaintiff to X and was therefore not aware of the process. The court may therefore only take the relevant fact as a basis if it is convinced of it as part of the free assessment of evidence. § Section 286 (1) ZPO stipulates in this respect that the court must decide whether it considers a factual allegation to be true or not true on the basis of its own conviction, taking into account the entire content of the hearings and the result of any evidence taken. It follows from the wording "any" that the necessary evidence can also be deemed to have been taken in individual cases without a formal taking of evidence in accordance with sections 371 et seq. ZPO can be regarded as having been taken. The court's formation of a conviction can therefore be based solely on the conclusiveness of a party's factual submission and/or their conduct in court and/or that of their opponent (see OLG Düsseldorf, judgment of 20.12.2017, I-2 U 39/26).

Based on the largely undisputed party submissions on the pre-trial license negotiations, the Chamber is convinced that X is the licensee of the plaintiff and acted with its consent. In any event, the plaintiff approved X's actions at the latest when the action was filed. 263

264

The entitlement of X is already apparent from the text of the standard license agreement sent, according to which the licensor (plaintiff) grants the license administrator (X) a license to enable it to manage the license (see Annex K 10 Exhibit G, page 1, penultimate paragraph).

None of the defendant's group companies had ever questioned the entitlement of the license administrator in the pre-trial license negotiations, which was specifically addressed in the sublicense agreements that the pool concludes with the respective AVC standard users. Even before September 2011, the license to the AVC standard had been addressed several times and even in these contexts the group companies of the defendant never questioned the entitlement. For example, in the email of February 16, 2009, N, an employee of X, addressed the use of the AVC standard to the Vice President of D USA Dr. X) (cf. Annex B 7, "offers products that make use of the [...] AVC/H.264 (MPEG-4 Part 10 Standards)". In an e-mail dated November 12, 2009 from M, Vice President of the Licensing Department of X to G, called E, A Co. Ltd. (see Annex B 13), the AVC standard and initial details on the content of the license (licenses, royalty cap and term of the protected entity) are again mentioned. There is therefore no indication that X did not act with the knowledge and awareness of the plaintiff in the granting of the license. 265

The plaintiff approved X's actions at the latest when it filed the lawsuit and with its submission in the lawsuit, as it thereby adopted X's actions as its own. 266

In this respect, actions of a pool license administrator in the context of license negotiations are to be regarded as those of the SEP holders, who are members of the pool. According to Section 286 ZPO, there is therefore not the slightest doubt that X acted legitimately on behalf of the plaintiff. 267

(bbb) 268

Also from the point of view of the principle of good faith, which also applies in procedural law (see BVerfG, decision of December 5, 2001 - 2 BvR 527/99 and others, NJW 2002, 2456), the defendant cannot prevail with a denial with ignorance. The defendant's conduct is contradictory. In the opinion of the Chamber, the defendant cannot argue that it did not act inconsistently itself. Even if certain other group companies involved in the group licensing issues were active in advance, which is common practice in the area of pool licensing for standard essential patents and which the defendant cannot seriously question, it must be held to the conduct of its group company. The consideration that such a denial would - and would not - lead to a taking of evidence can ultimately only be seen as an attempt to delay the proceedings when viewed objectively. 269

Circumstances that are undoubtedly clear to the defendant, who is actively involved in economic life, from a realistic point of view and that have never been questioned by her in the past, not even slightly, are now denied on the basis of procedural considerations within the framework of Section 138 (4) ZPO. This provision protects a litigant who has lost in knowledge. The defendant is not to be regarded as such in view of its overall conduct.

cc) 270

In terms of content, the duty to notify does not require detailed (technical and/or legal) explanations of the allegation of infringement, but it is sufficient if the other party is put in the position 271

to be able to form his own opinion of the justification of the accusation made to him (see OLG Düsseldorf, Urt. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219 - Mobiles Kommunikationssystem).

It is true that X neither mentioned the publication number nor specifically the accused embodiments, but made a general reference to the infringing products ("In particular, we understand that D now offers mobile handset products and tablet products that include [...] AVC/H.264 [...]"). In the present case, however, no more specific information is required. This is because the license for the AVC standard has already been addressed in the preliminary correspondence that has dragged on for years. 272

It has already been addressed in the e-mail of November 12, 2009 from Dean M , Vice President of the License Department of X, to G , called E , A Co Ltd (Annex B 13). The AVC standard and initial details on the content of the license (licenses, royalty cap and term of the protected unit) as well as the cell phones with T-DMB functions are mentioned as infringing products. In the email of 6 September 2011 (Annex K 10, Exhibit A), X ultimately only picked up on interrupted conversations by referring again to the AVC license. This is also made clear by the fact that E did not request any further explanations following the infringement notice, but instead requested a telephone appointment to discuss the matter "further" (Exhibit B 23, 23a). 273

Insofar as the defendant refers back to the fact that no specific reference is made to the patent in suit, this is harmless. For example, according to Exhibit E of Annex K 10, the defendant and its group companies were able to view the relevant SEP list for the pool together with cross-reference charts on the Internet at www.C .com, naming the associated standard sections that make use of the associated SEPs. Even if these are not classic claim charts - which Düsseldorf case law does not even require at this stage of the negotiations (see OLG Düsseldorf, judgment of 30.03.2017, ref. I-15 U 66/15, GRUR 2017, 1219, 1223 - Mobile Communication System) - was no longer necessary because the plaintiff already had the opportunity to take note of it. The fact that the parent company was in any case aware of the activities of MPEG LA - which suggests that it was not unaware of its internet presence - is already apparent from the email from Mr. P dated 1 July 2009 to X from X (cf. Annex B 10, 10a). 274

Finally, it should also be noted in the context of the content requirements that a notice of infringement can be a mere fabrication or a reference to its absence can be an abuse of rights if knowledge can already be assumed. This is the case with the defendant due to the circumstances already described. 275

c) 276

Employee E, who acted as the relevant group contact for the defendant, signaled the group's willingness to license to X, which represented the plaintiff's licensing interests. 277

aa) 278

The licensing request does not have to meet high requirements, but an informal and general statement by the license seeker clearly expressing his willingness to license is sufficient; even conclusive action may be sufficient depending on the individual case. 279

(see OLG Düsseldorf, judgment of March 30, 2017, file no. I-15 U 66/15, GRUR 2017, 1219, 1225 - Mobiles Kommunikationssystem).

bb) 280

E's reply to the infringement report on September 15, 2011 (Annex B 23, 23a) included a request for a telephone call to discuss the details of the matter. This can already be seen as a conclusive action that signals a willingness to license. In this respect, the previous negotiations on the MPEG 2 standard, in which the defendant persistently refused to take a license for the PRC as well, do not invalidate the general willingness to take a license for the AVC standard. Ultimately, the e-mail in September 2011 was a message in the context of stalled license negotiations, which mainly concerned the MPEG 2 standard until 2011, but also included the AVC standard from November 2009 and were resumed. 281

d) 282

The sending of the plaintiff's standard license agreement in February 2012 to the defendant's internal contact person for licensing issues, E, is to be seen as a license offer that complies with FRAND principles. In this respect, the persons involved in the exchange of offers acted on behalf of the respective parties involved in the legal dispute (see aa)), the formal requirements of an offer in accordance with FRAND principles are met (see bb)) and the substantive requirements for a FRAND offer are also met (see cc)). 283

aa) 284

As already explained in the context of the notice of infringement, E is the correct addressee, who was the person responsible for licensing issues within the defendant's group. E received the standard license agreement (Annex K 10 Exhibit G) at the beginning of February 2012, as can be seen from the email of 10 February 2012 (Annex B 22, 22a). 285

The standard license agreement was sent by X and, according to the wording of the preamble, is to be understood as an offer by the plaintiff to the defendant's group. Each licensor undertakes to grant individual licenses or sublicenses under all AVC essential patents to individuals, companies or other legal entities on moderate, reasonable and non-discriminatory terms and conditions in accordance with the terms and conditions agreed here, which may be granted by the licensor (without payment to third parties) (see Annex K 10 Exhibit G-a, page 2, 3. 286

paragraph). The licensor (the plaintiff) continues to grant a license to the license administrator (X) to enable it to manage the license (cf. Annex K 10 Exhibit G-a, page 2, last paragraph).

Insofar as the defendant does not wish to attribute the actions of X to the plaintiff, X may indeed be acting on its own account because it is granting a sublicense. Nevertheless, this action by sublicensing is ultimately only an activity that X carries out instead of the plaintiff (and all other pool members). The fact that this administrative activity is justified is clear from the above-mentioned passages of the standard license agreement itself. Throughout the out-of-court negotiations, the defendant did not question the authorization of X to act on behalf of the pool members, but only made sure on the occasion of the meeting on July 20, 2016 that X was not itself 287

entitled to bring an action (see Annex B 28a). Even if one did not want to assume a prior authorization of X with regard to all acts relating to the licensing of the patent in suit as part of the patent pool, the filing of the action is in any case to be seen as an authorization of the plaintiff. The Chamber does not see why the dialogue between the SEP holder and the prospective licensee provided for by the ECJ should be severely disrupted if negotiations are initially conducted with a pool administrator instead of the individual pool member, if only against the background that it is apparently common practice in the field of SEP licensing for companies to make their patents available by way of a pool solution and that there is therefore one contact person for the entire pool.

bb) 288

The sending of the standard license agreement in February 2012 is to be seen as a sufficiently concrete offer due to its objective explanatory value. 289

Person E, who was responsible for coordinating the group-wide license negotiations, had a complete contract document at his disposal which set out all the contractual conditions for a license to the patents essential to the AVC standard. In particular, the clause 3.1.1. contains the required parameters for the license calculation. Art. 2.1. contains the granting of the license for AVC products, whereby Art. 1.10 contains the definition of AVC products. The essentialia negotii of licensing are thus determined. 290

