UPC Court of Appeal, 12 May 2025, Ballinno v Kinexon

PATENT LAW – PROCEDURAL LAW

Admissible appeal against security for costs order brought together with the appeal against the order on provisional measures (R. 220.2 RoP)

- **"Decision" in R. 220.2 RoP also includes "orders" so that an appeal against a security order is admissible when brought together with an appeal against an order where an action is adjudicated**
- The admissibility is not changed by the fact that Ballinno no longer requests any provisional measures. Ballinno still has a legal interest in having the security order tried on appeal.

No withdrawal of the action by Ballino (R. 265 RoP)

- **It requests that the security order be reversed and that the main order be set aside and reversed in relation to the cost decision.**

Action has become devoid of purpose and there is no longer a need to adjudicate on it (R. 360 RoP)

- **after Ballino has withdrawn its request for provisional measures (injunctions, seizure of goods and penalties) on appeal, save for the appeal on security for costs**

Cost Allocation (Article 69 UPCA, R. 360 RoP)

- **Disposal of an action pursuant to R. 360 RoP can include a decision on who shall bear the costs; the review can be marginal**
- **Unsuccessful party: party that withdraws the main requests and took the inherent risk in its procedural strategy that the urgent interest in the requests fell away before a final order was rendered must considered as the unsuccessful party and consequently be held to bear the costs of the proceedings**
- An exception to this may apply where it has been established that the impugned order is based on manifest errors.
- Where a party, on the other hand, withdrew its requests for lack of urgent interest before a (final) order in the action was rendered, caused by circumstances it could not reasonably have foreseen, and not due to a materialisation of an inherent and foreseeable risk of a deliberate procedural strategy, equity may require a different allocation of costs.

Source: **Unified Patent Court**

UPC Court of Appeal,
12 May 2025
(Kalden, Simonsson, Rombach)
UPC_CoA_328/2024
APL_36389/2024
ORDER
of the Court of Appeal of the Unified Patent Court issued on 12 May 2025
on an appeal against an order for security for costs, especially when the action has become devoid of purpose
HEADNOTES:
- An appeal against an order for security for costs (R. 158 RoP), brought together with an appeal against an order on provisional measures, is admissible. The admissibility is not affected by the fact that the appellant has later made clear that it no longer requests provisional measures.
- If a party when it comes to necessity and urgency builds its case entirely, or at least primarily, on a single event or window of time where allegedly there is a patent infringement, such as the existence of a trade fair or, as here, a major sports event, the party must accept an inherent risk in its procedural strategy. That risk is that the interest falls away once the event is over and that its requests must be rejected for the lack of urgent interest in the requested measures.
- If that risk indeed materialises and such a party decides to withdraw its requests for provisional measures, prior to an order from the Court being issued, the result is that the action becomes devoid of purpose.
- If an action becomes devoid of purpose following a withdrawal of the main requests by a party who took the inherent risk in its procedural strategy that the urgent interest in the requests fell away before a final order was rendered, it is clear that - had the requests not been withdrawn - the requests would have been rejected for lack of urgent interest. Therefore, such a party must be considered as the unsuccessful party and consequently be held to bear the costs of the proceedings under the general rule of Art. 69 (1) UPCA.
- An exception to this may apply where it has been established that the impugned order is based on manifest errors.
- Where a party, on the other hand, withdrew its requests for lack of urgent interest before a (final) order in the action was rendered, caused by circumstances it could not reasonably have foreseen, and not due to a materialisation of an inherent and foreseeable risk of a deliberate procedural strategy, equity may require a different allocation of costs.
KEYWORDS:
Admissibility of appeal, provisional measures, order for security for costs, the applicant no longer pursues its requests for provisional measures on appeal, action devoid of purpose, extent of legal review

