

Preservation of evidence before the UPC: not a mere paper tiger

Insights on diverging levels of support required, ex parte orders, and practical implications



The Unified Patent Court (UPC) was established »*CONSIDERING that the fragmented market for patents and the significant variations between national court systems are detrimental for innovation ...; CONSIDERING that ... the Unified Patent Court must respect and apply Union law and ... ensure its ... uniform interpretation;*« (Official Journal (OJ) 2013/C 175/01, UPC Agreement (UPCA), preamble and Art. 21). From the outset, expectations amongst IP practitioners have therefore been that the UPC would provide consistent rulings and play a key role in harmonizing European patent practice. To date, however, the results are mixed. While certain issues are being addressed in a relatively consistent manner, the case law in other areas shows signs of divergence and often appears to reflect the national practices familiar to the judges assigned to a panel.

We present here a first analysis of the orders concerning the preservation of evidence (*saisie*), set out in Chapter 4, Rule 192 et seqq. of the Rules of Procedure (RoP). Current European practice in this area varies considerably: the French »*saisie contrefaçon*« and the Italian »*descrizione*« are widely regarded as powerful tools, whereas the German »*Besichtigungsanspruch*« or English »*Anton Piller*« orders are granted only rarely and under rather strict requirements. Against this background, it is striking that the UPC so far has shown a clear readiness to grant preservation-of-evidence orders under Rule 192 RoP.



The underlying legal provisions

The UPCA provides in Article 60(1) that:

*»At the request of the applicant which has presented **reasonably available evidence** to support the claim that **the patent has been infringed or is about to be infringed** the Court may, even before the commencement of proceedings on the merits of the case, **order prompt and effective provisional measures to preserve relevant evidence** in respect of the alleged infringement, subject to the protection of confidential information.«*

(emphasis added)

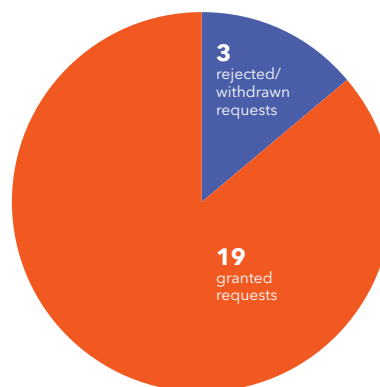
This provision represents an implementation, and in large part a verbatim transportation, of Article 7(1), first sentence of the Enforcement Directive (Directive 2004/48/EC). The corresponding measures are set out in Rule 192 et seqq RoP, with the possibility of an ex parte order expressly provided in Rule 197(1) and (2) RoP. These, in turn, closely mirror the wording of Article 7(1), second sentence et seqq of the Enforcement Directive. Rule 197(1) reads as follows:

*»The Court may order measures to preserve evidence [Rule 196.1] **without the defendant having been heard**, in particular where any delay is likely to cause **irreparable harm to the applicant** or where there is a **demonstrable risk of evidence being destroyed or otherwise ceasing to be available**.«* *(emphasis added)*

In the following, we will examine how the UPC has so far addressed the requirement of *»reasonably available evidence«* and under which circumstances it has granted ex parte orders.

Statistics

Overall, the outcomes appear remarkably favourable to patentees. Of the 22 analyzed, the UPC granted an order to preserve evidence under Rule 192 RoP in 19 cases.¹ In two instances, the request for preservation became moot (one was rejected on that basis,² and the other was withdrawn³). Only one request was denied due to lack of substantiation. Interestingly, all 19 preservation orders were issued ex parte, regardless of whether the matter was characterized as extremely urgent, urgent, or not urgent.



