

Choosing your **SEP** battleground: UPC, Germany or UK?

Litigation in Europe offers SEP owners a range of strategic options: the UK courts provide a leading forum for global FRAND rate-setting, while the German courts and the UPC offer powerful avenues for securing timely injunctive relief. This article distils the key points that SEP owners should have in mind when choosing between these jurisdictions.

Germany and UPC v UK – contrasting approaches to 1. the FRAND defence

1. Germany and UPC

The FRAND defence in the German courts and the UPC arises under EU competition law and the “FRAND dance” set out in the CJEU’s *Huawei v ZTE* decision. The courts carry out a **holistic, conduct-based assessment**, rather than treating *Huawei v ZTE* as a rigid step-by-step checklist. Recent decisions from both systems confirm that the central question is whether the parties’ behaviour throughout the licensing negotiations evidences a genuine attempt to conclude a licence on FRAND terms.

In almost all infringement decisions to date, the German courts have rejected the implementer’s FRAND defence and awarded the SEP owner an injunction, often without undertaking a detailed examination of whether the SEP owner’s offer is FRAND-compliant. **The UPC has adopted a similar approach**, with four decisions from three German Local Divisions rejecting the FRAND defence and awarding injunctive relief.

2. UK

By contrast, the UK views FRAND primarily as a matter of contract law. Normally a patentee would be able to obtain a UK injunction against an infringer; however, if the patent is subject to a FRAND commitment, the implementer can rely upon that contractual commitment to avoid the injunction by compelling the patentee to offer a FRAND licence. As a result, **the UK courts have in four cases so far determined what the terms, including royalties, are for the FRAND licence that the patentee is required to offer**.

To demonstrate their willingness, SEP owners or implementers (and, in some UK FRAND cases, both) have given a binding undertaking to the UK courts to enter into the court-determined licence. However, if an implementer does not give that undertaking, and is found to infringe a valid UK SEP, the UK court will injunct them.

Choosing between German national and UPC proceedings

1. Territorial reach of the UPC

A defining feature of UPC litigation is its **multi-territorial reach**. In a single infringement action, the claimant may seek **remedies, including injunctive relief, across multiple participating Member States** in which the patent is in force. In FRAND disputes, a multi-jurisdiction injunction arising from a single court proceeding can be a powerful tool against an implementer with a significant commercial presence in multiple UPC-participant countries.

2. Timing

UPC proceedings are structured around **tight timelines and a front-loaded written phase**. Aimed at reaching **an oral hearing on the merits within one year (a target which is often missed in practice by the busier Local Divisions)**, the procedural framework forces parties to crystallise their FRAND narrative, evidence and economic analysis at a very early stage, leaving limited scope for late tactical adjustments.

Germany's **bifurcated system** takes a different approach. Infringement and validity are decided in separate proceedings, which may give rise to an "injunction gap" that does not usually exist before the UPC. Although also front-loaded, German infringement proceedings are generally less strict on late filings. Hearing dates typically fall around **12 to 15 months after filing**, depending on the venue, but can be scheduled even earlier. **Germany is currently the quicker jurisdiction** compared to the busy German Local Divisions of the UPC. However, this might change in the future as the distribution of cases across the UPC Local Divisions evens out.

3. Costs

Another practical differentiator is **exposure to recoverable attorney costs**. In both jurisdictions, the costs depend on the value in dispute. In German SEP proceedings, the value in dispute usually lies between € 500,000 and € 1.5 million; in the UPC, it tends to be higher due to its multi-territorial impact, e.g. € 2 to 3 million.

The UPC may expose a losing party to considerably higher costs than the German infringement pathway as shown in the following example (which excludes the fees and costs of validity proceedings which are to be expected in both jurisdictions):

	German infringement proceedings with a value in dispute of € 1.5 million	UPC infringement proceedings with a value in dispute of € 3 million
Court fees	€ 25,014	€ 41,100*
Recoverable attorney costs	€ 43,197	Up to € 400,000

**(fixed + value-based fees)*

4. Security for costs

Another material difference between German and UPC proceedings is the requirement to provide security for costs. In both proceedings, the claimant may be required to provide security at the defendant's request. Under German law, in a few cases, claimants from certain countries may be obliged to provide security for costs. This depends on the ratification of certain international treaties. The amount must cover the defendant's recoverable costs for the first instance and first appeal proceedings as well as the petition for leave to appeal to the German Federal Court (second appeal).

