

Unwired Planet v Huawei

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Key findings

The ETSI undertaking is directly enforceable by implementers as a matter of French contract law

There is a single FRAND licence between a willing licensee and a willing licensor, which is likely to be global in scope

In setting a FRAND rate: (i) comparables; and (ii) a “top down” approach can be used

There is no ‘hard-edged’ non-discrimination element to FRAND

Seeking an injunction having failed to follow the *Huawei v ZTE* steps will not necessarily be an abuse under Article 102 TFEU

Offers made during the course of negotiation need not be FRAND





Background

Unwired Planet acquired approximately 2,100 patents (SEPs and implementation patents) from Ericsson in January 2013

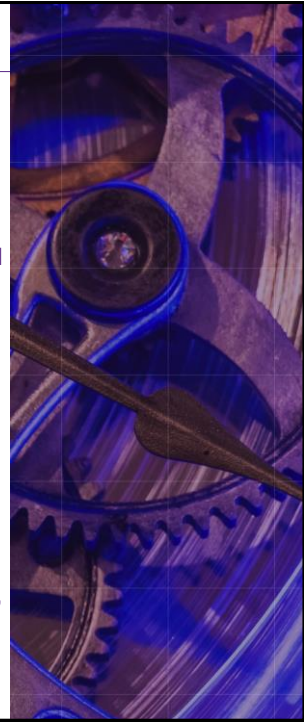
Revenue sharing and 'royalty floor' clauses in the MSA

Little initial licensing success

Deal with Lenovo in March 2014:

- patent sale and licensing agreement
- \$100 million lump sum payment

Started proceedings in UK and Germany against Samsung, Huawei and Google (and HTC / LG) in March 2014



Background

Defences / counterclaims including allegations that:

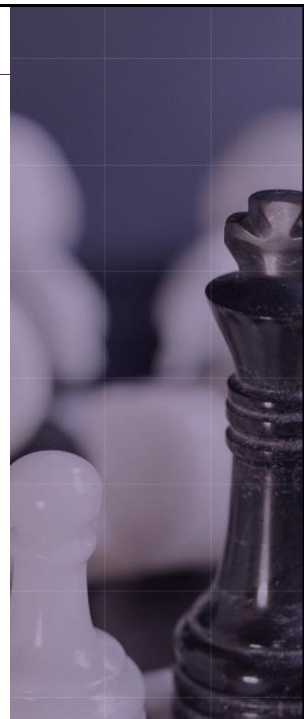
- the MSA was void for breaches of Article 101 TFEU; and
- Unwired Planet's conduct amounted to an abuse of dominance under Article 102 TFEU

Proceedings split into 5 technical and 1 non-technical trial

Two SEPs found valid and essential

Acquisition of Unwired Planet by PanOptis

Settlement with Samsung, and of all Article 101 TFEU issues involving Ericsson





The ETSI undertaking

As a matter of French law:

- the making of an ETSI declaration gives rise to a contract between ETSI and the declarant;
- such a contract will exist even where the declarant is not a member of ETSI; and
- the contract can be relied upon by third party implementers (i.e. the doctrine of *stipulation pour autrui* applies).

As such, FRAND can be enforced without recourse to competition law



One FRAND to rule them all

Between any two parties there is a single FRAND licence

This means:

- the *Vringo* problem does not exist;
- practically speaking the FRAND licence is likely to be global; and
- the English court can (and will) determine the terms of that licence.

Once a licence is agreed in the course of commercial negotiations the FRAND obligation is extinguished





FRAND rate methodology

Top down approach (patent counting)

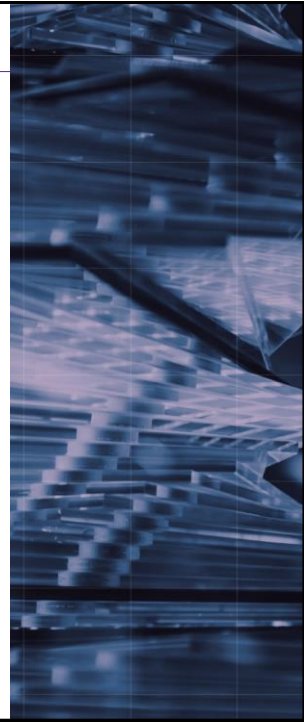
Over-declaration - identify relevant SEPs

Two competing methodologies:

- Unwired Planet's modified numeric proportionality approach
- Huawei's patent analysis

Neither wholly accepted by court

Outcome used to scale from Ericsson benchmark rate and as a cross-check of the comparables analysis



FRAND rate methodology

Comparables approach used to derive Ericsson benchmark rate - extensive disclosure, confidentiality rings

Unpacking issues:

- lump sums;
- cross-licences; and
- related party transactions.

