4b O 140/13

Pronounced on 26 March 2015
Brassel, Senior Court Assistant
as Clerk of the Court

[*Coat of arms*]

DISTRICT COURT OF DUSSELDORF

IN THE NAME OF THE PEOPLE

Judgment

In the matter of

██
██
███████████

Plaintiff,

legal representative: ████████████████████████████
████████████

v e r s u s

██
████████████████████████████

Defendant,

legal representative: ████████████████████████████
████████████

following the oral hearing of 19 February 2015, Civil Chamber 4b of the District Court [*Landgericht – LG*] of Dusseldorf, through the Presiding Judge at the District Court █, the Judge at the District Court ████ and the Judge at the District Court █ █

f o u n d   a s   f o l l o w s :

I. The Defendant is ordered,

1. on pain of a fine to be fixed by the court of up to EUR 250,000.00 for each case of violation – alternatively imprisonment – or imprisonment of up to six months, and in the case of repeated violation imprisonment of up to a total of two years, with the imprisonment to be executed against the Defendants' managing director, to cease and desist from

a) offering and/or supplying mobile telephones that are suitable for performing a method for routing data in a chipset comprising at least one host processor, a controller and an RFID-type contactless data send/receive interface, with the method comprising the steps of:

– sending to the controller, by means of a source point (P1, P2) located in the host processor, a command (CMD) for opening a data path designating a destination point (P3) located in the contactless data send/receive interface (CLINT),
– in response to the command (CMD) for opening a data path, opening, by means of the controller (NFCC), a data path linking the source point to the destination point, by allocating to the data path a routing channel number (CHANi) and by saving in a routing table (RT) the routing channel number and routing parameters comprising at least one identifier (IDsp) of the source point and one identifier (IDdp) of the destination point,
– sending to the controller (NFCC), by means of the source point, data destined for the destination point encapsulated in a frame (DF) having a small header field comprising the routing channel number, and
– upon receiving the data encapsulated in a frame (DF) having a header field comprising the routing channel number, searching, by means of the controller (NFCC) for a destination point of the data in the routing table by using the routing channel number as index to select the destination point, then sending the data to the destination point,

and/or

b) offering, placing on the market or using, or importing or possessing for the specified purposes,

devices for sending/receiving data (NFCR2) comprising an RFID-type contactless data send/receive interface (CLINT), a controller (NFCC) and at least one input/output port (INT1, INT2) to link the contactless data send/receive interface (CLINT) to a host processor (HP1, HP2)

with the controller (NFCC) being configured for:

- in response to a command (CMD) for opening a data path sent by a source point located in a host processor (HP1, HP2), and designating a destination point (P3) located in the contactless data send/receive interface (CLINT), opening a data path between the source point and a destination point by allocating to the data path a routing channel number (CHANi) and by saving in a routing table (RT) the routing channel number and routing parameters comprising at least one identifier (IDsp) of the source point and one identifier (IDdp) of the destination point, and
- upon receiving data encapsulated in a frame (DF) having a header field comprising the routing channel number, searching for a destination point of the data in the routing table using the routing channel number as index to select the destination point;

2. to fully render accounts to the Plaintiff by submitting a uniform, orderly list of the extent to which it has committed the acts as described under I.1. since 11 September 2010, stating

   a) the individual deliveries and orders itemised by designation of type, quantities delivered and ordered, dates of deliveries and prices as well as the names and addresses of the customers,
   b) the individual quotations itemised by designations of type, volume, dates and prices of supply as well as the names and addresses of the commercial quotation recipients,
   c) advertising itemised by advertising media, production volume and distribution of the latter, period and territory of distribution,
   d) the production costs [*Gestehungskosten*], itemised by individual cost factors, and the profit generated,

with the Defendant being required to submit invoices with regard to the information on a),

and the Defendant being granted the right, in lieu of disclosure to the Plaintiff, to disclose the names and addresses of the non-commercial customers and quotation recipients to a sworn auditor resident in the Federal Republic of Germany to be designated by the Plaintiff and bound by an obligation of confidentiality in respect of the same, provided that the Defendant bears the costs occurring due to the commissioning of such auditor and authorises and

obliges him to inform the Plaintiff upon inquiry whether a specific customer or quotation recipient is included in the rendering of accounts;

II. It is declared that the Defendant is obliged to compensate the Plaintiff for all damage that

- has been incurred by ███████████ through the acts specified under I.1. in the period between 11 September 2010 and 18 December 2014, and
- has been incurred by the Plaintiff in its capacity as the sole licensee through the acts specified under I.1. since 19 December 2014.

III. The Defendant is ordered to bear the costs of the legal dispute.

IV. The judgment is provisionally enforceable against provision of security in the amount of EUR 10 million; the individual enforceable claims can be enforced as follows against provision of partial security:

Cease and desist claim (I.1.): EUR 8 million
Rendering of accounts (I.2.): EUR 1.5 million
Costs: 110% of the amount to be enforced in each case.

Facts of the case

The Plaintiff is asserting claims against the Defendant due to infringement of the German part of European Patent ████████ B1 (patent in suit, Exhibit K 4, German translation Exhibit K 4a) to cease and desist from certain acts as well as claims for information, rendering of accounts and determination of the obligation to pay damages. The application for the patent in suit was filed by ████████ ██ (at that time called ████████ ██, later called ████████ ██) on 23 March 2007, claiming two French priorities (each dated 10 May 2006). The disclosure of the application took place on 14 November 2007. The mention of the grant of the patent in suit was published on 11 August 2010. The patent is in force.

On 2 June 2014, ████████ Co. Ltd. filed a nullity action before the German Federal Patent Court [*Bundespatentgericht*], moving that the patent in suit be declared null and void in the scope of claims 1 and 12. With respect to the content of the nullity action, reference is made to Exhibit HL 2 including annexes. No decision has been issued on the nullity action to date.

The patent in suit relates to a method of routing input and output data in an NFC chipset. Claims 1 and 12 of the patent in suit (for which the language of the proceedings is French) asserted by the Plaintiff, read as follows:

1.

A method for routing data in a chipset comprising at least one host processor (HP1, HP2), a controller (NFCC), and an RFID-type contactless data send/receive interface (CLINT), characterized in that it comprises the following steps:
  - sending to the controller, by means of a source point (P1, P2) located in the host processor, a command (CMD) for opening a data path designating a destination point (P3) located in the contactless data send/receive interface (CLINT),
  - in response to the command (CMD) for opening a data path, opening, by means of the controller (NFCC), a data path linking the source point to the destination point, by allocating to the data path a routing channel number (CHANi) and by saving in a routing table (RT) the routing channel number and routing parameters comprising at least one identifier (IDsp) of the source point and one identifier (IDdp) of the destination point.
  - sending to the controller (NFCC), by means of the source point, data destined for the destination point encapsulated in a frame (DF) having a small header field comprising the routing channel number, and
  - upon receiving the data encapsulated in a frame (DF) having a header field comprising the routing channel number, searching, by means of the controller (NFCC) for a destination point of the data in the routing table by using the routing

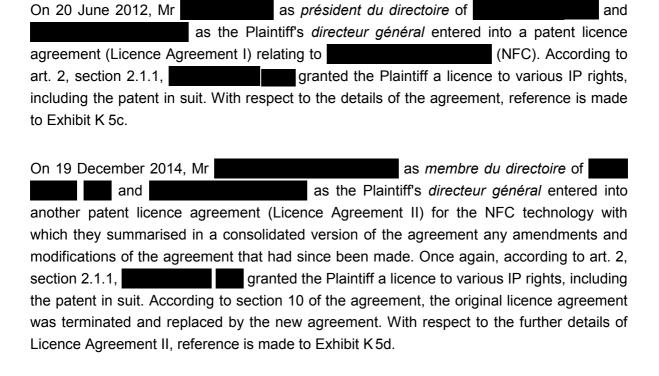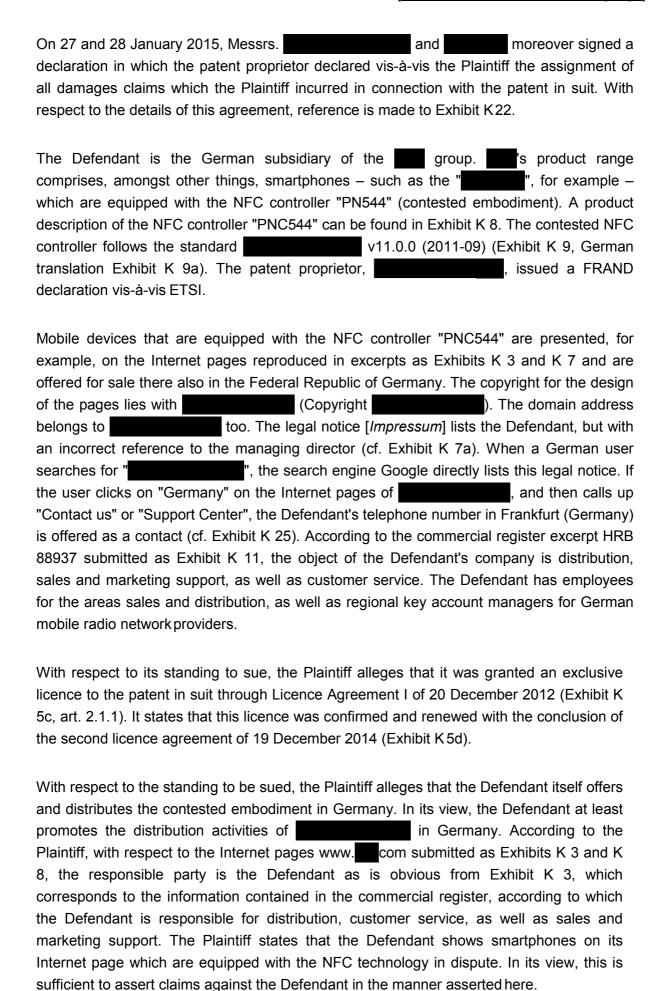channel number as index to select the destination point, then sending the data to the destination point,

12.