Contrary to the defendant's view, the document was not merely a model contract for information purposes. It was clearly a self-contained contractual document that was not specifically tailored to one of the group companies, but was intended as a standard contract for a large number of licensees (see Düsseldorf Regional Court, judgment of 9 November 2018, Ref. 4a O 17/17). The date and name of the licensee are left blank. The reference in X's email of 6 September 2011 (Annex B 21a) that the electronic copies are for information purposes only and cannot be used as copies shows precisely that, conversely, the documents sent by post were intended to fulfill the function of signature copies (see LG Düsseldorf, judgment of 9 November 2018, Ref. 4a O 17/17). 291

As a result, the method of calculating the license fee has also been sufficiently explained. 292

In this context, Düsseldorf case law requires that the SEP holder must explain the main reasons why he considers the remuneration parameters proposed by him to be FRAND. If he has previously granted licenses to third parties, he must, depending on the circumstances of the individual case, provide more or less substantiated reasons in particular as to why the license remuneration he intends to grant is FRAND precisely against this background (see OLG Düsseldorf, Urt. v. 30.03.2017, I-15 U 66/15, GRUR 2017, 1219, 1227 - Mobile Communication System). If there are a sufficient number of license agreements and acceptance on the market has been demonstrated in this way (e.g. via the market share of the products licensed at a certain fee level), no further information on the reasonableness of the license fee level will generally be required (LG Düsseldorf, Urt. v. 13.07.2017, Ref.: 4a O 154/15, para. 311 - cited in juris; LG Düsseldorf, Urt. v. 11.07.2018, Ref. 4c O 77/17, BeckRS 2018, 25099, para. 137). 293

In principle, the explanation of the calculation as well as the offer itself must be made in good time so that the infringer has sufficient time to react (see LG Düsseldorf, Urt. v. 13.07.2017, Ref.: 4a O 154/15, para. 319 - cited according to juris; LG Düsseldorf, Urt. v. 11.07.2018, Ref. 4c O 77/17, BeckRS 2018, 25099, para. 144). If at the time of the offer

the need for more specific explanations does not yet exist due to the individual circumstances of the case, this may arise during the process if individual material FRAND requirements are substantiated by the infringer, so that all calculation factors must be specifically presented (see OLG Düsseldorf, decision of 17.11.2016, case no. I-15 U 66/15, para. 19 - cited in juris; LG Düsseldorf, judgment of 13.03.2016, case no. 4a O 126/14 - para. 254 - cited in juris). 13.03.2016, Ref. 4a O 126/14, para. 254 - cited in juris). However, the specific additional information must not contradict the original more general information, otherwise the offer is to be regarded as abusive in the absence of FRAND conditions.

Although the standard license agreement itself does not contain any statements on the manner in which the license is calculated, such statements are not required in the specific individual case according to the previously established standards. The plaintiff has submitted a standard license agreement which it has submitted to a large number of licensees with the same conditions. The more license agreements concluded with similar license conditions, the stronger the presumption that the license fees demanded are FRAND (see LG Düsseldorf, Urt. v. 31.03.2016, Ref. 4a O 126/14 para. 219 - cited in juris). In the present case, it is a standard license agreement, as is already apparent from the pre-formulated contract text, which E, as the responsible negotiating partner of the defendant's group, was already essentially familiar with from the years of previous negotiations. 294

Apart from the fact that the list of licensees who had already concluded the agreement is available on the Internet (Annex K 10 - Exhibit F), according to the email of 21 February 2012 (Annex B 25, 25a), E knew licensees, such as O , LLC, who had concluded the agreement - albeit not group-wide. In this respect, the group company already had all the information it needed to enter into the negotiations, which it then continued with the justification already given for the MPEG-2 standard that, like these companies, it only wanted to license individual group companies. In addition, the defendant did not question the calculation of the license amount as such until the end of the oral hearing. 295

Finally, there are also no indications that a further explanation of the calculation parameters or a presentation of the concluded license agreements themselves are usually provided as part of the contract offer. There is no evidence that this is customary in the industry. 296

cc) 297

Furthermore, the plaintiff's offer is fair, reasonable and non-discriminatory. 298

(aaa) 299

"Fair and reasonable" contractual terms are to be understood as those that are not offered to the licensee by exploiting a dominant market position. The contractual terms must be reasonable and must not be exploitative (OLG Düsseldorf, decision of 17.11.2016, case no. I-15 U 66/15, para. 15, cited in juris). A licensor's offer may prove to be unfair/unreasonable in particular if a license fee is demanded that significantly exceeds the hypothetical price that would have been formed in the event of effective competition on the dominated market, unless there is an economic justification for the pricing (LG Düsseldorf, Teilurt. v. 31.03.2016, Az.: 4a O 73/14, Rn. 225 - cited according to juris; LG Düsseldorf, judgment of 9.11.2018, 300

Ref. 4a O 17/17). A strictly mathematical derivation is not required; it is sufficient - if possible - to demonstrate the acceptance of the requested license rates on the market via license agreements already concluded (LG Düsseldorf, Urt. v. 13.07.2017, Ref. 4a O 154/15, para. 311 - cited in juris). The presentation of contracts already concluded has priority. It is easier to prove FRAND compliance and establish it with greater certainty through the result of various, already successful, actual license agreements than through the presentation of the individual factors that can or should play a more or less important role in license agreement negotiations (see LG Düsseldorf, Urt. v. 13.07.2017, Ref. 4a O 154/15, para. 312 - cited in juris). The general objection (cf. Kurtz/Straub, GRUR 2018, 136) that it is not a suitable indication because these contracts give the appearance of an exploitation of market power per se does not hold up because, in addition to the submission of the contracts, it is also necessary to demonstrate acceptance on the market, which can result in particular from the comparability of the licensees and license seekers.

The contractual offer must also prove to be appropriate with regard to the other contractual conditions (intellectual property rights subject to license, license territory, etc.).

301

The prohibition of discrimination standardizes an obligation of equal treatment for the dominant company in that it must grant trading partners who are in the same situation the same prices and terms and conditions (OLG Düsseldorf, Urt. v. 30.03.2017, GRUR 2017, 1219, ref.: I-15 U 66/15, para. 173 - Mobiles

302

Kommunikationssystem). The principle of equal treatment only applies to situations that are comparable. There is no legal obligation to treat all trading partners equally. Rather, even the dominant company is not prevented from reacting differently to different market conditions. Unequal treatment is therefore permissible if it is objectively justified (OLG Düsseldorf, Urt. v. 30.03.2017, GRUR 2017, 1219, Ref.: I-15 U 66/15, para. 173 - Mobiles

Kommunikationssystem). The broad scope for objective justification to which the owner of an industrial property right is generally entitled is limited if, in addition to the dominant market position, there are other circumstances which show that the unequal treatment jeopardizes the freedom of competition (OLG Düsseldorf, Urt. v.

30.03.2017, GRUR 2017, 1219, Ref.: I-15 U 66/15, para. 174 - Mobiles

Kommunikationssystem). These may consist in particular in the fact that access to a downstream product market is dependent on compliance with the patent teaching or that the product - as here - is only competitive when the patent is used (OLG Düsseldorf, Urt. v.

30.03.2017, GRUR 2017, 1219, Ref.: I-15 U 66/15, para. 173 - Mobiles

Kommunikationssystem).

The license seeker has the burden of presentation and proof for unequal treatment (OLG Düsseldorf, Urt. v. 30.03.2017, GRUR 2017, 1219, Ref.: I-15 U 66/15, para. 177 - Mobiles Kommunikationssystem). However, account must be taken of the fact that the license seeker regularly has no detailed knowledge of the SEP holder's licensing practice, in particular of existing license agreements with third parties and their regulatory content. This justifies imposing a secondary burden of proof on the SEP holder, who naturally has knowledge of the contractual relationships with other licensees and who can reasonably be expected to provide more detailed information in this respect (OLG Düsseldorf, Urt. v. 30.03.2017, GRUR 2017, 1219, Ref.: I-15 U 66/15, para. 177 - Mobiles

303

Kommunikationssystem). The information on the licensees must be complete in this context and must not be reduced to a few well-known companies in the industry

(Regional Court Düsseldorf, judgment of 9.11.2018, 4a O 17/17). The submission must also contain information on which companies - to be specifically named - with which significance on the relevant market have taken a license and under which specific conditions (OLG Düsseldorf, Urt. v. 30.03.2017, GRUR 2017, 1219, Ref.: I-15 U 66/15, para. 177 - Mobiles Kommunikationssystem). If unequal treatment is established, it is up to the patent proprietor to explain and, if necessary, prove any circumstances justifying the different treatment (OLG Düsseldorf, judgment of 30.03.2017, GRUR 2017, 1219, Ref.: I-15 U 66/15, para. 173 - Mobiles Kommunikationssystem).

(bbb) 304

Measured against these standards, the submitted offer to conclude the standard license agreement is FRAND. 305

The plaintiff has substantiated that the standard license offered was accepted in the market, which has already been concluded thousands of times, as the submission of the license agreements shows. The defendant, which is burdened with the burden of proof in this respect, was not able to shake this indication. Its submission does not indicate that the license conditions are inappropriate, nor has it shown any objective reason why it alone should consider other license conditions, nor that it would be comparable with licensees who have also not concluded the standard license agreement on the terms shown in Exhibit G of Annex K 10. 306

(i) 307

The Chamber can neither find that the pool as such is composed in violation of antitrust law (under (1)), nor that the so-called "royalty cap" clause entails unreasonable or discriminatory and therefore unreasonable licensing (under (2)), nor that the license amount is unreasonable due to the lack of an adjustment clause (under (3)). 308

(1) 309

Licensing by means of a pool license as such is unobjectionable under antitrust law. There is also no dispute between the parties in principle that a certain flat rate, which necessarily goes hand in hand with a pool license, is not objectionable as such. 310

The pool license combines various advantages, first and foremost a possible simplified use of the covered standard, in that the license seekers receive the license from a single source at uniform conditions (so-called "one-stop-shop" solution; see LG Düsseldorf, Urt. v. 9.11.2018, Ref. 4a O 17/17 with further references). The Commission's Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements of 28 March 2014 (hereinafter: Guidelines) cite the generally positive and pro-competitive effects such as the reduction of transaction costs, the accumulation of license fees and central licensing (Guidelines, para. 245). This is accompanied by a better ability to enforce the license for SEP holders due to easier monitoring of contracts and easier prosecution of infringements. The Commission only assumes a restrictive effect on competition if a pool consists exclusively or to a significant extent of substitutable technologies that lead to collective tying and price fixing between competitors (Guidelines, para. 246, 255). Exploitation will regularly be found to have occurred if a pool systematically contains technologies that are not necessary for compliance with the standard. 311

intellectual property rights are included in the license agreement so that the purpose of unjustifiably increasing the license fees by including as many patents as possible becomes apparent (Regional Court Düsseldorf, judgment of 9.11.2018, Ref. 4a O 17/17 with further references).

