

Appeal n°:

UPC_CoA_631/2025

UPC_CoA_632/2025

App_33679/2025

App_33696/2025

FINAL ORDER

of the Court of Appeal of the Unified Patent Court

concerning an application for the protection of confidential information under R. 262A RoP
issued on 26 January 2026

HEADNOTE

1. When deciding on the measures for the protection of confidential information and assessing their proportionality, the Court must take into account the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties, and, where appropriate, for third parties, resulting from the granting or rejection of such measures.
2. In the event that one of the parties is a legal person, that party should be able to propose a natural person or natural persons who ought to form part of that circle of persons entitled to have access so as to ensure proper representation of that legal person, subject to appropriate judicial control to prevent the objective of the restriction of access to evidence and hearings from being undermined.
3. Whether the person proposed by a party may be granted access to the confidential information must be determined on the basis of the relevant circumstances of the case, including the role of that person in the proceedings before this Court, the relevance of the confidential information to the performance of that role and the trustworthiness of the person in keeping the information confidential.
4. The fact that a person is an employee of a party is, as a general rule, not sufficient to deny access to that person. The exclusion of employees would severely restrict a party's freedom to choose who will represent it in the proceedings. Furthermore, an employee of a party will often be better placed to present the party's view, provide and review relevant information and instruct the representatives than persons external to the party's organization. Consequently, access for a party's employee will often be essential to ensure compliance with the right of that party to an effective remedy and to a fair trial. For that reason, and as a general rule, the interest of the party in having full access for at least one of its employees outweighs the interests of the applicant, even if the imposition of an "External Eyes Only" regime would be preferable from the perspective of safeguarding confidentiality.
5. Furthermore, where the confidential information concerns a licence agreement between a party and a third party, the potential harm for this third party, resulting from allowing access to an employee of the other party to the proceedings, may be mitigated by requiring that employee to refrain from involvement in patent licensing negotiations with the third party for a certain period. Such a bar prevents the employee from using such confidential information in these negotiations, whether intentionally or not. It thereby facilitates compliance with the confidentiality regime and provides all parties with a greater

degree of legal certainty, as the involvement of the employee in negotiations is easier to establish than the employee's use – inadvertent or otherwise – of the confidential information in such negotiations.

KEYWORDS

Appeal; application for the protection of confidential information.

APPELLANT (CLAIMANT AND COUNTERDEFENDANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

Telefonaktiebolaget LM Ericsson, Stockholm, Sweden

hereinafter "**Ericsson**"

represented by attorney-at-law Wim Maas, Taylor Wessing N.V., and other representatives of that firm and of Jacobacci Avvocati

RESPONDENTS (DEFENDANTS AND COUNTERCLAIMANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

1) ASUSTeK Computer Inc., Taipei City, Taiwan (R.O.C.)

2) Arvato Netherlands B.V., Heijen, The Netherlands

hereinafter, jointly "**ASUS**"

represented by attorney-at-law Eva Geschke, Wildanger Kehrwald Graf v. Schwerin & Partner mbB Rechtsanwälte and other representatives of that firm

INTERVENER IN THE PROCEEDINGS BEFORE THE COURT OF APPEAL

APPLE Inc., Cupertino, California, United States

hereinafter "**Apple**"

represented by attorney-at-law Abdelaziz Khatab, Simmons & Simmons LLP, and other representatives of that firm.

PATENTS AT ISSUE

UPC_CoA_631/2025: EP 2 727 342

UPC_CoA_632/2025: EP 3 076 673

PANEL AND DECIDING JUDGES

Panel 1a

Klaus Grabinski, President of the Court of Appeal

Peter Blok, legally qualified judge and judge-rapporteur

Emmanuel Gougué, legally qualified judge

LANGUAGE OF THE PROCEEDINGS

English

IMPUGNED ORDERS OF THE COURT OF FIRST INSTANCE

UPC_CoA_631/2025:

- Order of the Court of First Instance of the Unified Patent Court, Milan Local Division, dated 20 June 2025
- Reference numbers:

UPC_CFI_730/2024
CC_62953/2024
App_22314/2025
ORD_23651/2025

UPC_CoA_632/2025:

- Order of the Court of First Instance of the Unified Patent Court, Milan Local Division, dated 20 June 2025
- Reference numbers:

