UKSC/2025/0058

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL OF ENGLAND AND WALES
(CIVIL DIVISION)
[2025] EWCA Civ 193

BETWEEN:

(1) TESLA, INC.
(2) TESLA MOTORS LIMITED

Appellants/Claimants

— and —

(1) INTERDIGITAL PATENT HOLDINGS, INC.
(2) INTERDIGITAL HOLDINGS, INC.

(3) AVANCI, LLC

Respondents/Defendants

WRITTEN SUBMISSIONS OF THE INTERNATIONAL CENTER FOR LAW & ECONOMICS AS INTERVENER PURSUANT TO SUPREME COURT RULE 24

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1. Statement of Interest

1.1 The International Center for Law & Economics ("**ICLE**") is a non-profit, non-partisan global research and policy center, devoted to building the intellectual foundations for sensible, economically grounded public policy. ICLE promotes the application and use of law and economics methodologies to inform complex judicial and regulatory debates, and possesses longstanding, well-recognised expertise in the evaluation of competition laws and policy, and their relationship with intellectual property rights. The scholars affiliated with ICLE include leading experts in competition law and economics from prominent universities and research institutions across the world.

1.2 The present appeal raises questions of significant public importance concerning the proper interpretation of fair, reasonable, and non-discriminatory ("**FRAND**") obligations, the role of collective licensing platforms in the innovation ecosystem, and the appropriate scope of judicial intervention. In particular, the issue before the Supreme Court is whether "*the courts of England and Wales have jurisdiction to determine disputes as to what licence terms are fair, reasonable and non-discriminatory at the request of an implementor rather than a patent owner, where the licence is offered by an intermediary as part of a pool or platform of patents?*".

2. Executive Summary

2.1 ICLE respectfully submits that the Appellant's attempt to extend FRAND obligations to the collective licensing rates offered by patent pools or platforms is legally unfounded, economically unsound and would generate significant adverse consequences for efficient licensing structures. As these submissions explain:

2.1.1 **Judicial rate-setting for pools or platforms threatens the viability of pro-competitive licensing structures.** Properly structured pools or platforms reduce transaction costs, mitigate royalty stacking, and speed licensed technology diffusion. Imposing FRAND-style obligations on these entities would increase legal uncertainty and undermine the very efficiencies they are designed to deliver, consequently risking chilling their very formation.

2.1.2 **FRAND obligations are strictly bilateral and do not bind patent pools or platforms.** The ETSI undertaking is a bilateral, patent-holder commitment that

applies only to the individual patent owner and its affiliates. It does not extend to non-owner pool administrators, such as Avanci. Consequently, courts may, where necessary, assess FRAND at the level of individual patent owners, but there is no legal basis for imposing FRAND obligations on a pool or platform operator.

2.1.3 **Implementers are not without recourse.** Pools or platforms offer a voluntary, efficiency-enhancing licensing option. Implementers remain fully entitled to seek bilateral FRAND licences from individual patent owners and, if necessary, to litigate against any patentee that fails to offer FRAND terms.

2.1.4 **Market forces discipline pool or platform rates.** Because bilateral FRAND licensing and judicial scrutiny thereof remain available, the pool or platform's collective licensing rate is inherently competitively disciplined. This built-in safeguard negates the need for judicial rate setting at the pool or platform level.

3. Introduction

3.1 The Appellants, Tesla Inc. and Tesla Motors Limited (collectively, "**Tesla**"), urge this Court to extend the contractual obligations incumbent upon individual patent owners to encompass standard licensing rates offered by the Avanci 5G Platform, an intermediary platform over which those individual owners have no direct control.[1]

f.n. 1
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3.2 Tesla contends, in error, that because the platform offers a standard rate and it claims bilateral licensing is impracticable[2], the pool or platform licence is effectively immune from scrutiny absent proactive judicial rate-setting.[3]

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f.n. 3
[3/31]

3.3 ICLE respectfully submits that the Appellants' perspective that patent pool or platform rates should be open to "*scrutiny"* by the Court, at the request of the implementer, fundamentally misapprehends the economic function of patent pools or platforms, the strict contractual privity of FRAND undertakings, and the market mechanisms that inherently discipline collective licensing rates. Exposing pro-competitive aggregation

