

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 21 September 2026
regarding an appeal against an order rejecting a Preliminary objection

HEADNOTE:

The question whether an action for a declaration of non-infringement of a patent can be filed before its grant is not a question of competence of the Unified Patent Court but is a question of admissibility of the instituted claims.

KEYWORDS:

remedies, competence, admissibility, declaration of non-infringement, opt-out.

APPELLANT (DEFENDANT IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

SIDEL PARTICIPATIONS SAS, Octeville-sur-Mer, France

(hereinafter referred to as: “Sidel”)

represented by Ms. Véronique Pede, Attorney-at-law, GEVERS IP Law, Ghent, Belgium, and Ms. Agata Sobol, Attorney-at-law, LEXSENTIAL Studio legale, Milano, Italy

RESPONDENTS (CLAIMANTS IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

1. **OMNIA TECHNOLOGIES S.P.A.**, Trevignano (TV), Italy
2. **ACMI LABELLING S.R.L.**, Sorbolo Mezzani (PR), Italy
3. **ACMI S.P.A.**, Fornovo di Taro (PR), Italy

(hereinafter referred to as: “OMNIA”)

represented by Mr. Lorenzo Battarino, Attorney-at-law, and Mr. Luca Pellicciari, Attorney-at-law, Trevisan & Cuonzo, Milano, Italy

PATENTS AT ISSUE

EP 4 594 194

EP 4 624 351

PANEL AND DECIDING JUDGES

PANEL 3:

Ulrike Voß, Presiding judge

Bart van den Broek, legally qualified judge

Nathalie Sabotier, legally qualified judge and judge-rapporteur

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- ☐ Order concerning the Preliminary Objection of 7 May 2026, issued by the Central Division Paris
- ☐ Reference number: UPC_CFI_799/2026 (Declaration of non-infringement)

LANGUAGE OF THE PROCEEDINGS

English

ORAL HEARING

The oral hearing has been held on 8 September 2026 by videoconference following the agreement of the parties.

SUMMARY OF FACTS AND PARTIES' REQUESTS

1. On 3 March 2026, OMNIA filed an action before the Central Division Paris requesting the Court to declare that the "Opera Omnia labelling module" does not directly or indirectly infringe EP 4 594 194 (EP 194) and EP 4 624 351 (EP 351). At the time of filing the action, EP 194 and EP 351 had not yet been granted. The intention to grant under R. 71(3) EPC for EP 194 was issued on 11 February 2026, while the intention to grant for EP 351 was issued on 26 March 2026.
2. Sidel filed applications to opt EP 194 and EP 351 out from the exclusive competence of the UPC on 2 April 2026 (for EP 194) and 8 April 2026 (for EP 351).
3. The grant of EP 194 has been published on 22 April 2026 and the grant of EP 351 has been published on 20 May 2026.
4. Prior to the grant of the patents at issue, on 9 April 2026, Sidel filed a Preliminary objection, requesting that the Court of First Instance dismiss OMNIA's action for lack of competence of the UPC pursuant to Art. 32(1)(b) UPCA, dismiss the action on the basis that it is manifestly bound to fail pursuant to R. 361 RoP, or, alternatively, stay the rest of the proceedings until a final decision on the Preliminary objection pursuant to R. 19.6 and R. 295(m) RoP.
5. By an order dated 7 May 2026 (the impugned order), the judge-rapporteur dismissed the Preliminary objection based on lack of competence of the Court and rejected both the application for an order based on R. 361 RoP and the request for a stay of the proceedings.
6. On 11 May 2026, Sidel filed an application for leave to appeal the impugned order regarding the dismissal of the Preliminary objection. Sidel did not act against the rejection of the R. 361 RoP request and the request to stay the proceedings.
7. By an order dated 26 May 2026, the judge-rapporteur granted leave to appeal.
8. On 8 June 2026, Sidel lodged an appeal against the impugned order. Sidel requests that the Court of Appeal:

