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SEP/FRAND case law: overview and challenges regarding confidentiality

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4iP Council interviews development economist, Xiaolan Fu. Xiaolan Fu is the Founding Director of the Oxford Technology and Development Centre for Development, Professor of Technology and International Development at Oxford University and Fellow at Green Templeton College. She is also the first mainland Chinese citizen to become a tenured professor at the University of Oxford.

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Post Huawei Case Search

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Most patents (78-82%) are invalid!

High invalidity rates in German Federal Patent Court suggests shortcomings in patent quality and granting process!

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In 2015 only 1 in 17500 (0.006%) of all patents in force in Germany were declared invalid by a court. Research findings show similar results for patents in other jurisdictions!

Data for Germany 2015

- 600,498 Patents in force
- 82,461 Patents granted*
- 1,200 Infringement Cases p.a.**
- 217 Subject to nullity proceedings!
- 34 Invalidated patents*

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December 2015 ISBN: 978-3-945185-03-3

The Viability of FRAND:

How the Seminal Microsoft Ruling Could Impact the Value of Standard Essential Patents and the Future of Telecom Standards

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CHALMERS Center for Intellectual Property (CIP) Department of Technology Management and Economics Chalmers University of Technology Gothenburg, Sweden

October 2016

Lessons from Huawei v. ZTE

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Rt Hon Professor Sir Robin Jacob Alexander Milner

December 2015 ISBN: 978-3-945185-06-3

Valuing Standard Essential Patents in the Knowledge Economy:

A Comparison of F/RAND Royalty Methodologies in U.S. Courts

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February 2016

The Smallest Saleable Patent-Pricing Unit experiment, general purpose technologies and the coase theorem

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MP3 - digital audio coding

"The patent really is a contract with society." Karlheinz Brandenburg, of the celebrated mp3 invention team talks to 4iP Council.

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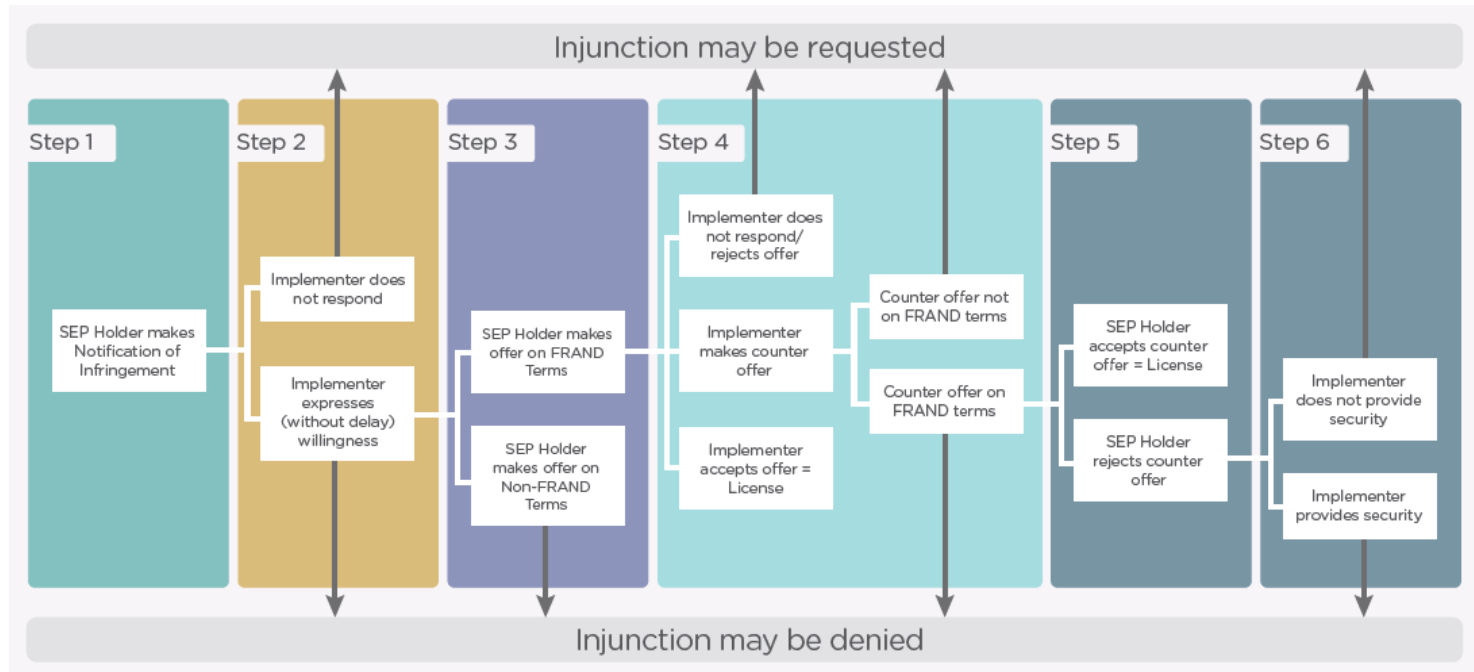
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4iP Council interviews Gill Smith, Group IP Director at Dyson about the company's culture and reputation, the value of its patents and patent system success.