A device for sending/receiving data (NFCR2) comprising an RFID-type contactless data send/receive interface (CLINT), a controller (NFCC) and at least one input/output port (INT1, INT2) to link the contactless data send/receive interface (CLINT) to a host processor (HP1, HP2),
characterized in that the controller (NFCC) is configured for:

- in response to a command (CMD) for opening a data path sent by a source point located in a host processor (HP1, HP2), and designating a destination point (P3) located in the contactless data send/receive interface (CLINT), opening a data path between the source point and a destination point by allocating to the data path a routing channel number (CHANi) and by saving in a routing table (RT) the routing channel number and routing parameters comprising at least one identifier (IDsp) of the source point and one identifier (IDdp) of the destination point, and
- upon receiving data encapsulated in a frame (DF) having a header field comprising the routing channel number, searching for a destination point of the data in the routing table using the routing channel number as index to select the destination point.

The Plaintiff is a patent-holding company which was founded in 2011 at the instigation of the French government in order to promote patent activity and the exploitation of French patents, in particular.

On 20 June 2012, Mr ███████ as *président du directoire* of ███████████ and ████████████ as the Plaintiff's *directeur général* entered into a patent licence agreement (Licence Agreement I) relating to ████████████████ (NFC). According to art. 2, section 2.1.1, ████████████ granted the Plaintiff a licence to various IP rights, including the patent in suit. With respect to the details of the agreement, reference is made to Exhibit K 5c.

On 19 December 2014, Mr ████████████████ as *membre du directoire* of ████ ██████ and ████████████████ as the Plaintiff's *directeur général* entered into another patent licence agreement (Licence Agreement II) for the NFC technology with which they summarised in a consolidated version of the agreement any amendments and modifications of the agreement that had since been made. Once again, according to art. 2, section 2.1.1, ████████████ granted the Plaintiff a licence to various IP rights, including the patent in suit. According to section 10 of the agreement, the original licence agreement was terminated and replaced by the new agreement. With respect to the further details of Licence Agreement II, reference is made to Exhibit K 5d.

On 27 and 28 January 2015, Messrs. ██████████ and ██████ moreover signed a declaration in which the patent proprietor declared vis-à-vis the Plaintiff the assignment of all damages claims which the Plaintiff incurred in connection with the patent in suit. With respect to the details of this agreement, reference is made to Exhibit K 22.

The Defendant is the German subsidiary of the ██ group. ███'s product range comprises, amongst other things, smartphones – such as the "████████", for example – which are equipped with the NFC controller "PN544" (contested embodiment). A product description of the NFC controller "PNC544" can be found in Exhibit K 8. The contested NFC controller follows the standard ██████████████ v11.0.0 (2011-09) (Exhibit K 9, German translation Exhibit K 9a). The patent proprietor, ████████████, issued a FRAND declaration vis-à-vis ETSI.

Mobile devices that are equipped with the NFC controller "PNC544" are presented, for example, on the Internet pages reproduced in excerpts as Exhibits K 3 and K 7 and are offered for sale there also in the Federal Republic of Germany. The copyright for the design of the pages lies with ██████████ (Copyright ████████████). The domain address belongs to ████████ too. The legal notice [*Impressum*] lists the Defendant, but with an incorrect reference to the managing director (cf. Exhibit K 7a). When a German user searches for "████████████", the search engine Google directly lists this legal notice. If the user clicks on "Germany" on the Internet pages of ████████, and then calls up "Contact us" or "Support Center", the Defendant's telephone number in Frankfurt (Germany) is offered as a contact (cf. Exhibit K 25). According to the commercial register excerpt HRB 88937 submitted as Exhibit K 11, the object of the Defendant's company is distribution, sales and marketing support, as well as customer service. The Defendant has employees for the areas sales and distribution, as well as regional key account managers for German mobile radio network providers.

With respect to its standing to sue, the Plaintiff alleges that it was granted an exclusive licence to the patent in suit through Licence Agreement I of 20 December 2012 (Exhibit K 5c, art. 2.1.1). It states that this licence was confirmed and renewed with the conclusion of the second licence agreement of 19 December 2014 (Exhibit K 5d).

With respect to the standing to be sued, the Plaintiff alleges that the Defendant itself offers and distributes the contested embodiment in Germany. In its view, the Defendant at least promotes the distribution activities of ████████████ in Germany. According to the Plaintiff, with respect to the Internet pages www.██.com submitted as Exhibits K 3 and K 8, the responsible party is the Defendant as is obvious from Exhibit K 3, which corresponds to the information contained in the commercial register, according to which the Defendant is responsible for distribution, customer service, as well as sales and marketing support. The Plaintiff states that the Defendant shows smartphones on its Internet page which are equipped with the NFC technology in dispute. In its view, this is sufficient to assert claims against the Defendant in the manner asserted here.

The Plaintiff perceives the offer and distribution of the mobile devices equipped with the NFC controller PN544 to be a literal infringement of the patent in suit, while asserting a direct infringement with respect to claim 1 and an indirect infringement with respect to claim 12. In this regard, it states that a realisation of the ███████████ v11.0.0 (2011-09) standard of necessity constitutes an infringement of the patent in suit, as the latter is standard-essential.

The Plaintiff states that the "opening" of a data path according to the teaching as described in the invention is nothing else than the creation of a data path, and that the opening and closing of a data path, by contrast, is not the subject matter of the invention. According to the Plaintiff, the fact that, based on the standard, the data path, after having been created, must then be opened using a separate command, thus does not oppose a realisation of the teaching according to the patent in suit.

In the Plaintiff's view, it is also irrelevant that, based on the standard, the gate from which the command for opening a data path is sent is not identical to the gate which is used for the data path that is yet to be created, because this is not required by the teaching according to the invention. The Plaintiff argues that what is, in fact, relevant is that the source point of the data path to be created is located in the host processor which sends the command for opening a data path.

The Plaintiff states that, after all, it is obvious that the standard uses a routing table as described by the teaching according to the invention. It also states that the host controller acknowledges vis-à-vis the host processor the creation of the data path, providing it with the parameters shown in table 10 of Exhibit K 9. The Plaintiff argues that this can only take place because the host controller has saved these parameters previously. According to the Plaintiff, the host controller also retains access to these parameters which it requires to forward incoming data to the correct destination point (Exhibit 9 clauses 4.4. and 5.1).

After the Plaintiff originally moved that the court declare that the Defendant be obliged to compensate the Plaintiff for any damage that the latter has incurred since 11 September 2010, it now moves

that the court find as it has found

that alternatively,

–   in case of offering, it be explicitly and clearly pointed out in the offer that the mobile telephones must not be used for the NFC mode without the consent of the Plaintiff as the exclusive licensee of the EP ████████;

    – in the case of delivery, the written obligation be imposed on the purchasers, subject to a contractual penalty of EUR 10,000, to be paid to the Plaintiff as the exclusive licensee, for each case of contravention, not to use the mobile telephones for the NFC mode without the consent of the Plaintiff as the exclusive licensee of EP ██████.

The Defendant moves that

the complaint be dismissed,

alternatively, the legal dispute be stayed until a decision has been issued at first instance by the German Federal Patent Court in the nullity proceedings concerning the legal validity of the German part DE ████████████ of European patent EP ████ ██ B1.

further in the alternative, the legal dispute be stayed until the ECJ has issued a decision in the matter C-170/13 (preliminary ruling procedure of the District Court of Dusseldorf, 4b O 104/12 – Huawei vs ZTE) has been issued.

further in the alternative, the court order the provision of an execution security in the amount of at least EUR 400 million in the event that the court finds against the Defendant.

With respect to the Plaintiff's standing to sue, the Defendant contests for lack of knowledge that the Plaintiff and ██████████ ████ were validly represented when concluding the licence agreements. Furthermore, it takes the view that both agreements do not grant the Plaintiff an exclusive licence but merely a simple licence, as is obvious from the prohibition of sub-licensing. Furthermore, the Defendant states that the Plaintiff's course of action is not covered by the NFC Licensing Program referred to in the licence agreement, and that it is not evident that the Plaintiff was validly assigned damages claims that had arisen prior to the granting of the licence.

With respect to its standing to be sued, the Defendant alleges that it is not involved in its parent company's distribution activities with regard to the contested embodiment. The Defendant states that the fact alone that its name is mentioned in the legal notice on the website www.██.com does not mean that it provided the contested embodiment in an externally perceptible manner for acquiring power to dispose of the same, which, however, is required to realise an act of offering relevant under patent law. According to the Defendant, the legal notice is, moreover, not correct because the website referred to is not operated by itself but by ███████████, and the factual and legal control over the design of the website, including its German-language version, lies solely with ████ Corporation. In the Defendant's view, the fact alone that Mr ██████████ is named as

managing director is proof of the fact that the legal notice provided on the website is incorrect, as Mr ███ is not the Defendant's managing director, but the CEO of ███ Corporation. The Defendant states that it merely assumes representative duties for ███ Corporation in Germany, and that it does not actively support the distribution activities.

Furthermore, the Defendant takes the view that claims 1 and 12 of the patent in suit are not infringed for the reason alone that while the contested embodiment realises the standard at issue, the patent in suit is not standard-essential and, thus, the realisation of the standard does not yet constitute an infringement of the patent in suit.

The Defendant states that, for example, the "opening" of the data path according to the patent in suit refers to the creation and opening of such data path, meaning that data can be sent directly afterwards. In the standard, by contrast – and this is undisputed – after the creation of the data path, the latter must still be opened by a separate command to be able to transfer data. The Defendant argues that in this regard, the creation of the data path according to the standard precisely does not constitute an "opening" of the data path according to the invention.

In the standard – and this is undisputed – the command for opening a data path is, furthermore not sent from the gate which is later the source point of the data path to be created. The Defendant states that, however, this is precisely what is a mandatory requirement for the realisation of the teaching according to the invention, which assumes a uniform source point for sending the command for opening the data path and the data path to be created.

Lastly, the Defendant states that the standard does not use a routing table according to the invention; and that it does not contain any specific indication in this respect. According to the Defendant, the fact that a routing channel number is allocated to a data path between two points within one chipset and that, subsequently, data is sent in a header of a data packet, with this routing channel number being indicated, does not allow the conclusion that a routing table according to the invention exists. In particular, this does not indicate that the routing channel number and the identifiers of the source point and the destination point of the data path are stored together in a table.