- I. set aside the impugned order in its entirety,
 - II. declare that the UPC lacks competence to hear the action filed by OMNIA,
 - III. dismiss the claim filed by OMNIA in its entirety,
 - IV. order that OMNIA bears the reasonable and proportionate legal costs and other expenses incurred by Sidel in first instance and in the appeal proceedings pursuant to Art. 69 UPCA and R. 118.5 RoP.
9. Service of the Statement of grounds of appeal was completed on 11 June 2026.
10. On 26 June 2026, OMNIA filed its Statement of response and requested that the Court of Appeal:
- I. dismiss the appeal in its entirety,
 - II. confirm the impugned order,
 - III. order Sidel to bear the reasonable and proportionate legal costs of the appeal,
 - IV. append an order for enforcement declaring that the order is immediately enforceable pursuant to Art. 82(1) UPCA.
11. By procedural order dated 3 July 2026, the judge-rapporteur rejected the application for further pleadings lodged by Sidel on 2 July 2026 and requested the parties to comment on the application of R. 300 and R. 301 RoP to the present case and the consequences on the admissibility of the appeal.
12. Both parties provided their comments on 10 July 2026.
13. Following the submission of these comments, by order dated 24 July 2026, the Court of Appeal requested the parties' comments on the possibility of considering the Statement of appeal as containing also a request for discretionary review.
14. Both parties provided their comments on 20 August 2026.

SUMMARY OF PARTIES' SUBMISSIONS

15. Sidel argues that the UPC is not competent to decide on the requested declaration of non-infringement of patent applications. Sidel first submits that the order rejecting its Preliminary objection is in conflict with both the wording of Art. 2 and Art. 32(b) UPCA, which refer to "patents" and do not mention patent applications, and the European Patent Convention, according to which a European patent only takes effect on the date of the publication of the grant of the patent in the European Patent Bulletin. Sidel further argues that competence and jurisdiction should be assessed at the time the action is filed and not at the time the Statement of defence is filed, contrary to the finding of the judge-rapporteur. According to Sidel, the approach followed by the judge-rapporteur has no basis in the UPCA nor in the RoP and is practically untenable. Sidel adds that the reasons given by the judge-rapporteur to substantiate the competence of the Court are unfounded as, firstly, there is no risk here that a national court would handle a case without competence since unitary effect has not been requested concerning the patents at issue and, secondly, principles of procedural economy and proportionality should not be used for the purpose of determining, let alone broadening, the competence of the Court, the list of Art. 32(1) UPCA being exhaustive. According to Sidel, those principles lead to an opposite conclusion to the one reached here by the judge-

rapporteur.

16. Concerning the admissibility of the appeal, in response to the order of the judge-rapporteur dated 3 July 2026, Sidel submits that the impugned order was issued a few minutes before midnight on 7 May 2026 and, therefore, should be deemed issued the following day (on 8 May 2026). This would lead to the conclusion that the 15-day deadline pursuant to R. 220.3 RoP ended on 23 May 2026 (which was a Saturday) and was automatically extended, pursuant to R. 301 RoP, to 26 May 2026, since Monday 25 May 2026 was a national holiday in France. On that day (26 May 2026) leave to appeal was granted. Sidel adds that if the Court of Appeal considers that leave to appeal was not (timely) granted, the appeal should nevertheless be admissible absent clear guidance from the UPC which path to follow in case leave to appeal is granted after the first 15-day term of R. 220.3 RoP, but within the second 15-day term of R. 220.3 RoP. Alternatively, Sidel requests that the Court of Appeal under R. 9.3(a) RoP retroactively extends the first 15-day term of R. 220.3 RoP so that leave to appeal is considered granted within said term (should it be considered too late), or to accept Sidel's appeal based on an excusable error, given the lack of notification of the appeal possibilities in the impugned order and the order granting leave to appeal of 26 May 2026, and the unclarity of the path to follow at the time of lodging the appeal.
17. In response to the order dated 24 July 2026, Sidel argues that the Statement of appeal lodged on 8 June 2026 complies with the procedural and substantive requirements of a request for discretionary review and that, given the specific circumstances of the present case, the Statement of appeal should be regarded as (containing) a request for discretionary review. The Court of Appeal would otherwise follow a very formalistic approach with no legitimate procedural objective. Sidel points out in this respect that the case law on which OMNIA relies in favor of the inadmissibility of the appeal, was not known at the time said appeal was lodged, and that, in the present case, the judge-rapporteur of the Central Division Paris granted leave to appeal the impugned order, which demonstrates that the case is suitable for appellate review.
18. OMNIA, on its part, submits in its Statement of response that the appeal is inadmissible given that leave to appeal has been granted more than 15 days following the impugned order. OMNIA states in this respect that the Court of Appeal ruled on several occasions that in the case where the Court of First Instance has not decided within 15 days of the impugned order on a timely filed request to grant leave to appeal, it must be considered that leave to appeal is refused and a request for discretionary review under R. 220.3 RoP has to be lodged. No request for discretionary review has been lodged here. Therefore, according to OMNIA, the appeal is inadmissible.
19. OMNIA further argues that, in any event, the appeal is not well-founded. According to OMNIA, the declaration of non-infringement does not relate to patent applications but to the subsequently granted patents. The UPCA and RoP would permit the filing of actions ahead of grant, as is evidenced in particular by Art. 83(3) UPCA, R. 5(6) RoP and R. 312(1) RoP, and this is accepted in the case law of the Court. OMNIA refers in this regard, by way of examples, to the *10x Genomics v Nanostring* (UPC-CFI-2/2023, 19 September 2023) and *Alexion Pharmaceuticals v. Amgen* (UPC-CFI-124/2024, 26 June 2024) infringement cases, which were both commenced before the formal grant of the patents at issue. OMNIA adds that the *Barco v Yealink* case (UPC-CFI-582/2024, 21 March 2025; UPC-CoA-317/2025, 28 November 2025) is not relevant here as it only deals with the question as to when an action for provisional