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FRAND LICENSING: CJEU'S INCREMENTAL APPROACH



CJEU's INCREMENTARY APPROACH



	Term	Country	Interpretation	Case reference
Step 1	Notification of infringement	Germany	SEP holder's notification of infringement does not have to contain either the original written FRAND declaration, nor proof that a FRAND declaration has been made during the development of the standard, provided that SEP holder leaves no doubt that it is bound by a FRAND licensing commitment.	Pioneer v Acer, > LG Mannheim, 8 January 2016 -Case No. 7 O 96/14
		Germany	SEP holder's notification of infringement has to (1) specify the infringed patent, including its number, (2) inform that the patent has been declared standard-essential, (3) name the relevant standard, (4) inform that the implementer uses patent's teachings as well as (5) indicate which technical functionality of the challenged embodiment makes use of the patent. The level of detail depends on the specific circumstances of the case, particularly the technological knowledge of the implementer (or the availability of external expertise gained by reasonable efforts). However, the information does not need to be as substantiated as facts submitted with a statement of claim in patent litigation. As a rule, reference to claim charts succes.	NTT DoCoMo v HTC, > LG Mannheim, 29 January 2016 Case No. 7 O 66/15
				Philips v Archos, > LG Mannheim, 1 July 2016 Case No. 7 O 209/15
				Philips v Archos, > LG Mannheim, 17 November 2016 Case No. 7 O 19/16

<https://caselaw.4ipcouncil.com/guidance-national-courts>

SUMMARIES CASE-LAW POST H. v ZTE



Case Law post CJEU ruling *Huawei v ZTE*



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Case law
home

German
court
decisions

Italian
court
decisions

English
court
decisions

Romanian
court
decisions

French
court
decisions

Dutch
court
decisions

National
Courts
Guidance

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Use the menu above to find cases by national court, filter cases by the following keywords, or use CTRL+F to search for specific terms:

Abuse of market power	Claim charts	Claim preclusion	Comparable agreements	Confidentiality	Country by country licensing	Cross-licensing	Damages	Essentiality	ETSI declaration	Exhaustion	FRAND declaration
FRAND range	Hold-out	Hold-up	Huawei framework	Implementer's reaction to offer	Non-disclosure agreement	Non-discrimination	Non-transitional and transitional cases		Notification of infringement		
Obligations of SEP holder and alleged infringer (Huawei Obligations)			Patent pools	Portfolio licensing	Recall of products	Recognised commercial practice	Relevant market	Rendering of accounts	SEP owner's offer	SSPPU	
			Technical and FRAND-related trials	Transfer of SEP	True FRAND rate	Validity	Willingness	Worldwide (portfolio) licenses			

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Cases not referenced here? Let us know...



Preliminary remarks

The following summaries relate to court decisions rendered after the Court of Justice of the European Union (CJEU or ECJ) handed down its ruling in case C170/13 Huawei v ZTE on 16 July 2015.

The summaries focus on the core issue raised by the Huawei decision, namely the conditions under which a standard essential patent holder may seek injunctive relief for infringement of his patents or where a standard implementer can raise a competition law-based defense to an action brought by a SEP holder. Occasionally, related and additional aspects of a decision are included into the summary because of their importance for understanding the context of FRAND licensing. In general, though, non-Huawei-related issues are omitted, such as, for instance, general procedural or patent law aspects (venue, patent description, validity, infringement, etc.).