[1] *See* Tesla's Grounds of Appeal ¶¶8, 17-27 (UKSC/2025/0058); *Tesla, Inc. v. IDAC Holdings, Inc.* [2025] EWCA Civ 193 ("**CA Judgment**"), ¶¶ 9–11, 95(Arnold LJ).
[2] CA Judgment ¶¶2, 95 –"… *Tesla allege that, as a matter of commercial reality, the only licence of UK SEPs covered by the Avanci 5G Platform which can be FRAND is a global platform licence of the kind offered by Avanci as agent for the SEP owners because negotiating bilateral licences with more than 65 SEP owners is impracticable. Tesla also allege that, in reality even if not formally, most members of the Avanci 5G Platform rely upon the availability of a licence under that platform as fulfilling their FRAND obligations*."
[3] *See* Tesla's Written Case ¶¶8, 11.

mechanisms, such as patent pools or platforms, to such potential litigation burdens and extra uncertainty, risks deterring companies from undertaking the creation of these highly beneficial, transaction-cost-reducing business arrangements[4].

3.4 Subjecting pool or platform operators to direct FRAND obligations (which they, themselves, never entered into)—would deter the formation and maintenance of such entities. Owners of standard-essential patents (**"SEPs**") contribute their patents to a collective licensing pool or platform because they consider the expected return to be at least as favourable as the returns available through bilateral licensing, particularly when transaction costs of bilateral licensing are taken into account. Industry experience confirms that the difference is marginal, with many large portfolio holders already preferring bilateral licensing.[5] Imposing the prospect of judicial rate-setting on pool or platform operators would materially influence this marginal difference by introducing the risk that a court, at the initiative of any individual implementer, could set a collective licensing rate, which may result in a lower overall return than could be achieved through bilateral licensing.[6] This, in turn, would create meaningful uncertainty for all parties involved: SEP holders would struggle to calculate the costs and benefits of licensing via pools or platforms; pool or platform operators would face more complicated negotiations with those SEP owners (as the rate they can charge becomes more uncertain); and implementers would need to determine whether to license at the pool or platform's market rate versus holding out in the hope of lower judicially-decided rates for the pool or platform.

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[4] Avanci's Skeleton Argument before the Court of Appeal (CA-2024-001749) ("**Avanci CoA Skeleton**"), ¶2 – "… *Avanci arrived at the pricing and other terms of the 5G Licence after extensive discussions with potential licensors and licensees, with a view to devising an optional joint licence that would be commercially attractive to the majority of SEP holders and the majority of automobile manufacturers."*

[5] Josh Lerner & Jean Tirole, *Efficient Patent Pools*, 94 AM. ECON. REV. 691 (2004); Gustav Brismark, Mattia Fogliacco, Carter Eltzroth, Matteo Sabattini & Richard Vary, *Overview of SEPs, FRAND Licensing and Patent Pools*, LES NOUVELLES 57 (Mar. 2023).

[6] The most instructive empirical analogy is the 2015 revision to IEEE's patent policy, which restricted SEP owners' access to injunctive relief and narrowed the definition of reasonable royalty rates. Following that change, negative Letters of Assurance—in which patent owners declined to commit to licensing on RAND terms—rose to 77% of all Wi-Fi LOAs filed between January 2016 and June 2019. The DOJ itself subsequently urged IEEE to reconsider whether changes were needed to promote full participation in standard-setting, and IEEE reversed the key elements of the 2015 policy in 2022. U.S. Dep't of Justice, Supplement to the Business Review Letter to IEEE (Sept. 10, 2020); David L. Cohen, *The IEEE 2015 Patent Policy—A Natural Experiment in Devaluing Technology* (2019). The lesson from that policy intervention may have relevance in this case, where the expected returns to SEP owners from a particular licensing channel may be reduced, leading to those owners redirecting their patents elsewhere.