measures is timely initiated and not with the admissibility of the action. OMNIA further argues that some Contracting Member States also allow actions ahead of formal grant. In such situations, the action is stayed until the grant of the patent (e.g. Art.120(1) of the Italian intellectual property code, and Art. L.615-4, last sentence, of the French intellectual property code). By requiring that the formal grant of the patent needs to occur before the lodging of the Statement of defence, the judge-rapporteur made it possible for the defendant to place its full substantive case before the Court at an early stage given the front-loaded nature of the proceedings before the UPC and also discouraged parties from acting too prematurely.

20. In response to the order dated 3 July 2026, OMNIA contends that the impugned order was issued and served on 7 May 2026, which means that the deadline for the Court to grant leave to appeal pursuant to R. 220.3 RoP expired on 22 May 2026. This was a regular Friday with no relevant bank holidays, so that no postponement of such deadline was possible. In the absence of leave to appeal on 22 May 2026, such leave should be considered to have been refused under *Speed Care v Teleflex* (UPC-CoA-85/2026, 10 June 2026). Therefore, Sidel should have filed a request for discretionary review under R. 220.3 RoP instead of a direct appeal according to R. 220.2 RoP. According to OMNIA, the fact that leave to appeal was ultimately granted is of no effect as this was after the expiry of the (first) 15-day term of R. 220.3 RoP.
21. In response to the order dated 24 July 2026, OMNIA submits that R. 220.3 RoP provides a residual appellate remedy with a deliberate narrow scope where the standing judge acts as a “gatekeeper” in order to not unnecessarily absorb the resources of both the Court of Appeal and the parties. Therefore, according to OMNIA, if the Court of Appeal were to consider the Statement of appeal lodged by Sidel as a request for discretionary review, the Court would circumvent the role of the standing judge and accept to review the entire impugned order without any limitation in accordance with the standards set out by the case law, i.e. the presence of a manifest error or a legal fundamental question.

GROUND FOR THE ORDER

22. Even assuming that the appeal is admissible, it is not well-founded and shall be dismissed.

I- On the admissibility of the appeal / Leave to appeal (R. 220.2 RoP)