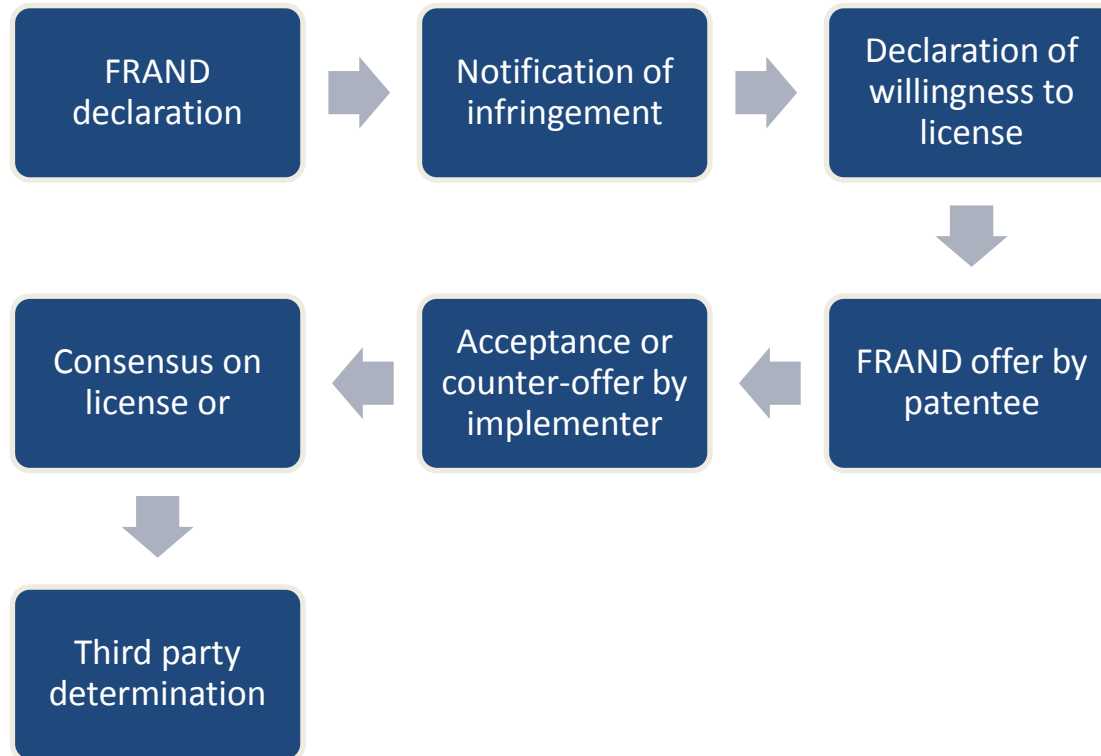
However, it is likely that some pre-Huawei decisions will continue to be of relevance, inter alia where national courts deem the Huawei-rules inapplicable. [\[1\]](#)

<https://caselaw.4ipcouncil.com>



The Huawei/ZTE mechanism for SEP/FRAND licensing

Duty to act timely, esp. no delaying tactics by implementer → willingness, acceptance, counter-offer



UnFRANDliness patentee: no injunction

UnFRANDliness implementer: no FRAND defense against injunction



Post-Huawei/ZTE issues and recent case-law

THE SETTING OF GLOBAL LICENSES



Global portfolio license is FRAND under appropriate circumstances and can be set by court in one jurisdiction

Validity and infringement to be decided by courts of the respective patent-granting jurisdictions (principle of territoriality)

Recent: *Unwired Planet International Ltd Unwired Planet LLC v. Huawei Technologies Co. Ltd Huawei Technologies (UK) Co. Ltd* [2018] EWCA Civ 2344, 23 October 2018; *Conversant Wireless Licensing S.A.R.L v. Huawei Technologies Co. Ltd Huawei Technologies (UK) Co. Ltd & ZTE Corporation* [2018] EWHC 808 (Pat)., 16 April 2018; Regional Court Düsseldorf, 13 July 2017, 4a O 16/16

FRAND AS A RANGE



There is not one single FRAND rate but several rates can be within the FRAND range.

