

STRIKING THE RIGHT BALANCE

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All views expressed in this speech are those of the author and do not necessarily represent the views of Ericsson

ERICSSON AT A GLANCE



Networks

Highly scalable, modular platforms offering lowest total cost of ownership, best user experience in 4G and leadership in 5G

Digital Services

Digitalize service providers through cloud and automation, providing cost efficient cloud native solutions in Core and OSS/BSS

Managed Services

Long lasting cost efficient performance through smart automation, analytics and business practice

Emerging business

Innovating new sources of revenue for our customers, e.g. in IoT and new partnership based services

45,000

Patents

23,700

R&D Employees

1 BILLION

Subscribers managed by us

55,000

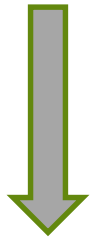
Services professionals

201,3 B. SEK

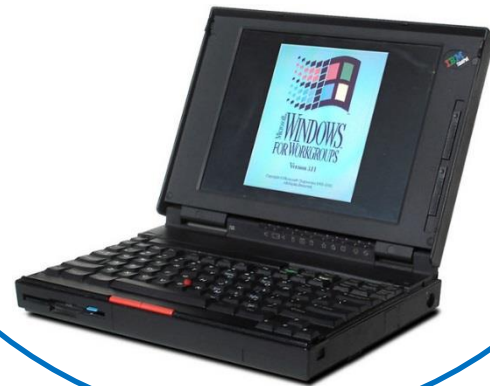
Net Sales

100,735









Employees



market



Mobile communications: from 1G to 4G

Generation	Device	Specifications	Generation	Device	Specifications
<p>1G</p> 		<p>1G</p> <p>Year early 80s</p> <p>Standards AMPS, TACS</p> <p>Technology Analog</p> <p>Bandwidth –</p> <p>Data rates –</p>	<p>3G</p> 		<p>3G</p> <p>Year 2001</p> <p>Standards UMTS / HSPA</p> <p>Technology digital</p> <p>Bandwidth Broad Band</p> <p>Data rates up to 2 Mbit/s</p> <p>SMS / MMS</p> <p>Internet services</p> <p>Video calls</p> <p>Mobile TV</p>
<p>2G</p> 		<p>2G</p> <p>Year 1991</p> <p>Standards GSM, GPRS, EDGE</p> <p>Technology Digital</p> <p>Bandwidth Narrow Band</p> <p>Data rates < 80 - 100 Kbit/s</p> <p>SMS / MMS</p>	<p>4G</p> 		<p>4G</p> <p>Year 2010</p> <p>Standards LTE, LTE Advanced</p> <p>Technology digital</p> <p>Bandwidth Mobile Broad Band</p> <p>Data rates xDSL-like experience</p> <p>1 hr HD movie in 6 minutes</p> <p>SMS / MMS</p> <p>Internet services</p> <p>Video calls</p> <p>Mobile TV</p> <p>Gaming services</p> <p>Cloud computing</p>



DEVELOPMENT OF RADIO ACCESS NETWORK

Work groups attended by all major vendors meet 4-8 times a year

RAN group alone = **1,9 million hours meetings**

To develop 3G and 4G: **262,773 technical submissions. Only 16.7% approved**

Proposals approved based on their **technical merits**

Project Co-ordination Group (PCG)