In German proceedings with a value in dispute of € 1.5 million, the security amount will be about € 150,000.

In UPC proceedings, the criteria for ordering security for costs are less clear-cut. According to the case law, the decisive factor is "whether the financial position of the Claimant gives rise to a legitimate and real concern that a possible order for costs may not be recoverable and/or the likelihood that a possible order for costs by the UPC may not, or in an unduly burdensome way, be enforceable" (see, for example, Munich Local Division, Order of 24 March 2026, case ref. UPC_CFI_617/2024 and UPC_CFI_398/2025, paragraph 15). This might be the case if there are doubts that the claimant has sufficient funds to reimburse the defendant or if the claimant is domiciled in a country in which enforcing the reimbursement might be "unduly burdensome".

The amount of security ordered in UPC proceedings could be as high as the ceiling for the recoverable costs - in a case where the value in dispute is set to € 3 million this could result in a security of up to € 400,000.

However, in the above-mentioned case, the UPC considered half of the ceiling amount sufficient. In addition, the claimant may be ordered to provide security for costs for the defendant's counterclaim for revocation of the patent, which would double the required security for a UPC infringement case.

5. Enforcement Strategy

A first instance injunction before a German national court can only be enforced by providing an enforcement security. This security is necessary regardless of whether the court has ordered the claimant to provide security for costs. The amount of the security is intended to cover damages due to the defendant if the German court's decision is reversed on appeal or the patent is invalidated.

In setting the enforcement security, German courts may use the value in dispute as an orientation point if they are not persuaded by the defendant's arguments for a higher amount.

When it comes to enforcing UPC orders, it is at the discretion of the court whether the enforcement should be subject to the provision of an enforcement security. The court may refrain from ordering the provision of security – for example, if the claimant is domiciled in one of the contracting member states and has sufficient funds there.

If the UPC orders a security, it is likely that the amount will be higher than in German proceedings given the wider territorial scope of the relief and thus the claimant's greater exposure to potential enforcement damages.

The claimant can decide to enforce only parts of the order thereby potentially reducing the amount of the required security. The claimant must notify the court which part(s) it intends to enforce and provide a certified translation of the order in the official language of a contracting member state in which the enforcement shall take place.

6. UPC – a potential rate-setting forum?

German courts have so far been reluctant to conduct a rate-setting – for example, the Munich and Frankfurt Regional Courts dismissed Samsung’s attempts in two recent cases. The exception is the 7th Chamber of the Munich Regional Court I, which calculated a FRAND rate for a cross-licence in *ZTE v Samsung*, without being asked by either party to do so. However, the parties in that case are not required to enter into a licence at the court-determined rate, and **Germany is not expected to become a rate-setting jurisdiction.**

In the UPC, a request for a FRAND rate determination in 2023 failed in the Mannheim Local Division. However, more recently, UPC judges in Mannheim and The Hague have indicated that they would consider conducting a FRAND rate determination. Thus, **the UPC could emerge as a rate-setting forum in the future.** Indications from the bench suggest that this would likely involve a dedicated, court-led hearing, lasting several days, supported by economic experts and decision-makers from both parties. The recent proceedings brought by Sun Patent Trust against Vivo before the Paris Local Division and Ericsson against Transsion before The Hague Local Division, in which – unlike previous cases – the claimant requested a FRAND determination are ones to watch.

If the UPC were to become an established rate-setting forum, this would be a major factor in the choice of UPC versus Germany – a SEP holder might embrace a rate-setting at the UPC or prefer to stick to the conduct-based assessment of the German courts.

III. Why are SEP owners returning to the UK to resolve their global FRAND disputes?

The perception in the last few years of the UK as an implementer-friendly jurisdiction is no longer valid.

