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FRAND-defense under Article 102 TFEU in the aftermath of the General Advocate's opinion

Thomas Musmann (Rospatt Osten Pross) · Wednesday, May 13th, 2015

On 26 March 2015 the Landgericht Düsseldorf rendered a judgment granting an injunction based on the finding of infringement of an SEP by sales of smartphones implementing NFC – Near Field Communication according to an ETSI standard (France Brevet vs. HTC – Landgericht Düsseldorf 4b O 140/13). Defendant's FRAND-defense was rejected by the Court because Defendant had failed to sufficiently substantiate facts establishing Plaintiff's dominant position within the internal market according to Article 102 TFEU.

In essence the Landgericht followed the opinion of General Advocate Melchior Wathelet ([Opinion](#) delivered on 20 November 2014 in Case C-170/13) that the ownership of an SEP as such does not necessarily equate to a dominant position.

According to the Landgericht the patent in suit was standard essential. This finding equates to a dominant position on the (primary) technology market as defined by the standard. However, the Landgericht didn't stop there but also required a dominant position on the (secondary) product market and put the burden of proof/substantiation on Defendant.

Factually, the Landgericht accepted that NFC was a feature essential for selling smartphones. However, it was undisputed between the parties that NFC could also be realized in a compatible fashion with technologies outside the ETSI standard and that smartphones with such technologies were actually on the market with a significant market share. Based on these factual findings the Landgericht concluded that Defendant had failed to substantiate that Plaintiff had a dominant position on the product market and thus rejected the FRAND defense under Article 102 TFEU.

Max v. Rospatt

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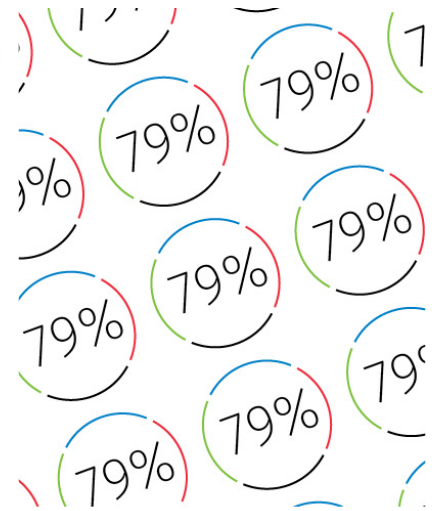
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