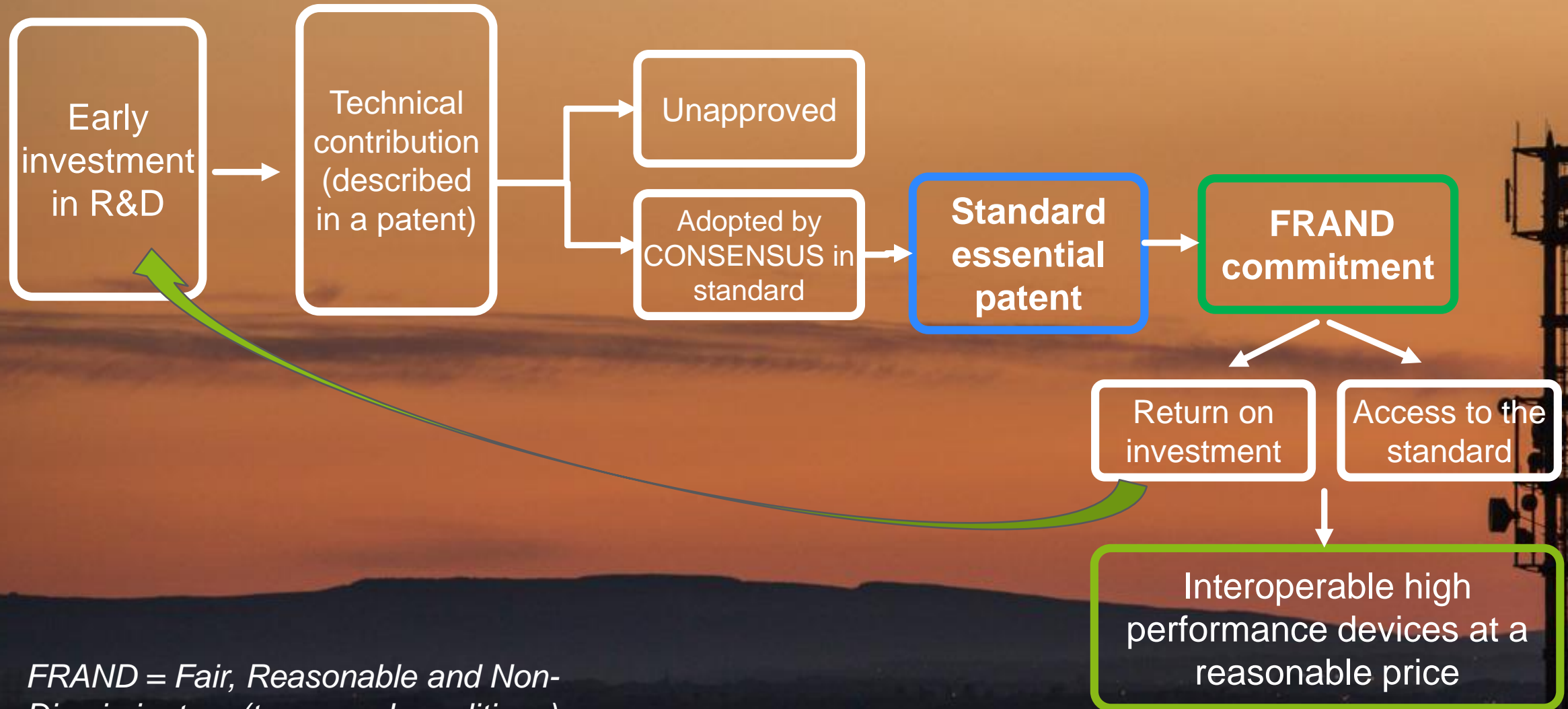
<u>TSG RAN</u> Radio Access Network	<u>TSG SA</u> Service & Systems Aspects	<u>TSG CT</u> Core Network & Terminals
<u>RAN WG1</u> Radio Layer 1 spec	<u>SA WG1</u> Services	<u>CT WG1</u> MM/CC/SM (Iu)
<u>RAN WG2</u> Radio Layer 2 spec Radio Layer 3 RR spec	<u>SA WG2</u> Architecture	<u>CT WG3</u> Interworking with external networks
<u>RAN WG3</u> Iub spec, Iur spec, Iu spec UTRAN O&M requirements	<u>SA WG3</u> Security	<u>CT WG4</u> MAP/GTP/BCH/SS
<u>RAN WG4</u> Radio Performance Protocol aspects	<u>SA WG4</u> Codec	<u>CT WG6</u> Smart Card Application Aspects
<u>RAN WG5</u> Mobile Terminal Conformance Testing	<u>SA WG5</u> Telecom Management	
<u>RAN WG6</u> Legacy RAN radio and protocol	<u>SA WG6</u> Mission-critical applications	

LTE APPROVED CONTRIBUTIONS for 13 WGs (2009 - Q3 2015) –Source: ABI Research



COMPANY	RANK
Ericsson	1
Huawei	2
Nokia Networks	3
Qualcomm	4
ALU	5
ZTE	6
Samsung	7
Anritsu	8
Rohde & Schwarz	9
CATT	10

STANDARDISATION PROCESS



FRAND = Fair, Reasonable and Non-Discriminatory (terms and conditions)



IN FRAND NEGOTIATIONS:

- Collaboration agreements
- Past sales information,
- Sales forecasts,
- Proprietary claim charts,
- Geographic distribution of future sales,
- Non SEPs
- etc

Non-Disclosure Agreement (NDA)



Non Disclosure Agreements (NDAs)

*„to **protect the commercial interests** of both potential licensor and potential licensee during an Essential IPR licensing negotiation“. **“this general practice is not challenged”***

See ETSI Guide on Intellectual Property Rights, September 2013, Section 4.4.

