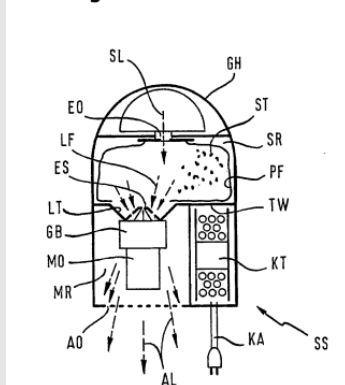


Court of Justice EU, 25 October 2025, BSH Hausgeräte v Electrolux

EP 1 434 512 – Vacuum cleaner

Fig.1



INTERNATIONAL JURISDICTION

Cross border jurisdiction of a Swedish court over a Swedish domiciled defendant regarding infringement of all national parts of a European patent validated in Germany, Greece, Spain, France, Italy, the Netherlands, Austria, Sweden, the United Kingdom and Türkiye.

Article 4 and article 24 Brussels I bis Regulation

• Article 24(4) of the Brussels I bis Regulation must be interpreted as meaning that a court of the Member State of domicile of the defendant which is seised, pursuant to Article 4(1) of that regulation, of an action alleging infringement of a patent granted in another Member State, does still have jurisdiction to hear that action where, in the context of that action, that defendant challenges, as its defence, the validity of that patent, whereas the courts of that other Member State have exclusive jurisdiction to rule on that validity.

51 As the Advocate General observed, in essence, in points 79 to 94 of his Opinion of 22 February 2024, such a division does not mean that the court of the Member State in which the defendant is domiciled that is seised of the infringement action should disregard the fact that an action for a declaration that the patent granted in another Member State is invalid has been duly brought by that defendant in that other Member State. If it considers it justified, in particular where it takes the view that there is a reasonable, non-negligible possibility of that patent being declared invalid by the court of that other Member State that has jurisdiction (see, by analogy, judgment of 12 July 2012, Solvay, C-616/10, EU:C:2012:445, paragraph 49), the court seised of the infringement action may, where appropriate, stay the proceedings, which allows it to take account, for the purpose of ruling on the infringement action, of a decision given by the court seised of the action seeking a declaration of invalidity.

Cross border jurisdiction under Article 4 Brussels I bis Regulation

• Under the general rule laid down in Article 4(1) of the Brussels I bis Regulation, the courts of the Member State in which the defendant is domiciled have, in principle, jurisdiction in an infringement action brought against that defendant by the holder of a patent granted or validated in a third State which is domiciled in another Member State. In addition, the jurisdiction of the court of the Member State thus seised does, in principle, by virtue of that general rule, extend to the question of the validity of that patent raised as a defence in the context of that infringement action.

Article 24(4) Brussels 1 bis Regulation does not apply to a court of a Third State

• and, consequently, does not confer any jurisdiction, whether exclusive or otherwise, on such a court as regards the assessment of the validity of a patent granted or validated by that State.

• If a court of a Member State is seised, on the basis of Article 4(1) of that regulation, of an action alleging infringement of a patent granted or validated in a third State in which the question of the validity of that patent is raised, as a defence [inter partes], that court has jurisdiction, pursuant to Article 4(1), to rule on that defence, its decision in that regard not being such as to affect the existence or content of that patent in that third State or to cause the national register of that State to be amended

Source: ECLI:EU:C:2024:914

Court of Justice EU, 25 February 2025

(K. Lenaerts, T. von Danwitz, K. Jürimäe, C. Lycourgos, I. Jarukaitis, M.L. Arastey Sahún, S. Rodin, A. Kumin, N. Jääskinen and M. Gavalec, Presidents of Chambers, E. Regan, Z. Csehi and O. Spineanu-Matei (Rapporteur))

JUDGMENT OF THE COURT (Grand Chamber)

25 February 2025 (*)

(Reference for a preliminary ruling – Jurisdiction and the enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Article 4(1) – General jurisdiction – Article 24(4) – Exclusive jurisdiction – Jurisdiction in proceedings concerned with the registration or validity of patents – Infringement action – European patent validated in Member States and in a third State – Challenge to the validity of the patent raised as a defence – International jurisdiction of the court hearing the infringement action)

In Case C-339/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Stockholm, Sweden), made by decision of 24 May 2022, received at the Court on 24 May 2022, in the proceedings

BSH Hausgeräte GmbH

v

Electrolux AB,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, T. von Danwitz, Vice-President, K. Jürimäe, C. Lycourgos, I. Jarukaitis, M.L. Arastey Sahún, S. Rodin, A. Kumin, N. Jääskinen and M. Gavalec, Presidents of Chambers, E. Regan, Z. Csehi and O. Spineanu-Matei (Rapporteur), Judges, Advocate General: N. Emiliou, Registrar: M. Siekierzyńska, Administrator, having regard to the written procedure and further to the hearing on 22 June 2023, after considering the observations submitted on behalf of:

– BSH Hausgeräte GmbH, by M. Dahlman and T. Grennard, advokater, and R. Sedlmaier, Rechtsanwalt,

– Electrolux AB, by C. Harmsen, Rechtsanwalt, P. Larsson, B. Rundblom Andersson and J. Westerberg, advokater,

– the French Government, by R. Bénard, A. Daniel and E. Timmermans, acting as Agents,

– the European Commission, by M. Gustafsson, S. Noë and I. Söderlund, acting as Agents, after hearing the [Opinion of the Advocate General at the sitting on 22 February 2024](#),

having regard to the order of 16 April 2024 reopening the oral proceedings and further to the hearing on 14 May 2024,

after considering the observations submitted on behalf of:

– BSH Hausgeräte GmbH, by M. Dahlman and T. Grennard, advokater, and R. Sedlmaier, Rechtsanwalt,

– Electrolux AB, by C. Harmsen, Rechtsanwalt, and B. Rundblom Andersson, advokat,

– the French Government, by R. Bénard, A. Daniel and E. Timmermans, acting as Agents,

– the European Commission, by P. Němečková, S. Noë and I. Söderlund, acting as Agents, after hearing the [Opinion of the Advocate General at the sitting on 5 September 2024](#),

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 24(4) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1; ‘the Brussels I bis Regulation’).

2 The request has been made in proceedings between BSH Hausgeräte GmbH (‘BSH’), a company incorporated under German law, and Electrolux AB, a company incorporated under Swedish law, concerning the infringement of a European patent.

- **Legal context**

- **European Union law**

3 Recitals 13, 15 and 34 of the Brussels I bis Regulation state as follows:

‘(13) There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common

rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.

...

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

...

(34) Continuity between the [Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), as amended by the successive conventions on the accession of new Member States to that convention (‘the Brussels Convention’)], [Council] Regulation (EC) No 44/2001 [of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1; ‘the Brussels I Regulation’)] and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of the ... Brussels Convention and of the Regulations replacing it.’

4 Chapter II of that regulation, headed ‘Jurisdiction’, contains 10 sections. Article 4 of that regulation, which appears in Section 1 of Chapter II, headed ‘General provisions’, provides, in paragraph 1 thereof:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

5 Under Article 24 of the Brussels I bis Regulation, which is part of Section 6 of Chapter II, headed ‘Exclusive jurisdiction’:

‘The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

...

(4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office [(EPO)] under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State;

...'

6 Article 27 of that regulation, which forms part of Section 8 of Chapter II thereof, headed 'Examination as to jurisdiction and admissibility', provides:

'Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it shall declare of its own motion that it has no jurisdiction.'

7 In Section 9 of that chapter, headed '*Lis pendens* – related actions', Articles 33 and 34 of the Brussels I *bis* Regulation determine the conditions under which a court of a Member State may stay the proceedings, or even dismiss the proceedings before it, or, conversely, continue those proceedings, where its jurisdiction is based in particular on Article 4 of that regulation and proceedings are pending before a court of a third State at the time when that court in a Member State is seised, respectively, of an action involving the same cause of action between the same parties as the proceedings in the court of the third State or of an action which is related to the action in the court of the third State.

8 Article 63(1) of that regulation, in Chapter V, headed 'General provisions', provides that, for the purposes of that regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat, central administration or principal place of business.

9 Article 73 of the Brussels I *bis* Regulation, which forms part of Chapter VII thereof, headed 'Relationship with other instruments', provides:

'1. This Regulation shall not affect the application of the [Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed at Lugano on 30 October 2007 (OJ 2007 L 339, p. 3; "the Lugano Convention")].

2. This Regulation shall not affect the application of the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958].

3. This Regulation shall not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of [the Brussels I Regulation] which concern matters governed by this Regulation.'

Swedish law

10 The second subparagraph of Paragraph 61 of the Patentlagen (1967: 837) (Law on patents (1967: 837; 'the Law on patents') provides as follows:

'If an action concerning patent infringement is brought and the person against whom the action is brought claims that the patent is invalid, the question of invalidity may be considered only after an action to that effect has been brought. The court shall order the party claiming that the patent is invalid to bring such an action within a specific period.'

• The dispute in the main proceedings and the questions referred for a preliminary ruling

11 BSH is the holder of [European patent EP 1 434 512](#), which protects an invention in the field of vacuum cleaners. That patent was validated in Germany,

Greece, Spain, France, Italy, the Netherlands, Austria, Sweden, the United Kingdom and Türkiye, which gave rise to the grant of national patents from those States.

12 On 3 February 2020, BSH brought an action against Electrolux alleging infringement of all the national parts of that European patent before the Patent- och marknadsdomstolen (Patent and Commercial Court, Sweden). BSH sought, inter alia, an order requiring Electrolux to cease using the patented invention in all States in which the same European patent had been validated and for Electrolux to be ordered to pay equitable remuneration and damages for the allegedly unlawful use of that invention.

13 Electrolux argues that those claims should be dismissed. It also pleaded that the claims relating to infringements of the national parts of patent EP 1 434 512 other than the Swedish part ('the foreign patents') were inadmissible.

14 In that regard, Electrolux argued that the foreign patents were invalid and that the Swedish courts did not have jurisdiction to rule on whether they had been infringed. According to Electrolux, the infringement action must be regarded as a dispute 'concerned with the ... validity of patents' within the meaning of Article 24(4) of the Brussels I *bis* Regulation, in so far as it is indissociable from the issue of the validity of the patents in question. Therefore, under that provision, the courts of the Member States in which the foreign patents have been validated have jurisdiction to hear BSH's claims relating to the infringement of those national patents. It follows that the Swedish court seised does not have jurisdiction to rule on the infringement of those patents.

15 In addition, according to Electrolux, the second subparagraph of Paragraph 61 of the Law on Patents, which provides that the issue of the validity of a patent must be examined in proceedings separate from the action alleging infringement of that patent, concerns only Swedish patents. Since Swedish law applies exclusively to Swedish patents, a Swedish court cannot, on the basis of that provision, hear a dispute in which the defendant argues, in the context of an infringement action, that a patent granted by a State other than the Kingdom of Sweden is invalid. It follows that BSH has to bring infringement actions relating to the foreign patents in the States in which they were validated.

16 By decision of 21 December 2020, the Patent- och marknadsdomstolen (Patent and Commercial Court) declared, on the basis of Article 24(4) and Article 27 of the Brussels I *bis* Regulation, that it did not have jurisdiction to hear the action alleging an infringement of patents validated in Member States other than the Kingdom of Sweden brought by BSH. It also declared that it did not have jurisdiction to hear the action alleging infringement of the patent validated in Türkiye ('the Turkish patent') on the ground that Article 24(4) is the expression of a principle of jurisdiction recognised at international level.

17 BSH appealed against that decision to the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of

Appeal, Stockholm, Sweden), which is the referring court. BSH argued that Article 24(4) of the Brussels I bis Regulation is not applicable to ‘pure’ patent infringement actions, with the result that a court seised on the basis of Article 4(1) of the Brussels I bis Regulation may hear an action alleging infringement of a foreign patent even if it does not have jurisdiction to rule on an action for a declaration that that patent is invalid. Furthermore, according to that party in the main proceedings, the Patent- och marknadsdomstolen (Patent and Commercial Court) could hear an action alleging infringement of a foreign patent which has not been granted or validated in a Member State, such as, in the present case, the Turkish patent, on account of the international jurisdiction arising under Article 4(1) of that regulation. It follows that that court had jurisdiction to rule on the infringement action in its entirety, including in respect of the Turkish patent. The principle that the courts of the State in which the defendant is domiciled have jurisdiction is recognised in international law.

18 Before the referring court, Electrolux reiterated, in essence, the position it had put forward before the Patent- och marknadsdomstolen (Patent and Commercial Court), arguing that Article 24(4) of the Brussels I bis Regulation applies to infringement proceedings in which the invalidity of the patent in question is relied on as a defence. The Swedish courts have no jurisdiction to hear the judicial proceedings as a whole, since the infringement and validity issues are indissociable.

19 The referring court has doubts as to whether the Swedish courts have jurisdiction. It is uncertain, first of all, whether Article 24(4) of the Brussels I bis Regulation must be interpreted as meaning that the expression ‘in proceedings concerned with the registration or validity of patents, ... irrespective of whether the issue is raised by way of an action or as a defence’, also includes a patent infringement action where the defendant has raised a plea of invalidity in respect of that patent as a defence. That provision could be interpreted as meaning that the national court does not have jurisdiction to hear the action alleging infringement of all the national parts of the European patent other than the one validated in the Member State of that court, where the defendant has raised, in the context of that action, a plea in which it claims that those national parts are invalid. A single set of proceedings before one court would reduce the risk of conflicting decisions, but such an interpretation would oblige the applicant to bring infringement actions again in other Member States.

20 The referring court states that another possible interpretation would be to take the view that the national court seised of a patent infringement action, in the context of which the defendant raises a plea alleging that foreign patents are invalid, lacks jurisdiction to hear only that plea and could, therefore, rule on that infringement action. Such an interpretation is supported, in particular, by the need to interpret Article 24(4) of the Brussels I bis Regulation restrictively, as an exception to the general rule set out in Article 4(1) of that regulation, and

by its objective of allowing disputes concerning the validity of patents to be heard only by the courts of the State of registration.

21 Next, if Article 24(4) of the Brussels I bis Regulation were to be interpreted as meaning that, where a plea of invalidity is raised in proceedings relating to a patent infringement action, that action comes within the exclusive jurisdiction provided for in that provision, the referring court is unsure whether that interpretation may be precluded by a provision of national law, such as the second subparagraph of Paragraph 61 of the Law on patents, which requires the defendant to bring a separate action seeking a declaration that that patent is invalid.

22 Lastly, the referring court is uncertain whether the fact that the European patent at issue in the main proceedings has been validated in a third State has any impact on its jurisdiction. According to that court, it is not clear whether Article 24(4) of the Brussels I bis Regulation applies to the courts of a third State – the Republic of Türkiye, in the present case – whereas Articles 33 and 34 of that regulation do refer to such courts. In that context, the referring court notes that it could follow from the judgment of [1 March 2005, Owusu \(C-281/02, EU:C:2005:120, paragraphs 26 and 35\)](#), that Article 4 of the Brussels I bis Regulation also applies to the courts of third States.

23 In those circumstances, the Svea hovrätt, Patent- och marknadsöverdomstolen (Svea Court of Appeal, Patent and Commercial Court of Appeal, Stockholm), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 24(4) of [the Brussels I bis Regulation] to be interpreted as meaning that the expression “proceedings concerned with the registration or validity of patents ... irrespective of whether the issue is raised by way of an action or as a defence” implies that a national court, which, pursuant to Article 4(1) of that regulation, has declared that it has jurisdiction to hear a patent infringement dispute, no longer has jurisdiction to consider the issue of infringement if a defence is raised that alleges that the patent at issue is invalid, or is the provision to be interpreted as meaning that the national court only lacks jurisdiction to hear the defence of invalidity?’

‘(2) Is the answer to Question 1 affected by whether national law contains provisions, similar to those laid down in the second subparagraph of Paragraph 61 of the [Law on patents], which means that, for a defence of invalidity raised in an infringement case to be heard, the defendant must bring a separate action for a declaration of invalidity?’

‘(3) Is Article 24(4) of the [Brussels I bis Regulation] to be interpreted as being applicable to a court of a third [State], that is to say, in the present case, as also conferring exclusive jurisdiction on a court in [Türkiye] in respect of the part of the European patent which has been validated there?’

• **Consideration of the questions referred**
The first and second questions

24 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 24(4) of the Brussels I *bis* Regulation must be interpreted as meaning that a court of the Member State of domicile of the defendant seised, pursuant to Article 4(1) of that regulation, of an action alleging infringement of a patent granted in another Member State, still has jurisdiction to hear that action where, in the context of that action, that defendant challenges, as its defence, the validity of that patent.

25 The referring court also seeks to ascertain whether the fact that a national procedural rule requires that defendant to bring a separate action seeking a declaration that that patent is invalid has any bearing on the answer to be given to that question.

26 In the latter regard, the Court notes at the outset that such a national rule cannot affect the interpretation of Article 24(4) of the Brussels I *bis* Regulation. That provision makes no reference to the law of the Member States, with the result that the expressions which it contains must be regarded as autonomous concepts of EU law which must be interpreted uniformly in all the Member States, irrespective of any national rule or procedure in that regard (see, to that effect, [judgment of 8 September 2022, *IRnova*, C-399/21, EU:C:2022:648](#), paragraph 38 and the case-law cited).

27 According to settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, to that effect, [judgment of 7 April 2022, *Berlin Chemie A. Menarini*, C-333/20, EU:C:2022:291](#), paragraph 34 and the case-law cited).

28 In the specific context of the interpretation of the Brussels I *bis* Regulation, it is also necessary, in accordance with recital 34 of that regulation, to ensure continuity in the interpretation of the provisions which replaced those which may be regarded as ‘equivalent’ in the previous legislation, such as Article 16(4) of the Brussels Convention and Article 22(4) of the Brussels I Regulation, which have been replaced by Article 24(4) of the Brussels I *bis* Regulation (see, to that effect, [judgment of 8 September 2022, *IRnova*, C-399/21, EU:C:2022:648](#), paragraphs 29 and 37).

29 In accordance with Article 4(1) of Regulation No 44/2001, persons domiciled in a Member State are to be sued in the courts of that Member State. Article 63(1) of that regulation states that a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat, central administration or principal place of business.

30 However, that rule of jurisdiction of the courts of the Member State of the defendant’s domicile is laid down in Article 4(1) ‘subject to’ the other provisions of the Brussels I *bis* Regulation. While that rule of jurisdiction constitutes, in accordance with recital 15 of that regulation, a rule of principle, that regulation lays down a number of exceptions. Among those provisions, Article 24 of the same regulation provides that the courts of a particular Member State are to have exclusive

jurisdiction of in respect of certain matters referred to in that article ‘regardless of the domicile of the parties’.

31 As regards, in particular, patents, in accordance with the wording of the first subparagraph of Article 24(4), ‘in proceedings concerned with the ... validity of patents ..., irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the ... registration [of the patent] has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place’ (‘the Member State granting the patent’) are to have exclusive jurisdiction.

32 In accordance with the second subparagraph of that paragraph 4, the courts of each Member State are to have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State.

33 Under the second subparagraph of Article 24(4) of the Brussels I *bis* Regulation, a European patent granted by the EPO in accordance with the procedure laid down in that regard by the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, that has subsequently been validated in a Member State is subject to the same rules of jurisdiction over validity as a national patent.

34 Furthermore, it is clear from the wording of the first subparagraph of Article 24(4) of that regulation, referred to in paragraph 31 of the present judgment, that, as regards the exclusive jurisdiction of the courts of the Member State concerned, it is irrelevant whether the issue of the registration or validity of the patent is raised by way of an action or as a defence.

35 Consequently, pursuant to Article 24(4), the courts of the Member State granting the patent are to have exclusive jurisdiction to hear a dispute concerned with the registration or validity of that patent, irrespective of whether that issue is raised by way of an action or as a defence in an infringement action before a court of another Member State.

36 That exclusive jurisdiction of the courts of the Member State granting the patent over disputes concerned with the registration or validity of that patent is justified both by the fact that the grant of patents involves the intervention of the national authorities, and by the fact that those courts are best placed to hear cases in which the dispute itself concerns the validity of the patent or whether or not deposit or registration has occurred. The courts of the Member State in which the registers are kept may rule, applying their own national law, on the validity of the patents which have been issued in that State. That concern for the sound administration of justice becomes all the more important in the field of patents since, given the specialised nature of that area, a number of Member States have set up a system of specific judicial protection, to ensure that those types of cases are dealt with by specialised courts (see, to that effect, [judgment of 13 July 2006, *GAT*, C-4/03, EU:C:2006:457](#), paragraphs 22 and 23).

37 It follows that, where a court of the Member State in which the defendant is domiciled is hearing, pursuant

to Article 4(1) of the Brussels I *bis* Regulation, an action alleging infringement of a patent granted by another Member State, in the context of which the defendant challenges, as its defence, the validity of that patent, that court cannot establish, indirectly, the invalidity of that patent, but must declare that it does not have jurisdiction, in accordance with Article 27 of that regulation, as regards the issue of the validity of that patent, in the light of the exclusive jurisdiction of the courts of the Member State in which the patent is granted, as provided for in Article 24(4) of that regulation. (see, as regards Article 16(4) of the Brussels Convention, [judgment of 13 July 2006, GAT, C-4/03, EU:C:2006:457, paragraphs 26 and 31](#)).

38 However, the question arises whether, in such a situation, the court of the Member State in which the defendant is domiciled still has jurisdiction to hear that infringement action or whether it must declare that it does not have jurisdiction in respect of any aspect of dispute relating to the patent granted by another Member State.

39 In that regard, the Court notes that, in accordance with Article 24(4) of the Brussels I *bis* Regulation, the exclusive jurisdiction rule laid down therein covers only proceedings ‘concerned with the registration or validity of patents’.

40 The Court has held previously that that provision does not concern, *inter alia*, patent infringement actions, although the examination of such an action does involve a thorough analysis of the scope of the protection conferred by that patent in the light of the patent law of the State in which that patent was granted (see, to that effect, [judgments of 15 November 1983, Duijnste, 288/82, EU:C:1983:326](#), paragraphs 22 and 23, and [judgment of 8 September 2022, IRnova, C-399/21, EU:C:2022:648](#), paragraph 48).

41 It follows that the exclusive jurisdiction rule laid down in Article 24(4) of the Brussels I *bis* Regulation concerns only the part of the dispute relating to the validity of the patent. Accordingly, a court of the Member State in which the defendant is domiciled, which has jurisdiction, under Article 4(1) of the Brussels I *bis* Regulation, in an action alleging infringement of a patent granted in another Member State, does not lose that jurisdiction merely because, as its defence, that defendant challenges the validity of that patent.

42 The interpretation of Article 24(4) of the Brussels I *bis* Regulation accepted in the preceding paragraph of the present judgment is borne out by the background of that regulation and by the objectives pursued both by it and by that provision.

