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Third and Final Act? – The German Federal Court of Justice completes the FRAND trilogy

Federal Court of Justice refines the framework for FRAND negotiation obligations in SEP disputes – and differs from the European Commission

By judgment dated 27 January 2026[1], the German Federal Court of Justice (*Bundesgerichtshof* – "BGH") further developed key aspects of the competition law framework governing the enforcement of standard-essential patents ("SEPs"). The BGH's decision in *FRAND III* is of immediate practical relevance to all parties involved in SEP licensing disputes before German courts (and also before the Unified Patent Court). The case gained additional relevance as it marked the first intervention by the European Commission as *amicus curiae* in German SEP litigation.

Background

VoiceAge owns the German part of a European patent relating to the coding of audio signals, which had been declared essential to the EVS standard (Enhanced Voice Services) before the standard-setting organization ETSI. At the same time, VoiceAge had given a FRAND undertaking.

The defendant, HMD (manufacturer of smartphones marketed inter alia under the "Nokia" brand), used the EVS standard in Germany without obtaining a license from VoiceAge.

VoiceAge brought claims against HMD for injunctive relief, recall, information and damages. HMD raised the defense of being entitled to a compulsory license based on competition law (the so-called FRAND defense), arguing that it was a willing licensee. The lower courts, the Munich Regional Court I[2] and the Higher Regional Court of Munich[3], rejected that defense. The BGH fully upheld those findings and dismissed HMD's appeal.

The Three Key Findings of the BGH

FRAND III contains three central holdings that consistently build on the legal framework previously established in the BGH's decisions *FRAND I*[4] and *FRAND II*[5], with direct practical consequences for licensing negotiations:

Key finding 1: Rejection of a strict sequential test

In *FRAND III*, the BGH rejects the view that the negotiation steps established in the CJEU judgment *Huawei/ZTE*[6] (notice of infringement by the patent holder – declaration of willingness to license by the implementer – FRAND offer by the patent holder – FRAND counter-offer by the implementer – provision of security by the implementer) should be understood as a rigid step-by-step sequence.

According to the BGH, what matters is always an overall assessment of the parties' mutual conduct during negotiations. In the Court's view, the CJEU in *Huawei/ZTE* sets out guidelines for negotiations in good faith, rather than a schematic checklist of mandatory steps.

Key finding 2: Willingness to take a license is a continuous requirement

The BGH further emphasized that an implementer's continuing willingness to obtain a license is an indispensable condition for a successful FRAND defense throughout the entire negotiation process. A one-time declaration of willingness, even if formally correct, is therefore insufficient. Hesitant, inconsistent or delaying conduct during later negotiations may override such an initial declaration.

Whether an implementer qualifies as a willing licensee is to be determined on the basis of an overall assessment. Relevant factors include

[1] BGH, judgement of 27.01.2026, KZR 10/25 – *FRAND III*.
[2] Local Court of Munich I, judgement of 25.05.2022, 7 O 14091/19, GRUR-RS 2022, 13480.
[3] Higher Regional Court of Munich, judgement of 20.03.2025, 6 U 3824/22 Kart, GRUR-RS 2025, 5771.
[4] BGH, judgement of 05.02.2020, KZR 36/17 – *FRAND I*.
[5] BGH, judgement of 24.11.2020, KZR 35/17 – *FRAND II*.
[6] CJEU, judgement of 16.07.2015, C-170/13 – *Huawei/ZTE*.

responsiveness, consistency of negotiating positions and the existence of objective reasons for delays.

Applying these criteria, the BGH found that HMD had failed to respond to VoiceAge's offers in due time, had not submitted a timely counter-offer, and had taken inconsistent positions during negotiations. As a result, the Court denied that HMD could be regarded as a willing-licensee.

Key finding 3: Timing of security

The BGH also clarified that an implementer has to provide security *promptly* after its counter-offer was rejected. Otherwise, under the *FRAND III* doctrine, it risks being classified as unwilling to take a license.

HMD had deposited an amount representing only slightly more than 1% of the royalty amount that HMD itself had most recently considered FRAND-compliant. In addition, HMD had not adjusted that amount for several years. A subsequent top-up after the close of oral proceedings at second instance was no longer accepted by the BGH.

By contrast, the Court expressly left open the question of the appropriate amount of security, as it was not decisive for the case. Accordingly, there is currently no "safe harbour" for security amounts below the SEP holder's last offer.

Amicus Curiae submission by the European Commission – and the BGH's response

For the first time in German SEP litigation, the European Commission submitted a formal statement pursuant to Article 15(3) Regulation 1/2003 before the Higher Regional Court of Munich in April 2024 and later before the BGH.[7]

In its submission, the Commission argued in favor of a strictly sequential interpretation of the *Huawei/ZTE* framework and a purely formal assessment of the implementer's declaration of willingness to license.

Neither the Higher Regional Court of Munich nor the BGH followed the Commission's approach. The BGH also declined to make a preliminary reference to the CJEU, taking the position that the legal position was sufficiently clear and that no referral was required.

Practical implications – What FRAND III means for negotiation strategy

The FRAND III decision gives rise to the following practical takeaways:

For SEP implementers

- Demonstrate willingness to take a licence consistently throughout the entire negotiation process.
- Respond to offers from SEP holders promptly, substantively and consistently.
- Submit counter-offers in a timely manner and provide reasons.
- Provide security promptly after rejection of a counter-offer (without waiting several months).
- Regularly review and adjust the amount of security provided. The litigation risk of aligning security solely with one's own counter-offer should be carefully considered.
- Keep a complete and timely record of all negotiation steps.

For SEP holders

- A holistic assessment applies equally to SEP holders: their own conduct should reflect that of a reasonable party genuinely interested in reaching a swift and mutually acceptable agreement.
- Licensing offers should be sufficiently transparent, particularly as regards royalty rates and calculation methodology.
- SEP holders are likewise well advised to carefully document every negotiation step.

Outlook

Despite *FRAND III*, important questions remain unresolved. These include, for example, the appropriate level of security and the treatment of anti-suit injunctions in the SEP context.

HMD has filed a constitutional complaint against the BGH judgment, alleging a violation of its right to its lawful judge due to the refusal to refer questions to the CJEU. Given the rigid standards applied by the German Constitutional Court, the prospects of success appear limited.

Nevertheless, the proceedings – together with the unresolved tensions with the position of the European Commission – show that the FRAND framework remains an area where both, political and legal debates will continue.

[7] Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://competition-policy.ec.europa.eu/document/download/66e0bd63-36da-4b27-9eef-70602a8c7be2_en?filename=2024_Amicus_Curiae_6U3824_22Kart_de.pdf.

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