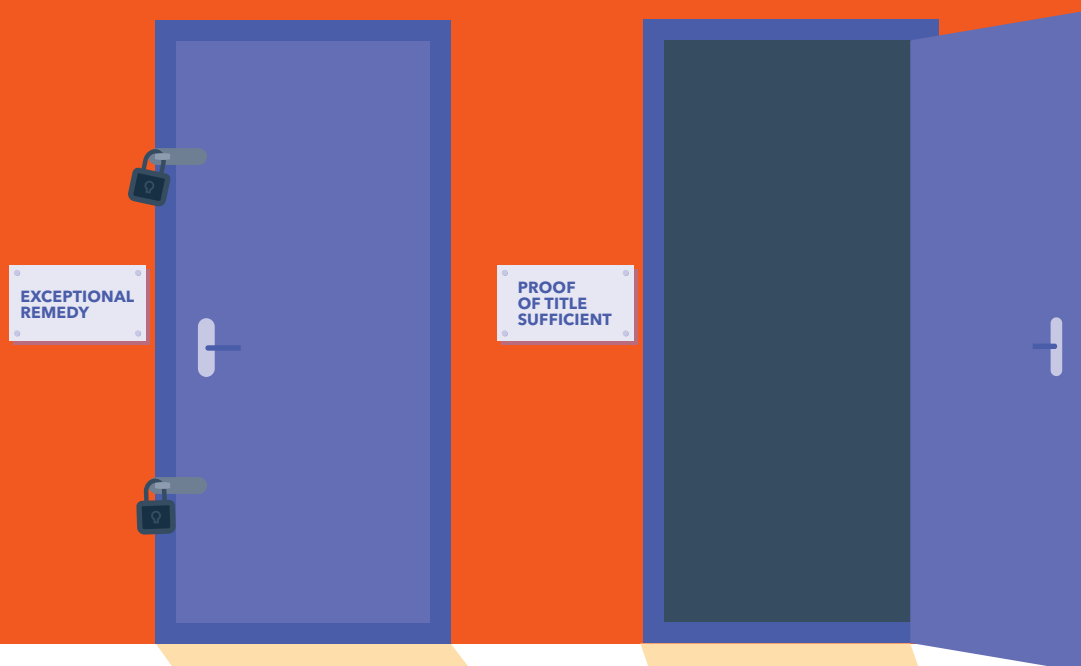
Reasonably available evidence: a low hurdle?

As outlined above, Article 60(1) UPC, consistent with the Enforcement Directive, requires the applicant to provide *»reasonably available evidence«* to support the assertion of ongoing or imminent patent infringement. This standard seeks to balance between two opposing approaches. Some argue that the preservation of evidence should primarily serve to facilitate securing evidence, meaning that proof of title alone should suffice. At the opposite extreme, others contend that such measures should be exceptional, requiring clear justification and demonstration of necessity, thus setting a high threshold. Where does the UPC position itself between these two extremes? Given the high proportion of granted requests, it would appear that the Court favours the former approach.

¹ The UPC database of orders and decisions appears to be incomplete and not fully searchable by Rule, Article, or keyword. Some orders cited in later decisions could not be located. This analysis is based on the database's summary listings, supplemented with information from blogs and other online sources; it may not be exhaustive.

² CFI 156/2024, order of 19 February 2025 – Swarco Futurit v Yunex.

³ CFI 527/2024, order of 17 February 2025 – Imbos v Brungard et al.



To test this conclusion, we begin with the order issued by the Local Division (LD) Mannheim on 3 March 2025⁴, which – so far – appears to be the only case in which a request for the preservation of evidence was rejected for insufficient substantiation (rather than, for example, becoming moot). In that order, the Presiding Judge emphasized that a sufficient degree of substantiation must be provided and that mere allegations of infringement are not enough to justify preservation of evidence or the inspection of premises. He referred to Prof. Tilmann’s UPCA commentary, noting Prof. Tilmann’s view that the omission of the word »sufficient« in Article 7 of the Enforcement Directive, compared with Article 6, should be regarded as a drafting oversight. This interpretation is supported by Article 9(3) of the Enforcement Directive, which explicitly requires applicants to provide »reasonably available evidence« sufficient to satisfy the Court with a certain degree of certainty that the right is actively being infringed or that infringement is imminent.

Likely for confidentiality reasons, the order is redacted, making it difficult to determine exactly how the Court construed the requirement of »sufficient« support. What stands out, however, is that the Court applied a »more likely than not« standard when assessing the applicant’s failure to substantiate its claim.⁵

In doing so, the Presiding Judge appears to diverge from Prof. Tilmann’s view that »reasonably available evidence« in terms of Article 60 UPCA should not set the bar too high.

Prof. Tilmann argues that, unlike the German implementation of Article 7 of the Enforcement Directive, which demands a »sufficient degree of probability« of infringement, the more appropriate benchmark would be the »plausible evidence« standard used in Rule 190 RoP. The LD Mannheim, however, required both »facts have to be submitted which establish a **certain probability [...] that infringement can be found**« and »sufficient substantiation« of that probability.

