

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 27 August 2026

HEADNOTES

1. The purpose of R. 190 RoP is to ensure effective judicial protection by enabling access to specified evidence that is not readily accessible to the party bearing the burden of proof. An order under R. 190 RoP requires reasonably available evidence supporting the plausibility of the claim and is subject to the cumulative requirements of specificity, necessity and proportionality. R. 190 RoP does not permit fishing expeditions.
2. Under R. 190 RoP, the assessment of whether the production of specific evidence is justified by the requirements of necessity and proportionality falls, in principle, within the margin of discretion of the Court of First Instance. The Court of Appeal will interfere with that assessment only in the event of an error of law, a manifest error of assessment, or a failure properly to apply the limits inherent in R. 190 RoP.
3. The fact that a party considers the evidence already available sufficient to support its allegations does not preclude it from seeking access to additional evidence under R. 190 RoP if that party has a legitimate interest in the additional evidence (as in case when the adverse party argues that the fact to be proven can only be established by means of additional evidence). R. 190 RoP requires that the applicant has already presented reasonably available evidence supporting the plausibility of its claim.
4. Neither Art. 59 UPCA nor R. 190 RoP requires an application for the production of evidence to be lodged together with the Statement of claim. Whether such an application has been made in a timely manner must be assessed having regard to the state of the proceedings and to the procedural developments that have occurred at the time the request is filed.
5. New factual allegations and supporting evidence relied upon for the first time on appeal may be disregarded where no justification is provided for their late introduction as required by R. 222.2 RoP.
6. A conditional appeal is inadmissible where it makes consideration of the appeal dependent upon a prior determination by the Court of Appeal whether evidence not yet produced and tested will ultimately be sufficient for the purposes of the claim in the main proceedings. Whether such evidence is sufficient to establish the claim is a matter for the court deciding the merits of the case and therefore lies outside the scope of the appeal.

7. Upon service of the decision or of the order determining the appeal, a suspensive effect granted pending determination of that appeal ceases to operate. Any subsequent issues relating to the enforcement of the order of the Court of First Instance are to be assessed by the judge-rapporteur of that Court in light of the circumstances then existing.

KEYWORDS:

Order to produce evidence; new submission before the Court of Appeal; conditional appeal; suspensive effect.

APPELLANT AND DEFENDANT IN CROSS-APPEAL (DEFENDANT IN THE INFRINGEMENT PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

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RESPONDENT AND CROSS-APPELLANT (CLAIMANT IN THE INFRINGEMENT PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE)

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PATENT AT ISSUE

EP 2 791 402

DECIDING PANEL

Panel 1b

Klaus Grabinski, presiding judge and president of the Court of Appeal

Paolo Catallozzi, legally qualified judge and judge-rapporteur

Emmanuel Gougé, legally qualified judge

LANGUAGE OF THE PROCEEDINGS

English

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- Order of the Court of First Instance of the Unified Patent Court, The Hague Local Division, dated 11 May 2026

Numbers attributed by the Court of First Instance: UPC_CFI_478/2025 and 585/2026

SUMMARY OF FACTS AND PARTIES' REQUESTS

1. The respondent commenced infringement proceedings before the Hague Local Division alleging infringement of the patent at issue, which concerns ultra-high molecular weight polyethylene ("UHMWPE") multifilament yarns and products incorporating such yarns, including ballistic-resistant composite articles and panels.
2. The invention seeks to provide yarns having specified tenacity characteristics and improved ballistic performance. Claims 1 to 4 relate to the yarns themselves, claims 8 to 10 to composite articles containing such yarns and claims 13 to 15 to ballistic panels comprising sheets containing the yarns of claims 1 to 4. Claims 13 to 15 require such panels to exhibit specified energy-absorption characteristics against particular projectiles at defined areal densities.
3. The respondent alleges that various UHMWPE fibres, UD fabrics and ballistic products marketed by the appellants, including products belonging to the J280, J300, J400 and J500 product families, fall within the scope of protection of the patent. In relation to claims 13 to 15, the respondent relied on technical analyses and calculations based on the appellants' published ballistic-performance data in support of its allegation of infringement.
4. In their Statement of defence, the appellants disputed infringement of claims 13 to 15. Whilst challenging the respondent's methodology, they contended in particular that infringement of those claims could not be established on the basis of extrapolations, assumptions or calculations alone, but required actual ballistic testing of the relevant products. They further argued that no such ballistic test report had been submitted with the Statement of claim.
5. Following the filing of the Statement of defence, the respondent applied for an order under Rule 190 RoP seeking the production of evidence allegedly necessary to further substantiate infringement of claims 13 to 15. The application was based, inter alia, on the contention that the quantities of material available to the respondent were insufficient to perform the ballistic testing which, according to the appellants, was necessary to establish infringement of those claims. The application sought, inter alia, production of various UD fabric samples, internal ballistic testing reports and English-language versions of the company introduction video.
6. The appellants opposed the application, arguing, inter alia, that the requested materials were commercially available, that the respondent had failed to establish the necessity of the requested measures and that the requirements of R. 190 RoP were not satisfied. They also disputed the necessity of producing the company introduction video.
7. By order of 11 May 2026, the judge-rapporteur partially granted the application.
8. The judge-rapporteur held that the respondent had presented a sufficient prima facie case of infringement and that the requirements of Article 59 UPCA and R. 190 RoP were satisfied. While rejecting the request for internal test reports and internal communications as unnecessary and disproportionate, the judge-rapporteur considered that ordering production of all six UD fabric

