

Judgment

DISTRICT COURT OF THE HAGUE

Commercial team
The Hague location

Case number / cause-list number: C/09/505587 / HA ZA 16-206

Judgment dated 8 February 2017

in the matter of

ARCHOS S.A.,
a legal entity under foreign law
having its registered office in Igny (France),
Claimant,
lawyer: F.W. Gerritzen, practising in Amsterdam,

v.

KONINKLIJKE PHILIPS N.V.,
a public limited liability company
having its registered office in Eindhoven,
Respondent
lawyer: J.A. Dullaart, Naaldwijk (previously L.Ph.J. baron van Utenhove, practising in The Hague).

The parties are referred to herein as Archos and Philips.

1. The proceedings

- 1.1. The course of the proceedings is apparent from:
- the judgment in the ancillary proceedings dated 6 April 2016 and the documents mentioned therein,
 - the statement of defence accompanied by exhibits GP1-13;
 - the reply including submission of exhibits EP23-34,
 - the rejoinder with exhibits GP14-22,
 - the deed submitting reactive exhibits EP35-40 (Archos),
 - a subsequently sent email dated 22 December 2016 concerning procedural costs in the various sets of proceedings (Archos),
 - a subsequently sent email dated 23 December 2016 concerning procedural costs in the various sets of proceedings (Philips).

1.2. The oral hearing took place on 18 November 2016 along with (though not consolidated with) the oral hearing in the VRO¹ proceedings between Philips v Archos under case number 504791 in relation to patent EP 1 440 525. There are also two further VRO actions pending before this Court between the parties, concerning two other patents. It had been agreed with the parties in advance that in principle the FRAND² defences/allegations (and associated exhibits) would be deemed to be repeated and incorporated or submitted in all cases (Archos v Philips 505587 and the VRO actions between Philips v Archos 504791, 504804 and 504802). The parties argued their positions, Archos represented by the said F.W. Gerritzen and his colleague J. Klopper, and Philips by B.J. van den Broek and R.J.F. Grijpink, lawyers practising in Amsterdam. They submitted written pleading notes (with Archos not pronouncing para. 6.11). Archos asked for a hearing *in camera* insofar as the matter related to what it was disclosing as margins and pricing information that were not in the public domain, because these contains confidential information. Philips indicated it had no objection to this. The District Court acceded to this request in this form and pointed out to those present for the parties who might discover such information that they were under an obligation of confidentiality in terms of Article 29(1) DCCP³. Due to the presence of members of the public in court, Philips did not pronounce the figures mentioned in para. 120 of its pleading notes, relating to Archos' confidential information. These were deemed to have been put forward, with Archos' approval. Lastly, judgment was handed down.

2. The facts

2.1. Philips holds patents that it considers to be essential for the technical standards UMTS⁴ (3G) and LTE⁵ (4G) for mobile communication. Philips has notified these patents to the standardisation body ETSI⁶ as being essential, and has undertaken in writing, by statements dated 15 January 1998 and 26 November 2009, to license these patents on fair, reasonable and non-discriminatory (FRAND) terms, in accordance with ETSI's *IPR Policy*. Article 6(1) of this reads as follows:

"When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory ("FRAND") terms and conditions under such IPR to at least the following extent:

- MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
- sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
- repair, use, or operate EQUIPMENT; and
- use METHODS.

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate."

2.2. Archos sells mobile communication devices that Philips alleges to constitute an infringement of its UMTS/LTE patents. Philips has initiated infringement proceedings before this Court in relation to its patents EP 1 440 525, EP 1 685 659 and EP 1 623 511 (these are the VRO proceedings mentioned at 1.2., hereafter also referred to as: the infringement proceedings). Philips has also initiated infringement proceedings against Archos (or against its subsidiary company) in Germany and France. The above-mentioned patents have been declared as essential for the so-called HSPA⁷ option within

¹ VRO = accelerated regime in patent cases

² Fair, Reasonable And Non-Discriminatory, also 'RAND'

³ Dutch Code of Civil Procedure

⁴ Universal Mobile Telecommunications System

⁵ Long-Term Evolution

⁶ European Telecommunication Standards Institute

⁷ High Speed Packet Access

the UMTS standard, used to achieve fast data transfer (also designated as 3.5G or 3G+).

2.3. On 5 June 2014, Philips, by letter, drew Archos' attention to its UMTS and LTE patent portfolio and licensing programme. In that letter, Philips pointed out that Archos was infringing its patent rights by putting products incorporating UMTS and LTE technology on the market. Philips explained in the letter that it was possible to conclude a FRAND licence in relation to these patents and invited Archos to enter into negotiations. The letter enclosed a list of the relevant patents, including those mentioned above at 2.2. In an email of 12 June 2014, Philips requested a meeting with Archos at short notice so that Philips could provide Archos with further information about the UMTS and LTE patents and licensing proposal.

2.4. On 15 September 2014, there was a meeting between representatives of Philips and Archos at the latter's office. At that meeting, the patent attorneys for Philips presented the UMTS/LTE portfolio (and also explained the geographical scope and technical relevance of the patents) and there was a discussion of the essential nature of the various individual patents on the basis of claim charts (this covered patents other than those mentioned in 2.2 above). Philips' licensing proposal was also explained.