43 In the first place, the concept of ‘proceedings concerned with the ... validity of patents’, within the meaning of Article 24(4) of the Brussels I *bis* Regulation, must be interpreted strictly since it establishes exclusive jurisdiction which is an exception to the general rule, set out in Article 4 of that regulation, that the courts for the place where the defendant is domiciled have jurisdiction (see, to that effect, [judgments of 15 November 1983, Duijnste, 288/82, EU:C:1983:326](#), paragraph 23, and [judgment of](#)

[8 September 2022, IRnova, C-399/21, EU:C:2022:648](#), paragraph 39 and the case-law cited).

44 Moreover, an interpretation to the effect that a court of the Member State in which the defendant is domiciled loses its jurisdiction in an action alleging infringement of a patent granted in another Member State merely because that defendant challenges, indirectly, the validity of that patent would mean, as the Advocate General observed, in essence, in [points 69 and 70](#) of his Opinion of 22 February 2024, that the exception provided for in Article 24(4) of the Brussels I *bis* Regulation would become the rule in many patent disputes.

45 As the Court observed in paragraph 17 of its [judgment of 13 July 2006, GAT \(C-4/03, EU:C:2006:457\)](#), the issue of the validity of the patent is very frequently raised as a defence in patent infringement actions. The application of the general rule of jurisdiction laid down in Article 4(1) of the Brussels I *bis* Regulation would therefore be limited to disputes in which such a ground of defence is not raised, whereas that rule is the expression of the jurisdiction of the courts of the Member State of the defendant’s domicile, which, as is apparent from recital 15 of that regulation, is the principle underlying the rules of jurisdiction contained in that regulation.

46 In the second place, it is apparent from recital 15 that the Brussels I *bis* Regulation seeks to ensure legal certainty by making the rules of jurisdiction highly predictable. Such an objective could not be achieved if it were accepted that, depending on the defence chosen by the defendant and, as the case may be, whenever the defendant considers it appropriate – in particular where the rules of procedure of the forum permit such a defence to be raised at any stage of the proceedings – a court of a Member State would lose its jurisdiction in an action of which it has properly been seised. As the Advocate General pointed out in [points 73 and 74](#) of his Opinion of 22 February 2024, such an interpretation of Article 24(4) of the Brussels I *bis* Regulation would mean that, throughout the proceedings before that court, there is a risk that it will have to decline jurisdiction.

47 Furthermore, given that, under Article 27 of the Brussels I *bis* Regulation, a court of a Member State is required to declare that it has no jurisdiction due to the exclusive jurisdiction of a court of another Member State, without being able to refer the case to that court, such an interpretation would mean that a defendant could, by raising a plea of invalidity in respect of a patent granted in a Member State other than that of its domicile, bring to an end infringement proceedings which were nevertheless properly brought against it before a court of the Member State in which it is domiciled.

48 In the third place, the interpretation of Article 24(4) of the Brussels I *bis* Regulation accepted in paragraph 41 of the present judgment fully satisfies the objective of that provision – which, as noted in paragraph 36 of the present judgment, consists of allowing disputes which themselves concern the registration or validity of a patent to be heard only by the courts of the Member State in which that patent is

granted, which, on account of their physical and legal proximity, are best placed to hear those disputes – without going beyond what is necessary to achieve that objective.

49 In particular, as the Advocate General observed in [points 75 and 77](#) of his Opinion of 22 February 2024, that interpretation, unlike the one referred to in paragraph 44 of the present judgment, allows the holder of a European patent, who believes that that patent has been infringed by the same defendant in several Member States, to concentrate all of its infringement claims and to obtain overall compensation in a single forum, thus avoiding, *inter alia*, the risk of divergent decisions.

50 Lastly, the interpretation of Article 24(4) of the Brussels I *bis* Regulation set out in paragraph 41 of the present judgment is not called into question by the fact that its application may cause infringement proceedings, which remain pending before a court of the Member State in which the defendant is domiciled, to be divided from the dispute relating to the validity of the patent granted in another Member State, for which the courts of the latter Member State have exclusive jurisdiction, pursuant to that provision.

51 As the Advocate General observed, in essence, in [points 79 to 94](#) of his Opinion of 22 February 2024, such a division does not mean that the court of the Member State in which the defendant is domiciled that is seised of the infringement action should disregard the fact that an action for a declaration that the patent granted in another Member State is invalid has been duly brought by that defendant in that other Member State. If it considers it justified, in particular where it takes the view that there is a reasonable, non-negligible possibility of that patent being declared invalid by the court of that other Member State that has jurisdiction (see, by analogy, [judgment of 12 July 2012, Solvay, C-616/10, EU:C:2012:445](#), paragraph 49), the court seised of the infringement action may, where appropriate, stay the proceedings, which allows it to take account, for the purpose of ruling on the infringement action, of a decision given by the court seised of the action seeking a declaration of invalidity.

52 In the light of the findings above, the answer to the first and second questions is that Article 24(4) of the Brussels I *bis* Regulation must be interpreted as meaning that a court of the Member State of domicile of the defendant which is seised, pursuant to Article 4(1) of that regulation, of an action alleging infringement of a patent granted in another Member State, does still have jurisdiction to hear that action where, in the context of that action, that defendant challenges, as its defence, the validity of that patent, whereas the courts of that other Member State have exclusive jurisdiction to rule on that validity.

The third question

53 By its third question, the referring court asks whether Article 24(4) of the Brussels I *bis* Regulation must be interpreted as meaning that it applies to a court of a third State and, consequently, as conferring exclusive jurisdiction on that court as regards the

assessment of the validity of a patent granted or validated in that State.

54 Under Article 24(4) of that regulation, the courts of the Member State which granted the patent have exclusive jurisdiction, *inter alia*, in proceedings concerned with the validity of patents, regardless of the domicile of the parties. As is apparent from paragraph 33 of the present judgment, that provision makes no distinction, in that regard, between a national patent granted in a Member State and a European patent validated in a Member State.

55 It follows from the wording of Article 24(4) of that regulation that the subject of that provision is the exclusive jurisdiction of the courts of the Member States in proceedings concerned with the registration or validity of patents granted by those Member States. As the Advocate General observed, in essence, in [point 23](#) of his Opinion of 5 September 2024, the regime laid down by the Brussels I *bis* Regulation, like the acts which preceded it, is a system of competence internal to the European Union which pursues objectives specific to it, such as the proper functioning of the internal market and the establishment of an area of freedom, security and justice.

56 In that regard, the Court has held previously that Article 24(4) of the Brussels I *bis* Regulation cannot be regarded as applicable in a situation in which the patents concerned are granted or validated not in a Member State, but in a third State (see, to that effect, [judgment of 8 September 2022, IRnova, C-399/21, EU:C:2022:648](#), paragraph 35).

57 Accordingly, it must be held that Article 24(4) of the Brussels I *bis* Regulation does not apply to a court of a third State and, consequently, does not confer any jurisdiction, whether exclusive or otherwise, on such a court as regards the assessment of the validity of a patent granted or validated in that State.

58 That said, in view of the doubts raised by the referring court concerning the interpretation of Article 4(1) of the Brussels I *bis* Regulation and in order to provide an answer that is of assistance to that court, it is still necessary to determine whether, where a court of a Member State is seised, on the basis of Article 4(1), of an action alleging an infringement of a patent granted or validated in a third State in which the issue of the validity of that patent is raised, as a defence, that court has jurisdiction, pursuant to Article 4(1), to rule on that defence.

59 In that regard, the Court recalls that, in order to come within the scope of the Brussels I *bis* Regulation, it is necessary for the legal relationship at issue to have an international element. This may result both from the location of the defendant's domicile and from the subject matter of the proceedings, which may be located in a third State, provided that that situation is such as to raise questions before a court of a Member State relating to the determination of international jurisdiction (see, to that effect, [judgment of 8 September 2022, IRnova, C-399/21, EU:C:2022:648](#), paragraphs 27 to 29).

60 It is common ground that the legal relationship at issue in the main proceedings, which is the subject of the

third question, involves international elements linked, first, to the applicant's domicile, in that it is situated in a Member State other than that of the defendant's domicile, and, second, to its subject matter, in that the patent at issue in the main proceedings has been validated in a third State, namely Türkiye. Therefore, that legal relationship comes within the scope of that regulation.

61 It follows that, under the general rule laid down in Article 4(1) of the Brussels I *bis* Regulation, the courts of the Member State in which the defendant is domiciled have, in principle, jurisdiction in an infringement action brought against that defendant by the holder of a patent granted or validated in a third State which is domiciled in another Member State. In addition, the jurisdiction of the court of the Member State thus seised does, in principle, by virtue of that general rule, extend to the question of the validity of that patent raised as a defence in the context of that infringement action.

62 Nevertheless, the Court observes that that jurisdiction in principle of the courts of the Member State in which the defendant is domiciled which are seised of such a dispute over the part of that dispute relating to the validity of a patent granted or validated in a third State may be limited by special rules such as those laid down in Article 73 of the Brussels I *bis* Regulation.

63 Thus, under Article 73(1) of that regulation, the courts of the States that are party to the Lugano Convention are to have exclusive jurisdiction to settle issues relating to the validity of a patent granted in one of the States that is a party to that convention, since that convention contains, in Article 22(4) thereof, a rule similar to the one set out in Article 24(4) of that regulation.

64 Similarly, a bilateral convention concluded between a Member State and a third State in the circumstances referred to in Article 73(3) of that regulation may stipulate that the courts of that third State are to have exclusive jurisdiction over disputes relating to the validity of patents granted in that third State.

65 Furthermore, in the circumstances referred to in Articles 33 and 34 of the Brussels I *bis* Regulation, a court of a Member State whose jurisdiction is based on Article 4 of that regulation may be prompted to recognise the jurisdiction of the courts of third States, by staying proceedings, or even terminating the proceedings before it, where proceedings are already pending before a court of a third State at the time when that first court is seised either of an application between the same parties involving the same subject matter and cause of action as the application brought before the court of the third State, or of an application related to the one brought before the court of the third State.

66 Subject to verification by the referring court, no restriction provided for by such special rules seems to have to be taken into consideration in the present case. The Republic of Türkiye is not a State that is party to the Lugano Convention and the file before the Court contains no indication as to whether there is an applicable convention between the Kingdom of Sweden and that third State or as to whether there are

proceedings pending before a court of that third State, within the meaning of Articles 33 and 34 of the Brussels I *bis* Regulation.

67 Furthermore, as the Advocate General observed in [point 23](#) of his Opinion of 22 February 2024, the Convention on the Grant of European Patents, signed at Munich on 5 October 1973 does not contain any provision expressly defining or restricting the jurisdiction of the courts of the parties to that convention in cross-border disputes relating to the European patent.

68 That said, it is necessary to determine whether the jurisdiction, based on Article 4(1) of the Brussels I *bis* Regulation, of a court of a Member State to rule on the issue of the validity of a patent granted or validated in a third State where that question is raised as a defence in the context of an infringement action brought before that court, is restricted by general international law.

69 In that regard, the Court recalls that the rules and principles of general international law are binding, as such, upon the EU institutions and form part of the EU legal order (see, to that effect, [judgments of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118](#), paragraph 47, and of [7 May 2020, *Rina*, C-641/18, EU:C:2020:349](#), paragraph 54 and the case-law cited). It follows that a measure adopted by virtue of the powers of the European Union, such as the Brussels I *bis* Regulation, must be interpreted, and its scope limited, in the light of those rules and principles (see, to that effect, [judgments of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453](#), paragraph 9, and of [3 September 2008, *Kadi and Al Barakat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461](#), paragraph 291).

70 First, the Court notes that it follows from its case-law that the jurisdiction of the courts of a Member State, based on the fact that the defendant is domiciled in that Member State, to rule in a dispute which is connected, at least in part, because of its subject matter, with a third State, is not contrary to the international law principle of the relative effect of treaties (see, to that effect, judgment of [1 March 2005, *Owusu*, C-281/02, EU:C:2005:120](#), [paragraphs 30 and 31](#)).

71 Second, it must be observed that that jurisdiction of the court of the defendant's domicile must be exercised without infringing the principle of non-interference, according to which a State may not interfere in cases which essentially come within the national jurisdiction of another State.

72 In the exercise of its powers, a State may grant, validate and register intellectual property rights which, within that State, confer on their holder exclusive intellectual property rights, such as a patent. It is also apparent from [Mr P. Jenard's report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters \(OJ 1979 C 59, p. 1\)](#) that one of the reasons why Article 16(4) of that convention – to which Article 24(4) of the Brussels I *bis* Regulation corresponds – conferred exclusive jurisdiction on the

courts of a State that is a party to that convention which has granted a patent to rule on disputes concerned with the registration or validity of that patent is that ‘the grant of a national patent is an exercise of national sovereignty’. Furthermore, as has been pointed out in paragraph 36 of the present judgment, that exclusive jurisdiction is justified both by the fact that the grant of patents involves the intervention of the national authorities, and by the fact that those courts are best placed to hear cases in which the dispute itself concerns either the validity of the patent or the issue of whether or not deposit or registration has occurred.

73 Where a judicial decision annulling a patent affects the existence or, in the event of annulment in part, the content of those exclusive rights, only the courts having jurisdiction in that State may give such a decision. It follows from the principle of non-interference referred to in paragraph 71 of the present judgment that only the courts of the third State in which a patent is granted or validated have jurisdiction to declare that patent invalid by a decision that may cause the national register of that State to be amended as regards the existence or content of that patent.

74 By contrast, the court of the Member State in which the defendant is domiciled which is seised, as in the case in the main proceedings, on the basis of Article 4(1) of the Brussels I *bis* Regulation, of an infringement action in the context of which the issue of the validity of a patent granted or validated in a third State is raised as a defence, does have jurisdiction to rule on that issue if none of the restrictions referred to in paragraphs 63 to 65 of the present judgment is applicable, given that the decision of that court sought in that regard is not such as to affect the existence or content of that patent in that third State, or to cause its national register to be amended.

75 As the Advocate General observed in [point 62](#) of his Opinion of 22 February 2024 and as the parties to the main proceedings and the European Commission stated at the hearing on 14 May 2024 before the Court, that decision has only *inter partes* effects, that is to say, a scope limited to the parties to the proceedings. Thus, where the issue of the validity of a patent granted in a third State is raised as a defence in an action alleging infringement of that patent before a court of a Member State, that defence seeks only to have that action dismissed, and does not seek to obtain a decision that will cause that patent to be annulled entirely or in part. In particular, under no circumstances can that decision include a direction to the administrative authority responsible for maintaining the national register of the third State concerned.

76 It follows from all the findings above that the answer to the third question is that Article 24(4) of the Brussels I *bis* Regulation must be interpreted as not applying to a court of a third State and, consequently, as not conferring any jurisdiction, whether exclusive or otherwise, on such a court as regards the assessment of the validity of a patent granted or validated by that State. If a court of a Member State is seised, on the basis of Article 4(1) of that regulation, of an action alleging

infringement of a patent granted or validated in a third State in which the question of the validity of that patent is raised, as a defence, that court has jurisdiction, pursuant to Article 4(1), to rule on that defence, its decision in that regard not being such as to affect the existence or content of that patent in that third State or to cause the national register of that State to be amended.

• Costs

77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 24(4) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**

must be interpreted as meaning that a court of the Member State of domicile of the defendant which is seised, pursuant to Article 4(1) of that regulation, of an action alleging infringement of a patent granted in another Member State, does still have jurisdiction to hear that action where, in the context of that action, that defendant challenges, as its defence, the validity of that patent, whereas the courts of that other Member State have exclusive jurisdiction to rule on that validity.

2. **Article 24(4) of Regulation No 1215/2012**

must be interpreted as not applying to a court of a third State and, consequently, as not conferring any jurisdiction, whether exclusive or otherwise, on such a court as regards the assessment of the validity of a patent granted or validated by that State. If a court of a Member State is seised, on the basis of Article 4(1) of that regulation, of an action alleging infringement of a patent granted or validated in a third State in which the question of the validity of that patent is raised, as a defence, that court has jurisdiction, pursuant to Article 4(1), to rule on that defence, its decision in that regard not being such as to affect the existence or content of that patent in that third State or to cause the national register of that State to be amended.

[Signatures]

* Language of the case: Swedish.

Opinion of the Advocate General of 22 February 2024

([ECLI:EU:C:2024:159](#))

OPINION OF ADVOCATE GENERAL

EMILIOU

delivered on 22 February 2024(1)

Case C-339/22

BSH Hausgeräte GmbH

v

Electrolux AB

(Request for a preliminary ruling from the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden))

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Exclusive jurisdiction – Proceedings concerned with the validity of patents – Article 24(4) – Scope – Infringement proceedings – Invalidity of the patents allegedly infringed raised as a defence – Consequences on the jurisdiction of the court seised of the infringement proceedings – Patent registered in a third State – ‘Reflexive effect’ of Article 24(4))

I. Introduction

1. The present request for a preliminary ruling of the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden) concerns the interpretation of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (2)

2. By its questions, the referring court seeks clarification, first, about the jurisdiction of the courts of the Member States of the European Union, under that regulation, to hear actions concerned with the infringement of patents registered in other Member States, particularly where the validity of the patents allegedly infringed is challenged by the opposing party. As I will explain in this Opinion, significant uncertainty surrounds that question as a result, notably, of an ambiguous decision delivered by the Court a long time ago, namely the judgment in GAT. (3) The present reference provides the Court with the opportunity to confirm one of several possible readings of that decision.

3. Secondly, the Court is invited to clarify whether Member State courts have jurisdiction to hear proceedings concerned with the validity of patents registered in third States. In that respect, the Court will have to address the delicate and long-standing issue of whether certain rules of the Brussels I bis Regulation apply to ‘external’ situations in the same way as they apply to ‘intra-EU’ conflicts of jurisdiction, or have a ‘reflexive effect’, as will be explained in this Opinion.

II. Legal framework

A. International law

4. The Convention on the Grant of European Patents, which was signed in Munich (Germany) on 5 October 1973 and entered into force on 7 October 1977, in the version applicable to the facts in the main proceedings (‘the EPC’), establishes, as stated in Article 1, ‘a system

of law, common to the Contracting States, for the grant of patents for invention’.

5. Article 2(2) of the EPC provides that ‘the European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State’.

B. The Brussels I bis Regulation

6. Article 4(1) of the Brussels I bis Regulation states that ‘subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’.

7. Article 24 of that regulation, entitled ‘Exclusive jurisdiction’ provides, in its paragraph 4:

‘The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

...

(4) in proceedings concerned with the registration or validity of patents ..., irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for [or] has taken place ...

Without prejudice to the jurisdiction of the European Patent Office under [the EPC], the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State’.

C. Swedish law

8. Paragraph 61, second subparagraph, of the Patentlagen (1967:837) (Patents Law) provides that ‘if an action concerning patent infringement is brought and the person against whom the action is brought claims that the patent is invalid, the question of invalidity may be considered only after an action to that effect has been brought. The court shall order the party claiming that the patent is invalid to bring such an action within a specific period’.

III. Facts, national proceedings, the questions referred and the procedure before the Court

9. BSH Hausgeräte GmbH (‘BSH’) is the holder of European patent EP 1 434 512, protecting an invention related to vacuum cleaners, granted for (and accordingly validated in) Austria, France, Germany, Greece, Italy, the Netherlands, Spain, Sweden, Türkiye and the United Kingdom.

10. On 3 February 2020, BSH brought an action against Aktiebolaget Electrolux (‘Electrolux’), a company registered in Sweden, before the Patent- och marknadsdomstolen (Patents and Market Court, Sweden). That action is based on Electrolux’s alleged infringement of EP 1 434 512 in the various States for which it had been granted. In that context, BSH seeks, inter alia, an injunction prohibiting Electrolux from continuing to use the patented invention in all those States and damages for the harm caused by that unlawful use.

11. In its statement of defence, Electrolux contended that the Patent- och marknadsdomstolen (Patents and Market Court) should dismiss that action to the extent that it concerns the Austrian, French, German, Greek,

Italian, Netherlands, Spanish, Turkish and UK parts of EP 1 434 512 ('the foreign patents'). In that respect, Electrolux pleaded, *inter alia*, the invalidity of the foreign patents.

12. Furthermore, Electrolux argued that, in the light of that defence, the Swedish courts have no jurisdiction to hear and determine the infringement proceedings to the extent that the foreign patents are concerned. In that respect, the infringement proceedings should be regarded as 'concerned with the ... validity of patents' within the meaning Article 24(4) of the Brussels I bis Regulation and, pursuant to that provision, the courts of the different Member States where those patents have been validated are exclusively competent to hear the case in so far as 'their' patent is concerned.

13. In response, BSH submitted that the Swedish courts have jurisdiction to hear the infringement proceedings pursuant to Article 4(1) of the Brussels I bis Regulation, as Electrolux is domiciled in Sweden. Article 24(4) thereof is not applicable, since the action brought by BSH is not, in itself, 'concerned with the ... validity of patents' within the meaning of that provision. Moreover, pursuant to the second subparagraph of Paragraph 61 of the Patentlagen, where the defendant pleads, in such infringement proceedings, that the patent is invalid, the court seised must order him or her to bring a separate action to that effect before the competent courts. In this case, Electrolux should thus bring separate invalidity proceedings before the courts of the different States for which the foreign patents were granted. In parallel, the Patent- och marknadsdomstolen (Patents and Market Court) could determine the infringement matter in a provisional judgment and then stay proceedings pending a final judgment in the invalidity proceedings. Finally, with respect to the Turkish part of EP 1 434 512, BSH submitted that Article 24(4) of the Brussels I bis Regulation is, in any case, not applicable to patents issued by third States and therefore it cannot have any bearing on the jurisdiction of the Swedish courts.

14. By decision of 21 December 2020, the Patent- och marknadsdomstolen (Patents and Market Court) dismissed the action in respect of the infringement of the foreign patents. While, at the moment of bringing the proceedings, the Swedish courts had jurisdiction to hear the action under Article 4(1) of the Brussels I bis Regulation, Article 24(4) of that regulation became applicable when Electrolux pleaded the invalidity of those patents as a defence. Under that provision, the courts of other States have exclusive jurisdiction to consider the validity issue, and as that issue is crucial for the outcome of the infringement action brought by BSH, the national court declared that it lacked jurisdiction over the proceedings to the extent that the foreign patents are concerned. That court also declined jurisdiction with respect to the Turkish patent, taking the view that Article 24(4) expresses an internationally accepted principle of jurisdiction, whereby only the courts of the State that granted a patent can adjudicate its validity.