variants originally requested was also neither necessary nor proportionate and therefore limited the order to the two variants sought in the alternative, namely J300_120H_2UD and J300_130S_4UD, in quantities of 30 kilograms each. The judge-rapporteur further ordered production of the English-language versions of the company introduction video. The order specified that the fabric samples were to be provided to the respondent at its registered address or at another address designated by it in the Netherlands.

9. The appellants challenge the order insofar as it directs production of the fabric samples and the introduction video and insofar as it requires delivery of the samples to the Netherlands. They request that the order be set aside in its entirety or, alternatively, modified so that any production obligation is satisfied by making the samples available at the appellants' premises.
10. In support of their appeal, the appellants submit, in essence, that: (i) the requirements of R. 190 RoP were not satisfied in relation to the production of the fabric samples; (ii) the application for production of those samples was brought at an unduly late stage of the proceedings; (iii) the judge-rapporteur was not entitled to determine the place and modalities of production of the samples; and (iv) the requirements of R. 190 RoP were likewise not satisfied in relation to the production of the "Introduction Video".
11. The appellants additionally request, should the Court consider it necessary, a referral of certain questions concerning the interpretation of R. 190 RoP and Art. 6 of Directive 2004/48/EC either to the full Court of Appeal pursuant to R. 238A RoP or to the Court of Justice of the European Union.
12. In its Response, the respondent requests dismissal of the appeal and lodges a conditional cross-appeal. By this cross-appeal, it seeks the broader production order originally requested before the Court of First Instance, including additional UD fabric variants belonging to the J280, J400 and J500 product families. The cross-appeal is made subject to a condition linked to the assessment of the Court of Appeal assessment of whether testing limited to the two J300 variants ordered by the judge-rapporteur is sufficient for the purposes of the respondent's infringement case and any subsequent damages claims, or whether testing of additional variants may be required for those purposes. The respondent argues that the limitation of the production order to two variants was unjustified and that additional variants may be required fully to establish infringement across the allegedly infringing product range.
13. The appellants contest both the admissibility and the merits of the cross-appeal. They submit, in particular, that the condition attached to the cross-appeal refers to issues falling outside the scope of the present appeal and would require the Court to determine questions concerning the evidentiary sufficiency of future infringement and damages claims. In the alternative, they argue that the additional samples sought are neither necessary nor proportionate for the purposes of the present proceedings.
14. Following the filing of the appeal, the appellants applied for suspensive effect pursuant to R. 223 RoP. By order of 26 May 2026, the Court partially granted that application and extended the time for compliance with the production order until 15 July 2026. In doing so, the Court considered, on a prima facie basis, the arguments relating to Chinese export-control requirements, while expressly reserving its assessment of the merits of the appeal. Subsequently, upon a further application by the appellants based on the continued pendency of the export-authorisation procedure, the Court, by order of 14 July 2026, extended the suspensive effect until service of its decision on the appeal.

GROUNDINGS FOR THE ORDER

Admissibility.

15. The appeal is admissible, as it refers to an order against which an appeal was timely filed pursuant to Art. 73(2) UPCA and R. 220.1(c) RoP. Furthermore, the appeal sets out the grounds upon which suspensive effect should be granted, alongside the facts, evidence, and legal arguments in support thereof.