Recent: *Unwired Planet International Ltd Unwired Planet LLC v. Huawei Technologies Co. Ltd Huawei Technologies (UK) Co. Ltd* [2018] EWCA Civ 2344, 23 October 2018

RELEVANCE OF HUAWEI/ZTE FRAMEWORK FOR CLAIMS OTHER THAN INJUNCTIONS



Non-compliance of patentee with Huawei/ZTE conduct requirements impacts claim for

- Injunction: +
- Recall: +
- Destruction: +
- Damages: Potentially limited to FRAND level if /as long as FRAND violation; no limitation (in the operative part) regarding claim for damages in principal and claim for information
- Information: Not affected by limitation of damages to FRAND level
- Rendering of accounts: Parallel with extent of damages claims?
- Security ?

Recent: Regional Court Düsseldorf, 13 July 2017, 4a O 16/16; Regional Court Mannheim, 28 September 2018, 7 O 165/16; Higher regional Court Düsseldorf, 30 March 2017, 1-15 U 66/15

A LOT OF FURTHER ISSUES AND CASE-LAW



- No automatic link between SEP ownership and market dominance
- Requirement of pre-litigation infringement notification and FRAND offer by patentee?
- Timeframes for party declarations (infringement notice, willingness, FRAND offers)
- Full or summary assessment of FRANDliness of license conditions
- Soft- or hard-edged non-discrimination
- SEP ambushes: Requirements and sanctions
- Subsequent license adjustments
- [...]

Cf. *Picht*, *FRAND wars 2.0* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2916544;
Picht, *SEP/FRAND – Update 2017/18* (forthcoming)



Confidentiality challenges in SEP/FRAND litigation

CONFIDENTIALITY CHALLENGES – THE ISSUE(S)



Confidential information, in particular license agreements concluded with third parties (i.e. market players not party to the respective litigation) can be of high relevance to SEP/FRAND court cases.

All the more so where – as in Germany and the UK – comparable license agreements (“Comparables”) loom large in the determination of FRAND conditions

For instance: Regional Court Düsseldorf, 13 July 2017, 4a O 16/16

Parties oftentimes hesitant to share confidential information, in particular

- If third parties’ business secrets involved
- If confidentiality clause in Comparable prohibiting disclosure, potentially even if NDA regarding litigation is in place
- All the more, if no NDA concluded between the parties regarding information disclosed in the negotiations/litigation

How can courts and the legal framework reconcile production of the necessary information and the protection of legitimate confidentiality interests?

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



FRAND demands a high level of transparency. In particular, confidential treatment of pre-existing, comparable licenses requires special justification since implementer may need this information to assess potential discrimination and exercise its rights effectively.

Regional Court Düsseldorf, 13 July 2017, 4a O 16/16; Higher Regional Court Düsseldorf, 25 April 2018, I-2 W 8/18

At least UK courts take third party disadvantages resulting from disclosure into consideration, in particular a weakening of their competitive position as licensors/licensees. Knowledge of confidential terms in license agreements with competitors can give “an unfair advantage in licensing negotiations”.

Unwired Planet International Lt v. Huawei Technologies Co. Ltd Huawei Technologies (UK) Co. Ltd & Anor [2017] EWHC 3083 (Pat)., 30 November 2017; TQ Delta LLC v. Zyxel Communications and Ors., UK High Court of Justice, 13 June 2018, HP-2017-000045, [2018] EWHC 1515 (Ch)

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



Obligation (*Obliegenheit*) of implementer to sign a NDA or to communicate information where such acts are strictly necessary (*zwingend erforderlich*) for the patentee to formulate and justify a FRAND offer

Regional Court Düsseldorf, 13 July 2017, 4a O 16/16

Chinese and Indian case-law apparently tend to take implementer's refusal to sign NDA as a sign of unwillingness if corroborated by other factors (e.g. no pro-active conduct regarding the FRAND license).

Xi'an China IWNcomm Co., Ltd. (IWNcomm) v. Sony Mobile Communications (China) Co. Ltd. (Sony), Beijing Intellectual Property Court (BIPC), 22 March 2017;
Telefonaktiebolaget Lm Ericsson v. iBall, New Delhi High Court, 2 September 2015, 2501/2015

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



Conditions of a NDA covering litigation submissions:

- Use of information only for the respective litigation
- Access only for limited number of other party's representatives and for other party's experts, themselves bound by specific confidentiality duties
- Contractual penalty (EUR 1 Mio.) for breach of confidentiality

Higher Regional Court Düsseldorf, 17 January 2017, I-2 U 31/16

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



Patentee must request implementer to sign an NDA as soon as possible, usually already in/alongside the notification of infringement.