15. Subsequently, BSH filed an appeal against that decision before the Svea hovrätt (Svea Court of Appeal,

Stockholm), maintaining that Article 24(4) of the Brussels I bis Regulation does not apply to actions for infringement of patents. Nevertheless, because Electrolux pleads invalidity as a defence, jurisdiction is distributed: the Swedish courts have jurisdiction under Article 4(1) to rule on the infringement matter, while the validity issue must be determined by the courts of the States of registration under Article 24(4). The Swedish courts are also competent with respect to the Turkish patent on the basis of Article 4(1) of that regulation. Indeed, the jurisdiction of the State where a defendant is domiciled is a recognised principle in international law. Electrolux maintained, for its part, that Article 24(4) applies to infringement proceedings in which invalidity is pleaded as a defence. The Swedish courts have no jurisdiction over the proceedings as a whole, since the infringement and validity issues cannot be separated.

16. It is in those circumstances that the Svea hovrätt (Svea Court of Appeal, Stockholm) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 24(4) of [the Brussels I bis Regulation] to be interpreted as meaning that the expression "proceedings concerned with the registration or validity of patents ... irrespective of whether the issue is raised by way of an action or as a defence" implies that a national court, which, pursuant to Article 4(1) of that regulation, has declared that it has jurisdiction to hear a patent infringement dispute, no longer has jurisdiction to consider the issue of infringement if a defence is raised that alleges that the patent at issue is invalid, or is the provision to be interpreted as meaning that the national court only lacks jurisdiction to hear the defence of invalidity?

(2) Is the answer to Question 1 affected by whether national law contains provisions, similar to those laid down in the second subparagraph of Paragraph 61 of the [Patentlagen], which means that, for a defence of invalidity raised in an infringement case to be heard, the defendant must bring a separate action for a declaration of invalidity?

(3) Is Article 24(4) of the [Brussels I bis Regulation] to be interpreted as being applicable to a court of a third [State], that is to say, in the present case, as also conferring exclusive jurisdiction on a court in [Türkiye] in respect of the part of the European patent which has been validated there?'

17. The present request for a preliminary ruling, dated 24 May 2022, was lodged on the same day. Written observations have been submitted by BSH, Electrolux, the French Government and the European Commission, and the interveners were represented at the hearing that took place on 22 June 2023.

IV. Analysis

18. The present case concerns the jurisdiction of Member State courts to hear actions for infringement of European patents allegedly committed in multiple States. Before dissecting the questions referred to the Court, I find it appropriate to provide the reader, who may not be familiar with the intricacies of this complex

area of law, with an overview of the relevant substantive and jurisdictional rules.

19. Generally speaking, patents are intellectual property rights issued by States following registration procedures carried out by national patent offices, in accordance with the requirements of granting (or ‘patentability’) laid down in their national law. Such patents confer on its holder certain exclusive rights over the patented invention (essentially a trade monopoly), whose extent is defined by that law. Since, in principle, a State only has the sovereign power to regulate trade on its territory, the protection conferred is so circumscribed (an idea generally referred to as the principle of territoriality of patents). The inconvenience of that system is that a person seeking to protect a single invention in several States must apply for a patent in all of them, individually.

20. The EPC was adopted to provide a (partial, as will be seen) solution to that inconvenience. That treaty, which binds 39 Contracting Parties, including the Member States and Türkiye, established an autonomous system for the grant of so-called European patents through a centralised registration procedure before the European Patent Office (‘EPO’), established in Munich. (4) In that respect, it lays down, *inter alia*, uniform patentability requirements. The EPO is tasked with examining applications for European patents in the light of those requirements. (5) When they are fulfilled, the EPO grants a European patent for (depending on the applicant’s wishes) one, several or all the Contracting Parties. (6) In the main proceedings, through that procedure, BSH obtained EP 1 434 512, which has been granted for several Member States and Türkiye.

21. That said, despite what its name seemingly implies, a European patent is not a unitary title providing uniform protection of the invention in question across the States for which it has been issued. In fact, a European patent comes to life essentially as a bundle of national ‘parts’, assimilated to patents issued by the States in question. It accordingly needs to be ‘validated’ by the respective patent offices of those States. As such, the national ‘parts’ of a European patent are legally independent of one another. Each of them confers on the patent holder the same exclusive rights over the patented invention as an ‘ordinary’ national patent (7) and is equally limited to the national territory. Furthermore, in principle, (8) a European patent may solely be revoked ‘part’ by ‘part’, the revocation of a ‘part’ being effective for the territory of the corresponding State only. (9)

22. Consequently, where a given invention is protected by a European patent, the unauthorised use of that invention by a third party may, on the one hand, result in the patent holder’s monopoly being breached in multiple States (namely the ones for which that patent has been granted). In the main proceedings, BSH accuses Electrolux of precisely that sort of ‘multistate’ patent infringement. On the other hand, as a European patent is not a unitary title, its infringement across several States is considered, from a legal point of view, as a bundle of national patent infringements, the breach of each of its ‘parts’ being appraised separately, in the

light of the national law applicable to it. (10) In effect, BSH’s action against Electrolux constitutes a bundle of infringement claims resting on the various ‘parts’ of EP 1 434 512.

23. Litigation over European patents, including actions for infringement, is also a matter left to the Contracting Parties and their national courts. (11) With respect to cross-border disputes, the EPC does not allocate jurisdiction between those courts either. (12) That question is to be determined in the light of the rules of private international law applied by the courts of those Contracting Parties.

24. In the Member States of the European Union, jurisdiction with respect to cross-border patent disputes between private parties is determined by the rules of the Brussels I bis Regulation (13) where the defendant is, like Electrolux, domiciled in such a Member State.

25. The jurisdictional regime laid down in that instrument (and in its predecessors) (14) (‘the Brussels regime’) operates, with respect to those disputes, under the following dichotomy.

26. On the one hand, proceedings ‘concerned with the registration or validity of patents’ are governed by a special rule under Article 24(4) of the Brussels I bis Regulation, which confers exclusive jurisdiction on the courts of the Member State that granted the patent in question (‘the State of registration’). Where the registration or validity of a European patent is at issue, the courts of the different Member States for which that patent has been granted each have exclusive jurisdiction with respect to their national ‘part’. (15) That rule is mandatory: parties cannot depart from it by agreement. (16) Furthermore, where litigants bring their dispute before the ‘wrong’ court, that court is required, pursuant to Article 27 of that regulation, to decline jurisdiction of its own motion. (17)

27. On the other hand, all other proceedings related to patents are governed by the general rules of the regulation. In principle, that includes infringement proceedings, since those ‘concern’ not the registration or validity of patents, but their enforcement. (18) Those rules afford litigants some jurisdictional leeway.

28. While the courts of the State of registration do have jurisdiction over infringement proceedings pursuant to Article 7(2) of the Brussels I bis Regulation, (19) that jurisdiction is not exclusive, but optional. Such proceedings may accordingly be brought before other courts. In particular, the patent holder may seise the courts of the Member States where the defendant is domiciled, under Article 4(1) of that regulation. In the event of a ‘multistate’ infringement of a European patent, a patent holder has an obvious interest in doing so.

29. Indeed, the jurisdiction of the courts of the Member State of registration, under Article 7(2) of the Brussels I bis Regulation, is territorially limited. In accordance with point 22 above, the courts of each State for which a European patent has been granted may only rule to the extent that their national ‘part’ and territory are concerned. (20) Consequently, the patent holder,

seeking a comprehensive remedy, would have to start separate proceedings in all those States.

30. By contrast, the jurisdiction of the courts of the Member State where the defendant is domiciled, under Article 4(1) of the Brussels I bis Regulation, is universal. Thus, it may extend to the infringement of the European patent committed in all the States for which it has been granted. (21) Those courts may award damages to compensate for the total loss suffered by the patent holder, or issue an injunction prohibiting the continuation of the infringement in all those States. In sum, that provision enables the patent holder to consolidate all his or her infringement claims before, and to obtain a comprehensive relief from, a single forum. In the present case, BSH has made use of that precise option and brought its entire action against Electrolux before the competent patent court in Sweden, where the latter is domiciled.

31. Against that background, the referring court harbours doubts as to whether such a consolidation is, in fact, possible in the main proceedings and, if so, to what extent. Those doubts arise from the fact that Electrolux pleaded, as a defence against BSH's claims, the invalidity of the various 'parts' of EP 1 434 512 on which those claims rest. (22) In the light of that defence, the referring court wonders whether, and to what extent, Article 24(4) of the Brussels I bis Regulation applies and 'trumps' Article 4(1) thereof. Under Article 24(4), those courts would have exclusive jurisdiction with respect to the Swedish 'part' only; Whereas other courts would have exclusive jurisdiction with respect to the foreign 'parts'. Consolidation of the proceedings in a single forum would not be possible and their fragmentation would be inevitable, instead.

32. Specifically, the first and second questions of the referring court, which it is appropriate to examine together, concern whether infringement proceedings fall within the scope of Article 24(4) of the Brussels I bis Regulation where the validity of the underlying patent is challenged by way of a defence. If that is the case, that court wonders whether, here, that provision deprives it of jurisdiction (to the extent that the foreign 'parts' of EP 1 434 512 are concerned) to hear and determine the infringement proceedings generally, or only the validity issue. I will examine that issue in Section A of the present Opinion.

33. Assuming that the Court answers the first two questions to the effect that Article 24(4) is of relevance in a situation such as the one at issue in the main proceedings, the third question concerns whether that provision applies also with respect to the validity of the Turkish 'part' of EP 1 434 512. I will examine that issue in Section B of the present Opinion.

A. The substantive scope of Article 24(4) of the Brussels I bis Regulation (first and second questions)

34. As indicated above, the scope of Article 24(4) of the Brussels I bis Regulation appears to be clear. Under that provision, the exclusive jurisdiction of the courts of the State of registration covers only proceedings 'concerned with the validity of patents', not proceedings

'concerned with' other patent-related matters, including infringement.

35. In reality, ambiguity lies beneath those terms. That dichotomy is sometimes blurred in practice. Indeed, while the validity of patents may be the object of dedicated actions (for revocation or cancellation), a patent's invalidity may also be pleaded as a defence against, most notably, infringement claims. By doing so, the alleged infringer seeks to obtain the dismissal of those claims by vitiating the title on which they stand. (23) Electrolux pleaded such a defence in the main proceedings.

36. The fact that the courts of the State of registration have exclusive jurisdiction over the first category of actions has always been certain. By contrast, whether, and to what extent, they also do in the second scenario is the subject of a long-standing debate.

37. Since the early 1990s, when patent holders started to make good use of the possibilities of consolidating their infringement claims under the general rules of the Brussels regime, Member State courts have been confronted with the issue. The original wording of the contentious rule of exclusive jurisdiction, as laid down (at the time) in Article 16(4) of the Brussels Convention, did not provide guidance on the matter. Those courts came up with three main approaches:

- First, some courts, especially in Germany, considered that the rule of exclusive jurisdiction in question does not apply when invalidity is pleaded as a defence in infringement proceedings. Courts outside the State of registration could, under the general rules of the convention, hear such proceedings and, in that context, adjudicate the validity of the patent(s) in question.

- Secondly, other courts, notably in the United Kingdom, took the view that, when an invalidity defence is raised, infringement proceedings become 'concerned with the validity of patents' and accordingly fall within the exclusive jurisdiction of the courts of the Member State(s) of registration.

- Thirdly, a last group of courts, including those in the Netherlands, considered that the contentious rule applied where invalidity is pleaded as a defence in infringement proceedings, but in a somewhat sophisticated way: only the validity issue falls within the exclusive jurisdiction of the courts of the State of registration; other courts could determine the infringement matter. (24)

38. In 2006, the Court entered into the debate with its judgment in GAT. Notably, that case was not about infringement proceedings per se. It concerned an action by which a company sought a declaration from the German courts that it had not infringed two French patents held by a German company ('negative declaration'), inter alia on the ground that those patents were invalid. Those courts suspected that Article 16(4) of the Brussels Convention could be relevant and referred a question in that regard to the Court. Nevertheless, the Court did not provide an answer tailored to those particular facts; instead, it ruled in general terms that the rule of exclusive jurisdiction (then) laid down in that provision 'concerns all

proceedings relating to the ... validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection'. (25) Contrary to what BSH submits, that reply is general enough to cover, inter alia, the scenario of infringement proceedings in which an invalidity defence has been raised. The reference to 'a plea in objection' was evidently added to that effect. (26) 39. A few years later, the legislature codified the judgment in GAT in Article 24(4) of the Brussels I bis Regulation, by specifying, in the text of that provision, that the exclusive jurisdiction of the courts of the State of registration covers proceedings concerned with the validity of patents 'irrespective of whether the issue is raised by way of an action or as a defence'.

40. However, clarity on the matter was not achieved, to say the least. In fact, the answer provided in the judgment in GAT (and now in Article 24(4)) to the issue discussed in the present section raised more questions than it solved. Indeed, while that answer dealt an unwarranted fatal blow to the first approach listed above (1), the Court (and the EU legislature) left national courts and litigants debating about whether the second or third approach was correct instead (2).

1. The unwarranted judgment in GAT

41. Usually, where a single set of proceedings concerns two distinct matters (like, in the present case, infringement and validity), falling within the scope of mutually exclusive rules of jurisdiction (here, the general rules with respect to infringement; Article 24(4) of the Brussels I bis Regulation with regard to patent validity), the Court follows some pragmatic principles to determine which court(s) is (or are) competent to hear and determine them.

42. First, for the purpose of determining which rules of jurisdiction apply, such proceedings are to be classified on the basis of the principal subject matter (or 'object') of the action brought by the claimant and any preliminary (or incidental) questions that may otherwise be raised, notably by way of a defence, should be left aside. (27)

43. Secondly, the forum designated by the applicable rules of jurisdiction is competent to hear the entire proceedings, that is to say, not only the action, but also the defence, even though the latter concerns a matter usually reserved to a different judge. (28) Indeed, procedurally speaking, such a defence is an integral part of the action and, logically, follows the jurisdictional treatment applied to the latter.

44. If the Court had followed those principles in the judgment in GAT, it would have adopted the first approach referred to in point 37 above. Indeed, with respect to infringement proceedings in which an invalidity defence has been raised, the principal subject matter (or 'object') of the action is, quite simply, infringement. By contrast, the validity issue is a prime example of a preliminary question. Since one cannot infringe an invalid patent, the judge will first have to determine the validity of the title on which the claimant relies in order, then, to resolve the principal question of whether the defendant's acts breached the rights conferred by the title in question. According to those

principles, such proceedings should have been governed, in the light of that subject matter and irrespective of that defence, by the general rules (then) laid down in the Brussels Convention. Furthermore, the courts designated as competent to hear and determine the infringement proceedings under those general rules, in particular the courts of the Member State where the defendant is domiciled, should also have had jurisdiction to determine that defence.

45. Evidently, that is not what the Court did in the judgment in GAT. Rather, it took the view that the rule of exclusive jurisdiction for 'proceedings concerned with the validity of patents' applies even to proceedings in which that issue is raised merely by way of a defence. By doing so, the Court adopted an interpretation which is, to my knowledge, unique in the Brussels regime. In fact, that solution departs even from the ones the Court adopted, so far, under the other rules of exclusive jurisdiction (now) laid down in Article 24 of the Brussels I bis Regulation. Following the principles discussed above, the Court considers that those other rules apply where an issue referred to therein constitutes the subject matter of the action only. (29) In several (but unfortunately not all) language versions of the regulation, that approach even stems from the very letter of that provision. (30) Moreover, in its judgment in BVG, delivered a few years after the judgment in GAT, the Court took the view that the rule of exclusive jurisdiction for proceedings concerned with the validity of companies or of the decisions of their organs (now laid down in Article 24(2) of that regulation) does not apply to proceedings in which such an issue is raised only by way of a defence. (31)

46. The precise implications of the interpretation adopted in the judgment in GAT are uncertain, as mentioned above, and will be discussed in Section 2 below. For present purposes, what is clear is that, contrary to what BSH submits, where infringement proceedings are brought outside the Member State of registration and an invalidity defence is raised, those courts are not allowed to adjudicate the validity of the patents concerned as a preliminary question.

47. That being said, unfortunately, in my view, the rather brief reasoning of the Court in the judgment in GAT does not offer a convincing justification for that solution.

48. The first argument put forward by the Court relates to the 'position of [that rule of exclusive jurisdiction] within the scheme of the [Brussels Convention]' (i.e. its primacy over the general rules of jurisdiction) and its 'mandatory nature'. (32) That argument fails to convince me. (33) In fact, those elements more readily support the opposite interpretation.

49. The rules of exclusive jurisdiction are exceptions in the Brussels regime. As such, they must be interpreted strictly. (34) Indeed, they are supposed to apply in a 'few well-defined situations' (35) only. Moreover, as the Court ruled in the judgment in BVG, a strict interpretation of those rules is 'particularly necessary' precisely because they have primacy over the general rules and are mandatory. (36) Where Article 24(4)

applies, it deprives claimants of the choice of forum, which would otherwise be theirs, and may result in defendants being sued outside of the Member State of their domicile, where they would usually be better placed to defend themselves.

50. By contrast, the interpretation adopted by the Court in the judgment in GAT can only be described as ‘wide’. (37) Certainly, the validity of patents is, in itself, a ‘well-defined’ issue. Nevertheless, it may be raised in an ‘ill-defined’ range of proceedings concerned with other matters. (38)

51. The two other reasons given by the Court in the judgment in GAT concern the general objective of legal certainty pursued by the Brussels regime. (39) In essence, the Court explained that if the contentious rule of exclusive jurisdiction did not apply when the issue of the validity of patents is raised by way of a defence in infringement proceedings (and so on), and courts outside the State of registration, seised of such proceedings, were allowed to adjudicate that issue as a preliminary question, it ‘would have the effect of multiplying’ the number of courts that could rule on that issue. That, in turn, would ‘undermine the predictability of the rules of jurisdiction’ and ‘multiply the risk of conflicting decisions’ on the matter, all of which would undermine legal certainty. (40)

52. I am not convinced by this either. When one ‘sees the whole picture’, those elements again more readily support the opposite interpretation. Admittedly, from one angle, the solution in the judgment in GAT prevents different courts from taking contradictory views of a patent’s validity. To that extent, it contributes to legal certainty. However, from another angle, the judgment in GAT has the potential to make the operation of the Brussels regime, with respect to infringement proceedings, precarious for patent holders.

53. Whereas that regime normally allows a patent holder to bring such proceedings outside the State of registration, *inter alia*, before the courts of the Member State of the defendant, the solution in the judgment in GAT creates uncertainty as to whether those courts would be able to grant a relief against infringement or, at least, to do so within a reasonable time. Indeed, were an invalidity defence to be raised by the alleged infringer at some stage of the proceedings, those courts would not be able to simply adjudicate that defence and proceed with the case but, depending on how that solution is to be understood, would either lose their jurisdiction and have to dismiss the proceedings, or may have to stay proceedings until the courts of the Member States of registration have determined the patent’s validity (see, further, Section 2 below).

54. Whatever the correct interpretation, the judgment in GAT makes the consolidation of infringement claims concerning the different ‘parts’ of a European patent before those courts an unattractive option. It encourages patent holders to start separate proceedings in the various States of registration of those ‘parts’ instead, since, at least, it is certain that the courts of those States are competent to rule on both the infringement and validity of ‘their part’ (as explained in points 26, 28 and

29 above). This creates, in turn, a risk that different courts take contradictory views on the same infringement dispute.

55. Such uncertainty and/or complexity with respect to enforcement of patents is all the more undesirable, given that intellectual property is protected as a fundamental right, *inter alia*, in Article 17(2) of the Charter of Fundamental Rights of the European Union (‘the Charter’). Under that provision, patent holders are to enjoy a ‘high level’ of protection of their intellectual property rights in the European Union. The possibility to bring expedient civil proceedings and obtain a relief in the case of infringement is essential in that respect. That is also required by the fundamental right to an effective remedy, guaranteed in Article 47 of the Charter. In connection with that, I recall that Article 41(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘the TRIPS Agreement’) (41) provides that ‘procedures concerning the enforcement of intellectual property rights ... shall not be unnecessarily complicated or costly, or entail ... unwarranted delays. This also concerns, in my view, the operation of the relevant rules of international jurisdiction.

56. In any event, pursuant to the settled case-law of the Court concerning the interpretation of the rules of exclusive jurisdiction under the Brussels regime, (42) the only question that the Court in the judgment in GAT needed to answer (but that it did not discuss) was whether the specific objective pursued by the contentious rule of exclusive jurisdiction ‘required’ that that rule also apply to infringement proceedings in which an invalidity defence has been raised. In my view, it did not.

57. From the outset, I would like to clear some confusion as to what that objective is. The explanation usually provided by the Court in that regard (and mentioned ‘in passing’ by the Court in the judgment in GAT) is that the rule in question pursues an objective of good administration of justice. In its view, the courts of the State of registration are ‘best placed’ to determine proceedings concerned with the registration or validity of patents, because of the ‘close link in fact and law’ that exists between such proceedings and that State. (43) However, in my Opinion, that is not the real *raison d’être* of that rule.

58. Admittedly, as explained in points 19 and 21 above, a patent is governed by the law of the State of registration. There is some weight to the argument that, for instance, a German judge is ‘best placed’ to apply German patent law (because of the language, knowledge of that law, and so on). (44) Furthermore, because a patent is only protected in the State of registration, there is usually a factual proximity between disputes concerning that patent and the territory of the latter.

59. However, those considerations only explain why the courts of the State of registration may hear and determine such disputes. They justify why, for instance, those courts have, under the Brussels regime, jurisdiction over infringement proceedings concerning their territory. (45) By contrast, such considerations do not reveal why, with respect to proceedings concerned

with the registration or validity of patents, those courts should have jurisdiction to the exclusion of all others. (46) In particular, the patent law of the State of registration is not so unique that only the courts of that State would have the ability to comprehend it. (47) While it may be harder for them to do so, the courts of another Member State are perfectly capable of applying such a foreign law. To imply the contrary would be tantamount to questioning the very foundations of the Brussels regime (and the entire field of private international law). (48)

60. The real *raison d'être* of the contentious rule lies in the fact that, as the Jenard report puts it, 'the grant of a ... patent is an exercise of national sovereignty'. (49) Indeed, the only compelling justification for providing such a rule of exclusive jurisdiction is the role (traditionally) played by State authorities in the issuing of such intellectual property rights, mentioned in point 19 above, (50) specifically the facts that national administrations are tasked with examining patent applications, granting them where the relevant requirements are fulfilled, and registering patents accordingly. However, the solution in the judgment in GAT was, in my view, not 'required' by that consideration either.