3.5 Moreover, extending FRAND obligations to pool or platform operators would impose significant additional legal overhead and management costs on the very intermediaries whose *raison d'être* is to reduce transaction costs, thereby undermining the efficiency gains that justify pooling in the first place.[7] At the margin, prospective pool or platform operators would face heightened litigation exposure and regulatory burden, making the formation of new pools or platforms less commercially viable and discouraging SEP owners from participating in existing ones.

3.6 The application of the error-cost framework[8]—a foundational concept in modern competition law designed to maximise consumer welfare and reduce the likelihood of counterproductive regulatory interventions, legal rules and standards—is central to the analysis presented herein. There is a significant risk that extending FRAND obligations to patent pool or platform operators, rather than confining them strictly to the individual SEP owners who made the underlying contractual undertaking, may hinder efficient licensing and, therefore, innovation and consumer welfare.

3.7 ICLE therefore takes the position that the majority of the Court of Appeal correctly concluded that FRAND obligations do not unilaterally subject a non-signatory pool or platform operator to the court's jurisdiction for collective rate-setting.

4. The Economic Imperative to Preserve Patent Pools

4.1 As Avanci explained before the Court of Appeal, a court-declared licence and rate for the Avanci 5G Licence risks the unravelling of the platform in its entirety as "*the patentees (who executed the MLMA knowing the terms of the 5G Licence) were under no obligation to stay, there was no guarantee that the patentees would continue to participate in the 5G Platform in the future. A possible outcome was that the entire 5G Platform would collapse…".*[9] It is ICLE's position that the collapse of patent pools or platforms would carry significant downstream consequences, given the central economic role such entities play in reducing licensing frictions and enabling efficient

[7] Giuseppe Colangelo, *Finding an Efficiency-Oriented Approach to Scrutinize the Essentiality of SEPs: A Survey*, 18 J. INTELL. PROP. L. & PRAC. 502 (2023) (emphasising that assessments imposed on pooling arrangements must avoid excessive costs that could discourage participation in the licensing process).
[8] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). The error-cost framework was further developed in the US Supreme Court's antitrust jurisprudence. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004).
[9] Avanci CoA Skeleton, ¶9.

licensing of standardised technologies. As explained in paragraph 3.4 above, the industry would revert to bilateral licensing, thus raising costs and delaying licensing of standardised technology.

4.2 That risk must be understood against the broader economic rationale for the formation, preservation, and protection of patent pools or platforms. Academic research and empirical evidence consistently show that patent pools or platforms designed around complementary technologies, such as the Avanci 5G Platform, can solve important market frictions that might otherwise stifle downstream production and hinder the widespread licensed diffusion of standardised technologies.[10]

4.3 Standard-setting organisations ("**SSOs**") develop complex technological standards that require the use of hundreds, often thousands, of complementary patented technologies. In extreme cases, this uncoordinated pricing may lead to a phenomenon known as "royalty stacking"[11], where the cumulative burden of individual royalties becomes significantly more than licensing through a pool or platforms as the number of patent holders grows.[12] By integrating the licensing functions of the complementary SEP

[10] Ashish Arora, Andrea Fosfuri & Alfonso Gambardella, *Markets for Technology: The Economics of Innovation and Corporate Strategy* (MIT Press 2001) (demonstrating that technology licensing markets enable specialisation between upstream innovators and downstream producers, accelerating the rate of technological change); Daniel F. Spulber, *How Patents Provide the Foundation of the Market for Inventions*, 11 J. COMPETITION L. & ECON. 271 (2015) (providing evidence that patent licensing facilitates technology transfer and that well-functioning markets for intellectual property are essential to the diffusion of innovation); David J. Teece, *Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy*, 15 RESEARCH POL'Y 285 (1986) (establishing that the ability to appropriate returns through licensing is a central determinant of firms' incentives to invest in R&D). For evidence that inefficient licensing directly harms innovation incentives, *see* Bowman Heiden & Justus Baron, *The Economic Impact of Patent Holdout*, 38 HARV. J.L. & TECH. 638 (2024); Kirti Gupta & Urška Petrovčič, *Evidence of Systematic "Patent Holdout"*, 38 BERKELEY TECH. L.J. 575 (2023).

