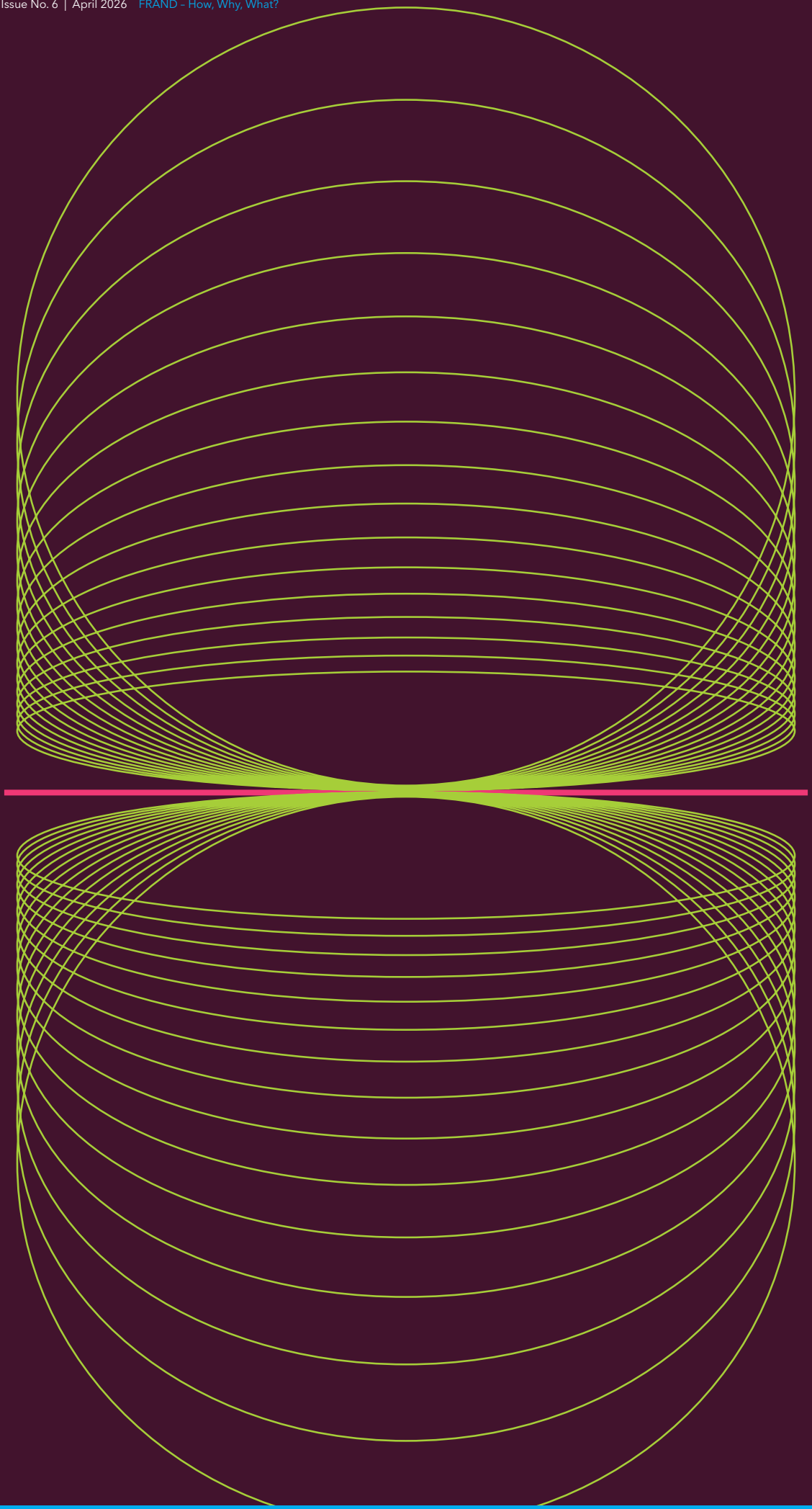


FRAND – How, Why, What?