- **The licence fees set by the UK courts have been substantial.** The relatively low lump sum licence fees set by the first instance court in 2023 in *InterDigital v Lenovo* and *Optis v Apple* were increased on appeal – in the Optis case by an order of magnitude to US\$502 million.
- **The impact of the controversial UK interim licence regime on SEP owners has been blunted** after courts of other jurisdictions have taken measures (including “anti-interim licence injunctions”) to mitigate any perceived jurisdictional overreach. As a result, SEP owners are able to embrace or ignore a UK interim licence, and there have now been several cases in the UK in which the patent owner has embraced the court’s interim licence regime.
- **By entering into a UK interim licence, a SEP owner will receive a non-refundable payment, likely equal to the licensee’s latest counter-offer.** That payment can be booked as revenue and used for any purpose, including to fund the UK litigation. In the recent case of *TP-Link v Huawei*, the non-refundable interim payment was US\$12 million.

SEP owners are once again choosing the UK to resolve their global licensing disputes - recent examples include Huawei (in their dispute with TP-Link) and Nokia (against Warner Brothers and Paramount). There are a few reasons to expect more SEP owners will follow suit.

1. A UK court-determined global licence provides a route to recovering royalties on historic sales from the date of first infringement, together with interest. In *Optis v Apple*, the interest alone amounted to over US\$200 million. Note, however, that this issue is currently the subject of an appeal to the UK Supreme Court.

2. A UK rate-setting action is a way to force early disclosure of an implementer's sales data which may help progress negotiations to a settlement.

3. Injunctions are available in the UK – unless an implementer agrees to take a FRAND licence, the UK court will injunct them.

4. The UK has moved away from a long multi-trial FRAND action; instead, proceedings typically move straight to a rate-setting trial, often expedited to occur within 12 months of the start of a UK action.

IV. Conclusion

While SEP owners hope to avoid litigation, they must nevertheless plan for that eventuality. Infringement proceedings or court-led rate-setting or a combination of both are sometimes needed to kickstart a licensing program or unblock a stalemate in licensing negotiations, and litigation in Europe is an effective way of doing so, as well as a means for reaching a satisfying conclusion.

If you are an SEP owner and would like to design a European SEP litigation strategy that suits your portfolio and licensing goals, please contact us.

Our innovative combination of experienced specialists



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About EIP

EIP provides strategic advice on high-value and complex patents, combining patent attorneys, commercial IP lawyers and litigators across Europe and the US to deliver a seamless, integrated service.

We are particularly well known for our work in standard essential patents (SEPs) and FRAND. Our award-winning litigation team has considerable experience in coordinating litigation and providing litigation support internationally in the field of SEPs and has played a central role in some of the most important FRAND cases of the past decade. Most recently, EIP acted for Optis in its landmark FRAND dispute against Apple, securing a Court of Appeal judgment in 2025 determining a global SEP licence exceeding US\$700 million - the highest-value UK court-determined SEP licence of its kind. The decision has had a significant impact on FRAND valuation methodology and reinforced the position of the English courts as a leading forum for global SEP disputes.

Earlier landmark cases, including *Unwired Planet v Huawei* and *Conversant v Huawei & ZTE*, helped shape the legal framework for SEP enforcement and FRAND licensing globally.

EIP has also achieved major recent success in Germany, acting for Datang in its SEP litigation against Samsung, where the Munich Regional Court found infringement, rejected Samsung's FRAND defence and rate-setting counterclaim and held it to be an unwilling licensee.

EIP's UPC team includes Attorneys-at-Law in Germany, technically skilled European patent attorneys, and highly reputed UK solicitors with experience in some of the largest European patent cases. Our attorneys have worked together successfully for many years, enabling us to respond quickly and intelligently under the UPC's tight timelines and new procedures. Our team has acted in UPC FRAND actions from the court's very first day, including *Mediatek v Huawei*, *Asus v Oppo*, and obtained the first Anti-Anti-Suit Injunction before the UPC in *Avago Technologies v RealTek*.

Our expertise is consistently recognised by the leading legal directories and awards, including the Financial Times' Europe's Leading Patent Law Firms and the Managing IP Awards, where EIP was named European Patent Disputes Firm of the Year in 2024.