2.5. There were further discussions between the parties on 14 October and 25 November 2014. During the latter discussion, Archos suggested Philips to grant Archos a royalty-free licence under all of the Philips patents (i.e. not only the UMTS/LTE patents but also other patents relating to so-called Portable Features) in exchange for the transfer of some patents from Archos to Philips. Philips notified Archos in an email of 23 December 2014 that it had no interest in Archos's own patents because they represented "relatively low value". There was a further exchange of emails between the parties in January 2015.

2.6. In a letter of 28 July 2015, Philips sent to Archos an updated list of UMTS/LTE patents, claim charts (this time including the patents mentioned in 2.2 above) and a draft licence agreement in which it confirmed its previous licensing proposal. The suggested royalty amounted to \$0.75 per product with UMTS and/or LTE functionality. For those products already sold, there would be a charge of \$1 per product and this figure would also apply in the event of any breach of contract by Archos.

2.7. It became clear, during the ensuing meeting between the parties on 3 September 2015 at the offices of Archos, that Archos did not want the licence that was on offer. It was indicated on behalf of Archos that if Philips wanted a licence payment, it would have to sue Archos. Philips initiated the patent infringement proceedings against Archos before this District Court as specified in 2.2 above, in mid October 2015.

2.8. In a letter dated 12 January 2016, Archos submitted a written counter-offer for a licence to Philips. The royalty rate offered by Archos was 0.071% of its net turnover for products in which the UMTS and/or LTE standards had been applied. With a net sales price per product of around €100⁸ the royalty offered by Archos amounted to a sum of about 7 eurocents per product.

2.9. The Mannheim *Landgericht* held on 1 July 2016 (case reference 7 O 209/15) that Philips had abused its dominant position by enforcing the patent (then under consideration) against (the German subsidiary of) Archos, as Archos can be regarded as a "willing licensee" and Philips had not substantiated in its offer of 28 July 2015 why this was FRAND. The *Landgericht* also dismissed the claim of exhaustion made by (the German subsidiary of) Archos, making the following finding in this

⁸ Archos summons, 6.11.

context (in the English translation):

V. Nor can the Defendant successfully raise the objection of exhaustion against the Plaintiff.

For one thing, the Defendant stated in this respect that its mobile telephones were equipped with chips of both Qualcomm and Mediatek anyway. The Defendant does not submit that exhaustion arose with respect to these chips, meaning that even if the Defendant would be able to invoke exhaustion with respect to the chips of the company Qualcomm, the infringement accusation is not eliminated.

For another, the Defendant, with a view to the licence of Qualcomm, merely stated that the latter had concluded with the Plaintiff a cross-licence agreement on UMTS patents; it also stated that it was currently unable to make more substantiated further submissions on whether it could derive its own rights from this contractual relationship. According to the Defendant, this has to wait until it can submit, at the District Court's request, the agreement - which was obtained in the US discovery proceedings, but is subject to a protective order - in the present proceedings. The Defendant stated that it followed from the agreement that the chips confer rights in the UMTS patents on authorised purchasers such as the Defendant. It states that, in any case, the chips as hardware implement the essential functionality of the UMTS standard, even if there should be an "excessive" part of the asserted claims which are supposed to be realised by other parts of the mobile telephone. According to the Defendant, the chips, in any case, implement the steps essential to the invention. In this respect, the Plaintiff stated that while there were contractual relationships between Qualcomm and itself, solely products of Qualcomm itself (and only hardware, not software) had been licenced, and that the agreement did not cover mobile telephones of third parties in which Qualcomm chips are used. According to the Plaintiff, the procedures according to the standard are implemented solely by the software in the form of a protocol stack which is installed on this hardware by a contract manufacturer of Archos group. Furthermore, it states that, if anything, the Qualcomm chips were distributed in the US or in Asia with the Plaintiff's consent, but not in the European Economic Area.

By the time the oral hearing ended, the Defendant had not substantiated its submissions in this respect, which is why the objection of exhaustion is fruitless. Even based on its own submissions, the Qualcomm chips do not implement all aspects of the technical teachings of the asserted claims.

3. The dispute

3.1. Archos is claiming:

I. a declaration of law that Philips' terms and conditions for a licence for patents that are essential for the UMTS and LTE standards, as set out in the offer made by Philips to Archos on 28 July 2015 and as described in the body of the summons, are not fair, reasonable and non-discriminatory, as specified in Article 6.1 of the ETSI Policy, to which Philips bound itself by the statements it issued to ETSI on 26 November 2008 and 15 January 1998;

II. a declaration of law:

firstly, that a royalty payment of €0.007 for each device sold by Archos applying the UMTS standard and a royalty payment of €0.020 for each device sold by Archos in which the UMTS and LTE standards are included are fair, reasonable and non-discriminatory royalty payments;

secondly, that the royalty rate offered by Archos to Philips in its letter of 12 January 2016, amounting to 0.071% of its net turnover for products applying the UMTS and/or LTE standards, for a licence for Philips patents that are essential to the UMTS and LTE standards, as mentioned in the body of the summons, is more than a fair, reasonable and non-discriminatory royalty rate;

III. an order against Philips to pay the costs incurred by Archos in these proceedings, to be estimated according to the applicable statutory provisions;

IV. a prohibition on Philips from making any disclosure to third parties in relation to the commercial information pertaining to Archos that has been designated as confidential, and

V. an order that the judgment should be immediately enforceable.

3.2. In support of this, in summary, Archos argues that the offer by Philips of 20 July 2015 is not FRAND but that Archos' offer of 12 January 2016 is, and that it has an interest in this being established as a matter of law. The statement by Philips to ETSI that it would grant a licence on FRAND terms and conditions continues to be valid, even during and after the infringement proceedings raised by Philips. Despite this, by raising the infringement proceedings, Philips is abusing its dominant position within the meaning of Article 102 TFEU⁹, or else is acting in breach of pre-contractual good faith, or there is an abuse of power.