The Chamber cannot establish that the latter is the case with the patent pool at issue. 312

First of all, the determination of a fair and reasonable license offer for a pool requires a substantiated factual submission on the use of the patents from the pool (see OLG Düsseldorf, decision of 17.11.2016, case no. I-15 U 66/15, para. 26). A corresponding submission can be made by submitting a so-called proud list with claim charts, provided that this is customary in the industry (see OLG Düsseldorf, decision of 17.11.2016, case no. I-15 U 66/15, para. 313

26). The defendant's objection that the plaintiff did not provide it with a proud list with claim charts on the basis of which the defendant or its sister company could have examined the infringement and the standard essentiality does not hold water. It is irrelevant whether the cross-reference charts (Exhibit K 10 - Exhibit E), which can be viewed on the Internet, may already be regarded as claim charts, since they assign the specifically relevant AVC standard passages to all pool patents (see Regional Court Düsseldorf, judgment of .

9.11.2018, Az. 4a O 17/17), or whether in any case this list was customary in the industry and a submission of separate claim charts was no longer necessary. It seems unrealistic in several respects that the department in the defendant's group dealing with IP issues should not have been in a position to examine the question of standard essentiality: Firstly, the defendant's group indisputably has one of the largest patent departments in the PRC. Secondly, it does not seem plausible that the defendant should not be familiar with the AVC technology on which the patent in suit is based when that very technology is used in its products - as the underlying case shows. Finally, it is also inexplicable that the defendant's parent company only requested claim charts for the first time in 2016, although negotiations had been going on since 2011, and obviously thousands of other licensees were in a position to check the standard essentiality on the basis of the cross-reference charts. It is also striking that the issue of over-declaration was not an issue at all in the pre-trial negotiations. Moreover, in an e-mail dated July 1, 2009 in the context of the negotiations on MPEG 2 and the exchange of ideas on the establishment of B pools by Mr. P (Annex B 10, 10a), there is even a general reference to the fact that the defendant's group was toying with the idea of adopting the certification procedure for essential patents established by X.

Based on the ECJ's model of honest negotiating parties in undistorted competition, the Chamber is inclined to assume that parties who are actually interested in concluding a contract do not present their constructive concerns regarding mutual claims "slice by slice", but rather concentrate the negotiation material. This is all the more the case when it comes to fundamental issues such as the composition of the pool. 314

The defendant's further submissions also do not support the assertion that there are considerably more non-standard essential patents (so-called NEPs) than SEPs in the patent pool at issue. 315

In this respect, the defendant has submitted an essentiality analysis by the IP consulting firm Q together with the associated explanations as Annexes B 39, 39a, B 40, 40a. According to this analysis, in addition to pool patents of company X, the plaintiff's pool patents are also said to be non-essential by default. This is the result of a random examination, the object of which is to check a few selected patents for their standard essentiality. 316

Accordingly, 1,227 (439 + 788) of a total of 5,047 patents filed (2173 + 2873) have been analyzed in English. This includes 935 patents from the plaintiff. Of these 169 patents, 46 patents are said to be SEPs, while 119 are merely NEPs. It is not clear from the study which pool patents (publication number) were analyzed and which deficits exactly exist with regard to the standard. The selection of the patents is - with the exception of the language - not comprehensible. 139 patent families of the four plaintiffs from the present proceedings and the parallel proceedings have not been examined. Even if one were to take the view that the study is representative and undoubtedly shows a realistic distribution, the distribution could only have an effect on the amount of the license offered with regard to the pool patents submitted by the plaintiff, the industry acceptance and appropriateness of which was not disputed as such by the defendant until the end of the oral hearing. Even then, the question would remain open as to whether the freedom to lawfully use several thousand patents across the board and to move freely within the AVC standard as part of the one-stop-shop solution justifies monetization to a certain extent, even if there is a risk that NEPs are among these patents.

In contrast, the plaintiff disputed the figures claimed and referred to the fact that the patents submitted are first examined by independent experts for their standard essentiality, as provided for in the guidelines under the safe harbor regulation (para. 261, b)). Against this background, the regulations of the standardization organization (ISO/ITU/IEC rules) do not play a significant role. 317

With regard to the alleged antitrust infringement, the defendant does not succeed in any case because its figures do not prove that significantly more NEPs are part of the patent pool than SEPs. For even according to its investigation, a total of 51% SEPs are in the pool at issue. Annex B 50, 50a does not produce any other results either. Finally, the objection remains that the result is based on a random sample and that not all pool patents were examined. 318

The Chamber is also unable to identify any systematic approach to over-declaration in the formation of R , the plaintiff from the parallel proceedings in Case No. 4a O 17/17, whereby the economic value of its portfolio is completely absorbed into the plaintiff's portfolio in part through transferred divisional applications and bifurcations. The same applies to the assertion of an S-SEP outside the pool by T , and other SEPs held by the plaintiff outside the pool. The investigation submitted by Q in this respect (Annex B 54, 54a) raises the same fundamental concerns as the investigation in Annex B 39, 39a, B 40, 40a. The processes described are "neutral" as such and the defendant does not submit anything that justifies a systematic abuse, especially since the increase in the number of patents is not accompanied by an increase in the license fee (see Regional Court Düsseldorf, judgment of 9 November 2018, Ref. 4a O 17/17). In addition, the plaintiff explained at the hearing that each pool member undertakes to contribute all SEPs when joining the patent pool. If the member holds SEPs outside the patent pool and uses them to claim a licensee of the patent pool, the licensee can also assert the standard license to the patent pool against this (non-pool) SEP. The standard license then has a third-party effect, so to speak, vis-à-vis the SEP held outside the patent pool. This circumstance also speaks against systematic abuse. 319

(2)

The clause in Art. 3.1 of the standard license agreement is also appropriate and non-discriminatory with regard to the capping limits. 321

The defendant cannot argue that the royalty caps are inappropriate and discriminatory because multi-product suppliers are more likely to benefit from the cap, which was \$8,125,000 in 2016, due to their broader product range. 322

In general, there is no obligation to grant most-favored-nation treatment. Even a market-dominant company cannot be prevented from reacting to different market conditions in a differentiated manner. This means that contracts concluded with the other side of the market do not always have to lead to the same economic result (see Regional Court Düsseldorf, judgment of 9.11.2018, Ref. 4a O 17/17 with further references). Discrimination is ruled out if there is already no difference in treatment. 323

The provision of Art. 3.1 provides for a cap from a certain license amount paid as well as a free license for the first 100,000 units sold. 324

The possible cross-subsidization of companies that offer AVC products from different sectors of the electronics industry and thus reach the capping limit more quickly than a single-product manufacturer due to a diversified product range is neither the result of unequal treatment nor can the clause therefore be qualified as inappropriate. 325

The cap initially creates an economic incentive to sell large quantities in order to become license-free when sales are high. However, this promotes natural competition. Promoting competition also results in good enforcement of the standard. It corresponds to natural market and competitive conditions that companies with certain market shares and a certain market presence are rewarded. For example, the mechanism of discounting - which is all that happens when the cap is reached - is a common practice in the economy for large quantities. 326

There is also no unequal treatment of single-product manufacturers compared to multi-product manufacturers. Unequal treatment presupposes that both groups of manufacturers are comparable at all. This is not the case here, because the licensing of the AVC product covers various downstream product markets, whereby the products are not substitutable with each other (televisions and cell phones). In this respect, the plaintiff offers the same capping limits to all manufacturers; there is no obligation to differentiate. Insofar as the defendant uses multi-product manufacturers as an example of a disproportionate advantage, it also disregards the fact that multi-product manufacturers also leave the area of license-free production of the first 100,000 units more quickly. The fact that the standard license agreement covers the encoding and decoding of AVC videos and thus various downstream markets (mobile devices, televisions, etc.) on which this technology is used does not constitute inadmissible bundling. The technology of the video format is licensed, irrespective of the device/terminal on which it is used. The tying is not evident because the use of the AVC format is made available in a uniform manner for use in return for payment. The AVC format technology covered by the patent pool is also not substitutable as such. As seen, substitutability is not established by the fact that the format can be used in different receivers or transmitters. 327

In addition, the established cap also applies to single-product manufacturers whose sales activities are limited to mobile devices. The achievement of high sales figures is not solely due to the selection of products, but is also attributable to the individual business practices of the respective competitor. Good marketing and brand management, well-developed infrastructures and reliable distribution networks all play a role. The commercial success of a product is based on numerous factors. 328

All of these factors mean that the clause at issue does not ultimately constitute an abuse under antitrust law and that the consequence of cross-subsidization, which can occur in a company that is successful on the market, is acceptable. 329

(3) 330

The license amount offered in the standard license agreement also does not prove to be unreasonable because no adjustment clause is provided for. 331

An adjustment clause is generally required to enable a price correction if there are noticeable changes in relation to the property rights portfolio (see OLG Düsseldorf, decision of 17.11.2016, case no.: I-15 U 66/15, para. 32 - cited in juris). However, it is also possible to compensate for an unreasonable level of license fees inherent in the variability of the property rights portfolio through other mechanisms (see Regional Court Düsseldorf, judgment of 9.11.2018, Ref. 4a O 17/17). 332