*„“a lot of the prospective **licensees** are hesitant about disclosing their business models, financial details etc. without an **assurance** that such disclosures would **remain confidential** and therefore prefer to have a NDA in place during the negotiation of a FRAND license””*

Telefonaktiebolaget Lm Ericsson v. Lava International Ltd , New Delhi High Court, CS(OS) No.764/2015, 10 June 2016.



What if SEP user refuses to sign an NDA?

- **CHINA:** Refusal while requesting detailed claim charts = Sign of unwillingness
= injunction
Xi'an China IWNcomm Co., Ltd. (IWNcomm) v. Sony Mobile Communications (China) Co. Ltd. (Sony), Beijing Intellectual Property Court (BIPC), 22 March 2017.
- **INDIA:** Refusal while “no step or shown any interest for the purpose of execution of the FRAND Agreement” = injunction
Telefonaktiebolaget Lm Ericsson v iBall, 2. Sept. 2015, New Delhi High Court, CS (OS) No. 2501/2015
- **GERMANY:** “SEP holder’s justified confidentiality interests, for instance by entering into a NDA” but refusal or delay does not nec. mean “unwilling licensee”. However “FRAND offer does not have to be detailed, enough with “merely indicative observations””
Sisvel v ZTE, District Court Düsseldorf, Case No. 4a O 27/16, 13.07.2017
Düsseldorf Appeal Court decision, I-2 U23/17, 18 July 2017



Exceptions to confidentiality

If disclosure is **required by**:

- (i) law,
- (ii) regulation,
- (iii) stock exchange rules,
- (iv) the relevant information has been made available to the **public** by other means than breach of confidentiality undertaking.



Comparable agreements to determine FRAND

- **US:**
 - *Laser Dynamics, Inc. v. Quanta Comp., Inc.*, 694 F.3d 51, 79 (Fed. Cir. 2012).
 - *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217
 - *ActiveVideo Networks, Inc. v. Verizon Comm., Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012).
- **CHINA:** *Xi'an China IWNcomm Co., Ltd. (IWNcomm) v. Sony Mobile Communications (China) Co. Ltd. (Sony)*, Beijing Intellectual Property Court (BIPC), 22 March 2017
- **INDIA:** *Telefonaktiebolaget LM Ericsson v. Mercury Elecs. & Another*, Interim Application No. 3825 of 2013 and Interim Application No. 4694 of 2013 in Civil Suit (Original Side) No. 442 of 2013, 1–4, High Ct. of Delhi (12 November 2014)
- **GERMANY:** *Saint Lawrence v Vodafone*, District Court Düsseldorf, 4a O 73/14, 31 March 2016
- **UK:** *Unwired Planet v Huawei* judgment ([2017] EWHC 2988 (Pat))



Who sees licensing agreements in litigation?

Usually 'confidential-attorneys' eyes only': Experts, external lawyers, court staff

Why?

"The overall agreement may also include aspects which are not patent licenses at all, such as patent sales or technology transfer."

Unwired Planet International Ltd v Huawei Technologies Co Ltd [2017] EWHC 711 (Pat), 5 April 2017



Why defendant or SEP holder not allowed to see licensing agreements of the other side?

To avoid access to *sensitive information* of competitors such as:

- business plans of the parties,
- sales forecast,
- pricing terms,
- purchase commitments,
- collaboration agreements
- technology transfers
- guaranteed minimum payment terms, etc....



What happens when third parties can access licensing contracts?

*“publication of the commercial licensing information in issue (subject to a few exceptions ...) ... would **substantially weaken the position of various companies** mentioned in the judgment, particularly **as licensors but also as licensees**. That interference with the competitive position of the telecommunications market is unwarranted.”*

Unwired Planet International Lt v. Huawei Technologies Co. Ltd Huawei Technologies (UK) Co. Ltd & Anor [2017] EWHC 3083 (Pat)., 30 November 2017

What happens when third parties get access to licensing contracts?