Legal framework.

16. As illustrated in the Order of the Court of Appeal of 29 June 2026, UPC_CoA_57/2026, *Polytechnik v Dall*, R. 190 RoP, read in conjunction with Art. 59 UPCA and the broader framework of the Rules of Procedure, empowers the Court to order the production of specified evidence which lies in the control of the opposing party or of a third party, provided that the requesting party has presented reasonably available evidence supporting the plausibility of its claims. In exercising this power, the Court must duly take into account the confidential nature of the information concerned, as well as the interests of any third party involved.
17. This mechanism forms part of the broader framework of access to evidence within the UPC, which is designed to ensure that the Court may, where necessary, obtain factual elements that are not readily accessible to the requesting party. In patent litigation, such measures are of particular importance because relevant technical or commercial data often reside exclusively within the sphere of the opposing party or third parties.
18. This approach reflects the rationale underlying Art. 6 of Directive 2004/48/EC, which provides for judicial measures intended to ensure effective access to evidence, subject to appropriate safeguards. The CJEU has consistently emphasised that the measures, procedures and remedies provided for by that Directive must guarantee a high level of protection of intellectual property rights, while operating within a structured and properly controlled system of judicial enforcement (see CJEU 28 April 2022, C-44/21, *Phoenix Contact*, para. 37, and 25 January 2017, C-367/15, *Stowarzyszenie Olawska Telewizja Kablowa*, para. 22).
19. The function of taking evidence under R. 190 RoP is to ensure the effectiveness of judicial protection by enabling the party bearing the burden of proof to discharge that burden where relevant evidence lies outside its sphere of control.
20. Such situations give rise to a structural asymmetry of information which may undermine the effectiveness of judicial protection. R. 190 RoP addresses this problem by providing a mechanism to overcome informational barriers, thereby facilitating access to otherwise inaccessible elements of proof. The production of evidence thus contributes to the establishment of a sufficiently reliable factual basis for the Court's assessment, particularly in technically complex patent disputes.
21. In this respect, the instrument also serves to safeguard the principle of equality of arms. It does not merely regulate a procedural power but contributes to rebalancing the position of the parties within the proceedings. The possibility of obtaining the production of evidence held by the opposing party is essential to ensure the effective enforcement of substantive law, in particular in the field of patent law.

22. In this context, the Court notes that, according to the case-law of the CJEU, the system established by Directive 2004/48/EC seeks to reconcile the effective enforcement of intellectual property rights with procedural fairness. Measures for the production of evidence must therefore be capable of mitigating informational asymmetries without imposing excessive evidentiary burdens at the preliminary stage. In particular, the applicant must present reasonably available evidence supporting the plausibility of its claims but cannot be required to provide full proof of the alleged infringement at that stage (see, by analogy, CJEU 27 April 2023, C-628/21, *Castorama Polska*, and 28 April 2022, C-44/21, *Phoenix Contact*).
23. This mechanism does not alter the allocation of the burden of proof, which remains governed by the applicable substantive law, but facilitates its discharge by granting access to evidentiary material otherwise unavailable to the party bearing that burden.
24. The Court's power to order the production of evidence is not unlimited and is subject to cumulative constraints. First, such measures may be granted only on the basis of specific and substantiated allegations and cannot serve exploratory or speculative purposes. R. 190 RoP does not permit fishing expeditions but requires a concrete link between the requested measure and the facts relied upon by the requesting party. This reflects the structured nature of the UPC system, which does not provide for general disclosure or discovery, but only for targeted and justified access to specific evidence.
25. Secondly, the requested evidence must be strictly necessary (*id est*, relevant) to the issues in dispute. The taking of evidence serves the adjudication of the case and must not give rise to unnecessary procedural dispersion or delay; accordingly, only those evidentiary measures that are genuinely necessary for the resolution of the dispute should be ordered. In this context, the Court exercises an active role in the management of the proceedings, ensuring that evidentiary measures are limited to what is necessary for the proper resolution of the dispute.
26. Thirdly, the requested measure must be proportionate, in the double sense that the evidence cannot reasonably be obtained by the requesting party through less burdensome means and that the burden imposed on the responding party be justified in the light of the interests at stake.
27. Finally, the Court must ensure a fair balance between competing rights, including the protection of confidential information, trade secrets and personal data. In that regard, the CJEU has held that the instruments provided for by Directive 2004/48/EC must not be used abusively and must remain subject to safeguards ensuring that they are justified, proportionate and non-abusive (see CJEU 17 June 2021, C-597/19, *Mircom*).
28. The approach set out above is consistent with analogous principles governing access to evidence under Union law, in particular as reflected in Directive 2014/104/EU on actions for damages for infringements of competition law (see CJEU 29 January 2026, *Meliá Hotels International*, C-286/24). Article 5 of that Directive provides that national courts may order the disclosure of relevant evidence upon reasoned justification, subject to strict conditions of necessity, proportionality and specificity (see CoA 24 September 2024, UPC_CoA_298/2024, *Guangdong OPPO v Panasonic*, and the CJEU case-law mentioned therein). This confirms that access to evidence is not conceived as a general right to disclosure, but as a controlled mechanism based on judicial oversight and the balancing of competing interests.

