

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 17 August 2026
on requests for evidence production (R. 190 RoP)

HEADNOTES

- 1) A decision on an application pursuant to Art. 59 UPCA / R. 190 RoP needs to be appealed within 15 days after service of the order pursuant to Art. 73(2)(a) UPCA and R. 224.1(b) RoP even if it is contained in a decision in the main proceedings in one document that is called 'Decision'; the Court's decision on a R.190 RoP application still takes the form of an order, to which R. 220.1(c) and R. 224.1(b) RoP apply.
- 2) An excusable error can, in exceptional circumstances, justify a derogation from the rule that the time period for lodging an appeal is a mandatory time limit that cannot be extended. A wrong indication of a time period applicable to an order referred to in R. 220.1(c) RoP is in itself insufficient to constitute exceptional circumstances, because a representative exercising all due care should have been aware that the applicable time period for lodging an appeal is 15 days after service of the order.
- 3) Leaving aside whether R. 242.2(a) RoP, stating that the Court of Appeal may exercise any power within the competence of the Court of First Instance, implies that a party may lodge an application pursuant to R. 190 RoP for the first time during appeal proceedings, such an application is held inadmissible under the circumstances of the case.
- 4) An application that is substantially the same in terms of the requested evidence to be produced as an application that was already filed and decided upon in substance at first instance, failing new facts justifying its refiling, is not a request which has not been submitted by a party during proceedings before the Court of First Instance that may, at the discretion of the Court of Appeal, under the conditions of R. 222.2 RoP, be allowed on appeal. Thus, R. 222.2 RoP does not apply to such a request and the only procedural remedy against its dismissal is lodging a (timely) appeal.
- 5) A refiled R. 190 RoP application, i.e. requesting substantially the same evidence to be produced, would only be admissible on appeal if justified by new facts that could not reasonably have been available during the first instance proceedings. That is because allowing a refiling of essentially the same – and dismissed – R. 190 RoP application on appeal that is not based on new facts would lead to a circumvention of the appeal mechanism set forth in the UPCA and Rules of Procedure and the strict time limits applicable thereto, which serve legal certainty of third parties and procedural efficiency.

- 6) R. 222.2 RoP would apply by analogy to an admissible refiled R.190 application, i.e. whose filing is justified by new facts.

KEYWORDS

Applicable time period for appeal concerning an Art. 59 UPCA / R. 190 RoP application; excusable error; refiled application on appeal; wrong or incomplete appeal information or other missing parts in decisions of the Court of First Instance;

APPLICANT AND APPELLANT (AND CLAIMANT AND COUNTER-DEFENDANT BEFORE THE COURT OF FIRST INSTANCE)

Network System Technologies LLC, Portland, United States

(hereinafter referred to as 'NST')

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

1. **Qualcomm Incorporated**, San Diego, United States
2. **Qualcomm Technologies, Inc.**, San Diego, United States
3. **Qualcomm Germany GmbH**, Munich, Germany

(hereinafter jointly referred to as 'Qualcomm')

all represented by Johannes Heselberger, attorney at law, and other attorneys at law and Patent attorneys of the law firms BARDEHLE PAGENBERG Partnership mbB, Munich, Germany

PATENTS AT ISSUE

EP 1 552 399

EP 1 552 669

EP 1 875 683

DECIDING JUDGES

Panel 2:

Rian Kalden, presiding judge and judge rapporteur

Patricia Rombach, legally qualified judge

Ingeborg Simonsson, legally qualified judge

Steven Kitchen, technically qualified judge

Christoph Norrenbrock, technically qualified judge

IMPUGNED DECISIONS OF THE COURT OF FIRST INSTANCE

Decisions of the Munich Local Division issued on 11 March 2026 in the infringement proceedings UPC-CFI-63/2024, UPC-CFI-64/2024, UPC-CFI-65/2024

LANGUAGE OF THE PROCEEDINGS

English

SUMMARY OF FACTS (INSOFAR AS RELEVANT)