An introductory overview of the impact on SEPs

Standard-essential patents (SEPs) protect technology that is mandatory for implementing a technical standard: Any product compliant with that standard necessarily uses the patented subject matter. Their status is typically linked to declarations made in the context of standard setting organizations (SSOs) such as ETSI, IEEE, ITU, 3GPP or ISO/IEC, where participants are expected to disclose potentially standard-essential patents and to offer licenses on fair, reasonable and non-discriminatory (»FRAND«) terms.

In practice, however, it is often difficult to determine whether a specific patent is in fact essential. Essentiality requires a detailed comparison against the standard specification, and assessments may differ across experts, jurisdictions, and over time. The absence of clear, objective, and consistently verified essentiality determinations creates uncertainty about the real size and strength of SEP portfolios and complicates FRAND determinations.

With modern communication protocols such as Bluetooth Low Energy (BLE), 5G, emerging 6G standards and successive generations of Wi-Fi now embedded in smartphones, vehicles, industrial equipment, medical devices and numerous Internet of Things (IoT) applications, reliance on SEPs has increased sharply. This has amplified both their economic significance and the potential for conflict.

SEP holders argue that strict enforcement is necessary to secure adequate returns on R&D. SEP implementers, in contrast, point to a lack of transparency in the SEP landscape and to the difficulty of tracing technical contributions back to specific patents. A further challenge for implementers is fragmentation: Major standards are typically covered not by a single SEP holder but by dozens or even hundreds of them. To bring a standard-compliant product to market, SEP implementers may need licenses from a wide range of players, including operating companies, pure licensors, and non practicing entities (NPEs), each with their own portfolio and licensing models. Even for willing licensees, this fragmentation creates substantial financial and transactional risk in obtaining freedom-to-operate, particularly for small and medium sized enterprises (SMEs).

The landmark: Huawei v ZTE – the CJEU's procedural benchmark for FRAND

The decision of the Court of Justice of the European Union (CJEU) in **Huawei v ZTE** (C 170/13, 2015) is widely regarded as the landmark decision of the EU framework for assessing SEP enforcement and, by extension, as a procedural template for FRAND negotiations. The CJEU set out a structured sequence of obligations that SEP holders and implementers must observe if they wish to preserve their respective positions:

- the SEP holder gives a detailed notice of infringement;
- the implementer clearly declares its willingness to take a FRAND license;
- the SEP holder makes a specific written FRAND offer;
- the implementer responds promptly, with a concrete counter-offer if it contests the terms;

and

- pending agreement, the implementer provides appropriate security for past and future use and keeps proper accounts.

Within this framework, Huawei v ZTE does not define FRAND with respect to a determination of FRAND rates. Instead, it establishes a procedural benchmark for FRAND-compliant conduct and, correspondingly, for when the pursuit of injunctive relief may be considered legitimate. This sequence has become the reference model against which European courts assess whether parties have behaved as »willing« licensors or licensees and therefore whether recourse to injunctions is admissible.

The German FRAND approach

The German Federal Court of Justice (FPC)[1] has built on Huawei v ZTE in three decisions in which it developed its own framework for dealing with FRAND in SEP litigation, referred to as **FRAND I, FRAND II, and FRAND III**:

In **FRAND I** *(Sisvel/Haier, KZR 36/17, 2020)* the FPC essentially aligned German practice with Huawei v ZTE but adopted a relatively SEP-holder-friendly reading. The Court emphasized that the Huawei v ZTE sequence does not amount to a rigid checklist, and that minor deviations do not automatically prohibit injunctive relief (margin no. 71-79 of the Decision). At the same time, it significantly raised the bar for a successful FRAND objection: an SEP implementer must clearly and unambiguously declare, at an early stage, its readiness to conclude a license on FRAND terms, engage purposefully in negotiations, and submit a concrete counter offer that is at least plausibly FRAND (margin no. 83 of the Decision). Merely contesting infringement or validity, insisting on extensive pre licensing disclosure, or making highly conditional or territorially narrow counter offers is insufficient to demonstrate the required »licensee willingness« (margin no. 96 of the Decision).