29. The discretion conferred on the Court is not unfettered but is governed by objective criteria of justification and rationality. The decision whether to grant or refuse a measure for the taking of evidence must be reasoned in terms of the specificity and substantiation of the allegations, as well as its necessity and proportionality, thereby ensuring that it remains open to review and consistent with the requirements of a fair trial.

Assessment by the Court of Appeal.

30. The Court further notes that the assessment whether a particular category of evidence is capable of contributing to the clarification of disputed factual or technical issues falls, in principle, within the margin of discretion of the Court of First Instance. The Court of Appeal will intervene only where that assessment is affected by an error of law, a manifest error of assessment, or where the limits imposed by the requirements of necessity and proportionality have been exceeded (see CoA, order of 29 June 2026, UPC_CoA_57/2026, *Polytechnik v Dall*).

The production of the fabric samples.

31. The appellants contend that the requirements of R. 190 RoP were not satisfied in relation to the production of the UD fabric samples ordered by the judge-rapporteur. They submit that the respondent subsequently obtained samples of the relevant products and carried out testing, while at the same time maintaining throughout the infringement proceedings that infringement of claims 13 to 15 had already been established on the basis of the evidence available to it. According to the appellants, these circumstances demonstrate that the requested measure was not necessary. They further argue that the respondent failed to establish that the requested samples, in the quantities required for the intended ballistic testing, were unavailable through ordinary commercial channels or that reasonable efforts had been made to obtain them independently. In their view, the requested samples therefore did not constitute evidence lying within the appellants' control and the requirements of R. 190 RoP were not met.
32. The respondent disputes these submissions. It argues that there is no inconsistency between its assertion that it had obtained limited quantities of J300 UD fabric and its position that such quantities were insufficient for the ballistic testing relied upon in relation to claims 13 to 15. Finally, it submits that, in light of the appellants' own contention that infringement of claims 13 to 15 could only be established through actual ballistic testing, the judge-rapporteur was entitled to conclude that production of the requested samples in quantities sufficient for such testing was necessary and proportionate.
33. In the impugned order, the judge-rapporteur found that the respondent had established a sufficient prima facie case of infringement and that the requirements of R. 190 RoP were satisfied. As regards the fabric samples, the judge-rapporteur considered that ballistic testing was relevant for the assessment of infringement of claims 13 to 15 and that the appellants had not effectively challenged the respondent's assertion that it was unable to obtain, through ordinary commercial channels, the quantities of UD fabric necessary to carry out such testing. While considering the original request excessive, the judge-rapporteur limited the measure to the two UD fabric variants sought in the alternative and concluded that the production of those samples was necessary and proportionate.
34. As regards the alleged inconsistency in the respondent's written submissions regarding its ability to obtain the requested sample, the Court is not persuaded by the appellants' submission that

the respondent made irreconcilably contradictory statements concerning its ability to obtain the requested samples.