Applying these two distinct requirements conflicts with Article 6 and Article 9(3) of the Enforcement Directive, which stipulate that the evidence must be sufficient to support the request, although there need not necessarily be a sufficient probability of infringement.

An earlier order of the LD Mannheim⁶ rejecting a request under Rule 190 RoP complements this reasoning by clarifying the practical assessment of reasonably available evidence, albeit with respect to Article 59, not 60, UPC. In that case, the Court highlighted the limits of its entitlement to compel the defendants to provide additional materials, and emphasized that, before an order to produce evidence is justified, applicants must have exhausted all reasonably available means to substantiate their claims. This approach underlines the principle that the interests of both parties, particularly the protection of

⁴ CFI 142/2025, order of 3 March 2025.

⁵ Grounds, 3.a of the order.

⁶ CFI 471/2023, order of 20 October 2024 – *DISH v Sling*.

confidential information, must be considered in evaluating such requests. The LD Mannheim order thus illustrates the practical application of Article 59 UPCA in balancing evidentiary needs with fairness and proportionality.

By contrast, other LDs have consistently applied a lower threshold. The LD Milan, for example, held in 2023 in the *Oerlikon* trade fair case⁷ that documents provided »positive evidence« justifying the measure, and in *Progress Maschinen*⁸ that the applicant had »sufficiently provided reasonable evidence«. More recent LD Milan orders *Primetals*⁹, *Prinoth*¹⁰ and *3Vsigma*¹¹ formulated the test as requiring reasonable evidence to support »a well-founded suspicion« (»a sostegno del fondato sospetto«) of infringement. This wording reflects a focus on credibility of the allegation rather than a probability threshold.

Other LDs from jurisdictions where preservation of evidence has traditionally been a strong tool for patentees, such as the LDs Paris and Brussels, have issued similar orders. For example, LD Brussels held in its order of 21 September 2023¹² that »the applicant has argued plausibly that it holds a valid patent and that the defendant is threatening to infringe it in Belgium«. Interestingly, even LD Düsseldorf, despite Germany's traditionally restrictive approach, took a similar stance. In the 2025 *OTEC* trade fair case¹³, the Court accepted that the applicant had plausibly shown possible infringement, while acknowledging that sufficient substantiation could only be achieved by securing the product to be displayed at the fair. It should be noted, however, that in this case, the applicant had already analyzed the same product model in a non-UPC country and was able to demonstrate realization of the claim features.

In its recent order in the *Genentech*¹⁴ case, the LD Brussels emphasized that a balance must be struck regarding the amount of evidence an applicant must provide: where sufficient evidence already exists, invasive measures are unnecessary, while »purely unsubstantiated allegations« risk turning into fishing expeditions. The Court interpreted the »certain degree of plausibility of the infringement« required by the LD Mannheim, noting that the standard of proof under Article 60 UPCA should be lower than for preliminary measures. In the LD Brussels' view, applicants are not required to prove infringement at this stage, because doing so would undermine the very purpose of preservation orders. The Court in this case concluded that

sufficient proof exists to grant an order to preserve evidence. A similar view on the required degree of certainty was expressed by the LD The Hague in its order from early 2025 in the *PTS Machinery* case¹⁵.

Regarding proof of infringement, critical commentary has been offered in a blog article¹⁶ suggesting that, starting from a French perspective, where the patent right itself can justify seizure in principle, it may be more appropriate to set limits by ensuring that the interests of both parties and potential harm are taken into account (as provided under Article 62(2) UPCA). Similarly, rejecting clearly inappropriate requests as an abuse of rights, rather than superficially requiring proof of infringement is also suggested to serve these goals.

This question has also been addressed in case law. In its order of 23 July 2024¹⁷, the UPC Court of Appeal (CoA) overturned the order rendered by the first instance to revoke the measures to preserve evidence due to a failure to request disclosure of the evidence within the deadline set, reasoning that such a request was inherent in the original application but also expressly made, and clarified that an application under Article 60 UPCA not only serves to preserve evidence but necessarily entails the possibility of disclosure of the seized material to the applicant. However, the CoA stressed that such disclosure is not unconditional: it must always be balanced against the protection of confidential information, requiring the defendant to be heard and given an opportunity to request confidentiality restrictions before disclosure. This decision underscores the **dual function of saisie-like measures: securing evidence while safeguarding legitimate secrecy interests**. The CoA's approach to respect confidentiality by weighing the extent of disclosure once evidence has been safely secured aligns with the readiness of most LDs to grant preservation orders. However, this contrasts sharply with the LD Mannheim's opinion in the *DISH v Sling* order (supra) that the protection of confidential information should be already considered when deciding on the request of preserving evidence.