APPELLANT (AND APPLICANT BEFORE THE COURT OF FIRST INSTANCE)
Ballinno B.V., Obdam, The Netherlands (hereinafter 'Ballinno')
represented by: attorney-at-law Rien Broekstra, Vossius & Brinkhof, Amsterdam, The Netherlands and other representatives of this law firm
RESPONDENTS (AND DEFENDANTS BEFORE THE COURT OF FIRST INSTANCE)
1. **Kinexon Sports & Media GmbH**, Munich, Germany
2. **Union des Associations Européennes de Football (UEFA)**, Nyon, Switzerland
3. **Kinexon GmbH**, Munich, Germany
(hereinafter jointly referred to as the Kinexon companies and UEFA, or the defendants)
1-3 represented by attorney-at-law Prof. Dr. Tilman Müller-Stoy, Bardehle Pagenberg, Munich, Germany, and other representatives of this law firm
PATENT AT ISSUE
EP 1 944 067
PANEL AND DECIDING JUDGES
Panel 2
Rian Kalden, Presiding judge and legally qualified judge
Ingeborg Simonsson, legally qualified judge and judge rapporteur
Patricia Rombach, legally qualified judge
Guillaume Faget, technically qualified judge
Elisabetta Papa, technically qualified judge
IMPUGNED DECISIONS OR ORDERS OF THE COURT OF FIRST INSTANCE
□ Date of upload in CMS: 15 May 2024, ORD_23557/2024 (signed on 14 May 2024), App_23209/2024, UPC_CFI_151/2024
□ Date: **3 June 2024, ORD_33145/2024, App_26791/2024 (Order without grounds), and 28 June 2024, ORD_33151/2024 in workflow ORD_33150/2024, ACT_16267/2024, UPC_CFI_151/2024 (Order with grounds)**
ORAL HEARING
24 February 2025
POINTS AT ISSUE
Admissibility of appeal, consequences of no longer requesting an injunction and seizure of goods on appeal, an appeal against an order for security for costs brought together with an appeal against the order on provisional measures, action devoid of purpose, extent of legal review.
SUMMARY OF FACTS
1. Ballinno, as the proprietor of the patent at issue, entitled "Method and system for detecting an offside situation", applied for provisional measures before the Court of First Instance, Hamburg Local Division against the Kinexon companies and UEFA. In relation to a contested embodiment referred to as the Connected Ball Technology, Ballinno requested (in brief) an injunction against the defendants, each individually and collectively, to refrain from infringing the patent at issue in the territories of Germany and the Netherlands, an order for the seizure of the goods suspected of infringing the patent at issue, and that the defendants pay an interim award of costs and a penalty payment of up to € 100.000 for every day that one or more of the sought injunctions were not complied with.
2. The Kinexon companies and UEFA requested an order requiring Ballinno to provide security for costs. The Local Division ordered Ballinno to provide security for the legal costs of the Kinexon companies and UEFA in the (total) amount of € 56.000, by deposit or bank guarantee (order dated 14 May 2024, hereinafter 'the security order').
3. Through the orders of 3 June 2024 (**order without grounds**) and 28 June 2024 (order with grounds), the Local Division dismissed the application for provisional measures (hereinafter 'the main order'). According to the findings of the Local Division, Ballinno had not acted with the necessary urgency, and had not sufficiently proven an infringement according to any of the operational requests. Ballinno was ordered to pay the costs of the proceedings and the value of the dispute was set to € 500.000.
4. Ballinno appealed the order.
5. Following a request from the Kinexon companies and UEFA on security for costs incurred and/or to be incurred by the Kinexon companies and UEFA in the proceedings before the Court of Appeal, the Court of Appeal ordered Ballinno to provide security for the legal costs of the said companies in the (total) amount of € 25.000.
INDICATION OF THE PARTIES' REQUESTS
6. Ballinno lodged a Statement of appeal on 18 June 2024 and made numerous requests and auxiliary requests, including an extension of term for its (further) Statement of grounds of appeal. The requests included, in the alternative:
- To set aside the security order in its entirety;
- To order the release of the € 56.000 security placed by Ballinno;
- To set aside the main order insofar:
  a. the application for provisional measures was dismissed (1); and
  b. Ballinno is ordered to pay the costs of the proceedings, including those incurred by filing the Protective Letter dated March 4th 2024 (2);
  and subsequently:
  A. – F. To order an injunction against the Kinexon companies and UEFA, each individually and collectively (the detailed content of the requests being set out in the Statement of appeal, not reproduced here);
  G. To order for the seizure of the goods (the detailed content of the requests being set out in the Statement of appeal, not reproduced here);
  H. To order the Kinexon companies and UEFA to pay an interim award of costs for the first instance and appeal proceedings;
  I. To order the Kinexon companies and UEFA to pay the Court a penalty payment of up to € 100.000 for every day that one or more of the aforementioned injunctions are not complied with.
7. On 12 July 2024, the Court of Appeal held that, in view of the fact that there were no grounds provided in the order uploaded on 3 June 2024, the Statement of

