



# The changing SEP ecosystem

7th EUROPEAN INTELLECTUAL PROPERTY FORUM

27<sup>th</sup> - 28<sup>th</sup> April 2023, Berlin



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# SEP: Basic concepts around the functioning of SEPs

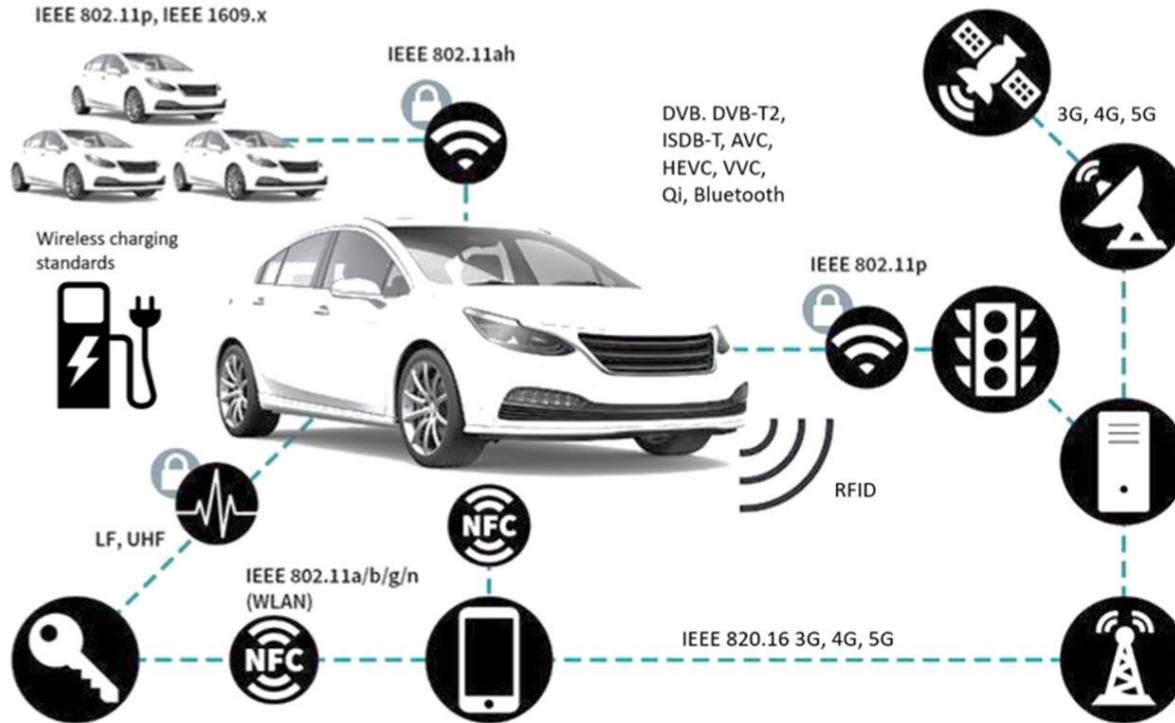
- › Standard Essential Patents (SEPs) are patents that protect standardized subject matter
- › By the process of standardization only one technical solution out of many is selected (usually by a group of horizontal competitors / Art. 101 and 102 AEUV) while all others technical solutions are excluded from competition

Regular Patents		SEP
<ul style="list-style-type: none"><li>› Subject to competition and design-arounds by others</li></ul>	Competition	<ul style="list-style-type: none"><li>› Patented technology mandatory no design-arounds</li></ul>
<ul style="list-style-type: none"><li>› Patent holders decide whether to license third parties and freely negotiate royalties</li></ul>	Rights & Obligations	<ul style="list-style-type: none"><li>› Obligation to license any willing licensee on FRAND conditions</li></ul>

- › The SEP ecosystem must entail a balancing of interests through licensing that is based on fair, reasonable and non-discriminatory terms (FRAND), which was introduced to substitute regular market forces