1. On 4 March 2024, NST initiated infringement proceedings against, amongst other, Qualcomm.
2. NST requested a finding of infringement of the patents at issue and the grant of corresponding remedies, including an injunction and other measures following from a finding of infringement.
3. On 4 February 2025, together with its Statement of reply to Qualcomm's defence, NST lodged an application for an order for the production of evidence under R. 190 RoP in all infringement proceedings (hereinafter 'the R. 190-Applications'). The R. 190-Applications were amended on 8 April 2025.
4. NST requested an order requiring Qualcomm to produce the source code and technical documentation relating to its NoC technology. NST argued that Qualcomm's chips implemented Arteris NoC technology and that disclosure of those materials was necessary to establish infringement, particularly because Qualcomm disputed that its NoC technology corresponded to the Arteris documentation.
5. Qualcomm requested dismissal of the infringement actions and, by way of counterclaims for revocation, revocation of the patents in suit.
6. In UPC-CFI-449/2024 and UPC-CFI-63/2024, the Munich Local Division (MLD) revoked European patent EP 1 552 669 with effect for the territories of France and Germany and dismissed the application to amend the patent as well as the infringement action. Moreover, it ordered that the costs of the infringement action against Qualcomm and the costs of the counterclaim for revocation be borne by NST. In its decision, the MLD considered that NST's R. 190-Application is not successful and must be rejected.
7. NST filed an appeal against this decision on 11 May 2026 (UPC-CoA-69/2026, infringement).
8. In UPC-CFI-64/2024 and UPC-CFI-450/2024 as well as UPC-CFI_65/2024 and UPC-CFI-451/2024, the MLD dismissed both the infringement actions and the counterclaims for revocation and ordered that the costs of the infringement actions against Qualcomm be borne by NST and the costs of the counterclaims for revocation by Qualcomm. In each decision, the MLD considered that NST's R. 190-Application is not successful and must be rejected.
9. NST lodged appeals against these decisions on 11 May 2026 (UPC-CoA-71/2026 and UPC-CoA-72/2026 respectively concerning infringement).
10. On 13 July 2026, NST filed its Statements of grounds of appeal in each of the appeal cases. Therein, NST *inter alia* objects to the MLD's reasoning and dismissal of its R. 190-Application.
11. Also on 13 July 2026, NST filed another request for evidence production pursuant to Art. 59(1) UPCA and R. 190 RoP with the Court of Appeal.

12. In the judge rapporteur's order of 21 July 2026, the parties were invited to submit their comments on whether:
- a. NST's appeals against the dismissals of its R.190-Applications are admissible;
 - b. NST's applications pursuant to R. 190 RoP filed on 13 July 2026 are admissible.
13. The parties each timely filed their comments.

GROUND

The admissibility of the appeals against the dismissal of the R. 190-Applications

The orders rejecting the R. 190-Applications and applicable time period for lodging an appeal

14. An application for an order to produce evidence pursuant to R. 190 RoP has its basis in Art. 59 UPCA. As already indicated in these provisions, a decision on such an application takes the form of an order. This is also clear from Art. 73 (2)(a) UPCA, pursuant to which explicitly "for the *orders* referred to in Articles 49(5), 59 to 62 and 67 UPCA" (emphasis added), an appeal may be brought within 15 calendar days of the notification of the order to the applicant.
15. This is reflected in the Rules of Procedure in R. 220.1(c) RoP, where *orders* referred to in Articles 49(5), 59 to 62 and 67 UPCA are mentioned as a separate category that an adversely affected party may bring an appeal against – sometimes referred to as 'privileged orders', next to the *decisions* mentioned in R. 220.1(a) and (b) RoP to which a two-month appeal period applies. The applicable time limit of 15 days for lodging an appeal against a privileged order as mentioned in Art. 73(2)(a) UPCA is contained in R. 224.1(b) RoP.
16. R. 220.2 RoP refers to a further category of orders that a party may bring an appeal against, i.e. orders other than those referred to in R. 220.1 RoP and R. 97.5 RoP, often referred to as 'procedural orders'. These may be either appealed together with the appeal against the decision (in the main proceedings) or may be appealed – with the leave of Court of First Instance – within 15 days of service of the Court's decision to that effect.
17. The short time period for bringing an appeal against privileged orders and procedural orders is justified by the impact that such orders may have on the course of the main proceedings and thus require fast proceedings, which is also reflected in the equally short time period of 15 days for lodging a response in these proceedings.
18. In its order of 26 April 2024 (UPC-CoA-500/2023, *AIM v. Supponor*), the Court of Appeal clarified that R. 220.1(c) RoP must be understood as referring to "*orders on applications* referred to in ..." (emphasis added). Consequently, a decision concerning an application for the production of evidence, whether it is granted or dismissed, constitutes an appealable order pursuant to Art. 73(2)(a) UPCA in conjunction with R. 220.1(c) RoP.
19. It also follows from the *AIM v Supponor* order – where the Court in the first instance proceedings had decided in the main action and in the action for preliminary measures in one document called 'Decision' – that for the determination of a decision on an application pursuant to Art. 49(5), 59-62 and 67 UPCA as