3.3. Philips has put forward a defence.

3.4. Insofar as relevant, the parties' submissions will be examined in further detail below.

4. The assessment

Jurisdiction

4.1. The Court finds, *ex proprio motu*, that the jurisdiction of this Court is not in dispute, as the Court has jurisdiction in terms of Article 26, Brussels I bis Regulation¹⁰.

Philips offer FRAND?

4.2. Archos states that the offer Philips made to it on 28 July 2015 was not FRAND and that it has an interest in this being confirmed as a matter of law, as Philips continues to be under an obligation to grant Archos a licence on FRAND terms and conditions. Since Archos is relying upon the legal consequences of the said facts and rights, it bears the obligation to furnish facts and the burden of proof pursuant to Article 150 DCCP. Moreover, Archos has not argued for any different division of said burden. Nor has it alleged that Philips has any enhanced onus of asserting facts, for instance because (only) Philips has access to data concerning the 'FRAND-ness' of the offer. Nor is there any reason to assume any heavier onus of asserting facts, having regard to all of the facts and assertions put forward by Archos in these proceedings and also paragraphs 6.26-6.36 of the summons (and the summary of this in the statements of defence in the infringement proceedings, p. 12 at (C): "*Archos could demonstrate, based on publicly accessible information at the time when the summons was issued in the FRAND Proceedings, that the offer by Philips was discriminatory (§ 6.26-6.36 of the summons in the FRAND Proceedings)*"). The question to be dealt with now is whether Archos has supplied sufficient substantiation for its assertion that the offer by Philips was not FRAND. The District Court answers this question in the negative, based on the following considerations.

4.3. Philips emphasised that it has always been prepared to negotiate on the level of the royalty rate, the method of calculation (fixed-rate or a percentage) and the other elements of its offer. Archos only counters this by stating that it had the clear impression that no negotiations were possible in relation to the licence. Leaving aside the fact that Archos is accordingly relying merely on a subjective impression (on the part of its CEO, Mr Poirier) and therefore not on an objective fact, this impression appears to be incorrect to this Court, for the following reasons.

⁹ Treaty on the European Union and the Treaty on the Functioning of the European Union, 2012/C 326/01.

¹⁰ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

It is established, uncontradicted, that the royalty figure proposed by Philips was a matter for discussion before 28 July 2015, namely during the very first meetings in 2014. There were various meetings between the parties in 2014 and 2015 and even after the offer of 28 July 2015, i.e. on 3 September 2015 (see 2.7 above). From this, and from the correspondence that has been submitted to this Court, no other conclusion can be drawn than that if Archos had made any serious counter-offer or taken any negotiating incentive [*sic*], negotiations would have been possible on all aspects of Philips' offer. This is all confirmed in the (second) statement from Dr. Pasquier of Philips (GP14), which specifically indicates that Philips was open to negotiations with Archos. It is however clear that Archos took (essentially) no action prior to the infringement proceedings, while its counter-offer dated 12 January 2016 cannot be regarded as FRAND – as shall become clear from this Court's further deliberations. It is also generally accepted and is essentially intrinsic to the system under the Huawei *v* ZTE judgment¹¹, that a FRAND licence has a certain bandwidth. After all, that judgment determined that the SEP¹² holder first makes a FRAND offer and then, if the SEP user cannot agree to it, the user can submit a counter-offer that should also be FRAND. During this negotiation process, specific features of the SEP user and also his specific objections can be incorporated into the licence if approved by the parties. In connection with that judgment, Archos also talks about a "*flexible framework allowing the parties to take account of the variables that apply to the specific situation*" (summons at 5.16). In other words, the mere fact that the first offer from Philips turned out to be unreasonable specifically for Archos, for instance because it would only be involved in the low-budget segment of the market, its margins were small and so on, does not mean that the offer from Philips, which was reiterated on 28 July 2015, would not be FRAND.

It should also be remembered, in all of this, that until the judgment by the ECJ in the case of Huawei *v* ZTE, the case law had imposed the initiative for a licence on the user of the standard and not so much on the SEP holder, or at least that is how the situation was understood at both 6.22 of the judgment issued by this Court in the case of Philips *v* SK Kassetten¹³ and also in the Orange Book decision by the German *Bundesgerichtshof*¹⁴. The decision by the ECJ – diverging on this crucial point – was issued on 15 July 2015 and, in the view of this Court, thus formed a new occasion for negotiations between the parties.

In accordance with that decision, Philips took the initiative with its offer dated 28 July 2015. At the meeting that was then arranged for 3 September 2015, however, Archos slammed the door closed by indicating, as is established without dispute, that Philips would have to sue Archos if it wanted more than a few thousand euros. In view of this it is inappropriate for Archos to accuse Philips of not having been open to negotiation; at the least, such an accusation is not sufficiently substantiated.