UPC_CFI_728/2024
CC_62950/2024
App_22313/2025
ORD_23268/2025

HEARING DATE

26 November 2025

FACTS AND REQUESTS OF THE PARTIES

1. On 14 June 2024, Ericsson filed two infringement actions against ASUS and Digital River Ireland Ltd. (“Digital River”) with the Milan Local Division.
2. On 29 November 2024, ASUS and Digital River filed a Statement of defence in the two infringement actions, two counterclaims for revocation and four identical applications for the protection of confidential information pursuant to R. 262.2 and 262A RoP.
3. On 20 December 2024, Ericsson filed a response to the applications for a confidentiality regime. In its response, it announced that it intended to submit to the Court, with its Statement of reply to the Statement of defence, one or more exhibits containing information from and on licence agreements between Ericsson and third parties. For this reason, Ericsson requested that an “external eyes only” regime (“EEO regime”) be applied to the confidential documents submitted by ASUS and Digital River as well as to the documents to be submitted by Ericsson, meaning that access to such confidential documents will be provided only to one expert on each party’s side and to each party’s outside counsel.
4. Following an invitation by the Court to explore the possibility of reaching an agreement on the confidentiality regime, the parties informed the Court that they agreed that a confidentiality regime should be established in respect of all confidential information. ASUS and Digital River, however, were against applying an EEO regime. They argued that the UPCA and RoP provide no basis for applying such a regime and that it would prejudice their right to a fair trial.
5. By orders of 28 April 2025 (the “Confidentiality Orders”), the judge-rapporteur of the Milan Local Division – in summary – established a confidentiality regime for the confidential documents submitted by ASUS and Digital River, as well as all other documents designated as confidential by one of the parties, without prejudice to the right of the other parties to challenge the confidential nature of such documents.

However, the judge-rapporteur rejected the adoption of an EEO regime. The group of persons having access to the confidential information therefore included one natural person from each party.

6. By orders of 20 June 2025 (the “Panel Review Orders”), the panel of the Milan Local Division dismissed Ericsson’s applications for review of the Confidentiality Orders.
7. With its Statement of reply in the infringement action of 30 June 2025, Ericsson submitted an expert report (Exhibit E60), which comprises an analysis of [REDACTED] licence agreements that Ericsson has concluded with third parties for its standard essential patents. The [REDACTED] counterparties to these agreements did not object to Ericsson disclosing these licence agreements under the confidentiality regime imposed by the Confidentiality Orders. These licence agreements are attached as annexes to the expert opinion.
8. Ericsson wishes to rely on licence agreements with three other parties, i.e. [REDACTED] [REDACTED] and [REDACTED] (the “Confidential Licence Agreements”). These three parties object to Ericsson disclosing the Confidential Licence Agreements under the confidentiality regime imposed by the Confidentiality Orders. They would allow disclosure under an EEO regime.
9. Ericsson filed appeals against the Panel Review Orders, requesting that the Court of Appeal – in summary – partially revoke the panel review orders and the confidentiality orders of 28 April 2025 and order an EEO regime with regard to the Confidential Licence Agreements, and uphold these orders in all other respects.
10. ASUS responded to the appeal, requesting that the Court of Appeal reject the appeals, uphold the confidentiality regime and order that Ericsson bear the costs of the appeal.
11. By order of 23 September 2025, the Court of Appeal admitted Apple as an intervener in the appeal proceedings in support of Ericsson’s position.
12. In its Statement in intervention, Apple requests that the Court of Appeal set aside the Panel Review Orders and the Confidentiality Orders and – in summary – order a confidentiality regime complying with various requirements, relating inter alia to the number of persons having access, the residence of such persons, the stage of the proceedings at which access is granted, the use of virtual data rooms and the fines for breach of the confidentiality obligations.
13. Ericsson and ASUS responded to the Statement in intervention.