Alternatively, the Defendant invokes the licence defence under antitrust law against the claims asserted with the complaint. It states that, with the unrestricted assertion of the patent in suit, the Plaintiff abuses its dominant market position. In the Defendant's view, the Plaintiff is obliged to grant the Defendant a licence in the patent in suit on FRAND terms. According to the Defendant, the proprietorship in an SEP always leads to the assumption that there is a dominant market position – an assumption which, in the Defendant's view, the Plaintiff cannot refute. The Defendant states that while the NFC

technology is not a prerequisite for a market entry, it has penetrated the market to such an extent that a smartphone that is not NFC-enabled would not be marketable or competitive. According to the Defendant, this is proven by market analyses and studies (Exhibits HL 19–27) which shows that, in January 2015, as much as 74% of the smartphones offered on the market were NFC-enabled. The Defendant states that, in this context, smartphone buyers are interested in particular in the scope of application of mobile payment. It furthermore states that the consistently decreasing life span of a mobile device (which, at present, is 18 to 24 months) is a sign that the buyers of such smartphone want to buy a state-of-the-art device. According to the Defendant, from a technical perspective, it is possible to use other technical alternatives which do not make use of the HCI standard, but that is precluded due to economic reasons. It states that the German network operators strictly require the realisation of the HCI standard in their conformity requirements, and that smartphones which do not meet these requirements are not distributed by the network operators.

Further in the alternative, the Defendant invokes an allegedly missing protectability of claims 1 and 12 of the patent in suit which are asserted in this legal dispute. It states that the subject matter of the patent claims is not patentable since it is anticipated in a novelty-destroying manner by D 1 (WO ██████████ A1) and D 2 (JP ██████████ A). According to the Defendant, the technical solution claimed in claims 1 and 12 lacks the requisite inventive step in view of D 3 (excerpts from "Specification of the Bluetooth System").

The Plaintiff opposes to the motions for a stay of the proceedings.

With respect to the compulsory licence defence under antitrust law, it takes the view that there is no dominant market position to begin with, and that the NFC technology is a "niche technology" which is merely of minor significance for the relevant market. According to the Plaintiff, the fact alone that the teaching according to the invention was included in the standard set by one of the standardisation organisations does not say anything about its significance for the relevant market; in actual fact, it must be verified in the individual case whether an SEP is significant for the relevant market to such an extent that it is able to put the proprietor into a dominant market position. According to the Plaintiff, this is not the case here. It states that hardly any consumer is even familiar with the NFC technology, let alone uses it or bases his purchase decision on whether the NFC technology is available in a device. Furthermore, it is not the use of the NFC technology as such which is the subject matter of the patent in suit but only the part of the HCI technology that is described in the asserted standard. According to the Plaintiff, this requires the implementation of the NFC technology in a SIM card (also referred to as UICC card); alternatively, the NFC technology can also be embedded in other components, such as so-called "embedded security elements" or smartcards. The Plaintiff states that only 27% of the NFC-enabled smartphones available on the market adhere to

the HCI standard, and that in 43%, the NFC-capability is achieved using a so-called "embedded secure element".

In the Plaintiff's view, the Defendant's nullity action against the patent claims in suit 1 and 12 will not be successful. It states that the protectability is given as the teaching according to the invention is both new and inventive, and, in any case, both D 1 and D 2 do not disclose a routing table within the meaning of the teaching according to the patent in suit. According to the Plaintiff, D 3 is not referred to by the person skilled in the art for the reason alone that the Bluetooth method described therein relates to data transmission within a network. It also states that a data routing is not required for factual reasons to begin with, as it is not required that data be transferred from one network to the other network.

For the further details of the facts of the case and the stage of the proceedings, reference is made to the pleadings, including exhibits, exchanged between the parties and the transcript of the oral hearing held on 19 February 2015. The files of the parallel proceedings 4b O 10/14 and 4b O 09/14 were obtained and were part of the subject matter of the oral hearing.

Grounds for the decision

The complaint is admissible and founded.

A.

The complaint is admissible; in particular, the Plaintiff has a right of action. For one thing, the Plaintiff is asserting own claims in its own name for patent infringement due to its alleged capacity as the exclusive licensee. For another, due to the alleged assignment, it asserts, in its own name, claims acquired by subrogation. This is sufficient to justify the right of action.

B.

The complaint is also founded. The Plaintiff is entitled to the asserted cease and desist claim as well as to the asserted claims for information and rendering of accounts and for determination of the obligation to pay damages under art. 64 EPC in conjunction with secs. 9 sentence 2 nos. 1, 10, 139 paras. 1 and 2, 140 b paras. 1 and 3 of the German Patent Act [*Patentgesetz – PatG*], secs. 242, 259 of the German Civil Code [*Bürgerliches Gesetzbuch – BGB*].

I.

The Plaintiff has standing to sue.

1.

Where the Plaintiff asserts cease and desist claims, damages claims and claims for information under its own rights, it is objectively entitled to do so in its capacity as the exclusive licensee. The exclusive licensee has own its cease and desist claims, damages claims and claims for information under the patent in suit from the point in time the exclusive licence was granted, i.e. since 19 December 2014 in the case at hand.

a)

A licence agreement was validly concluded between ██████████ as the proprietor in the patent in suit and the Plaintiff. ██████████ is the registered proprietor of the patent in suit. Following the submission of the corresponding commercial register extract (Exhibit K 5d, p. 3 *et seq*.), it is clear – and is, correctly, no longer contested by the Defendant – that ██████████████ and ████████ merely constitute former company names of ██████████ The agreement with which ██████████ validly granted the Plaintiff a licence, is Licence Agreement II which was entered into on 19 December 2014.

aa)

The agreement dated 20 June 2012 (Licence Agreement I) cannot be invoked to demonstrate the valid granting of a licence, as the Defendant, in any case, contested Mr ██████████ power of representation for █████████ Under French law, it is, as a rule, solely the *directeur général* who has the power to represent the ██ vis-à-vis third parties, unless otherwise stated in the statutes of, or individual agreements with, the company. At the point in time the agreement was concluded on 19 June 2014, Mr █████ was not the *directeur général* of █████████ The Plaintiff failed to demonstrate that ████████, as CEO, was authorised to conclude the licence agreement of behalf of ████ ███████ on the basis of other agreements.

bb)

Licence Agreement II of 19 December 2014, however, is a different matter altogether. While it is true that Mr ████████████ is not the *directeur général* of █████████ ██ either, the Plaintiff submitted as Exhibit K 20 the copy of a power of attorney with which the *directeur général* of █████████ ██, Mr █████████, grants Mr █████ █████████ the power of attorney to sign Licence Agreement II ("Restated Patent License Agreement"). As Mr ████████ acted on behalf of the Plaintiff in his capacity as *directeur général*, a licence agreement was validly concluded.

b)

With Licence Agreement II, the patent proprietor granted the Plaintiff an exclusive licence in the patent in suit. That the licence granted is an exclusive licence is made clear in the preamble of the licence agreement already. Art. 2 of the licence agreement governing the granting of rights likewise explicitly refers to the granting of an exclusive licence in section 2.1.1. This is not opposed by the prohibition of "sublicensing" set out in art. 2 section 2.1.1. This passage of the agreement must be interpreted to the effect that only the licensee itself and its affiliates are authorised to grant non-exclusive licences in the patent in suit. By contrast, what is to be precluded is that the Plaintiff transfers this sublicensing right to third parties. In contrast to the limited right to grant non-exclusive licenses also referred to in art. 2 section 2.1.1, "sub-licensing" means the transfer of the exclusive licence and, thus, of the right to grant non-exclusive licences. Based on the wording of the clause, the Plaintiff is not authorised to grant such a sub-licence "except to its Affiliates". The further half-sentence "limited right to grant non-exclusive licenses [...]" then describes in detail the exclusive licence granted to the Plaintiff in the agreement ("Licensor hereby grants to Licensing Entity and its Affiliates the [...] limited right [...]"). Furthermore, this intent of the contractual parties follows from a comparison with art. 2 section 2.1.1 of Licence Agreement I which, due to its slightly different wording, directly reveals that the Plaintiff was to be given the right to grant non-exclusive licences in the "licensed patents" for the respective jurisdictions in the context of the NFC Patent Licensing Program. The fact that "sublicensing" is excluded can thus only mean that the right to grant non-exclusive licences to third parties was supposed to be precluded. With Licence

Agreement II, the contractual parties did not intend to regulate something substantially different. It does not contain any indications whatsoever for the interpretation of the agreement made by the Defendant, according to which the Plaintiff was supposedly merely entitled to conclude licence agreements on behalf of the patent proprietor without holding a licence in the patent itself.

c)

With respect to territory, term and content, the claims asserted by the Plaintiff do not extend beyond the powers granted in the Plaintiff's exclusive licence. The patent infringement of which the Plaintiff accuses the Defendant constitutes a violation of the Plaintiff's rights under the exclusive licence in every respect. Now that the unabbreviated licence agreement (Exhibit K 5d) has been submitted, even the Defendant no longer alleges that the exclusive licence granted in Licence Agreement II is subject to restrictions based on which the Defendant's acts do not constitute an impairment of the Plaintiff's exclusive licence. In particular, the NFC Licensing Program which is mentioned in art. 2 section 2.1.1 and described in Exhibit 2 of the licence agreement, and to which the exclusive licence is restricted, includes the distribution of NFC-enabled smartphones of which the Plaintiff accuses the Defendant in the present proceedings.

2.

To the extent the Plaintiff asserts claims for information and damages claims acquired by subrogation, ███████ ██ validly assigned the corresponding claims to the Plaintiff.

In its declaration dated 27/28 January 2014, ████████ ██ assigned all damages claims accrued to it in connection with the licenced patents, including the patent in suit, to the Plaintiff. The fact that the claims for information are not mentioned explicitly in this context does not raise any concerns. The declaration must be interpreted to the effect that, in addition to damages claims, claims which serve the enforcement of damages claims (i.e. in particular so-called auxiliary claims) are likewise to be assigned.

The aforementioned assignment declaration for ████████ ██ was made by Mr ██████████ on behalf of ███████████ Mr ███████ declared acceptance of the assignment on behalf of the Plaintiff. Both also had the power of attorney required for the legal transaction. For Mr ███████, the power of attorney follows from his capacity as the Plaintiff's *directeur général*. According to Exhibit K 20, on 27 January 2015, Mr ██████ ████████ was given the power of attorney to conclude "Amendment no. 1" to Licence Agreement II by declaration of Mr ██████████ who, as *directeur général*, was authorised to represent the Plaintiff. Amendment no. 1 is the assignment declaration dated 27 January 2015 submitted as Exhibit K 22.

II.

The invention underlying the patent in suit relates to a method for routing data in a chipset (Exhibit K4a, para. [0001]) and, moreover, to a data send/receive circuit (Exhibit K 4a para. [0002]), which each comprise, amongst other things, an RFID-type (Radio Frequency Identification) contactless data send/receive interface. In this respect, the patent in suit in particular relates to the implementation of an NFC (Near Field Communication) chipset (Exhibit K 4a para. [0003]).