In the authors' view, regardless of whether the reasoning is grounded in a) fundamental rights (as suggested by the LD Brussels in its *Genentech* order), b) in the prohibition of abuse of rights (as noted in the above-cited blog article), or c) in a requirement for a »certain degree of probability of infringement«, the decisive factor under Article 60 UPCA

⁷ CFI 127/2023 and CFI 141/2023, both of 13 June 2023.

⁸ CFI 286/2023 and CFI 287/2023, order of 25 September 2023.

⁹ CFI 337/2024, order of 11 September 2024.

¹⁰ CFI 127/2025, order of 18 March 2025.

¹¹ CFI 342/2025, order of 19 May 2025.

¹² CFI 329/2023, order of 21 September 2023 - *Anonymous v. OrthoApnea*.

¹³ CFI 260/2025, order of 26 March 2025.

¹⁴ CFI 408/2025, order of 30 May 2025.

¹⁶ See "UPC "saisie-contrefaçon" Part I by Matthieu Dhenne on Kluwer Patent Blog available under <https://legalblogs.wolterskluwer.com/patent-blog/upc-saisie-contrefaçon-part-i-the-texts/>.

¹⁷ CoA 177/2024, order of 23 July 2024 - *Progress Maschinen v. AWM and Schnell*.

¹⁸ CFI 286/2023, order of 25 Sept 2023, section 3.2.

¹⁹ CFI 813/2024 and CFI 814/2024, both order of 23 December 2024.

²⁰ CFI 127/2023 and CFI 141/2023, both orders of 13 June 2023.

²¹ CFI 397/2023, order of 14 November 2023.

should be **the overall circumstances of the case**. A holistic approach, with an evidentiary standard that is not set excessively high, appears most appropriate. For example, in its *3Vsigma* order, the LD Milan emphasized that the applicant's evidentiary burden must be proportionate, given that the request concerns a procedural right (to preserve evidence) rather than a substantive right (such as an injunction). Articles 59 and 60 UPCA are designed to address situations where patentees face difficulties in obtaining evidence to support their claims. Once it is shown that applicants have exhausted available possibilities, the preservation request should be granted. It would be unreasonable to demand additional proof of infringement beyond what can reasonably be obtained, as also correctly noted by the LD Brussels. Other courts share this understanding, recognizing that there is no need to prove that each claim feature is likely infringed, particularly when certain features are hidden or otherwise inaccessible, as reflected in orders such as *Progress Maschinen*¹⁸ by the LD Milan and *Tiru*¹⁹ by the LD Paris.

Thus, insofar as the LD Mannheim based its decision on the applicant's alleged failure to show that a certain claim feature was *»more likely than not«* implemented by the alleged infringer, the authors tend to not agree, although they acknowledge that the request may have also lacked sufficient support for its claim of infringement.

The consideration of the overall situation and other circumstances is evident in several orders where the requirements of Article 60 UPCA were deemed fulfilled. For example, in the two *Oerlikon*²⁰ trade fair cases, the LD Milan issued relatively short orders, likely reflecting the extreme urgency of these cases. In both cases, a technical opinion prepared by a patent attorney together with supporting materials from the fair, such as photographs, posters, and brochures from the defendant's exhibit, was considered sufficient. In the *C-KORE*²¹ case, the LD Paris' order to preserve evidence of 14 November 2023 was confirmed by the LD Paris on 1 March 2024 following a review request by the defendants. The claimant C-KORE had submitted product brochures and an email exchange demonstrating that the Defendant's product was likely perceived by customers as equivalent to C-KORE's patented product, CABLE MONITOR. Circumstantial evidence, such as the Defendant being a former customer who had received training for the CABLE MONITOR product, also appears to have influenced the Court's assessment.

The CoA has not yet addressed the standard of *»reasonably available evidence«*. It remains to be seen whether, and on what grounds, future orders will reject requests under Rule 192 RoP.



