

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 26 June 2025
concerning security for costs (R. 158 RoP) and
disposal of an action that has become devoid of purpose (R. 360 RoP)

HEADNOTES:

- Where an applicant for provisional measures has withdrawn its requests for provisional measures (injunctions, seizure of goods and penalties) on appeal, the action has become devoid of purpose so that there is no longer any need to adjudicate on it. The Court of Appeal may dispose of the action pursuant to R. 360 RoP.
- It has not been considered necessary to examine the merits of the case in order to determine which party is the successful party. The applicant has been considered the unsuccessful party at both instances.

KEYWORDS:

Order for security for costs, disposal of an action that has become devoid of purpose, cost decision

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 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 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

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 (CFI), Hamburg Local Division against the Kinexon companies and UEFA.
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. According to the findings of the Local Division in the security order, the undisputed facts point in the direction of the argument of the defendants that there is a risk of insolvency of Ballinno when it comes to the reimbursement of the costs of the proceedings. The Local Division especially considered that the patent in suit was not only just recently assigned to Ballinno, but that the transfer was performed months after the assignor entered into a pre-trial correspondence about a possible patent infringement with two of the defendants. This raised the concern that the purpose of this transfer might be to facilitate this litigation without any financial risk to Ballinno. The Local Division weighed the interests of the defendants higher than those of Ballinno in the present case. Given the transfer of the patent on 22 January 2024 shortly before initiating proceedings before the Court on 18 April 2024, but months after the assignor having posed the question of patent infringement and having issued a first warning letter on 17 October 2023, Ballinno was not in a position to claim protection for small and medium-sized enterprises with regard to R. 158 RoP. The amount of € 500.000 was considered adequate for the value

of the dispute, corresponding to a ceiling for recoverable costs up to € 56.000. Whereas there is no automatism that the posed security has to follow the ceiling for recoverable costs, the Local Division considered that this set of rules still give a guidance for the maximum amount of reimbursable costs. With regard to the interest of the claimant, the specifications of the present dispute and the nature of the patent in suit, the Local Division found the amount of € 56.000 to be an adequate security for the expected costs of the three defendants together.

4. The Local Division subsequently denied the application for provisional measures. In the operative part of the order, the Application for provisional measures was dismissed. Ballinno was ordered to pay the costs of the proceedings, including those incurred by filing the Protective letter dated 4 March 2024 and the value of the dispute was set to € 500.000.
5. Ballinno lodged an appeal against the security order together with an appeal against the order on provisional measures, but later made clear that it no longer requested provisional measures. The Kinexon companies and UEFA challenged the admissibility of the appeal.
6. In an order of 12 May 2025, the Court of Appeal declared Ballinno's appeal against the security order admissible, as it was brought together with the appeal against the order on provisional measures. Furthermore, based on the facts of the case, the Court of Appeal concluded that Ballinno had withdrawn its requests for provisional measures (injunctions, seizure of goods and penalties) on appeal, save for the appeal on security for costs, so that the action had become devoid of purpose and there is no longer any need to adjudicate on it. In the operative part of the order, it was stated that after adjudicating on security for costs, the Court of Appeal would proceed to dispose of the action in other parts, including determination of whom shall bear the costs.
7. The parties agreed not to have another oral hearing, so that the Court of Appeal could adjudicate on the basis of the written documents and what has been said at the oral hearing on 24 February 2025.

INDICATION OF THE PARTIES' REQUESTS

8. Ballinno requests that the Court of Appeal set aside the security order in its entirety and order the release of the € 56.000 security placed by Ballinno, and that the defendants jointly and severally be ordered to compensate for Ballinno's legal costs at the CFI and on appeal, immediately enforceable; and that the value of the dispute for the appeal proceedings be set to € 56.000.
9. The Kinexon companies and UEFA request that the appeal be dismissed and that Ballinno be ordered to bear also the costs of the appeal proceedings.

SUBMISSIONS OF THE PARTIES

Ballinno's submissions, in summary and insofar as relevant

10. Ballinno is asserting:
 - The premise that the patent at issue was transferred to an empty shell company to avoid any liability stemming from litigation is incorrect. The patent was transferred to Ballinno along with a sum sufficient to cover reasonable and proportionate legal costs of the defendants in case of a loss.

This is confirmed by the fact that Ballinno was indeed able to put up the ordered security within one week of the security order.

