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Huawei v ZTE – Judicial Conservatism at the Antitrust and IP Intersection

Professor Nicolas Petit, University of Liege, @CompetitionProf
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Huawei v ZTE in legal context

Case

- ▶ Case C-170/13, Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH
- ▶ Preliminary ruling procedure
- ▶ Is it an abuse of dominance for holders of FRAND pledged SEPS to apply for injunction or product recall against unlicensed implementers of their technology?

Law

- ▶ Article 102 TFEU (more or less equivalent to Section 2 Sherman Act)
- ▶ Abuse of dominance
- ▶ CJEU
 - ▶ « SCOTEU »
 - ▶ On issues of law, not facts
 - ▶ Court distant from policy circles

Outline and goals

1. From Existence of Abuse, to Absence of Abuse?
 2. Antitrust liability for Practicing Entities, Immunity for Non Practicing Entities?
 3. Antitrust liability vis a vis Competitors only?
 4. Antitrust Liability for Exclusion of Competitors, not Exploitation?
 5. Patentee (antitrust) or Implementer (IP) Liability for Negotiation Breakdown?
 6. FRAND as a Range, not a Pixel?
- ▶ Very marginal extension of antitrust liability against FRAND-pledged SEPS holders
 - ▶ Conservative reading of Article 102 TFEU
 - ▶ Practical consequences limited for SEPs holders

From Existence of Abuse, to Absence of Abuse?

- ▶ Paragraph 55, the Court talks about how “*the proprietor of an SEP*” can “*prevent an action for a prohibitory injunction or for the recall of products from being regarded as abusive*”
- ▶ Paragraph 71: a SEP holder that complies with specific conduct conditions “*do not abuse its dominant position ... by bringing an action for infringement*”
 - ▶ German question: tell me what is abuse?
 - ▶ EU reply: let me tell you what is **NOT** abuse
 - ▶ Safe harbor for SEPs holder

Liability for Practicing Entities, Immunity for Non Practicing Entities?

- ▶ Paragraph 52: a SEP proprietor “*can prevent products manufactured by competitors from appearing or remaining on the market and thereby reserve to itself the manufacture of the product in question*”
- ▶ Practical implication: Non Practicing Entities (“NPEs”) remain at bay from Article 102 TFEU liability
- ▶ The flawed paragraph 53 argument:
 - ▶ “[...] an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties” such that a “refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU”
 - ▶ Forgets the introduction of the paragraph: “*In those circumstances*”