GROUND FOR THE ORDER

Principles for establishing a confidentiality club

14. The Trade Secrets Directive (Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15 June 2016, p. 1, hereinafter also “TSD”) concerns the unlawful acquisition, use or disclosure of trade secrets and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings (Art. 1(1) TSD and CJEU, decision of 7 September 2021, C-927/19, para 97). The Directive’s provision on the preservation of confidentiality of trade secrets in the course of legal proceedings (Art. 9 TSD) is not directly applicable to the patent law proceedings before this Court.
15. As is apparent from the identical wording of parts of R. 262A RoP and Art. 9 TSD and the legislative history of the Rules of Procedure, the provisions of the Directive have inspired the legislature when drafting R. 262A RoP. Therefore, when interpreting R. 262A RoP, the Court of Appeal will use principles similar to the principles underlying the Trade Secrets Directive.

16. To protect trade secrets, personal data or other confidential information, the Court may order that access to such information be restricted to specific persons (Art. 58 UPCA and R. 262A RoP). The Court may allow an application for such an order considering in particular whether the grounds relied upon by the applicant significantly outweigh the interest of the other party to have full access to the information (R. 262A.5 RoP).
17. When deciding on the measures for the protection of confidential information and assessing their proportionality, the Court must take into account the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties, and, where appropriate, for third parties, resulting from the granting or rejection of such measures (cf. Art. 9(3) TSD).
18. Pursuant to R. 262A.6 RoP, the number of persons to whom access is restricted shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings.
19. In the event that one of the parties is a legal person, that party should be able to propose a natural person or natural persons who ought to form part of that circle of persons entitled to have access so as to ensure proper representation of that legal person, subject to appropriate judicial control to prevent the objective of the restriction of access to evidence and hearings from being undermined (cf. recital 25 TSD).
20. Whether the person proposed by a party may be granted access to the confidential information must be determined on the basis of the relevant circumstances of the case, including the role of that person in the proceedings before this Court, the relevance of the confidential information to the performance of that role and the trustworthiness of the person in keeping the information confidential (UPC_CoA_621/2024, order of 12 February 2025, point 12, *Daedalus v. Xiaomi*).
21. The fact that a person is an employee of a party is, as a general rule, not sufficient to deny access to that person. The exclusion of employees would severely restrict a party's freedom to choose who will represent it in the proceedings. Furthermore, an employee of a party will often be better placed to present the party's view, provide and review relevant information and instruct the representatives than persons external to the party's organization. Consequently, access for a party's employee will often be essential to ensure compliance with the right of that party to an effective remedy and to a fair trial. For that reason, and as a general rule, the interest of the party in having full access for at least one of its employees outweighs the interests of the applicant, even if the imposition of an EEO regime would be preferable from the perspective of safeguarding confidentiality.
22. Furthermore, where the confidential information concerns a licence agreement between a party and a third party, the potential harm for this third party, resulting from allowing access to an employee of the other party to the proceedings, may be mitigated by requiring that employee to refrain from involvement in patent licensing negotiations with the third party for a certain period. Such a bar prevents the employee from using such confidential information in these negotiations, whether intentionally or not. It thereby facilitates compliance with the confidentiality regime and provides all parties with a greater degree of legal certainty, as the involvement of the employee in negotiations is easier to establish than the employee's use – inadvertent or otherwise – of the confidential information in such negotiations.
23. This assessment is not altered by Ericsson's and Apple's reference to Art. 9 TSD, with which Art. 262A RoP is in line according to the drafters of the RoP. Ericsson and Apple invoke that provision primarily to argue that the Trade Secrets Directive does not preclude the application of an EEO regime. Even if the Directive were applicable and this interpretation were correct, it does not follow that this Court is required to impose an EEO regime in the present case.

24. The Milan Local Division correctly observed that the Court must apply Union law in its entirety, including EU competition law, and respect its primacy (Art. 20 UPCA), and that the Court must further ensure that the rules, procedures and remedies provided for in the UPCA and the UPCS do not distort competition (Art. 42(2) UPCA). However, Ericsson and Apple have not demonstrated that disclosing information under a confidentiality regime that allows use of the information by an employee of a party solely in the context of proceedings before this Court would result in violations of EU law or produce any anti-competitive effects. Even if use of the information in violation of the confidentiality regime were to produce anti-competitive effects, this does not mean that imposing the regime conflicts with EU competition law.

The confidentiality club in the present case

25. The Milan Local Division did not err in allowing one natural person from ASUS access to the confidential information.