- It is set out in the security order that Ballinno did not challenge the defendants' assertion that it had no assets other than the patent at issue, but this is incorrect, as this was challenged by Ballinno. Furthermore, the issued capital of a limited liability company does not determine nor reflect its cash reserves and thus its insolvency risks. Indeed, Ballinno had a substantial amount of cash available at the time of filing the application. The insolvency risk contemplated by the Local Division therefore did not exist.
- Ballinno is entitled to protection for small and medium-sized enterprises. The Local Division should therefore have taken Ballinno's SME status into account in weighing up the interests for purposes of deciding on pre-trial security.
- Ballinno was created to protect the inventor's unrelated businesses from unexpected large risks associated with patent litigation. The inventor did, however, take due account of the legitimate interests of the defendants by providing Ballinno with sufficient cash reserves to cover liability for reasonable and proportionate legal fees due in case of a loss.
- In contrast, the defendants are financially very powerful entities. The interests of Ballinno in not having to provide security clearly outweigh the interests of the defendants in this case.
- The dispute on appeal is limited to the value of the cost order that was rendered in first instance. The cost order is capped at € 56,000. The value of the case of appeal therefore does not exceed € 56,000.

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

11. The Kinexon companies and UEFA are defending the security order for the reason set out there, adding that:
 - The assertion about a bank balance on Ballinno's bank account is belated and not admissible according to R. 222.2 RoP. Beyond that it does not allow any conclusions to be drawn about the financial situation of Ballinno. In particular, it cannot serve as evidence to adequately secure Ballinno's potential reimbursement for the second instance as it does not give a full picture of its financial balance, including its permanent assets.
 - The value in dispute is not limited to the value of the cost order that was rendered in first instance. Rather the value in dispute as set in first instance must be applied, i.e. a value of € 500.000.

GROUND FOR THE ORDER

The security order

12. The evidence pertaining to the balance on Ballinno's bank account has already been considered in relation to Ballinno's obligation to provide security for costs for the appeal proceedings (order of 26 August 2024, App_45255/2024, ORD_45561/2024), and it would be artificial to disregard it pursuant to R. 222 RoP in relation to the appeal of the first instance security order.
13. The Local Division was right in ordering Ballinno to provide security for the legal costs and other expenses of the Kinexon companies and UEFA. The facts presented before the Local Division gave rise to a real concern that a possible cost order against Ballinno might not be recoverable by the Kinexon companies and UEFA.

14. Ballinno has not brought anything forward to negate that risk. Indeed, the evidence presented by Ballinno on the balance on its bank account is insufficient since in the event of a procedural loss, Ballinno must be able to cover both its own litigation costs – which may well exceed the applicable ceiling – and that of the other parties. Ballinno has not explained its overall financial situation (assets, liabilities, costs, incomes, financial risks). The absence of such information – and the uncertainty that the liquid funds will not be transferred – makes it impossible to make an educated prognosis about the realistic chances for the Kinexon companies and UEFA to recover costs later on.
15. The provision of security does not hamper Ballinno's access to justice. National rules on the provision of security for costs have been assessed several times by the Court of Justice of the European Union and held compatible with EU law provided they do not discriminate in relation to nationals of other Member States and that the litigant is not denied the opportunity to present his case effectively before the court (see for example judgment of 7 April 2011 in C-291/09 *Francesco Guarnieri & Cie*, ECLI:EU:C:2011:217, para 19, and judgment of 22 December 2010 in C-279/09 *DEB*, ECLI:EU:C:2010:811, paras 45-47 and 61).
16. What Ballinno has brought forward about its SME status and the weighing of interests does not lead to any other conclusion.
17. The request that the security order be set aside in its entirety and that the € 56.000 security placed by Ballinno be released shall be rejected.

Disposal of the action

18. In the order of 12 May 2025, the Court of Appeal has concluded that – save for the appeal on security for costs, which has been addressed in this order – in view of Ballinno's withdrawal of its requests for provisional measures (injunctions, seizure of goods and penalties) on appeal, the action has become devoid of purpose and there is no longer any need to adjudicate on it.
19. Pursuant to R. 360 RoP, the action shall be disposed of.

