

Germany's Federal Cartel Office has taken the unusual step of suggesting that first instance courts hearing ten Nokia v Daimler cases make a reference to the CJEU. Some have speculated that this intervention means that a reference is now all but inevitable. But is there actually anything in these cases that the CJEU needs to decide?

Background

Nokia develops cellular mobile communication technology, and licenses its portfolio of standard essential patents ("**SEP**"). Daimler is the manufacturer of Mercedes motor cars, and started to introduce cellular technology in its cars more than a decade ago. In 2015 Nokia established an automotive cellular licensing programme, under which car makers could enter an agreement which would cover the use of Nokia's cellular SEPs throughout their supply chain. A collective licensing platform, Avanci, also started to offer licences to several SEP owners' portfolios, under a similar model.

Most of the major European car brands signed up to the Avanci programme. Daimler took a different approach. It declined to deal with SEP licensing itself, preferring that SEP owners deal directly with its "Tier 1" component suppliers.

Nokia developed and proposed a Tier-1 licence model, which could be entered by the Tier 1 suppliers instead of the OEM car makers. Like the licence that Nokia offered to car makers, this made Nokia's cellular SEPs available to the entire supply chain, including the car-maker customers of the Tier 1 supplier.

The Tier-1 model was not well received. Although Tier 1s liked the idea of having a direct agreement themselves, they were less enthusiastic about having to pay for the activities of others in the chain. This is perhaps understandable: the value of cellular technology is only really realised at the end product level¹, and not at component level. However, because of the strong bargaining power of the OEM car makers,

¹ The inclusion of cellular technology in a car adds hundreds or thousands of euros to the profit margin
<https://www.simon-kucher.com/en-gb/node/1711>;
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521488

Tier 1s believed themselves unable to pass on the cost of licences to their customers.

With Daimler, this led to an impasse. Nokia filed a number of infringement proceedings against Daimler in Germany. Some of Daimler's suppliers intervened in the infringement proceedings. Daimler and its suppliers made offers after the proceedings commenced.

Daimler and some suppliers had earlier filed complaints with the EU Commission with respect to Nokia's licensing practices. The EU Commission is currently reviewing these complaints but has not taken any decision to open proceedings².

On 10 June 2020, after trial in one of the infringement cases, one of the intervening Tier 1 suppliers (Continental) asked the German patent court hearing to stay any judgment and refer questions about the FRAND defence to the CJEU. A few days later, the German Federal Cartel Office ("**FCO**") also submitted a post-trial submission with similar arguments to the ones expressed by Continental, also suggesting a referral.

The FCO and Continental suggest that the court makes an Article 267 TFEU reference to the CJEU of the following questions:

- for SEPs implemented at an intermediate product level, whether an OEM can rely on a 102 TFEU defence in case the supplier of such intermediate products has requested a full licence from the SEP holder, but his request has been rejected (Question 1); and
- whether Article 102 TFEU would be violated if a SEP holder refrains from granting "full" licences to each member of the supply chain of an end-user (Questions 2-4).

² as at the time of writing: August 2020.

FCO intervention

Intervention by the FCO in German cases is not unusual. German courts are obliged to inform the FCO about private litigation involving the application of Articles 101 or 102 TFEU³. The FCO may then decide to participate in such proceedings. The office is not subject to the procedural rules on pleadings and/or deadlines applying to the parties, which is why (as here) it can submit statements even after the trial.

As a matter of principle, the FCO participates in all private enforcement proceedings relating to Articles 101 or 102 TFEU before the German Supreme Court. In proceedings before lower courts the authority will only participate in leading cases, in cases linked to on-going investigations, or upon request of the respective court. Statistically, the FCO submits about ten written statements to German courts per year.

To the external observer, two aspects of the FCO's intervention appear surprising. First, the FCO did not invite Nokia to comment before making its intervention: it appears to have accepted Continental's arguments without hearing the other side of the debate. Secondly, having waited so long to intervene, it was surprising that the FCO did not wait the few more weeks for the anticipated decision of the United States Ninth Circuit's decision in *FTC v Qualcomm*. It was generally expected that the Ninth Circuit would rule that licensing at the OEM level does not violate the Sherman Act (the US equivalent of Article 102), and this would appear pertinent to the FCO's argument.

The FCO is not always followed by the German courts: in its *Sisvel v Haier* decision, the Federal Supreme Court does not appear to have been greatly influenced by the lengthy oral submissions of the FCO representative.

Test for a reference

References under Article 267 TFEU are more usually issued by appellate courts under Article 267(3) TFEU. Lower courts tend to make references only in exceptional cases⁴.

The FCO Statement argues that its questions should be referred, as they are of "fundamental importance for competition"⁵. However, that is not sufficient for a reference. A first instance court may only make a reference to the CJEU if the question is "necessary" to give judgment.

³ Section 90(1) ARC

⁴ For example, the *Huawei/ZTE*⁴ reference arose from the Regional Court of Düsseldorf.

⁵ FCO Statement, p. 13

A court may also not refer hypothetical issues⁶. Question 1 in this case appears to be a hypothetical issue: the question concerns patents which are implemented at the intermediate product level. But it has not been established (or admitted) that any of the patents in this case are implemented at the intermediate product level. Many SEPs are not⁷.

The CJEU will also reject a reference if the questions can be resolved based on established CJEU case-law or if the answer to the questions is obvious ("*acte clair*"). There is a good argument that the facts of this case can be resolved based on the CJEU's *Huawei v ZTE* decision.