Regional Court Düsseldorf, 13 July 2017, 4a O 27/16

If confidential information is delayed because implementer has delayed NDA, implementer cannot invoke insufficient time for assessing FRANDliness.

If implementer has delayed and, at the same time, patentee has not initiated timely, burden lies, in principle, with the patentee but patentee can show that NDA would have been delayed even if initiated timely

Regional Court Düsseldorf, 13 July 2017, 4a O 16/16

Subsequent conclusion of NDA shows that patentee could have realized a NDA if initiated timely → patentee cannot invoke delaying tactics by implementer where implementer did not have enough time for assessing the NDA and NDA not concluded

Regional Court Düsseldorf, 13 July 2017, 4a O 16/16



German courts on disclosure absent NDA

Right to be heard, Art. 103(1) German Constitution, protects party's (*in casu*: implementer/defendant's) right to personally participate in the proceedings and have access to Comparables, unless waived by party

Higher Regional Court Düsseldorf, 14 December 2016, 17 January 2017, I-2 U 31/16

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



German courts on disclosure absent NDA

If the implementer fulfills the obligation to sign a NDA belatedly or deficiently (*verzögerte oder mangelhafte Mitwirkung*), this does not make him an unwilling licensee.

Where the implementer refuses to conclude a NDA which is necessary and reasonable (*zumutbar*) for the protection of the other party's confidentiality interests, the patentee's burden to produce evidence (*Darlegungslast*) is reduced, general statements (*pauschale Angaben*) can be sufficient then, and the implementer's contesting such statements is not to be considered (*unbeachtlich*). The patentee still has to make a FRAND offer and explain why the offer is FRAND and how the royalty has been calculated. However, the patentee does not have to offer explanations to the extent – and only to the extent – such explanations would violate the patentee's legitimate confidentiality interests (*berechtigte Geheimhaltungsinteressen*). Instead of detailed information, mere indicative remarks may be sufficient in such regards and the implementer does have to accept this level of information as a sufficient explanation for the FRANDliness of the conditions.

Higher Regional Court Düsseldorf, 25 April 2018, I-2 W 8/18; Regional Court Düsseldorf, 13 July 2017, 4a O 16/16, 4a O 27/16; Higher Regional Court Düsseldorf, 18 July 2017, I-2 U23/17

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



German courts on disclosure absent NDA

However, patentee cannot omit all elements usually covered by a NDA, but only such elements as are truly confidential. Reasons must be given why necessary to keep a particular piece of information confidential

Not truly confidential are, in particular:

- General considerations on how to calculate license fees
- Publicly available prices (here: for tablets)
- Previous contracts between the litigation parties
- Standards covered by the portfolio
- Questionable: claim charts, linking standard passages and patent claims

Regional Court Düsseldorf, 13 July 2017, 4a O 16/16

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



German courts on disclosure absent NDA

“The unjust refusal of the licensee to enter into a non-disclosure commitment, leads, at most, to easing the claimant’s burden to provide the defendant with explanations regarding the justification of its licensing conditions, to the extend (and not beyond!) that this is required for protecting its justified confidentiality interests.”

Higher Regional Court Düsseldorf, 18 July 2017, I-2 U 23/17 (para. 33)

Patentee must identify confidential information, explain why it constitutes a business secret, show details on measures taken to secure confidentiality, verifiably substantiate (for each piece of information) concrete harm resulting from disclosure, as well as its likelihood.

Higher Regional Court Düsseldorf, 25 April 2018, I-2 W 8/18

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



German courts on disclosure absent NDA

For a party's right to access the file (Sec. 299(1) German Code of Civil Procedure), it is not relevant whether other party to the proceedings has confidentiality interests regarding documents in the file. Filing party has to expect other party's access and must, if the party wishes to protect confidentiality, attempt to conclude NDA beforehand. This approach serves to keep proceedings for access to file free from disputes over confidentiality issues.