61. Indeed, on the one hand, proceedings that have the registration or validity of patents as their object, call into question, by their very nature, the functioning of the administration of the State of registration. (51) The heart of the dispute is whether the relevant State authority (patent office) 'did its job' correctly. With an action for revocation, in particular, a claimant essentially asks the court to review whether that authority was right to grant the patent in the first place and, if it was not, to declare the patent invalid as a relief. Such a declaration has, by nature, *erga omnes* effect and may, as such, be invoked against the authority in question. The ruling delivered by the court may even instruct the latter to rectify its registers accordingly. Obviously, such rulings should only be delivered by the courts of the State of registration. Deference to the sovereignty of States applies here. States would find it unacceptable if the actions of their authorities were to be sanctioned by the courts of a foreign State and that the latter instruct them on how to manage their national registries. (52)

62. On the other hand, infringement proceedings, in particular, do not call into question the functioning of the administration of the State of registration, even where the invalidity of the patent allegedly infringed is raised by way of a defence. There, that issue, as a preliminary question, is examined by the court, but only for the purpose of resolving the infringement matter. The only consequence that may ensue is the court dismissing the infringement claim. Such a ruling is concerned with the private interests of the litigants and, accordingly, generally has *inter partes* effects only. (53) It cannot encroach on the sovereignty of the State of registration because it has no effect on its administration nor does it purport to have one. The validity of the patent, from a legal point of view, is not affected. No instruction to that

administration is being issued by a court of another sovereign State.

2. The proper reading of the judgment in GAT

63. For all those reasons, the judgment in GAT is, in my view (and according to the majority of the literature I have consulted), (54) an unfortunate decision. If the solution laid down therein stood on that ruling alone, I would have advised the Court to overturn it and to declare instead that the rules of exclusive jurisdiction for proceedings concerned with the validity of patent does not apply where an invalidity defence is raised in infringement proceedings, to the extent that the judgment delivered by the court seised would produce *inter partes* effects only. (55)

64. However, as indicated above, the EU legislature codified that judgment in Article 24(4) the Brussels I bis Regulation. (56) Thus, as EU law stands, the Court is 'trapped' in the solution that it initially adopted. It is left to choose, at the invitation of the referring court, between two possible readings of the judgment in GAT (and its codification), which correspond, respectively, to the second and third approaches listed in point 36 above.

65. Pursuant to the first reading, defended by Electrolux, and which I shall describe as 'broad', where invalidity is pleaded as a defence in infringement proceedings, the courts of the Member State of registration are (or become) exclusively competent under Article 24(4) of the Brussels I bis Regulation to determine those proceedings. Any other court must decline jurisdiction pursuant to Article 27 of that regulation.

66. According to the second reading, defended by the Commission and which I shall describe as 'narrow', where invalidity is pleaded as a defence in infringement proceedings, the courts of the Member State of registration have exclusive jurisdiction under Article 24(4) of the Brussels I bis Regulation to determine the issue of validity only. Other courts could have (or keep) jurisdiction, under the general rules of that regulation, to determine the infringement matter.

67. As EU law stands, it does not provide clear indications as to which reading is supposed to be correct. First, while, as Electrolux submits, the 'broad' reading of the operative part of the judgment in GAT and of the wording of Article 24(4) of the Brussels I bis Regulation seems the most natural one, (57) those elements can also reasonably be read the 'narrow' way. Although the Court said, in that judgment, that the contentious rule of exclusive jurisdiction 'concerns all proceedings relating to the ... validity of a patent', it did not indicate to what degree. This drafting is simply ambiguous. Secondly, the subsequent case-law of the Court does not support one reading or another of the judgment, as it contains contradictory indications in that regard. On the one hand, as Electrolux points out, the Court seemingly endorsed the 'broad' reading in its judgment in BVG. (58) On the other hand, as the Commission underlines, the Court apparently endorsed the 'narrow' reading in the judgment in Roche Nederland and Others. (59) Finally, the legislature did not express any position in that regard

in the text of Article 24(4) or in a recital of the regulation. (60)

68. Hence, to resolve the controversy, one must turn to the system established under the Brussels I bis Regulation as well as the objectives pursued by that instrument generally and by Article 24(4) thereof, specifically. In the light of those elements, the Court should reject the ‘broad’ reading of in the judgment in GAT (part (a)) and endorse the ‘narrow’ reading instead (part (b)). It should also provide some guidelines to national courts as to how that reading is to be put in practice (part (c)).

(a) The critical flaws of the ‘broad’ reading

69. In the first place, the ‘broad’ reading of the judgment in GAT can hardly be reconciled with the system established under the Brussels I bis Regulation. Under that system, as was intended by its drafters, the exclusive jurisdiction of the courts of the State of registration is an exception, circumscribed to ‘proceedings concerned with the registration or validity of patents’, while infringement proceedings, and the rest of patent disputes, may normally be brought before other courts.

70. However, if the judgment in GAT were to be understood in the way suggested by Electrolux, the exception would, in fact, become the rule, as the Commission observes. Since invalidity defences are often raised in infringement proceedings, such proceedings would frequently fall within the exclusive jurisdiction of the courts of the State of registration. The application of the general rules of jurisdiction, and the options they confer on patent holders, would be limited to the cases where such a defence is not raised.

71. Secondly, contrary to what Electrolux submits, since the classification of infringement proceedings and, thus, the rules of jurisdiction applicable to them would depend on whether or not an invalidity defence is raised (in contradiction with the principle stated in point 42 above), the ‘broad’ reading of the judgment in GAT would compromise the predictability and certainty of jurisdiction aimed at by the Brussels I bis Regulation. (61)

72. Indeed, for jurisdiction over infringement proceedings to be predictable, patent holders should be able to easily identify the court before which they may bring such proceedings. However, under the ‘broad’ reading of the judgment in GAT, it would be hard for them to determine in advance whether such proceedings fall within the exclusive jurisdiction of the State of registration or may be brought before other courts, as they have no control over the defence strategy that the alleged infringer will adopt. (62)

73. Furthermore, were the patent holder to choose to bring proceedings outside of the State of registration, for instance before the courts of the Member State where the alleged infringer is domiciled, the jurisdiction of those courts would be precarious. Indeed, it could disappear if the alleged infringer were to raise an invalidity defence. Those courts would have to decline to continue hearing the case. (63) If, under the procedural rules of the forum, such a defence may be raised not only at the beginning

of the trial, but also at subsequent, later stages, including on appeal, proceedings that have been going on for months, or even years, could suddenly reach a dead-end. The alleged infringer could also strategically choose the moment to raise such a defence and effectively ‘torpedo’ the proceedings. As BSH and the Commission observe, the consequences for the patent holder would be dramatic. Indeed, as it stands, there is no possibility, under the Brussels I bis Regulation, for the courts of a Member State to transfer a case to the courts of another. The courts initially seised could only dismiss the proceedings, leaving the claimant the task of starting fresh proceedings in the State of registration.

74. To add insult to injury, it may no longer be possible for the patent holder to do so. Indeed, the limitation periods applicable to the infringement claims may have elapsed in the meantime. In effect, the patent holder would be deprived, through no fault of their own, of all possibility of a remedy against the breach of their intellectual property rights. Such an outcome would be contrary to Article 17(2) and Article 47 of the Charter as well as Article 41(2) of the TRIPS Agreement.

75. Even if it were still possible for the patent holder to do so, in case of ‘multistate’ infringement of a European patent, they would be bound to start infringement proceedings in all the States concerned to obtain a comprehensive relief. (64) It would not be possible to consolidate the claims before a single forum. A number of courts could get involved in what is essentially the same dispute, increasing the risk of conflicting decisions mentioned in point 54 above.

76. Finally, contrary to what Electrolux submits, the ‘broad’ reading of the judgment in GAT goes beyond what is ‘required’ by the specific objective of Article 24(4) of the Brussels I bis Regulation, namely, as explained in points 60 and 61 above, to ensure that deference is given to the sovereignty of the State of registration. Even understood broadly, it would only be possible for that objective to ‘require’ (where an invalidity defence is raised in infringement proceedings) that the courts of that State have exclusive jurisdiction to adjudicate the validity issue, not the infringement matter.

(b) The ‘narrow’ reading of the judgment in GAT is ‘the lesser evil’

77. The ‘narrow’ reading of GAT scores significantly higher on all the aspects discussed above. The principle remains that the general rules of the Brussels I bis Regulation govern infringement proceedings. As such, jurisdiction is predictable and certain for the patent holder. If they bring proceedings outside the State of registration and the alleged infringer raises an invalidity defence, the courts seised do not lose the competence to hear and determine the action. Those courts ‘simply’ cannot adjudicate the validity of the patent(s) in question, which, under the exceptional rule laid down in Article 24(4) of that regulation, can only be determined by the courts (65) of the State of registration. Furthermore, in the case of a ‘multistate’ infringement of a European patent, that reading allows for the partial consolidation of the claims before a single forum. Only

the validity of the patent, if challenged, would have to be determined in the various States for which it was granted.

78. As the Commission observes, that reading of the judgment in GAT implies that the Court admitted a derogation to the principle, under the Brussels regime, that jurisdiction to hear and determine an action extends to any potential defence (see point 43 above). That being said, such a derogation, although unique within that regime, is not completely unheard of. Indeed, similar derogations feature in the rules of territorial jurisdiction of the Member State for certain matters subject to exclusive jurisdiction under national law. (66)

79. In practical terms, it follows that, when infringement proceedings concerning a patent registered in a Member State are pending before the courts of another Member State and an invalidity defence is raised, because those courts can neither adjudicate the validity issue nor (as the Brussels I bis Regulation stands) refer an interlocutory question on the matter to the authorities of the State of registration, it is up to the alleged infringer (if he or she had not already done so) to bring invalidity proceedings before those authorities so that the latter determine that issue. (67)

80. Electrolux objects, not without merit, that the ‘splitting’ of the infringement and validity issues into two sets of proceedings brought in different Member States is questionable in terms of the administration of justice. Indeed, those issues are closely interrelated. (68) As explained in point 44 above, in principle, the preliminary issue of validity of the patent must be resolved in order to determine the main issue of infringement. Furthermore, besides the fact that the law of the State of registration applies to both issues, they essentially depend on the same element, namely the construction of the patent claims. (69)

81. Nevertheless, in my view, while it is not always ideal from a practical point of view for the validity and infringement issues to be determined by different courts and/or authorities, (70) it is not impossible either. In fact, at national level, several Member States, such as, it would seem, Sweden, (71) adopted a ‘bifurcation system’ of patent adjudication, under which those issues are determined by different judges in separate, dedicated proceedings. (72)

82. While validity and infringement must be ‘split’ in this way, it does not follow, as Electrolux posits, that, where an invalidity defence is raised in infringement proceedings, the court hearing those proceedings should, or even could, systematically ignore that defence, presume the patent to be valid and issue a final decision on the infringement matter, irrespective of the invalidity proceedings that may be pending in parallel in another Member State.

83. Indeed, as BSH and the Commission submit, Article 24(4) of the Brussels I bis Regulation cannot be interpreted that way. Otherwise, an alleged infringer would be completely deprived of one of the most effective shields against bogus infringement claims. That would constitute an unacceptable limitation of their right of defence, which are guaranteed, *inter alia*, by

Article 47 of the Charter, and which the Brussels regime seeks to ensure. (73)

84. Moreover, in some cases, that could result in irreconcilable judgments being delivered. Indeed, on the one hand, the courts in charge of the infringement proceedings could recognise the infringement while, on the other, the authorities of the State of registration could subsequently declare the patent invalid. The latter could also confirm the validity of the patent, but under a narrow construction of its claims (which would normally exclude a finding of infringement), while the courts in charge of the infringement proceedings could recognise infringement under a wide construction of the patent claims (which would have led the validity judge to declare the patent invalid). (74)

85. As I will explain further in the next section, there are circumstances where the courts in charge of the infringement proceedings would be entitled to presume the patent valid and rule accordingly, irrespective of an invalidity plea. However, in other circumstances, respect for the rights of defence will require those courts to wait until the validity of the patent has been determined by the authorities of the State of registration before they issue a final, concurring decision on infringement. (75)

86. So, case management and/or procedural measures will sometimes have to be taken to ensure the coordination of the infringement and invalidity proceedings. In that regard, Electrolux observes that neither the Brussels I bis Regulation nor EU law in general provide for a solution in that regard. Specifically, Article 30(1) of that regulation could allow the courts in charge of the infringement proceedings to stay those proceedings until the authorities of the State of registration have determined the validity of the patent, but only if the latter have been seised first. That provision provides no relief in the case of subsequent invalidity proceedings. Nevertheless, as BSH and the Commission submit, until the EU legislature has enacted provisions to that effect, (76) the courts seised of the infringement can, and sometimes should, apply the solutions provided under its procedural law (*lex fori*).

87. Electrolux retorts that such a reliance on national procedural law poses a risk for the uniform treatment of cases and litigants in the Member States, as different courts may have different powers at their disposal or may apply them differently. However, in my view, that is another unavoidable downside of the judgment in GAT. Furthermore, the matter is not left entirely to national law. As I will explain further in the next section, EU law significantly frames the latter, ensuring a sufficient degree of uniformity.

88. Finally, it is often argued that the ‘narrow’ reading of the judgment in GAT is not ideal for the effective enforcement of patents, either. The ‘splitting’ of the validity and infringement issues into two sets of proceedings increases the cost and inconvenience for the parties. The need for the courts in charge of the infringement proceedings, in some circumstances, to await an answer on validity from the authorities of the State of registration could potentially delay those proceedings, whereas it is usually a matter of urgency

for the patent holder that such infringement be sanctioned and prohibited. (77) It may also incite alleged infringers to raise ‘torpedo’ defences or delay the bringing and conduct of the invalidity action in order to paralyse the infringement proceedings. While I generally agree with those objections (as it stems from Section 1), the fact remains that, of the two possible approaches left on the table after the judgment in GAT, it is the ‘lesser evil’. Furthermore, the issues outlined above can be curtailed with pragmatic measures, as discussed below.

(c) Practical guidelines for national courts

89. At the hearing, at the invitation of the Court, the interveners discussed how courts outside the State of registration should act when hearing infringement proceedings and an invalidity defence is raised. Although, as discussed above, that is mostly a matter for the procedural rules of those courts, the Court is, in my view, competent to set guidelines in that regard. Indeed, I recall that, pursuant to settled case-law, those procedural rules cannot impair the effet utile of the Brussels I bis Regulation, and must be applied accordingly. (78) The principles laid down in the TRIPS Agreement and in Directive 2004/48, as well as, in relation to the patent holder, the right to an effective remedy and, on the alleged infringer’s side, the rights of defence, both protected under Article 47 of the Charter, also frame national law in that regard.

90. When an invalidity defence has been (properly) (79) raised by the alleged infringer, a solution, which is often advanced by commentators and debated before the Court, would be for the courts hearing the infringement proceedings – where their procedural rules give them the power to do so (which is, I assume, usually the case) – (80) to stay the proceedings until the validity of the patent in question has been determined by the authorities of the State of registration. (81)

91. While that is indeed a solution, I agree with BSH that those courts should not grant a stay automatically. They must, in fact, carefully consider the matter before doing so, because of the (potentially significant) delays that such a measure would inevitably entail for the resolution of the infringement proceedings. A stay should only be granted where, in accordance with Article 3 of Directive 2004/48 and Article 41 of the TRIPS Agreement, it is proportionate and fair to do so, and those delays are ‘warranted’. Those courts must, therefore, be accorded the discretion to balance, on the one hand, the requirements of efficiency of procedure as well as the right to an effective remedy of the patent holder, and, on the other hand, the sound administration of justice and the rights of defence of the alleged infringer.

92. Specifically, as BSH and the Commission submit, the courts hearing the infringement proceedings should assess the seriousness of the invalidity challenge first. In my view, Article 24(4) of the Brussels I bis Regulation does not prohibit them from taking a preliminary view on how the authorities of the State of registration would decide the matter. (82) In that regard, those courts should only consider granting a stay where that challenge has a

genuine prospect of success. Indeed, because patents are granted after a prior control of the patentability requirement has been conducted by patent offices, they benefit from a presumption of validity. Therefore, the grounds put forward by the alleged infringer must seem, prima facie, sufficiently solid to call that presumption into question. Where that is not the case, those courts can assume that the patent is valid and rule on the infringement accordingly. Moreover, it would make little sense, in the light of efficiency of procedure and the right to an effective remedy of the patent holder, to delay the infringement proceedings in cases of frivolous invalidity defences. There is also no risk (or, at least, a negligible one) of irreconcilable decisions, as there is no (reasonable) chance that the authorities of the State of registration subsequently declare the patent invalid. (83) Such an assessment also limits the possibility of infringers raising spurious defences as dilatory tactics. (84)

93. Where the invalidity defence is serious, the courts in charge of the infringement proceedings should grant a stay. Indeed, in such circumstances, the rights of defence would usually require it. (85) So would the sound administration of justice, as the risk of irreconcilable decisions discussed above would be significant. However, as the Commission submits, to ensure the efficiency of proceedings and to avoid, once more, dilatory tactics by the alleged infringer, those courts should set a deadline for the latter to bring invalidity proceedings in the State of registration (if they have not already done so). If the alleged infringer does not do so, those courts should lift the stay, assume that the patent is valid and rule on the infringement. Where such a stay has been granted, those courts should follow the progress of the invalidity proceedings and decide to maintain or lift the stay accordingly.

94. Finally, for the duration of the stay, nothing prevents the courts hearing the infringement proceedings from ordering provisional measures, including protective ones, such as an interlocutory injunction prohibiting the continuation of the potentially infringing acts (here again, depending on the seriousness of the validity challenge). (86) Indeed, such a possibility was expressly preserved by the Court in the judgment in Solvay, (87) and it should be used where proportionate to safeguard the rights of the patent holder.

B. The ‘reflexive effect’ of Article 24(4) (third question)

95. It flows from Section A of this Opinion that, while the Swedish courts have jurisdiction, pursuant to Article 4(1) of the Brussels I bis Regulation, to hear the infringement proceedings brought by BSH, they cannot adjudicate the validity of the parts of the European patent allegedly infringed. Under Article 24(4) of that regulation, the courts of the various Member States where those parts have been validated are exclusively competent to determine that issue.

96. That being said, given that BSH’s action is also based on the part of that European patent that was validated in Türkiye and that Electrolux challenges, the referring court wonders, by its third question, whether

Article 24(4) of that regulation is ‘applicable to a court of a third [State]’, that is to say, whether, in the main proceedings, it ‘confer[s] exclusive jurisdiction’ on the Turkish courts over that issue.

97. Taken literally, that question calls for an obvious answer. As a piece of EU law, the Brussels I bis Regulation binds the Member States. It determines the jurisdiction of their courts. That instrument cannot possibly confer any sort of jurisdiction on the courts of third States. The European Union has no competence in that regard. The jurisdiction of those third-State courts depends on their own rules of private international law.

98. Nevertheless, to provide a useful answer to the referring court, the Court cannot limit itself to that self-evident finding. Read in the context of the main proceedings, it is clear that the third question concerns, in essence, not the positive, jurisdiction-conferring effect of Article 24(4) of the Brussels I bis Regulation, but its negative, jurisdiction-depriving effect. What is really at issue is whether that provision deprives Member State courts of the power to adjudicate the validity of third-State patents in the same way that those courts are deprived with respect to patents registered in other Member States.

99. As the French Government observes, understood in that way, that question raises a cross-cutting issue, the relevance of which goes well beyond the scope of the present case. Indeed, it may arise in relation to any of the subject matters for which Article 24 of the Brussels I bis Regulation lays down a rule of exclusive jurisdiction. For instance, what if Member State courts are seised of a claim concerned with the validity of rights in rem over immovable property (a matter addressed in Article 24(1) thereof), but that property is located in China? The same issue may also arise in relation to exclusive choice of court agreements. When such an agreement designates the courts of a Member State, another provision of that regulation, namely Article 25, deprives all other courts of jurisdiction. However, what if the courts of a Member State are seised notwithstanding a similar agreement in favour of third-State courts?

100. The answer to that issue is, by contrast, very obscure. In fact, it has generated significant debate in academic writing and before the national courts. So far, the Court has not provided a clear and comprehensive answer. As I will explain in detail in the next sections, the complexity of the issue stems from the fact that, when it comes to its territorial scope, the Brussels regime suffers from what I would call a ‘design flaw’ (1), which requires deeper reflection as to the best way to ‘fill the gaps’ of that regime with regard to those scenarios (2).

1. The ‘design flaw’ of the Brussels regime

101. The ‘design flaw’ mentioned above is the result of a paradox. On the one hand, it is clear that the territorial scope of the Brussels I bis Regulation extends to disputes having strong connections with third States. Indeed, under Article 4(1) of that regulation, interpreted in the light of the seminal judgment in *Owusu*, (88) that regulation is applicable, *ratione territoriae*, to any cross-border dispute where the defendant is, like *Electrolux* in the present case, domiciled in a Member State; it does

not mean only ‘intra-EU’ disputes. Disputes which, beyond the seat of that litigant, are connected with third States are also covered, even where the subject matter is closely related to such a State or where there is a choice-of-court agreement in favour of third-State courts. (89) In principle, only where the defendant is not domiciled in the European Union is the matter excluded from the scope of that regulation, pursuant to Article 6(1).

102. On the other hand, the Brussels regime was not actually designed for disputes connected to third States. That regime was, for the most part, drafted with ‘intra-EU’ disputes in mind. Articles 24 and 25 of the Brussels I bis Regulation demonstrate that clearly. The wording of the first provision limits its scope to disputes, the subject matter of which is closely related to a ‘Member State’. The second refers to choice-of-court agreements regarding ‘the courts of a Member State’ only. The scenario of disputes having similar connections with third States was not envisioned when crafting those rules. As a result, that regime is generally silent on the effect, if any, that such connections should have on the jurisdiction of the courts of the Member States. (90)

2. ‘Filling the gaps’ of the Brussels regime

103. Where a Member State court is seised of a dispute which, on the one hand, involves an EU defendant but, on the other, is strongly connected to a third State (because it concerns a subject matter closely related to that State, or because it is covered by an exclusive choice-of-court agreement in favour of its courts), the general silence of the Brussels I bis Regulation on the matter leaves open the question of how that court should proceed. Three possible answers can be derived from the literature and the debate that took place before the Court in the present case.

104. At one extreme lies a first answer, which was not supported by any interveners before the Court, pursuant to which Article 24 or Article 25 of the Brussels I bis Regulation would apply, by analogy, in that scenario. Accordingly, pursuant to the relevant provision, a Member State court would be deprived of jurisdiction to hear such a dispute and would be bound to dismiss the proceedings.

105. At the other extreme lies a second answer, which is supported by BSH, the French Government (reluctantly) (91) and the Commission, pursuant to which the general rules of that regulation would apply instead. As a result, amongst others, the courts of the Member State where the defendant is domiciled would have jurisdiction pursuant to Article 4(1) of the Brussels I bis Regulation. Furthermore, they would be bound to exercise it and thus to determine the case, save in some limited circumstances.

106. In between lies a third answer, which *Electrolux* supports. It corresponds to the ‘reflexive effect’ (*effet réflexe*) theory developed many years ago by *Droz*. (92) It boils down to saying that while a Member State court may have jurisdiction under that regulation over a dispute featuring such connections with a third State, it may decline to exercise it, where that ‘reflects’ the system established therein.