appeal with provisional grounds of appeal lodged by Ballinno on 18 June 2024 was to be considered as only the Statement of appeal. The 15 days time period for lodging the Statement of grounds of appeal only started on service of the order with grounds (R.224.2(b) RoP).

8. On 15 July 2024 Ballinno lodged its Statement of grounds of appeal (App_41711/2024). Here, Ballinno explained that the urgent interest in an injunction had significantly diminished, as the event giving rise to this urgent interest (UEFA EURO 2024, hereinafter 'the 2024 event') had meanwhile taken place, and that it would therefore no longer claim a provisional injunction. Ballinno is requesting the Court of Appeal (the requests are not reproduced word by word here but are summarised):

- to set aside the main order in its entirety;
- to set aside the security order in its entirety;
- to order the Kinexon companies and UEFA jointly and severally to pay the costs of the proceedings at the Court of First Instance and on appeal, immediately enforceable;
- to set the value of the dispute to € 56,000.

9. The Kinexon companies and UEFA request that the appeal be dismissed and that Ballinno be ordered to bear the costs of (also) the appeal proceedings.

SUBMISSIONS OF THE PARTIES

Ballinno's submissions, in summary and insofar as relevant

10. According to Ballinno, the appeal is admissible. There is no basis in the Agreement on a Unified Patent Court (UPCA) nor in the Rules of Procedure (RoP) for an obligation to pursue on appeal a decision on all or even the main remedies sought in first instance. To the contrary: R. 225(e) RoP explicitly requires the appellant to define the order or remedy sought in the Statement of appeal – which thus may be different from the order or remedy sought in first instance.

11. Moreover, R. 263(1) – (3) RoP allow a party at any stage of the proceedings to unconditionally limit its claims. This confirms that a party is not obliged to pursue all that it had pursued in first instance. An obligation to pursue the remedies pursued in first instance would also be contrary to Art. 76 UPCA, which embodies the general principle that parties determine the scope of the dispute by formulating and submitting requests.

12. Ballinno was not only adversely affected by the dismissal of its request for provisional measures, but also by the dismissal of the requested cost award, by the order to pay the opponents' procedural costs, by the order to provide security, and by the determination of the dispute value. Ballinno still has an interest in a final decision from the Court of Appeal on costs, security and dispute value. It is admissible to request the Court of Appeal a final decision on those elements only. Furthermore, a request to set aside an order is not a declaratory judgment.

13. Ballinno argues that the stipulation in Art. 73(2)(b) UPCA allows the appeal, including procedural orders, to be handled in a single appeal procedure. It cannot be understood to mean that an "other" order can only be appealed provided that a part of the main order is also requested to be set aside.

14. Moreover, Ballinno takes the view that the Court of Appeal shall assess whether the application for provisional measures should have been allowed. The fact that the 2024 event is over so that a provisional injunction is no longer necessary, does not mean that Ballinno has now become the unsuccessful party within the meaning of Art. 69(1) UCPA.

15. In the impugned order, the Local Division did not order an interim award of costs but gave a final decision in principle on the obligation to bear legal costs. An appeal is the only possibility for Ballinno to challenge and overturn the cost order.

16. Ballinno has not withdrawn its action in the sense of R. 265 RoP. At most Ballinno can be considered to have unconditionally limited its claims in the sense of R. 263.3 RoP. Even if Ballinno would be considered to have withdrawn its action by no longer requesting an injunction, adjudication on the remaining requests would still be required, because Ballinno still has an interest in a reversal of the cost order and the security order.