A. Legal Framework

23. According to R. 21.1 RoP, an order of the judge-rapporteur rejecting a Preliminary objection may only be appealed pursuant to R. 220.2 RoP. In accordance with R. 220.2 RoP, orders covered by this provision can either be appealed together with an appeal against the (final) decision or with leave of the Court of First Instance within 15 days of service of the Court’s decision to that effect.
24. In case leave to appeal is refused within 15 days of the order, a request for discretionary review may be filed within 15 days from the end of that (first) 15-day period (R. 220.3 RoP). This also applies in the case where the Court of First Instance fails to decide within the time limit of 15 days of the impugned order despite a timely request for leave to appeal (UPC-CoA-85/2026, 10 June 2026, *Speed Care v. Teleflex*, para. 20).
25. Once, following a request for leave to appeal pursuant to R. 220.2 RoP, leave to appeal has been denied by the Court of First Instance, either by way of an order expressly denying such

appeal, or absent such an order within the 15-day time limit set out under R. 220.3 RoP, it is no longer to the Court of First Instance to grant leave to appeal, even retroactively (UPC-CoA-100/2026, 101/2026 and 102/2026, 2 July 2026, Shenzhen Transsion v Ericsson, para. 10).

B- Application to the present case

26. In the present case, the impugned order was issued and served on 7 May 2026. According to R. 300(a) RoP, the (first) 15-day time period under R. 220.3 RoP started on 8 May 2026, i.e. the day following the day on which the relevant event occurred. The Court of Appeal therefore agrees with OMNIA that this (first) 15-day time period under R. 220.3 RoP expired on 22 May 2026.
27. On or before 22 May 2026, the Court of First Instance failed to decide on Sidel's timely filed application for leave to appeal. As stated above, the absence of a reaction by the Court of First Instance within the 15-day time limit should effectively be regarded as a refusal of leave to appeal.
28. The fact that the Court of First Instance later decided on the application for leave to appeal by granting it on 26 May 2026 does not alter this finding. Neither the UPCA nor the RoP confer on the Court of First Instance the power to grant leave to appeal after it should be regarded as being refused due to the expiry of the 15-day time limit of R. 220.3 RoP (above cited CoA Order, Shenzhen Transsion v Ericsson, para. 13).

II. On the admissibility of the appeal / Discretionary review (R. 220.3 RoP)

29. As leave to appeal has not been timely granted, the question arises whether there may be specific reasons in this case to exceptionally interpret the Statement of grounds of appeal lodged by Sidel on 8 June 2026 as containing a timely filed request for discretionary review pursuant to R. 220.3 RoP.

A – Legal framework

30. The strict application of the rules on the appellate review of decisions and orders serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice.
31. Moreover, under Art. 76(1) UPCA, the Court shall make a decision in accordance with the requests submitted by the parties and shall not award more than is requested. The Court is therefore bound by the parties' claims and consequently, also by the legal remedy lodged.
32. On the other hand, a party's claim or remedy, like any procedural submission, may be subject to interpretation. How the Court is to understand a claim or a remedy therefore depends not only on its wording. Rather, the grounds and the purpose of the claim must also be considered. When interpreting a claim or remedy, the Court is therefore not bound by its literal wording but must ascertain the party's actual intention.
33. In addition, pursuant to paragraphs 2 and 4 of the Preamble of the RoP, the rules shall be applied and interpreted in accordance with Art. 41(3), 42 and 52(1) UPCA on the basis of the principles of proportionality, flexibility, fairness and equity. Flexibility shall be ensured by applying all procedural rules in a flexible and balanced manner with the required level of discretion for the judges to organize the proceedings in the most efficient and cost-effective manner.
34. This Court has further clarified that an excusable error can, in exceptional circumstances,

justify a derogation from the rules. 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 (UPC-CoA-500/2023, 26 April 2024, AIM v. Supponor, para. 18).

35. With regard to the substantive requirements for a discretionary review, the Court of Appeal has specified that, when deciding whether to allow a discretionary review, the Court must consider whether the impugned order of the Court of First Instance is manifestly erroneous and whether the impugned order raises a fundamental question of law and its review is necessary to ensure a consistent application and interpretation of the Rules of Procedure or any other objective of the discretionary review (UPC-CoA-489/2024, 6 September 2024, Motorola v. Ericsson, para. 4; UPC-CoA-805/2025, 1 September 2025, Centripetal v. Keysight, paras. 8 and 11).

