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The Competition Law Firm

Competition Law and SEP: Testing the Limits of Extra-Territorial Enforcement

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AGENDA

- Antitrust enforcement and SEP licensing disputes in a global context:
  - Challenges
  - Potential solutions
- Enforcement of SEPs in a global context:
  - Challenges
  - The *Unwired Planet v. Huawei* E&W High Court judgment (2017)
    - Background
    - The FRAND remedy
    - Criticism
- Conclusions

ANTITRUST ENFORCEMENT IN A GLOBAL CONTEXT

- Today, over 100 nations have developed competition law regimes and created enforcement authorities.
- This has led to a process of "decentralized globalization": antitrust is today a global phenomenon, not through the adoption of supranational rules, such as in areas pertaining to environmental protection, labor rights, or human rights, but through the adoption of national rules often varying in scope, objectives, methods, and enforcement methodology.
- While the globalization of antitrust has major benefits, it also increases:
  - the cost of doing business and the complexity of large-scale antitrust investigations, which now often have a multi-jurisdictional component;
  - the risk of contradictory decisions where a firm's behavior is reviewed by different antitrust authorities under different sets of rules; and
  - the likelihood that some decisions will be guided by protectionist motives.
- In addition, when multiple regimes apply to a given conduct, the strictest regime prevails. This may lead to over-enforcement.

GLOBAL ANTITRUST ENFORCEMENT AND SEP LICENSING: THE CHALLENGES

- Global antitrust enforcement can also be witnessed in the SEP licensing field. For instance,
  - Qualcomm has been investigated in several jurisdictions, including the EU, the US, Korea and China.
- The fact that SEP holders are investigated in different jurisdictions is not entirely surprising since their activities are global in scope.
- Many such investigations are focusing on unilateral conduct /abuse of dominance given that SEP holders typically have market power in the markets for the licensing of their SEPs.
- The challenge with unilateral conduct / abuse of dominance investigations is that it this is the area of competition law where jurisdictions may considerably differ in their assessment. This is likely to lead to different outcomes with the strictest regimes ruling.
- The problem is compounded by the fact that remedies will often have extra-territorial features.
- Moreover, antitrust authorities have different policy views regarding the role of competition law in SEP licensing disputes. DAAG Delrahim is not aligned with his EU counterpart on this issue.
- There is thus little harmony on the global stage as to how issues arising out of SEP licensing should be dealt with.

GLOBAL ANTITRUST ENFORCEMENT AND SEP LICENSING: POTENTIAL SOLUTIONS ?

- Greater antitrust convergence across jurisdictions is always desirable, but there are reasons to believe that it will be hard to achieve with respect to SEP licensing in the future for the following reasons:
  - First, there is little harmony in the way unilateral conduct is dealt with across jurisdictions, although a growing number of nations tend to follow the EU approach to the assessment of such conduct.
  - Second, while some of these differences may be a matter of competition policy, others are more structural in nature. For instance,
    - Article 102 TFEU and Section 2 of the Sherman do not have the same scope (e.g., exploitation is not a concern under US antitrust law).
    - Even an more "interventionist" DoJ or FTC would be limited in its action by U.S. federal courts, which have increasingly restricted the scope of antitrust over the years.
- Some degree of convergence may, however, develop on issues that may or may not be antitrust-related:
  - Growing recognition that a balance between the interests of SEP holders and SEP implementers is needed.
  - Growing recognition that injunctions should not be excluded, but limited to certain circumstances
  - Growing agreement on the type of methodologies that make sense to calculate FRAND royalties.
  - Etc.

JUDICIAL ENFORCEMENT OF SEPs IN A GLOBAL CONTEXT

- As in the case of antitrust, a growing number of jurisdictions have developed proper IP law regimes.
- IP enforcement is pursued on a national basis because IP rights are territorial in nature.
- This means that in the case of major IP licensing disputes, the SEP holder will sue in several jurisdictions.
  - For instance, during their patent war, Apple and Samsung sued each other in the U.S., Korea, Japan, Australia, France, Germany, Italy and the Netherlands.
- This may lead to different outcomes on both the technical level, but also the FRAND analysis.
- These problems are somewhat manageable as long as the courts remedies are limited to their jurisdictions.
- A Dutch court may, for instance, grant an injunction to the SEP holder that the implementer can escape by taking a license at FRAND terms for the Dutch SEPs.
  - But what happens if Dutch court threatens the implementer with an injunction unless it takes a global license at terms that are determined (for the entire world) by that court?
  - This is the situation that has arisen in the *Unwired Planet v. Huawei* case.