17. The present situation is not one where there is no need to adjudicate pursuant to R. 360 RoP. The appeal serves a purpose and a decision in appeal is necessary.

18. While Ballinno could have started (and still can start) proceedings on the merits and ask for a permanent injunction, it cannot in those proceedings successfully ask for a reversal of the final decision on the obligation to bear legal costs of the provisional measures proceedings. Any merits proceedings instigated by Ballinno would have been considered as different proceedings than the provisional measures proceedings at hand. Moreover, the Court of First Instance cannot overturn the final decisions on costs rendered in the impugned order in main proceedings. Nor could Ballinno successfully have asked the Court of First Instance in merits proceedings to make a "final assessment of security".

Submissions of the Kinexon companies and UEFA, in summary and insofar as relevant

19. The Kinexon companies and UEFA take the view that Ballinno's remaining requests (see para 8 above) are inadmissible as Ballinno is no longer pursuing the request for a provisional injunction (Art. 62 UPCA. Art. 73.2(a) UPCA, R.220.1(c) RoP, Art. 75 UPCA, R.242 RoP and Art. 32 UPCA). They point out that Ballinno's requests before the Local Division were broad and of a general nature, not limited to the 2024 event, and that none of the three remedies requested at first instance (injunction, seizure of goods and a penalty payment) were asserted by Ballinno in the second instance proceedings.

20. As regards the security order, the Kinexon companies and UEFA assert that as the main order of the Local Division is an "order" according to Art. 62 UPCA and R.220.1(c) RoP, but not a "decision" according to R. 220.1(a),(b) RoP, Ballinno cannot file an appeal against the security order together with the appeal against the main order. Rather, Ballinno should have

filed a request for discretionary review to the Court of Appeal according to R.220.3 RoP which they did not. Even if one would allow an appeal against the security order together with the main order there would be no separate procedure for such a dependent appeal. Instead it would depend on the admissibility of the appeal against the main order, however, in this case the appeal against the main order is inadmissible.
21. The request to order the Kinexon companies and UEFA to bear the first instance and appeal costs is inadmissible as well, once again because Ballinno did not file an (admissible) appeal against the main order. Also, Ballinno's submission dated 18 June 2024 did not comprise such a request.
22. Moreover, the Kinexon companies and UEFA consider that the request that the value of the dispute be set to € 56.000 is inextricably linked to the request to set aside the security order. Since that latter request is inadmissible, there is no basis for the request that the value of the dispute be set to € 56.000, which is therefore inadmissible as well.
23. The Kinexon companies and UEFA take the view that Ballinno has fully withdrawn its action in the sense of R. 265 RoP.
24. There is no appealable subject matter as Ballinno no longer requests any provisional measures. Due to this lack of appealable subject matter, there is no room for a leave to change the claim or amend the case according to R. 263 RoP according to Kinexon companies and UEFA.
25. R. 360 RoP – a provision that regulates a situation where there is no need to adjudicate – is not applicable here according to the Kinexon companies and UEFA as the relevant action – the application for provisional measures – has not become devoid of purpose. Rather, Ballinno has expressed a mere diminished interest to pursue its original claims.
26. If Ballinno would have started proceedings on the merits, Ballinno could have asked for a final assessment of security for costs and (ultimately) a decision in principle on the obligation to bear legal costs of the proceedings.
27. According to the Kinexon companies and UEFA it is not necessary to make a hypothetical assessment of how the outcome should have been in the first instance proceedings and Ballinno must be considered the losing party.

