FRAND commitments include no right to a platform licence

In my recent article, *Are patent pool royalty rates FRAND?,*[1] I argued that patent pool and platform rates are structurally unsuited to serve as benchmarks for bilateral FRAND licensing. That analysis focused on pricing (i.e. royalty rates) — specifically, on the risk of inferring inapplicable rates from fundamentally different licensing arrangements.

This article addresses a logically prior question now before the England and Wales ("UK") Supreme Court in *Tesla v InterDigital / Avanci*:[2] Before any court determines whether a platform licence is FRAND, does it have jurisdiction and is there any entitlement to have those terms determined in court? [3]

That question is not merely procedural. It goes to the meaning and scope of FRAND.

FRAND is not a number

Following publication of my previous article, Eric Stasik helpfully reframed the debate in public comments on LinkedIn.[4] He took issue with terms such as *"sub-FRAND", "supra-FRAND",* and *"non-FRAND"* rates, on the basis that they implicitly regard FRAND as a number, or a narrow numerical range.

His central point is worth adopting explicitly: FRAND is not a number, it's a commercial process through which a licence-specific number is determined and agreed.[5]

This is more than semantics. It helps explain why outcomes can legitimately differ widely:

- bilateral licensing is typically bespoke and iterative;
- platform or pool licensing is multilateral, standardised and largely fixed following the programme's pre-launch negotiations among market participants; and
- different processes can yield different royalty rates, all of which may be FRAND in their respective contexts.

That perspective also clarifies why discussion of "non-FRAND factors" is unhelpful in this broad context.[6] Discounts, lump sums, timing effects and bargaining asymmetries are not necessarily deviations from FRAND; they are frequently integral to the

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[1] Keith Mallinson, *"Are patent pool royalty rates FRAND?"*, IP Finance (2 June 2026)
[2] UK Supreme Court, *Tesla v InterDigital* (UKSC/2025/0058), case summary
[3] I mostly refer to platforms rather that pools in this article because it's focused on Avanci. My analysis applies to both. Avanci makes the distinction that its platform is not a pool because it owns no SEPs and it is not owned or controlled by the platform's licensors.
[4] Eric Stasik, LinkedIn post responding to Mallinson (June 2026). Eric Stasik is the founder of Avvika with extensive experience negotiating FRAND licensing agreements on behalf of his numerous consulting clients.
[5] Eric Stasik, LinkedIn post responding to Mallinson (June 2026
[6] *Samsung v ZTE* [2026] EWHC 999 (Pat)

commercial process through which FRAND outcomes including royalty rates and other terms are reached.

What Tesla is actually asking for

The Tesla litigation must be appropriately characterised against that backdrop.

The dispute is framed by some[7] as though it were about whether Avanci's $32 per-vehicle royalty for its 5G automotive platform is FRAND.[8] But that is not the immediate issue before the Court.

The UK Supreme Court has framed the question in jurisdictional terms: whether UK courts may determine FRAND terms "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."[9]

Tesla is not seeking a determination of bilateral licence terms from an individual SEP owner in the conventional *Unwired Planet* (UKSC) sense.[10] Rather, it seeks declarations as to the terms of a collective platform licence, offered by Avanci acting as agent for numerous licensors that have only committed to license bilaterally, but to do so on FRAND terms.[11]

That distinction is fundamental.

The structure of the Avanci platform

As the Court of Appeal recorded, the Avanci 5G platform exhibits a number of distinctive features:

- Avanci is not an SEP owner and has given no undertaking to ETSI's IPR Policy;
- the licence is offered on standard terms at a fixed royalty ($32 per vehicle for 5G);
- Avanci acts as intermediary under contractual arrangements with licensors; and
- participation in the platform does not preclude licensors from offering bilateral licences independently: on the contrary, all its licensors are obliged to do under ETSI's IPR Policy.[12]

Avanci's position before the UK Supreme Court is accordingly that the ETSI undertaking:

[7] https://eu.36kr.com/en/p/3786609112996864
[8] Avanci also operates a separate 4G platform, previously licensed to Tesla.
[9] UK Supreme Court, *Tesla v InterDigital* (UKSC/2025/0058), case summary
[10] UK Supreme Court, *Unwired Planet v Huawei* (UKSC/2018/0214), case summary
[11] UK Supreme Court, *Tesla v InterDigital* (UKSC/2025/0058), case summary. *Tesla v InterDigital* [2025] EWCA Civ 193, Court of Appeal judgment.
[12] *Tesla v InterDigital* [2025] EWCA Civ 193, Court of Appeal judgment

- requires SEP owner readiness to grant bilateral FRAND licences;
- does not require collective licensing; and
- does not confer a general judicial mandate to assess platform licensing terms.[13]

InterDigital similarly emphasises that Tesla's claim is directed at the platform rather than any bilateral entitlement, and that Tesla has not sought a bilateral 5G licence from it.[14]

The category error

Viewed through the lens above, there is a risk of a category error in the current debate.

My previous article argued that platform rates should not be used as benchmarks for bilateral FRAND determinations.[15] The courts should hesitate before assuming that such rates are the appropriate subject matter for judicial FRAND determination under the ETSI framework.

If FRAND is a process rather than a number, and if platform licensing is a distinct process, then the existence of a platform should not necessarily bring it within the same judicial framework that's developed for bilateral licensing disputes.