In RFID ("Radio Frequency Identification") systems, data is stored on an electronic data carrier – a transponder. This data can then be read by a reader using magnetic or electromagnetic fields. The transponder does not, as a rule, have its own voltage supply. Instead, it is activated only if it is within the reader's reading range. The energy required to operate the transponder is transmitted to the transponder via the magnetic or electromagnetic field of the reader. RFID systems thus permit the automated and contactless identification and tracking of objects tagged with a transponder and/or the recording of data stored in the transponder.

NFC relates to a wireless data interface between electronic devices. The particularity of the NFC technology consists in that a data exchange is possible only over short distances of a few centimetres, i.e. the devices that participate in the data exchange must, accordingly, be held close to one another. In this regard, the devices that are connected to each other via their respective NFC interface behave in the manner of an RFID reader or transponder; however, in contrast to the RFID technology, in which the passive unit (the transponder) is always passive, the NFC technology may also use units which can operate both actively and passively, and may also change roles. The NFC technology is specified by various technical standards of ISO, ECMA and ETSI.

The patent specification in suit describes NFC readers with various operating modes, namely a "reader" mode, a "card emulation" mode and a "device" mode. In the reader mode, the NFC reader operates actively by sending a magnetic field in the manner of a common RFID reader, in order to obtain read and write access to an RFID chip. In the emulation mode, the NFC reader operates passively in the manner of a transponder in order to communicate with another reader that sends a magnetic field and to be perceived as an RFID chip by the other reader. In the device mode – which is a characterising feature of the NFC technology – the reader alternately assumes an active and a passive mode as described above (reader and/or card emulation mode) in order to exchange data with another reader. (Exhibit K 4a, para. [0004])

Due to its extended communication capacities, the NFC reader is integrated in portable devices such as mobile telephones or PDAs. For this purpose, an NFC chipset is required which comprises an NFC reader and at least one host processor. (Exhibit K 4a, para. [0006])

Figure 1 of the patent specification in suit reproduced below shows the typical architecture of such an NFC chipset in block form and contactless circuits with which the NFC chipset can communicate:

Fig. 1

The NFC chipset is bordered by the dotted rectangle on the left-hand side of the illustration. It comprises an NFC reader (NFCR1), which is assigned a contactless interface (indicated by the coil that is visible), and two host processors (HP1 and HP2). The patent specification in suit defines the term host processor to mean an integrated circuit comprising a microprocessor or a micro controller that is connected to a port of the NFC reader (Exhibit K 4a para. [0006]). In figure 1, the two host processors (HP1 and HP2) share the resources of the NFC reader (NFCR1). They are connected to this NFC reader via ports and can both communicate bidirectionally with this NFC reader (indicated by the arrows).

The host processors manage their respective contactless applications or services (so-called apps) via the NFC reader. This means that incoming and outgoing data flows must be processed via the NFC reader by the applications or services executed in the host processors, i.e. the NFC reader must be capable of communicating with different external circuits. (Exhibit K 4a, para. [0006]). Accordingly, the implementation of a suitable NFC chipset in any case requires that a routing of data flows which are transmitted via a bidirectional contactless data transmission channel between the respective host processors (HP1, HP2) and the NFC reader (NFCR1) within the NFC chipset be provided for (Exhibit K 4a [0007]).

This routing of data flows between the respective host processors and the NFC reader is described in the patent specification in suit by way of example on the basis of figures 3a and 3b reproduced below:

The NFC chipset of figure 3a consists of two host processors (HP1, HP2) and the NFC reader (NFCR1; smaller dotted rectangle). The latter in turn comprises a contactless data send/receive interface (CLINT), equipped with an antenna circuit (ACT), two wired communication interfaces (INT1, INT2) and a controller (NFCC). The communication interfaces are connected to the data send/receive interface (CLINT) on the one hand, and to the two host processors (HP1, HP2) located outside the NFC reader on the other.

Figure 3B illustrates by way of example the data flows from and to the applications or services executed by a host processor (HP1, HP2) which pass the NFC chipset. In this manner, the resources of the contactless data send/receive interface (CLINT) may be used by the individual host processors. In this context, the data flows each have a source point and a destination point. Depending on the direction of the data flow, the source point or destination point is located either in a host processor (HP1, HP2) or in the contactless data send/receive interface (CLINT) (Exhibit K 4a para. [0009]).

To enable the routing of outgoing data and the configuration of the interface CLINT, frames are formed, each comprising header fields and data fields. The header fields

contain the information required to control the interface CLINT, in particular fields specifying the source and destination points of the data. (Exhibit K 4a, para. [0011])

As can be inferred from the patent specification in suit (Exhibit K 4a para. [0012]), the HCI protocol known from the prior art provided for frames having long and complex header fields. This entailed the disadvantage that significant processing efforts were required before the actual data processing could take place. This problem is also referred to as "overheading". Another problem that existed in the prior art was that the contactless data send/receive interface CLINT and the controller NFCC did not necessarily know to which host processor the data was supposed to be sent. As a result, the data was transmitted to two processors, and the processor for which such data was not intended did not respond (Exhibit K 4a para. 0014]).

Against this background, the patent specification in suit states the task (the technical problem) to be, for one thing, the provision of a method for routing data in an NFC chipset that is simple to implement and does not require any long header fields [Exhibit K 4a para. [0013]), and, for another, the provision of a method in which it is possible to determine in an NFC chipset the host processor that is the recipient of the data received via a contactless data transmission channel, without necessarily having to analyse the content of such data (Exhibit K 4a para. [0017]).

The invention tries to fulfil this task by means of a method for routing data and a data send/receive device according to claims 1 and 12 having the following features:

Claim 1:
1. A method for routing data in a chipset
2. The chipset comprises
    a) a controller (NFCC),
    b) an RFID-type contactless data send/receive interface (CLINT), and
    c) at least one host processor (HP1, HP2).
3. The method comprises the following steps:
    a) sending to the controller, by means of a source point (P1, P2) located in the host processor, a command (CMD) for opening a data path
      a1) with the command for opening a data path designating a destination point (P3) located in the contactless data send/receive interface (CLINT),
    b) Opening, by means of the controller (NFCC), a data path in response to the command (CMD) for opening a data path,
      b1) with the data path linking the source point to the destination point,
      b2) with a routing channel number being allocated to the data path (CHANi), and
      b3) with the routing channel number as well as routing parameters comprising at least one identifier (IDsp) of the source point and one identifier (IDdp) of the destination point being saved in a routing table (RT),

c) Sending to the controller (NFCC), by means of the source point, data encapsulated in a frame (DF) and destined for the destination point,

    c1)   with the frame having   a small header field comprising the routing channel number,

d) Searching, by means of the controller (NFCC) for a destination point of the data in the routing table upon receiving the data encapsulated in a frame (DF),

    d1)   with the frame having a header field comprising the routing channel number, and

    d2)   with the routing channel number being used in the search as index to select the destination point.

e) Sending the data to the destination point.

Claim 12

1.   A device for sending/receiving data (NFCR2)

2.   The device for sending/receiving data (NFCR2) comprises:

  a) a controller (NFCC),

  b) an RFID-type contactless data send/receive interface (CLINT), and

  c) at least one input/output port (INT1, INT2) to link the contactless data send/receive interface (CLINT) to a host processor (HP1, HP2).

3.   The controller (NFCC) is configured for:

  a) in response to the command (CMD) for opening a data path, opening a data path between the source point and a destination point,

    a1) with the command for opening a data path being sent by a source point located in a host processor (HP1, HP2),

    a2) with the command for opening a data path designating a destination point (P3) located in the contactless data send/receive interface (CLINT),

    a3) with a routing channel number (CHANi) being allocated to the data path, and

    a4) with the routing channel number as well as routing parameters comprising at least one identifier (IDsp) of the source point and one identifier (IDdp) of the destination point being saved in a routing table (RT),

  b) upon receiving data encapsulated in a frame (DF) searching for a destination point of the data in the routing table,

    b1) with the frame having a header field comprising the routing channel number, and

    b2) with the routing channel number being used in the search as index to select the destination point.

III.

In view of the parties' dispute, feature group 3 of claims 1 and 12 requires further explanation. For the sake of simplicity, reference is made to the features of claim 1 which can be found in an (almost) identical manner – but in some parts with a slightly different numbering – in claim 12.

Feature group 3 describes the implementation of the routing method according to the invention. This is illustrated by figure 4 of the patent specification in suit which is reproduced below:

Fig. 4

What is shown is an NFC chipset according to the invention with two host processors (HP1, HP2) and an NFC reader (NFCR2). The NFC reader comprises the controller NFCC and a contactless data send/receive interface CLINT. The source or destination points of a data flow in the chipset are referred to as P1 (point located in the host processor 1), P2 (point located in the host processor 2) and P3 (point located in the contactless interface CLINT).

According to feature 3.a), a command for opening a data path is first of all send to the controller by means of a source point (P1, P2) located in the host processor. In this regard, feature 3.a) introduces the term "source point" which is then taken up again in features 3.b1), 3.b3) and 3.c). A general definition of the "source point" cannot be found anywhere in the patent specification in suit. However, subclaim 9 protects an embodiment of the invention wherein the source points or destination points saved in the routing table are services taking the form of programs executed by a host processor and to which the controller allocates data paths. Corresponding embodiments of the invention are also described in paragraphs [0026], [0037] and [0065] of the patent specification in suit. From this, it can be concluded that the source points mentioned in claim 1 and in claim 12 constitute services that are executed in the corresponding host processor. This is apparent also from figure 1 which shows that different applications AP1, AP2 and AP3 are

located in the host processors HP1 and HP2. The data exchange is performed in a functional manner in order to execute these applications, i.e. between the services concerned. According to feature 3.a), the command for opening a data path takes place by means of the source point destined for the subsequent data exchange, i.e. with regard to a special service located in the corresponding host processor.

According to feature 3.a1), the command for opening a data path must then designate the destination point of the data path that is located in the contactless data send/receive interface. In this way, the controller receives the routing parameter required for identifying the data path.