107. In my view, the two extreme answers must be rejected and the middle one endorsed. Indeed, as I will explain in the sections below, because Articles 24 and 25 cannot possibly apply in such circumstances (a), the general rules of the regulation do instead (b); however, a Member State court cannot be bound to exercise the jurisdiction it derives from those rules in such situations (c). I will then clarify the conditions under which it can legitimately decline jurisdiction (d).

(a) Articles 24 and 25 cannot apply

108. Although part of the literature suggests the contrary, (93) it is clear, in my view, that Articles 24 and 25 of the Brussels I bis Regulation cannot apply, as such, to disputes having connections of the kind envisioned therein with third States.

109. Such an interpretation would be in direct conflict with the express wording of those two articles, which, as indicated above, are limited to disputes, the subject matter of which is closely related to a ‘Member State’, and choice-of-court agreements designating the courts of a ‘Member State’. (94) Furthermore, extending the scope of those provisions through analogical reasoning to similar scenarios involving third States would be incompatible with the principle of strict interpretation of exceptions, as BSH, the French Government and the Commission submit. Besides, the Court has already refused to do so. In the judgment in *IRnova*, it ruled that, since Article 24(4) of the Brussels I bis Regulation ‘does not envisage’ disputes concerned with the validity of third-State patents, ‘that provision cannot be regarded as applicable’ in such a situation (that reasoning being transposable to all the provisions of Article 24). (95) Similarly, in its judgment in *Coreck Maritime*, (96) the Court took the view, with respect to the rule equivalent to Article 25 laid down in the Brussels Convention, that ‘as the wording of ... Article 17 ... itself makes clear’, it ‘does not apply to [choice-of-court agreements] designating a court in a third [State]’.

110. Furthermore, as the French Government observes, the system established under Articles 24 and 25 of the Brussels I bis Regulation, pursuant to which Member State courts are obliged to relinquish jurisdiction in favour of the courts designated by those provisions, makes sense for ‘intra-EU’ disputes only. In those circumstances, pursuant to that regulation, where one court has no jurisdiction, another one does. That is not the case with respect to ‘external’ disputes. As I mentioned before, the jurisdiction of third-State courts depends on their own rules of private international law. While those courts usually consider themselves competent where the disputed matter is closely related to their territory, or where chosen in a jurisdiction agreement, that may not always be the case. If Member State courts were deprived of jurisdiction in such a situation, there would be a denial of justice. Furthermore, the strict, almost automatic obligation for the courts of the Member State to remit litigants to other courts under Articles 24 and 25 is justified by the ‘mutual trust’ that those States accord to each other’s judicial institutions. (97) That ‘trust’ does not extend to third States. It cannot be presumed that litigants would

have a fair trial in such a State. It can even be excluded in certain cases.

(b) The general rules of the regulation apply instead

111. As BSH, Electrolux, the French Government and the Commission submit, since Articles 24 and 25 of the Brussels I bis Regulation are not applicable with respect to disputes having connections of the kind envisioned therein with third States, the logical consequence, in the system established under that regulation, is that the general rules apply instead. It follows that, inter alia, the courts of the Member State where the defendant is domiciled have jurisdiction to hear such a dispute, under Article 4(1) of that regulation.

112. That systematic reading is supported by several of the official reports that accompany the Brussels instruments. (98) Most of all, it has been endorsed implicitly (but quite clearly) by the Court (Full Court) in Opinion 1/03 (New Lugano Convention). (99) For the present purposes, it suffices to recall that that decision was concerned with whether the European Union had exclusive competence to conclude the Lugano II Convention, which depended, in turn, on whether the latter would ‘affect’ the Brussels regime. (100) The Court considered that it would. It explained that, with respect to disputes that involve a defendant domiciled in a Member State but that are closely related to a third-State party to that convention, or covered by a choice-of-court agreement in favour of its courts, the future convention would confer exclusive jurisdiction on the third State, (101) whereas, under that regulation, the courts of that Member State would have had jurisdiction. (102)

(c) Member State courts cannot be bound to exercise the jurisdiction they derive from the general rules of the regulation

113. While, notably, the courts of the Member State where the defendant is domiciled have jurisdiction over disputes having such connections with third States under Article 4(1) of the Brussels I bis Regulation, I disagree with the view, supported by BSH, the French Government and the Commission, that those courts are bound to exercise that jurisdiction, save in a narrow set of circumstances. In my view, such an approach is neither required by the text of that regulation and the related case-law (1), nor is it compliant with the objectives of the Brussels regime (2). The fact that international agreements may, in some situations, remedy the difficulties that such an interpretation would generate does not justify endorsing it (3), and nor does the alleged intent of the EU legislature (4).

(1) The terms of the regulation and the related case-law

114. The main argument put forward by BSH, the French Government and the Commission is based on the text of the Brussels I bis Regulation. In their view, it flows from the terms of Article 4(1) thereof (‘Subject to this Regulation, persons domiciled in a Member State shall ... be sued in the courts of that Member State’) that, in principle, jurisdiction under that provision is mandatory. It means that, where the courts of that State are seised, they are generally bound to hear and

determine the case. Furthermore, in the judgment in *Owusu*, the Court took, with respect to the equivalent provision of the Brussels Convention (Article 2), the strict view that ‘there can be no derogation from the principle it lays down except in the cases expressly provided for’ by the Brussels regime. (103) In that case, the courts of the United Kingdom (then a Member State) had been seised of a dispute against, *inter alia*, a defendant domiciled in that State concerning a tort that had occurred in Jamaica. The first question referred by those courts was whether they were permitted to decline jurisdiction in favour of the courts of Jamaica, pursuant to the common law doctrine of *forum non conveniens*. (104) The Court replied in the negative, on the ground that the Brussels regime does not contain such an exception. (105)

115. For those interveners, since the Brussels I bis Regulation does not expressly provide exceptions for disputes whose subject matter is closely related to third States, or covered by a choice-of-court agreement in favour of third-State courts, it follows that the courts of the Member State, when seised of such a dispute and competent under Article 4(1) of that regulation, are bound to hear and determine the case. They could decline jurisdiction only in the specific circumstances envisioned by certain rules added by the EU legislature with the adoption of the Brussels I bis Regulation, namely Articles 33 and 34 thereof, that is to say, in the case of concurrent proceedings in third-State courts and only where the dispute was already pending before the latter when the Member State courts were seised. (106)

116. That is, in my view, a simplistic reasoning.

117. First, to deduct, from the mere absence of provisions dedicated to disputes strongly connected to third States in the Brussels I bis Regulation, that Member State courts are generally bound to ignore those connections and to rule on such cases is a flawed logic. Indeed, it disregards the fact that, as indicated in point 102 above, that instrument was not designed with those disputes in mind. That fact explains the general silence of the text on the matter, and why any positive consequences cannot, in my view, be drawn from it. (107)

118. Secondly, one also cannot reasonably deduce, from the mere fact that Articles 33 and 34 of the Brussels I bis Regulation now expressly permit Member State courts to decline jurisdiction over, *inter alia*, such disputes where concurrent proceedings are pending in the courts of a third State, that any possibility to do so is excluded in all other scenarios. Again, the text of that regulation is simply silent on that question. Indeed, nothing in the wording of those provisions or in the related recitals indicates that they are meant to regulate exhaustively the possibility for Member State courts to decline jurisdiction in favour of the courts of third States. (108)

119. Thirdly, the judgment in *Owusu*, in fact, provides no authority for the literal interpretation suggested by BSH, the French Government and the Commission. Admittedly, the Court formulated its statement about the only possible derogations to the mandatory effect of (now) Article 4(1) of the Brussels I bis Regulation being

the ones expressly provided therein in unqualified terms. However, at the same time, it refused to answer the second question of the referring court, which concerned, specifically, whether Member State courts are bound to exercise jurisdiction also when seised of disputes in which the subject matter is closely related to third States, or notwithstanding choice-of-court agreements designating third-State courts, because those situations were not at issue in the main proceedings. Clearly, if that statement were meant to cover those situations as well, the Court would have replied to both questions together. Instead, it specifically excluded them from its judgment. (109)

120. Finally, at least two other decisions of the Court, not discussed by those interveners and delivered respectively before and after the judgment in *Owusu*, indicate (quite clearly, in my view) that Member State courts are, in fact, not bound to hear and determine disputes having such close connections with third States, despite the absence of express provisions to that effect in the Brussels regime.

121. In the judgment in *Coreck Maritime*, the Court, having decided that Article 17 of the Brussels Convention is not ‘applicable’ to choice-of-court agreements designating third-State courts, immediately specified that, if it is seised notwithstanding such an agreement, a Member State court ‘must ... assess the validity of the [agreement] according to the applicable law, including conflict of laws rules, where it sits’. (110) The logical implication of that reasoning is that if that court finds that agreement to be valid, it may give effect to it and decline jurisdiction in favour of the designated courts.

122. In the judgment in *Mahamdia*, the Court took the view that the courts of a Member State, having jurisdiction over an employment dispute pursuant to the protective rules (then) laid down for such matters in the Brussels I Regulation, were not permitted to give effect to a choice-of-court agreement designating the courts of a third State. Crucially, however, it did so on the ground that the agreement at issue did not respect the limits laid down in the Brussels regime with respect to party autonomy in employment matters. (111) The logical implication is that, where such limits are respected (see, further, point 150 below), Member State courts are permitted to give effect to jurisdiction agreements in favour of third-State courts. (112)

123. Although those judgments concerned choice-of-court agreements, the general idea that emerges from them (that Member State courts are permitted, in certain situations, not to exercise jurisdiction, even in the absence of express provisions to that effect in the Brussels regime) is, in my view, transposable to disputes whose subject matter is closely related to third States.

(2) The teleological and consistent interpretation of the regulation

124. Turning to principles, it seems to me that, while, as indicated above, it would be undesirable to completely deprive Member State courts of jurisdiction over disputes which have connections of the kind envisioned in Article 24 or Article 25 of the Brussels I bis

Regulation with third States, it would be unjustifiable to oblige those courts to rule on them.

125. First, such an interpretation would be at variance with the very reasons, related to fundamental principles, underpinning Articles 24 and 25 of the Brussels I bis Regulation.

126. The *raison d'être* of (most of) the rules of exclusive jurisdiction laid down in Article 24 of the Brussels I bis Regulation is, I recall, the deference due to certain sovereign rights and interests. Disputes over rights in rem in immovable property (Article 24(1) of that regulation) touch upon the traditional sovereignty of States to control land within their borders. Those concerned with the validity of entries in public registers or patents (Article 24(3) and (4) thereof) question the functioning of the public administrations involved. Those surrounding the enforcement of judgments (Article 24(5) thereof) directly concern the right, reserved to States, to exercise enforcement power on their territory. States would not accept that foreign courts interfere with such matters. They can only be adjudicated by 'their' tribunals. (113) Remarkably, that policy was regarded as so important by EU legislature that it provided for Article 24 of the Brussels I bis Regulation to apply as soon as a Member State's sovereign rights and interests are at stake, irrespective of the domicile of the defendant. (114)

127. Accordingly, I fail to see the logic behind the contention that the courts of a Member State are, on the one hand, prohibited to adjudicate on the validity of a title of land situated in another Member State or the suitability of enforcement measures taken by its authorities (and so on), but are, on the other hand, generally mandated to do exactly that where a third State is concerned. The notion that, in the main proceedings, the Swedish courts are prohibited from adjudicating the validity of, say, the German part of the European patent at issue, even as a mere preliminary question, but would have been obliged, if seised to that effect, to issue a declaration as to the validity of the Turkish one, is baffling; the same sovereign rights and interests would be respected in the first case, but completely dismissed in the other. (115)

128. Such an interpretation of the Brussels I bis Regulation would be questionable from the point of view of public international law. Although the issue is disputed, the majority view is that international law sets boundaries to States' adjudicatory jurisdiction over civil matters. (116) Admittedly, as the Commission submits, where the defendant in a civil dispute is domiciled in a Member State, such a connection to its territory usually entitles the latter, in public international law, to adjudicate on the matter. However, where that dispute impinges upon the rights of another State, its claim to jurisdiction is paramount. The location of the defendant's domicile could hardly serve as justification for the first State to interfere in the domestic affairs of the second. That could be seen as a breach of the principle of sovereign equality. (117) The Brussels I bis Regulation must be interpreted consistently with those fundamental principles. (118) The system laid down in

that regulation is not isolated from the rest of the world and it cannot entirely invalidate the claims to exclusive jurisdiction of third States.

129. For its part, Article 25 of the Brussels I bis Regulation reflects a policy in favour of party autonomy. The EU legislature found it desirable to promote the ability of contractual partners to 'choose their judge'. (119) By resolving the issue of which court(s) would adjudicate potential disputes arising from contracts in advance, choice-of-court agreements increase legal certainty and the predictability of litigation, which, in turn, fosters international commerce (hence the frequent use of that instrument by businesses). Here again, the EU legislature considered that policy so important that, where the courts of a Member State are designated in such an agreement, it mandated, in principle, (120) any other courts to cede jurisdiction to the courts chosen by the parties, and Article 25 to apply irrespective of the defendant's domicile. (121)

130. Accordingly, I fail to see once more the logic behind the contention that Member State courts should, on the one hand, be bound to enforce choice-of-court agreements in favour of the courts of another Member State but, on the other hand, should generally ignore similar agreements designating third State courts. That would subvert the policy pursued in the Brussels regime. The will of the parties would be respected in the first case but dismissed in the other. If Member State courts would be required to assume jurisdiction notwithstanding such agreements, those instruments would lose their purpose of ensuring legal certainty. For example, a European Union-based company and a company established in the United States could not reach a binding compromise in favour of the courts of New York (United States). The United States company could freely break its commitment by suing before the courts of the Member State where the EU company is established. If seised first, those courts would be denied the permission to enforce the agreement in question. (122)

131. Such an interpretation of the Brussels I bis Regulation would, again, be questionable from the point of view of overarching norms, namely, this time, fundamental rights. Indeed, party autonomy is an expression of freedom of contract, which is protected under EU law by, *inter alia*, Article 16 of the Charter. (123) That freedom entails that, in principle, a State's legal system gives effect to the will of the parties to a contract. If Member State courts were prohibited, under an extreme view of the 'mandatory effect' of the Brussels I bis Regulation, from giving effect to choice-of-court agreements in favour of third-State courts, that would entail a severe and, in my view, unjustifiable limitation to that freedom. (124) Accordingly, that interpretation cannot be endorsed by the Court. (125)

132. Secondly, that interpretation would also go against the general objectives of the Brussels regime. Notably, it seems to me that obliging the courts of the Member States, where competent under the rules of the Brussels I bis Regulation, to adjudicate on the validity of titles of property situated in third-State territories, or of third-

State patents (and so on), or disputes covered by choice-of-court agreements designating third-State courts, would hardly contribute to the legal certainty that that regulation seeks to achieve in terms of jurisdiction.

133. That is obvious, in particular, with respect to choice-of-court agreements. Parties expect that only the courts chosen by them will hear and determine their potential dispute. That some Member State courts might be obliged to rule notwithstanding such agreement would shatter those expectations.

134. Moreover, as Electrolux submits, such a solution would hardly contribute to the sound administration of justice. Indeed, while the decisions that the courts of the Member States would issue on such disputes would be considered valid in the European Union, they would (precisely because they impinge on a sovereign matter or because they were delivered in breach of a choice-of-court agreement) most likely be ignored in the third States in question. (126) Plainly, a ruling on the validity of a property title, or of a patent, is of little value if it cannot be enforced in the State where the property is located or the patent registered. As for a ruling delivered in breach of a choice-of-court agreement, while the claimant may find some strategic advantage in bringing proceedings in the Member State where the defendant is domiciled (since usually the assets of the latter are located in that State), because the judgment would be denied effect in the third State initially chosen, nothing would prevent the same dispute from being re-adjudicated there by the other party. On top of that, in all those scenarios, irreconcilable decisions may end up being delivered by Member State and third-State courts on the same dispute.

(3) International conventions do not provide a comprehensive answer

135. The French Government and the Commission observe that, in the absence of dedicated provisions in the Brussels I bis Regulation, a solution to the objections expressed above may be found in the international conventions dealing with jurisdiction in civil matters, which bind the European Union and its Members. Under certain conditions, (127) such conventions take precedence over the Brussels regime. Where those conventions are applicable, the jurisdiction of the courts of the Member States is governed by their rules instead. The two main instruments (128) in that regard are the Lugano II Convention and the Hague Convention of 30 June 2005 on Choice of Court Agreements. (129) The first contains provisions equivalent to Articles 24 and 25 of the Brussels I bis Regulation. The second mandates the enforcement, by the courts of the Contracting Parties, of exclusive choice-of-court agreements.

136. Admittedly, those international conventions provide for an ideal solution to the issues discussed above. They ensure that Member State courts respect the rights and interests of the third States involved, as well as those of private parties willing to entrust their disputes to certain third-State courts. They also guarantee reciprocity from the States concerned, as well as the recognition and enforcement, in all the Contracting

Parties, of the decisions given by the courts of their counterparts.

137. However, the solution so provided is inevitably (very) partial. By nature, those conventions take precedence over the Brussels regime only in the cases where the third State concerned by the dispute, or whose courts were designated by a choice-of-court agreement, is a party to the convention in question. (130) In that regard, for instance, the Lugano II Convention only binds, besides the Member States, the European Free Trade Association States and the Swiss Confederation. It offers no solution where the patent at issue is, like in the present case, registered in Türkiye. Similarly, to date, only a handful of third States are bound by the Hague Convention. (131) Thus, only in some situations do such conventions provide a solution to the issues discussed above.

138. Obviously, the more third States participate in such international conventions with the European Union, especially the Hague Convention, the more relevant such conventions will become in international litigation and contribute to the certainty of the field. Nonetheless, pragmatically speaking, never every third State in the world, or almost the majority of them, will do so. Thus, multilateral solutions do not (and will never) alleviate the need for sound unilateral solutions in the Brussels regime. The obligation for Member State courts to adjudicate on disputes closely connected to third States is not one of those solutions.

(4) The alleged ‘clear intent’ of the EU legislature

139. BSH, the French Government and the Commission nonetheless argue, or at least imply, that the ‘clear intent’ of the EU legislature, when adopting the Brussels I bis Regulation, was that Member State courts, where competent under that instrument, be bound to hear and determine disputes having strong connections with third States, save where Articles 33 and 34 of that regulation apply. While it is well aware of the shortcomings of that solution, enumerated above, and thus unsatisfied with the result, the French Government submits that it is not for the Court to correct the will of the legislature by way of interpretation.

140. I cannot but agree with the general idea behind that objection. Nonetheless, I do not think that it bears weight in this particular instance.

141. First, together with Advocate General Bobek in his Opinion in BV, (132) I am of the view that the intent of the EU legislature is, in principle, only conclusive where it is clearly expressed in the adopted legislation. As explained, *inter alia*, in point 118 above, that is not the case here. If the will of the legislature was that explained by the French Government and the Commission, it would have had ample opportunity to state it, at least, in a dedicated recital of the Brussels I bis Regulation.

142. Secondly, with respect to what happened during the legislative process that led to the adoption of that regulation, I also concur with Advocate General Bobek that, generally speaking, the Court should avoid undertaking ‘an almost archaeological excavation’ of the travaux préparatoires of an instrument and feel bound by events, ideas and intentions it (re)discovered that way,

especially because such an exercise usually does not reveal a clear picture, but a complex and blurry one. (133) That is precisely the case here.

143. As the French Government and the Commission emphasise, it is clear from the relevant travaux préparatoires that the EU legislature was aware of the issue surrounding the application of the Brussels regime to 'external' situations. (134) Furthermore, while the initial proposal of the Commission only contained a new provision on concurrent proceedings, proposals to include rules providing for discretion to decline jurisdiction in cases where the subject matter closely related to a third State or a choice-of-court agreement designating third-State courts applied were put forward at several steps of the legislative process, both before the European Parliament (135) and the Council, notably by the French and UK delegations. (136) Evidently, those proposals were rejected by the legislature, as only the rules on concurrent proceedings were kept in the final text (which became Articles 33 and 34 of the Brussels I bis Regulation).

144. However, one should not jump to any conclusions. There is, in the publicly available documents, little (if any) explanation as to why the EU legislature rejected those proposals (137) or, most importantly for the present purpose, as to the consequences that the absence of such dedicated rules in the Brussels regime should, in its mind, have on the jurisdiction of Member State courts with respect to disputes closely connected to third States. Notably, I did not find any indication, let alone a clear statement, that the legislature sought, by not adding such rules, to deny the possibility for Member State courts to decline jurisdiction. In fact, the only internal document of the Council that I could find that substantially discusses the proposals of the French and United Kingdom Governments is a note from the German delegation, which indicates the contrary. Therein, that delegation declares its opposition to those proposals but, crucially, on the ground that 'the Brussels I Regulation does not definitively regulate the international jurisdiction of courts in the Member States vis-à-vis courts in third States' and that, consequently, it should, in particular, 'continue to be left for the national law of the Member States independently to regulate the effect of an agreement conferring jurisdiction on the courts of a third State'. (138) That explanation echoes the judgment in *Coreck Maritime*, discussed in point 121 above. (139)

145. Besides, the refusal of the legislature to add such rules, save for Articles 33 and 34 of the Brussels I bis Regulation, needs, in my view, to be considered within its context. I recall that the original intent of the Commission, through its legislative proposal, was to proceed to a complete 'internationalisation' of the Brussels regime by extending it to defendants domiciled in third States. (140) However, the legislature rejected the idea, inter alia because of the impact that such an extension could have on the relations of the European Union with its international partners and the difficulties litigants would face in having the decisions delivered by the courts of the Member States recognised abroad. In

that context, it seems that the legislature did not mean to impose a comprehensive solution on the issues of disputes closely connected to third States. Rather, it wanted to deal with the issue a minima, regulating only concurrent proceedings and leaving the rest to national law (for now). (141)

146. Finally, and in any event, I do not think it ever was in the EU legislature's power to oblige the courts of a Member State to rule on matters impinging on the sovereign rights and interests of third States, or to require those courts to generally deny choice-of-court agreements pointing to such a State. Evidently, public international law and Article 16 of the Charter, as higher norms, frame the legislature's discretion when adopting an instrument of secondary EU law such as the Brussels I bis Regulation. I have explained, in points 128 and 131 above, why such a solution would be incompatible with those higher norms. Hence, while the legislature could legitimately choose to add, in that instrument, rules governing the conditions under which a court of a Member State can decline jurisdiction in favour of third-State courts in those situations, or not to add such rules, the implication of the latter choice cannot possibly be the one defended by the French Government and the Commission.

(d) Member State courts may decline to hear such disputes, where they 'reflect' the system of the regulation

147. Together with *Electrolux*, I am of the view that, while the courts of a Member State may have jurisdiction, under the rules of the Brussels I bis Regulation, in disputes whose subject matter is closely related to third States or is covered by an exclusive choice-of-court agreement designating their tribunals, that regulation permits them to decline to hear the case. It is, quite simply, the only rational answer, achieving the purpose of that instrument and ensuring its consistency with higher norms.