Under *Huawei v ZTE*, bringing an infringement claim is in line with Article 102 TFEU if the SEP holder has:

- 1 alerted the infringer of the infringement; and
- 2 after the infringer has expressed its willingness to conclude a licensing agreement, presented a specific, written offer for a licence on FRAND terms to the infringer.

The core issue of the dispute is whether or not Nokia's written offer comprises a FRAND price. Whether a price is FRAND is an issue which national courts can assess, without CJEU involvement.

Where the infringer continues to use the relevant SEP, it may only claim that the SEP owner is acting abusively if the infringer himself has promptly submitted a specific counteroffer to the SEP holder that corresponds with FRAND terms⁸. Daimler has continued to use the SEPs. It has made an offer. Nokia contends that Daimler's offer is too low, and too late. Both of these issues may be resolved by national courts without CJEU involvement.

FCO misapprehensions

A further difficulty with the FCO's intervention is that it appears to be based on misunderstandings of the relatively complex factual issues in the case. The European Commission, by contrast, is still investigating these factual questions and invites submissions from all parties.

[The FCO proceeds on the basis that Nokia refuses to offer licences which cover suppliers](#)

The FCO's arguments assume that Nokia's offers would not allow suppliers to use Nokia's patents, and only

⁶ CJEU (CJEU, Case C-210/06 - CARTESIO, para. 67)

⁷ Putnam and Williams, *ibid*.

⁸ *Huawei/ZTE* 764, para. 65

allow use by the OEM vehicle maker. In fact, Nokia's offers permit the entire supply chain to use Nokia's patents. They even expressly allow Tier 1s to carry out research and development and pre-sales activities before any customer has been identified.⁹ This undermines the FCO's argument.

No exhaustion

The FCO assumes that, if the Tier 1 suppliers were granted a licence to the patent claims that they use, Daimler would not itself need a licence because of the effects of patent exhaustion. This assumption is also incorrect.

First, many standards-essential patents that are infringed by a connected device are not infringed by its components: standards-essential patent claims often feature claim integers which are not found in components¹⁰. Secondly, exhaustion is not international in effect: those patent claims implemented by the component would only be exhausted in the region where the component was supplied. Third, almost all patents in this area contain process claims, and exhaustion does not always follow when a licensed component is sold and later used in a patented process¹¹.

Consequently, the question whether Article 102 TFEU might oblige Nokia to grant a licence to the suppliers is irrelevant for reaching an infringement decision against Daimler because Daimler still needs a licence from Nokia.

The FCO suggests that Article 102 obliges a patent owner to grant a licence to a component maker which also permits the component maker to pass on to his customer rights to other patents which the customer may wish to use, not just those embodied in the component being sold. It is not clear how seriously this argument is being advanced. It is a bit like arguing that a landlord, who leases a ground floor unit to a coffee shop, must not only allow his tenant's customers into

⁹ See <https://www.twobirds.com/en/news/articles/2020/global/the-case-for-the-defence-access-for-all-v-license-to-all>

¹⁰ Putnam, Jonathan and Williams, Tim, The Smallest Salable Patent-Practicing Unit (SSPPU): Theory and Evidence (September 6, 2016). Available at SSRN: <https://ssrn.com/abstract=2835617> or <http://dx.doi.org/10.2139/ssrn.2835617>

¹¹ Under German law the reasoning is that this does not put the process itself into market circulation, but only the device (OLG Düsseldorf, judgment dated 27 April 2017 – 2 U 23/14, BeckRS 2017, 109820 para. 152. Under English law the test is one of implied licence: if a "licence to all" model was to become the norm, a licence to the component maker for his activities would not impliedly license his customer to use the component in a patented process.

the coffee shop, he must also permit them to enter any other building that he owns. It is a bit of a stretch.

It would not be "cheaper" for consumers to license at supplier level

The FCO argues that a licence granted at the supplier level would be cheaper for the consumer. They do not explain why this should be the case. If a licence covers a whole supply chain, the price would be based on the benefits that the technology brings to the product of that supply chain, not merely the contribution of the person who signs the agreement on behalf of the supply chain. If a licence does not cover the whole supply chain, then each person in the chain needs separately to take a licence, and pay his part. In that case, the cost ultimately borne by the consumer would not be lower. It would be higher, because of the significantly increased transaction costs.

A reference would cause further delay

With the success of the Avanci platform, and the Federal Circuit's decision in *FTC v Qualcomm*, it seems that OEM level licensing remains an accepted model for most technology companies. In a recent article, Mlex argued that a referral of the question to the CJEU would create years of further uncertainty for technology companies¹². During that time, Daimler would continue to make use of the technology without a licence. This would prolong Daimler's cost advantage over its competitors who have paid for licences, decreasing competitiveness. That does not benefit consumers.

In summary

There are good arguments against a CJEU reference in these cases.

First, the CJEU is not the right place to answer hypothetical questions. If necessary, these need to be tackled by standards-development organisations, legislators or administrative bodies, who can take into consideration economic, political and social considerations.

Secondly, the cases can be resolved by relying on current applicable CJEU case law, in a way that caters to all legitimate interests.

¹² <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/antitrust/nokia-daimler-fight-could-stall-licensing-talks-if-lawsuit-goes-to-eu-court>

Author

Richard Vary

Partner

Tel: +442030176998
richard.vary@twobirds.com



twobirds.com

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