In response to the command for opening the data path, the data path requested is then opened by means of the controller (feature 3.b). In this context, the term "opening" does not imply something completely different from the creation of the data path. In actual fact, the patent specification in suit uses these two terms in parallel without making an explicit distinction between them. To the extent that it is stated in paragraphs [0047] and [0048] of the patent specification in suit that the command for opening the data path is sent from one of the host processors or from the interface CLINT, while the actual creation of the data path is ensured by the controller NFCC, this cannot be understood as a clear distinction between the terms for the reason alone that feature 3.b) requires that the opening of the data path is to take place by means of the controller. It is thus possible, in any case, that the "opening" and "creation" of the data path overlap.

Accordingly, the command for creating data paths mentioned in subclaim 4 by no means constitutes a further command in addition to the command for opening a data path mentioned in claims 1 and 2. This would not be consistent with the structure of claims 1 to 6 and 12 to 17. In actual fact, the command for creating data paths goes beyond the command for opening a data path in that, in addition to the routing parameter "destination point", it contains further configuration parameters such as operating mode or protocol parameters. Based on this understanding, the "command for creating data paths" mentioned in subclaim 4 always also comprises the "command for opening a data path" mentioned in claims 1 and 2.

The patent claims in suit 1 and 12 do not contain any indication that further requirements beyond the measures to be taken by the controller are specified with regard to the opening of a data path according to the invention. The controller must allocate a routing channel number to the data path and must save this routing channel number in a routing table together with various identifiers of the data path. The controller must then forward incoming frames to the correct destination point with the help of the routing channel number and the parameters contained in the routing table. This excludes neither that further configuration parameters are sent together with the command for opening a data path, nor that further commands are required in order to send data via the opened data path.

The data path "opened up" in this manner links the source point to the destination point (feature 3.b1). What is essential then is that a routing channel number (CHANi) is allocated to the data path (feature 3.b2) and is saved in a routing table (feature 3.b3). In the routing table, routing parameters are allocated to the routing channel number which identify at least the source point and the destination point of the respective data path (IDsp, IDdp) (feature 3.3b). In this manner, using solely the routing channel number, the respective data path can be identified by recourse to the routing table.

It is thus possible, when transmitting data encapsulated in a frame, to use a header field which only contains the routing channel number and, accordingly, can be processed easily and quickly (feature 3.c). For this purpose, the controller must merely retrieve and evaluate the routing parameters saved in the routing table for the corresponding routing channel number (feature 3.d). In this manner, it is possible to determine the destination point of the data (cf. feature 3.d2) to which the controller then forwards the data (feature 3.e).

From a functional perspective, the routing table must be designed such that the controller is able to access this routing table and to retrieve the parameters of the corresponding data path by indicating the routing channel number. In this regard, the manner in which this is ensured, in particular how the routing table is structured and where it is stored, is left open by the patent in suit. In actual fact, what is sufficient is any allocation of identifiers to a routing channel number which is stored such that the host controller can access such routing channel number for the purpose of searching for the destination point.

Contrary to what was argued by the Defendant at the oral hearing, it is not required that the routing table meet any other requirements beyond the characteristics specified in the patent claim in suit. In particular, it is not required that the routing table contain all the parameterisation data for the configuration of the contactless data send/receive interface (CLINT). Nor is it required that it be formatted from the outset such that it is at least suitable for receiving such data. The teaching of the patent in suit solves the technical problem of overheading in that routing data which was previously contained in a routing table is stored in a routing table and can be found with the help of a routing channel number. Patent claims in suit 1 and 12 do not contain anything as to how the interface CLINT is configured in detail and where the parameterisation data originates from. Nothing else can be inferred from subclaim 2 of the patent in suit, which does not merely specify data for the routing table to be set up according to patent claim in suit 1, but sets further requirements to be fulfilled by the routing table that go beyond patent claim in suit 1. The further references to paragraph [0053] and figure 4 of the patent specification in suit merely relate to embodiments which cannot establish a restricting construction of the patent claim in suit.

IV.

Offering and selling the contested embodiment constitute grounds for an indirect violation of claim 1 of the patent in suit within the meaning of Sec. 10 (1) BPatG.
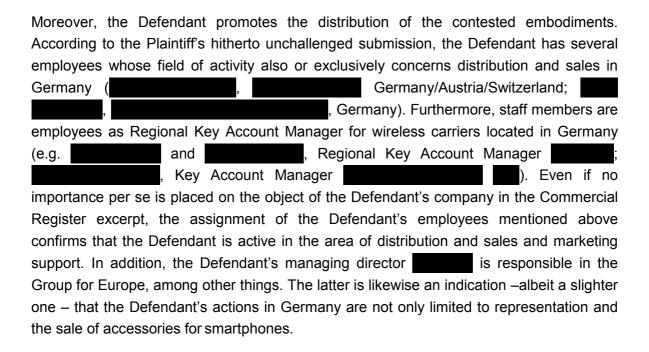
1.

The same principles developed by case law as in the case of Sec. 9 PatG apply for the standing to be sued in the event of an indirect patent infringement within the meaning of Sec. 10 (1) Pat G. According to this, not only does that party have standing to be sued, which directly uses the patented invention on its own account, yet so does the party, which as a participant facilitates or promotes any third-party direct use within the meaning Sec. 9 PatG, even though it could with reasonable effort obtain the knowledge that the action it is supporting infringes the patent proprietor's absolute right. Any party liable to honor claims for injunctive relief, damages and information may also ultimately be whosoever simply provides further cause for the legal infringement by failing to prevent any legal infringement by a third party, which it facilitated, even though this would be expected of it. In addition to this objective contribution to the cause, however, comes the fact that a legal obligation is being violated, which at least serves to protect the violated absolute right and the compliance with which would allow the contribution to cause to be dropped. In the individual case, the existence and the scope of a legal obligation are based on the consideration of all concerned interests and legally relevant assessments. Decisive is whether and to what extent the party against which claims have been asserted can be reasonably expected to take action based on the circumstances in the individual case (cf. in whole: BGH, GRUR 2009, 1142 – MP3-Player-Import).

If one sets these principles as the basis, the Defendant is an infringer within the meaning of Sections 9 and 10 PatG in conjunction with Art. 64 (1) EPC and thus has standing to be sued with respect to the asserted claims.

The Defendant promotes the sale of the disputed mobile telephones on the Internet. It is mentioned in the legal notice on the Internet site www.▮▮▮com as the responsible party, which is automatically called up by inputting the URL www.▮▮de. Assuming the Defendant's argument were accurate, that this supposedly concerns an oversight— hitherto as yet still uncorrected—this would not eliminate the contribution of responsibility. Any considerations regarding Sec. 5 TMG [*Telemediengesetz* / German Telemedia Act] in this connection are immaterial, as they are not relevant to the decision. For aside from being mentioned in the legal notice, all other paths also lead to the Defendant if the user wishes to contact "▮▮▮via the Internet site. The headers "Call Us" and "Support Center" lead the Internet site user to the Defendant's telephone number in Frankfurt. Even if the Internet sales offer as such originates from the ▮▮▮Corporation, it is inherent in the Defendant's job of being available as a contact partner in any case to promote this sales

action. Because a caller interested in purchasing a smartphone automatically places his call to the Defendant. This constitutes an organizational and support service. In addition, only indicative significance is attributed to the fact that the subsidiaries (and thus also the Defendant) are named as the contractual partner in addition to the parent company ███ Corporation in the general terms and conditions for use of the Internet site.

Moreover, the Defendant promotes the distribution of the contested embodiments. According to the Plaintiff's hitherto unchallenged submission, the Defendant has several employees whose field of activity also or exclusively concerns distribution and sales in Germany (████████████, ████████████ Germany/Austria/Switzerland; ████ ██████, █████████████████████████, Germany). Furthermore, staff members are employees as Regional Key Account Manager for wireless carriers located in Germany (e.g. ███████████ and ███████████, Regional Key Account Manager ████████; ████████████, Key Account Manager ██████████████████ ███). Even if no importance per se is placed on the object of the Defendant's company in the Commercial Register excerpt, the assignment of the Defendant's employees mentioned above confirms that the Defendant is active in the area of distribution and sales and marketing support. In addition, the Defendant's managing director ████████ is responsible in the Group for Europe, among other things. The latter is likewise an indication –albeit a slighter one – that the Defendant's actions in Germany are not only limited to representation and the sale of accessories for smartphones.

Against this background the Defendant has a legal obligation to monitor patent infringements caused by the offering and sale of the disputed smartphones. For by actively supporting the offering and sales actions of the ████ Corporation in Germany, it is contributing to a risky situation, which corresponds to a legal obligation to avoid any legal violations, in particular the infringement of third-party patents (cf. OLG Düsseldorf, judgment of 03/27/2014, Case No. I-15 U 19/14; guiding principles in GRUR 2015, 61).

It is neither evident nor has it been submitted that the Defendant was unable to monitor the patent situation or that it was unreasonable for the Defendant to do so. Within the framework of its position as subsidiary, it should have contacted its parent company and ensured that the contested smartphones did not infringe upon any third-party rights, in particular the patent in suit. The interdependency within the Group makes this easier for the Defendant to do, than say for an outside third party.

2.

The offer recipients are persons that are not authorized to use the invention. Pursuant to Sec. 10 (3) PatG that is also then the case if the offer recipients are consumers that only use the contested embodiment pursuant to Sec. 11 No. 1 PatG privately for non-commercial purposes.
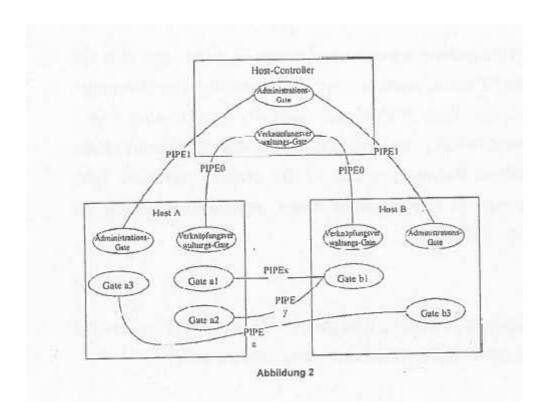
3.

The contested embodiment concerns a means that refers to an essential element of the invention, because the contested embodiment contains an NFC chip of the type "PN544", which indisputably comprises a host processor (HP1, HP2), a control unit (NFCC) and an RFID-type data send/receive interface (CLINT) (feature group 2). Since insofar in any case parts of the means are even mentioned in claim 1 of the patent in suit, it also refers to an essential element of the invention.

4.

The contested embodiment is objectively suited for being used for implementation of the process protected with claim 1 of the patent in suit.