4.4. The most far-reaching argument by Archos to substantiate its assertion that the offer from Philips was not FRAND is that baseband chips from the company Qualcomm were incorporated into a number of its products, and that Philips had agreed a cross-licence with Qualcomm. Philips' rights had therefore allegedly been exhausted in relation to devices containing Qualcomm baseband chips, or Philips had at any rate already received a payment that should have been taken into account in the licence offer. Philips denied all of this in its statement of defence. It argued that the licence to Qualcomm had in any case nothing to do with marketing a mobile phone. Philips also pointed out that there was no factual substantiation for the exhaustion argued by Archos and that Archos could have

¹¹ ECJ 16 July 2015, C-170/13, ECLI:EU:C:2015:477 (Huawei *v* ZTE)

¹² Standard Essential Patent

¹³ District Court of The Hague, 17 March 2010, IEPT20100317, IEF8682, <http://www.ie-forum.nl/artikelen/fair-reasonable-and-non-discriminatory-frand>

¹⁴ Bundesgerichtshof 6 May 2009, KZR 39/06, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=acea256584d0e420272381a9d0c7a57a&nr=48134&pos=0&anz=1> and with an English translation here: <http://www.ipeg.com/blog/wp-content/uploads/EN-Translation-BGH-Orange-Book-Standard-eng.pdf>

raised this topic during the negotiations. Archos provided no more specific response to this latter allegation, apart from arguing that Philips was not open to negotiation. In view of the Court's considerations in the previous paragraph, this argument cannot succeed. For this reason alone, the Archos' argument fails. This Court is bearing in mind here that Archos no longer relies upon exhaustion in its Reply, but merely on the suggestion that there ought to have been a discount. Agreeing with Philips, this Court considers that, if that is true, this could indeed have been raised during the negotiations after the offer arrived from Philips. The argument also fails as Archos has not denied that the licence to Qualcomm was not about the production and sale of a mobile phone (but merely the baseband chip) and as it has failed to provide any more detailed substantiation for its argument. Doing so would have been all the more appropriate once the Qualcomm defence had been dismissed in the German proceedings (see 2.9 above), a decision that Archos itself submitted to this Court with its Reply.

4.5. It is not in dispute that the licence offer from Philips dealt with the SEPs for both the UMTS and LTE. Archos argued that bundling the patent portfolios for UMTS and LTE meant that the offer was not FRAND because this does not enable differentiation as to whether the product only applies UMTS or LTE functionality. This argument by Archos is dismissed. Philips has asserted, without challenge, that the LTE standard is a progression from the UMTS standard and that an LTE device (therefore) also uses UMTS technology (statement of defence at 139). In view of that, this Court fails to see that, if the offer from Philips was FRAND on the basis of the UMTS SEPs, as argued by Philips, it would not be FRAND if that offer included the licensing of even more patents (in this case Philips' LTE SEPs). The situation would only be different if Archos were making products for which it only required a licence under the LTE SEPs but not under the UMTS SEPs. As already considered above, that was not the case. Agreeing with Philips, therefore, this Court shall now proceed to consider the extent to which its offer can be regarded as FRAND on the basis of its share of SEPs in the UMTS standard.

4.6. The parties may well be in disagreement about the (technical) importance of Philips' SEPs for the UMTS standard, but it is not a matter for discussion that Philips' share of the absolute number of SEPs in the UMTS-SEP portfolio as such is an important factor in assessing the extent to which the offer from Philips (and that from Archos) was FRAND. Both parties have arrived at different absolute numbers, however. In this context, Archos refers to reports from the advisory firm Oxfirst Ltd. in Oxford, UK (hereinafter "Oxfirst"). Oxfirst searched the ETSI IPR database of SEPs submitted to the European Patent Office (EPO) in the period from 1 January 1996 until 24 December 2015 for the keyword UMTS (and LTE) (see Oxfirst 1st report, p. 21). Oxfirst thus found 2130 patent families for the UMTS standard (Oxfirst response report, p. 30). In this number, Philips would have a numerical share of 2.5%, of which around 0.7% remained after a weighting of quality, according to Oxfirst (Oxfirst 1st report, p. 37 and Oxfirst response, p. 42). Countering this, Philips asserted that this method generated a lot of irrelevant bycatch and also that the quality weighting undertaken by Oxfirst was incorrect.

Firstly, Philips denied, with reasoning, that searching for the search term "UMTS" in this way would generate a fair reflection of the total number of SEPs for UMTS. Referring to the statement from its expert Dr. Scott (GP 10), Philips reached a numerical share of 5.1% in the UMTS SEP portfolio (55 EP patents out of a total of 1069). Scott used a database of UMTS SEPs for this (the dSEP database created by scientists from various universities, including the Massachusetts Institute of Technology, available at www.ssopatents.org), which he and Philips argued to be "*cleaned and harmonised*" and "*far more accurate than the raw ETSI database*", arguments that were not sufficiently refuted. In

countering this reasoned rebuttal, Archos did not sufficiently justify why the numerical proportion of 2.5% that it claimed for Philips was correct, or at least that Oxfirst had based its findings on the correct arithmetical numbers of SEP patents for UMTS. By merely criticising Scott's report, as Archos does at 7.24-7.29 of its Reply, Archos is missing the point that it is still subject to a duty to assert and prove facts in relation to the numbers it has mentioned (see 4.2 above).