The standard license agreement stipulates the price regardless of the rise and fall in the number of licensed AVC patent portfolio patents (see Art. 4.9 of the standard license agreement). In fact, despite the growing pool portfolio (currently over 5,000 patents), the license fees have not yet changed to the detriment of the licensees; only the upper cap has been increased at irregular annual intervals. Insofar as the defendant states that the non-essentiality rate has changed, this is not substantiated sufficiently (see above) and the change has not yet assumed a degree that makes the license appear unreasonable. With regard to the economic value of the AVC standard, it is not apparent that its importance has decreased to such an extent that a license reduction is appropriate. The defendant does not claim that the AVC technology at issue here has been completely replaced by the successor standard. 333

Apart from this, the standard license agreement provides further adjustment options for such changing circumstances. For example, Art. 6.4 provides for an ordinary right of termination within a period of 30 days and otherwise Art. 6.1 regulates a term of 5 years, whereby the (automatic) extension on the part of MPEG LA can be made subject to the condition that appropriate contractual amendments can be made. Amendments may take into account prevailing market conditions, changes in the technology environment and the commercially available products. It is not apparent that X will refuse to terminate the contract if the licensees object to X's unilateral contract amendments. Nothing to the contrary can be inferred from the renewal notices submitted in Exhibit K 38 to Exhibit K 39, which were sent to all licensees in standardized form and contained contract amendments. 334

In this respect, it is guaranteed that the standard license agreement reflects the property rights situation in a contemporary and realistic manner. Finally, the fact that the agreement has been concluded thousands of times is also an indication that the existing compensation is to be regarded as customary in the industry. 335

(ii) 336

Nor can the Chamber find that the offer is in any other way unreasonable or discriminatory towards the defendant. 337

FRAND compliance is indicated by the standard license agreements concluded in the cell phone sector (see (1) below). In the discussion of the contracts submitted, the defendant has also not pointed out any other circumstances that would contradict the indicative effect of the license agreements already concluded (see (2)). A worldwide license including the PRC does not constitute discrimination contrary to antitrust law in terms of the selective enforcement of intellectual property rights (see (3)), nor is the license fee amount including the PRC (see (4)) and including all standard profiles (see (5)) unreasonably high. 338

(1) 339

The fact that half of the mobile phone market is not licensed by X and that the vast majority of licensees are also pool members does not lead the Chamber to doubt the market acceptance in the cell phone segment. 340

In Annex B 87, 87a, the defendants have submitted figures based on information from the International Data Corporation (IDC), which show that 56% of the relevant market for mobile telephones in terms of units is unlicensed in the period from 2017 up to and including Q2 2018. Of the 44% of the licensed market, 42% is attributable to pool members. Insofar as the plaintiff denied with ignorance at the hearing that the figures were collected by the IDC, it is not clear what conclusion it intends to draw from this. It has stated that the compiler of the data - as is normally the case - is not apparent from Annex B 90, 90a, but that the figures have been prepared. 341

At the hearing, the plaintiff itself presented current figures prepared on the basis of the Excel table (D Data) and the bar chart (AVC Handset Sales Worldwide), which are based on X's market knowledge and data from the Gartner database - as the plaintiff's representative confirmed when asked by the court - without the sources on the table/diagram being apparent. In this respect, the Chamber does not see that the denial of the origin implicitly constitutes a denial of the content. 342

The figures of both parties are only representative to a limited extent because they take into account the worldwide number of sales of mobile telephones. They obviously also include sales outlets that are neither the usual manufacturers nor retailers, such as the French department store chain Auchan (Annex B 87, p. 2; Excel sheet plaintiff, p. 3) or the German DIY chain Obi (Annex B 87, p. 5; Excel sheet plaintiff, p. 3). 343

However, the plaintiff also arrives at approximately the same figures with regard to licensing in the mobile phone sector, namely 42.69% of licensed cell phones, whereby 41.55% are licensed devices from pool members (Licensor) (see excel sheet plaintiff, last page below). 344

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The fact that between 42% and 44% of cell phones sold are licensed by X suggests that the standard license has been widely accepted in the mobile phone market. This figure represents almost half of the market share. In addition, the plaintiff has shown on the basis of the bar chart submitted at the hearing that the licensing rate was still above 70% in 2011 (blue bar on the far left) and has steadily decreased since 2013. This development since 2013 goes hand in hand with the growing market share of Chinese companies (blue bar on the far right), including the defendant's group as well as company B, none of which have taken a standard license to date. In addition, the unlicensed cell phones also include those whose providers do not exceed the license-free quantity limit of 100,000 cell phones.

The fact that only 2% of the telephones come from licensees who are not also pool members does not stand in the way of general acceptance of the contractual conditions. The plaintiff was able to refute the defendant's objection at the hearing that the pool members would compensate for additional expenses due to the license payments at the same time as increasing license income. In this respect, it argued that the license fees generated are paid out on a pro rata basis depending on the patents contributed. An example of a pure net payer, which only holds nine patents in the pool (see Annex 10 - Exhibit C), is the U Group, which produces and sells the second highest number of AVC-capable mobile devices worldwide. There is no correlation between pool patents and significance on the market, rather there is a complete separation of the pool data from the market data with the result that pool members are treated like any other licensee. In this respect, it is not apparent why the licenses concluded should not be a valid indication of market acceptance. The defendant also has nothing substantiated to counter this except that the pool members have a general interest in the functioning of the pool system. On the one hand, every licensee who wants to benefit from the advantages of the one-stop-shop system has such an interest. On the other hand, it is evident that even market-leading companies such as X have agreed to the license conditions, whereby U indisputably does not derive any profit from its pool membership. Both companies have great market power and are quite capable of imposing reasonable conditions in license negotiations. The fact that they also concluded these licenses indicates that the terms are FRAND-compliant. Insofar as the defendant states that it does not know the membership agreements of the pool members, there is no reason to submit them, since the objective circumstances - as far as is known - do not even hint at any facts that support the defendant's fear that several large market participants have joined forces to enforce certain license conditions on the market.

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(2)

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The defendant has not succeeded in showing any differences in the submitted, already concluded license agreements that are relevant to the present legal dispute and that could lead the Chamber to doubt the fundamental FRAND compliance.

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Insofar as the defendant criticizes the contract with ZDF (Annex B 65 to Annex K 38, Annex K 37 to Annex K 39), it must be conceded that, according to Annex K 37 to Annex K 39, a right of use was granted for AVC/H.264 technology for HDTV program distribution via satellite and cable with the aid of a professional AVC/H.264 broadcast encoder.

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A unit price per unit of € 1,903.53 and a total price (net) of € 3,807.06 are stated there. In this respect, it is a standard license agreement that has obviously been modified in terms of the license amount. However, this does not eliminate the indicative effect for the contracts relating to the cell phone segment, as ZDF is evidently a television broadcaster and provider of telemedia services. ZDF is therefore not a licensee comparable to the defendant, so that the contract does not provide any indication of unequal treatment that would eliminate the circumstantial effect.

The defendant itself correctly states that other licensees have also concluded non-comparable license agreements, such as providers of security products (H Co., Ltd) or digital and video cameras (V). However, this does not undermine the indicative effect with regard to licensees offering mobile devices, as they are not comparable. The Chamber cannot establish that the non-comparable contracts, as claimed by the defendant, are the vast majority of the pool license agreements already concluded.

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(?)

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Since the oral hearing at the latest, it has been undisputed between the parties that company X is not a licensee and therefore no contracts can be presented.

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The plaintiff has rectified the incompleteness of the documents complained of by the defendant. The license agreements of X. are now available in full as Annex K 34 and Annex K 35 to Annex K 39. The contracts of X, of which initially only the cover sheet and signature page were available, have now also been submitted in full to the files as Annex K 36 to Annex K 39. The plaintiff has comprehensibly justified the incompleteness with scanning errors. The defendant no longer contested this.

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(?)

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The defendant's conclusion from the quantitative differences in the number of pages to significant changes in content is not compelling. This applies all the more as the plaintiff has explained the different number of pages inter alia with changes in the preamble and the legal definition 1.3.1, which result from the changed number of pool patents and the listed patentees. This was also accompanied by an amendment to Annex 1 of the standard license agreement. A change in the definition of the standard also increased the scope of the contract text at this point.

357

(?)

358

The fact that the submitted contracts, with the exception of the contract with W, are not accompanied by Annex 1 does not give rise to the assumption that individual deviating agreements exist for all other contracts. The denial with ignorance with regard to the fact that the other submitted license agreements relate to the same portfolio is therefore in vain.

359

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Contrary to the view of the defendant, Annex 1 does not serve the binding determination of the specific contractual protection rights, which is regulated in Clause 2.1. Annex 1 is ultimately the result of the definition in Clause 1.8, which provides for a dynamic adjustment (addition, reduction) of the AVC patent portfolio. It follows from Clause 8.2.1 that, notwithstanding any agreements to the contrary in the standard license agreement, amendments to Annex 1 of the agreement shall only become effective after the publication of a new Annex 1 on the license administrator's website, of which notification shall be given. In this respect, Annex 1 is updated and the current inventory of the contractual property rights, insofar as it is published on the website X, forms the uniform subject matter of the contract for all standard license agreements. Against this background, no direct conclusions can be drawn from any differences in the Annex 1 initially provided to the licensee in paper form as to a changed subject matter of protection.