[11] As Galetovic, Haber, and Levine have demonstrated, the predicted consequences of royalty stacking—stagnant quality-adjusted prices and suppressed innovation—have failed to materialise in SEP-reliant industries. To the contrary, industries heavily reliant on SEPs, such as smartphones, personal computers, and audio-visual equipment, exhibit the fastest quality-adjusted price declines in the U.S. economy. *See* Alexander Galetovic, Stephen Haber & Ross Levine, *An Empirical Examination of Patent Holdup*, 11 J. COMPETITION L. & ECON. 549, 551 (2015). Similarly, Auer and Morris have argued that the standardisation ecosystem is characterised by emergent private-ordering mechanisms—including FRAND undertakings, repeat interactions among participants in SSOs, inter-platform competition among SDOs, and, crucially here, patent pools or platforms. These mechanisms substantially mitigate the scope for the opportunistic pricing. These institutional safeguards mean that individual SEP owners rarely, if ever, behave as unconstrained independent monopolists. *See* Dirk Auer & Julian Morris, *Governing the Patent Commons*, 38 CARDOZO ARTS & ENT. L.J. 291 (2020). *See also* Justus Baron *et al.*, *Empirical Assessment of Potential Challenges in SEP Licensing* (European Commission 2023) (finding no discernible evidence that patent owners are systematically overcharging implementers or that FRAND disputes are undermining innovation and standard adoption).

[12] Mark A. Lemley and Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEXAS LAW REVIEW 1991 (2007); Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, in 1 Innovation Policy and the Economy 119 (2001), at 121–25.

owners, the pool or platform coordinates royalties across all contributors. That, in turn, increases joint profits of SEP owners while simultaneously *lowering* the aggregate royalty rate for all the patents, leading to lower overall prices for downstream implementers and ultimately consumers.[13]

4.4 Patent pools or platforms generate significant systemic efficiencies by reducing transaction costs. In the automotive sector's transition to cellular connectivity, implementers face the prospect of obtaining licences to tens of thousands of patents held by dozens of different owners.[14] The bilateral licensing of SEPs requires extensive, multiple negotiations, the evaluation of large global portfolios, the retention of specialised technical and legal counsel. None of this is impossible or economically unviable, but it does make patent pools or platforms a highly attractive alternative option. These pools or platforms offer a comprehensive "one-stop-shop" convenience. In practical terms, the pool or platform is a commercially convenient alternative to bilateral licensing: it packages coverage that would otherwise require multiple negotiations.

f.n. 14
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[12/240]

4.5 Economic literature and available evidence consistently indicate substantial transaction cost savings generated by pooling arrangements, which facilitate the rapid licensing of emerging technologies into entirely new markets.[15] There is also a vast body of economic literature showing how patent pools or platforms have, throughout history, facilitated the licensed diffusion of new technologies.[16]

4.6 The pro-competitive character of properly structured patent pools or platforms is also widely recognised by policymakers. The United States Department of Justice ("**DoJ"**)

[13] Lerner & Tirole, *supra* footnote 5, at 696 (Proposition 1 shows that a pool of complementary patents reduces aggregate royalties while increasing total licensor profits).
[14] CA Judgment, ¶1, 18 (noting over 65 SEP owners together owning more than 170,000 SEPs declared to the 5G standard on the Avanci 5G Platform).
[15] Robert P. Merges & Michael Mattioli, *Measuring the Costs and Benefits of Patent Pools*, 78 Ohio St. L.J. 281 (2017) (presenting the first empirically-based estimate of pool or platform transaction cost savings and finding that pools or platforms can save hundreds of millions of dollars relative to bilateral licensing counterfactuals); *see also* Statement of Facts and Issues, ¶¶11–12 (noting the rapid adoption of the Avanci 5G Platform by more than 65 SEP owners and 31 vehicle manufacturers); CA Judgment, ¶95 (Arnold LJ recording Avanci counsel's observation of a "*stark difference*" between the orderly licensing Avanci achieved in the automotive sector and the "*licensing debacle*" in the mobile phone sector where no comparable pool exists).
[16] Gavin Clarkson and Joshua Newberg, *Blunt Machetes in the Patent Thicket: Modern Lesson from the History of Patent Pool Litigation in the United States Between 1900–1970*, 22 JOURNAL OF TECHNOLOGY LAW & POLICY 1 (2017); Adam Mossoff, *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s*, 53 ARIZONA LAW REVIEW 165 (2011); Richard J. Gilbert, *Antitrust for Patent Pools: A Century of Policy Evolution*, STANFORD TECHNOLOGY LAW REVIEW 3 (2004).