Secondly, Philips states that only the SEPs should be taken into account that relate to mobile stations (including smartphones and tablets, for convenience hereafter referred to as mobile phones) and not those relating to the standard as a whole, thus for instance the technology in base stations, radio network controllers (RNCs) and further necessary infrastructure (see also Scott's statement at 15-21, GP 10). This defence holds and results in a very substantial increase in the proportion attributable to Philips, since it has asserted, uncontradicted, that all of its patents deal with the mobile phone. It is not readily comprehensible why, when considering the share of Philips' patents for a FRAND licence to be able to manufacture and sell mobile phones, the SEPs for the remainder of the standard (i.e. UMTS technology not applied in mobile phones) should also be included. Admittedly, the patented UMTS technology in mobile phones functions in combination with technology from the remainder of the UMTS standard, but the manufacturer and/or seller of mobile phones does not use that other technology (unless, for instance, there is an indirect infringement, but that has not been asserted in this context). If they want a FRAND payment for SEPs that relate not to mobile phones but, for instance, to base stations or other infrastructure, the relevant holder should knock on the doors of those companies implementing those SEPs. Those companies and their use of the UMTS technology cannot be compared with the manufacturer and/or seller of mobile phones.

4.7. In addition to these objections regarding the assumptions used by Archos for numerical share, Philips has correctly pointed out that Oxfirst has used methodology and calculations in a substantial part of its report that are not sufficiently elucidated. Further, a not insignificant part of that report is rather speculative in nature.

Firstly, one could point towards the weighting of the technical utility of Philips' patents, for which Oxfirst draws a connection with the number of "forward citations" and the number of independent patent claims. Neither Oxfirst nor Archos has satisfactorily elucidated why these are actually relevant factors for the technical value of a SEP. This is all the more problematic as Oxfirst's weighting of the (technical) quality of the Philips SEPs resulted in a substantial reduction in the numerical share (from 2.5% numerically to 0.7%¹⁵ weighted share). In the absence of further substantiation, the result of this weighting undertaken by Oxfirst is even less acceptable having regard to the analysis performed by another licensee during its negotiations with Philips. This licensee, like Archos a manufacturer of consumer end products, identified a 9.78% (rounded up to 9.8%) share for Philips in the number of actually relevant UMTS SEPs. The performance of this analysis and its results are confirmed by the expert Prof. Kearl (GP 8, pp. 17 et seq.). This Court can ignore the criticism by Archos of Kearl's expertise, as no actual expertise is required for this factual finding.

Secondly, Oxfirst for example assumed an added value of €1.05¹⁶ for a mobile phone with 3G compared to a mobile phone with WiFi alone; of that amount, 0.66% or 0.7 euro cents would accrue to Philips (pp. 36-37, Oxfirst 1st report and paras. 7.4-7.6 of the summons). Such a low added value does not appear to be realistic. After all, this is a mobile phone, which is mobile by nature and is therefore not bought purely for using the internet via wifi, i.e. tied to a location.

It may well be that anyone reading this judgment has at some point been faced with how inconvenient it is if one can only use wifi, for instance in other countries, because of high roaming rates. Just because an end user who wants to use his phone abroad for its internet functionality might have no

¹⁵ 0.66% is also mentioned on p. 37 of Oxfirst's 1st report, rounded up to 0.7%.

¹⁶ For 3G and 4G together, Oxfirst arrived at an added value of €3.66.

option but to put up with this handicap does not in any sense mean that he would accept this for normal use in his own country. In other words, an end user would be prepared to pay significantly more than the €1.05 calculated by Oxfirst for the facility of mobile data connection.

4.8. Archos argued that the royalty rate requested by Philips amounted to impermissible "royalty stacking". The thought behind this is that if all licence payments were added together (not just for UMTS but also for all the other technologies used in a phone) there would be an unbearable royalty burden. However, Archos failed to flesh out this argument sufficiently. Firstly, it used as a starting point the assumption of the (low) share for Philips in the UMTS SEP portfolio, of (in round figures) 0.7%, which it contended but did not sufficiently substantiate. Assuming with Philips, however, that its share is between 5.1-9.8%, and also the assumption that all SEP holders ask for roughly the same royalty, then the total royalty for UMTS would work out at a figure between ($\$0.75 \times 100/9.8 =$) \$7.65 and ($\$0.75 \times 100/5.1 =$) \$14.71.¹⁷ Because Archos assumes 0.7%, i.e. different from the analysis by Philips by a factor of 10 – which is based on more accurate patent data and without the objections that attach to the assumptions applied by Archos – it is clear why its arithmetical argument cannot be accepted as correct. This would still be the case if the criticism by Archos of Dr. Scott's report had any impact, so that the Philips share would end up at 3.1% (as calculated by Archos). After all, this would still leave a major discrepancy with the 0.7% Philips share asserted by Archos. Secondly, Archos has not provided sufficient argument to be able to conclude that the burden of the Philips royalty, worked out in this way, would be unbearable or disproportionate. Even less so if this is contrasted with the royalties mentioned in the literature. In this context, Philips referred to an article by Armstrong et al., from which one may deduce a total royalty for LTE of \$60¹⁸ and to Stasik,¹⁹ who reports estimates of around 30% of the final price of the mobile phone for WCDMA (part of UMTS) (p. 114). Although these royalty amounts appear substantial to this Court, Archos has not provided this Court with the ammunition needed for it to accept that these amounts are not FRAND. The criticism by Archos of the Stasik article, that it is too old (2010), overlooks the fact that it is up to Archos to provide factual substantiation (see 4.2, above). If the estimates in these articles are compared with the cumulative royalty for UMTS suggested by Philips (between \$7.65 and \$14.71 – see calculation above), then this Court cannot find that these latter figures are disproportionate or intolerable. To the extent that Archos has thirdly pointed out that if the royalty burden for the UMTS technology on its own is already so high, the total burden of all licences for all technologies used in the mobile phone would be unbearable, this is not substantiated with any empirical facts – in contrast to the explicit rebuttal by Philips and taking all of the foregoing factors into account. Another factor at play here is that not every technology in the phone will represent the same value (or will have an impact on other elements of the phone, like the data connection undoubtedly has), which can also be deduced from the table on page 68 of Armstrong et al.