# Standardization is crucial for the next generation of cars

## Selection of currently implemented standards



# Examples for Standards implemented in modern cars

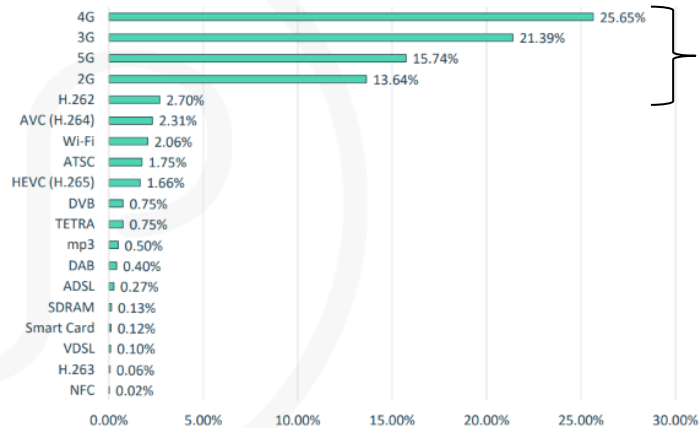
## Fair and unfair licensing environment

Standard	FRAND concept	Origin
AUTOSAR	FRAND zero for members	car industry
PSI5	FRAND zero for all implementers	car industry
CAN Bus	FRAND chip set level licensing	car industry
Bluetooth	FRAND zero for members	ICT industry
IEEE (e.g WiFi)	Change in IPR policy, risk increased	ICT industry
3G/4G/5G	unclear, conflict-prone IPR policy	ICT industry

# Litigation concentrates mainly on cellular connectivity SEPs

- › Under ETSI/3GPP's IPR policy we find the vast **>75% of all SEP litigation worldwide**
- › Under IEEE's IPR policy we find only **2% of all SEP litigation worldwide** despite covering more than 80 standards
- › Commenters have suggested that SDO FRAND policies play a role in this trend.\*
- › Automotive Standards do not lead to court disputes at all

Standards subject to SEP litigation 2001-2021 (world-wide)



>75%

Source: IP Lytics “Webinar: SEP Litigation Trends and Licensing Realities”, 9 March 2021, slide 7, available at: <https://www.iplytics.com/de/webinar/sep-litigation-trends-licensing-realities-webinar-video-recording-slides/>.


\*Michael Carrier and Brian Scarpelli, <https://www.law360.com/articles/1392222/how-standard-setting-orgs-can-curb-patent-litigation>

# A typical SEP from the Automotive SEP litigations: it has such an impact only because it could be part of a standard specification

Their actual value contribution is neglectable

## Patent Claim EP 2 087 629

An apparatus (1, 12, 13) comprising:  
**a processor** configured to schedule data transmissions for transmission within a telecommunications system and schedule re-transmission data independently of the scheduling of data transmissions, characterized in that the retransmission data is transmitted with a shorter transmission interval than the data transmissions; and the **processor is further configured** to cause the data transmissions to be transmitted on a first cycle time while the re-transmission data is transmitted on a second cycle time, **the second cycle time being shorter than the first cycle time.**

- › A method that is executed in the Processor 
- › saving a microscopic amount of electric energy



- › Claiming the value of connectivity of a state-of-the-art upper-class car as base for royalties
- › with a huge battery which can supply electrical energy on a massive scale
- › and thousands of elements of value-adding functionality

!! This is not ground-breaking high tech but a marginal improvement at best.

!! For the automotive and some IoT implementers it is largely worthless.

!! This would never work in the non-essential “IP world” as an easy design-around would be available.

!! The power of this patent *vis-à-vis* the automotive industry arises only and exclusively if and when it becomes a SEP i.e. through a joint decision of (non- automotive) **horizontal competitors** to make this method the standard.



# Abuse of injunctions - *IPB vs. Ford Werke GmbH – EP737*



... leads to German courts “blessing” **worldwide** license rates for **entire patent pools**;

... and German court decisions effectively having **extraterritorial effect**

- › ... although essentiality and validity of any other German IP Bridge patents is **not** reviewed;
- › ... although essentiality and validity of any foreign IP Bridge patents is **not** reviewed;
- › ... although essentiality and validity of any patent from 48 other Avanci pool members is **not** reviewed (not even a single German patent);
- › ... although the value of IPB’s portfolio or entire Avanci pool portfolio is **not** reviewed (“willingness” test)



# IP Bridge vs. HTC and Inter Digital vs. Lenovo

## IP Bridge vs. HTC (*BGH X ZR 123/20*) Jan 2023

EP 737 was **the** Patent that forced OEMs into unFRAND AVANCI License contracts  
According to the ruling of the German FCJ the Patent EP 737 could very well be exhausted (IP B / Qualcomm covenant to sue last)

## InterDigital vs. Lenovo (*UK High Court*) March 2023

“Overall, I was puzzled as to how anyone could reach conclusions effectively as to whether Lenovo was an unwilling licensee without considering the all-important valuation of the offers which were under discussion. In other words, how can a final conclusion be reached until it is possible to review the negotiating history against what is found to be FRAND.”