an “order” mentioned in R. 220.1(c) RoP, it is irrelevant whether it is decided upon in a separate order or it is contained in the decision in the main proceedings. Also in the latter case, the decision on the application still constitutes an order as meant in R. 220.1(c) RoP that needs to be appealed within 15 days. Indeed, contrary to NST’s argument, it is expected from the appellant to identify decisions which are appealable within 15 days and to identify other individual decisions which are appealable within two months (see also *Speed Care v Teleflex* (UPC-CoA-85/2026), 10 June 2026, para. 17).

20. The determination of a decision on a R.190 RoP application as an “order” mentioned in R. 220.1(c) RoP also does not depend on whether it was issued by the judge-rapporteur or the panel, or whether it was decided upon as a separate order or contained in the decision in the main proceedings, as NST submits. There is no basis in the UPCA or the Rules of Procedure to only characterise a decision on a R.190 RoP application as an order as meant in R. 220.1(c) RoP if separately issued by the judge-rapporteur prior to the decision in the main proceedings.
21. According to R. 190.3 RoP – which NST relies on – the judge-rapporteur may make an order to produce evidence in the written procedure or in the interim procedure. However, this Rule allows the judge-rapporteur to do so, but does not compel him to do so. Neither does R. 190.3 RoP exclude a decision by the panel, rather than the judge-rapporteur. This is already apparent from R. 190.5 RoP which states that “Where the *Court* orders a third party to produce evidence...”. This also follows from R. 1.2 (a) RoP. According to that rule, where these Rules provide for the Court to perform any act other than an act exclusively reserved for a panel of the Court, the President of the Court of First Instance or the President of the Court of Appeal, the act may be performed by the presiding judge or the judge-rapporteur or the panel to which the action has been designed. The possibility of an act exclusively reserved to the judge-rapporteur is not mentioned. In line therewith R. 102.1 RoP provides that “The judge-rapporteur may refer any matter to the panel for decision”.
22. The Court has a discretion to decide on an application for the production of evidence which was filed in the course of the main proceedings, such as infringement proceedings, together with the decision in the main proceeding if the circumstances of the case dictate and/or allow to do so.
23. NST therefore without success argues that once a decision on an application pursuant to Art. 59 UPCA / R. 190 RoP is contained in a decision in the main proceedings (such as an infringement action), it becomes part of a ‘uniform decision’, which may be appealed from within the same time period of two months. Transforming a decision on a R. 190 RoP application from an “order” to a “decision” once contained in a decision in the main proceedings has no basis in either the UPCA or the RoP. The privileged orders are explicitly mentioned as a separate category of orders with a short time period for bringing an appeal, for the reason explained above (para. 17). Unlike for procedural orders (R. 220.2 RoP), a regime that allows a privileged order to be also appealed together with the appeal against the decision in the main action is not foreseen.
24. NST’s allegation that “[a] ruling made inside the reasoning of a decision, and given no separate designation, takes the form of the decision that contains it” (p. 12 of its Comments) is incorrect. It also would not lead to a two-month appeal period being applicable in the present case. A ruling on a R. 190 RoP application has been given a separate designation in the UPCA (Art. 73.2(a)) and the Rules of Procedure (R. 220.1(c)) with a 15-day time period for the appeal applicable to it.