35. The appellants rely on the fact that, while the respondent sought the production of the requested fabric samples on the basis that it could not obtain the material necessary for the testing relied upon in support of its case, it subsequently stated in its Reply that samples of J300 UD fabric had been obtained and tested.
36. However, the Court does not consider those statements to be inherently inconsistent. The respondent's R. 190 application was based on the contention that the quantities of material available to it were insufficient to carry out the ballistic testing relied upon in relation to claims 13 to 15. The fact that certain quantities of J300 UD fabric were subsequently obtained and tested does not in itself contradict that contention.
37. Neither does the subsequent testing of certain J300 samples establish that the respondent was able to obtain the quantities or variants of material which it considered necessary for the purposes of its infringement case. Nor does the fact that samples were subsequently obtained refute the necessity of the requested measure.
38. The impugned order is directed at the production of specific quantities of specific UD fabric variants. The appellants have not shown that the material subsequently obtained by the respondent corresponded to that evidence or otherwise eliminated the need for the ordered production.
39. The appellants further argue that the respondent failed to establish that the requested samples were unavailable through ordinary commercial channels.
40. The Court notes that the respondent's application was based on the more limited contention that it could obtain only small quantities of the relevant UD Fabric products through ordinary commercial channels and that such quantities were insufficient to carry out the intended ballistic testing. Whilst disputing the application, the appellants primarily maintained that the products were commercially available. However, they did not specifically engage with the respondent's more limited assertion that the quantities required for the intended ballistic testing could not be obtained through ordinary commercial channels.
41. In those circumstances, the judge-rapporteur did not err in considering that the respondent's allegation regarding the unavailability of the material in the quantities required for the intended testing had not been effectively challenged.
42. Only on appeal have the appellants relied more specifically on the contention that the respondent could have obtained the requested samples through a particular Chinese distributor, namely China Xinxing Group, and have supported that contention by reference to [REDACTED]. However, these factual allegations were not relied upon before the judge-rapporteur. The appellants have not provided any justification for their late introduction as required by R. 222.2 RoP. Accordingly, the Court sees no reason to take those new factual submissions into account (see Court of Appeal, order of 18 June 2026, UPC_CoA_907/2026, *Occlutech v Lepu*).
43. Nor does the Court consider persuasive the appellants' criticism that the respondent failed to make sufficient efforts to obtain the requested material independently. That criticism presupposes that the quantities required for the intended ballistic testing were obtainable

through ordinary commercial channels, an assumption which formed the very subject of dispute between the parties and which was not established before the judge-rapporteur.

44. Finally, the Court does not accept the appellants' submission that the R. 190 application was self-contradictory. The fact that the respondent considered the evidence already available sufficient to support its allegation of infringement did not preclude it from seeking access to additional evidence pursuant to R. 190 RoP. Moreover, in the present case, the appellants themselves maintained that infringement of claims 13 to 15 could only be established by means of actual ballistic testing. In those circumstances, a request for access to material capable of enabling such testing was consistent with the purpose of R. 190 RoP and with the respondent's position in the infringement proceedings.
45. For these reasons, the appellants have not established that the judge-rapporteur erred in concluding that the requirements for ordering production of the requested UD Fabric samples under R. 190 RoP were satisfied.

Alleged self-refuting necessity of the requested samples.

46. The appellants further submit that the requested samples were not necessary because the respondent itself had maintained in the infringement proceedings that infringement of claims 13 to 15 had already been established on the basis of the evidence available to it.
47. The respondent submits that there is no inconsistency between maintaining that the evidence already available supported its infringement allegations and seeking access to additional material capable of corroborating those allegations. It further argues that the request for samples became particularly relevant after the appellants had disputed the respondent's methodology and maintained that infringement of claims 13 to 15 could only be established by means of actual ballistic testing.
48. The Court is not persuaded by the appellants' submission.
49. The fact that a claimant considers the evidence already available sufficient to support its allegation of infringement does not preclude it from seeking access to additional evidence pursuant to R. 190 RoP if that party has a legitimate interest in the additional evidence, as in case when the adverse party argues that the fact to be proven can only be established by means of additional evidence. Nor does R. 190 RoP require an applicant to demonstrate that it lacks evidence supporting its case. Rather, the Rule requires that the applicant has already presented reasonably available and plausible evidence in support of its claims.
50. Moreover, the appellants' argument disregards the procedural context in which the application was made. In their Statement of defence, the appellants expressly challenged the methodology relied upon by the respondent in relation to claims 13 to 15 and maintained that compliance with the requirements of those claims could not be established by extrapolations or assumptions but requires actual ballistic testing of the relevant products.
51. In those circumstances, there is no inconsistency between the respondent maintaining that the evidence already available supported its infringement allegations and, at the same time, seeking access to material capable of enabling further testing in response to the objections raised by the appellants.