It is undisputed between the parties that the contested NFC Controller of the type "PN544" functions according to the specifications of the standard ▆▆▆▆▆▆▆▆▆ V11.0.0 (2011-09). The aforementioned standard concerns a logical interface that enables contactless applications, hosted on the Universal Integrated Circuit Card (UICC). Specifically it describes a configuration in which a host is embedded in the UICC, whereby the UICC is connected with the host controller, which in turn is embedded in the contactless frontend (CLF). A logical entity, which operates at least one service, is understood under host. The host controller is a host that is also responsible for managing the host network. Every service operated inside a host has an entry point, which is designated as a gate. Communication channels are formed between the gates of various hosts, which are called pipes.

A schematic representation of the data routing process described in the standard is given in Fig. 2 of Exhibit K9:

Abbildung 2

This shows the data routing between host A and host B via the host controller functioning as the control unit. Both the host controller and the individual hosts have administration gates and link manager gates. Both gates are so-called static gates, which are always available and cannot be deleted. They establish the connection between the host controller and the individual host. In addition, the standard also provides for dynamic gates that can be created and deleted. A connection between the individual hosts can be created through these. In addition to administration and link manager gates, the hosts have other gates for doing this (cf. in this regard Exhibit K9 Chapter 4.4). If data is to be exchanged between host A and host B, a dynamic pipe has to be created between the gates of these hosts. For this purpose the administration gate of host A sends a data path opening command (ADM_CREATE_PIPE) via the existing static pipe to the administration gate of the host controller. This data path opening command identifies the gate of host B, to which the data is supposed to be sent. The host controller uses the "White List" defined by the destination host to monitor whether the source host is authorized to create a pipe. If this is the case, a dynamic pipe between the source host (host A) and the destination host (host B) is created (cf. in this regard Exhibit K9 Chapter 6.1.3.1). The host controller subsequently reports to the destination host that a pipe has been created, whereby it transmits identifiers of the source host, the source gate, the destination host and the destination gate and assigns the pipe a P_{ID} (cf. Exhibit K9 Chapter 6.2.3.1). By using the P_{ID} in the header field of a data packet, data from the source host contained in this data packet can be transmitted to the destination gate of the destination host (Exhibit K9 Chapter 5.1).

Implementation of the above-described standard by the contested embodiment at the same time substantiates – contrary to the Defendant's view – the realization of feature group 3. In detail:

According to feature 3.a) the command "ADM_CREATE_PIPE" is sent via a starting point located in the host processor (host A) to the control unit. At the same time the starting point located in host A is characterized by the application, for the execution of which a new dynamic pipe is supposed to be created. The fact that according to the standard this application uses an administration gate to send off the data path opening command to the control unit while the data are subsequently sent from a gate A of a dynamic pipe is irrelevant according to the teaching of the patent in suit. For this makes no specific distinction according to the various gates, but rather emphasizes the functional aspect of a specific application. The service responsible for this is supposed to simultaneously send off the data path opening command and be the starting point for the subsequent data path. This is the case according to the standard, which specifies a logical interface that enables the contactless applications hosted on the UICC (Exhibit K9 Section 1). The standard states that a gate is accordingly the entry point to a service that operates within a host (cf. Exhibit K9 Section 3.1). The use of various gates as entry points to a service at the same time simply constitutes a special technical implementation of the teaching protected by patent claim 1 of the patent in suit.

Executing the command "ADM_CREATE_PIPE" through the host controller qualifies as opening the data path within the meaning of feature 3.b). The host controller identifies a data path between a starting point and a destination gate by assigning a routing channel number (P_{ID}) to the data path and among other things by entering this pipe ID and gate ID from the source and destination host in a table (Table 10 of the HCI Standard). The patent in suit does not require more for opening the data path according to the invention.

As far as the dynamic pipes are basically initially closed according to the standard and do not open until another command is received, this is not revealed from the teaching of the patent in suit. This does not rule out that another control command must be issued before the data to be transmitted within the meaning of feature 3.c) can be sent. The term "opened pipe" used in the standard is not to be equated the "opening of a data path" according to the patent in suit.

The data reproduced in Table 10 of the HCI Standard forms a routing table within the meaning of feature 3.b3). The table shows the routing channel number, an identifier of the starting point as well as an identifier of the destination gate:

Table 10

Description	Length
source H_{ID}	1
source G_{ID}	1
destination H_{ID}	1
destination G_{ID}	1
P_{ID} of pipe	1

The aforementioned data are stored by the host controller of the contested embodiment in such way that it can use the data if needed for forwarding a data packet to the destination host (Section 5.1 of the standard). Whether storage is a prerequisite for the fact that the host controller can communicate the table contents to the inquiring host with the reply "ANY-OK" in the first step can be left unanswered. However it is incomprehensible how the host controller can use the pipe ID for forwarding the data packet to the destination host without storing this data in a further step. It is equally difficult to explain how the host controller can send a frame to the destination gate solely with the aid of the pipe ID if it cannot search for and assign the routing information relevant for the data path, namely host and gate ID, via the pipe ID.

The Plaintiff has already disproved that – as the Defendant has submitted – exactly one data path is supposedly created and opened for each Card-RF-gate so that it no longer needs to search for the destination gate in a routing table with the help of a routing number by the fact that no fixed pipe IDs are assigned to the dynamic pipes in the contested embodiment (cf. HCI-Standard Section 9.1 and 4.4), vice versa the pipe ID must be unique. However if the assignment between pipe ID and specific pipe can change and the pipe ID is used according to the HCI-Standard to send the data packets to the correct destination gate, the respective gate IDs for the pipe have to be stored under a specific pipe ID, which can also change. Therefore the pipe ID can only serve as an index within the meaning of the patent in suit in order to be able to identify the corresponding destination gate.

Section 5 of the HCI-Standard simultaneously shows the realization of feature group 3.c). According to the standard, the data to be transmitted are encapsulated in a frame and given a header field. This header field contains the routing channel number via which the control unit can determine the destination gate by recourse to the routing table (feature group 3.d).

The Defendant is right by not disputing the realization of feature 3.e). Obviously the data arrive at their destination gate according to the standard.

5.

It is obvious in any case for the Defendant that the contest embodiment is suited for and on the part of the consumer intended for implementing the process according to the patent.

For the obviousness it is important whether the imminent patent infringement was so clearly recognizable from the perspective of the seller or supplier at the time of the offer or sale based on all the circumstances of the case that an offer or a supply had to be equated with deliberate patent endangerment (BGH GRUR 2007, 679 – *Haubenstretchautomat* [automatic stretch hooder]). It is suffices if from the perspective of the third party it can be expected with sufficient certainty that the buyer will use the supplied means in the manner according to the patent (BGH GRUR 2006, 839 – *Deckenheizung* [ceiling heating]). As a rule the necessarily high degree of expectation of a patent infringement is then present if the seller or supplier itself has suggested such a use (BGH GRUR 2007, 679 – *Haubenstretchautomat*). That is the case here.

The NFC capability is pointed out explicitly in the product description of the contested embodiment. When a smartphone is turned on, the NFC mode appears in the menu program. Use of the contested embodiment is designed to use the NFC function. It may be that individual users do not apply NFC, yet if such an application exists on a smartphone, it is certainly to be expected that a portion of the user will in any case also use the NFC application. Since the patented process is necessarily applied in such a case, namely data is routed within the meaning of the teaching of the patent in suit, the application of the patented process is obvious from the Defendant's perspective.

V.

The contested embodiment also realizes all the features of claim 12 of the patent in suit. For more detail we refer to the statements regarding objective suitability of the contested embodiment for using the process protected by claim 1 of the patent in suit (see Section III.3.). The features of the claims of the patent in suit are congruent for the most part. It is correctly not disputed between the parties that the NFC controller "PN544" has a data send/receive device, which in addition to the control unit and an RFID-type contactless data send/receive interface also comprises at least one input/output port for connecting the contactless data send/receive interface with a host processor (feature group 2).

VI.

Since the Defendant uses the invention protected by claims 1 and 12 of the patent in suit within the meaning of Sec. 9 pages 1 and 2 No. 1 PatG and Sec. 10 (1) PatG, the following legal consequences ensue.

1.

The Defendant is obligated to render the Plaintiff injunctive relief pursuant to Art. 64 (1) EPC, Sec. 139 (1) PatG, since the patented invention was used without authorization.

As a result the imposition of an order to cease and desist entirely is justified insofar as the claim for injunctive relief is based on acts of use within the meaning of Sec. 10 (1) PatG. Although a complete injunction as a rule does not come into consideration within the framework of an only indirect patent infringement if the contested embodiment can also be used without infringing the patent (cf. Schulte/Rinken/Kühnen, PatG 9th edit.: Sec. 10 margin no. 34 et. seqq.). The contrary shall only apply if neither a warning notice nor any agreement on liquidated damages can offer a guarantee that use of the means shall not constitute a patent infringement, any patent infringement is practically not detectable for the patent proprietor and the supplier may without further ado be reasonably expected to redesign the means in such a way that it can no longer be used according to the patent (Schulte/Rinken/Kühnen, PatG 9th edit.: Sec. 10 margin no. 39). That is the case here because the patent-infringing NFC application is not being used until it reaches the final buyer of the contested smartphone, regularly a private end consumer. Agreements on liquidated damage are prohibited vis-à-vis these parties. But even a warning notice is out of the question because this would as a rule be ineffective: Any notice disallowing the use of the NFC application vis-à-vis an end consumer is not only inaccurate but may also constitute a serious purchase obstacle. The same applies for the notice that the contested embodiment is not NFC-capable even through the NFC mode is offered in the menu program. Beyond that the Plaintiff is unable to determine whether those buying the contested embodiment will end up using the NFC application contrary to a warning notice, whereas it is reasonable to expect that the Defendant can easily modify the contested embodiment to such an extent that the HCI-Standard will not be used. In the contested embodiment the NFC functionality is basically based on the NFC chip "PN544". Insofar it can be reasonably expected of the Defendant to redesign the hardware of the contested embodiment in such a way that the NFC functionality can in fact no longer be carried out, or in any case through corresponding software modifications to ensure that the NFC functionality is no longer available to the user (even if the technical hardware requirements are still given). Alternatively the NFC functionality could be stored outside of the UICC; this would also provide a way out of the infringement.