(?) 361

Finally, there are no indications of a contract design deviating to a large extent from the standard license because the overview in Annex K14 lists different contract numbers with different US dollar amounts in the 3rd column "Associated Contracts". According to the first column, this table refers to the patent pool "MPEG 2" and thus neither to the patent pool at issue nor to the standard at issue here. 362

(3) 363

The worldwide extension of the standard license agreement to include the Chinese market does not constitute discrimination in violation of antitrust law from the perspective of selective enforcement. 364

Selective enforcement occurs when a patent proprietor in a dominant market position selectively takes (legal) measures against individual infringers while allowing other infringers to do so, unless it can justify the selection (see OLG Düsseldorf, decision of 17.11.2016, I-15 U 66/15). This constitutes discrimination if certain competitors are permitted free use without an objective reason while others are not. 365

First of all, the plaintiff's submission is conceded in the absence of substantial denial by the defendant that a large proportion of the suppliers active on the Chinese market, in particular X, have also taken licenses for the PRC. Insofar as the defendant mentions the companies X without a license for the PRC, these are licensees for the MPEG 2 standard, which is not the subject of the dispute (see Annex B 9, B 9a). This circumstance is therefore of no significance for the present case. 366

The plaintiff has further explained that X is endeavoring to license the large Chinese companies that have undisputedly not yet been licensed. In particular, it argued at the hearing that all four major Chinese competitors had rejected X on the same grounds, namely that the respective competitors were also license-free in the Chinese market. One week before the oral hearing on November 6, 2018, the plaintiff/X had met with representatives of X. They had stated that they wanted to wait for the outcome of the proceedings in Düsseldorf and would only then be prepared to conclude the standard license if necessary. 367

The defendant did not counter this submission. Only the plaintiff's assertion, also made in this context, that X had contacted all companies subject to AVC that had not yet concluded a license with serial e-mails, including the Chinese competitors of the defendant X, was denied by the defendant with ignorance. Whether the negotiations began in this way can ultimately be left open. Even if the denial with ignorance was generally directed at the parallel negotiations with the competitors and their reactions, the defendant does not prevail. On the one hand, the Chamber has come to the conclusion that the plaintiff or X was and continues to be in negotiations with other Chinese companies according to the above-mentioned standard for denial with ignorance. Thus, it is already apparent from the minutes of the meeting of the defendant of 20 July 2016 (Annex B 28) that X informed the parent company, in response to its reproach that other Chinese market participants had not taken a license, that they were also holding talks with X ("(6) [...] X said that it was talking with X about this issue."). It is not clear from the minutes that the parent company doubted this information. On the other hand, the Chamber is aware from the plaintiff's parallel proceedings against the defendant B Deutschland GmbH (Ref. 4b O 16/17) that the conclusion of the standard license agreement was also rejected by its parent company until the pending legal dispute. However, these circumstances confirm the submission that the plaintiff is making efforts to persuade the other unlicensed Chinese companies to conclude a license. 368

The fact that the plaintiff has not asserted any further claims against the unlicensed companies named in more detail in addition to B Deutschland GmbH - in this respect on behalf of the B Group - does not lead to a different assessment. The plaintiff is entitled to a differentiated assertion due to the associated cost risk (see LG Düsseldorf, judgment of 9.11.2018, Ref. 4c O 17/17). In this respect, the plaintiff has plausibly justified its choice by the fact that it initially wants to enforce its rights against the largest market participant - the defendant - with the largest number of units. Apart from the fact that this is the largest damage, the plaintiff expects a deterrent effect against the other companies. In view of the fact that the largest Chinese manufacturers refuse to grant a license not only for the PRC, but also worldwide with reference to the other companies operating without a license, this does not appear to be an antitrust violation, but rather an effective means of breaking through such behavior, which rather gives the impression of a delaying tactic in order to be able to avoid serious negotiations. 369

(4) 370

The worldwide license fee does not appear to be unreasonably high considering the Chinese market, nor does it discriminate against the defendant compared to other licensees. 371

In the dispute with the submitted license agreements, the defendant has not shown that, according to its assertion, there are other licensees who pay lower license fees for sales in the PRC. Insofar as it refers to alleged discriminatory conduct on the part of X because licenses were concluded excluding the parent companies, such conduct on the part of X with regard to the AVC standard at issue is also not sufficiently demonstrated. The plaintiff has specified the licensing practice with regard to company X to the extent that separate licenses are only granted to group companies if 372

the acts of use under patent law can be restricted to this specific group company. In contrast, the defendant has not shown that a comparable situation exists in its group. On the contrary, it is undisputed that the defendant's group operates worldwide, as is also undoubtedly evident from the overview of sales units in Annex B 49, 49a.

The plaintiff has already shown through the numerous license agreements already concluded that it is customary in the industry to conclude group-wide licenses. 373

In view of the sliding scale of \$0.20 per unit (sales of 100,001 to 5,000,000 units per year) or \$0.10 per unit (sales of more than 5,000,000 units per year), the Chamber cannot establish that the defendant no longer retains any own profit in the license structure of the standard license agreement. 374

If the defendant uses a sales-related approach and argues in general terms that the share of the total value of the AVC technology or the price per unit sold attributable to terminal equipment sales in the PRC is many times higher than in other countries, this objection does not readily hold water. 375

The plaintiff has submitted specific sales prices of the defendant's group in the PRC, USA and Europe, which do not reflect the difference alleged by the defendant. Accordingly, the prices in all three segments are very similar:

Premium:	VRC \$ 384,	USA \$ 336,	Europe \$ 320	376
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Basic:	VRC \$ 151,	USA \$ 166,	Europe \$ 141	377
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Utility:	PRC \$ 53,	USA \$ 53,	Europe \$ 52	378
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The defendant has not objected to the price distribution. The defendant merely states that its group sold around 85 million units in Asia in 2016, of which around 77 million were sold in the PRC, and around 140 million worldwide (Annex B 49, 49a). This proves the lower price within the PRC with the majority of sales outside the PRC. Apart from the fact that the specific cell phone prices of the defendant's group are not disputed, these figures are in turn contrasted with other sales figures of the plaintiff. According to these figures, the worldwide sales of the defendant's group in 2016 amounted to approximately 122 million units, whereby sales in the PRC are already excluded. Finally, it is not clear from either figure whether they relate exclusively to cell phones or to AVC-enabled products as a whole (e.g. including tablets). A disadvantage due to the Chinese price development does not result from these facts, which is to the detriment of the defendant. 379

No other circumstances are apparent that would lead to the conclusion that the proportion of fees for distribution activities in the PRC is unreasonably high, so that no economically reasonable licensee could be expected to accept this. 380

The defendant itself does not claim that there is an unreasonably excessive overall license burden. Insofar as the defendant fears such a burden, it neither sets out specific reasons for this nor can such reasons be inferred from the circumstances already discussed. 381

The blanket reference to the English K /D judgment and the appropriateness of a 50% discount for sales in the PRC also does not explain why only a correspondingly reduced license, as opposed to the license scale at issue, should be FRAND. 382

The findings that the English court is said to have obtained after a comprehensive investigation of the facts - as the defendant states - are not disclosed. In this respect, there are also doubts as to the extent to which findings relating to a completely different case with a different standard and different hearing modalities and obtained under a completely different procedural system can be readily transferred to this case in another jurisdiction. The defendant cannot ignore the latter argument either, since in another context it disputes the scope of examination and evidence that prevails in the US proceedings.

The fact that Chinese patents are more difficult to enforce is, on the one hand, disputed with ignorance and, on the other hand, is probably not an argument for a license reduction in the specific patent pool because the defendant states in another context that only 5% of Chinese patents are in force within the patent pool. Apart from this, the possibility of patent enforcement is also not primarily important because a patent must generally be observed if it exists (see Regional Court Düsseldorf, judgment of 9.11.2018, Ref. 4a O 17/17).

(5)

The defendant's objection that the standard license agreement does not differentiate between the various profiles and features of the AVC standard and is therefore not FRAND does not apply. In this respect, the defendant is of the opinion that the AVC standard standardizes different profiles and features that do not fully support all end devices and also not the challenged embodiment of the defendant. The AVC standard establishes quasi sub-standards, all of which are bundled in a pool license. Since the standard license agreement does not differentiate between different profiles with regard to the license amount, companies with devices that make use of all profiles benefit compared to providers of mobile devices. The Chamber does not agree with this.

The uniform licensing of property rights relating to the AVC standard in the standard license agreement without differentiation between individual profiles and their features constitutes a permissible flat-rate arrangement which, in the event of a dispute, does not lead to the inappropriateness of the license or discrimination against the defendant compared to other licensees.

The printout of the Wikipedia entry on H.264/MPEG-4 AVC submitted as Annex B 35 / 35a shows that a profile within the meaning of the AVC standard comprises a set of capabilities aimed at specific classes of applications.

In particular, the profiles for non-scalable 2D video applications include the Baseline, Extended, Main and High profiles, whereby other profiles such as Constrained Baseline, Progressive High or Constrained High correspond to the profiles mentioned above with certain restrictions. The aforementioned profiles describe the typical capabilities of mainstream consumer products (see p. 12 of Annex B 35 / B 35a to the High 10 profile). The fact that the standard license agreement does not differentiate between these profiles is irrelevant. First of all, the tests submitted as Annex K 8 prove that the challenged embodiment is capable of decoding files using the Baseline, Main and High profiles. As a result, the defendant is not in a worse position than other providers of mobile end devices, since it uses all the usual profiles for mobile end devices. Insofar as the Extended profile is not listed, it is irrelevant whether it cannot be used anyway due to its suitability for the Main and High profiles.

In any case, the uniform licensing is a permissible flat-rate licensing of the license conditions and rates because a differentiation with regard to

each individual profile would involve unreasonable effort. This applies all the more to individual features of the profiles. It would be necessary to keep track of which profiles and features are supported for each device type. Software updates that were accompanied by a change in profile compatibility would not be comprehensible for a licensor anyway. In the absence of any submission by the defendant to the contrary, it cannot be assumed that this effort would be justified by significant differences in the license amount if a distinction were actually made between individual profiles. Insofar as licensees therefore have different types of mobile devices in their product portfolio, of which the simpler devices only use profiles such as Baseline or Main, while higher-value devices also provide the High profile, the standardization undertaken by the standard license agreement is acceptable, especially as it offers the possibility of using profiles such as Main and High in the lower segment with the development of new mobile devices with even higher performance, without having to conclude a new license agreement.

Ultimately, the standard license agreement provides a uniform license for the common use of the AVC standard on the market: While the use was initially predominantly limited to the use of the Baseline profile due to the limited computing power of the devices, devices with higher computing power resulted in the possibility of using other profiles (cf. Annex B 36 / B 36a). However, it cannot be assumed that higher license rates are necessarily associated with advances in technology, even if the various technological options are defined in a standard. 388

Consideration of the other profiles offered by the AVC standard and covered by the standard license agreement does not lead to a different conclusion. The other profiles such as High 10 and, building on this, High 4:2:2 and High 4:4:4 go beyond the requirements for mainstream consumer products; the last two profiles mentioned are also aimed at professional applications (cf. p. 12 f. of Annex B 35 / B 35a on the High 10 and High 4:2:2 profile). 389
Whether and to what extent devices that use profiles beyond High are used at all on the product market relevant here does not need to be decided. Even if this is the case, it has not been argued that these profiles are made available in mobile devices to such an extent that a uniform license for all profiles would be inappropriate and discriminatory towards providers of devices that do not include all profiles. Precisely because the profiles beyond High-10 are aimed at professional users, it can be assumed that they are used in the relevant market here to such a small extent at best that differentiation in this respect proves to be inappropriate for the reasons stated above.