4.9. It should be noted at this point that Archos correctly argued that in order to determine the actual value of a SEP, one must look at the closest alternative solution (available free or at negligible cost) and at the additional technical and economic advantage offered by a SEP. Under this approach,

¹⁷ Also proceeding on the assumption that its UMTS portfolio would in fact justify the royalty asked for, Philips is essentially offering a licence under its LTE SEPs without further payment. If the other SEP holders followed this example, this amount would therefore include the payment for LTE (possibly with a further surcharge for holders who did not have a SEP under UMTS but did have one under LTE).

¹⁸ Ann Armstrong, Joseph J. Mueller, and Timothy D. Syrett, *The Smartphone Royalty Stack: Surveying Royalty Demands for the Components Within Modern Smartphones (WORKING PAPER 2014) (EPI7)*, available at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/The-Smartphone-Royalty-Stack-Armstrong-Mueller-Syrett.pdf

¹⁹ Eric Stasik, *Royalty Rates and Licensing Strategies for Essential Patents on LTE (4G) Telecommunications Standards, LES NOUVELLES*, at 116 (September 2010) (EP30), available at <http://www.investorvillage.com/uploads/82827/files/LESI-Royalty-Rates.pdf>

therefore, one must extrapolate from the fact that the patent is included in a standard, because if the royalty and actual value of the patent lost step with each other, the choice would not (have to) be taken to include that technology in the standard. However, Archos does not attach any actual (legal) consequences to this assumption, with the result that this Court likewise does not feel called upon to do so. After all, Archos itself points out that this type of detailing of value for each SEP would be impractical (summons at para. 5.5). Nor has its expert, Oxfirst, made any attempt to establish the value of the Philips SEPs separately from the UMTS standard. On the contrary, in its 1st report, there are comments at various points that the value is determined on the basis of the Philips share in the UMTS standard (emphasis added by Court):

pp. 16-17:

"Rather, what we were primarily interested in, was to determine the economic role that the SEPs at stake play in a consumer's purchase decision. In doing so, we were keen to understand the economic role that the patents at stake[footnote] have in the implementer's business model and hence understand the economic value proposition of the patents within the context of the sales of the implementer. This means in the first instance determining the relationship between UMTS/LTE technology and consumer's purchase decision and in the second instance grasping the role that the patents under debate play to the UMTS and LTE standard respectively."

(...)

"In our approach we follow this rationale by establishing a relationship between the UMTS/LTE standard and the demand for mobile data trafficking by customer segment; a method which is further discussed in the empirical part of this opinion. "

pp. 19-20:

"7. ROYALTY RATE VALUATION METHODS

Among the quantitative approaches, the income approach and the market approach are used to determine the value of the royalty rate. Within the income method again we used a host of different methods to determine the relationship between the patents at stake and expected future revenue streams of Archos products applying the UMTS/LTE standard.

Equally the discount rate was determined with reference to different methods. The very nature of intangible assets makes valuation difficult. Each method of valuation has its own advantages and each its own specific disadvantages. One of the benefits of using several methods is that the errors inherent in each approach tend to cancel each other. Important to all methods is an assessment of Philips' share in UMTS/LTE SEPs. Therefore, we describe first how we determined Philips' share of SEPs in both standards."

4.10. In this context, Archos has also pointed out that the royalty should not be based on the price of the phone as a whole but only on the component that incorporates this technology (the Smallest Saleable Patent-Practising Unit, or SSPPU), which in this case is the baseband chip. Firstly, Philips has correctly argued against this to the effect that the royalty it asked for is a fixed amount, so that there is no relationship to the sale value of the device. Secondly, this Court considers that this concept is at the very least a matter of debate, among lawyers and also among economists.

On the one hand, proceeding on the basis of the SSPPU price seems to encompass the intrinsic disadvantage that no account is taken of the value of the component for the phone as a whole. Thus, Archos correctly points out that the photo camera is one distinguishable component of the phone, whereas in fact a highly valued attribute of such a camera for the average consumer is that the photo he has taken can immediately be shared on social networks and such via the data connection. Likewise, a high-quality screen will be less useful if it cannot display photos and videos that are received via the data connection.

For the average smartphone user, the value of the data connection will be large and will considerably exceed the value of the baseband chip, the SSPPU (around \$10). Why else would users be prepared to

spend significant monthly amounts for their data bundles (and possible extensions once they have been used up)? With UMTS, the main thing is this data connection.

On the other hand, proceeding on the basis of the sale price of the smartphone appears to encapsulate the inherent disadvantage that other price factors also play their part that have relatively little to do with UMTS or the data connection. Many high-end smartphones are therefore relatively expensive, because of an innovative design, a prestigious brand with a good reputation, a fast processor and so on. It appears incorrect that a licensor for UMTS or LTE technology could share in benefitting from the efforts put into the reputation of the brand or the design of the phone, because the licence fee rose correspondingly. The camera and the screen in these types of devices are also often markedly improved. While, as already held, these components interact with the data connection, it will be just as convenient for a significant proportion of the consumers that one can take good photos without having to carry along a separate camera. Nonetheless, there will be few who do not regard a fast data connection as being of major importance in a high-end smartphone.