25. It cannot be denied that a decision on an application for the production of evidence impacts the main proceedings, but contrary to NST's argument, that does not lead to the conclusion that an appeal period of 2 months should apply if it is contained in the decision on the merits. The very reason why the appeal period for privileged orders have a short time period for lodging an appeal is that it serves procedural efficiency. A timely lodged appeal within 15 days would have allowed the Court of Appeal to decide on this appeal and, if allowed, the produced evidence could have been available before the Statement of grounds of appeal would have to be lodged. Procedural efficiency would suffer if an appeal against a decision on a R. 190 RoP application could be lodged together with the appeal against the decision in the main proceedings within 2 months. The appeal related to the R. 190 RoP application could not be decided before the Statement of grounds of appeal is lodged and if the R. 190 RoP appeal is allowed and the evidence admitted in the appeal proceedings, the appellant would need a further opportunity to comment on the evidence obtained and the consequences for the infringement actions, while no such further Statement is foreseen. It would also mean that the respondent would require an extension for lodging its Statement of response or an opportunity for a further submission, all leading to an increased complexity and substantial delay of the appeal proceedings.
26. It is also clear that the MLD decided on the R. 190-Applications in the impugned decisions and there cannot have been any doubt that the R. 190-Applications were rejected.
27. For the UPC-CFI-63/2024 case, this is apparent from chapter 4 "Application to produce evidence" with para. 216-234 at the end of the impugned decision. In para. 216 the MLD stated that "It follows from the reasons stated above that the Claimant's application to produce evidence is not successful and must be rejected". After setting out the parties' submissions and requests, the MLD under the heading "c) Grounds for rejection" sets out the reasons for the rejection, starting with para. 222 stating "The Claimant's request for an order to produce evidence has no basis in Art. 59 (1) UPCA and Rule 190.1 RoP and is therefore unfounded". The MLD then further elaborated and explained the principles in the following para. 223-226 under the heading (1), followed by the application of the principles to the case under the heading (2), starting with para. 228. stating "Applying the above principles to the present case, the Court exercises its discretion not to issue an order to produce evidence. The Claimant's requests are not well-founded" further elaborated and explained in para. 229-232, concluding that "the requested order cannot be granted".
28. For the UPC-CFI-64/2024 case, similar considerations are in para. 251-269 and for the UPC-CFI-64/2024 case, similar considerations are contained in para. 309-327.
29. It was also clear to NST that the MLD had decided on the R. 190-Applications by rejecting them, since it included objections against that dismissal in its Statements of grounds of appeal. In the UPC-CoA-69/2026 appeal, NST states (p. 31) that "The present appeal is directed exclusively against the dismissal of the infringement action and on an auxiliary basis against the dismissal of the evidence production request". This is further elaborated in chapter E (Grounds of Appeal), section V (Request for Evidence Production, p. 70 et seq), where NST complains that "the CFI's refusal to grant access to source code production under Art. 59(1) UPCA, R. 190 RoP materially impaired the Claimant's ability to establish infringement and in any case led to the erroneous dismissal of the action". Similar statements are contained in the

Statement of grounds of appeal in the UPC-CoA-71/2026 appeal (p. 18 and chapter E section III, p. 63 et seq), as well as in the UPC-CoA-72/2026 appeal (p. 21 and chapter E section III, p. 65 et seq).