FRAND II *(Sisvel/Haier II, KZR 35/17, 2020)* further develops this framework, focusing more on the substance and structure of the parties' offers and counter offers. The FPC clarifies, inter alia, that:

- the SEP holder is not required to present a fully »perfect« FRAND offer at the outset; an offer is sufficient if it is recognizably FRAND oriented, consistent with the licensor's overall licensing practice, and not obviously discriminatory (margin no. 71 of the Decision);
- the core of the abuse test lies in whether a principally willing SEP implementer is effectively denied access to a license (margin no. 54 of the Decision); and
- an SEP implementer cannot simply criticize the SEP holder's offer as non-FRAND. It must engage as a reasonable party would: examine the offer in substance (scope, rate, royalty base) and table a concrete, workable counter proposal that could realistically form the basis of agreement (margin no. 58 of the Decision).

The recent decision **FRAND III** (VoiceAge/HMD, KZR 10/25, 2026) places additional emphasis on the temporal and behavioral dimension of »willingness« and on the provision of security. The emerging line underlines that:

- continuous licensee willingness is an indispensable precondition for a viable FRAND defense (Headnote 1a);
- where the SEP implementer does not accept the SEP holder's offer and its own counter offer is rejected, it must provide adequate security for past and future use within a reasonable time (Headnote 2).

[1] Bundesgerichtshof (BGH)

Overall, the decisions FRAND I to III establish a **conduct-driven German approach**. Injunctions remain available where the SEP holder broadly follows the Huawei v ZTE framework and the SEP implementer fails to demonstrate clear, continuous, and economically substantiated willingness, while the FRAND defense gains traction only where the SEP implementer can show sustained, substantiated efforts (including a realistic counter offer and timely provision of security) to reach a license on FRAND terms.