evaluated the Avanci 5G Platform prior to its launch, issuing a Business Review Letter in July 2020 which concluded that the platform was "*unlikely to harm competition*".[17] The DoJ explicitly identified the substantial transaction cost savings generated by providing a unified licensing solution for vehicle manufacturers and declined to impose its own assessment on the pool or platform rate, noting that there is no single correct way to calculate a reasonable royalty and that each patent holder would independently decide whether the pool's terms comported with its own individual commitments.[18] In short, the experience to date suggests that properly structured pools or platforms have been highly successful at catalysing widespread licensing where the bilateral alternative would be more burdensome and costly.

f.n. 17 [20/423]

5. The Non-Transferability of FRAND Undertakings

5.1 The Appellants assert that FRAND undertakings made by individual patent owners must legally constrain the licensing offers made by the patent pool or platform.[19] This argument relies on a flawed conflation of bilateral contractual obligations with voluntary, market-driven collective licensing arrangements. Such undertakings are, however, strictly bilateral obligations binding the declarant alone and not the downstream pool or platform operator. The obligation to license SEPs on specific, encumbered terms arises from the intellectual property rights policies of SSOs and/or competition law.

f.n. 19 [22/458]

5.2 In the case of the European Telecommunications Standards Institute ("**ETSI**"), this obligation is governed by Clause 6.1 of the institutional policy, which operates under French law as a *stipulation pour autrui*—a specific form of contract made by a promisor for the distinct benefit of a third-party beneficiary.[20] Under this framework, the declarant irrevocably commits to the SSO that it is prepared to grant irrevocable licences to its essential rights on specific terms to any implementer seeking to practise the standard.[21]

f.n. 20 [12/238]

f.n. 21 [52/727]

[17] U.S. Department of Justice, Business Review Letter Re: Avanci 5G Platform (28 July 2020) at 2-3 ("**DoJ Business Review Letter"**) – "*After soliciting input from a range of stakeholders in the automotive and telecommunications industries, including potential licensors and licensees, conducting an independent review, and considering our prior guidance and reviews of other patent pools, we conclude that, on balance, Avanci's proposed 5G Platform is unlikely to harm competition*.".

[18] *Id.* at 21 – "*There is no single correct way to calculate a reasonable royalty in the FRAND context*."

[19] *See* Tesla's Grounds of Appeal, ¶¶16–18.

[20] CA Judgment, ¶ 9.

[21] ETSI, Intellectual Property Rights Policy, cl. 6.1.

5.3 SSO policies are silent on the subject of patent pools or platforms and collective licensing. Clause 6.1 imposes binding legal obligations strictly on the individual declarant and its corporate affiliates.[22] As a result, there is no justiciable standard by which to evaluate a collective pool or platform rate where the FRAND obligation is with respect to a bilateral licence and rooted in ETSI clause 6.1 (a *stipulation pour autrui*). f.n. 22 [52/727]

5.4 Pools or platforms are not themselves bound by FRAND. There is no contractual term, statutory duty or competition-law obligation requiring a pool or platform's rate to be FRAND, nor is there any interpretative mechanism within ETSI that extends the FRAND undertaking to licensing agents. Consequently, there is no legal basis on or criterion by which to assess a pool or platform's rate.

5.5 A supplementary provision, Clause 6.1bis, operates to ensure that the commitment travels with the patent itself in the event of a transfer of ownership, legally binding any subsequent "successors-in-interest."[23] However, a patent pool or platform operator is not (i) an individual declaration or a corporate affiliate of an individual declaration, nor (ii) a successor-in-interest. The pool or platform operator does not acquire legal title or equitable ownership of the underlying patents. It acts merely as a non-exclusive licensing agent possessing circumscribed authority to offer a standard portfolio licence on behalf of its contributing members. f.n. 23 [52/728]

5.6 Because the pool or platform operator functions exclusively as a licensing agent, the underlying contractual obligation remains solely vested in the individual patent owners.