52. The request for access to additional material capable of enabling such testing was therefore consistent both with the purpose of R. 190 RoP and with the respondent's position in the infringement proceedings.
53. The judge-rapporteur therefore did not err in concluding that the requested samples remained necessary notwithstanding the respondent's position in the infringement proceedings.

Alleged untimeliness of the request.

54. The appellants further submit that the application under R. 190 RoP should have been rejected as belated. According to them, the need for ballistic testing in relation to claims 13 to 15 was apparent from the outset and the respondent should therefore have sought the requested samples before commencing the infringement action or, at the latest, together with the Statement of claim.
55. The respondent disputes that the R. 190 application was belated. It submits that neither Art. 59 UPCA nor R. 190 RoP requires an application for the production of evidence to be filed before the commencement of proceedings or together with the Statement of claim. According to the respondent, the need for the requested samples became particularly apparent following the appellants' Statement of defence, in which they argued that infringement of claims 13 to 15 could not be established through extrapolations or assumptions but required actual ballistic testing of the relevant products. The respondent therefore maintains that it was entitled to seek access to material necessary for such testing at that stage of the proceedings.
56. The Court is not persuaded by the appellants' submission that the R. 190 application should have been made together with the Statement of claim. Neither Art. 59 UPCA nor R. 190 RoP imposes such a requirement. On the contrary, the necessity and proportionality of a request for the production of evidence must be assessed in the light of the issues actually in dispute at the stage of the proceedings at which the request is made.
57. In the present case, the respondent had already presented evidence in support of its allegation that the products marketed by the appellants satisfied the requirements of claims 13 to 15. It was only in their Statement of defence that the appellants expressly challenged the methodology relied upon by the respondent and maintained that infringement of those claims could not properly be established on the basis of extrapolations or assumptions but required actual ballistic testing of the relevant products. The R. 190 application was directed precisely at obtaining material capable of enabling such testing and of addressing the objections raised in the Statement of defence.
58. In these circumstances, the judge-rapporteur was entitled to assess the respondent's request in the light of the procedural developments that had occurred by the time the application was made. The Court therefore sees no basis for concluding that the R. 190 application was filed at such a late stage as to justify its rejection.

Location of delivery of the samples.

59. The appellants further contend that the judge-rapporteur erred in directing that the samples be provided in the Netherlands, either at the respondent's registered address or at another address designated by the respondent. They submit that the respondent merely requested production of the requested samples and did not request that they be delivered to the Netherlands. According to the appellants, by requiring the samples to be provided in the Netherlands, the

judge-rapporteur granted relief that had not been sought. They further argue that the ordinary meaning of “produce” is merely to make evidence available and that neither the respondent’s application nor the UPCA and the Rules of Procedure provide a basis for requiring delivery of the samples to the Netherlands. Finally, they submit that delivery of the samples to the Netherlands entails additional burdens, including compliance with Chinese export control requirements and the obtaining of export permits, whereas no such issues would arise if the samples were merely made available at the premises of the Xingi Group. In that regard, they further point out that the respondent forms part of a multinational group having subsidiaries in China and could therefore itself have arranged collection and export of the samples.

60. The respondent disputes that the judge-rapporteur granted relief going beyond the application. It submits that the samples were requested for the purpose of ballistic testing by the respondent or an independent testing facility in the Netherlands (such as TNO) and that the application therefore necessarily contemplated that the samples would be placed at the respondent’s disposal for that purpose. According to the respondent, the contested direction merely specified the practical arrangements for compliance with the production order. The respondent further contends that the appellants’ reliance on the existence of affiliated companies within the Avient group in China is irrelevant and, in any event, was not part of the case before the judge-rapporteur.
61. The Court is not persuaded by the appellants’ submission that the impugned order granted relief beyond that sought by the respondent. Whilst the respondent did not expressly request that the samples be delivered to its registered address or to another location in the Netherlands designated by it, the R. 190 application made clear that the samples were sought in order to enable ballistic testing by the respondent itself or, if necessary, by an independent testing facility. The application therefore necessarily contemplated that the samples would be placed at the respondent’s disposal for that purpose and not merely made available for inspection at the appellants’ premises.
62. Moreover, R. 190.4(a) RoP requires the Court, when granting an order for the production of evidence, to determine the conditions under which, the form in which and the period within which the evidence is to be produced. In doing so, the Court is required to specify the practical arrangements necessary for the implementation of the order. The designation of the place at which the samples are to be made available to the requesting party forms part of those arrangements.
63. Accordingly, the judge-rapporteur did not grant relief different from or exceeding that sought by the respondent but merely exercised the powers conferred by R. 190.4(a) RoP in order to give practical effect to the production order.
64. The appellants’ reliance on the fact that the respondent belongs to a multinational group having affiliated companies in China does not lead to a different conclusion. The issue before the judge-rapporteur was not whether the respondent might itself have been capable of arranging collection or export of the samples, but under which conditions the production order should be implemented once granted. The existence of affiliated companies in China has no bearing on that assessment.
65. Therefore, the Court finds no error in the judge-rapporteur’s decision to direct that the samples be provided to the respondent in the Netherlands.

