



ARMENGAUD GUERLAIN  
INTELLECTUAL PROPERTY  
SPECIALIST LAWYERS

**Competition in telecoms**  
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**Introduction: General issues of EU law**

**1. Patent Pools and Article 101 of the TFEU**

- Not covered by the exemption of Reg. (EU) No 316/2014  
*Assessment of formation and operation of pools:*  
Safe Harbour:
  - Open pool
  - Essential technologies
  - Restriction on the exchange of sensitive information
  - Licenses on a FRAND and non-exclusive basis
  - Parties of the pools and licensees are free to challenge the validity and essentiality of the patents and to develop competing products

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## **Introduction: General issues of EU law**

### **1. Patent Pools and Article 101 of the TFEU**

Outside of the Safe Harbour:

- Non-essential technologies:
  - Pro-competitive reasons
  - Freedom to license independently
  - Separate packages

## **Introduction: General issues of EU law**

### **1. Patent Pools and Article 101 of the TFEU**

*Assessment of individual restraints in agreements between the pools and its licensees:*

- Market position of the pool
- No limitation to the creation of alternative pools or standards
- No limitation to license outside of the pool
- Non-challenging / termination clauses

## Introduction: General issues of EU law

### 2. Standardisation and Article 101 of the TFEU

*Main issues when setting the standard:*

- Unrestricted participation: open to competitors
- Transparency
- FRAND terms
- Clear and balanced IP policy: good-faith disclosure of IPR

## Introduction: General issues of EU law

### 2. Standardisation and Article 101 of the TFEU

*FRAND calculation:*

- Comparison ex ante / ex post
- Same IPR in other standards

## Introduction: General issues of EU law

### 3. Article 102 of the TFEU

Huawei vs ZTE (C-170/13):

- No abuse of dominant position if the owner of a SEP seeks an injunction or a recall of products as long as:
  - Prior to bringing the action the SEP owner has alerted the alleged infringer by designating the SEP and specifying the way it has been infringed; after the alleged infringer has expressed its willingness, provided a written offer on FRAND terms specifying the royalties and the way they are calculated
  - No diligent response from the alleged infringer (in accordance with commercial practice in the field and in good faith)

## Introduction: General issues of EU law

### 3. Article 102 of the TFEU

Huawei vs ZTE (C-170/13):

- If the negotiations fail, possibility to ask for the determination of FRAND rate by a third party; the alleged infringer can still challenge the validity or essentiality of the patent during the negotiations
- No abuse of a dominant position if the owner of a SEP seeks the rendering of account in relation to past acts of use or an award of damages for those acts of use

## France

Core vs LGE (Paris Court of First Instance – 17 April 2015)

Five asserted patents

The Court decided that none of the patents were essential to the standards

Therefore, no need to determine a FRAND rate

Two years of negotiation between the parties: enough to conclude that none of them acted in bad faith

## France

Core vs LGE (Paris Court of First Instance – 17 April 2015)

No abuse of a dominant position:

*“The mere fact of bringing a legal action in order to obtain the payment of royalties through legal proceedings – as no amicable settlement could be reached – does not constitute an abuse of a dominant position in the absence of any other circumstance showing a clear intent to deprive the company LG from using the patents in return for the payment of honest and proportionate royalties”*

## France

### Core vs LGE (Paris Court of Appeal – 17 January 2017)

LGE sought the disclosure of agreements between Core and the previous owners of the patents and between Nokia and Qualcomm as well as all the attachments

LGE aimed to:

- Check if Core was the owner of all asserted patents
- Establish an exhaustion of rights
- Determine whether the patents were pledged in order to assess the FRAND rate

## France

### Core vs LGE (Paris Court of Appeal – 17 January 2017)

Court dismissed LGE:

- The agreements already disclosed were sufficient to establish that Core was the owner of the asserted patents – No hints showing otherwise
- The burden of proof of the exhaustion of rights relied on LGE – The sole press release regarding the contract between Nokia and Qualcomm was not sufficient: no information on the scope and the territorial extent

## France

### Core vs LGE (Paris Court of Appeal – 17 January 2017)

Court dismissed LGE:

- Too early to ask for documents determining if the patents were pledged in order to assess the FRAND rate
- Before assessing the FRAND rate, the Court had to determine if the patents were essential
- In any case, the confidentiality should be safeguarded – only the necessary information could be disclosed

## France

### VRINGO vs ZTE (Paris Court of First Instance – 30 October 2015)

Two asserted patents

One was found non-inventive

One was non-essential