30. In view of the clear considerations of the MLD that it rejected the R. 190-Applications, the impugned decisions must be understood to contain an order referred to in Art. 59 UPCA, as meant in R. 220.1(c) RoP. The fact that the MLD did not include the R. 190-Application in the 'Requests' section of the decisions and did not include its dismissal of the R. 190-Application in the operative part of the decisions does not alter that.
31. Failing to include the rejection of the R. 190-Application in the operative part of the impugned decisions, as required by R. 351 (e) RoP, is a mere 'obvious slip' that would (still) justify rectification pursuant to R. 353 RoP. This is also NST's understanding, since it argues that the MLD 'could have and it should have' included the order rejecting the R. 190-Application in the operative part of the impugned decisions. The consequence of the MLD's failure to do so does not lead to the conclusion that there is no order, rather that it should have been contained in the operative part. This is clearly also how NST has understood the decisions. If there would have been no order, there would also not have been any reason to object to the rejection of the R. 190-Application in the Statements of ground of appeal.
32. It follows that the impugned decisions contained an appealable order as meant in R. 220.1(c) RoP, which should have been appealed from within 15 days of its service.

No excusable error

33. NST did not lodge an appeal against the rejection of its R. 190-Applications within the applicable 15-day time period.
34. The time period for lodging an appeal is a mandatory time limit that cannot be extended (see R. 9.4 RoP). The strict application of the rule on the time period laid down in R. 224.1 RoP serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (cf. consistent case law of the CJEU, see e.g. Order of 14 January 2010, SGAE v Commission, C-112/09 P, ECLI:EU:C:2010:16, para. 20; order of 17 August 2022, SJM Coordination Center v Magnetrol, C-4/22 P (I), ECLI:EU:C:2022:626 para. 39).
35. It is for the Court of Appeal to examine ex officio whether the time limit has been complied with. The Registry's completion and validation of the formal requirements in the Case Management System should not be understood as a determination that all formal requirements under R. 225, 226 and 229 RoP, or any other applicable provisions, have been fully and finally satisfied.
36. In *AIM v. Supponor*, the Court of Appeal considered that an *excusable error* can, *in exceptional circumstances*, justify a derogation from the rule that the time period for lodging an appeal is a mandatory time limit that cannot be extended. That is in particular so when it was the conduct of the court, either alone or to a decisive extent, that gave rise to confusion by a party, who acted in good faith and displayed all the diligence required of a normally well-informed person. This follows from the principle of the protection of legitimate expectations (see case law above and CJEU, Judgment of 22 September 2011 *Bell & Ross BV v OHIM* C-426/10 P ECLI:EU:C:2011:612, para. 43, 45, 56; Order of the General Court of 13 January 2009, *SGAE v Commission*, T-456/08, ECLI:EU:T:2009:1, para. 17, 28; Order

of the General Court 1 April 2011, *Doherty v Commission*, T-468/10, para. 20, 27 on Article 45(2) of the Statute of the Court of Justice of the European Union).

37. As is clear from the *AIM v Supponor* order, exceptional circumstances were held to exist in that case due to a *combination* of an ambiguity when reading Art. 62 UPCA and R. 220.1(c) and 224.1(b) RoP together, and the incorrect, or at least incomplete, information provided by the Court of First Instance on the applicable time period for lodging an appeal. No such exceptional circumstances exist in these cases.
38. First, the Court of Appeal has clarified the ambiguity on R. 220.1(c) RoP. It must have been clear to NST that an appeal period of 15 days applied to privileged orders, even if contained in a decision in the main proceedings.
39. Contrary to NST's assertion, the present situation is not distinguishable from that in *AIM v Supponor*. Even if in this case the application decided upon in the decision in the main proceedings concerns an application for the production of evidence, rather than an application for provisional measures as in the *AIM v Supponor* case, both are applications pursuant to Articles of the UPCA referred to in R. 220.1(c) RoP, to which the short time period of appeal of 15 days applies. An application for provisional measures may be started as a separate action, but may also be lodged after the main proceedings have been started (R. 206.1 RoP). There is nothing in the *AIM v Supponor* order that can reasonably be understood to indicate that what has been decided therein applies only if the action has been started as a separate action, rather than in the course of the main proceedings. In each case, the decision on the application constitutes an order.
40. The reasoning in *AIM v. Supponor*, which indeed rests on the existence of two separate sets of proceedings, more specifically main (infringement) proceedings on the one hand, and an application for an order referred to in Articles 49(5), 59 to 62 and 67 UPCA as mentioned in R. 220.1(c) RoP on the other hand, can therefore without any doubt be transferred to the present case. The different character and aim of the applications in the respective cases (procedural production of evidence, or substantive provisional measures) does not alter that.
41. Second, the MLD did not indicate an incorrect time period for lodging an appeal against the rejection of the R. 190-Application in its decisions. It failed to indicate, pursuant to R. 190.6 RoP, that an appeal may be brought against the order on the application for the production of evidence in accordance with Art. 73 UPCA and R. 220.1 RoP.
42. Its indication in the decisions that an appeal against the decision may be brought, in whole or in part, within two months of service, could not reasonably have led NST to believe that the time period for lodging an appeal against the dismissal of the R. 190-Applications was also two months. Contrary to the indication on the applicable time period for appeal in the Helsinki Local Division in its decision in *AIM v Supponor* that explicitly referred to the decision dismissing the actions₂ (plural – thus referring to both actions), the indication in the impugned decisions was clearly directed to the decision in the main action only, given the explicit reference to Art. 73(1) UPCA, R. 220.1 (a) RoP and R. 224.1 (a) RoP. The expression “in whole or in part” clearly indicates that a party is entitled to object to only parts of the decision in the main proceedings. There is no indication, failing a reference to Art. 73(2)(a) UPCA, R. 220.1(c) and R. 224.1(b) RoP that the information on the appeal – and the wording ‘in part’ specifically – refers to the decision on the R. 190-Application.