26. Ericsson and Apple do not contest that the employee who ASUS proposes to be included in the confidentiality club plays an essential role in the proceedings, including in the debate on ASUS's claim to a Fair Reasonable and Non-Discriminatory ("FRAND") licence. ASUS has further demonstrated that access to the confidential information, including the Confidential Licence Agreements, is necessary to perform that role. Such access is necessary, since the confidential information concerns licence agreements on which Ericsson seeks to rely in support of its arguments relating to the FRAND licence requirements. It is not in dispute that those requirements are a core aspect of the case. Apple's contention that aggregated data on the Confidential Licence Agreements would be sufficient is ill-founded. Even if the debate on the FRAND licence requirements were to focus on aggregated data, the ASUS employee must be in a position to examine and, where necessary, challenge the information on which the aggregated data is based.

27. Furthermore, Ericsson and Apple did not raise any substantiated concerns on the trustworthiness of the employee in maintaining the confidentiality of the information.

28. However, the fact that the employee cannot "unlearn" information to which he has been exposed and that the information on the Confidential Licence Agreements may influence the employee's behaviour in future negotiations, even inadvertently, necessitates additional measures. Following a suggestion by ASUS (Statement of response, para. 30 and 46.4) and Apple, the Court of Appeal therefore discussed with the parties the option of a licensing bar. Ericsson emphasised that the bar should apply to all three counterparties to the Confidential Licence Agreements. ASUS argued that the bar restricts the employee and ASUS in conducting licence negotiations and that therefore it should be formulated with sufficient specificity with regard to duration and the counterparties.

29. The Court of Appeal is of the opinion that in the present case a licensing bar is necessary to protect the confidential information for the reasons given above in paragraphs 22 and 28. The statement by the ASUS employee (ASUS Exhibit COA_1) is not a sufficient safeguard. The statement does not cover the counterparties to the Confidential Licence Agreements other than Apple and does not provide for any sanctions for involvement in negotiations. At the same time, the employee's statement that he is not involved in outbound licensing negotiations, and will continue to ensure that he will not be involved either directly or indirectly in licence negotiations with Apple in the future, support the finding that the licensing bar on this employee is not a disproportionate limitation of his or ASUS's rights and freedoms. The employee from each party will therefore be allowed access to the Confidential Licence Agreements only if the employee will not participate in or advise upon any patent licensing negotiations with the counterparties to the Confidential Licence Agreements for a period of five years from the date of this order, save with the relevant counterparty's consent. The five-year term is in accordance with the duration of the licensing bar requested by Apple, which as such was not contested by Ericsson and ASUS.

30. These findings on the appropriate confidentiality regime for the present case are not called into question by the fact that ASUS, in its Statement of response, stated that it needs to be able to form an informed

view on whether to maintain that Ericsson's licensing demands are not FRAND and whether to make a revised counteroffer and, if so, at what level. Contrary to Apple's contention, this statement does not prove that there is a concrete and direct risk of improper use of the confidential information. The statement refers to the use of the confidential information in the context of the present proceedings, as allowed under the confidentiality regime.

31. Ericsson failed to demonstrate that sharing the confidential information with an employee of the parties in the present proceedings violates a protective order which a US Court has imposed in parallel proceedings in the USA. None of the parties is seeking to rely on documents that it has access to only by virtue of the US protective order. ASUS is not even party to the US proceedings. In addition, the rules for sharing information in proceedings before this Court are not determined by regimes imposed by other courts in parallel proceedings. Nor has Ericsson shown that differences in the applicable regimes will complicate its ability to consult effectively with both US and European counsel regarding strategy and approach towards ASUS. Furthermore, the alleged complications for Ericsson cannot limit ASUS's entitlement to full access for one of its employees. In addition, Ericsson stated that it has not shared any confidential information with its employee pending the appeal. It is free to continue with not sharing the confidential information if it believes that such sharing complicates consultations between counsel.
32. Ericsson's statement that the Confidential Licence Agreements only allow sharing of the information under an EEO regime does not alter the assessment. The rules for sharing information in proceedings before this Court are determined by the UPCA and RoP, not by agreements between one of the parties and third parties. In addition, Ericsson only maintains that the Confidential Licence Agreements prevent it from submitting these documents voluntarily. As observed by ASUS, this leaves open the possibility that Ericsson, under the Confidential Licence Agreements, may seek an order to produce these documents. Against this background, Ericsson's complaint that it is harmed in its defence and that its right to an effective legal remedy is violated must be dismissed.