B – Application to the case at hand

36. In the present case, after Sidel timely lodged a request for leave to appeal the impugned order, the judge-rapporteur of the Central Division Paris issued an order granting leave to appeal outside the applicable deadline, i.e. after the expiry of the (first) 15-day time limit of R. 220.2/3 RoP. Following this order, Sidel lodged the Statement of Grounds of appeal.
37. The Court notes in this respect that, at the time the Statement of grounds of appeal was filed (8 June 2026), the question of which path to follow in a situation wherein leave to appeal is granted in the second 15-day term of R. 220.3 RoP had not yet been clarified. Until the decision of the Court of Appeal in Speed Care v. Teleflex of 10 June 2026 (cited above), the view that an appeal should then be lodged following the granted leave to appeal in accordance with R. 220.2 RoP was tenable.
38. It should also be noted that Sidel acted diligently by filing the Statement of grounds of appeal within the (second) 15-day period following the expiry of the (first) 15-day period, allowed for the lodging of a discretionary review before the Court of Appeal.
39. Furthermore, the Statement of grounds of appeal points to several alleged manifest errors in the impugned order and raises a number of fundamental legal questions. The submission clearly aims to request the Court of Appeal to consider these issues in appeal.
40. In particular, Sidel emphasizes that, under the UPCA “*it is not possible to file an action before the grant of the patent*” (see Statement of grounds of appeal, para. 51 *et seq.*) and that the impugned order violates several provisions of the UPCA in this respect. Sidel also argues that the possibility of filing a declaration of non-infringement based on a patent application deprived it from its right to opt-out from the exclusive jurisdiction of the UPC pursuant to Art. 83(3) UPCA. Before the impugned order, a patentee could rightfully and legitimately assume that a declaration of non-infringement of a patent application could not be lodged before the UPC and that such opt-out could therefore be filed until the formal grant of the patent (see para. 55 of the Statement of grounds of appeal). According to Sidel, these are all fundamental questions of law on which the Court of Appeal should ensure consistent interpretation.
41. In this particular case, it could be argued that although Sidel did not explicitly request a discretionary review of the impugned order, the Statement of grounds of appeal was filed within the applicable time limit of R. 220.3 RoP and also complied with the substantive requirements for such request developed by this Court. In the absence of exceptional

circumstances, this would normally not be sufficient to qualify the submission as a request for discretionary review under R. 220.3 RoP and to justify the non-compliance with the (other) procedural rules applicable to such request, such as those included in R. 220.4 RoP. Whether such exceptional circumstances exist in this case, for example in view of the unconditional leave to appeal that was granted by the judge-rapporteur during the second 15-day term of R. 220.3 RoP, and the absence of case law of the Court of Appeal on how to proceed in such case, can be left unanswered as the Court of Appeal is of opinion that the appeal is unfounded for the following reasons.

III - On the merits of the appeal

A – Is the Court competent under Art. 32(1)(b) UPCA?

42. Art. 32(1) UPCA sets out the actions for which the UPC has exclusive competence. Included in these actions are “*actions for declaration of non-infringement of patents*” (Art. 32(1)(b) UPCA).
43. To determine the nature of the action concerned, the Statement of claim is of primary importance. In the Statement of claim, the claimant sets out the details of its case and the requests that the claimant wishes the Court to grant. This allows the Court and the defendant to assess their position with respect to the action, including whether the Court is competent to hear the action. As indicated above, when interpreting a claim or remedy, the Court is not bound by the literal wording of the submission but must ascertain the party’s actual intent.
44. In the case at hand, OMNIA requests the Central Division Paris in the Statement for a declaration of non-infringement (“the Statement”) to “*declare that the Opera Omnia labelling module does not directly or indirectly infringe **the Patents** in the Contracting Member States*”. The “Patents” are defined in the Statement as EP 194 and EP 351 (para. 2: “*Both EP ‘194 and EP ‘351 (hereinafter also referred to jointly as the “Patents”) ...*”). OMNIA acknowledges in the Statement that EP 194 and EP 351 were not yet granted but indicates that an intention to grant under R. 71(3) EPC had already been issued (EP 194) or was expected soon (EP 351). It is thus clear from the Statement that OMNIA aims to obtain a declaration of non-infringement with respect to the “Patents” following their grant. The reference to the patent applications in the Statement was merely a description of their status at the moment of filing the action.
45. The Court of Appeal therefore agrees with OMNIA that the action concerns a request for a declaration of non-infringement of patents, which is covered, in principle, by Art. 32(1)(b) UPCA. The fact that the patents were not yet granted at the time of filing the action does not make the action an action for a declaration of non-infringement of patent applications.
46. The decisive question in this case is thus not whether the Court has competence to hear actions for declarations of non-infringement of patent applications, as asserted by Sidel, but whether an action for a declaration of non-infringement of a patent can be filed before its grant. That, however, is not a question of competence of the UPC but is a question of admissibility of the instituted claims.
47. As previously held by this Court, R. 19 RoP exhaustively lists the objections that can be raised under R. 19 RoP (UPC-CoA- 188/2024, 3 September 2024, Aylo v Dish, para. 32). The question of admissibility of the claims is not one of the permissible objections.
48. Consequently, the question of whether, in the present case, the action for a declaration of non-infringement of the patents at issue is inadmissible either because it allegedly does not refer to the specific embodiment mentioned in the cease-and-desist letter, or because it may