Having regard to these factors, there is something to say for both positions, although just as much could be said against them. It appears to this Court that there could have been a balancing act during the negotiations. That the royalty rate suggested by Philips was not based on the SSPPU price and for that reason was allegedly not FRAND is not a finding that can be made by this Court in the light of the foregoing, so that this assertion made by Archos must be dismissed.

4.11. Archos also argued that the offer from Philips was not FRAND because it – Philips – was under no obligation to maintain the SEPs and because the level of the royalty did not reduce after a period of time, whereas the value of the patent portfolio (and UMTS) did reduce.

Firstly, Philips correctly argued against this that objections of this type could have been the subject of negotiation, so that the offer cannot be classified as not being FRAND for this reason alone (see 4.3 above). This is also eminently correct, as already stated, for the modality and calculation of the royalty figure. Philips stated undisputed, that this aspect was never raised by Archos during the negotiations.

Secondly, Philips would be cutting off its nose to spite its face if it were to let its patents lapse, for instance by not paying the appropriate fees. After all, if new players entered the market, they would not then have to obtain a licence from Philips. It should also be mentioned in relation to the reduction of the royalty rate, as was discussed with the parties during the hearing, that the royalty payment of \$0.75/unit asked for by Philips was not indexed, so the payment would due to inflation decrease in real value as time went on.

4.12. Archos also expressed objections against the royalty surcharge in the event of non-compliance (from \$0.75 to \$1) and also that it would have to pay high royalties for the past. This argument also founders against the defence by Philips, already discussed, that there could have been negotiations. In fact, a surcharge in the event of incorrect compliance does not appear to be unreasonable, depending on the nature of the non-compliance. Philips also stated, without being contradicted, that this is not unusual in licence agreements. What actually appears to be less correct is calculating the same surcharge for the past. According to the system under the said *Huawei v ZTE* judgment, after all, the first thing that the holder of a SEP should do when his patent is being put into effect is to notify the user of the infringement against the SEPs and provide appropriate details. Without any further explanation from Philips, of which there is none, this system would appear to be incompatible with asking for a higher royalty payment for the past. Nonetheless, this objection cannot lead to the conclusion that the license offered by Philips was not FRAND, given that there could have been negotiations about the royalty, as mentioned above. Far less has Archos persuaded this Court with convincing arguments, having regard to all of the foregoing factors, that a royalty of \$1 is not FRAND (if \$1 is inserted into the calculation at 4.8 above, the amount of the total license burden for

the UMTS standard would be a few dollars more, but not so much as to render it unacceptable).

4.13. Bearing in mind all the foregoing factors, the argument by Archos based on "patent hold-up", where an SEP holder effectively ransoms the application of the entire standard against a request for a higher royalty payment, must fail. Only if the offered (and also the finally concluded) licence is not FRAND could it be assumed that there might be a "hold-up" situation. However, this has not been established, as has already been determined. This charge of patent hold-up is even less acceptable given the (maximum) royalty fee of €0.99, which the documents show was asked for by Sisvel for its licence, covering 62 SEPs for LTE, a number comparable with the 55 UMTS SEPs and 42 LTE SEPs of Philips. Another argument by Archos that has to fail, based on the findings at 4.5 above, is that it was compelled to pay for both the UMTS and LTE because they were combined, so that there was a patent hold-up.

4.14. Archos also asserted that the licence it was offered was discriminatory and that Philips favours its other licensees. This argument also founders on the lack of any (factual) substantiation. Archos did not point to any single license agreement offered by Philips to a third party or concluded with a third party that included better (specifically financial) terms and conditions. Nor was there any other sign of such an agreement. On the contrary, Philips allowed Prof. Kearl to examine a number of the licensing agreements it had already tied up and he concludes (pp. 14-15 of his first report, GP8)²⁰:

"Of particular relevance, Philips' running royalty licenses contain terms that are essentially identical to those offered to Archos in July 2015. That is, Philips has signed a number of worldwide, patent-life licenses covering the exact same patents as those at issue in this case with terms that are essentially the same as those offered to Archos in July 2015, including the offered per unit royalty rate."

Archos admittedly expresses criticism of these findings (see, for instance, paras. 7.6-7.16 of the Reply), but loses sight of the fact that it must provide substantiation for its own assertion that there was any discrimination (see 4.2, above).

4.15. Likewise, the (more theoretical) assertion by Archos – that Philips' offer was discriminatory because the royalty was a fixed amount, irrespective of the value of the product – should be set aside. According to Archos, the royalty for high-end devices would then be relatively low, but this would exert a disproportionately hefty burden on low-end devices, such as those – allegedly – of Archos. First of all, the argument is at odds with its assertion that one should proceed on the basis of the SSPPU, on which all that needs to be said has already been said at 4.10 above and is just as applicable here.

Secondly, here again Philips explicitly indicated that it was open to negotiation and, as already held at 4.3 above, this could readily have been a point of negotiation.