43. There could have been no doubt that a decision on an application pursuant to Art. 59 UPCA / R. 190 RoP needs to be appealed within 15 days pursuant to Art. 73(2)(a) UPCA and R. 224.1(b) RoP even if it is contained in a decision in the main proceedings, given the clarification in the AIM v Supponor order (para. 15) that even if decided in the decision in the main proceedings in one document that is called 'Decision', the Court's decision on a R. 190 RoP application still takes the form of an order, to which R. 220.1(c) and R. 224.1(b) RoP apply.
44. Third, the Court of Appeal in AIM v Supponor, para. 21, noted that "in another case in which the Court of First Instance incorrectly suggests that the time limit for lodging an appeal against a rejection of a preliminary measure is two months, the outcome may be different, as the Court of Appeal now has clarified the wording used in R. 220.1(c) RoP in this order". This clearly indicates that – after having clarified the possible ambiguity in relation to R. 220.1(c) RoP – a wrong indication of a time period applicable to a privileged order is in itself insufficient to constitute exceptional circumstances, because a representative exercising all due care should have been aware that the applicable time period for lodging an appeal is 15 days after service of the order.
45. There are no further ambiguities or other circumstances that – in *combination* with a (alleged) wrongly understood indication of the applicable time period for filing an appeal in the main proceedings – could make NST's error excusable. Failure to include the order rejecting the R. 190-Application in the operative part of the impugned decisions cannot qualify as such a circumstance, since this is an *obvious* error that could not reasonably have led (and considering its Statements of grounds of appeal it did not lead) NST to believe that the impugned decisions did not contain an order on the R. 190-Applications. Indeed, NST itself submits that "only due to the legally flawed statement" it did not conclude that a separate 15-day period applied to the R. 190-Applications (page 8 of its comments of 31 July 2026).
46. It follows from the above that by not lodging the appeals against the dismissal of the R. 190-Applications within the applicable time period, NST did not display all the diligence required of a normally well-informed person.

Conclusion on the admissibility of the appeals against the orders on the R. 190-Applications

47. The Court of Appeal concludes that in the present case no excusable error occurred under exceptional circumstances. It should have been obvious to NST that the impugned decisions of the MLD contained an order rejecting the R. 190-Application and it should have been aware that the time period for filing an appeal was 15 days after service thereof. The appeals against the dismissal of the R. 190-Applications lodged on 13 July 2026 are thus outside the applicable time period and thus inadmissible.
48. NST lodged the appeals against the dismissal of the evidence production on an auxiliary basis in the sense that it would only need to be decided if the Court of Appeal would not reverse the impugned decision and finds an infringement. In view of procedural efficiency, the Court of Appeal at this stage of the proceedings decides on the admissibility of the appeals against the rejection of the R. 190-Applications.