Against this background the Plaintiff's ongoing sales of the contested embodiment is in any case unacceptable, since it will regularly result in the buyer of the contested smartphone making use of the teaching of the patent in suit. Even if the contested embodiment can be used without infringing the patent and a modification of the contested embodiment incurs a certain expense, this can be reasonably expected of the Defendant with respect to the fact that otherwise the Plaintiff's patent protection would be in vain.

2.

On the merits thereof the Plaintiff has the right to claim payment of damages from the Defendant arising from Art. 64 (1) EPC, Sec. 139 (1) and (2) PatG.

The legitimate interest required for the admissibility of the declaratory judgment pursuant to Sec. 256 (1) ZPO [*Zivilprozeßordnung* / German Civil Code of Procedure] results from the fact that the Plaintiff is currently not in the position to estimate the specific damages and, without a final declaration of the liability for damages, the expiration of the damage claim is imminent.

The Defendant is liable for damages because it culpably infringed upon the patent. As a specialist company it should have at least been able to recognize the patent infringement by applying the due diligence required in its business practice, Sec. 276 BGB [*Bürgerliches Gesetzbuch* / German Civil Code]. It is also likely that the Plaintiff, as the exclusive licensee and proprietor of the patent in suit, has incurred a loss due to the patent infringement.

That also applies insofar as the claim for damages is based on infringement actions within the meaning of Sec. 10 (1) PatG. Indeed simply offering the means, as the Defendant is accused of doing in this case, does not regularly lead to a direct patent infringement by the use of these means, as long as the offer is not followed by any delivery. However the offer already is grounds for a certain likelihood that a delivery has also been made. As a rule, this likelihood is not sufficient proof of any such delivery and thus for any substantiation of an estimated action for damages. Based on experience in everyday life, it does however suggest with some degree of certainty that a loss has been incurred, and therefore results in substantiating a motion of an unspecified amount for a declaration of liability for damages (BGH GRUR 2013, 713, 715 – *Fräsverfahren* [milling process]).

For the time since 12/19/2014 the Plaintiff is entitled to damage claims arising from its rights because at this point in time the licensing agreement between it and ▓▓▓▓▓▓ ▓▓ as proprietor of the patent in suit entered into force and since then it has held an exclusive license to the patent in suit. For the time period prior to 12/19/2014 the Plaintiff can request compensation for the loss incurred by ▓▓▓▓▓▓ ▓▓

3.

Vis-à-vis the Defendant the Plaintiff is entitled to claim a rendering of accounts and information pursuant to Art. 64 (1) EPC, Sec. 140b (1) PatG, Sections 242, 259 BGB. The right to information regarding the origin and distribution channel of the contested embodiment arises directly from Sec. 140b (1) Pat G on the ground of unauthorized use of the invention's subject matter, the scope of the duty of disclosure arises from Sec. 140b (3) PatG. The more extensive duty of disclosure and the obligation to render accounts follow from Sections 242, 259 BGB so that the Plaintiff is in the position to estimate the claims for damages to which it is entitled. The Plaintiff shall rely on the information given in the operative part of the judgment, which it does not have through no fault of its own, and the Defendant shall not be unreasonably burdened by the information it is requested to provide.

VII.

Art. 102 TFEU [Treaty on the Functioning of the European Union] does not conflict with the Plaintiff's aforementioned claims. It has not been sufficiently demonstrated that the Plaintiff's patent in suit conveys a dominating market position.

Although it must be taken into account from the start that a high value is placed on the claims due to unauthorized use of the patent. Intellectual property rights are exclusively protected in the Charter of Fundamental Rights of the European Union (Art. 17 (2)). In order to appropriately assert this protection, the legal claims on the grounds of illegal patent use as a rule have to be applied. This applies even more so as even access to the courts for its part enjoys fundamental rights (Art. 47 of the EU Charter). However the protection of intellectual property is restricted by the reservation of general tolerance, which especially requires that patent rights be exercised according to the rules of cartel law.

In this respect Art. 102 TFEU specifies: "Any abuse by [an] ... undertaking of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States." The intervention of Art. 102 TFEU would, on the one hand, subsequently require the company asserting the claims to have a dominant market position and on the other the intervention of extraordinary circumstances that would result in the restriction of trade.

The Plaintiff is the party to whom Art. 102 TFEU is addressed because it can control the standard-compliant application of NFC-technology through its exclusive legal position to the patent in suit (see above the statements regarding the patent in suit's standard essentiality). The Plaintiff's dominant market position required for the application of Art. 102 TFEU, on the other hand, is not solely due to this legal position to the patent in suit.

For not every standard-essential patent (SEP) imparts a significant market power from the perspective of cartel law. Rather it must be reviewed on an individual case basis whether any such market dominant importance relevant under cartel law is actually attributed to the patent-protected technical teaching.

In this respect the Division follows the legal opinion of the Advocate General Melchior Wathelet, who in his opinions in the ECJ referral proceedings C-170/13 (Exhibit HL 9 No. 57) states as follows: "I share the view expressed by the Netherlands Government that the fact that an undertaking owns an SEP does not necessarily mean that it holds a dominant position within the meaning of Article 102 TFEU, and that it is for the national court to determine, on a case-by-case basis, whether that is indeed the situation."

Further on (No. 58) it reads: "The fact that anyone who uses a standard set by a standardization body must necessarily make use of the teaching of an SEP, thus requiring a license from the owner of that patent, may indeed give rise to a rebuttable presumption that the owner of that patent holds a dominant position. Yet in my view it must be possible to rebut that presumption with specific and substantiated evidence." The Division already doubts whether this passage is to be understood to mean that the ownership of an SEP necessarily substantiates the presumption of a market dominant position. The Advocate General's statements could also be understood to mean that nothing is to be determined on this issue particularly as this aspect is not the subject matter of the submission proceedings at the ECJ. This notwithstanding, the Division however is also of the opinion that any such presumption has no factual basis for every standard-essential patent. The standards standardized by the Standardization Organization – in any case in the field of telecommunications – are in no way exclusively limited to technical functions, which are fundamentally important for the relevant market. Rather there are definitely functions that, although included in a standard, are only of minor importance for the market. With respect to the functions last mentioned, there is no evident reason why it should be presumed that the patent proprietor holds a dominant market position. Since the content of the respective patent and its actual significance on the market thus play a decisive role, in accordance with the general principles of distributing the burden of proof, for a start the party invoking the factor of market dominance first has to submit the facts substantiating the alleged market dominance.

The term market dominance is neither a fixed quality of company nor is it an absolute legal concept. Market dominance always only exists with respect to certain functions, markets, provisions, etc. Hence a company can be especially market dominating only with regard to a certain portion of its activities (Langen/Bunte/*Norhdurft/Ruppelt*, Kommentar zum deutschen und europäischen Kartellrecht [Commentary on German and European Cartel Law], Vol. 1, 11th edit. 2011, Sec. 19 margin no. 15).

Especially in the field of intellectual property rights, the European Commission determined in the decision "AstraZeneca" (C-457/10P, EU:C:2012:770, margin no. 175) that a

dominating position concerns a position of economic power held by an undertaking "which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers." Further on under margin number 186 it reads that "although the mere possession of intellectual property rights cannot be considered to confer such a position, their possession is nonetheless capable, under certain circumstances, of creating a dominant position, in particular by enabling an undertaking to prevent effective competition on the market."

In the process the market power does not necessarily have to limit itself to the dominated market but may extend itself to the upstream and downstream markets (Langen/Bunte/*Norhdurft/Ruppelt*, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edit. 2011, Sec. 19 margin no. 15). With respect to intellectual property rights, it is not the market of the issued license that is insofar relevant from the perspective of cartel law but it is the downstream product market (cf. ECJ, GRUR Int. 1995, 490 margin no. 47 – Magill TVG Guide; BGH, NJW-RR 2010, 392 et. seqq. -- *Reisestellenkarte* [travel center credit card]).

With respect to the patent-protected teaching, this downstream product market as the technically relevant market has to be qualified more specifically. With regards to a standard-essential patent the relevant market is basically the market on which those products are offered that implement the standard with the SEP-protected technology. In the process the market is delineated in established case law according to the demand-oriented market concept. According to this all services are assigned to a market that are functionally interchangeable from the perspective of the market opponent (BGH, WuW/E DE-R 1355-1360 –*Staubsaugebeutelmarkt* [vacuum cleaner bag market] with additional commentary; Düsseldorf Higher Regional Court, judgment of 03/13/2088, Case No.: VI-U (Kart) 29/06, cited from juris). The objective of delineating the market is always to comprehend the reality of the competition that corresponds to the choices the market opponent has (Langen/Bunte/*Norhdurft/Ruppelt*, Kommentar zum deutschen und europäischen Kartellrecht, Vol. 1, 11th edit. 2011, Sec. 19 margin no. 20 with additional commentary).

It is certainly too broad in scope to apply the entire mobile telephone sales market for the relevant market in the present case. Near-field communication is practically limited to use on smartphones. Therefore only its sales market must be considered. In addition to end customers, demand on this sales market is created by wireless network providers, which offer the wireless devices in connection with corresponding wireless network agreements to the end customer.

The near-field communication (NFC) being discussed is not a technology that constitutes one of the basic functions of a smartphone. Undoubtedly various devices are offered on the market for smartphones that are not equipped with NFC. Use of the patent in suit or of

the standard relevant here is accordingly not a prerequisite for access to the market. However this is also not mandatory for assuming a dominant market position.

Rather a dominant market may also be assumed if products are also being offered on the relevant market, here the distribution of smartphones, which do not have the product configuration of the standard-essential patent. The prerequisite for assuming a dominant market position in this case is that a competitive offer is not possible without access to the use of the patent in dispute, i.e. there is no effective competition to other sellers solely with products that do not have the patented function. By contrast, a dominant market position would in any case only be denied if the SEP-protected technical function did not play any role whatsoever or only a minor role in the demand for SEP-products—here smartphones.

One indication in this connection can be the fact to what extent the technology in question has already prevailed on the market. At the same time it would be imprudent to rely on rigid percentage limits because any such schematic legal application would disregard the particulars of the respective market. Hence the smartphone market is characterized to a special degree by rapid technological progress and an ever growing number of new applications. The end customer searching for a new smartphone has this in mind when deciding to buy a new device. Aside from end consumers, this applies to an even greater extent to wireless network providers. Devices that are not technically up-to-date quickly become irrelevant in the competition and lose market value. This is particularly true when seen against the backdrop that the average useful life of a wireless device is continually declining and is currently only at 18 to 24 months (cf. set of Exhibits HL 31). The relevant competition between individual smartphone sellers is primarily taking place between the seller's newest products.