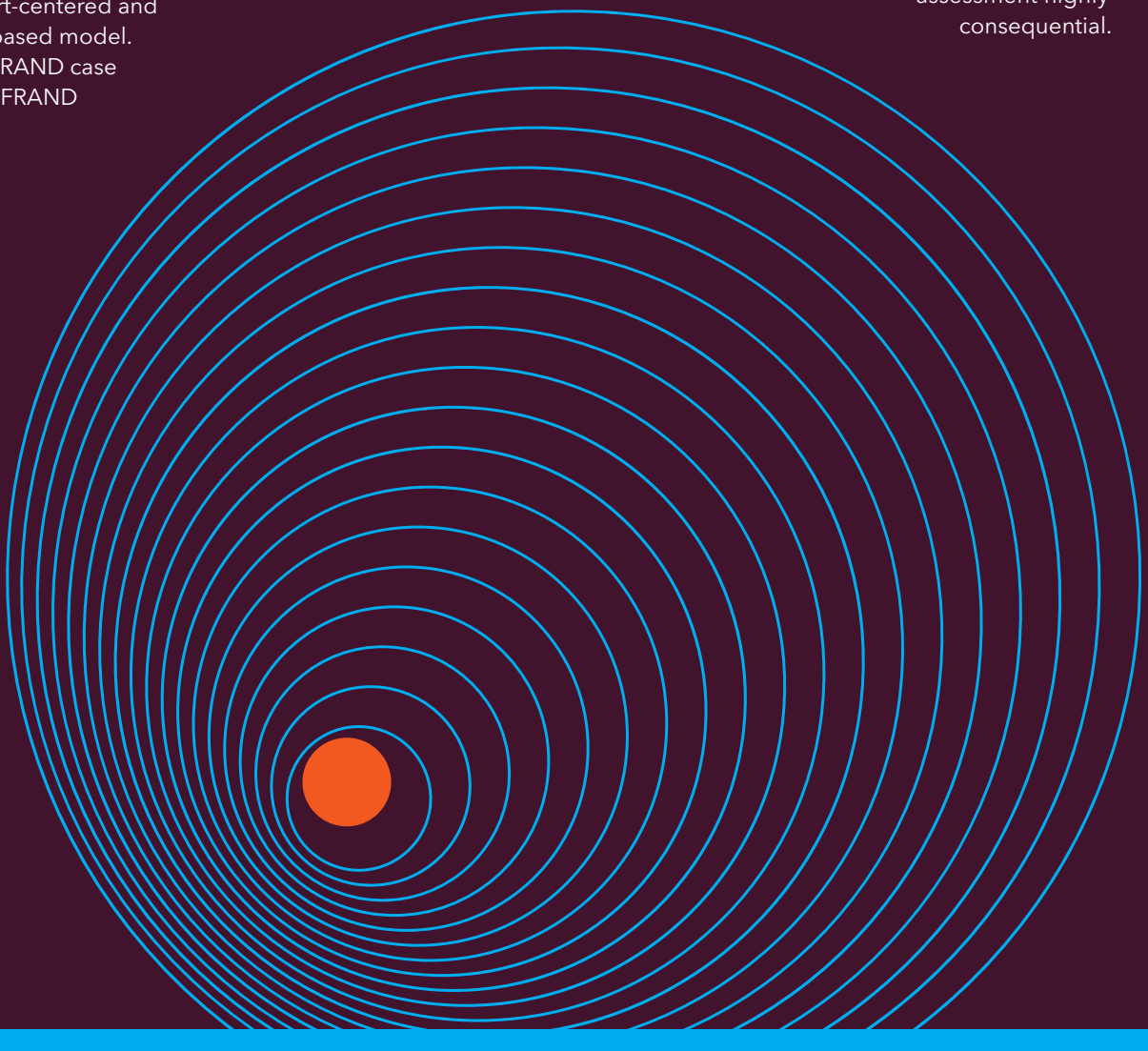
The UK FRAND approach

The UK has become a key forum for setting global FRAND rates, mainly due to the Supreme Court's decisions in **Unwired Planet v Huawei** (UKSC/2018/0214) and **Conversant v Huawei/ZTE**, 2020 (UKSC/2019/0041). In Unwired Planet v Huawei, the Court held that a UK court can set the terms of a **worldwide FRAND rate**. If the implementer refuses the court determined global license, a UK injunction may follow.

Compared with Germany, this is a more court-centered and contract-based model. German FRAND case law treats FRAND mainly as a antitrust law constraint on injunctions; the focus is on the parties' behavior in negotiations (timely and clear willingness, concrete counter offers, provision of security, continuous engagement) rather than on the court itself constructing a full FRAND license. The UK approach, by contrast, is to fix the license terms directly (often on a global basis) and to use the prospect of a UK injunction to encourage acceptance. In practice, implementers face a conduct-driven FRAND test with strong injunction leverage in Germany and the risk of a court-imposed global license in the UK.

The UPC FRAND approach

Like the German courts, the UPC has treated FRAND primarily as a constraint on injunctive relief, grounded in EU law and antitrust principles, and focuses strongly on the parties' conduct, in line with Huawei v ZTE and the German FRAND case law. At the same time, the UPC has pan-European reach: A single decision can produce multi-state injunctions, which makes its FRAND assessment highly consequential.



So far, however, the UPC has not gone as far as the UK by actually fixing detailed FRAND rates or imposing full license terms. In recent proceedings, including **Sun Patent Trust v Vivo Mobile Communication Co** (UPC_CFI_361/2025, UPC_CFI_362/2025) and others, the UPC Court of Appeal has indicated that **court-led FRAND rate determination is within the realm of possibility** and has declined, at the preliminary stage, to exclude such requests outright, preferring to defer questions of admissibility and scope to the main proceedings. This suggests that court-driven FRAND determinations remain a live option at UPC level, but they are not yet established UPC case law.