UNWIRED PLANET v. HUAWEI: BACKGROUND

- Unwired Planet has a worldwide patent portfolio which includes patents which are declared essential to various telecommunications standards (2G, 3G, and 4G LTE).
- Unwired Planet is a NPE: Most of its portfolio was acquired from Ericsson. Unwired Planet's business is licensing those patents to companies who make and sell telecommunications equipment such as mobile phones and infrastructure.
- Action filed in E&W High Court when Unwired Planet sued Huawei, Samsung and Google for infringement of six UK patents from their portfolio. Five were claimed to be SEPs. Unwired Planet contended their patents were infringed and (so far as relevant) essential.
- Google and Samsung eventually settled with Unwired Planet. Huawei decided to litigate.
- Unwired Planet also sued in other jurisdictions (notably Germany and China), but the E&W case progressed faster with a judgment adopted by Birss J. in April 2017.
- This judgment is currently under appeal.

UNWIRED PLANET v. HUAWEI: FRAND REMEDY (1)

- Although Justice Birss found that Huawei had infringed only two UK patents, he nevertheless:
  - ordered that unless Huawei enter into a worldwide license it would be injuncted in the United Kingdom under the two patents found to be infringed; and also
  - set the rates at which this license should be granted not only for Huawei's sales in the UK, but also for Huawei's sales outside of the United Kingdom.

	Major Markets		China and Other Markets	
	Handsets	Infrastructure	Handsets	Infrastructure
2G/GSM	0.064%	0.064%	0.016%	0.032%
3G/UMTS	0.032%	0.016%	0.016%	0.004%
4G/LTE	0.052%	0.051%	0.026%	0.026%

UNWIRED PLANET v. HUAWEI: FRAND REMEDY (2)

- Justice Birss justified this outcome based on the following propositions:
  - Worldwide portfolio SEP licenses are very common in the industry.
  - While Unwired Planet has many fewer patents in general than that of the biggest players like Huawei, Samsung and Ericsson, its patent portfolio is large enough that it would be impractical to fight over every patent.
  - Country-by-country licensing is inefficient as it requires to negotiate and agree so many different licences and then to keep track of so many different royalty calculations and payments. No rational business would do this if it could be avoided.
  - A FRAND licence should not prevent a licensee from challenging validity or essentiality of licensed patents and should have provisions dealing with sales in non-patent countries.
    - Thus, for instance, if the German courts (where Unwired Planet and Huawei are also litigating) decide all the relevant patents are invalid (or not essential), that would simply result in whatever consequences the worldwide licence provided for.

UNWIRED PLANET v. HUAWEI: CRITICISM (1)