Finally, the same applies to the profiles High 10 Intra, High 4:2:2 Intra, High 4:4:4 Intra and CAVLC 4:4:4 Intra. These profiles are intended for camcorders, cameras and video editing systems and similar professional applications (see p. 13 of Annex B 35 / 35a) and therefore do not concern the relevant market of mobile devices. In this respect, there can be no discrimination against providers of other products such as cameras, televisions or the like. It is neither argued nor evident that the license is inappropriate or even exploitative when considering only the providers of mobile devices. The same applies to the profiles with the Multiview Video Coding extension such as Stereo High and Multiview High. Even if they are not typically used in mobile devices, these are such special extensions that enable stereoscopic dual 3D video, for example, that 390

their licensing together with the basic profiles is not significant and blanket licensing is justified. The same applies to extensions with regard to scalable video coding, which merely add a scalability tool to the existing profiles.

The reference to the successor standard HEVC is also irrelevant in this context, as this is a different technology. The fact that the licensing there is divided into profile groups can have a variety of reasons and may be necessary taking into account all other circumstances to be included in this licensing (see LG Düsseldorf, judgment of 9.11.2018, Ref. 4a O 17/17). However, no reliable conclusions can be drawn from this for the case of the AVC standard to be decided here. 391

iii) 392

The defendant's other objections also do not justify any unreasonableness of the license fee or lead to discrimination against the defendant. 393

(1) 394

The inappropriateness of the license fee charged does not result from the fact that only 5% of the pool patents in the patent pool are in force in the PRC. 395

In the present case, it is not a question of a situation in which a fee is also demanded for an act requiring a license in a country in which only a single SEP is in force and used (see OLG Düsseldorf, decision of 17.11.2016, case no. I-15 U 66/15). 396

A certain proportion of the pool patents (5% of all patents) are in force in the PRC. The special situation addressed in the case law of the Düsseldorf Higher Regional Court does not exist. In this case, the contrary view of the Düsseldorf Regional Court must be applied, namely that the number of property rights in force in a country must not be overestimated because, on the other hand, one patent is sufficient to keep an interested party away from the standard-defined market. Whether additional intellectual property rights must also be licensed for the local market in order to be able to market the standardized technology in the relevant sales territory can then only play a subordinate role for the interest of the license seeker in gaining legal market access (see LG Düsseldorf, judgment of 11.09.2008, Ref. 4b O 78/07 - Videosignal- Codierung III, para. 102 - cited in juris). This generalization is to be accepted to some extent for the advantage of being able to use the standard essential technology worldwide. Added to this is the fact that the PRC is the fourth strongest nation in terms of the share of pool patents (see Annex B 31). 397

(2) 398

The fact that pool members refuse to conclude individual licenses and offer to conclude the standard license - as the plaintiff also does - does not constitute market abuse. 399

The advantages of the pool license, which the licensee receives with a one-stop-shop solution, which also serve to enforce the AVC standard and are also emphasized and welcomed by the European Commission, have already been described above. There is also no disadvantage for the licensees of the pool compared to those licensees who conclude individual licenses with the respective pool members, because the 400

pool members are internally obliged to license all SEPs held outside the patent pool to the pool licensees as well (see above). In this respect, the plaintiff has the right, which it is entitled to within the scope of its contractual freedom, to offer its preferred standard license agreement via X.

The fact that the business strategy of the defendant's group is to conclude cross-licenses - as the defendant explained at the hearing - is not a circumstance that compels the plaintiff to offer an individual license. The most-favored-nation principle does not apply. 401

The fact that there are individual companies that are neither pool members nor licensees of the patent pool and may nevertheless hold AVC standard-essential patents, such as Y, does not in itself speak against the FRAND character of the standard license agreement. 402

(3) 403

It is not apparent to what extent the agreement of the defendant's group companies with NTT I should speak against the FRAND character of the plaintiff's offer. 404

The fact that the pool members are free to license their SEPs outside the pool is already clear from the preamble to the standard license agreement ([...] nothing in this agreement prohibits the individual licensors from licensing or sublicensing the rights under the individual AVC essential patents [...], which include, inter alia, the rights granted under the AVC Patent Portfolio License. [...]). The standard license agreement provides for this because otherwise it would not comply with the Guidelines, which expressly state for the safe harbour area that licenses for pooled technologies may not be granted exclusively to the pool (see Guidelines para. 261). If the pool management practice did not open up this possibility, it would be contrary to antitrust law for this reason alone. 405

The fact that NTT I licenses its own patent portfolio individually in addition to the standard license agreement is not objectionable as such and does not constitute a license agreement with significantly different terms and conditions. The examination of discrimination would only be opened up if this involved the licensing of AVC standard-essential patents (which would be held within or outside the patent pool). However, this is not the case. This is about the licensing of 3GPP/3GPP2 essential patents. 406

With regard to the option right/pick-right (Art. 5.2, Annex B 48) of the defendant's group companies, which apparently also covers the defendant as an "associated company", this is a special constellation that only applies if an AVC standard-essential patent is required for the use of the 3GPP-licensed products (Art. 5.2.1, Annex B 48) and NTT I asserts the infringement of this SEP against the defendant's group companies. This does not constitute a comprehensive grant of rights to the AVC standard-essential patents. In addition, the defendant has not argued that NTT I has so far asserted the infringement of an unlicensed AVC standard-essential patent against the defendant's group companies. In this respect, it is no longer relevant that X had also held out the prospect that license fees already paid to NTT I on the occasion of the pick-right could be offset upon conclusion of the standard license agreement. 407

(4)		
Any installment payment and set-off agreements do not constitute unequal treatment that violates the prohibition of discrimination, but payment modalities that do not affect the fees to be paid in accordance with the standard contract in principle (see LG Düsseldorf, judgment of 9 November 2018, Ref. 4a O 17/17). With regard to any offsetting agreements - the need for which is not substantiated in the specific case and is at best presented with regard to the contract with NTT I, which apparently also covers the defendant, whereby there is again a lack of presentation with regard to the requirements (see above) - unequal treatment is ruled out because it is merely a matter of compensation for any services already provided by the licensee and in this respect there is an objective justification (see Düsseldorf Regional Court, judgment of 9 November 2018, file no. 4a O 17/17).		409
e)		410
The defendant did not make use of the possibility to which it is entitled in the event of a FRAND offer by the plaintiff to submit a counter-offer that complies with FRAND principles. Neither the first counteroffer submitted with the statement of defense dated July 3, 2017 (see aa)) nor the second counteroffer dated October 29, 2018 (see bb)) were FRAND.		411
aa)		412
Whether the first counter-offer is FRAND can in principle be left open, as it was superseded by the second counter-offer. Only the latter concerns the current license terms, which the defendant put up for negotiation until the end of the oral hearing and to which it felt bound.		413
Even if one wanted to see it differently, the first counteroffer contradicts the FRAND principles.		414
The offer contained an unfair differentiation of license rates in relation to regional use. The offer differentiated between the following regional markets:		415
USA:	2.6 US cents/1.3 US cents;	416
EU:	0.7 US cents/0.3 US cents	417
as well as PRC and others:	0.4 US cents/0.2 US cents)	418
The regional distinction as such already appears questionable in light of the fact that the defendant's pricing of its cell phones shows virtually no differences between the continents. In all three countries, the prices for cell phones in the premium segment (between \$380 and \$320), basic segment (between \$141 and \$166) and utility segment (\$52, \$53) are similar. These prices have not been substantially disputed by the defendant, as explained above.		419
In any case, however, it has not been conclusively demonstrated why the rest of the world should be included in the low-price mobile communications market in addition to the PRC. The definition of "PRC and others" includes China and all other continents with the exception of Europe and the USA. This is doubtful insofar as the defendant itself describes Japan as a high-price market. Since the defendant uses precisely the allegedly different market conditions		420

as a criterion for differentiation, it cannot arbitrarily neglect this by combining a high-price market with a low-price market (see Regional Court Düsseldorf, judgment of 9.11.2018, Ref. 4c O 17/17). There is no factual justification as to why uses in Japan, which is otherwise even listed separately from Asia by the defendant in its sales overviews, should now be remunerated in the same way as those in the PRC.

bb) 421

But the second counteroffer does not comply with FRAND principles either. 422

In view of the parties' dispute on this point, it should be noted that the mere fact that an offer is made for a worldwide license exclusively to the entire plaintiff AVC-essential portfolio (including the pool patents and the SEPs held outside the pool) does not per se qualify as abusive. 423

Both parties have the option of offering both an individual license and a pool license. This option is rightly provided for in the standard license agreement, as otherwise the pool management practice of X would itself be in breach of antitrust law (see above). Nothing else follows in this respect from the decision Videosignal-Codierung III (LG Düsseldorf, judgment of 11.09.2008, 4b O 78/07): There, with regard to the predecessor standard and the predecessor standard license agreement, which also provided for the option of a pool license or individual license to the patent in suit, the Chamber ruled that the defendant was not entitled to a third option in the form of a pool license for Germany only (pool license for Germany only). In contrast, however, the defendant here simply made use of one of the two possible options. 424

The mere exercise of the option to license only the plaintiff's portfolio is in itself neutral under antitrust law. 425

However, the passage in the preamble does not give rise to any claim by the defendant to the conclusion of such an individual license. The plaintiff has exercised its right to choose in favor of the pool license. Its freedom of contract would only be restricted by antitrust law if there were circumstances that objectively justified treating the defendant differently from the other licensees and the plaintiff would be forced to conclude an individual license in this respect. 426

However, this is not the case here, so that the defendant should have agreed to a pool license. It would be incompatible with the freedom of contract if the defendant could insist on its claim without objective reason and force the plaintiff into an individual license agreement in deviation from the licensing model of a pool license practiced by it. This is because the plaintiff has granted a pool license in a large number of cases. The defendant, which is already confronted with a FRAND-compliant offer from the plaintiff, has not explained why only an individual license agreement with the plaintiff is justified for it. It must be taken into account here that the SEPs that the plaintiff holds outside the pool are also co-licensed with the standard license agreement due to the internal agreement of the pool members. In this respect, it is not placed in a worse position by choosing the standard license agreement. The defendant's expressed interest in retaining its usual licensing model in the form of cross-licenses is not in itself a compelling reason why the defendant should not accept a pool license. This is especially not the case because it does not hold any AVC SEPs itself and therefore only could cross-license with property rights from other technologies. 427

Objectively speaking, the defendant prefers a contractual agreement that puts it in a worse position according to objective criteria: It must conduct individual license agreement negotiations with all pool members, it incurs higher total license payments and more transaction costs, and as a result it does not receive more licensed rights than it would actually receive under the standard license agreement.