None of: (i) Unwired Planet / Samsung; (ii) Unwired Planet / Lenovo; or (iii) Ericsson / Huawei perceived to be good comparables





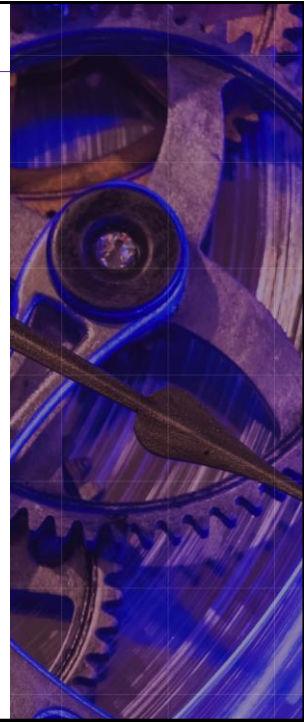
FRAND in numbers

Benchmark rates:

	4G	3G	2G
Ericsson	0.80%	0.67%	0.67%
Unwired Planet <i>(multimode (MM) handsets)</i>	0.062%	0.032%	0.064%
Unwired Planet <i>(infrastructure)</i>	0.072%	0.016%	0.064%

Portfolio strength ratio Unwired Planet to Ericsson: **7.69%**

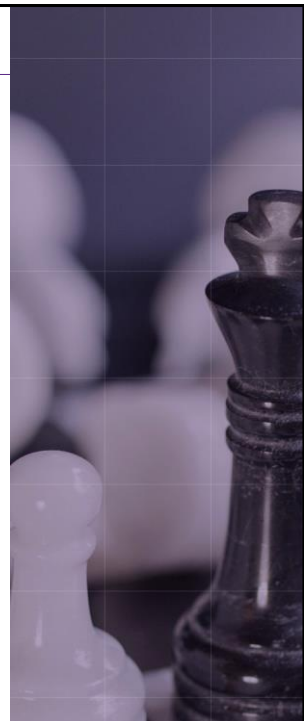
Aggregate royalty burden as cross-check: **8.8%** for 4G MM



FRAND in numbers

Licence rates payable:

	MM	China / OM
<i>Handsets</i>		
2G	0.064%	0.016%
2G / 3G	0.032%	0.016%
2G / 3G / 4G	0.052%	0.026%
<i>Infrastructure</i>		
2G	0.064%	0.032%
3G	0.016%	0.004%
4G	0.051%	0.026%





'Hard-edged' ND

In the context of the 2016 Unwired Planet / Samsung licence

A benchmarking approach to FRAND is non-discriminatory

FRAND does not impose a 'hard-edged' non-discrimination obligation

Price discrimination is permitted

If a 'hard-edged' ND obligation did exist, it would only have an effect if there was a distortion of competition as a result of the discrimination



Huawei v ZTE

Unwired Planet started proceedings in March 2014 before an NDA had been agreed

No offer was made to Huawei until April 2014

However, injunctive relief was not precluded because:

- *Huawei v ZTE* defines a clear safe harbour
- falling outside the safe harbour will not automatically be abusive - it will depend on the circumstances
- Huawei had 'notice', even if no concrete offer

FRAND is enforceable irrespective of Article 102 TFEU





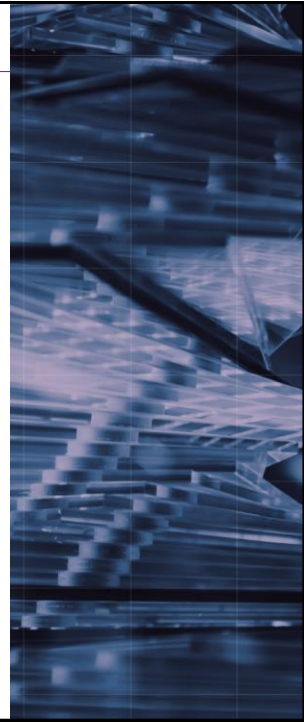
FRAND negotiation

Both parties need to follow a FRAND approach

However, offers made during negotiation do not need to be FRAND:

- the rate offered can exceed (or underestimate) FRAND by some margin as long as the negotiation is not disrupted or prejudiced

Making extreme offers / taking an intransigent approach may not be FRAND



Questions?