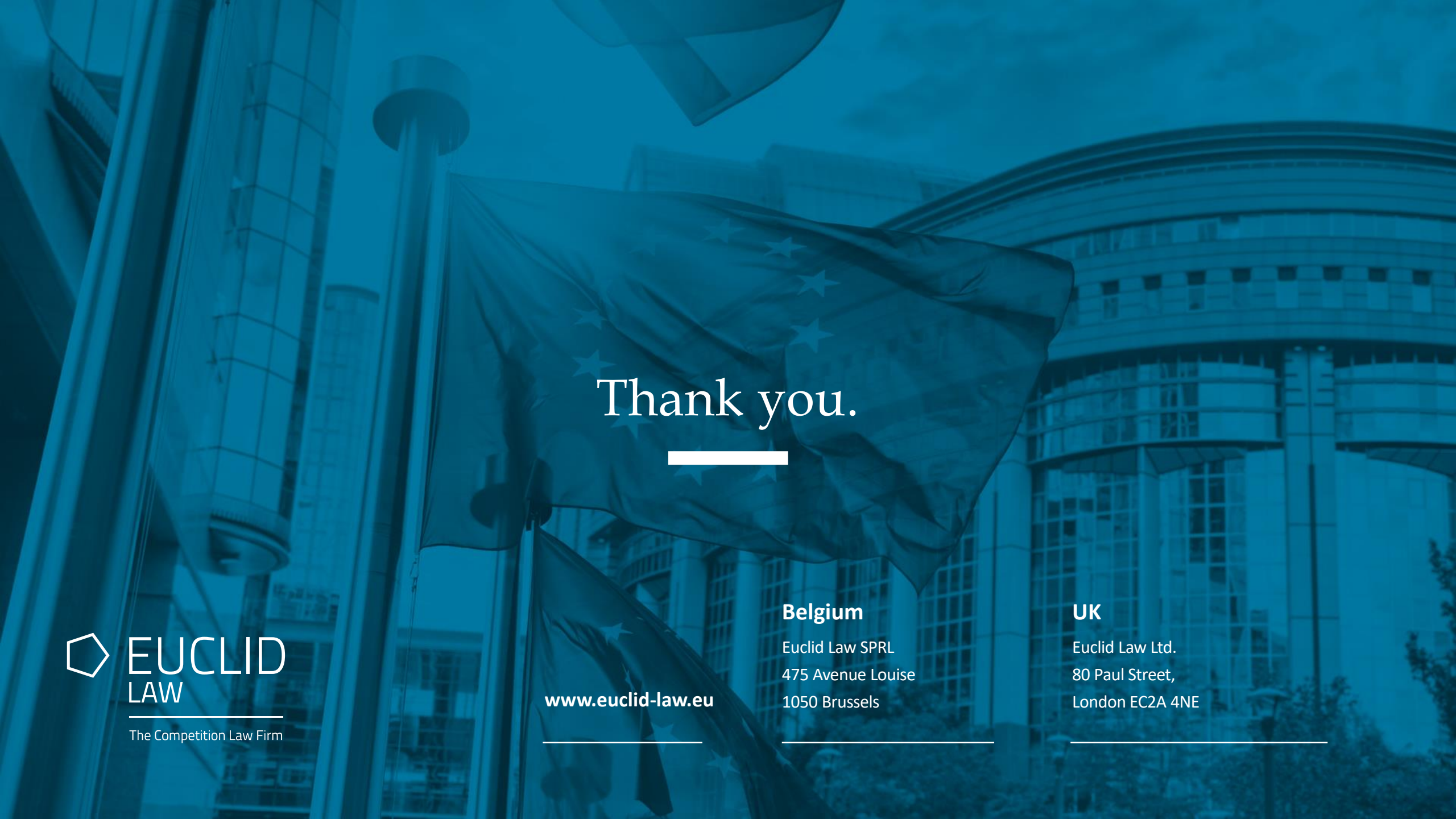
- Justice Birss' approach that a national licence was not FRAND loses sight of the territorial nature of patent proceedings.
  - Whether an SEP holder is entitled to require an implementer to take a licence of its foreign patents and pay worldwide royalties depends on whether those foreign patents are valid, essential and infringed. The validity, essentiality and infringement of such patents can only be determined by the relevant foreign courts, not be the UK court.
  - It is hard to understand why a court which finds that a standard-compliant product breaches two UK patents, should order an injunction against the manufacturer of that product unless it enters into a worldwide license, despite the fact that the manufacturer agrees to pay the court-set royalty rate for standard-compliant products sold in the UK.
- Justice Birss' view that "country-by-country" litigation would be inefficient fails to have regard to both commercial and legal realities.
  - No-one is suggesting that patentees would need to litigate in each and every jurisdiction. There are usually only a few jurisdictions that really matter in any given dispute. In the *Unwired Planet v. Huawei* dispute, the jurisdiction of central commercial importance is China as this is where a large part of Huawei's sales are made.

UNWIRED PLANET v. HUAWEI: CRITICISM (2)

- While a FRAND licence should not prevent a licensee from challenging validity or essentiality of licensed patents, it would be unfair to ask implementers to challenge the validity and essentiality of licensed SEPs in each and every country. This would also be inefficient.
- Encouraging national patent courts, which have jurisdiction on the basis of questions concerning the validity and infringement of domestic patents, to grant injunctions unless standard implementers take worldwide licenses may create:
  - significant issues of "forum shopping".
  - issues of "comity" when patent infringement and validity proceedings have been launched in several jurisdictions.
- The UK High Court's approach (that a national licence was not FRAND):
  - Is not in line with the approach taken in other jurisdictions, including China, Japan and the U.S.
  - Seems in tension with the European Commission's 2014 *Motorola* decision where the Commission also endorsed an SEP licence covering the territory of Germany as being FRAND. The Commission held that the legitimate objective of an injunction in Germany was *"to obtain appropriate remuneration for Apple's use of its telecommunication SEPs in Germany"*, which objective was fully met by a licence which *"covered all Apple products infringing the licensed SEPs in Germany."*

CONCLUSIONS

- While SEP holders and implementers usually operate on a global scale, enforcement of antitrust and IP laws is still an intensely national process.
- This has several disadvantages:
  - It increases costs for both claimants and defendants, and creates the risk of conflicting decisions.
  - It encourages “forum shopping”.
- There is little prospect to see the creation of global antitrust or IP regimes, but greater efforts should be made to ensure convergence:
  - The development of SEP licensing guidelines by the European Commission, the JPO, etc. is a positive step, especially since these policy documents seem to adopt a balanced approach between the interests of SDEP holders and SEP implemementers.
  - SSOs, which are international in scope, may also facilitate convergence and adopt measures that can reduce the risks of SEP licensing disputes.
  - ADR mechanisms, such as international arbitration, can also avoid the need for multiple, overlapping actions in different jurisdictions.



Thank you.

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