Higher Regional Court Düsseldorf, 25 April 2018, I-2 W 8/18

Right of access to file extends to interveners. However, if intervention takes place only after the parties have concluded NDA and a party has, based on that NDA, submitted documents to file, intervener must either sign a NDA as well or has no access to the confidential information in the file. If intervener claims access to such information, court has to assess whether submitting party has substantiated confidentiality (*hinreichend substantiiert dargetan*). Fact that other main party (*Hauptpartei*) has signed NDA does not automatically prove that file contains information worthy of protection.

Higher Regional Court Düsseldorf, 25 April 2018, I-2 W 8/18

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



German courts on disclosure absent NDA

Where the other party has breached or risks to breach a NDA, the patentee can refrain from communicating further confidential information and restrict its submissions to the level acceptable in the absence of a NDA.

Higher Regional Court Düsseldorf, 25 April 2018, I-2 W 8/18

It seems to be the opinion of (at least) the Higher Regional Court (*OLG*) Düsseldorf that failure to honor a NDA can be indicated by a party's argument that the NDA belongs, in its legal nature, to the other party's general terms and conditions (*Allgemeine Geschäftsbedingungen, AGB*) and that some parts of the NDA are ineffective according to Sec. 307 German Civil Code. In casu case remanded for assessing intervener's intention to honor the signed NDA

Higher Regional Court Düsseldorf, 25 April 2018, I-2 W 8/18

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



UK courts on disclosure to “external eyes only”

Confidential information may be disclosed to external eyes only, meaning access is restricted to outside counsel, experts and the court. “External eyes only” can apply if parties agree or in “exceptional cases”.

“[R]ole which the document will play in the case is a factor which must be weighed in the balancing exercise in setting the terms of the confidentiality regime at any given point in the case”:

- Limited, if any, relevance: Protection if disclosure could be unnecessarily damaging
- Greater relevance: Protection possible, in exceptional cases, at least at an interim stage of the proceedings
- Key to the case: No “external eyes only”, unless exceptional circumstances; amounted to violation of party’s right to fair hearing according (Art. 6 ECHR), as well as incompatible with the obligations of lawyers to their clients
- Generally, Comparables are key to the case

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



UK courts on disclosure to “external eyes only”

Instead of “external eyes only” arrangements, confidentiality club agreements (access to sensitive documents only to specific individuals within one of the parties) or document redactions excluding confidential parts are acceptable, even “now commonplace” in intellectual property cases.

TQ Delta LLC v. Zyxel Communications and Ors., UK High Court of Justice, 13 June 2018, HP-2017-000045, [2018] EWHC 1515 (Ch)

On categorizing the relevance of documents (potentially) to be disclosed, balancing their relevance against the resources disclosure would require, keying court disclosure orders to the results of this exercise, framing subsequent disclosure orders after insufficient initial disclosure as “unless” orders, and setting appropriate (in casu: non-monetary but strike out-) sanctions for repeated failure to disclose properly, cf.

TQ Delta LLC v. Zyxel Communications and Ors., UK High Court of Justice, 28 September 2018, HP-2017-000045, [2018] EWHC 2577 (Pat)

French court orders disclosure regime under new French confidentiality legislation

As part of its new legislation on the protection of trade secrets, France has introduced Article L. 153 French Commercial Code which states:

Art. L. 153-1 “Where, in the course of civil or commercial proceedings aimed at obtaining a pre-trial order of investigative measures before any proceedings on the merits, or in the course of proceedings on the merits, and the exhibit has been deemed to infringe or alleged by a party to the proceedings or a third party to be capable of infringing a trade secret, the court may take any of the following steps sua sponte or at the request of a participating or third party if the trade secret cannot be otherwise protected, without prejudice to the rights of defence: 1° Have the court alone review the exhibit, and if deemed necessary, order an expert opinion and request an opinion from each of the parties via a person authorized to assist or represent the party so as to decide whether to apply the protective measures set out in this Article; 2° Decide to limit the disclosure or production of the exhibit to certain parts thereof, order disclosure or production of a summary of the exhibit only, or restrict all parties’ access to a single individual person and a person authorized to assist or represent that party; 3° Decide that hearings will be held and the decision issued in chambers; 4° Adapt the grounds of the decision and the mode of publication thereof to the need to protect the trade secret.”