“One well-established exception to the public’s general right of access is preventing public disclosure of commercially sensitive information including, but not limited to, licensing information. *See, e.g., In re Elec. Arts, Inc.*, 298 Fed. App’x 568, 569-70 (9th Cir. 2008) (unpublished) (granting mandamus relief and sealing license agreement); *AMC Tech., L.L.C. v. Cisco Sys.*, No. 11-CV-03403, 2012 U.S. Dist. LEXIS 9934, at *5 (N.D. Cal. Jan. 27, 2012) (granting motion to seal patent licensing terms); *TriQuint Semiconductor v. Avago Techs.*, No. 09-CV-1531, 2011 WL 4947343, at *2-3 (D. Ariz. Oct. 18, 2011) (granting motion to seal *draft* patent licensing terms); *Pecover v. Elec. Arts, Inc.*, No. C 08-2820 CW, 2013 WL 174063, at *1 (N.D. Cal. Jan. 16, 2013) (granting motion to seal where “public disclosure ... would cause it harm by providing its licensors a **commercial advantage** over it in future negotiations and by giving its competitors, other potential licensees, information that they could use to negotiate for better license terms or additional license rights”); *Ovonic Battery Co. v. Sanyo Elec. Co.*, No. 14-cv-01637, 2014 WL 2758756, at *2-3 (N.D. Cal. Jun. 17, 2014) (finding that disclosure of “financial and other terms of licenses” could place the plaintiff “in a **diminished bargaining position** in future negotiations with potential customers and competitors, thereby causing significant harm to [plaintiff’s] competitive standing”).”

Document filed by Apple on 10 May 2016, *TCL Communication Technology Holdings v Telefonaktiebolaget LM Ericsson*, US District Court Central District of California, Case No. 8:14-CV-00341 JVS-DFMx, Case No. 2:15-CV-02370 JVS-DFMx, Document 1159-1

What happens when third parties can access licensing contracts?



“Licensing information, including “pricing terms, royalty rates, and guaranteed minimum payment terms,” is “the precise sort of information” that can cause significant injury if disclosed. Elec. Arts, 298 Fed. App’x at 569. (...) investors and the media will often speculate about its [Apple’s] financial prospects based on tidbits of publicly available information. For example, Apple’s **stock value** declined 3.7% earlier this year amid speculation that Apple’s sales growth would decline based on rumors that Apple had cut demand for parts.

Information that has been publicly disclosed in other litigation has been **used against Apple in licensing negotiations and litigation to its detriment.** (...) **In Apple v. Samsung, the court found that Samsung had used Apple’s confidential licensing information in subsequent licensing negotiations with Nokia and in preparation for an arbitration with Ericsson,** even though in that arbitration, discovery of Apple’s licenses had not been obtained. (Song Decl., Ex. C (Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK, Dkt. No. 2934, at 4-6 (N.D. Cal. Jan. 29, 2014)).)”

Document filed by Apple on 10 May 2016 *TCL Communication Technology Holdings v Telefonaktiebolaget LM Ericsson*, US District Court Central District of California, Case No. 8:14-CV-00341 JVS-DFMx, Case No. 2:15-CV-02370 JVS-DFMx, Document 1159-1

German approach



- Not allowing access to FRAND agreements to defendant = **in breach of** Art. 103 Sec. 1 of the German Constitutional Law
 - Party's right to be heard contains also the **right to personally participate in the proceedings.**
 - Exception if defendant waives its right.
- Court **encouraged** the parties to enter into a NDA reinforced by a contractual penalty, in case confidentiality was breached
 - Confidential information used only in the context of the present litigation.
 - Information available only to 4 company representatives of the Defendant (as well as any experts engaged by the Defendant in the ongoing litigation).
 - These persons shall be themselves obliged to confidentiality by the Defendant.
 - If breach, contractual penalty amounting to EUR 1 million

Court of Appeal Düsseldorf, 14 December 2016 and 17 January 2017, Case No. I-2 U 31/16



German approach

- **Seemingly incompatible** with the vast majority of confidentiality clauses
- **If following German approach:**
 - Commercial advantage of defendant (potentially unwilling licensee) over competitors (willing licensees)
 - Discourage flexibility in FRAND negotiations
 - Makes it more difficult to agree on confidentiality clauses, thus more difficult to agree on FRAND contracts

Court of Appeal Düsseldorf, 14 December 2016 and 17 January 2017, Case No. I-2 U 31/16

Transparency via ETSI licensing terms declarations



List of Ex Ante Disclosures of Licensing Terms

Ex ante disclosures by Company

Ericsson	By clicking on this link you will be redirected to the Ericsson webpage: Disclosure of FRAND licensing terms in relation with the 3GPP's forthcoming 5G/NR Release 15 technology
Qualcomm	By clicking on this link you will be redirected to the Qualcomm webpage: Disclosure of FRAND licensing terms in relation with the 3GPP's forthcoming 5G/NR standards

Implementing 5G/NR until 3GPP Release 15

Unpacking FRAND contracts



- Challenges:
 - The role of floors and caps
 - How clauses in the contract impact the rate
 - Retain v. sales prices
 - Avoid making twice the same discount
 - Apply same criteria for numerator and denominator, etc

- Guidelines from companies?