The surprise effect: *Ex parte* orders

The *ex parte* nature of evidence preservation orders under Rule 192.3 RoP has a powerful »surprise effect«, enabling applicants to secure evidence without notifying the alleged infringer in advance. This procedural measure is granted under Rule 194.1(d) RoP at the discretion of the Court taking into account Rules 194.2 (a) to (c) and 197 RoP, which set out the framework for urgency and justification, such as the likelihood of the evidence being destroyed or otherwise becoming unavailable.

Under Rule 194.2(a) RoP, the Court can assess whether a request is urgent, extremely urgent, or not urgent, offering a structured approach to evaluating time sensitivity. Other reasons justifying an *ex parte* order are (i) a likelihood of irreparable harm being caused in case of delay (Rule 194.2(b) RoP referring to Rule 197.1) as well as (ii) the risk of evidence being destroyed or becoming unavailable (Rule 194.2(c) RoP and Rule 197.1 RoP). In practice, successful arguments often seem to have focused on electronic documents and the risk of deletion or modification, as well as on special situations, such as trade fairs where products are displayed publicly but may soon be removed or modified.

The CoA has illustrated the practical application of preservation-of-evidence rules in cases such as *VALINEA* and *MAGUIN*²². *MAGUIN* was the manufacturer of a waste incineration furnace operated by *VALINEA*. The Patentee TIRU had obtained orders of preservation of evidence against each of *MAGUIN* and *VALINEA*. Both defendants appealed, resulting in the two CoA cases (*supra*). In *VALINEA*, urgency was acknowledged due to the furnace's imminent activation. In *MAGUIN*, the risk of loss of digital data if measures were not ordered at the same time as

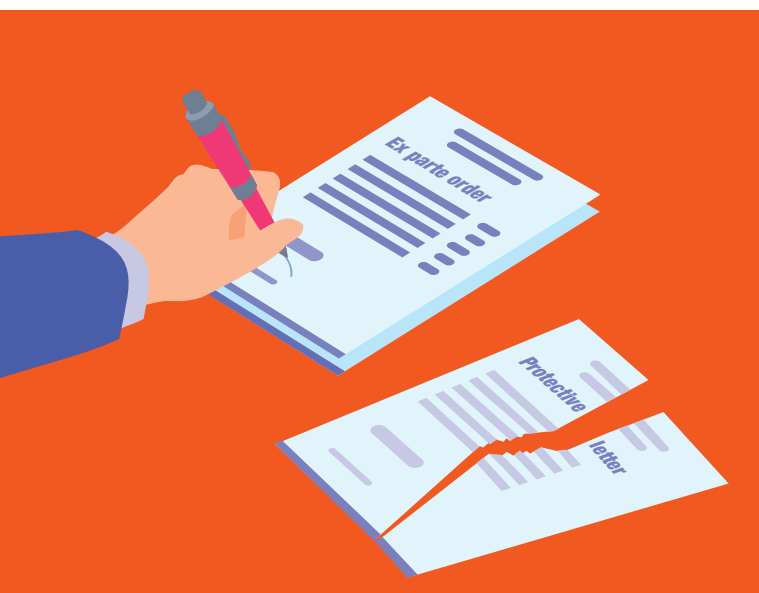
the order for *VALINEA* was seen as sufficient to fulfil the urgency criterion. These cases show that *ex parte* orders are secured based on a combination of concrete risk and timing, rather than theoretical harm alone. The CoA further clarified key principles regarding the assessment of such requests: (1) A request to preserve evidence does not need to be made without unreasonable delay. It is important to distinguish between urgency assessments for preservation of evidence (Rule 194.2(a) RoP) and for provisional measures (Rule 209.2(b) RoP); in the latter case, any unreasonable delay may count against granting relief (Rule 211.4 RoP), but no such requirement applies to preservation requests. The CoA acknowledged urgency for *VALINEA* and *MAGUIN* despite the Applicant having taken two months to prepare the request. (2) The risk of destruction or unavailability of evidence is assessed based on probability or demonstrable risk (Rule 194.2(c) and Rule 197.1 RoP in *ex parte* cases), not on absolute certainty.

(3) Moreover, the validity of the patent is generally not examined when granting an order to preserve evidence. Unlike provisional measures, which require a sufficient degree of certainty regarding patent validity (Rule 211.2 RoP), preservation orders focus solely on the risk to evidence.

These rulings underscore that successful preservation orders depend on demonstrating a concrete risk to evidence and documenting urgency effectively, rather than on proving infringement or patent validity at this preliminary stage.