4.16. Finally, Archos raised an objection against the specific wording of a number of the provisions in the licensing agreement that it was offered, such as the definition of "Licensed Product", the audit provision, the indemnification clause and termination on bankruptcy. Philips correctly stated that this type of objection could have been discussed during the course of negotiations. Without rebuttal, Philips stated that this matter was likewise never raised by Archos during the negotiations. Also, once Philips had raised this argument in its statement of defences, Archos never came back to the point. It may be added here that to the extent that Archos objects that Appendix C (a list of licensed patents

²⁰ As previously, no actual expertise is required for this factual finding, so that the criticism by Archos of Kearl's expertise need not be explored further.

referred to in the definition of "Philips UMTS/LTE Patents" in the licence proposal) did not accompany that proposal, this is of no benefit to it. After all, Philips had already by then sent a summary of its UMTS/LTE SEPs to Archos. If anything still remained unclear, Archos could also have asked for it to be re-sent.

Archos offer FRAND?

4.17. Archos asserts that its offer of 12 January 2016 (claim II, secondary) is FRAND. For the simple reason that this offer (it is postulated at 2.8 above that this works out to around 7 cents per product) is 10 times lower than the offer from Philips (\$0.75/1.00) and proceeds on the basis of an incorrect (or at least insufficiently substantiated) share of Philips in the UMTS SEPs that are relevant for mobile phones, its assertion must be rejected. This Court also refers to the further criticism – already classified above as being in part correct – of the report from Oxfirst that has been presented to substantiate Archos' offer.

Conclusion

4.18. The conclusion is that the declaration of law claimed at (I), to the effect that Philips' offer of 28 July 2015 is not FRAND, must be refused. The same applies to the secondary declaration of law claimed at (II), that the counter-offer from Archos was FRAND, let alone that there could be any finding that this offer was higher than a FRAND royalty rate, as requested by Archos. The rates in the declaration of law claimed primarily under (II) are even lower and must therefore share the fate of the secondary claim under (II). The remaining defences from Philips, including the defence that Archos has no (continuing) interest in the declarations of law that it has requested because the FRAND statement by Philips had been exhausted by the hostile attitude of Archos and the instigation of these proceedings, require no further discussion.

4.19. Archos has further asked for the appointment of an expert. Having regard to all of the foregoing findings, this Court considers however that it is fully able to reach a finding without an expert explanation, so that this request will be dismissed.

4.20. The claim at (IV), requesting a prohibition against Philips making disclosures to third parties concerning the Archos trade secret information, is also dismissed. It has not been asserted that there is any serious threat of Philips ignoring its obligation of confidentiality in terms of Article 29(1) DCCP, nor is there any other evidence to that effect.

4.21. Archos, as the party found to be in the wrong, will be ordered to pay the procedural costs in the main action. Archos has argued that Article 1019h DCCP, does not apply to these proceedings. That position is rejected (as was argued by Philips). It can be deduced from the first paragraph of the summons, and also the date when it was issued, that Archos initiated these proceedings with an eye to the infringement proceedings that Philips had initiated just previously. Furthermore, the declaration in law requested by Archos, to the effect that Philips' offer is not FRAND but that its own offer is, would provide very important ammunition against infringement claims (i.e. in the infringement prohibitions and recalls that are claimed in the infringement proceedings), in the light of the *Huawei v ZTK* case and also its assertions that Philips was abusing its rights or acting in breach of pre-contractual good faith. It is a factor here that Archos makes explicit and detailed reference, in the statement of defence in the infringement proceedings, to its arguments in these FRAND proceedings and to the associated bulky expert reports (including at paragraphs 4.15-4.17 of the statement of defence). This means that these proceedings are so closely linked with the infringement defences and proceedings that the costs,

which in fact in these proceedings overlap significantly for both parties with those in the infringement proceedings, must be regarded as falling within the scope of application of Article 1019h DCCP (cf. Court of Appeal of The Hague, 26 February 2013 (Danisco v Novozymes), ECLI:NL:GHDHA:2013:BZ1902).

4.22. For these FRAND proceedings, Philips has submitted a statement of procedural costs in the sum of €317,076.26 (excluding costs of the (joinder) ancillary proceedings). Archos admittedly indicated in general terms that it felt these costs were high but, having regard to the detailed substantiation from Philips, there has not been sufficient challenge to the effect that these costs are unreasonable or disproportionate, so that in principle they qualify to be awarded. During the hearing, Philips went on to explain that there was some overlap with (the FRAND-related aspects of) the infringement proceedings. This Court shall accordingly split the costs in half for the FRAND proceedings on the one hand and the infringement proceedings on the other hand. The costs for Philips are accordingly assessed at €158,538.13 (this Court assumes that the court fee of €619.00 is included in this statement).

4.23. Philips, as the party found to be in the wrong, will be ordered to pay the procedural costs in the ancillary proceedings for joinder. Part II of the procedural costs statement from Archos, which (alternatively) relies upon Article 1019f DCCP, insofar as this Court considers that Article to be applicable, implies that a figure of €9,558.13 + €1,484.47 = €11,042.60 has been spent on the ancillary proceedings. This Court sees no reason to find these (undisputed) costs are unreasonable or disproportionate, so that this figure shall be awarded.

5. The ruling

The District Court

5.1. dismisses the claims;

5.2. orders Archos to pay the procedural expenses of the main action, estimated at today's date to amount to €158,538.13 for Philips;

5.3. orders Philips to pay the procedural expenses of the ancillary proceedings, estimated at today's date to amount to €11,042.60 for Archos;

5.4. declares this judgment, as regards the order for costs, to have immediate effect.

This judgment is issued by Judges E.F. Brinkman, C.T. Aalbers and J.H.F. de Vries and pronounced in public session on 8 February 2017.

[signed]

[signed]