The alleged lack of necessity of the requested video.

66. The appellants submit that the judge-rapporteur erred in concluding that production of the Introduction Video was necessary. They argue that the video was never removed from public access but merely remained available through different channels (in particular, YouTube platform). They further submit that the factual circumstances allegedly evidenced by the video were not genuinely in dispute and that the disagreement concerned only the legal consequences to be drawn from those facts. According to the appellants, production of the video could therefore not contribute to the resolution of any disputed factual issue.
67. The appellants further contend that the respondent's Statement of claim in fact relied on the Chinese-language version of the video, whereas the alleged removal concerned the English-language version. According to the appellants, the Chinese-language version was never removed from the Xingi Group's website and remained continuously accessible, only through a different hyperlink. They additionally point out that they subsequently provided the respondent with a direct link to the video, which, in their view, confirms that the video was not exclusively within their control and that its production was therefore unnecessary.
68. The respondent disputes that production of the Introduction Video was unnecessary. It submits that the order has confirmed that an English-language version of the video existed and was within the Xingi Group's possession. According to the respondent, the first-instance record did not provide a reliable basis for verifying the availability, identity and content of the video and the judge-rapporteur was therefore entitled to order its production. It further argues that the video produced pursuant to the order is not the same as the YouTube video relied upon by the appellants and remains directly relevant as evidence of the marketing and offering of J500 products to customers within the UPC territory.
69. To the extent that the appellants rely on the alleged availability of the video through alternative links, on the distinction between the Chinese-language and English-language versions of the video, or on the existence of allegedly equivalent material on YouTube, these matters were not part of the case before the judge-rapporteur.
70. Similarly, the appellants' argument that production of the Introduction Video was unnecessary because the facts allegedly evidenced by the video were not disputed and that the disagreement between the parties concerned only the legal consequences to be drawn from those facts did not form part of the debate before the judge-rapporteur in the R. 190 proceedings.
71. Given these circumstances, the Court notes that the assessment of the requirement on necessity of the order issued pursuant to R. 190 RoP must be reviewed having regard to the factual and legal submissions that were before the judge-rapporteur when the contested order was made. The appellants cannot establish an error in that assessment by relying on a line of argument which was not developed before the judge-rapporteur, as that line of argument is based on new facts and the appellants have not provided any reason why those facts should be admitted pursuant to R. 222.2 RoP. Accordingly, the appellants have not demonstrated that the judge-rapporteur's assessment was affected by an error of law, a manifest error of assessment, or a failure properly to apply the requirements of R. 190 RoP.

Referral to the full Court to Art. 21(2) UPCS and R. 238A RoP.

72. The appellants request for a referral to the Court of Appeal sitting in full composition pursuant to R. 238A RoP.

73. The Court does not consider that the present appeal raises issues of exceptional importance or that its determination requires clarification in order to preserve the consistency and unity of the Court's case law. The issues raised by the appellants can be resolved through the application of established principles governing applications for the production of evidence under R. 190 RoP and their application to the particular facts of the case. The appellants have not demonstrated the existence of conflicting lines of authority within the Court's case law that would justify referral to the full Court.

74. Therefore, the request must be rejected.

Referral to the CJEU to Art. 267 TFEU, Art. 21 UPCA and R. 266 RoP.

75. The appellants request a referral to the Court of Justice pursuant to Art. 267 TFEU concerning the interpretation of Art. 6(1) of Directive 2004/48/EC, and in particular the meaning of the expression “evidence which lies in the control of the opposing party”. According to the appellants, evidence cannot be regarded as being within the control of the opposing party where the applicant could obtain the same evidence by other means without undue burden and within a reasonable time.