Even if one wanted to see this differently, the FRAND character of the counter-offer is contradicted by another fundamental and decisive point for the Chamber. 428

As already mentioned at the beginning, the purpose of the outlined negotiation process according to ECJ case law is to strive for a negotiation situation that most closely resembles that of free competition. There, honest parties face each other, conduct serious and balanced negotiations and are mutually interested in a license. With regard to the counter-offer, the ECJ postulates (cf. 429

16.07.2015, Ref. C-170/13 (A Co.Ltd ./ ZTE), GRUR 2015, 764, para. 65, 66): The alleged infringer, on the other hand, is obliged to respond to this offer with due diligence, in accordance with recognized business practices in the field and in good faith, which is to be determined on the basis of objective considerations and implies, among other things, that no delaying tactics are pursued.

The Chamber is of the opinion that, under the given circumstances of this individual case, it is no longer a case of a diligent offer made in good faith. For this purpose, the entire conduct of the defendant and its group must be taken into account. Since the beginning of the negotiations, the relevant group companies of the defendant have refused to take a license on the grounds that they did not want to pay licenses for the PRC or for certain group companies. In the context of the negotiations with MPEG LA, they also did not consider the possibility of entering into individual negotiations with the plaintiff regarding its AVC portfolio, at least this has not been submitted. Rather, the persons present on behalf of the defendant's group companies made sure in the meeting in July 2016 that MPEG LA was not entitled to sue, but only the individual patent holders. As a result, the group waited five years for the lawsuit against the defendant, only to submit two offers from the relevant group companies during the trial, which are now only directed at the plaintiff's AVC standard-essential patents. The defendant's group companies are displaying the same behavior in the parallel proceedings 4b O 4/17 against another plaintiff. 430

No party that seriously wants to obtain a FRAND license behaves in this way. A party that only reacts with a counter-offer five years after the plaintiff's offer under the pressure of the lawsuit is acting like a party that is not interested in a license in principle or wants to delay it as long as possible. 431

In doing so, however, the defendant has removed itself from the basic requirements of the negotiation situation intended by the ECJ. This is not the much-cited negotiation ping-pong, but rather the defendant lacked any reciprocity until the action was filed. Against this background, the defendant's offers no longer fall within the negotiating corridor corresponding to that of free competition. 432

f) 433

434

In view of the fact that the objection already fails due to the counteroffer, it is no longer important whether sufficient security has been provided.

V. 435

Since the defendant uses the invention protected by claims 1 and 7 of the patent in suit within the meaning of Section 9 sentence 1 and 2 no. 1 PatG and Section 10 (1) PatG, the following legal consequences arise. 436

1. 437

The defendant is obliged to cease and desist the plaintiff, Art. 64 EPC in conjunction with. § Section 139 (1) PatG. 438

The risk of repetition is presumed on the basis of the infringement already committed (see BGH GRUR 2003, 1031 (1033) - Kupplung für optische Geräte). 439

The imposition of a prohibition by implication is also justified if the injunctive relief is based on acts of use within the meaning of Section 10 (1) PatG. It is true that a prohibition in bad faith in the context of a merely indirect patent infringement is generally not considered if the attacked embodiment can also be used without a patent (see Schulte/Rinken, PatG 10th ed.: Section 10 para. 40 et seq.). However, the situation is different if neither a warning notice nor a contractual penalty agreement can guarantee that the use of the means will not lead to a patent infringement, a possible patent infringement is practically undetectable for the IP right holder and the supplier can easily be expected to redesign the means in such a way that it can no longer be used in accordance with the patent (Schulte/Rinken, PatG 10th ed., Section 10 para. 43). 440

This is the case here. This is because the patent-infringing AVC application is only used by the end user of the infringing smartphones, usually a private end user. Contractual penalty agreements are prohibited vis-à-vis this consumer. However, a warning notice is also out of the question because it would regularly be ineffective: A notice stating that AVC compatibility may not be used is not only inaccurate vis-à-vis an end user, but is also likely to constitute a serious obstacle to purchase. The same applies to the reference that the attacked embodiment is not AVC-compatible. In addition, the plaintiff cannot determine whether the purchasers of the contested embodiment do not use AVC decoding, contrary to a warning. On the other hand, the defendant can easily be expected to modify the attacked embodiment in such a way that AVC decoding is no longer available to users by removing the corresponding codec program components (even if the technical hardware requirements are still met).

2. 441

Furthermore, the plaintiff has a substantive claim against the defendant for payment of damages under Art. 64 EPC in conjunction with Section 139 para. § Section 139 (1) and (2) PatG. 442

The interest in a declaratory judgment required for the admissibility of the application for a declaratory judgment pursuant to Section 256 (1) ZPO arises from the fact that the plaintiff is currently not in a position to quantify the specific damage and without a legally binding determination of the liability for damages, there is a risk that claims for damages will become time-barred. 443

444

The defendant is liable to pay damages because it culpably committed the patent infringement. As a specialist company, it could at least have recognized the patent infringement if it had exercised the care required in business transactions, Section 276 BGB. It is also not unlikely that the plaintiff has suffered damage as a result of the infringement of property rights.

3. 445

The plaintiff also has a claim against the defendant for accounting and information under Art. 64 EPC in conjunction with Sec. 140b (1) PatG. § Section 140b (1) PatG. The claim for information on the origin and the distribution channel of the attacked embodiment arises directly from Sec. 140b (1) PatG due to the unauthorized use of the subject matter of the invention, the scope of the duty to provide information arises from Sec. 140b (3) PatG. The further obligation to provide information and the obligation to render accounts follow from §§ 242, 259 BGB, so that the plaintiff is in a position to quantify the claim for damages to which it is entitled. The plaintiff is dependent on the tenor information, which it does not have at its disposal through no fault of its own, and the defendant is not unreasonably burdened by the information requested of it. 446

4. 447

Finally, the plaintiff has a claim against the defendant to recall the directly infringing products from the distribution channels and to destroy them in accordance with Section 140a (1) and (3) PatG. 448

VI. 449

There is no reason to suspend the hearing pursuant to Section 148 ZPO until the nullity proceedings have been concluded. This is because the sufficient probability of success of the nullity action required for a stay cannot be established (see BGH, decision of September 16, 2014, X ZR 61/13, GRUR 2014, 1237, 1238, para. 4 - Newsflash). 450

This is because the invention is new within the meaning of Art. 52 (1), (4) EPC (see 1.) and also inventive (see 2. below). 451

1. 452

For legal reasons alone, Fig. 3 of the patent in suit is not prior art prejudicial to novelty, even if the patent in suit itself describes it as prior art. This is because it is not the subjective - and possibly erroneous - ideas of the applicant as to what the state of the art is that are decisive, but the objective factual situation and thus solely whether the content of Fig. 3 results from one of the citations in a manner prejudicial to novelty (see BGH Urt. v. 18.11.2014 - X ZR 143/12, BeckRS 2015, 00325, - Floor system, para. 23 mwN.; BGH NJW-RR 1994, 1400 - Muffelofen). 453

An invention is not new within the meaning of Art. 52 (1), 54 EPC if it was disclosed in its entirety, i.e. in all claimed features, in the prior art. In this context, it is important that a citation discloses all the features in question (see BGH, GRUR 1980, 283, 284 - Terephthalic acid; GRUR 1989, 494, 495 - Inclined reclining device; judgment of November 4, 2008, X ZR 154/05, BeckRS 2009, 02615). 454

455

On the one hand, only that which discloses not only the individual features directly and unambiguously, but also their combination presupposed by the patent in suit, is prejudicial to novelty (see BGH, GRUR 1992, 599, 600 - Teleskopzylinder).