5.7 Academic critiques of standard-setting frameworks have noted that existing policies do not stipulate that transferring or granting licensing authority to an agent results in the encumbrance moving with that authority.[24] Consequently, there is no basis for an implementer to claim a breach by a pool or platform operator. The pool or platform itself has made no declarations to the SSO, has signed no contracts with the organisation, and is completely unbound by the *stipulation pour autrui*.

[22] *Id.*
[23] ETSI, Intellectual Property Rights Policy, cl. 6.1bis.
[24] *See* Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard-Setting and Antitrust Through a Historical Lens*, 80 ANTITRUST L.J. 39, 67–68 (2015).

5.8 The Court of Appeal's recent judgment in *Tesla v. InterDigital and Avanci* reflects this position.[25] The majority concluded, correctly in ICLE's opinion, that the FRAND undertaking does not oblige patent owners to license their portfolios on a collective basis, nor does it subject the pool or platform operator to the Court's jurisdiction for rate-setting.[26]

f.n. 25 [12/292] [12/297]

f.n. 26 [12/293] [12/298]

5.9 Lord Justice Phillips observed that, on any sensible interpretation of the contractual arrangements with ETSI, patent owners have emphatically not agreed to license their SEPs on a collective basis with other SEP owners, whether on FRAND terms or otherwise.[27] He notes that "*the undertaking clearly and distinctly creates an obligation on individual owners to licence the patent family of their declared SEPs, but it cannot be interpreted as extending to include licensing a portfolio which includes many SEPs owned by other organisations altogether*".[28]

f.n. 27 [12/293]

f.n. 28 [12/293]

5.10 Lady Justice Whipple forcefully reinforced this point, noting that the Master Licence Management Agreement governing patent pools or platforms explicitly separates the SEP owner's individual undertakings from the distinct commercial deal struck to offer a packaged pool or platform licence.[29] The pool or platform represents a wholly different commercial offering, presented as an optional alternative to bilateral negotiations.

f.n. 29 [12/298]

5.11 FRAND undertakings guarantee an implementer licensed access to the specific underlying technology on FRAND terms. What they do not do is guarantee implementers the right to demand a heavily discounted bulk licence from third parties under the guise of contractual enforcement. If an implementer desires the convenience of a pool or platform licence, it must accept the commercial terms offered by the pool or platform. If it desires a licence on FRAND terms, it retains the right to obtain one from the individual SEP owner.

6. Patent Pool or Platform Rates Controlled by Market Forces

6.1 Even if the FRAND undertakings made by SEP owners were somehow applicable to patent pool or platform operators (which they are not), economic theory shows that,

[25] *See* CA Judgment, ¶222–242 (Phillips LJ), ¶243–255 (Whipple LJ).
[26] *Id.* ¶228–231, 248–251.
[27] *Id.* ¶228.
[28] *Id.*
[29] *Id.* ¶249.

when bilateral licences remain available, patent pool or platform rates are continually disciplined by market forces and, therefore, highly competitive. Accordingly, there is no need for the Court to assess or set rates at the patent pool or platform level, as the Appellants urge.

6.2 Tesla maintains that Avanci's $32 rate is not FRAND because it is offered on a non-negotiable, "take it or leave it" basis, and therefore escapes meaningful commercial negotiation.[30] However, this position is not correct, as patent pools or platforms face strong competitive pressure precisely because bilateral licensing agreements remain available, as required by the competition laws of almost all major jurisdictions.

f.n. 30
[12/237]
[3/29]

Pools or Platforms are Substitutes for Bilateral Licensing

6.3 Because pool or platform members retain the right to license their SEPs bilaterally, the pool or platform licence and individual bilateral licensing serve as alternative routes to the same licensed access for the downstream implementer. As economic literature on strategic substitutes demonstrates, pool or platform pricing is therefore disciplined by the competitive constraint of independent licensing.[31]

6.4 In this case, an automotive manufacturer seeking the licensing necessary to implement the 5G connectivity standard can obtain it through two avenues: (i) it can purchase the comprehensive "one-stop-shop" licence from the centralised patent pool or platform, or (ii) it can invest the necessary time, capital, and administrative resources to assemble individual bilateral licences from each independent SEP owner. Because these two avenues are functional substitutes: any change in the cost, terms, or attractiveness of one necessarily affects the rates that can be negotiated for the other.