148. For those particular disputes, an implicit derogation from the mandatory effect of Article 4(1) of that regulation must be acknowledged. As that instrument does not (yet) contain provisions conferring on the courts of the Member States the power to decline jurisdiction in such scenarios, it means that its silence is to be construed in the sense that it allows those courts to do so on the basis of their national law. That is what the Court hinted at in the judgment in *Coreck Maritime*.

149. That being said, Member State courts do not have an unfettered discretion to decline jurisdiction, based on their national law, over those disputes (as that last judgment, read in isolation, could imply). As Droz explained a long time ago, and as the overwhelming majority of courts (142) and academics (143) that have dealt with the matter have confirmed since, Member State courts may do so only where it 'reflects' the system established in the Brussels I bis Regulation. Specifically, they can do so in cases where, had there been a similar connection with a Member State, the court would have had to relinquish jurisdiction under Articles 24 or 25 of that regulation. (144)

150. That requirement of ‘reflectivity’ implies, first, that a court of a Member State may refuse to exercise jurisdiction over a dispute connected to a third State only where the matter in dispute falls within the substantive scope of one of the rules of exclusive jurisdiction laid down in Article 24, (145) or where that court is seised notwithstanding a choice-of-court agreement which fulfils the requirements laid down in Article 25 (146) (so that, in a similar ‘intra-EU’ dispute, the relevant article would have applied). Secondly, with respect to those agreements, following the judgment in *Mahamdia*, ‘reflectivity’ implies that such a course of action be taken only where the limits imposed on their effects in ‘intra-EU’ disputes are respected. A Member State court cannot give effect to such an agreement where the dispute falls under the exclusive jurisdiction of the courts of another Member State, or where that agreement does not comply with the provisions of the regulation which protect weaker parties (policy holder, consumer or employee). (147)

151. Such a requirement of ‘reflectivity’ is both logical and crucial. Indeed, if a Member State court may decline jurisdiction in an ‘external’ situation where, under Articles 24 or 25 of the Brussels I bis Regulation, it would have had to do the same had the situation been ‘intra-EU’, the consistency of the Brussels regime is ensured. It also permits the attainment of the policies pursued under those provisions in both cases. By contrast, there would be no reason for ‘external’ situations to be treated more favourably than ‘intra-EU’ disputes. If EU law did not frame the powers of national courts, the paramount rules that confer exclusive jurisdiction on Member States, or that protect weaker parties, could easily be circumvented by businesses by simply including third-State choice-of-court agreements in their contracts. Thus, those rules would lose a significant part of their effectiveness. (148)

152. Where those conditions are fulfilled, the requirement of ‘reflectivity’ does not go as far as requiring a Member State court to decline jurisdiction in the manner that Articles 24 or 25 of the regulation require in the cases to which they apply directly, that is to say, automatically. I have explained in point 110 above why that cannot be the case: a risk of denial of justice could ensue, in breach of Article 47 of the Charter. Accordingly, that court must be accorded some limited discretion, to verify that (i) the third-State courts concerned indeed have exclusive jurisdiction under their own rules of private international law and (ii) those parties may obtain an effective remedy there. If that is not the case, the Member State court seised should not decline jurisdiction; it should do so in the opposite scenario. Where the matter is not clear, it should stay proceedings until the parties have seised the third-State court in question (and it is clear that that court will adjudicate the matter) in proceedings that offers fair-trial guarantees. (149)

153. In the case in the main proceedings, it follows from the foregoing considerations that, while Article 24(4) of the Brussels I bis Regulation does not apply directly with respect to the issue of the validity of the Turkish patent,

contested by Electrolux by way of a defence, that provision may have ‘reflexive effect’ on the jurisdiction of the Swedish courts. It means that those courts may use the powers available to them under their national law to decline to adjudicate that issue and to stay proceedings until the Turkish courts determine the validity of that patent, under the conditions explained above.

154. Contrary to what the French Government implies, recognising such an implicit derogation to the mandatory effect of Article 4(1) of the Brussels I bis Regulation does not go *contra legem* or, stated differently, ‘rewrites’ that regulation. That solution does not require the Court to depart from the text which, I recall, is silent on the issue under consideration and, thus, open to such a teleological and consistent interpretation. If anything, it may well incite the EU legislature to deal with the matter when revising that instrument.

155. Recognising such (limited) room for national law does not mean reversing the judgment in *Owusu* either, despite what BSH and the Commission argue. I recall that the Court specifically excluded the hypothesis of disputes closely related to third States, or choice-of-court agreements in favour of third-State courts, from its analysis. Accordingly, it can perfectly well recognise an exception, tailored to those situations, to its seemingly unqualified statement about the mandatory effect of (current) Article 4(1) of the Brussels I bis Regulation. (150) Furthermore, doing so reconciles that judgment with that in *Coreck Maritime*. In fact, the interpretation suggested in the present Opinion has the non-negligible advantage of conciliating all the decisions related to the issue under consideration (from the earliest, the judgment in *Coreck Maritime*, to the most recent, the judgment in *IRnova*), where any other interpretation would require the Court to depart from certain of those precedents.

156. Those interveners nevertheless retort that, if Member State courts were permitted to decline jurisdiction in the scenarios at issue, under the powers reserved to them under their national law, that would be contrary, if not to the letter, at least to the rationale of, the judgment in *Owusu*. Indeed, such a solution would create the same issues as the doctrine of *forum non conveniens*.

157. In my view, the comparison does not withstand close scrutiny.

158. The application of the *forum non conveniens* doctrine, at issue in the judgment in *Owusu*, would have given Member State courts a wide discretion not to exercise jurisdiction in any ‘external’ disputes, based on the appropriateness of the forum, taking into account a wide range of factors. Such a flexible, case-by-case approach was completely at odds with the spirit of the Brussels regime, based on clear-cut rules. It would have seriously affected the predictability of jurisdiction under that regime, something which, in turn, would have undermined the principle of legal certainty and the legal protection of persons established in the European Union (as the defendant would not have been able to reasonably foresee where he or she could end up being sued, and the

claimant would have had no guarantee that the court seised, while designated by that regime, would actually hear the case). Finally, the uniform application of that regime in the Member States would have been affected, in so far as that doctrine is recognised only in a few of them. (151)

159. By contrast, here, I propose to recognise a narrow discretion for Member State courts to decline jurisdiction in specific circumstances where, and to the extent that, it ‘reflects’ the solutions applicable under Articles 24 and 25 of the Brussels I bis Regulation. Thus, the grounds on which a Member State court may do so (exclusive jurisdiction of a third State and choice-of-court agreement in favour of the courts of the latter) are limited and precise, as opposed to the *forum non conveniens* doctrine. Hence, recognising such discretion does not give rise to the kind of uncertainty that the application of that doctrine would have created. The Brussels regime admits granting courts a limited discretion where it serves its goals. (152) That is the case here.

160. Such discretion does not affect the predictability of jurisdiction. A reasonably well-informed claimant may foresee that he or she would have to sue (and a defendant that he or she might be sued) in relation to the subject matters envisaged in Article 24, in the courts of the third State concerned. It could also hardly come as a surprise to those litigants that proceedings have to be brought before the courts designated in a prior agreement they concluded. In fact, that solution enhances the predictability of jurisdiction as it contributes to the comparable treatment of similar ‘intra-EU’ and ‘external’ disputes.

161. It also enhances legal certainty, for it allows Member State courts, notably, to give effect to agreements designed to ensure it. The legal protection of persons established in the European Union is also enhanced. It avoids the defendant having to face, in the courts of his or her Member State, proceedings that would result in pointless decisions, or abusively started in breach of such an agreement. The legal protection of the claimant is also ensured, as he or she will still be able to bring proceedings before the courts of the Member States if he or she could not obtain justice before the third State courts concerned.

162. Finally, as for the uniform application of the rules of the Brussels I bis Regulation in the Member States, I observe that, where a few Member States applied the doctrine of *forum non conveniens*, it is widely recognised, in those States, that courts should not entertain proceedings relating to disputes whose subject matter is closely related to a third State, and that jurisdiction agreements designating foreign courts should in principle be enforced. (153) Thus, the courts of all the Member States generally have the power, in their national law, to decline jurisdiction in such circumstances. While the precise conditions under which they do so could, in principle, vary from one Member State to the other, I recall that EU law frames national law in quite a significant way, as explained in points 150 and 152 above, which ensures that such a

solution is applied by Member State courts in a sufficiently consistent way.

V. Conclusion

163. In the light of all the foregoing considerations, I propose that the Court of Justice answer the questions referred by the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden) as follows:

(1) Article 24(4) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

must be interpreted as meaning that where the courts of a Member State are seised of proceedings concerned with the infringement of a patent registered in another Member State, and an invalidity defence is raised by the alleged infringer, those courts have no jurisdiction to adjudicate the validity issue.

(2) Article 24(4) of Regulation No 1215/2012 must be interpreted as meaning that that provision does not apply with respect to the validity of a patent registered in a third State. However, the courts of the Member States, where competent under another rule of that regulation, may not adjudicate that issue.

1 Original language: English.

2 Regulation of the European Parliament and of the Council of 12 December 2012 (OJ 2012 L 351, p. 1) (‘the Brussels I bis Regulation’).

3 Judgment of 13 July 2006 (C-4/03, ‘the judgment in GAT’, EU:C:2006:457).

4 See Article 1, Article 2(1) and Articles 10 to 25 of the EPC. The regime laid down in the EPC is not part of EU law, as the European Union itself is not a party to that treaty.

5 See Articles 52 to 57 and 94 to 97 of the EPC.

6 See Articles 3 and 79 of the EPC.

7 See Article 2(2) and Article 64(1) of the EPC.

8 Articles 99 to 105 of the EPC set out an opposition and limitation procedure through which a person may seek, before the EPO, a centralised, European-wide revocation of a ‘European patent’ within nine months of its grant.

9 See Article 138 of the EPC. I underline that, following a tumultuous series of debates and proposals, a ‘European patent with unitary effect’ has been created through enhanced cooperation between several Member States. Pursuant to Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ 2012 L 361, p. 1), a ‘European patent’ granted by the EPO through the centralised EPC procedure may, under certain conditions, be attributed ‘unitary effect’ in respect of all the participating Member States. Such a patent confers on its holder uniform protection and rights across all those States. Furthermore, as a unitary title, it may only be revoked in respect of all those States. The new regime entered into force on 1 June 2023, however it is not

relevant for the purpose of the present case; indeed, the title at issue is not a 'European patent with unitary effect'.

10 See Article 64(3) of the EPC and Article 8(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

11 By contrast, litigation of 'European patents with unitary effect' was conferred on a special jurisdiction, the Unified Patent Court (see Agreement on a Unified Patent Court (OJ 2013 C 175, p. 1)).

12 The EPC does include a Protocol on Jurisdiction and the Recognition of Decisions in respect of the Right to the Grant of a European Patent, of 5 October 1973. However, as its title indicates, that protocol governs jurisdiction over a narrow matter, namely claims to the 'right to the grant of a European patent' (see Article 60 EPC), formulated during the granting procedure.

13 Those actions come under 'civil and commercial matters' within the meaning of Article 1(1) (see judgment of 8 September 2022, *IRnova*, C-399/21, 'the judgment in *IRnova*', EU:C:2022:648, paragraph 30).

14 The Brussels I bis Regulation replaced Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) ('the Brussels I Regulation'), which had itself replaced the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 (OJ 1978 L 304, p. 36) ('the Brussels Convention'). I underline that the Court's interpretation of those preceding instruments is transposable to the equivalent provisions of the Brussels I bis Regulation (see, *inter alia*, judgment in *IRnova* (paragraphs 29 and 37)). Accordingly, in this Opinion, I will only distinguish between those instruments where necessary.

15 The jurisdiction of the EPO under the centralised revocation procedure provided in the EPC (see footnote 8 above) is reserved by Article 24(4) of the Brussels I bis Regulation.

16 See Article 25(4) and Article 26(1) of the Brussels I bis Regulation.

17 Finally, a judgment delivered by a court in breach of that rule may be refused recognition in another Member State (see Article 45(1)(e) of the regulation).

18 See judgments of 15 November 1983, *Duijnste* (288/82, EU:C:1983:326, paragraphs 23 to 25); in *GAT* (paragraphs 15 and 16); and in *IRnova* (paragraphs 40 and 48). See also explanatory report on the Brussels Convention, prepared by Mr P. Jenard (OJ 1979 C 59, p. 1, at p. 36) ('the Jenard report').

19 Article 7(2) provides that a person may be sued, in 'matters relating to tort' in the 'courts for the place where the harmful event occurred'. In that respect, first, the breach, by a third party, of the exclusive rights that a patent confers on its holder constitutes a 'tort' within the meaning of that provision. Secondly, the 'place where the harmful event occurred' is located on the territory of the State of registration of the patent infringed. Indeed,

since the rights stemming from a patent are only protected on the territory of the State that issued it, those rights can only be breached there (see, to that effect, judgment of 19 April 2012, *Wintersteiger*, C-523/10, EU:C:2012:220, paragraphs 27 and 28).

20 See, by analogy, judgment of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraphs 36 and 37 and the case-law cited).

21 See Opinion of Advocate General Jääskinen in *Pinckney* (C-170/12, EU:C:2013:400, point 46).

22 Except, it would seem, the Swedish part.

23 See judgment in *GAT* (paragraph 17). A defendant in infringement proceedings may also bring a counterclaim in invalidity, which is not a mere defence, but an independent claim. The alleged infringer seeks not merely the dismissal of the infringement action, but a separate ruling on the validity of the patent at issue. In effect, it is an action for invalidity brought during the infringement proceedings. Thus, it falls in the first category.

24 See, for reference to the case-law of the courts of various Member States, Fawcett, J.J. and Torremans, P., *Intellectual Property and Private International Law*, Oxford Private International Law Series, 2nd ed., §§ 7.22 to 7.26.

25 See judgment in *GAT* (paragraph 31 and the operative part). Or, stated differently, that it applies 'whatever the form of proceedings in which [that issue] is raised, be it by way of an action or a plea in objection' (see paragraph 25 of that judgment).

26 Furthermore, the scenario of infringement proceedings where invalidity is pleaded as a defence was expressly taken into account by the Court in several parts of its reasoning (see judgment in *GAT* (paragraphs 17 and 26)).

27 See, *inter alia*, judgments of 8 May 2003, *Gantner Electronic* (C-111/01, EU:C:2003:257, paragraphs 25 and 26); of 12 May 2011, *Berliner Verkehrsbetriebe* (C-144/10, 'the judgment in *BVG*', EU:C:2011:300, paragraphs 37 and 38); and of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 25).

28 See, to that effect, judgments of 9 November 1978, *Meeth* (23/78, EU:C:1978:198, paragraphs 7 to 9), and of 13 July 1995, *Danværn Production* (C-341/93, EU:C:1995:239, paragraphs 13 to 16). See also Hartley, T., *Civil Jurisdiction and Judgements in Europe*, Oxford University Press, Oxford, 2017, § 9.39.

29 See, *inter alia*, judgments of 3 October 2013, *Schneider* (C-386/12, EU:C:2013:633, paragraph 29); of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraphs 40 and 41); and of 10 July 2019, *Reitbauer and Others* (C-722/17, EU:C:2019:577, paragraph 44). See also the Jenard report, pp. 34 and 39, and Gothot, P. and Holleaux, D., *La Convention de Bruxelles du 27 septembre 1968 : compétence judiciaire et effets des jugements dans la CEE*, Paris, Jupiter, 1985, p. 83, § 141.

30 Some versions, such as the German language one, indicate that the rules of exclusive jurisdiction apply to proceedings which have as their 'subject matter' or

‘object’ an issue mentioned therein. Other versions use vaguer terms.

31 See judgment in BVG (paragraphs 37 and 47).

32 Judgment in GAT (paragraphs 24, 26 and 27).

33 The fact that the contentious rule of exclusive jurisdiction is ‘mandatory’ says a priori nothing about its scope or why it should apply to any proceedings where the validity of patents is discussed, even simply as a preliminary question. The argument of the Court that otherwise a ‘claimant would be able, simply by the way it formulates its claims, to circumvent ... [that] rule of jurisdiction’ (judgment in GAT, paragraph 27 (emphasis added)) carries weight only in relation to the particular facts of the judgment in GAT. It cannot explain why that rule should apply even where invalidity is raised by the defendant, for instance in infringement proceedings.

34 See, inter alia, judgment in IRnova (paragraph 39 and the case-law cited).

35 See recital 15 of the Brussels I bis Regulation.

36 See judgment in BVG (paragraph 32).

37 Judgment of 12 July 2012, Solvay (C-616/10, EU:C:2012:445, paragraph 47).

38 Besides infringement proceedings, an invalidity defence may be raised against an action for failure to pay the fee provided in a licensing agreement, and so on.

39 See recital 15 of the Brussels I bis Regulation as well as, inter alia, judgment of 9 December 2021, HRVATSKE ŠUME (C-242/20, EU:C:2021:985, paragraph 30).

40 Judgment in GAT (paragraphs 28 and 29).

41 Agreement which constitutes Annex 1C to the Agreement establishing the World Trade Organization (WTO), signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1)

42 See, inter alia, judgment of 5 October 2017, Hanssen Beleggingen (C-341/16, EU:C:2017:738, paragraph 32 and the case-law cited).

43 See, inter alia, judgment in IRnova (paragraphs 36 and 40).

44 See, to that effect, judgment in GAT (paragraph 22).

45 Indeed, despite what the Court implied in paragraph 48 of its judgment in IRnova, that ‘close link in fact and law’ exists also with respect to infringement proceedings. Infringement of a patent is also determined in the light of the law of the State of registration. The factual proximity between the dispute and the territory of that State is similarly present (see points 22 and 28 above). For those reasons, in its case-law on Article 7(2) of the Brussels I bis Regulation, the Court has ruled that the courts of that State are also ‘best placed’ to hear such proceedings (see, inter alia, judgment of 19 April 2012, Wintersteiger, C-523/10, EU:C:2012:220, paragraphs 27 and 28).

46 See Usunier, L., *Compétence judiciaire, reconnaissance et exécution des décisions en matière*

civile et commerciale. – Compétence. – Règles de compétence exclusives. – Article 24 du règlement (UE) n° 1215/2012, *JurisClasseur Droit international*, Fasc. 584-160, 2015, § 3.

47 Quite the contrary. The patent laws of the Member States have been harmonised by several international treaties, in particular the TRIPS Agreement. Furthermore, with respect to disputes over the validity of European patents, I recall that the patentability requirements (which are at the heart of such disputes) are laid down in the EPC. Thus, they are identical in all the national laws of the Contracting Parties.

48 In any case, even if the sound administration of justice were the objective pursued by Article 24(4) of the Brussels I bis Regulation, that objective could not ‘require’ the solution in the judgment in GAT, as it may lead to unsound administration of justice with respect to infringement proceedings (see points 53 and 54 above).

49 The Jenard report, p. 36.

50 Something that was noted, but not discussed, by the Court in the judgment in GAT (paragraph 23).

51 That explanation, while valid with regard to ‘ordinary’ national patents, is less compelling with respect to European patents. I recall that those patents are granted by the EPO, the intervention of national administrations in that process being limited to the formal requirement of ‘validation’ in their respective States.

52 See, inter alia, Gothot, P. and Holleaux, D., *op. cit.*, pp. 88 and 89, § 155; Treppoz, E., ‘Répertoire de droit international – Contrefaçon’, *Dalloz*, §§ 5, 9, 10, 11 and 30; Fawcett, J.J. and Torremans, P., *op. cit.*, p. 19; Gaudemet-Tallon, H. and Ancel, M.-E., *Compétence et exécution des jugements en Europe : matières civile et commerciale : règlements 44/2001 et 1215/2012, Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)*, LGDJ, Paris, 6th ed., 2018, p. 162, § 120; and Usunier, L., *op. cit.*, §§ 3 and 63.

53 The argument of the Court in the judgment in GAT (paragraph 30) that, in some national rules of procedure, a finding of invalidity contained in a ruling on infringement proceedings has a declaratory, erga omnes effect and that the interpretation of Article 16(4) of the Brussels Convention could not vary depending on the effect of such a ruling under national law missing the mark. The Court could perfectly (and legitimately) have decided, instead, that a rule of procedural law conferring erga omnes effect on validity findings made in infringement judgments should be set aside, on the ground that its application impairs the effectiveness of Article 16(4) (see judgment of 15 May 1990, Hagen, C-365/88, EU:C:1990:203, paragraphs 17 and 20).

54 See, inter alia, Szychowska, K., ‘Quelques observations sous les arrêts de la Cour de justice dans les affaires C-4/03 GAT et C-539/03 Roche’, *Revue de Droit Commercial Belge*, No 5, 2007; Kur, A., ‘A farewell to cross-border injunctions? The ECJ decisions GAT v. LuK and Roche Nederland v. Primus and Goldenberg’, *International Review of Intellectual Property and Competition Law*, Vol. 37, 2006, p. 844; Treppoz, E., *op. cit.*; and Ancel, M.-E., ‘Brevet – L’arrêt

GAT : une occasion manquée pour la défense de la propriété intellectuelle en Europe’, Communication Commerce électronique, 2007, no 5, étude 10.

55 See European Max Planck Group on Conflict of Laws in Intellectual Property, Draft Principles for Conflict of Laws in Intellectual Property, 25 March 2011, Article 2:401(2) and Article 4:202. See, in the United States, The American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgements in Transnational Disputes, 2008, §§ 211(2), 212(4) and 213(2).

56 The reason behind that codification seems mostly circumstantial. It appears that, shortly after the judgment in GAT was delivered, those terms were added in what would become Article 22(4) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007 (OJ 2007 L 339, p. 3) (‘the Lugano II Convention’) in order to ensure consistency between that provision and the corresponding rule of jurisdiction laid down in the Brussels regime, as interpreted in that judgment (see explanatory report by Pocar, F. on the Lugano II Convention (OJ 2009 C 319, p. 1), paragraph 102). Then, when the Council approved that convention on behalf of the European Union, it committed itself to do the same when recasting the Brussels I Regulation, to ensure the parallelism between the two instruments (see Annex I to Council Decision 2009/430/EC of 27 November 2008 concerning the conclusion of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2009 L 147, p. 1).

57 It flows from those elements that Article 24(4) of the Brussels I bis Regulation does not cover the ‘issue’ of validity of patents per se, but any ‘proceedings’ in which that issue is raised. Infringement proceedings in which an invalidity defence has been raised should be regarded as ‘concerned with the validity of patents’ within the meaning of that provision, the seemingly logical consequence of that classification being that those proceedings fall within the exclusive jurisdiction of the Member State of registration.