Antitrust Liability vis a vis Competitors

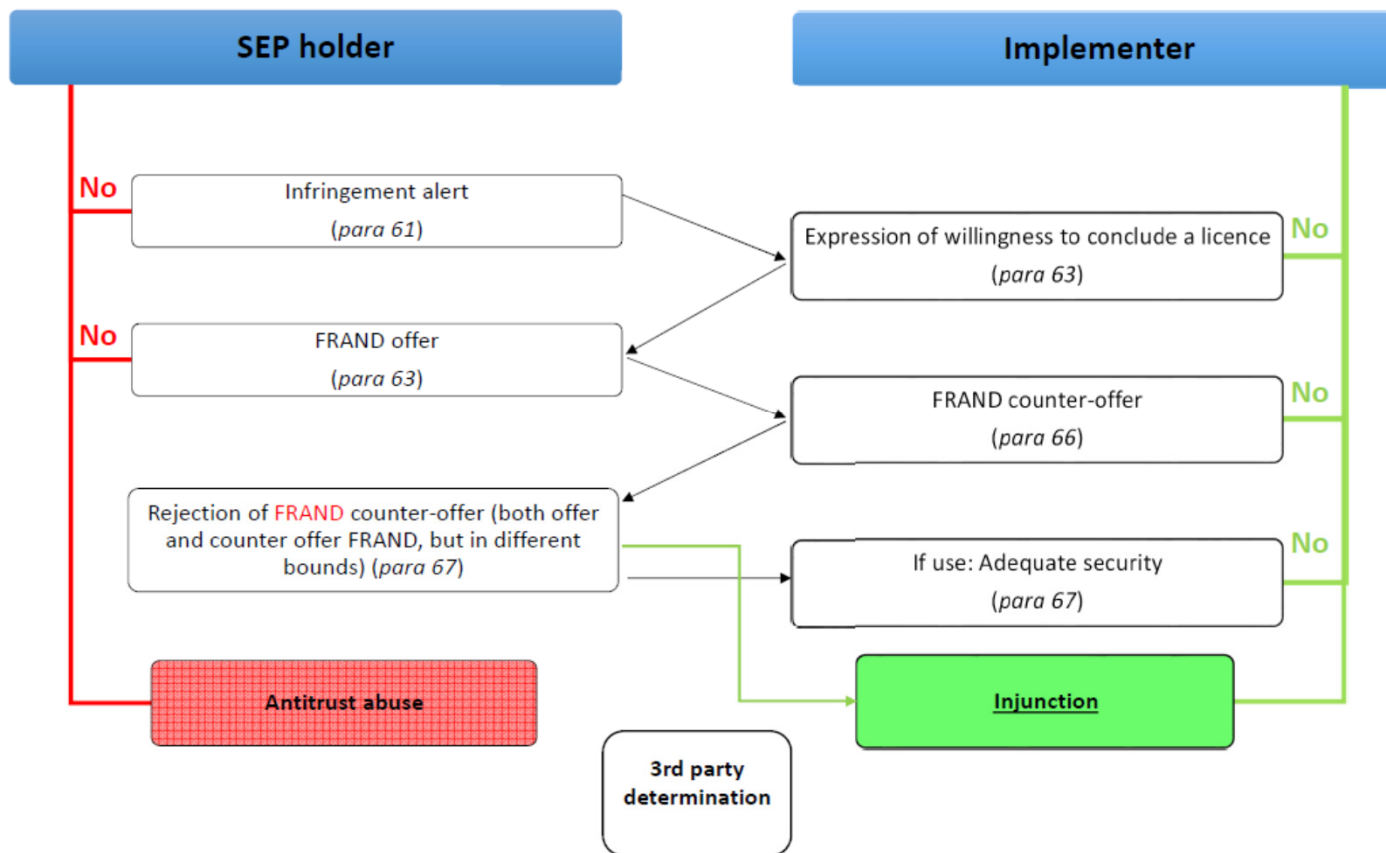
- ▶ Only abusive for a SEP holder to seek an injunction and/or product recall against an implementer with whom it does (or will) compete in a market
- ▶ Network equipment supplier can seek injunction against handset provider?

Antitrust Liability for Exclusion of Competitors, not Exploitation

- ▶ Court is silent on the risk that SEPs owners resort to patent litigation – or threats thereof – to charge extortionate licensing terms
- ▶ Did it miss “*patent hold-up*”?
- ▶ Unlikely
 - ▶ Mentioned in German reference, discussed at hearing
 - ▶ Acknowledged in AG Wathelet’s Opinion under the case

Patentee (antitrust) or Implementer (IP) Liability for Negotiation Breakdown

- ▶ Court uses the threat of antitrust (abuse) and IP (injunction) liability as backstops, to discipline both SEP holder and infringer to converge towards a mutually agreeable FRAND level



FRAND is a Range, not a Pixel

- ▶ FRAND offer and counter offer may not match
- ▶ Upper and lower bound
- ▶ FRAND is not a pixel price

Conclusion

- ▶ Many issues unresolved: dominance, standards competition, countervailing buyer power amongst SEP holders, portfolio licensing, Non-SEPS, *De facto* standards, FRAND pricing, valuation techniques, etc.
- ▶ Abuse of dominance has little space to occupy in FRAND-pledged SEPs disputes
- ▶ Competitor exclusion, basta
- ▶ Little teeth on the conditions at which SEP licenses are granted