Secondly, the only decisive factor is what technical teaching was made available to the public at the time of priority, irrespective of the question of how and by what means it was published (see Mellius in: Benkard, PatG, 11th ed., § 3 para. 55 f.). The entire content of a published document, i.e. also the description of the (alleged) state of the art, is published. 456

a) 457

NK 6 does not disclose arithmetic coding within the meaning of feature 4, but clearly and obviously provides exclusively for the use of variable-length coding. 458

This results not only from the fact that arithmetic coding is not mentioned, but also from the fact that NK 6 expressly refers to length-variable coding, which is envisaged both as prior art and as a subject-matter of the invention. This is already shown by column 1, line 65, according to which the use of a single, length-variable coding method is envisaged. 459

However, also from Fig. 6, which according to the description shows the prior art, the TCOEFF data contained at the block level are encoded and decoded according to the method described by the by a variable-length encoding method, which is shown in Fig. 6 in excerpts and as is also apparent from the description in column 5 line 61 ff. 460

There is also no recognizable reason for the skilled person to read arithmetic coding into variable-length coding in view of the substantially different complexity, the resulting hardware requirements and the otherwise different mode of operation. 461

b) 462

It is not sufficiently probable that the Federal Patent Court will consider NK 13 to be prejudicial to novelty, because it is not sufficiently probable that the Federal Patent Court will consider feature 4 of the patent in suit to be directly and unambiguously disclosed by NK 13: 463

This does not yet result from the syntax tables 7.3.6.1 and 7.3.6.2. The plaintiff rightly assumes that both tables contain a descriptor for the syntax element "abp_coeff_idx", which is always ue(v) and thus refers to a length-variable coding method and not an arithmetic one. This in turn is shown by the definitions of NK 8: According to these, the descriptor ue(v) denotes an "unsigned exponential-Golomb-coded syntax element", whereas CABAC (and therefore arithmetically) coded syntax elements are represented by ae(v) (cf. p. 13 of NK 8 for both). 464

Unlike the other cases provided in the tables, which show ue(v) and ae(v) for each additional syntax element, separated by an "or" symbol, ue(v) is the only descriptor provided in the case of "abp_coeff_idx". The fact that "abp_coeff_idx" can also be CABAC-coded is therefore not disclosed. 465

However, this does not mean that two methods must always be used, exponential Golomb on the one hand and arithmetic CABAC coding on the other: 466

As NK 8 shows elsewhere, this variable, which is assigned this descriptor "abp_coeff_idx" is not always sent: 467

"11.3.5 ABP coefficient index (abp_coeff_idx) 468

If the explicit B prediction block weighting is in use, abp_coeff_idx indicates the ABP coefficient index. If number_of_abp_coeff_minus1 is 0, then abp_coeff_idx is not sent and regarded as 0. For the skipped macroblock, the ABP coefficient corresponding to abp_coeff_idx=0 is used." 469

However, if it is not only assigned a value, such as zero, but is not sent at all, it can neither be encoded nor decoded. NK 8 therefore provides for cases in which the "abp_coeff_idx" simply does not exist in the data stream. 470

However, it cannot be established with sufficient probability for a suspension that the NK 8 directly and unambiguously discloses that exclusively and solely CABAC coding is to be used, as the asserted version of feature 4 of the patent in suit requires: 471

This is because the syntax tables of NK 8 are not complete and are still under development, as shown by Table 7.6.3.3 (p. 23), which contains no descriptors at all and was overwritten by the editor with the fact that the syntax for CABAC must look different. 472

Consequently, it is not clear and immediately obvious what will actually be found in these tables once they are in place. The exact implementation is ultimately not recognizable. It is therefore not clearly disclosed that these tables, once they are finished, will only contain CABAC descriptors and not - as 7.3.6.1 and 7.3.6.2 - others in addition. 473

Furthermore, there is no declaration of intent that allows the clear conclusion that only CABAC coding is to be used. Such a declaration can be found - as the plaintiff rightly pointed out - in the later standard, but it is missing in NK 8 itself. No reasons are apparent from which the skilled person could draw the conclusion that, according to NK 8, CABAC *alone* and *exclusively is* clearly to be used, as the patent in suit claims for arithmetic coding in feature 4, and that it must not end with "essentially" or "where practicable". 474

It is irrelevant whether the fundamental decision for the use of CABAC coding is already made at the slice level in the syntax, and whether this results in the use of the descriptor ae(v), which refers to CABAC, in all intended and already described cases in NK 8. 475

This does not rule out the possibility that other descriptors may also be found in the tables, as shown in 7.3.6.1 and 7.3.6.2. 476

NK 12 - a further version of NK 8 published after the Klagenfurth meetings - is already more advanced in this respect. The corresponding tables are already shown in full in NK 12, without the use of methods other than CABAC. 477

However, it is not apparent that the document created three days before the filing date of the patent in suit, even if it is regarded as an output document 478

of the meeting in Klagenfurt was published within these three days.

Nor does NK 12 - or any of the other annexes submitted - provide any information as to whether the changes it contains were actually discussed at the meeting in Klagenfurt, or whether a fundamental commitment to CABAC as the *exclusive* coding system was publicly discussed or adopted there. 479

2. 480

The invention of the patent in suit is also based on an inventive step, since it was not obvious to a person skilled in the art from the prior art, Art. 52 (1), 56 EPC. 481

An inventive step is lacking if the prior art has suggested the inventive solution to be examined. On the one hand, this requires that the skilled person, with his knowledge and skills acquired through his training and professional experience, was in a position to develop the inventive solution to the technical problem from the prior art (see BGH GRUR 2012, 378, 379 - Installiereinrichtung II). 482

However, a suggestion resulting from the prior art to follow the path of the invention is also required in order for it to be considered obvious in the aforementioned sense, whereby it is a question of the individual case to what extent the skilled person needs such suggestions in the prior art (see BGH GRUR 2012, 378, 379 - Installiereinrichtung II and BGH, judgment of March 11, 2014 - X ZR 139/10 - Farbversorgungssystem, cited in juris, para. 25). 483

According to these standards, the teaching of the patent in suit in the version asserted is not suggested by the prior art. 484

Insofar as the defendant claims that the skilled person is led by the combination of NK5 with NK8 to use several Huffman tables for the header data, this can be left open. As already explained, the use of several Huffman tables does not constitute the use of several coding methods within the meaning of feature 3. 485

Also the combination of NK 8, which is the only citation disclosing arithmetic coding, with other citations does not give the skilled person sufficient inspiration to arrive at the invention of the patent in suit: 486

It is true that NK 8 suggests the use of CABAC and NK 6 suggests the use of only one method. However, NK 6 is pursuing a different purpose: it wants to improve resynchronization within variable-length coding in order to combat the effects of transmission errors. It cannot be assumed that the skilled person receives the suggestion from the solution of another problem of NK 6, which relates to another method, to isolate the idea of using only *one* method from NK 6, which serves completely different purposes in the patent in suit, in order to address another problem - that of the patent in suit. 487

3. 488

There is also no impermissible extension. 489

490

To determine an inadmissible extension, the subject matter of the granted patent must be compared with the content of the original documents. However, the relevant content of the patent application must be taken from the documents as a whole. The patent claim may not be directed to subject matter which the original disclosure does not reveal as belonging to the invention from the perspective of a person skilled in the art (BGH, GRUR 2005, 1023 (1024) - Einkaufswagen II; GRUR 2010, 513 para. 29 - Hubgliedertor II; GRUR 2011, 1109, para. 36 - tire sealant).

According to these requirements, the replacement of the word "frame" by "unit" in the grant procedure does not constitute an impermissible extension compared to the original application. 491

It is true that the change in wording in the claims from "frame" to "unit" is in itself a generalization in the present case. However, in the present case - which ultimately remained undisputed - the skilled person could expressly infer from the description of the original application that the invention was intended to relate not only to "frames", but also to other image units which have common data, such as "fields" and "macroblocks". Thus, the claim does not go beyond the relevant disclosure content of the application documents. 492

VII. 493

The decision on costs follows from section 91 (1) ZPO, the decision on provisional enforceability follows from sections 709 sentences 1 and 2, 108 ZPO. 494

The security deposit was to be set at the amount in dispute. 495

The enforcement damages - and thus the security - generally correspond to the amount in dispute. This is because the determination of the amount in dispute is based on the interest of the plaintiff in the requested court decision, for the calculation of which, in the case of a claim for injunctive relief - which is also in the foreground here - not only the value and significance of the infringed legal position of the plaintiff, but also the scope of the challenged acts are decisive (OLG Düsseldorf, GRUR-RR 2007, 256 - Sicherheitsleistung/Kaffeepads). In any case, the enforcement security is typically not to be assessed higher than the amount in dispute. This is because, while the amount of the enforcement security to be ordered by the regional court is only dependent on the presumed enforcement loss of the debtor in the short period up to the appeal hearing and the subsequent announcement of the appeal decision, because it creates a separate, new basis for enforcement, and, in addition, non-enforceable parts of the judgment (such as the declaratory judgment) are to be disregarded, all claims and the entire period up to the regular end of the patent term are taken into account when determining the value in dispute (OLG Düsseldorf, GRUR RR 2012, 304 - Höhe des Vollstreckungsschadens). If, on the other hand, it is to be expected - as an exception - that a security set in the amount of the value in dispute will not fully cover the impending enforcement damage, it is up to the defendant to provide the court with concrete evidence of this (see OLG Düsseldorf, InstGE 9, 47). This does not require detailed accounting or the disclosure of internal business information. Rather, a generalized presentation that makes the alleged turnover and profit figures comprehensible and plausible is sufficient, but also necessary. In many cases, it will suffice to refer to documents that are already accessible to third parties, such as annual reports or similar, or to submit a sworn statement by the managing director or another responsible employee specified in accordance with the above explanations (see OLG Düsseldorf, 496

InstGE 9, 47).

The defendant has not provided any concrete evidence that there is a risk of enforcement damages exceeding the amount in dispute. The defendant limits itself to quantifying the gross profit from the sales of cell phones in Germany in 2017. The affidavit (Annex B 89) only provides the bare figure for 2017, but no further information as to why an approximately equal profit can be expected in the future. This is also not apparent from the press article submitted as Annex B 90. It is also not clear how sales and profits will turn out if mobile devices are offered without AVC standard compatibility. Despite the basic requirement of AVC standard compatibility for a competitive product, it cannot be assumed that the defendant will no longer sell smartphones from one day to the next. 497

VIII. 498

The defendant is not to be granted protection against enforcement within the meaning of Section 712 ZPO, as it has neither set out the requirements of Section 712 (1) ZPO nor made them credible in accordance with Section 714 (2) ZPO. 499

IX. 500

The defendant's written submissions of November 30, 2018 and December 11, 2018, which were submitted after the conclusion of the oral hearing, were not considered in the decision and did not give rise to a reopening, Sections 296a, 154 ZPO: 501

X. 502

The amount in dispute is set at EUR 30,000,000. However, according to the plaintiff's statements at the hearing, the value in dispute was to be increased to € 30,000,000.00. Accordingly, only the plaintiff's interest - not that of the entire patent pool - amounts to \$ 100,000,000 in license debts alone. This ultimately only addresses the interest with regard to the determination of damages. Taking into account the claims for injunctive relief, recall, destruction and information, the provisionally determined amount in dispute of € 5,000,000.00 appears to be far too low. 503