76. The questions proposed by the appellants are not relevant for the determination of the present appeal. The judge-rapporteur found that the evidence sought by the respondent could not be obtained through ordinary commercial channels in the quantities required for the intended ballistic testing and that the relevant version of the Introduction Video was not available to the respondent.

77. Accordingly, even assuming in favour of the appellants that Art. 6(1) of Directive 2004/48/EC should be interpreted as meaning that evidence does not lie within the control of the opposing party where it can be obtained by other means without undue burden and within a reasonable time, the proposed questions remain irrelevant to the outcome of the present appeal. The impugned order is based on the opposite factual finding, namely that the requested evidence could not be obtained by such means.

78. Since the answer to the proposed questions cannot affect the outcome of the present appeal, a reference under Art. 267 TFEU is not required.

Cross-appeal.

79. By way of its conditional cross-appeal, the respondent submits that, if the Court were to consider the evidence ordered by the judge-rapporteur insufficient, the production order should be extended to include the additional J280, J400 and J500 UD fabric variants originally requested. The respondent argues that the additional variants are relevant because the different product lines correspond to different yarn grades. While a successful ballistic test performed on the J300 variants would generally support the respondent's infringement case regarding claims 13-15, the respondent submits that the appellants are likely to argue that the other product lines cannot be covered by conclusions drawn from testing of J300 products alone and require independent testing.

80. The respondent further submits that the judge-rapporteur's reasoning itself supports a broader production order and contends that the incremental burden associated with supplying additional quantities of commercially marketed products is modest, whereas the benefit to the administration of justice is substantial.

81. The appellants submit that the conditional cross-appeal is inadmissible because the condition formulated by the respondent cannot be fulfilled within the present proceedings. According to the appellants, the Court of Appeal cannot decide whether testing of the two J300 samples would suffice not only for the present infringement proceedings but also for any future damages or enforcement proceedings, as such issues fall outside the scope of the present appeal.
82. The Court considers that the cross-appeal is inadmissible.
83. The cross-appeal is expressly made subject to the condition that the Court considers the production of the two J300 variants ordered by the judge-rapporteur insufficient for the purposes of the respondent's infringement case and any subsequent damages claims. At the oral hearing, the respondent confirmed that it intended to maintain the cross-appeal as a genuinely conditional cross-appeal and not as an unconditional request for broader relief.
84. Under generally accepted principles governing conditional appeals, the condition attached to the appeal must serve to identify the circumstances in which the appellant retains an interest in pursuing the challenge. In the present case, however, the condition relied upon by the respondent goes beyond merely identifying such circumstances. Rather, it makes consideration of the cross-appeal dependent upon a prior determination by this Court whether testing of the two J300 variants ordered by the judge-rapporteur will ultimately suffice for the purposes of the respondent's infringement case and possible future damages claims.
85. Whether testing of those variants will ultimately be sufficient to establish infringement or support possible future damages claims does not fall to be determined in the present appeal. It is for the court deciding the merits of the case, in the light of the evidence eventually produced and tested, to assess the evidentiary significance and sufficiency of that material.
86. Since the condition upon which the cross-appeal has been made dependent requires a determination that falls outside the scope of the present appeal, the condition cannot be fulfilled within these proceedings.

Suspensive effect.

87. Upon service of this order, the suspensive effect granted by the orders of 26 May 2026 and 14 July 2026 ceases to operate, its purpose having been exhausted by the determination of the appeal. Any issues arising thereafter concerning the implementation of the order of the Court of First Instance, including the manner and timing of compliance, the consequences of any delay in compliance and any questions relating to the application of the measures provided for in R. 190.4(b) and R. 190.7 RoP, fall to be assessed by the judge-rapporteur of the Court of First Instance in the light of the circumstances then existing.

Conclusions.

88. For the reasons given above, the appeal is not well-founded, and the conditional cross-appeal is inadmissible.
89. No decision on the reimbursement of legal costs is to be made, since this order of the Court of Appeal is not a final order, as it does not conclude the proceedings pending before the Court of First Instance.

ORDER

The Court dismisses the appeal and declares inadmissible the counter-appeal.

Issued on 27 August 2026.

KLAUS STEFAN
MARTIN
Grabinski

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Klaus Grabinski, presiding judge and President of the Court of Appeal

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Paolo Catallozzi, legally qualified judge and judge-rapporteur

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