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**Huawei v. ZTE - FRAND defense in patent infringement action:**

**here: opinion of the Advocate General of the European Court of Justice of November 20, 2014**

We would like to refer you to the Advocate General's opinion dated November 20, 2014 in the case Huawei v. ZTE (C-170/13) before the European Court of Justice (ECJ) which deals with certain questions regarding the so called FRAND defense in patent infringement actions concerning standard essential patents (SEPs).

The questions referred by the Landgericht Dusseldorf (District Court Dusseldorf) in April 2013 may be found under the following link:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=139489&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=528395>

By demanding that the SEP holder needs to make the first move before being able to seek an injunction, the Advocate General takes a tougher stance on the owner of a standard essential patent (SEP) than, for example, the German Bundesgerichtshof (Federal Supreme Court) did in its 2009 Orange Book decision and thus raises the bar for injunctive relief in SEP infringement cases. In particular the Advocate General states that

*".. the SEP holder must, before making a request for corrective measures or seeking an injunction, alert the offending company to the infringement at issue in writing, giving reasons and specifying the SEP concerned and the way in which it has been infringed by that company, unless it has been established that the allegedly offending company is fully aware of the infringement. The SEP holder must, in any event, present the allegedly offending company with a written offer of a licence on FRAND terms and that offer must contain all the terms normally included in a licence in the sector in question, including the precise amount of the royalty and the way in which that amount is calculated."*

The full English text of the opinion may be found under the following link:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=159827&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=439748>

A press release summarizing the opinion is attached for your convenience and may in addition be found under:

<http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-11/cp140155en.pdf>

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Please note that the Attorney General's opinion is not binding upon the ECJ which, however, follows said opinion in most cases.

We will update you about further developments and are happy to answer your questions.

You may contact Josef Schmidt or Rainer Viktor acting as the collaborating Patent Attorneys of Vossius & Partner for ZTE Corporation in the infringement action before the District Court Dusseldorf.

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