Apple's additional requests

33. In its Statement in intervention, Apple submitted a number of requests which go beyond Ericsson's request to order an EEO regime with regard to the Confidential Licence Agreements. These additional requests are inadmissible.
34. Pursuant to R. 313.2 RoP, an application to intervene is admissible only if it is made in support of a claim, order or remedy sought by one of the parties. Accordingly, by its order of 23 September 2025, the Court of Appeal admitted Apple as an intervener in support of Ericsson's position. The Court of Appeal did not permit the submission of additional requests concerning, for instance, the residence of the persons having access, the stage of the proceedings at which access is granted and the use of virtual data rooms.

Conclusion

35. It follows that the Panel Review Orders and Confidentiality Orders of the Court of First Instance must be set aside to the extent that they impose a confidentiality regime for information contained in the Confidential Licence Agreements without a licensing bar. The orders will be upheld in all other respects, i.e. the orders relating to confidential information other than information contained in the Confidential License Agreements and the orders relating to information contained in the Confidential License Agreements other than the omission of the licensing bar. For the sake of clarity, the Court of Appeal will establish a new confidentiality regime for the information contained in the Confidential License Agreements. The penalty for non-compliance will be set at € 1,000,000 for each culpable breach of the order, notwithstanding the power of the Court to deviate therefrom for reasons of reasonableness and proportionality, if the circumstances so require (cf. UPC_CoA_699/2025, order of 14 October 2025, Kodak v. Fujifilm).

36. The Court of Appeal will not issue a cost decision in this order, since this order is not the final decision concluding the actions.

ORDER

- I. The Panel Review Orders and Confidentiality Orders are set aside to the extent that the imposed confidentiality regime relates to information contained in the Confidential Licence Agreements;
- II. The information contained in the Confidential Licence Agreements is classified as confidential;
- III. Access to the information contained in the Confidential Licence Agreements shall be restricted to the following persons only:
 - (i) Ericsson's authorised external UPC representatives in these proceedings and their assistants;
 - (ii) ASUS's authorised external UPC representatives in these proceedings and their assistants;
 - (iii) Ericsson's licensing expert witness Robert Mills - Berkeley Research Group, LLC - and his assistants;
 - (iv) ASUS's licensing expert witness Philip Kline - EconEdge, LLC - and his assistants;
 - (v) one natural person from each party
 - a) for Ericsson, [REDACTED]
 - b) for ASUS, [REDACTED]
- IV. Such information shall not be used or disclosed outside these court proceedings;
- V. The persons under III. shall be under a mutual obligation to maintain the confidentiality of the information contained in the unredacted versions of the confidential documents;
- VI. The persons under III. sub (v) a) and b) shall not participate in or advise upon any patent licensing negotiations with the counterparties to the Confidential Licence Agreements for a period of five years from the date of this order, save with the relevant counterparty's consent;
- VII. This obligation of confidentiality shall continue to apply after the termination of these proceedings;
- VIII. In the event of a culpable breach of this order, the Court may impose a penalty payment of € 1,000,000 on the relevant party for each breach pursuant to rule 354.3 RoP;
- IX. The Panel Review Orders and Confidentiality Orders are upheld in all other respects;
- X. Apple's further requests are rejected as inadmissible.

This order was issued on 26 January 2026.

KLAUS STEFAN MARTIN Grabinski
Digitally signed by KLAUS STEFAN MARTIN Grabinski
DN: cn=KLAUS STEFAN MARTIN Grabinski,
c=DE,
email=klaus.grabinski@unitedpatentcourt.org
Date: 2026.01.26 17:25:04 +01'00'

Klaus Grabinski
President of the Court of Appeal

Peter Hendrik Blok
Digitally signed by
Peter Hendrik Blok
Date: 2026.01.26
18:11:58 +01'00'

Peter Blok
Legally qualified judge and judge-rapporteur

EMMANUEL, LUCIEN, RENÉ GOUGÉ
Signé numériquement par
EMMANUEL, LUCIEN,
RENÉ GOUGÉ
Date : 2026.01.26 17:34:53
+01'00'

Emmanuel Gougé
Legally qualified judge