58 In the judgment in BVG, the Court, evidently aware of the tension between the interpretations it provided with respect to the rule of exclusive jurisdiction (now) laid down in Article 24(2) of the Brussels I bis Regulation and the judgment in GAT, attempted to distinguish the two cases. For present purposes, it suffices to recall that, in that context, it summarised in the judgment in GAT as saying that the courts of the Member State of registration have ‘exclusive jurisdiction to adjudicate upon any dispute in which the patent’s validity is contested’ (judgment in BVG, paragraph 46 (emphasis added)).

59 Judgment of 13 July 2006 (C-539/03, EU:C:2006:458). In that judgment, the Court excluded the possibility, for a patent holder, to consolidate claims against several infringers before the courts for the domicile of one of them under Article 6(1) of the Brussels Convention (now Article 8(1) of the Brussels I bis Regulation). Amongst the reasons given in that

regard the Court stated that, even if such consolidation had been possible, it could not have prevented ‘a partial fragmentation of the patent proceedings’ where validity of the patents is contested, because ‘that issue ... is a matter of exclusive jurisdiction ... in favour of the courts of the ... State [of registration]’ (paragraph 40) (my emphasis).

60 Neither does it stem from the travaux préparatoires of the regulation. The legislature did not reject a proposal to indicate that, where invalidity is pleaded as a defence in infringement proceedings, the courts seised with those proceedings would merely have to stay proceedings until the courts of the State of registration had determined the validity issue. Such a proposal was never put forward by the Commission nor suggested during the legislative process. In fact, it appears that the matter had been scarcely discussed, if at all, by the legislature.

61 See, to that effect, judgments of 8 May 2003, Gantner Electronic (C-111/01, EU:C:2003:257, paragraphs 24 to 32); of 15 May 2003, Préservatrice Foncière Tiard (C-266/01, EU:C:2003:282); and in BVG (paragraph 35).

62 Admittedly, a patent holder may sometimes be able to anticipate that the alleged infringer will raise an invalidity defence. In the present case, Electrolux submits that BSH was perfectly capable of doing so because their dispute over both the validity and infringement of the European patent in question has been going on for more than 10 years. However, that may not always be the case. Even where a patent holder could foresee such a defence being raised, they may not know it for certain. Deciding where to sue would become a gamble based on the probability of invalidity being raised.

63 Contrary to what Electrolux submits, I do not think that such a consequence would be compatible with Article 27 of the Brussels I bis Regulation either. I recall that that provision obliges a court of a Member State to dismiss proceedings when seised of ‘a claim which is principally concerned with’ (my emphasis), inter alia, the validity of a patent registered in another Member State. To consider that infringement proceedings are ‘principally concerned with’ validity where that issue has merely been raised as a preliminary question would be to stretch those words.

64 The argument of Electrolux that Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16) has harmonised the procedural rules applying to infringement proceedings, so that patent holders enjoy an equivalent level of protection in all the Member States, misses the mark. Indeed, having to start multiple proceedings instead of a single one is, in itself, an issue (even if each of the courts seised offer adequate guarantees).

65 Or the authorities of that State, more generally. Invalidity proceedings can also be brought before the relevant patent office.

66 See, for instance, Article 49 of the Code de procédure civile (French Code of Civil Procedure).

67 Indeed, since it is the alleged infringer challenging the validity of the patent in question, it is only logical that the burden of bringing invalidity proceedings rests on them. Furthermore, positive declaratory relief concerning the validity of a patent is not available in every Member State (see Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of [the Brussels I Regulation] (COM(2009) 174 final, 21 April 2009, pp. 6 and 7; ‘the 2009 Commission report’).

68 See judgment in BVG (paragraph 46).

69 Patent claims define the boundaries of the patented invention and, as such, lay down what the patent does or does not cover. Therefore, the construction of those claims is decisive to determine whether the acts committed by the alleged infringer fall within the scope of the patent and, thus, infringe the latter. Patent claims are also decisive in determining whether the patent is valid or not. Indeed, one of the usual conditions for the grant of a patent over a given invention is the ‘novelty’ of the latter. To assess that requirement, the invention in question, as defined in those claims, is compared with the ‘prior’ state of the art (see, with respect to European patents, Article 54 and Article 69(1) of the EPC).

70 Again, that complexity could have been avoided by simply allowing courts outside the State of registration, when seised of infringement proceedings, to adjudicate the validity of the patent as a preliminary question (see Section 1 above).

71 The referring court explains that, pursuant to the second subparagraph of Paragraph 61 of the Patentlagen, where an invalidity defence is raised in infringement proceedings, the defendant must bring a separate invalidity action.

72 See Tang, Z.S., ‘Validity in patent infringement proceedings – A new approach to transnational jurisdiction’, *The Queen Mary Journal of Intellectual Property*, 2021, pp. 47 to 68.

73 See recital 38 of the Brussels I bis Regulation and judgment of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraph 48).

74 That would also allow strategic manoeuvres by the patent holder. They could advance a narrow construction of the patent claims before the validity judge in order to avoid a finding that the patent covers prior art and, thus, is invalid, and advance a different, broader construction of those claims before the infringement judge for the purposes of bringing the alleged infringer’s acts within its scope.

75 To be clear, even understood that way, as Electrolux maintains, the ‘narrow’ reading of the judgment in *GAT* is still not ideal from the point of view of the rights of defence. To defend effectively themselves against bogus infringement claims, a defendant is not able to simply raise a defence in the course of the infringement proceedings, but must, on top of that, start invalidity proceedings in the State(s) of registration of the patent(s) (which is not only less

convenient, but also significantly more expensive to do). However, the rights of the defence are not unfettered prerogatives (see, inter alia, judgment of 15 March 2012, *G*, C-292/10, EU:C:2012:142, paragraph 49). The Court in the judgment in *GAT* (and the EU legislature afterwards) evidently considered that such a limitation of those rights was necessary to ensure respect for the exclusive jurisdiction of the State of registration.

76 See European Max Planck Group on Conflict of Laws in Intellectual Property, *Principles for Conflict of Laws in Intellectual Property – Draft*, Article 2:703(1).

77 See Hess, B., Pfeiffer, T. and Schlosser, P., *Report on the Application of Regulation Brussels I in the Member States* (Study JLS/C4/2005/03), Ruprecht-Karls-Universität Heidelberg, 2007, § 818.

78 See, inter alia, judgment of 15 May 1990, *Hagen* (C-365/88, EU:C:1990:203, paragraphs 17, 19 and 20).

79 Obviously, in infringement proceedings, Article 24(4) of the Brussels I bis Regulation comes into play if the alleged infringer has raised such a defence in compliance with the conditions that the procedural rules of the forum may impose as to timing and form. To the extent that those conditions do not make it excessively difficult or impossible, in practice, for the defendant to do so, they are not objectionable under EU law.

80 Notably, the referring court explains that, under the Swedish rules of procedure, an infringement action can be stayed pending determination of the invalidity action.

81 See, inter alia, Opinion of Advocate General Geelhoed in *GAT* (C-4/03, EU:C:2004:539, point 46); Pocar, F., op. cit., § 102; and Hartley, T., op. cit., § 12.34.

82 See, by analogy, judgment of 12 July 2012, *Solvay* (C-616/10, EU:C:2012:445, paragraphs 49 and 50).

83 Those courts could also deliver a provisional, enforceable decision on infringement, subject to a contrary decision on validity.

84 See Opinion of Advocate General Geelhoed in *GAT* (C-4/03, EU:C:2004:539, point 46), and Tang, Z.S., op. cit., pp. 47 to 68.

85 Of course all the circumstances should be taken into account. The invalidity proceedings may already be so advanced that it is not necessary to stay the infringement proceedings (and so on).

86 See Article 9 of Directive 2004/48.

87 Judgment of 12 July 2012 (C-616/10, EU:C:2012:445, paragraphs 31 to 51).

88 Judgment of 1 March 2005 (C-281/02, ‘the judgment in *Owusu*’, EU:C:2005:120, paragraphs 24 to 35).

89 Some experts defend the opposite view. In their view, while the domicile of the defendant is the main criterion of applicability of the Brussels regime, it flows from Article 6(1) of the Brussels I bis Regulation that, with respect to such disputes, only the situation of the property at issue (and so on) or the courts designated by the agreement is relevant. Therefore, where those factors point to third States, the dispute falls outside the scope of the regulation. Unfortunately, that is not what the text of that regulation actually says. Article 6(1) thereof

provides that the principle pursuant to which national rules of jurisdiction apply where the defendant is not domiciled in the European Union is ‘subject ... to Articles 24 and 25’. The clear meaning of those terms is that, in such a scenario, the dispute is nonetheless governed by the rules of that regulation when the elements referred to in those two provisions point to a Member State. They cannot be stretched to mean that that regime does not cover disputes against EU defendants when they concern immovable property situated in, or a choice-of-court agreement designating the courts of, a third State. The case-law of the Court confirms that interpretation (see, *inter alia*, judgments of 19 July 2012, *Mahamdia*, C-154/11, ‘the judgment in *Mahamdia*’, EU:C:2012:491, paragraph 39, and in *IRnova* (paragraphs 25 to 28)).

90 To be fair, where its predecessors were completely silent, the Brussels I bis Regulation touches on the matter (see point 115 below).

91 Indeed, the French Government considers that that solution is undesirable but imposed by the text of the regulation (see points 115 and 139 below).

92 See Droz, G., *Compétence judiciaire et effets des jugements dans le Marché commun*, Paris, Dalloz, 1972, §§ 164 to 169 and 204.

93 See, *inter alia*, Mayer, P., Heuzé, V. and Remy, B., *Droit international privé*, LGDJ, Paris, 12th ed., 2019, § 360.

94 The same way, Article 27 of that regulation obliges a Member State court to relinquish jurisdiction to ‘the courts of another Member State’ only.

95 Judgment in *IRnova* (paragraphs 34 and 35).

96 Judgment of 9 November 2000 (C-387/98, ‘the judgment in *Coreck maritime*’, EU:C:2000:606, paragraphs 17 and 19, respectively).

97 See judgment of 9 December 2003, Gasser (C-116/02, EU:C:2003:657, paragraph 72).

98 See Jenard, P. and Möller, G., Report on the Lugano Convention (OJ 1990 C 189, p. 57), § 54, and Almeida Cruz, M., Desantes Real, M. and Jenard, P., Report on the Convention of San Sebastián (OJ 1990 C 189, p. 35) § 25.

99 Opinion of 7 February 2006 (‘Opinion 1/03’, EU:C:2006:81).

100 See judgment of 31 March 1971, Commission v Council (22/70, EU:C:1971:32, paragraphs 17 to 22).

101 See point 135 below.

102 Opinion 1/03 (point 153). The fact that Article 4(1) may apply where the disputes present, with a third State, the kind of connections envisioned in Articles 24 and 25 of the Brussels I bis Regulation stems also from Articles 33 and 34 of that regulation (see footnote 107 below).

103 See judgment in *Owusu* (paragraph 37).

104 According to the doctrine of *forum non conveniens*, known in common law countries, a court may decline to exercise jurisdiction on the ground that a court in another State would be a more appropriate forum for the trial of the action (see the judgment in *Owusu* (paragraph 8)). In that case, in the view of the United Kingdom courts, that was Jamaica.

105 The Court also rejected the application of the *forum non conveniens* doctrine on principle grounds (see point 156 below).

106 Those provisions cover the situation where any given claim (Article 33) or related claims (Article 34) is pending, in parallel, in a Member State court and a third State court. Based on the relevant provision, the Member State court, where competent under Article 4(1) of the Brussels I bis Regulation, may decline jurisdiction in favour of the third-State court, under certain conditions, including that it is ‘necessary for the proper administration of justice’. In that regard, recital 24 of that regulation hints at disputes closely connected to third States, by stating that ‘when taking into account the proper administration of justice, the court of the Member State concerned’ should consider, *inter alia*, ‘whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction’. Therefore, where Article 33 or Article 34 apply, Member State courts can indirectly take those connections into account and decline jurisdiction, not on those grounds *per se*, but because of the *lis pendens* situation. However, as stated above, those provisions apply only where the third-State court has been seised first, not where it has been seised second.

107 Article 4(1) of the Brussels I bis Regulation is, in my view, also silent on the issue at hand. Indeed, that provision needs to be read in conjunction with Article 5(1) thereof. The first indicates that a defendant ‘shall’ be sued before the courts of the Member State of their domicile, and the second that they ‘may be sued in the courts of another Member State only by virtue of the rules set out [in the regulation]’. Thus, those provisions only deal with the allocation of jurisdiction between the Member States. They do not address the question of whether and, if so, in what circumstances, the courts of the defendant’s domicile may relinquish jurisdiction to the courts of a third State.

108 See Briggs, A., *Civil Jurisdiction and Judgments*, Informa Law, Oxon, 2015, 6th ed., pp. 316 to 362, at p. 345, and Mills, A., *Party Autonomy in Private International Law*, Cambridge University Press, Cambridge, 2018, p. 217. Notably, Articles 33 and 34 of the Brussels I bis Regulation do not feature in a closed section, entitled ‘Possibility to decline jurisdiction in favour of the courts of third States’. Instead, they are part of Chapter II, Section 9, of the regulation, entitled ‘*Lis pendens – related actions*’. Those provisions do not indicate either, for instance, that ‘a court of a Member State may only decline jurisdiction in favour of the courts of a third State where ...’. Instead, they indicate that ‘where’ there is a situation of *lis pendens*, the court of the Member State may do so if the conditions they provide are fulfilled. The same goes for recital 24 of that regulation. The latter simply indicates that, in case of concurrent proceedings, to assess whether to decline jurisdiction the Member State court may take into account the close connections of the case with the third State at issue. It does not say that such connections may be taken into account only in that situation.

109 See judgment in *Owusu* (paragraphs 48 to 52). It is sometimes argued that Opinion 1/03 supports such a literal interpretation. However, it does not, for it simply does not address the question of whether Member State courts are obliged to exercise the jurisdiction they derive from the Brussels regime. Similarly, in the judgment in *IRnova*, the Court did not address the issue of whether, as Article 24(4) is not ‘applicable’ to disputes concerning the validity of patents registered in third States, the courts of the Member State where the defendant is domiciled would be bound to adjudicate on the matter. The Court did not have to do so, because that case was not about validity (see paragraphs 36 to 48 of that judgment).

110 Judgment in *Coreck* (paragraph 19 and the case-law cited).

111 See judgment in *Mahamdia* (paragraphs 60 to 66).

112 See, to that effect, judgment in *Mahamdia* (paragraph 65). See, also, Kistler, A.R.E., ‘Effect of exclusive choice-of-court agreements in favour of third States within the Brussels I Regulation Recast’, *Journal of Private International Law*, Vol. 14, No. 1, 2018, pp. 79 and 81 to 83; Hartley, T.C., op. cit., §§ 13.19 to 13.21. Thus, to accept the view suggested by BSH, the French Government and the Commission would mean accepting also the awkward notion that the Court (1) implicitly overturned the judgment in *Coreck Maritime* in that in *Owusu* and (2) followed an entirely moot reasoning in the judgment in *Mahamdia*.

113 See, with respect to Article 24(1) the Brussels I bis Regulation, Opinion of Advocate General Poiares Maduro in *ČEZ* (C-343/04, EU:C:2006:13, points 35 to 39); with respect to Article 24(4) of that regulation, point 60 above; and with respect to Article 24(5) of that regulation, judgment of 26 March 1992, *Reichert* and *Kockler* (C-261/90, EU:C:1992:149, paragraph 26). See, generally, the *Jenard* report, pp. 35 and 38; Usunier, L., op. cit., §§ 3, 43 and 59; Droz, G., op. cit., §§ 137 and 156; Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., §§ 104 and 118; Hartley, T., op. cit., p. 212; and Gothot, P. and Holleaux, D., §§ 154, 155 and 158.

114 See recital 14 as well as Article 6(1) and Article 24 of the Brussels I bis Regulation.

115 Or, more precisely, could be taken into account, but only in the case of concurrent proceedings, and not if the Member State courts were seised even just one day before the third-State courts (see point 115 above), which would be incoherent, if not absurd. The ‘special relationship’ between the European Union and its Member States cannot justify such a difference of treatment. The rights of those States are taken into account, in Article 24, not because of their capacity as Members of the European Union, but simply because they are sovereign entities in the international order.

116 See, inter alia, Roorda, L. and Ryngaert, C., ‘Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters’, in Forlati, S. and Franzina, P. (eds), *Universal Civil Jurisdiction – Which Way Forward?*, BRILL, 2020, pp. 74 to 95, and Mills, A., ‘Rethinking Jurisdiction in International Law,

The British Yearbook of International Law, 2014, Vol. 84, No. 1, pp. 187 to 239.

117 See, inter alia, Roorda, L. and Ryngaert, C., op. cit., pp. 77, 82 and 87; Mills, A., *Party Autonomy in Private International Law*, p. 233; Usunier, L., op. cit., §§ 1, 43 and 67. BSH and the Commission nonetheless argued that, if the courts of a Member State were, for instance, to declare invalid a patent granted by a third State, it would not impinge on the sovereignty of that State, because that decision would not be recognised there. In my view, that argument misses the point on two accounts. First, a third State would deny any authority to such decision precisely because it would be perceived as an interference in a sovereign matter. Secondly, because such a decision could never be enforced in that State, a fortiori Member State courts should not be mandated to rule in the first place (see point 134 below).

118 See, inter alia, judgments of 16 June 1998, *Racke* (C-162/96, EU:C:1998:293, paragraph 46), and of 26 April 2022, *Poland v Parliament and Council* (C-401/19, EU:C:2022:297, paragraph 70). Even if the Court erroneously took the view that such limits to adjudicatory jurisdiction do not exist in international law, as Electrolux submits, it would still be repugnant to international comity for a Member State court to rule on matters that impinge on a third State’s rights.

119 See recitals 14 and 19 of the Brussels I bis Regulation, as well as, inter alia, judgment of 7 July 2016, *Höszig* (C-222/15, EU:C:2016:525, paragraph 44).

120 Provided the conditions laid down in Article 25 are fulfilled and the limits imposed by the rules on protective jurisdiction are respected (see point 150 below).

121 See recital 14, Article 6(1) and Article 25 of the Brussels I bis Regulation.

122 See point 115 above. It would encourage an unhealthy ‘race’ to the courts, each party seeking to be the first to act to either enforce or, on the contrary, trump the choice-of-court agreement.

123 See judgment of 12 January 2023, *TP (Audiovisual editor for public television)* (C-356/21, EU:C:2023:9, paragraph 74 and the case-law referred).

124 Such a limitation would not fulfil the conditions laid down in Article 52(1) of the Charter. First, it would not be ‘provided for by law’, for such a drastic outcome would stem from the absence of dedicated rules in the Brussels I bis Regulation. Secondly, it could hardly be regarded as ‘genuinely meet[ing] objectives of general interest recognised by the Union’ (see more in point 161 below). Thirdly, even if such an objective existed, the incoherence, if not the absurdity, of that limitation would make it impossible to defend. I recall that Member State courts would be permitted to give effect to choice-of-court agreements in favour of third State, in case of concurrent proceedings, but not if Member State courts were seised even just one day before the third-State courts (see point 115 above).

125 See, inter alia, judgment of 26 April 2022, *Poland v Parliament and Council* (C-401/19, EU:C:2022:297, paragraph 70 and the case-law cited).

126 The refusal to recognise foreign judgment delivered in violation of the required State's exclusive jurisdiction is a common measure in national law. It is also provided, intra-EU, in Article 45(1)(e)(ii) of the Brussels I bis Regulation, as well as in international conventions, such as the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (see Article 5(3) and Article 6 of that convention).

127 See Article 71(1) and Article 73(1) and (3) of the Brussels I bis Regulation as well as judgment of 4 May 2010, *TNT Express Nederland* (C-533/08, EU:C:2010:243).

128 By contrast, I recall that the EPC does not contain rules of international jurisdiction, save for one exception, not relevant for the present case (see point 23 above). Therefore, as all the interveners emphasised, a State, such as Türkiye, which is a party to the EPC, is to be treated like any other third State for the purposes of the rules of the Brussels I bis Regulation.

129 Convention approved by Council Decision 2014/887/EU of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements (OJ 2014 L 353, p. 5) ('the Hague Convention').

130 See Articles 22 and 23 of the Lugano II Convention and Article 3(a) of the Hague Convention.

131 Namely China, Mexico, Montenegro, Singapore, Ukraine and the United Kingdom (see Hague Conference on Private International Law, Status table, 37; Convention of 30 June 2005 on Choice of Court Agreements; accessible at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>).

132 C-129/19, EU:C:2020:375, points 117 to 123.

133 Opinion of Advocate General Bobek in *BV* (C-129/19, EU:C:2020:375, point 123).

134 The question was singled out, in view of the future recasting of the Brussels regime, by several studies commissioned by the Commission (see, inter alia, Hess, B., Pfeiffer, T., and Schlosser, P., op. cit., §§ 360 to 362 and 388) and in the 2009 Commission report (p. 5). Furthermore, the Commission consulted a stakeholder on that question (see European Commission, 21 April 2009, Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(2009) 175 final), p. 4).

135 See European Parliament, Committee on Legal Affairs, doc. 2010/0383(COD), 19 October 2011, Amendments 106, 112 and 113.

136 Council of the European Union, doc. 9474/11 ADD 8, 8 June 2011, Note from the United Kingdom delegation to Working Party on Civil Law Matters (Brussels I), pp. 7 to 15; doc. 9474/11 ADD 14, 16 June 2011, Note from the French delegation to Working Party on Civil Law Matters (Brussels I), pp. 8 to 18; doc. 8000/12, 22 March 2012, Note from the United Kingdom delegation to Working Party on Civil Law Matters (Brussels I), pp. 1 to 8; doc. 8205/12, 27 March

2012, Note from the French delegation to Working Party on Civil Law Matters (Brussels I), pp. 1 to 7.

137 The (then) future approval by the European Union of the Hague Convention features a few times (see Council of the European Union, doc. 9549/12, 4 May 2012, Note from the delegation of the United-Kingdom to Working Party on Civil Law Matters (Brussels I), p. 2) and may explain why the legislature chose not to add rules on choice-of-court agreements in favour of third States in the regulation.

138 Council of the European Union, doc. 13756/11 ADD 1, 9 September 2011, Note from German delegation to Working Party on Civil Law Matters (Brussels I), p. 3 (emphasis added).

139 An argument is put forward in the literature that the EU legislature indeed wanted to deny Member State courts the right to give effect to choice-of-court agreements in favour of third-State courts, because that would give an incentive to third States to adhere to the Hague Convention (see Beaumont, P., 'The revived Judgments Project in The Hague', *Netherlands Internationaal Privaatrecht (NIPR)*, 2014, Vol. 4, pp. 532 to 539). Admittedly, the author was a member of the working group of the Council that designed the Brussels I bis Regulation. However, such an expert's statement can hardly be enough to establish the will of the EU legislature, especially where contradicted by statements from other delegations. In any event, the notion that the legislature could ever have intended to sacrifice party autonomy under the regulation in order to promote it at the international level is perplexing.