Re-establishment of rights

49. Pursuant to R. 320 RoP, where a party has failed to observe a time-limit set by the Rules of Procedure for a cause which, despite all due care having been taken by the party, was outside his control and the non-

observance of this time limit has had the direct consequence of causing the party to lose a right or means of redress, the relevant panel of the Court may upon the request of that party re-establish the right or means of redress. No such request has been lodged by NST and no decision is required on this.

50. The Court of Appeal merely notices that it follows from the above that the requirement of ‘all due care having been taken by the party’ seems to have not been met under the circumstances of these cases.

The admissibility of the R. 190 RoP applications on appeal

51. The MLD rejected the R. 190-Applications in substance. It considered that R. 190 RoP is not intended to permit speculative requests for disclosure aimed at discovering whether an infringement claim may exist. Instead, an applicant must first present a sufficiently plausible infringement case. The MLD found that NST had failed to do so, as it relied primarily on the Arteris NoC Chapter and historical links between Arteris and Qualcomm, which did not plausibly demonstrate that the accused Qualcomm products implemented the same technology. The MLD further held that NST had not sufficiently identified the concrete facts that the requested disclosure was intended to establish or explained how those facts would substantiate the alleged infringement.

52. At first instance, NST requested:

- I. The so-called “Qualcomm source code” which is specifically identified and individually addressed in the Western District of Texas Action Order dd. 26 November 2024 in Case No. 1:22-cv-1331-DAE, Dkt. 259;
- II. The so-called “NST supplemental infringement contentions” which are specifically identified and individually addressed in the Western District of Texas Action Order dd. 26 November 2024 and that were amended by Claimant on 7 February 2025, as stated in Claimant’s Notice of Compliance in Case No. 1:22-cv-1331-DAE, Dkt. 292;
- III. The “documents” which are specifically identified and individually addressed by Claimant in Claimant’s 7 February 2025 “NST supplemental infringement contentions” Case No. 1:22-cv-1331-DAE, Dkt. 292.

53. On appeal, NST requests that Qualcomm be ordered to produce the so-called “Qualcomm source code” as specifically identified and individually addressed and already produced in the Western District of Texas Action Order dated 26 November 2024 in Case No. 1:22-cv-1331-DAE, Dkt. 259.

54. Leaving aside whether R. 242.2(a) RoP, stating that the Court of Appeal may exercise any power within the competence of the Court of First Instance, implies that a party may lodge an application pursuant to R. 190 RoP for the first time during appeal proceedings, such an application is inadmissible under the circumstances of the present case.

55. In the R. 190 RoP applications that were filed together with its Statement of grounds of appeal, NST substantially requests the production of the same evidence as that has been dismissed by a reasoned decision of the Court of First Instance. The fact that NST has amended the modalities of the disclosure of the requested evidence does not alter that the evidence it seeks to obtain – the Qualcomm source code – is the same.