“Mr Meyer characterised the total discounts said to have been applied in Samsung 2014 at around 85%” or in other words: Big players get discounts up to 85%, SME pays full rate

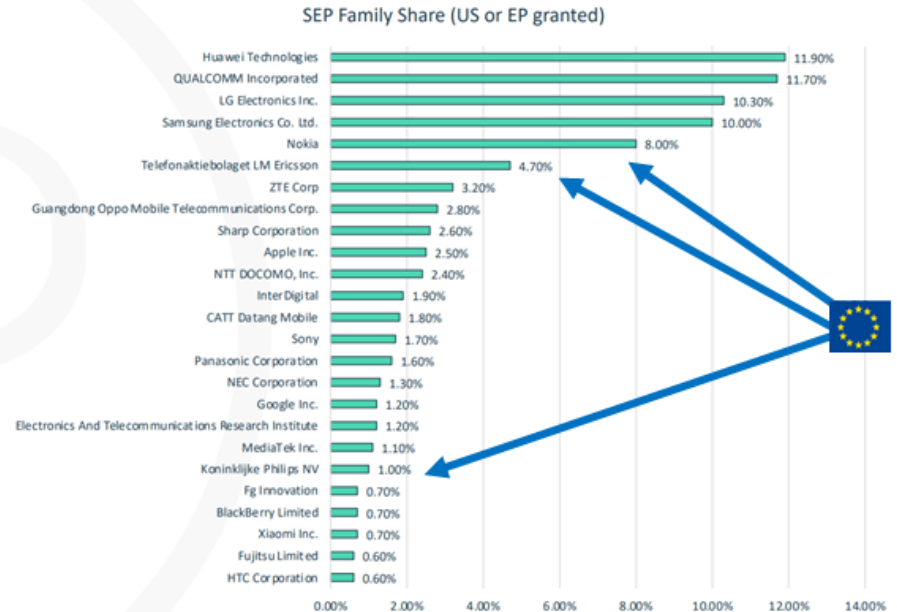
# Cellular SEP Owners are mostly NOT European

## Injunctions support mostly non-EU companies

- › unFRAND SEP licensing weakens European industry
- › 5G and 6G are dominated by Asian and American industry

### Top 25 SEP Family Owner

- The top **10 SEP holders** own **67%** of all SEP families
- The top **20 SEP holders** own **83%** of all SEP families
- The top **25 SEP holders** own **86%** of all SEP families



Source: IP Lytics “Webinar: SEP Litigation Trends and Licensing Realities”, 9 March 2021, slide 7, available at: <https://www.iplytics.com/de/webinar/sep-litigation-trends-licensing-realities-webinar-video-recording-slides/>.