GROUNDS FOR THE ORDER

The appeal against the security order

28. The appeal against the security order is admissible.
29. Art. 69(4) UPCA provides that, at the request of the defendant, the Court may order the applicant to provide adequate security for the legal costs and other expenses incurred by the defendant which the applicant may be liable to bear, in particular in the cases referred to in Arts. 59 to 62 UPCA. An application for provisional measures falls in the category of provisional and protective measures as envisaged in Art. 62 UPCA, and is thus encompassed by Art. 69(4) UPCA (see CoA, order of 26 August 2024, UPC_CoA_328/2024, APL 36389/2024, App 45255/2024, Kinexon and UEFA, paras 23-24).
30. Pursuant to Art. 73(2)(b) UPCA, an appeal against an order of the Court of First Instance may be brought before the Court of Appeal by any party which has been unsuccessful, in whole or in part, in its submissions for other orders than so called privileged ones (i) together with the appeal against the decision, or (ii) where the Court grants leave to appeal, within 15 days of the notification of the Court's decision to that effect.
31. This applies to orders for security for costs of the other party. Pursuant to R. 158.3 RoP, the order for security shall indicate that an appeal may be lodged in accordance with Art. 73 UPCA and Rule 220.2 RoP.
32. R. 220.2 RoP states that orders other than those referred to in paragraph 1 and R. 97.5 RoP (so called non-privileged orders), may be either the subject of an appeal together with the appeal against the decision or may be appealed with the leave of the Court of First Instance.
33. There was no leave to appeal the security order. Leave to appeal under R.220.2 RoP, other than in the case of an appeal together with an appeal against the decision, must be expressly granted by the Court of First Instance and cannot be presumed (CoA, 15 October 2024, PC 01/2024, Photon Wave vs Seoul Viosys).
34. As can be seen, R. 220.2 RoP refers to an appeal together with the appeal against *the decision* (italics added). An order granting or rejecting provisional measures is however an order (Art. 62(1) UPCA and R. 220.1 (c) RoP).
35. Such a literal reading of R. 220.2 RoP would however force the Court in the direction of granting leave to appeal routinely in relation to security orders to ensure the party's right to appeal pursuant to Art. 69(4) and Art. 73(2)(b) UPCA and R. 158.3 RoP.
36. A reasonable interpretation of R. 220 RoP which is consistent with the right to appeal and the requirement of leave, is that "decision" in R. 220.2 RoP includes orders so that an appeal against a security order is admissible when brought together with an appeal against an order where an action is adjudicated.
37. In the present case, Ballinno appealed the main order in time and requested a reversal of the outcome as regards the provisional measures, including detailed claims for such measures, and, at the same time, requesting a reversal of the security order. The appeal against the security order was consequently brought together with the appeal against the order on provisional measures.
38. After the Statement of appeal, Ballinno upheld in the Statement of grounds of appeal its request that the main order be set aside in its entirety, but made clear that it no longer requested any provisional measures. At the same time, Ballinno is still requesting a reversal of the outcome when it comes to, as far as relevant for the present discussion, the security order.
39. An application of the principles set out in this order leads to the conclusion that Ballinno's appeal against the security order is admissible, as it was brought together with the appeal against the order on provisional

measures. The admissibility is not changed by the fact that Ballinno no longer requests any provisional measures. Ballinno still has a legal interest in having the security order tried on appeal.

Has Ballinno withdrawn its action in the sense of R. 265 RoP?

40. Ballinno denies that it has withdrawn its action, and, as set out in this order, is still pursuing an admissible request that the security order be reversed. Ballinno is also requesting that the main order be set aside and reversed in relation to the cost decision. There is consequently no withdrawal of the action and it can be left open whether the fact that no injunction or seizure of goods is requested any longer results in a de facto withdrawal of the action.

Is this a situation where there is no need to adjudicate pursuant to R. 360 RoP?

41. If the Court finds that an action has become devoid of purpose and that there is no longer any need to adjudicate on it, it may at any time, on the application of a party or of its own motion, after giving the parties an opportunity to be heard, dispose of the action by way of order (**R. 360 RoP**).

42. This provision gives the Court broad discretion to consider whether the prerequisites for disposing of the action are present. The assessment is not in the hands of the parties, although the facts and arguments brought forward by them can have an impact on the Court's decision.

43. In the present proceedings, Ballinno withdrew its requests for provisional measures, allegedly because the urgent interest to have such measures issued by the Court had fallen away.

44. Indeed, the requirements according to **R. 206.2(c) RoP** are that provisional measures are necessary to prevent a threatened infringement, to forbid the continuation of an alleged infringement or to make such continuation subject to the lodging of guarantees. According to case law of this Court this implies that the requested measures must be both necessary and urgent.