6.5 This dynamic effectively puts a practical ceiling on the price a patent pool or platform can sustainably charge. In other words, a patent pool or platform operator cannot sustainably charge a royalty rate higher than the sum of available bilateral alternatives minus the efficiency the pool or platform creates. If the pool or platform attempts to

[30] CA Judgment, ¶2 – "*Tesla complain that Avanci has only offered a flat rate of $32 per vehicle for such a licence on a non-negotiable basis. Tesla contend that this rate far exceeds a FRAND rate*."; Tesla's Written Case ¶5.2 – *"The members were, according to the evidence, presented with the rate on a "take it or leave it" basis."*

[31] Jeremy I. Bulow, John D. Geanakoplos & Paul D. Klemperer, *Multimarket Oligopoly: Strategic Substitutes and Complements*, 93 J. POL. ECON. 488 (1985) (establishing the foundational framework for analysing strategic substitutes in oligopoly settings).

extract a supra-competitive rate, rational licensees will seamlessly pivot to their "outside option" and negotiate individual deals with the SEP owners, who remain legally and contractually bound by their FRAND commitments to license their portfolios on FRAND terms. In a world where those SEP owners are bound to license bilaterally at FRAND rates, no patent pool or platform operator can profitably charge a rate that is not competitive.

6.6 This presumption that patent pool or platform rates are competitive is further reinforced by empirical economic research.[32] Indeed, the jointly optimal rate for the patent pool or platform is necessarily lower than the sum of the independent bilateral rates, even before accounting for transaction cost efficiencies. Empirical evidence from major pool or platform operators confirms this theoretical prediction, demonstrating that aggregate pool licensing costs can routinely be significantly lower than the aggregate cost of corresponding bilateral licences negotiated individually.[33]

Independent Licensing as a Competition Law Safeguard

6.7 Economic research demonstrates that a handful of safeguards are sufficient to ensure that pool or platform pricing remains competitive. Chief among these is the preservation of the right to independent licensing.

6.8 Because individual SEP owners maintain the absolute right to license their portfolios bilaterally, the pool or platform must present an offering that is objectively more attractive than the bilateral alternative to survive. Because the bilateral alternative is strictly governed by standard-setting obligations, the pool or platform rate is structurally and permanently capped by reference to the benchmark of the figure that would represent the aggregate of the royalties that would be paid under the bilateral licences for the patents in the pool or platform. Therefore, the pool or platform rate itself must be viewed by courts and regulators as presumptively efficient.

6.9 This simple finding is widely understood and enforced by major competition authorities around the world, who heavily scrutinise whether this vital outside option is preserved when competition authorities evaluate the formation of patent pools or platforms. Indeed, as noted in paragraph 4.6 above, in the United States, the DoJ concluded that

[32] *See* Merges & Mattioli, *supra* footnote 15.
[33] *Id.*

the Avanci platform was unlikely to harm competition and identified the preservation of independent licensing as one of the primary, non-negotiable safeguards against anti-competitive effects.[34] The agency found no evidence whatsoever of agreements restricting independent licensing outside the platform, thereby allowing the strategic substitute mechanism to function freely and efficiently.[35]

6.10 From a policy standpoint, this means it is entirely sufficient for judicial review to be available only to assess whether the rates applied by individual patent owners are FRAND. Because standalone bilateral SEP licensing is a substitute for pools or platforms, potential judicial review of bilateral licensing rates is sufficient to guarantee pool or platform rates remain competitive.