Principles for the allocation of costs in the context of an order pursuant to R. 360 RoP

20. As a general rule, the unsuccessful party must bear the reasonable and proportionate legal costs and other expenses incurred by the successful party (Art. 69 (1) UPCA). Exceptions apply if a party is only partially successful or if there are exceptional circumstances which justify a different allocation of costs from an equity perspective (Art. 69 (2) UPCA).
21. The disposal of an action under R. 360 RoP does not necessarily preclude the application of these principles (*Meril/Edwards*, para 13 and order of 26 March 2025, UPC_CoA_290/2024, APL_31428/2024, *Stäubli-Tec*, para 20).

The extent of the legal review in relation to costs

22. Concerning the extent of the legal review in relation to costs where the action is disposed of pursuant to R. 360 RoP, the Court of Appeal set out general principles in the order of 12 May 2025 in the present case as follows.

23. 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.
24. 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.

Allocation of costs; application to the present case

25. Under the circumstances of this case it is not necessary to examine the merits of the case in order to determine which party is the successful party. It follows that the cost decision for the first instance proceedings holds.
26. As already considered in the order of 12 May 2025, under the circumstances of the case, Ballinno must accept the inherent risk in its procedural strategy that – as it submits – the urgent interest fell away before a final decision (on appeal) had been rendered. In addition, it has been held by this Court that the complaints raised by Ballinno do not reveal any manifest errors or violation of procedural law in the impugned order.
28. Ballinno must therefore be considered the unsuccessful party in the appeal proceedings and shall therefore be ordered to also bear the costs of the proceedings on appeal.

Value of the dispute on appeal

29. The value in dispute as set in the first instance is € 500.000. Ballinno has not requested that this value be changed; its remaining request and grounds only relate to the value of the appeal proceedings.
30. Ballinno's requests in its Statement of appeal included the request that the main order be set aside and that an injunction be ordered against the Kinexon companies and UEFA, as well as orders for the seizure of goods, provision for penalty payments and interim award of costs. Ballinno made clear in the Statement of grounds of appeal that it no longer requested those measures. However, it still requested that the CFI order be set aside in its entirety, setting out its view that the Application should have been allowed and that the Kinexon companies and UEFA should compensate for Ballinno's legal costs. More particularly, Ballinno challenged the Local Division's assessments on urgency, claim construction and infringement.
31. This caused the Kinexon companies and UEFA to respond in substance, setting out their views on necessity, urgency, infringement (including claim construction) and validity.

32. Even so, it was clear after Ballinno's Statement of grounds of appeal that the dispute on appeal related to the costs of the proceedings and that the appeal would not result in provisional measures. R. 370.6 RoP stipulates that the assessment of the value of the action must reflect the objective interest pursued by the party at the time of filing the action. Applied to appeals, the value of the appeal should then reflect the objective interest of the party pursuing the appeal at the time of filing the said appeal. Ballinno has, however, subsequently withdrawn its requests for provisional measures, which justifies setting a reduced value of the dispute.
33. Ballinno argues that the cost order at first instance is capped at € 56.000, and that this corresponds to the value of the dispute on appeal. However, in the operative part of the order the Local Division did not limit the amount which may be awarded. It ordered Ballinno to pay the costs of the proceedings, including those incurred by filing the Protective Letter dated March 4th 2024, and set the value of the dispute to € 500.000.
34. The scale of ceilings for recoverable costs are to be regarded as a safety net, an absolute cap on recoverable representation costs (see para 1 of the Explanatory note, in fine). It applies to representation costs (see Article 1(2) of the scale of ceilings, and R. 152.2 RoP). Nevertheless, as is clear from R. 151 (d) RoP and R. 152–155 RoP, representation costs is only part of what can be awarded as compensation. In addition there can be compensation for court fees, costs of experts, costs of witnesses, costs of interpreters and translators, and other expenses.
35. Ballinno's argument is consequently a simplification which could furthermore lead to an underestimation of the magnitude of cost compensation at stake.
36. On the basis of the considerations set out above, the Court of Appeal decides to set the value of the appeal proceedings to € 100.000.

ORDER

1. The Court of Appeal rejects the request that the order of 15 May 2024, ORD_23557/2024 (signed on 14 May 2024), App_23209/2024, UPC_CFI_151/2024, be set aside in its entirety and that the € 56.000 security placed by Ballinno be released.
2. The Court of Appeal rejects the request for a reversal of the CFI's cost order (para 2 of order of 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)).
3. The action is disposed of.
4. Ballinno is ordered to bear the legal costs and other expenses of the Kinexon companies and UEFA for the appeal proceedings.
5. The value of the dispute for the appeal proceedings is set to € 100.000.

Issued on 26 June 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

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