# EC (draft) IMPACT ASSESSMENT REPORT

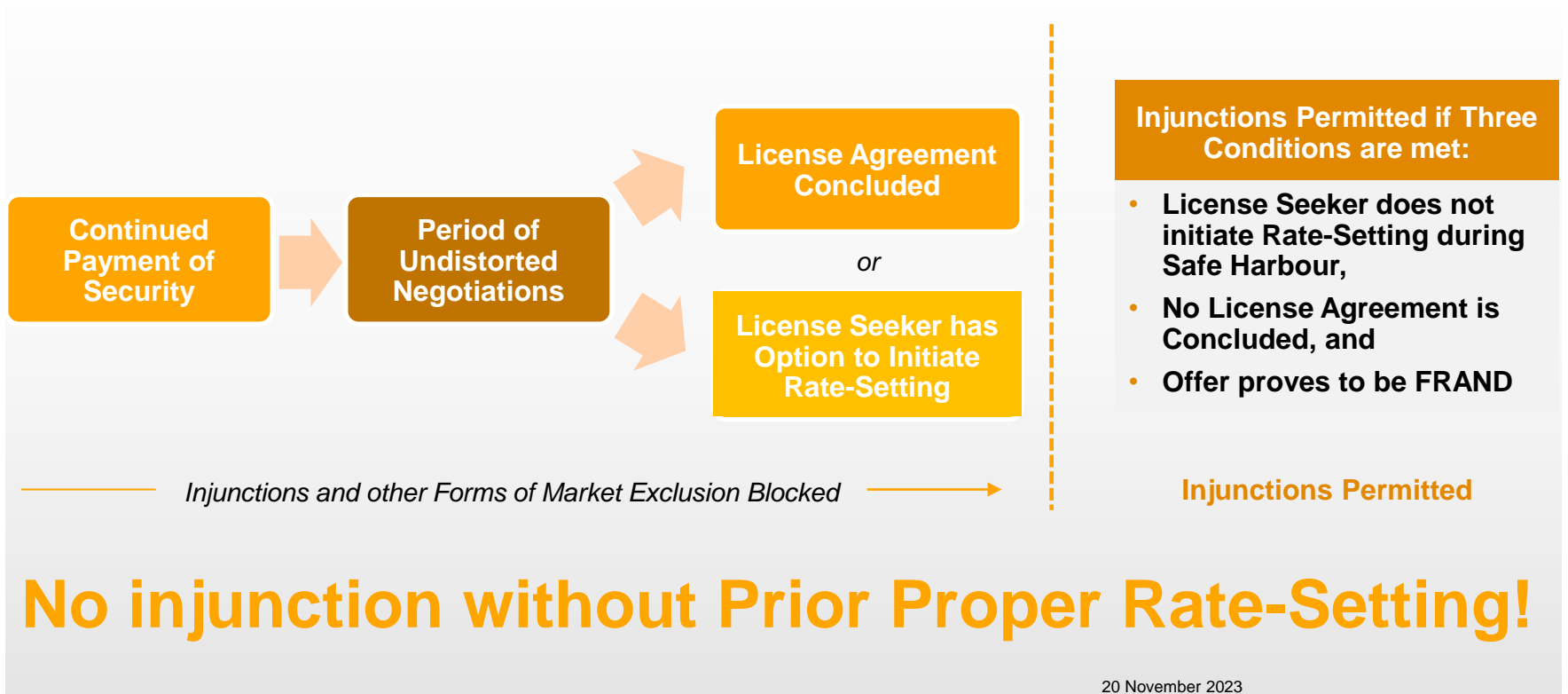
- Start-ups and SMEs lack not only the resources but also the SEP and licensing expertise. Two thirds of SMEs replying to the Commission's targeted survey stated that **there is uncertainty regarding SEPs and that royalty payments affect their competitive position**
- **There is already proof in the automotive industry that because of SEP royalties, European suppliers are no longer able to compete and exit the automotive supplier market.** In a submission to the Commission, the automotive manufacturers' organisation ACEA reported a shortage of supplier offers and a growing dependence on Chinese suppliers

# Proposal for a Fair negotiation safe harbour

- › Create a balanced system of **incentives for both sides** to engage in good faith-negotiations
- › Allow for undistorted negotiations **without injunction-threats** while not allowing delay tactics
- › Avoid misconception that „willingness-test“ will bring about less litigation and will help conclude FRAND-license agreements
- › **No injunction without Prior Proper Rate-Setting!**



# Proposal: Fair negotiation safe harbour



20 November 2023

# EC DG Grow (leaked) draft regulation on standard essential patents / EU SEP competence center

- **Information on SEPs available through the competence center**  
**Registration of claimed SEPs (Art. 22)**, as registrations would be **updated** (Art. 22 (4)), the proposed register would offer **significant advantages over existing registers** that certain SDOs
- **Notification of aggregate royalties for standards (Art. 17 - 19)**, Knowing the aggregate licensing costs for standards will help create **predictability** and thus **plannability** across entire industries implementing standardized technologies and for SEP holders
- **Option for implementers to obtain an expert opinion on aggregate royalties for standards (Art. 20)**

# EC DG Grow (leaked) draft regulation on standard essential patents / EU SEP competence center

- **Initiation of the FRAND determination (Art. 36)**, The FRAND determination mechanism as envisioned by Art. 36 ff. fills an important hole in the current available legal framework in Member State jurisdictions where SEPs are almost exclusively enforced through injunctions, in many cases without any proper determination what terms are really FRAND. **A FRAND determination must be initiated prior to any enforcement (Art. 36 (1) (a)).**
- **Duration of the FRAND determination (Art. 38)**, **nine months** at maximum for the FRAND determination starting from the date of the submission of the response according to Art. 39(2) or from the date of the submission of the request to continue the FRAND determination according to Art. 39(3)

**Thank You**  
for your attention!