have been brought “too early” - given that R. 61 and R. 63 RoP may require the patent to have been granted – remains to be determined in the further proceedings.

49. In conclusion, Sidel’s argument that the impugned order should be set aside because the UPC would lack competence to hear an action for a declaration of patent applications is rejected. OMNIA’s action effectively relates to a declaration of non-infringement of the patents at issue, for which the UPC has competence under Art. 32(1)(b) UPCA.

B – Is the Court competent under Art. 83(3) UPCA?

50. Pursuant to R. 19.1(a) RoP, a Preliminary objection may also concern an objection that an opt-out applies to the patent that is the subject of the proceedings. In the present case, the Court of Appeal can leave it in the middle whether Sidel has actually raised such objection, which OMNIA contests, as the opt outs of the patents at issue are ineffective.
51. According to Art. 83(1) UPCA, during a transitional period of seven years after the date of entry into force of the UPCA, an action for infringement or for revocation of a European patent or an action for infringement or for declaration of invalidity of a supplementary protection certificate issued for a product protected by a European patent may still be brought before national courts or other competent national authorities.
52. Art. 83(3) UPCA further specifies that “*unless an action has already been brought before the Court*”, a proprietor of or an applicant for a European patent granted or applied for prior to the end of the transitional period under paragraph 1 and, where applicable, paragraph 5, as well as a holder of a supplementary protection certificate issued for a product protected by a European patent, shall have the possibility to opt out from the exclusive competence of the Court.
53. The Court of Appeal has already clarified that the term ‘action’ in Art. 83 UPCA does not only refer to infringement and revocation actions, but to all actions mentioned in Art. 32 UPCA over which the UPC has jurisdiction (UPC-CoA-489/2023, 12 November 2024, AIM v Supponor, para. 13).
54. As discussed above, such action has been lodged here with the action for a declaration of non-infringement of the patents at issue. That action was lodged by OMNIA at the Central Division Paris on 3 March 2026, and thus before Sidel filed its applications to opt EP 194 and EP 351 out from the exclusive competence of the UPC on 2 and 8 April 2026, respectively. OMNIA’s action therefore renders the opt outs ineffective.
55. Sidel’s argument that OMNIA’s action impermissibly deprived it from its right to opt out the patents does not alter this. This argument is based on the assumption that OMNIA’s action concerns an unallowed declaration of non-infringement of patent applications. As discussed above, this assumption is incorrect (leaving aside the question whether Art. 83(3) UPCA even leaves room for Sidel’s argument).
56. Therefore, also the objection that the Court lacks competence in view of the opt outs (assuming that such objection was actually made) is unfounded.
57. The appeal shall therefore be dismissed in its entirety.

IV- Costs and enforceability

58. The present order does not conclude the action within the meaning of R 150.1 RoP. Therefore, there is no need to decide on costs.

59. No provision of the present order being enforceable, also part IV of OMNIA's requests is rejected.

ORDER

- I. The appeal is dismissed.
- II. All other requests are rejected.

Issued on 21 September 2026.

Ulrike Voß, Presiding judge

Bart van den Broek, legally qualified judge

Nathalie Sabotier, legally qualified judge and judge-rapporteur