That does not mean that platform rates are illegitimate. On the contrary, they may be entirely legitimate — indeed FRAND — in the context in which they arise. But it does not follow that courts must stand ready to determine or recalibrate those rates at the request of any dissatisfied implementer.[16]

Commercial process versus contractual obligation

The distinction can be framed more precisely.

The ETSI undertaking is a contractual commitment by the SEP owner to be "prepared to grant" irrevocable licences on FRAND terms.[17] Courts have developed a body of case law enabling them, in appropriate circumstances, to determine those terms and enforce compliance.

A platform licence, however, is something different:

- it aggregates rights from multiple licensors;
- it's offered through an intermediary that has given no ETSI undertaking; and

[13] Avanci, Written Case to UK Supreme Court (24 April 2026)
[14] InterDigital, Written Case to UK Supreme Court (23 March 2026)
[15] Keith Mallinson, *"Are patent pool royalty rates FRAND?"*, IP Finance (2 June 2026)
[16] If, hypothetically, the court would make such a determination, upon what basis would it do that? The comparables would surely be the dozens of automotive OEMs that are all paying the same $32 or $29 early bird royalty rate per car. https://www.avanci.com/vehicle/5gvehicle/
[17] https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf

- it's the product of a multilateral commercial process conducted prior to the platform's launch, rather than a bilateral negotiation conducted afterwards.[18]

Treating that offer as if it were simply another bilateral proposal risks extending the ETSI framework beyond its intended scope.

Freedom of contract and institutional design

The platform model also reflects deliberate institutional design choices.

Avanci's submissions emphasise that its platform is a voluntary, market-driven arrangement, developed through engagement with licensors and prospective licensees before launch, and subsequently adopted by significant numbers of both.[19] The UK Court of Appeal similarly recorded substantial uptake on both sides of the market.[20]

Such arrangements depend on:

- standardised terms;
- broad participation; and
- predictability once launched.

If courts treat platform pricing as subject to routine ex post judicial recalibration under FRAND, that may alter incentives for licensors to participate and for intermediaries to structure such arrangements in the first place.

That is not an argument for excluding scrutiny altogether. It is an argument for recognising that collective licensing sits alongside, rather than within, the core bilateral structure envisaged by the ETSI undertaking.[21]

"Non-FRAND factors" reconsidered

This brings us back to the increasing prominence of so-called "non-FRAND factors."[22]

In *Samsung v ZTE*, the English court placed significant weight on the effects of bargaining context, discounts, litigation risks and other adjustments in assessing

[18] Platforms periodically review terms including rates. This is also a multilateral process.
[19] Avanci, Written Case to UK Supreme Court (24 April 2026)
[20] *Tesla v InterDigital* [2025] EWCA Civ 193, Court of Appeal judgment
[21] The 3G Patent Platform Partnership (3G3P), developed circa 1998–2003 alongside ETSI/3GPP standardisation, sought to create a pooled licensing platform for essential 3G patents. Although ETSI supported the initiative conceptually, neither 3G3P licensing nor pooling in general was embedded in or adopted as part of ETSI's IPR Policy, which continued to rely entirely on bilateral FRAND commitments. Following conditional antitrust clearance, the platform was restructured into multiple technology-specific pools and failed to attract major SEP holders (including Ericsson, Nokia and Qualcomm). It therefore did not achieve industry-wide adoption or ETSI consensus, and had no impact on the evolution of ETSI's IPR framework, leaving bilateral licensing dominant. In: World eBusiness Law Report, [2003]
[22] That term was coined in *Samsung v ZTE* [2026] EWHC 999 (Pat) and appears 23 times in the Judgment.

comparables.[23] Yet, as suggested above, many such elements are better considered as part of the ordinary process of commercial negotiation, rather than as aberrations.

Applied uncritically, the same reasoning risks mischaracterising the features of platform licensing — standardisation, limited post-launch flexibility, and ex ante rate-setting — as departures from FRAND, rather than as defining characteristics of a different licensing model.

No gap in protection

Importantly, recognising this distinction does not leave implementers without protection.

SEP owners remain bound by their ETSI undertakings and must be prepared to grant bilateral FRAND licences. That obligation remains, particularly where enforcement relief (i.e. an injunction) is sought.

Participation in a platform does not displace that obligation.[24]

The question is not whether FRAND applies at all, but where and how it applies.

Conclusion

This article is intended to complement my previous analysis.

There, I argued that platform rates should not be used as benchmarks for bilateral FRAND determinations.[25] Here, I suggest that courts should also be cautious before treating such rates as the appropriate object of judicial FRAND determination under the ETSI framework.

The point is not that platform rates are "sub-FRAND" or otherwise deficient. On the contrary, they may be entirely FRAND within their own commercial context. The point is that FRAND operates through different processes in different licensing structures, and those processes should not be conflated.

FRAND does not necessarily include a right to a platform licence. Recognising that preserves both the integrity of the ETSI undertaking and the legitimacy of alternative licensing institutions developed by the market.

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[23] *Samsung v ZTE* [2026] EWHC 999 (Pat)
[24] Avanci, Written Case to UK Supreme Court (24 April 2026)
[25] Keith Mallinson, *"Are patent pool royalty rates FRAND?"*, IP Finance (2 June 2026)