45. Ballinno argues that it was forced to withdraw its claims due to the fact that the 2024 event had ended before the Court of Appeal could decide on the appeal. The Court of Appeal is not convinced by this argument.

46. Necessity and urgency do not automatically fall away because an event where (allegedly) a patent infringement occurs has ended. Whether there is still an (urgent) interest must be assessed on a case-by-case basis. As a fact of life, it must be considered rather uncommon that a product is only used once, at an international event with considerable audience and coverage in media, and that the use, production and sales of the product then cease for reasons of its own. Rather, it could normally be expected that the prerequisites for commercialisation of the product are improved as a result of the exposure.

47. Although Ballinno stated in its application at first instance that the announcement that the Connected Ball Technology would be used during the spring-summer of 2024 made the need for a preliminary order particularly urgent, its requests before the Court of First Instance and on appeal were much broader than an injunction in relation to the said event. Among other items, the requests included an injunction against the Kinexon companies and UEFA, each individually and collectively, to refrain from infringing the patent at issue in the territories of Germany and the Netherlands. Neither was the request for the seizure of the goods suspected of infringing the patent at issue limited to the 2024 event.

48. As set out in the impugned order (page 17), Ballinno clarified that the application for provisional measures is primarily directed at the balls that incorporate the Connected Ball Technology to be used during the 2024 event. Insofar as any other balls and/or systems of the defendants incorporate the Connected Ball Technology and thereby the patented invention, the application was also directed at those.

49. The grounds for the application, as stated by Ballinno, included not only that the Kinexon companies supply and have supplied the Connected Ball Technology in Germany to UEFA, but moreover, that the Kinexon companies offer to supply to UEFA and other potential customers. Ballinno allege that the Kinexon companies offer the Connected Ball Technology i.a. in Germany, places the Connected Ball Technology on the market and/or used the invention during the developing and testing phase of the infringing product and/or stored and imported the technology for the purpose of making and/or offering and/or placing on the market and/or for using. Additionally, the offer by the Kinexon companies is alleged to be considered to be directed at use in The Netherlands since the website is (also) open to Dutch football clubs, which inevitably would be using the technology on their own fields in The Netherlands if they were to accept the offer.

50. It may well be that Ballinno's interest in a provisional injunction and seizure of goods significantly diminished once the 2024 event ended. Even so, the Court of Appeal cannot see, in this case, any external reasons that would inevitably have forced Ballinno to withdraw its requests for provisional injunctions, seizure of goods and penalties.

51. On the contrary, Ballinno could in any case have pursued the requests for provisional measures in relation to other balls and/or systems of the Kinexon companies that allegedly incorporate the Connected Ball Technology, and in relation to the Kinexon companies' alleged offers to other potential customers, including in The Netherlands.

52. If, however, the facts would not support the need for provisional measures in relation to alleged infringements other than at the 2024 event, as Ballinno submits, then the conclusion must be that Ballinno has decided not to pursue the requests for provisional measures as a consequence of the risks inherent in its litigation strategy.

53. If a party when it comes to necessity and urgency builds its case entirely, or at least primarily, on a single event or window of time where allegedly there is a patent infringement, such as the existence of a trade fair or, as here, a major sports event, the party must accept an

inherent risk in its procedural strategy. That risk is that the interest falls away once the event is over and that its requests must be rejected for the lack of urgent interest in the requested measures.

54. If that risk indeed materialises and such a party decides to withdraw its requests for provisional measures, prior to an order from the Court being issued, the result is that the action becomes devoid of purpose.

55. The conclusion is thus that after Ballinno has withdrawn its requests for provisional measures (injunctions, seizure of goods and penalties) on appeal, save for the appeal on security for costs, the action has become devoid of purpose and there is no longer any need to adjudicate on it.

The extent of the legal review in relation to costs

56. This case raises the question of to what extent an appellant should be entitled to a review in substance of the whole first instance provisional measure order, for the sole purpose of determining whom shall bear the costs, even though the appellant has effectively withdrawn its main request on appeal, so that the action has become devoid of purpose.

57. It should be said at the outset that a disposal of an action pursuant to **R. 360 RoP** can include a decision on whom shall bear the costs. The interest of procedural efficiency and of reducing the aggregate litigation costs of the parties that underly **R. 360 RoP** speak in favour of a marginal review.