Be prepared: What if a competitor requests a *saisie* at the UPC?

In view of the *ex parte* nature of these orders, companies should consider how they would respond if they suspect that a competitor might seek a preservation order. Relying solely on reactive defences is often insufficient. An illustrative case in point is the LD Munich's order in *Nanoval*²³ of 28 May 2025, where the use of protective letters, a formal notification to the Court signalling concerns about the applicant's claims, backfired. The Court criticized the way in which the Defendants presented their arguments and interpreted the protective letters as confirmation that the Defendants were aware of the alleged infringement. This highlights the need for careful legal strategy in practice: defensive measures must be calibrated carefully to ensure they do not inadvertently reinforce the patentee's request.



²² CoA 327/2025 and CoA_002/2025, orders of 15 July 2025.

²³ CFI 63/2025, order of 28 May 2025 – *Nanoval v ALD Vacuum*.

Preservation orders under Article 60 UPCA may also target evidence beyond the design of a contested embodiment. For example, the LD Düsseldorf in the *Bekaert Binjiang Steel Cord*²⁴ case held that *ex parte* measures could extend to invoices and delivery notes when these documents are relevant to suspected acts of infringement. The Court emphasized that the list of measures in Rule 196.1 RoP is not exhaustive, and that orders should be tailored to the specific interest in preserving evidence. In this case, because the suspected infringements occurred in Germany (among other countries), the applicant's interest in invoices and delivery notes was sufficient to justify their seizure.

Taken together, these cases highlight two important considerations for companies. First, defensive actions, such as protective letters, should be employed strategically. Second, evidence preservation orders can encompass a wide range of evidence, including business records. This reinforces the need for thorough documentation and proactive legal planning.

Summary and practical implications

Early practice under Rule 192 RoP at the UPC demonstrates a strong tendency to grant *ex parte* preservation-of-evidence orders, often with a relatively low evidentiary threshold. While this is patentee-friendly, the Court also signals the need for substantiation; allegations alone are insufficient, but applicants are not required to conclusively prove infringement. The variation between local divisions, particularly the higher threshold of the LD Mannheim versus the more flexible approach of the LD Milan or the LD Brussels, suggests that harmonization is still a work in progress.

Overall, the UPC appears to position itself between the extremes of national courts. Neither is the right to preserve evidence justified by reference to a patent right alone, nor is the interest of the defendant to reject inappropriate requests overrated. Instead, more weight is given to proportionality. The CoA's order of 23 July 2024 reflects this balancing approach: it confirmed that preservation measures are readily granted to secure evidence at a reasonable level of substantiation, and inherently imply disclosure of the resulting evidence, but only subject to strict confidentiality safeguards and adversarial participation by the defendant. However, it seems that the LDs have not yet consistently applied the guidance from the CoA. This is particularly evident in the treatment of »reasonably available evidence«. While LDs such as Milan, Brussels, or Paris have

accepted **plausibility** arguments or **circumstantial indicators** (e.g., brochures, trade fair materials, prior dealings) as sufficient, the LD Mannheim has demanded a higher threshold of substantiation, approaching a probability standard. The practical implication is that patentees face a shifting bar depending on the forum. **Defendants, in turn, should be prepared to challenge plausibility and proportionality proactively, since even relatively modest substantiation can still open the door to a saisie.**

For practitioners, several key points emerge:

- *Ex parte* orders are the norm, creating opportunities for patentees and risks for defendants.
- Reasonably available evidence is sufficient, and this standard should be assessed holistically, taking into account the practical difficulties of obtaining proof.
- Thorough preparation is essential for both patentees seeking evidence preservation and potential defendants anticipating such requests. Inadvertent missteps, such as ill-considered protective letters, may strengthen a patentee's case.
- Harmonization remains incomplete, so forum-shopping based on the divergence between local divisions in how evidence and substantiation are assessed may be a useful tool for the patentee.
- Confidentiality concerns are important: defendants should raise them proactively, and applicants must prepare for disclosure to be delayed or restricted accordingly.

Looking to the future, the CoA's developing case law will be pivotal in establishing a more consistent and balanced standard. For now, parties should approach UPC evidence preservation proceedings strategically, balancing urgency, substantiation, confidentiality concerns and procedural safeguards in order to navigate this evolving area effectively.



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²⁴ CFI_539/2024, order of 16 April 2025 – *Bekaert Binjiang Steel Cord v Siltronic*.