6.11 In short, economic evidence demonstrates that there is no need for a court to proactively assess or dictate rates at the patent pool or platform level, as the Appellants urge the Court to do here.

7. Addressing the Appellants' Assertions and the Error-Cost Framework

7.1 When viewed through this legal and economic framework, the arguments advanced by the Appellants fail.

7.2 Tesla assert that they are left without recourse when faced with Avanci's standard rate, but this alleged asymmetry is an illusion. Tesla retains the unfettered right to approach InterDigital—and every other individual SEP owner within the platform—to ask for an individual bilateral licence on FRAND terms. If an individual SEP owner refuses to negotiate, or demands an exorbitant rate, Tesla may then bring a proactive declaratory judgment action against that specific patentee. Indeed, the courts in the United Kingdom have recently confirmed that implementers can take active steps to seek out the licences they need. As the Court of Appeal held in *InterDigital v Lenovo*, a willing licensee "*does not sit back and wait for demands from SEP licensors*" but rather "*takes active steps to seek out the licences that it needs*."[36] The Appellants' refusal to utilise this alternative bilateral avenue does not generate the right to force a judicial rate-setting exercise upon the entire voluntary pool or platform. As the majority in the Court of Appeal correctly

f.n. 36
[128/1944]

[34] DoJ Business Review Letter at 11–13.
[35] *Id.* at 13.
[36] *InterDigital Technology Corp v Lenovo Group Ltd* [2024] RPC 24, ¶205.

recognised, there is simply no recognised legal standard against which the pool or platform's collective rate can be judged[37]. f.n. 37 [12/294]

7.3 Furthermore, the non-negotiability of a pool or platform's published rate is not an indicator of market abuse or evasion of commercial norms; it is a necessary feature of transaction-cost economics. Avanci achieves system-wide efficiencies precisely by offering a standardised, "one-size-fits-all" commercial package. Requiring Avanci to negotiate bespoke, individualised rates potentially with every single implementer would significantly reduce the transaction-cost savings the platform was created to achieve and hence potentially defeat Avanci's value proposition.

7.4 Ultimately, accepting the Appellants' arguments could risk imposing significant costs on the global innovation economy. Subjecting a voluntary patent pool or platform to the prospect of global judicial rate-setting based on the flawed premise that a non-negotiable uniform rate is somehow inherently suspicious represents a severe false positive. It improperly infers anti-competitive harm from conduct that is provably pro-competitive. As explained throughout these submissions, the formation of patent pools or platforms (i) reduces the threat of royalty stacking and (ii) saves on transaction costs, which accelerates the diffusion of licensed standard-essential technologies. Because the patent pool or platform lacks market power—owing to the constant competitive discipline imposed by independent bilateral licensing—there is no economic justification for subjecting them to the prospect of judicial rate-setting.

7.5 The error-cost framework teaches that false positives in antitrust—interventions that burden pro-competitive conduct—are particularly costly because they are largely irreversible. Markets can self-correct against under-enforcement, but cannot recreate efficient arrangements once the prospect of judicial intervention has deterred them from forming.[38] Establishing a precedent that potentially subjects pool or platform rates to FRAND adjudication would create a permanent litigation overhang that depresses pool or platform formation. The Appellants' position thus invites the kind of irreversible institutional change the error-cost framework is designed to guard against—one whose

[37] CA Judgment, ¶235.
[38] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2–3, 15 (1984).

principal casualties would be the very implementers and consumers who benefit from efficient collective licensing.

7.6 Penalising an efficient patent pool or platform by potentially subjecting its standard rate to protracted litigation (often involving multiple jurisdictions) undermines the vital incentive structures that encourage intellectual property holders to aggregate their complementary technologies in the first place. If pool or platform operators face the constant threat of having their meticulously balanced, standardised rates rewritten by courts at the behest of individual implementers, the incentive to form these pools or platforms will be significantly weakened.

7.7 Patent pools or platforms are vital, market-based, solutions. Regulating them through an overly rigid application of bilateral standard-setting obligations threatens to dismantle these aggregations. Attempts by the Appellants artificially to expand jurisdiction to capture patent pool or platform operators must therefore be firmly rejected.

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16 March 2026