56. NST argues that (re-)submitting the R. 190 RoP applications on appeal does not circumvent the appeal mechanism because the appeals against the MDL's rejection of its R. 190-Applications and the new R. 190 RoP applications filed before the Court of Appeal are two procedural routes serving different functions. An appeal against a refusal under R. 190 RoP asks the Court of Appeal to review the correctness of the first instance ruling, while an application under R. 190 RoP on appeal asks the Court of Appeal to exercise that power itself, based on the record in the pending appeal proceedings, which would be admissible – even when the application is substantially the same – if the underlying facts or procedural record have changed such that the requirements for the application may now be met.
57. The argument fails. As NST rightly submits, the admissibility of new applications on appeal is governed by Art. 73(4) UPCA and R. 222.2 RoP, which states that “Requests, facts and evidence which have not been submitted by a party during proceedings before the Court of First Instance may be disregarded by the Court of Appeal”.
58. An application that is substantially the same in terms of the requested evidence to be produced as an application that was already filed and decided upon in substance at first instance, failing new facts justifying its refiling, is not a request which has not been submitted by a party during proceedings before the Court of First Instance that may, at the discretion of the Court of Appeal, under the conditions of R. 222.2 RoP, be allowed on appeal. Thus, R. 222.2 RoP does not apply to such a request and the only procedural remedy against its dismissal is lodging a (timely) appeal.
59. A refiled R. 190 RoP application, i.e. requesting substantially the same evidence to be produced, would only be admissible on appeal if justified by new facts that could not reasonably have been available during the first instance proceedings. That is because allowing a refiling of essentially the same – and dismissed – R. 190 RoP application on appeal that is not based on new facts would lead to a circumvention of the appeal mechanism set forth in the UPCA and Rules of Procedure and the strict time limits applicable thereto, which serve legal certainty of third parties and procedural efficiency, as considered above (para. 34 and 25 respectively). Contrary to NST's argument, failing new facts, legal certainty demands also in relation to procedural applications that the finality of a decision is respected if no appeal is lodged with the applicable time period therefor.
60. R. 222.2 RoP would apply by analogy to an admissible refiled R.190 application, i.e. whose filing is justified by new facts.
61. New facts that could not reasonably have been available during the first instance proceedings which might justify the new R. 190 RoP applications at this (appeal) stage of the proceedings, have not been brought forward and substantiated by NST.
62. NST has advanced that the Statements of grounds of appeal further develop NST's infringement case and address the findings made in the respective first-instance decisions and that the relevance and necessity of the requested evidence must therefore be assessed against the case as now advanced on appeal. However, the objections that NST has raised against the impugned decision cannot be considered to constitute *new* facts justifying a re-filing on appeal.

63. As is clear from R. 222.1 and R. 222.2 RoP, appeal proceedings are based on the requests, facts, evidence and arguments brought forward at first instance. Therefore, objections brought forward in the framework of appeal proceedings cannot justify a refiling of a R. 190 RoP application on appeal, because that requires *new* facts that could not reasonably have been available during the first instance proceedings. NST has not included in its Statement of grounds of appeal a request to admit new facts in the appeal proceedings pursuant to R. 222.2 RoP.
64. That the Court's case law on the production of evidence and the protection of confidential information has developed since the impugned decisions, as NST has alleged, cannot be considered new facts either. Case law concerns the legal principles to be applied when deciding on an application for the production of evidence. This is part of the – according to NST distinct – review function of an appeal and thus should have been (and indeed has been) made part of the appeals (which are, insofar as it concerns the rejection of the R. 190-Application, inadmissible due to its late filing).
65. NST further alleged that the applications lodged on appeal do not merely repeat the applications filed at first instance, because NST "has specified the question of evidence in each proceeding. It has linked the requested source code to identified claim features and concrete technical propositions. It has also developed the supporting infringement case and explained the relevance and necessity of the requested evidence by reference to the findings in the respective first-instance decision". NST has not explained – and it cannot be seen – that this would constitute new facts. Rather, it is a further substantiation of its first R. 190-Application, which it could have provided at first instance as well as objections and arguments raised in the appeal proceedings, which as stated above, cannot be new facts justifying a refiled R. 190 RoP application on appeal.
66. The adaption of the measures sought, by proposing alternative means of taking evidence with different levels of access, that NST further referred to, obviously do not constitute new facts that could not reasonably have been available during the first instance proceedings either.
67. The conclusion from the above is that the R. 190 RoP applications filed on appeal are inadmissible.

ORDER

The Court of Appeal:

- I. rejects the appeals against the dismissal of the R. 190-Applications in the impugned decisions as inadmissible;
- II. rejects the R. 190 RoP applications filed by NST in the appeal proceedings as inadmissible.

Issued on 17 August 2026

Rian Kalden, presiding judge and judge-rapporteur

Patricia Rombach, legally qualified judge

Ingeborg Simonsson, legally qualified judge

Steven Kitchen, technically qualified judge

Christoph Norrenbrock, technically qualified judge