(Translation by Herbert Smith Freehills LLP, <https://www.lexology.com/library/detail.aspx?g=165fd351-15a3-4b3a-ab8c-1e5c6a712e30>)

French court orders disclosure regime under new French confidentiality legislation

As part of its new legislation on the protection of trade secrets, France has introduced Article L. 153 French Commercial Code which states:

Art. L. 153-2 “Any person with access to an exhibit (or content thereof) that the court has deemed to be covered or likely to be covered by trade secret is bound by a duty of confidentiality and prohibited from any use or disclosure of the information in the exhibit. For a legal entity, this obligation [...] applies to its representatives by law or pursuant to the articles of association and to any persons acting for the entity in court. Persons with access to the exhibit or its content are not bound by this duty either in their interactions with one another or with the aforementioned representatives of the entity that is party to the proceedings. Persons authorized to assist or represent the parties are not bound by this duty of confidentiality vis-à-vis said parties, except as provided in Article L. 153-1 (1°). The duty of confidentiality does not expire at the end of the proceedings. It does expire, however, if a court issues a non-appealable decision that trade secrecy does not apply or where the information in question has since ceased to qualify as a trade secret or has become easily available.”

(Translation by Herbert Smith Freehills LLP, <https://www.lexology.com/library/detail.aspx?g=165fd351-15a3-4b3a-ab8c-1e5c6a712e30>)

CONFIDENTIALITY CHALLENGES – THE CASE-LAW



French court orders disclosure regime under new French confidentiality legislation

In an early decision based on the new provision, the Paris Court of Appeal has held, with regards to document production requests by the parties, that confidential, non-redacted documents can be submitted at first between attorney's only, that the attorneys shall then submit to the court statements on whether parts of the documents are likely to contain trade secrets, and that the court will subsequently decide on an appropriate confidentiality regime.

Cour d'Appel de Paris, 9 October 2018, N° RG 15/17037 - N° Portalis 35L7-V-B67-BW6UV

CONFIDENTIALITY CHALLENGES – REFLECTIONS



- Public interest in sufficient access to relevant information
- Parties' rights to be heard and effectively defend themselves
- Effects on licensing incentives
- Appropriateness of proceedings based on limited submissions due to lack of NDA and lack of alternative disclosure regimes
- Likelihood and controllability of confidentiality breaches
- Third party rights to and interests in confidentiality: Risk of disclosing party to face legal action by affected third parties
- Relevance of general legal framework regarding limited disclosure in litigation

CONFIDENTIALITY CHALLENGES – REFLECTIONS



General legal framework regarding limited disclosure – Germany

- **Document production claim**, Sec. 422, 423 German Code of Civil Procedure (CCP): Relatively high threshold, substantive law claim for production or document referred to by other side
- **Document production order** (Sec. 142 CCP)
 - o Court discretion
 - o Production is, in principle, not enforced, but unjustified failure to produce → party's position unsubstantiated or regarded as frustration of evidence
 - o Justified refusal to produce → no production order or reduced substantiation requirements
- **Exclusion of the public**, Sec. 172, 174 German Courts Constitution Act (GVG): No protection against opposing party
- **Blacking-out** of confidential passages considered an option by judicature and scholars, not least regarding confidential third party information

CONFIDENTIALITY CHALLENGES – REFLECTIONS



General legal framework regarding limited disclosure – Germany

- **“External eyes only”** established in some contexts, e.g. in the assessment of confidentiality under Sec. 140c German Patent Act (*“Düsseldorfer Verfahren”/“Düsseldorf Proceedings”*)
- **In camera assessment** of (potentially) confidential documents
 - o Provided for e.g. in Sec. 99(2) German Code of Administrative Procedure, Sec. 138(2) German Telecommunications Act

General legal framework regarding limited disclosure – Germany

- In camera assessment

- German Constitutional Court:
 - Admissible in principle despite Art. 103 German Constitution; legislative basis desirable but apparently not strictly necessary, except where the law specifically limits in camera to part of proceedings (Sec. 99(2) German Code of Administrative Procedure, Sec. 138(2) German Telecommunications Act).
 - Balancing of involved interests which protects confidentiality interest only if material/“existential” would establish too high and vague a threshold. Skeptical regarding “expert eyes only” mechanism as court needs to see the evidence.
 - Dissenting vote *Gaier*: Limitation of in camera option to interim/interlocutory proceedings (*Zwischenverfahren*; Sec. 99(2) German Code of Administrative Procedure) to be set aside as unconstitutional. In camera can be extended to main proceedings (*Hauptsacheverfahren*).