58. There may be various reasons why a party wishes to withdraw its requests because of which an action becomes devoid of purpose. Some of the reasons can be completely unexpected or outside the control of the parties, and others that they can foresee and relate to, to a greater or lesser extent.

59. Applications for provisional measures are treated by way of summary proceedings (**R. 205 RoP**). It is reserved for situations where there is an urgent interest. This is a requirement on the applicant's side and at the applicant's risk when urgency falls away, particularly so when this is predictable. In such cases, it must be assumed that the applicant balances in advance its urgent interest and the risk of being unsuccessful if, for example, there is no longer an urgent interest at the time of the appeal.

60. If an action becomes devoid of purpose following a withdrawal of the main requests by a party who took the inherent risk in its procedural strategy that the urgent interest in the requests fell away before a final order was rendered, it is clear that – had the requests not been withdrawn – the requests would have been rejected for lack of urgent interest. Therefore, such a party must be considered as the unsuccessful party and consequently be held to bear the costs of the proceedings under the general rule of **Art. 69 (1) UPCA**.

61. An exception to this may apply where it has been established that the impugned order is based on manifest errors.

62. Where a party, on the other hand, withdrew its requests for lack of urgent interest before a (final) order in the action was rendered, caused by circumstances it could not reasonably have foreseen, and not due to a materialisation of an inherent and foreseeable risk of a deliberate procedural strategy, equity may require a different allocation of costs.

63. In the present case, the scheduling of the 2024 event was well known to Ballinno. The risk that an alleged infringement, insofar as UEFA is concerned, would have ended before the application for provisional measures had been tried in one or two instances, must have been visible to Ballinno, who as applicant could determine whether and when to lodge its application. Despite the fact that Ballinno's requests and grounds at first instance in relation to the Kinexon companies were of a general nature and included allegations about offers to other customers, it decided not to pursue its requests and relied for its urgent interest solely on the 2024 event. As said, in such a situation, a party must accept the inherent risk in its procedural strategy that the urgent interest falls away before a final decision (on appeal) has been rendered.

64. The complaints raised by Ballinno do not reveal any manifest errors or violation of procedural law in the impugned order.

65. Concerning the extent of the legal review in relation to costs, the Court of Appeal has previously ruled on related issues in the context of a disposal of an action following a cease-and-desist undertaking by the defendant. If, after the commencement of the proceedings, the defendant undertakes to comply with the claimant's requests, it is generally not necessary to examine the admissibility and the merits of the case at the point of time of the undertaking in order to determine which party is the successful party. This ensures that the Court of Appeal can decide on the obligation to bear the costs of the proceedings without having to examine the facts of the case, which in patent cases may require a complicated and costly procedure (order of **4 October 2024, UPC CoA 2/2024, APL 83/2024 Meril/Edwards**, paras 14 and 19).

66. Although the facts of that case were different, the Court of Appeal believes that similar considerations apply, and that this approach is consistent with **Art. 3** and **14 of Directive 2004/48** EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, which requires Member States to ensure the reimbursement only of 'reasonable' legal costs, reflecting the general obligation to ensure, inter alia, that the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by that directive are not unnecessarily costly (see especially judgment of the Court of Justice of 28 April 2022, Koch Media, ECLI:EU:C:2022:317, at para 49 with references).

ORDER

- The Court of Appeal declares admissible the appeal on security for costs.
- After adjudicating on security for costs, the Court of Appeal will proceed to dispose of the action in other parts. This will include determination of whom shall bear the costs, in accordance with the principles set out in this order.

- The parties are invited to state, **no later than 22 May 2025**, whether they agree not to have another oral hearing, so that the Court of Appeal can adjudicate on the basis of the written documents and what has been said at the oral hearing on 24 February 2025.

Issued on 12 May 2025
Rian Kalden, presiding judge and legally qualified judge
Ingeborg Simonsson, legally qualified judge and judge-rapporteur
Patricia Rombach, legally qualified judge
Guillaume Faget, technically qualified judge
Elisabetta Papa, technically qualified judge