In other words, the UPC is presently positioned between Germany's and UK's approaches and has left the door open to future FRAND rate determinations.

The (so far) unsuccessful EU SEP Regulation

In order to address SEP-related conflict and uncertainty, the European Commission presented a proposal for an EU SEP Regulation in 2023[2]. The draft Regulation aimed to create a harmonized EU system for transparency, essentiality checks, and FRAND determinations. Its key elements included:

- creation of an EU-wide SEP register at the EUIPO, with registration as a condition for certain enforcement rights;
- sample-based essentiality checks by independent experts, with publication of essentiality statistics and optional party requested reviews;
- expert-based, non-binding guidance on aggregate royalties (overall royalty figures or ranges for a given standard);
- European Union Intellectual Property Office (EUIPO)-administered procedures for FRAND determinations in specific SEP implementer disputes, intended to interface with national court actions;
- a mandatory »cooling-off« or determination phase in some cases before injunctions, and the option for national courts to stay parallel proceedings;

and

- SME-oriented measures to ease access to information and procedures and to reduce cost burdens for smaller implementers.

Many SEP implementers reacted positively to the goals of increased transparency and structured FRAND processes. By contrast, a number of SEP holders expressed concerns, particularly regarding the legal basis, the additional administrative layer, the EUIPO's role and experience in SEP-related patent matters, and the practical impact of non-binding FRAND determinations.

The legislative process has since slowed considerably, and the proposal's prospects for adoption in its original form are uncertain. It remains open whether, and in what form, an EU wide SEP framework might be pursued in the future.

The rise of patent pools

In parallel with litigation-driven FRAND developments, patent pools such as Avanci and Sisvel have become increasingly important actors in the SEP ecosystem. A patent pool is a licensing mechanism in which multiple SEP holders aggregate their relevant patents into a centrally managed portfolio and offer standardized licenses, typically on FRAND terms. SEP implementers can then obtain coverage for most relevant SEPs for a given standard through a single, transparent license and one plannable fee per product (e.g., per unit or percentage of sales). For SEP holders, pools offer several advantages: they aggregate portfolios from multiple owners, provide access to new sectors (e.g., automotive and IoT) that many individual licensors cannot efficiently reach, centralize administration and enforcement support, and turn numerous smaller licensing opportunities into scalable, recurring revenue streams. For SEP implementers, pools reduce search and negotiation costs, provide a single, standardized license instead of dozens of bilateral deals, and help manage »royalty stacking« by bundling a substantial part of the relevant SEP landscape into one transaction with more predictable pricing.

[2] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standard essential patents and amending Regulation (EU)2017/1001 dated 27 April 2023, COM(2023) 232 final

Summary and outlook

The European SEP/FRAND landscape is currently shaped by four main elements: German case law, the UK's global rate-setting model, the UPC's emerging practice, and regulatory and market initiatives.

- **Germany** has developed a conduct-driven framework that ties access to injunctions closely to how SEP holders and implementers behave in FRAND negotiations.
- **The UK** has adopted a court-centered approach in which judges are prepared to set portfolio-wide FRAND rates, often on a global basis, and to link them to the availability of injunctions.
- **The UPC** currently sits between these models: It applies EU-law-based FRAND and proportionality limits to pan-European injunctions and has left open the possibility of future FRAND rate determinations, without yet turning that into a standard tool.
- **Regulatory and market initiatives**, including the (so far) unsuccessful attempt at an EU-wide SEP Regulation and the growing importance of patent pools, which aim to increase transparency and reduce transaction costs, while raising their own FRAND and antitrust-law questions.

Overall, the SEP landscape still seems to move towards clearer expectations and more structured mechanisms. Any stable equilibrium will need to balance incentives to invest in R&D and standardization with practical, predictable access for implementers, so that legal frameworks support rather than hinder continued innovation and technical deployment.

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