BVerfGE 115, 205; NVwZ 2006, 1041

CONFIDENTIALITY CHALLENGES – REFLECTIONS



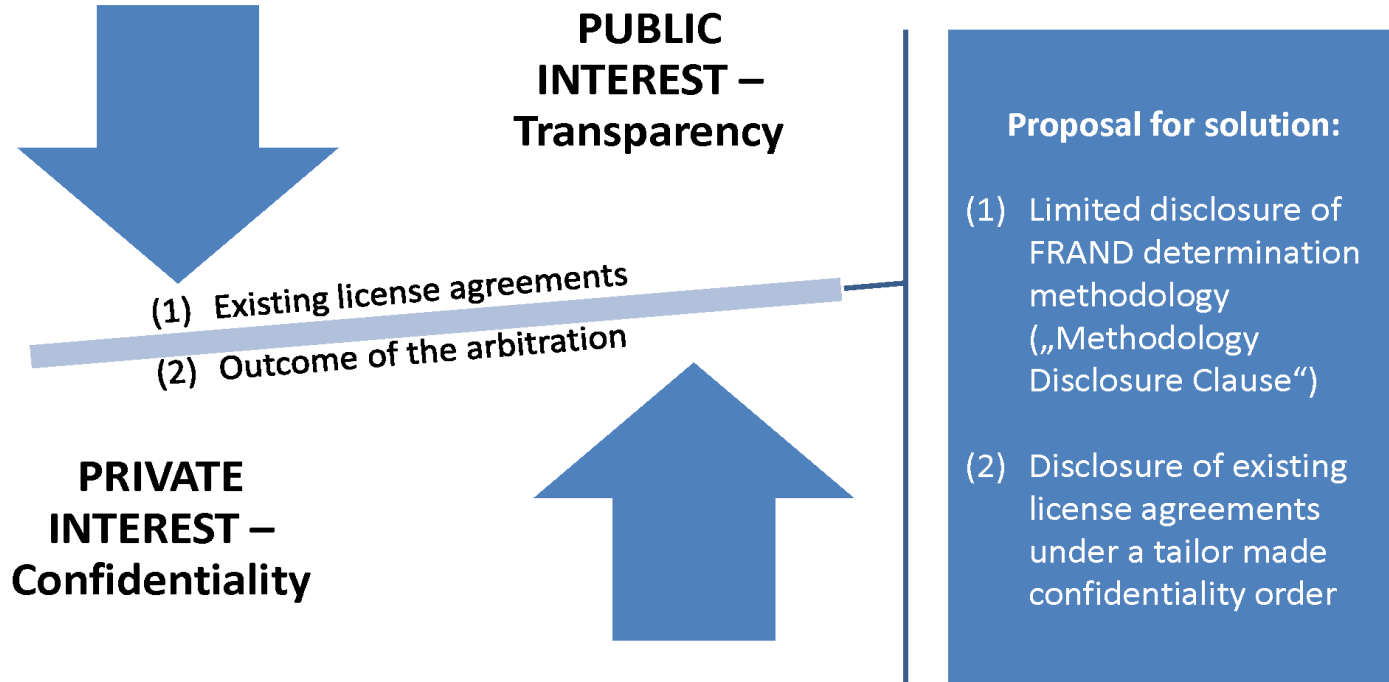
General legal framework regarding limited disclosure – Germany

- **In camera assessment**
 - o Legislator: No explicit and specific in camera provisions in the course of implementation of Enforcement and Know-how Directives. Debated whether provisions on the protection of confidential information implementing the Enforcement Directive encompass in camera or similar mechanisms
 - o Favored and considered admissible de lege lata by substantial part of literature
 - o Cf. further Art. 9 Trade Secrets Directive, Art. 58 UPC Agreement
- **“Black box”/“expert eyes only”** proceedings: admissibility doubted



Confidentiality challenges in ADR

Issue 3: Transparency vs. Confidentiality



**Thank you for
your attention!**



Presented by
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