ACCESS FOR CARS, SMART METERS...



AVANCI

Industry driven



Licensors






- › Predictable and non-discriminatory
- › Fair and reasonable rate
- › Removing barriers

AVANCI Vehicle pricing



VEHICLE PRICING

	eCall only	\$3/vehicle
	3G (includes 2G and eCall)	\$9/vehicle
	4G (includes 2G/3G and eCall)	\$15/vehicle

- The **price** of the Avanci license for a vehicle **will never increase**.
- No matter the number of 2G, 3G and 4G essential patents added to the license
- Regardless of the number of connections included in a vehicle

See www.avanci.com

How to be FRAND?



Summaries of the court cases after CJEU ruling *Huawei v ZTE* at

<https://caselaw.4ipcouncil.com/>

The collage features several articles and news items:

- MP3 - digital audio coding**: "The patent really is a contract with society." Karlheinz Brandenburg, of the celebrated mp3 invention team talks to 4iP Council. Includes a portrait of Karlheinz Brandenburg.
- Impact of perceived high invalidity rates in business and innovation**: A study by the Council's 'Impact' Taskforce, analysing the misconception that many patents are invalid and its impact on businesses and the development of Europe.
- Philips tops the EPO list for second consecutive year**: Philips has just been named the world's largest patent applicant in the European Patent Office (EPO) second year running. The company is also in the EPO's top 10 list for patents granted and ranks first in three leading technology fields: 'Medical apparatus, energy' and 'measurement'.
- Post Huawei Case Search**: A banner for a new search facility from 4iP Council.
- News**: A section with three items:
 - Forthcoming 4iP Council speaker engagements: Milan, Madrid, Budapest and Leuven (17 March 2017)
 - EPO Annual Report: EPO grants record number of European patents in 2016 (07 March 2017)
 - A comparative study of quality across the five largest patent offices estimates that only 2-6 per cent of granted patents have "dubious validity" (06 March 2017)



ANNEX 6: ETSI Intellectual Property Rights Policy

Rules of Procedure, 29 November 2017

4 Disclosure of IPRs

*4.1 Subject to Clause 4.2 below, each MEMBER shall **use its reasonable endeavours**, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, **on a bona fide basis**, draw the attention of ETSI to any of that MEMBER's IPR which **might be ESSENTIAL** if that proposal is adopted.*

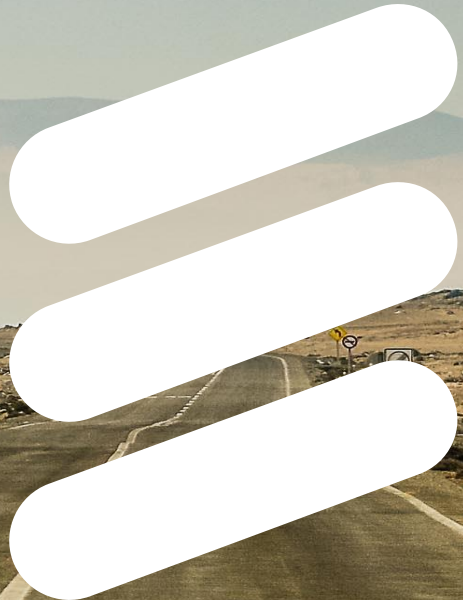
*4.2 The obligations pursuant to Clause 4.1 above do however **not** imply any **obligation** on MEMBERS to conduct **IPR searches**.*

See <http://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>

Independent essentiality analysis



- (1) Who will analyse essentiality?
- (2) How much will it cost?
- (3) Who will pay for it?
- (4) How many hours will the expert/s invest?
- (5) Which skills will they have? (employee/s active in meetings + patent lawyer + technical experts)
- (6) Non-binding assessment
- (7) Liability issues
- (8) Dynamic standardisation
- (9) Etc.



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