Against this background the Division is fully aware that the NFC Technology as such is suited to confer a market dominant position on the relevant market. The Defendant argued without any objections that the share of NFC-capable smartphones was at 59.5% in 2014 and even at 74% in January 2015 (cf. in this regard Exhibits HL28 and HL29), whereby the share of the newest models was supposedly even higher (cf. Exhibits HL19 – HL25).

The excerpt from the Internet service "www.heise.de" listed by the Plaintiff on the significance and spread of NFC Technology (cf. Exhibit K16) does not reveal – contrary to the Plaintiff's view – any different picture. Although it is pointed out that the near-field technology initially had a tough start, further on it then reads: "With the decision by Apple to install NFC in its iPhone payment system, the process is however again on a winning streak, showed the CES. After Apple as the second largest smartphone platform jumped into near-field technology NFC with its iPhones, the applications are expanding with the process." Insofar as this passage is supposed to refer only to the US-American market – as the Plaintiff argues –, it can be applied to the German market since the iPhone 6 currently being offered on the German market now also has NFC-capability.

However it must be noted that the NFC Technology as such is neither the subject matter of the patent in suit nor of the standard in dispute ETSI TS ████. The aforementioned standard in fact exclusively concerns cases in which NFC applications are carried out via an interface between the NFC host controller and the SIM card ("UICC"). Accordingly, the infringement of the patent in suit is only at issue for smartphones that allow NFC implementation on the SIM card (UICC).

It is undisputed between that parties that in addition to this there are other technical alternatives for implementing NFC application, for instance the implementation of corresponding applications on a smartcard (SD card) or on a so-called "embedded Secure Element (eSE)".

In particular the Division sees the implementation of NFC applications on an eSE as an equivalent technical solution of the teaching according to the patent in suit. In the hearing of 02/19/2015 the Plaintiff argued in this respect that only 27% of NFC-capable smartphones would use the HCI-Standard, whereas 43% would guarantee NFC-capability via eSE. The Defendant neither opposed this with any evidence by mentioning deviating percentage figures nor could it comprehensibly explain why the eSE should not present a competitive alternative to UICC against this background in the field of NFC Technology.

Insofar as the Defendant based its argument primarily on the fact that the Germany wireless network providers would require the implementation of NFC applications on the UICC as mandatory in their requirements catalogs for NFC-capable smartphones, its line of argumentation in this regard is insufficient for substantiating a dominant market position on the part of the Plaintiff. It may be that German wireless network providers are interested in guaranteeing that secure contactless applications are embedded on the UICC so that as the issuer of the UICC they can control access to secure services to their contract customers and verify this with usage fees. However, in the inverted argument this does not mean that smartphones, which embed such secure applications on an eSE, would not be competitive on the market. In order to be able to make such a statement, the Defendant would have needed to provide further statements regarding the market power of the wireless network providers on the sales market for smartphones relevant in this case. The general reference that wireless network providers would form the main distribution channel for smartphones is insufficient in this respect. Rather, this would have required statements regarding what percentage of smartphones are sold through network providers and what percentage are sold directly or through retail stores (excluding wireless network providers) to the end customer. The Defendant made no comment in this regard despite the corresponding discussion in the hearing. The Defendant's reference to Exhibits HL30-30b on the other hand is not sufficient. On the one hand it makes no statement regarding to what extent German wireless network providers are actually in the position to enforce mandatory technical guidelines on the market, on the other had the submitted requirements catalogs from network providers have been blackened that they cannot be used to convey a comprehensive picture of the technical requirements of

network providers. Hence neither the author nor the audience is recognizable. The Division is also unable to judge whether technical alternatives for implementing the HCI-Standard are allowed underneath the blackened areas. In any case the Defendant was unable to comprehensibly explain why apparently a considerable number of smartphones that implement NFC applications specifically not on the UICC but on an eSE can be distributed on the market.

Insofar as the Defendant maintains for the first time in its pleading of 02/19/2015 that the HCI protocol specification has now also opened up for the use of such Secure Elements that are not embedded in the UICC, the Division was unable to find this in the submitted Exhibit HL35 (HCI-Standard ███████ in version 12.1.0). In fact there it reads under No. 1 that the standard concerns "a logical interface that enables contactless applications hosted on the UICC" (cf. also Exhibit K38). Thus the standard also only deals with the interface between the NFC host controller and the UICC. It does not deal with the interface between the host controller and other eSE. In as far as the Defendant refers to Table 20 in section 7.1.1.1 of Exhibit HL35, there it only states that the various "host types" are given their own identity so that the host controller can tell them apart. On the other hand this does not mean that the eSE replaces the UICC. Rather the standard only intervenes (also) only if a SIM card with NFC application is present.

As previously stated, the Division does not fail to recognize that the smartphone market is characterized to a particular degree by rapid technological progress as well as an every growing number of new applications. However based on the statements of fact and dispute at the end of the hearing it cannot be determined that the use of the HCI-Standard for applications implemented on the UICC has already achieved a market penetration that substantiates a dominant market position. Based on the submitted market analyses and expert opinions with regard to future technological developments rather the impression is made that the market is currently in flux and it is not yet decided which applications will ultimately prevail on the market and how they will be technically implemented. The fact that the end buyer wishes to participate in the newest technological development changes nothing about this finding and its legal classification. For it may well be a deciding factor for the potential buyer of a smartphone whether the smartphone has NFC-capability. It is not evident and has not been argued by the parties that the purchase decision also depends on the fact that it enables NFC applications on the UICC and insofar follows the HCI-Standard.

VIII.

Against this background, a suspension of the legal dispute until a decision has been rendered by the ECJ in matters C-170/13 (preliminary ruling procedure Düsseldorf District Court, 4b O 104/12 – Huawei ./. ZTE) is out of the question. The issue of market dominance is specifically not the subject matter of the referral proceedings, but must be decided beforehand. Only if this is affirmed are the legal issues important that are the subject matter of the aforementioned referral proceedings.

XI.

There is no cause to suspend the hearing pursuant to Sec. 148 ZPO. It cannot be assumed with the sufficient certainty required for a suspension that the nullity action directed against the patent in suit will be successful.

The subject matter of the patent claims is patentable, in particular neither D1 (WO ███████ A1) nor D2 (JP ███████ A) anticipate the teaching according to the invention in a matter that is detrimental to novelty. Even in light of D3 (excerpts from "Specification of the Bluetooth System") the technical solution claimed with claims 1 and 12 does not lack the requisite inventive step.

1.

The technical teaching protected by patent claims 1 and 12 is not disclosed in citations D1 (WO ███████ A1) and D2 (JP ███████ A) in a manner that is detrimental to novelty.

In order to assess whether the subject matter of a patent has been affected in a manner detrimental to novelty by a pre-publication, the entire contents of the pre-publication has to be ascertained. Therefore it does not have to be ascertained in what form the person skilled in the art can execute any given general teaching for instance by using his technical knowledge or how he can perhaps modify this teaching, but it must be exclusively ascertained what the person skilled in the art learns from pre-publication as the content of the given (general) teaching. The decisive factor is what is to be "directly and clearly" taken from a publication from the perspective of the skilled person (BGH GRUR 2009, 382, 384 – Olanzapine with additional commentary).

a) D1 (WO ███████ A1)

D1 is the verified state of the art and it is mentioned explicitly in paragraph [0015] of the patent in suit. In any case it does not disclose a routing table as in feature 3.b3) of claim 1 or feature 3.a4) of claim 12 of the patent in suit. D1 does in fact provide for the use of routing channel number ("logical channel identifier") but does not mention anything about storing an identifier of the source gate and an identifier of the destination gate. Rather in the process described in D1 the data frame is brought to its destination gate in that the APDU header identifies the application. Thus the data routing according to D1 is not application-dependent like the data routing according to the invention of the patent in suit (and apart from that also the data routing according to the standard in dispute).

b) D2 (JP ███████ A)

Also D2 does not disclose any routing table according to the invention. The data routing process described there is not based on identifying a data path with the aid of a routing channel number, but rather functions by transmitting node addresses, between which data is supposed to be transferred. Nowhere in D2 is it described that a routing channel number is used in the header field of a data frame to do this, with the help of which one can guide the data to its destination gate by having recourse to routing table containing an identifier of the source gate and an identifier of the destination gate.

2.

Furthermore, the technical teaching protected by patent claims 1 and 12 do not lack the requisite inventive step, particularly with regard to D3 (excerpts from "Specification of the Bluetooth System").

D3 is farther from the teaching according to the invention that the aforementioned publications D1 and D2. Data transfer via Bluetooth requires a uniform network. A data routing within the meaning of the invention's teaching is not necessary here. In fact this is only needed if – like with NFC Technology – several networks are communicating with one another and the information has to be translated from the one into the other network via a router. Therefore the person skilled in the art has no cause to develop a better procedure for data routing based on D3. Likewise the person skilled in the art has no cause to refer to D2 on the basis of the objective of the patent in suit.

V.

The decision regarding costs is based on Sections 92 (1), sent. 1, 269 (3) page 2 ZPO.

The decision regarding provisional enforcement is based on Sec. 709 pages 1 and 2 ZPO. At the Plaintiff's corresponding motions partial sureties were set. The amount of surety depends on the given value in dispute of the Plaintiff of EUR 10,000,000.00. The Division is of the opinion that this amount is appropriate to secure any losses on the Defendant's part that may arise from the enforcement of the judgment. In this connection the Division assumed the period of approx. one year, which should pass until the Higher Regional Court of Düsseldorf has rendered a decision on the appeal. The Defendant has not made any substantiated submission that its potential loss would exceed the amount of EUR 10,000,000.00 should the judgment be rescinded. In addition to court and attorney fees, any such loss could be incurred through lost profit or increased manufacturing costs (for instance by using an eSE), whereby it must be taken into account that this primarily concerns only any losses incurred by the Defendant, not however by the ▇▇ Corporation. The Defendant failed to make submission in this respect. The reference to the sales figures with ▇▇ One shall not lead any further. This figures only refer to the sales of the ▇▇ Corporation. The Defendant does not submit to what extent it

participates in this figure. In addition, the pure sales figures do not allow for any conclusion to be drawn with regard to profits achieved with the ███████.

The value in dispute is set at EUR 10,000,000.00.

Dr. ████

Presiding Judge
at the District Court

Dr. ████

District Court Judge

Dr. ████

District Court Judge