140 See the Commission's proposal, Article 4(2).

141 See, inter alia, European Parliament, Committee on Legal Affairs, doc. A7-0320/2012, 15 October 2012, Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010) 748)); Council, doc. 9474/11 ADD 9, 10 June 2011, Note from the Belgian delegation to Working Party on Civil Law Matters, p. 3.

142 See, inter alia, in the United Kingdom, High Court, Queen's Bench Division (Commercial Court), *Konkola Copper Mines plc v. Coromin* [2005] 2 Lloyd's Rep. 555; High Court, Queen's Bench Division (Commercial Court), *Ferrexpo AG v. Gilson Investments* [2012] EWHC 721 (Comm); in France, Cour de cassation (court of cassation), *Chambre Civile 1*, 2 April 2014, 13-11.192, FR:CCASS:2014:C100356. See, further Nuyts, A., *Study on Residual Jurisdiction*, General Report, 2007, pp. 73 to 80.

143 See, inter alia, Nuyts, A., 'La théorie de l'effet réflexe', in *Le droit processuel et judiciaire européen*, Bruxelles, La Charte, 2003, pp. 73 to 89; Mills, A., *Party Autonomy in Private International Law*, p. 138; Harris, J., 'Stay of proceedings and the Brussels Convention', *ICLQ*, 2005, Vol. 54, pp. 933 to 950; Bachmeir, T. and Freytag, M., 'Discretionary elements in the Brussels Ia Regulation', *Journal of Private International Law*, 2022, Vol. 18, No. 2, pp. 296 to 316; Kistler, A.R.E., op. cit., pp. 66 to 95; Fawcett, J.J. and Torremans, P., op. cit., §

7.218; Usunier, L., op. cit., § 14; De Verneuill Smith, P., Lasserson, B. and Rymkiewicz, R., 'Reflections on Owusu: The Radical Decision in Ferrexpo', *Journal of Private International Law*, 2012, Vol. 8, no 2, pp. 389 to 405; Dicey, A.V., Morris, J.H.C. and Collins, L.A.C., *The Conflict of Laws*, Sweet & Maxwell U.K., 2012, 15th ed., §§ 12.021 to 12.024; See Goodwin, J., 'Reflexive effect and the Brussels I Regulation', *Law Quarterly Review*, 2013, Vol. 129, pp. 317 to 320; Takahashi, K., 'Review of the Brussels I Regulation: A Comment from the Perspectives of Non-Member States (Third States)', *Journal of Private International Law*, 2012, Vol. 8, no 1, pp. 8 to 11; Briggs, A., op. cit., §§ 2.305 to 2.308; Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., § 106; and Gothot, P. and Holleaux, D., op. cit., §§ 37 and 142.

144 Of course, that is an imperfect 'reflection' of the solution stemming from Articles 24 and 25 for intra-EU disputes. There, any other court than those designated is deprived of jurisdiction and is obliged to relinquish jurisdiction.

145 It is not enough, for instance, that a dispute concerns a third-State patent; it must concern, specifically, its validity or registration, as envisioned in Article 24(2) of the Brussels I bis Regulation.

146 Apart, obviously, from the one concerning the designation of the courts of a Member State.

147 See Articles 15, 19 and 23 and Article 25(4) of the Brussels I bis Regulation.

148 See, to that effect, judgment in *Mahamdia* (paragraph 64).

149 See Kistler, A.R.E., op. cit., pp. 89 and 90; Nuyts, A., 'La théorie de l'effet reflexe', § 6; Mills, A., *Party Autonomy in Private International Law*, pp. 138 and 233; Goodwin, J., op. cit., pp. 317 to 320; Gaudemet-Tallon, H. and Ancel, M.-E., op. cit., § 106; Bachmeir, T. and Freytag, M., op. cit., p. 309; and Usunier, L., op. cit., § 14.

150 By analogy, in its judgment of 27 June 1991, *Overseas Union Insurance and Others* (C-351/89, EU:C:1991:279), the Court laid down, in unqualified terms, a principle governing the operation of the rules of *lis pendens* of the Brussels regime ('in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction') (paragraph 23). At the same time, it expressly reserved the scenario of the court second seised having exclusive jurisdiction (see paragraph 20). Eventually, in its judgment of 3 April 2014, *Weber* (C-438/12, EU:C:2014:212, paragraph 53 et seq.), the Court acknowledged an exception to that principle, precisely for the scenario that it had initially reserved.

151 See judgment in *Owusu* (paragraphs 38 to 43).

152 See Articles 30, 33 and 34 of the Brussels I bis Regulation. Furthermore, the (slight) degree of uncertainty coming with such a limited discretion is infinitely preferable to the absolute certainty, and absurdity, that would come with the solution consisting in obliging the courts of the European Union to adjudicate such cases.

153 See Nuyts, A., *Study on residual jurisdiction*, §§ 93 to 96 and 103.

Opinion of the Advocate General of 5 September 2024

([ECLI:EU:C:2024:687](#))

OPINION OF ADVOCATE GENERAL

EMILIOU

delivered on 5 September 2024 (1)

Case C-339/22

BSH Hausgeräte GmbH

v

Electrolux AB

(Request for a preliminary ruling from the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden))

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in civil matters – Jurisdiction in civil and commercial matters – International jurisdiction of the courts of the Member States in respect of disputes concerning third-State patents – Infringement action – Plea of invalidity – Regulation (EU) No 1215/2012 – Article 4(1) – Scope – Article 24(4) – ‘Reflexive effect’)

I. Introduction

1. On 22 February 2024, I delivered an Opinion in the present case. (2) Subsequently, on 9 April 2024, in accordance with Article 60(3) of its Rules of Procedure, the Court decided to assign the case to the Grand Chamber. In addition, by order of 16 April 2024, adopted on the basis of Article 83 of those Rules of Procedure, it decided to reopen the oral part of the procedure.

2. In that context, the Court invited the interested parties to participate in a new hearing and to focus their future pleadings on the third question referred for a preliminary ruling by the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden), concerning, I recall, the jurisdiction of the courts of the Member States, in accordance with the Brussels I bis Regulation, (3) over disputes concerning third-State patents. That second hearing was held on 14 May 2023. Representatives of BSH Hausgeräte GmbH (‘BSH’), Aktiebolaget Electrolux (‘Electrolux’), the French Government and the European Commission discussed, for the most part, that issue at that hearing.

3. In accordance with the Court’s request, I shall deliver a new Opinion, focusing on that third question. It will act as an ‘addendum’ to my first Opinion. It will provide me with a rare opportunity to expand on certain aspects of my reasoning in that regard.

II. Analysis

4. I shall briefly recall the context. BSH (established in Germany) brought an infringement action against Electrolux (established in Sweden) before the Swedish courts. In essence, BSH alleges that Electrolux is infringing a particular ‘European patent’, which had been granted to the first of those companies by the European Patent Office (EPO) (4) for several EU Member States (including Sweden) and one third State (Türkiye). Since that ‘European patent’ is not a unitary supranational title but essentially a bundle of national patents, each offering protection that is valid in the territory of the State concerned (in accordance with the principle of territoriality applicable to such titles), that

action constitutes, in fact, a set of infringement claims (one per national title). To defeat those claims, Electrolux raised the invalidity of those titles as a defence. In the light of that defence, the referring court asks whether the Swedish courts are entitled to adjudicate on the claims concerning patents of Member States other than Sweden (first and second questions referred for a preliminary ruling) and the claim concerning the Turkish patent (the third question). As explained in the introduction, my analysis will focus on that last aspect and, therefore, on the international jurisdiction of the courts of the Member States to hear and determine disputes concerning third-State patents.

5. The starting point for this analysis is not (or is no longer) subject to debate. The Brussels I bis Regulation is applicable and, therefore, determines the jurisdiction of the courts of the Member States to hear and determine such a dispute where (and on the sole ground that) the defendant is domiciled in the European Union (as Electrolux is in this case), (5) irrespective of the ‘external’ origin of the patent at issue. (6) I shall not dwell on that subject again, and refer, for further details, to points 24 and 101 of my first Opinion.

6. With regard to the solutions provided by the regime established in the Brussels I bis Regulation (‘the Brussels regime’), another point is clear. It is common ground between the interveners that, under the general rule laid down in Article 4(1) of that regulation, the courts of a Member State have jurisdiction, in the vast majority of cases, (7) to rule on claims relating to foreign patents, including third-State patents, where the defendant is domiciled on the territory of that Member State. On that basis, those courts have jurisdiction *inter alia* to rule on the infringement of such a patent which has occurred outside the frontiers of that Member State. (8) Indeed, it follows from the judgment in *Owusu* (9) that the jurisdiction that those courts derive from that rule is, in principle, not only general, but also universal.

7. That said, the crux of the present case lies, I recall, in the fact that, in accordance with Article 24(4) of the Brussels I bis Regulation, the courts of a Member State, including those of the defendant, are not empowered, by way of exception, to hear and determine claims concerned with the registration or validity of patents filed or registered in another ‘Member State’ (or deemed to be so). Nor may they rule on those matters as an incidental question in the context of infringement proceedings. That provision confers exclusive jurisdiction in such matters on the ‘courts of the Member State’ of the title. However, the essential point at issue is whether, under that regulation, the courts of the Member States also lack jurisdiction to rule, either principally or as an incidental question, on the registration or validity of third-State patents. The issue thus raised is delicate, long-standing and, what is more, cross-cutting: it arises in the same way in relation to all the matters in respect of which Article 24 of that regulation provides for a rule of exclusive jurisdiction (rights in rem in immovable property, the validity of entries in public registers, the enforcement of judgments and so forth), where the State involved is not a Member State, but a third State. (10)

8. BSH, the French Government and the Commission have suggested a response to that question (which is also cross-cutting as it applies without distinction to all those matters) to the effect that since Article 24 of the Brussels I bis Regulation does not expressly provide for such a scenario, the general rule laid down in Article 4(1) of that regulation applies, as it were, ‘unconditionally’. Therefore, the courts of the Member State in which the defendant is domiciled are, on the basis of that rule, entitled to rule, *inter alia*, on the registration or validity of a third-State patent. Moreover, once seised, they would be obliged to do so, except in cases where Articles 33 and 34 of that regulation apply (situations which will be discussed below). (11)

9. I shall return, first of all, to some of the pitfalls of that reading of the Brussels I bis Regulation (A), before reiterating the solution I had myself suggested (B). The oral argument that took place before the Court at the second hearing will lead me, finally, to examine a ‘third way’ (C).

A. Some pitfalls of the ‘unconditional’ application of Article 4(1) of the Brussels I bis Regulation

10. I shall not reiterate here all the criticisms I made in my first Opinion with regard to the ‘unconditional’ application of Article 4(1) of the Brussels I bis Regulation. I shall revisit only two aspects which were at the centre of the oral argument at the second hearing, namely (1) the extent to which it would be contrary to customary international law for the courts of a Member State to rule on the registration or validity of a third-State patent and (2) whether the text of that regulation, as it currently stands, requires such a solution.

1. The limits imposed by customary international law on the adjudicatory jurisdiction of States

11. As the majority of experts point out and as, moreover, the French Government and the Commission acknowledged at the second hearing (despite some initial misgivings), customary international law circumscribes the adjudicatory jurisdiction of States in civil and commercial matters. In essence, a State may legitimately claim such jurisdiction only where there is a sufficient connection between itself and a particular dispute, which may be of a territorial or national nature. Accordingly, where a State defines the international jurisdiction of its courts by adopting rules of private international law (or where the European Union does so, in respect of the courts of the Member States), it must respect that framework. (12)

12. In that regard, for most disputes in civil and commercial matters, the universal jurisdiction of the courts of the Member State in which the defendant is domiciled, as provided for in Article 4(1) of the Brussels I bis Regulation, is consistent with customary international law. A State may legitimately adjudicate on actions brought against persons domiciled on its territory, even where such actions otherwise concern factual matters which have arisen in another State (be it a Member State or a third State). That domicile establishes, as between the first State and those actions, a sufficient connection to that end. On that basis, the courts of the Member States may legitimately

adjudicate, in particular, on an action for infringement of a third-State patent brought against a ‘local’ defendant. (13) In exercising such adjudicatory jurisdiction, the Member State in which the defendant is domiciled does not undermine the sovereignty of the third State concerned. In particular, the first State in no way prevents the latter State from exercising its own adjudicatory jurisdiction over the dispute in question. (14) The resulting overlap of jurisdiction over one and the same dispute is not contrary to (but rather inherent in) customary international law. (15)

13. However, and by way of exception, it would be (highly) questionable, in the light of that law, for the courts of a Member State to rule on certain disputes in civil and commercial matters involving another State (whether a Member State or a third State), even where the defendant concerned is domiciled in the territory of the first State. That is the case, in particular, for proceedings concerned with the registration or validity of patents. At the second hearing, the French Government and the Commission acknowledged that considerations of sovereignty apply in this matter, while emphasising that their importance varies from case to case. In my view, two situations must indeed be distinguished.

14. On the one hand, it is clear that the courts of a Member State cannot legitimately rule on claims whose very subject matter (or ‘object’) is the registration or validity of a patent filed or registered in another State (be it a Member State or a third State), given the involvement of one of the latter’s bodies, namely its intellectual property office (IPO), in the grant of that title and the management of the register in which it is entered.

15. It is not that the grant of a patent is an ‘act of government’ reflecting ‘sovereign’ political choices that do not lend themselves to review by a foreign court. Nowadays, IPOs do not (or rarely) have any discretion as to whether it is appropriate to grant such a title. They examine patent applications in the light of the applicable legal requirements, grant patents if those requirements are met and register them accordingly. In short, their involvement is more ‘automatic’ than ‘sovereign’. That is true *a fortiori* with regard to the role of national IPOs in relation to European patents (such as the one at issue in the main proceedings), since those offices, when it is a matter of ‘validating’ such a patent for their territory (thus giving it the same effect as a national patent), merely endorse the EPO’s prior control of the patentability conditions laid down in the EPC.

16. The explanation is, actually, much simpler. It is in fact a clear principle of customary law that one State cannot interfere with the operation of the public services of another. Just as a State cannot order, through its courts, a foreign body to adopt a measure, it likewise cannot amend or annul measures which originate from it. The State to which the body in question belongs has exclusive substantive jurisdiction in that regard. Therefore, just as the courts of a Member State cannot order the IPO of another State (whether a Member State or a third State) to grant a patent for the latter’s territory, they cannot order that office to amend or delete an entry

in the register which it manages, or even make an erga omnes declaration as to the validity of the title which gave rise to that entry. Only the State of that IPO may legitimately claim adjudicatory jurisdiction in such matters. (16) I would point out that, contrary to what I suggested in footnote 51 to my first Opinion, the problem is exactly the same in relation to claims concerned with the registration or validity of the national ‘parts’ of European patents. (17)

17. On the other hand, it would not, in principle, be contrary to customary international law for the courts of a Member State, seised of a claim against a ‘local’ defendant and concerning the infringement of a third-State patent, to rule on the validity of that patent as a preliminary or incidental question (since the existence of a valid title is an essential premiss for the success of such an action), for example where an invalidity defence is raised by that defendant.

18. In accordance with the explanations given in the preceding point, and contrary to Electrolux’s submissions, what is decisive in that regard is not the nature of the question to be decided (the validity of the patent), or that of the rules to be applied (the grounds for revocation or, in the event of an alleged procedural defect, the procedural rules, provided for in the law of the third State), (18) but the nature of the judgment to be delivered. In an infringement action, the courts of the Member State before which the case has been brought will not give judgment on the lawfulness of the title in question, but will simply set out, at an intermediate stage of their reasoning, a proposal (validity or invalidity) for the sole purpose of resolving the main issue before them (infringement or lack of infringement). The operative part of the judgment which they will deliver will establish the private rights of the parties. It will order the defendant to pay damages (and so forth) where infringement is established or, where it is not, will dismiss the claimant’s action. To the extent that such a judgment thus has only inter partes effects, and that no erga omnes effect is attached to the grounds relating to the validity of the title, it does not exceed the adjudicatory jurisdiction of the Member State in which the defendant is domiciled. (19)

2. The text of the Brussels I bis Regulation

19. The rule of exclusive jurisdiction in proceedings concerned with the registration or validity of patents in Article 24(4) of the Brussels I bis Regulation derives from the considerations of customary international law set out above. That rule is intended, where a Member State is involved in the dispute, to safeguard the sovereignty of that State in the international order, (20) by ensuring that only its courts can validly give judgment. (21) That rule even pursues that objective to excess, since, I would recall, it prevents the courts of a Member State from examining merely as an incidental question, in an infringement action, the validity of a patent granted by another Member State. (22)

20. That said, since Article 24(4) of the Brussels I bis Regulation refers only to the patents of Member States, that provision cannot (without distorting its wording) cover third-State titles, (23) and that regulation does

not, moreover, provide for any equivalent provision in their regard. In the judgment in Owusu, the Court held that the only permissible derogations from the general rule (now) in Article 4(1) of that regulation are those ‘expressly provided for’ (24) by that regulation. Should we therefore deduce from all of those factors, as BSH, the French Government and the Commission have done, the paradoxical solution that while the courts of the defendant’s Member State are completely deprived of jurisdiction to rule on the validity of the patents of other Member States, they are entitled (and even obliged) to adjudicate on claims concerning the validity of third-State titles?

21. I (still) do not think so.

22. In that regard, I would recall at the outset that, in the judgment in Owusu, the Court reserved the specific scenario at issue in the case at hand. (25) The lessons to be learned from that judgment cannot therefore be applied to it without caution.

23. Indeed, there is no question here, as in the case which gave rise to that judgment, of adding an exception to the Brussels regime which is fundamentally unrelated thereto. In this instance, the drafters of those rules perceived from the outset that the registration and validity of patents were among the specific matters that justified a departure from the general rule that the courts of the Member State of the defendant have jurisdiction. Consequently, they ‘expressly provided’ for a rule to that effect. The fact that that rule is limited to the titles of Member States is easily explained. The Brussels regime is a system of jurisdiction internal to the European Union which pursues objectives specific to it (namely the proper functioning of the internal market and, more recently, the establishment of the area of freedom, security and justice). Consequently, the derogations from the general rule laid down in that regime, including in relation to the registration and validity of patents, were designed to distribute jurisdiction in civil and commercial matters between the courts of the Member States. (26) By contrast, since the European Union does not have the power to determine the jurisdiction of the courts of third States, it is logical that the drafters of those rules did not envisage such derogations in their favour. Originally, in fact, that regime did not include any such derogation.

24. In the light of the foregoing explanation, it would be simplistic to infer, from the limitation of those ‘express’ derogations to Member States, that the general rule of the jurisdiction of the courts of the Member State in which the defendant is domiciled is absolute in relations with third States and applies ‘unconditionally’, even to actions concerned with the validity of patents delivered by those States, thereby ignoring the exclusive jurisdiction generally conferred on the courts of those States in such matters. Such an outcome would constitute a very curious ‘external effect’ of the Brussels regime, one which was not envisaged by the original drafters. (27)

25. BSH, the French Government and the Commission nevertheless contend that, since the adoption of the Brussels I bis Regulation, the Brussels regime has

included certain derogations in favour of third States, namely Articles 33 and 34 of that regulation. According to those interveners, the EU legislature intended with those new articles to regulate expressly and, above all, exhaustively the relationship between the courts of the Member States and the courts of third States. In that context, the legislature is said to have wanted to allow the former to decline jurisdiction in favour of the latter only in the circumstances provided for in those articles, namely where a Member State court is seised of a dispute (irrespective of the subject matter) that is already pending before the courts of a third State.

26. I am not convinced by that submission. As is apparent from their wording and from the title of the section of the Brussels I bis Regulation in which they appear, Articles 33 and 34 of that regulation deal with a specific subject: ‘external’*lis pendens* and related actions. Although those articles undeniably regulate, expressly and exhaustively, that specific subject, there is nothing in the text of that regulation to suggest that the EU legislature really intended to resolve, by means of such specific provisions, all of the questions raised by relations between the courts of the Member States and those of third States, including questions relating to respect for the sovereignty of the latter. (28)

27. The travaux préparatoires are no more enlightening in that regard. Although, as those same interveners have observed, it is apparent from those documents that the French delegation to the Council of the European Union had proposed adding, in the forthcoming regulation, a complete ‘corpus’ of rules dedicated to such relations (recognising in particular the possibility for the courts of the Member States to decline jurisdiction in matters falling within the exclusive jurisdiction of a third State) and that that ‘corpus’ was not taken up by the EU legislature, no public document explains the reason for that decision (which the French Government confirmed at the second hearing). Once again, it cannot be inferred, merely from the refusal to add the rules in question, that there was any ‘clear intention’ on the part of the EU legislature as regards the question before us and, in particular, that there was a ‘political choice’ in favour of the jurisdiction of courts of the Member States to rule on issues affecting the sovereignty of third States, such as the validity of the titles which they grant. (29) That legislature may just as equally have wished to confine itself to settling ‘external’*lis pendens* and to leave it, for the time being, to the national law of each Member State (30) or to the Court, by means of an interpretation of the existing rules, (31) to find a response to other questions concerning relations between the courts of the Member States and those of third States, including the question at issue in the present case.

28. In short, neither the text, read in its context, nor the deference which the Court is required to show to the EU legislature, in compliance with institutional balance, requires the solution suggested by BSH, the French Government and the Commission. In view of the ‘vagueness’ surrounding the intention of that legislature, and contrary to what that government claims, the Court would not be ‘exercising caution’ by accepting, after a

rudimentary a contrario reasoning (see point 20 above), such a drastic interpretation of the Brussels I bis Regulation. (32) The Court would, by contrast, demonstrate such ‘caution’ by drawing from that regulation, according to its usual methods of interpretation, the response which is most consistent with the objectives it pursues and the higher rules which govern it. (33)

29. In that regard, first, I have already explained, in points 124 to 134 of my first Opinion, why the argument relating to the ‘unconditional’ application of Article 4(1) of the Brussels I bis Regulation is contrary to the objectives pursued by that regulation. I will focus only on two issues that were (re)discussed at the second hearing, namely the sound administration of justice and the legal protection of defendants established in the European Union.

30. On the first point, while the universal jurisdiction of the courts of the defendant’s Member State in infringement matters contributes to the sound administration of justice, (34) it would not be consistent with that objective for those courts to have jurisdiction (and be obliged) to rule on claims having the validity of a patent delivered by a third-State as their object. An invalidity judgment issued by those courts would never be recognised in that latter State and could not therefore, in practice, lead its IPO to correct its registers.

31. On the second point, such a solution would also be problematic. It could, in practice, force persons established in the European Union who are holders of third-State patents to face, before the courts where they are domiciled, invalidity proceedings that are ineffective (for the reasons explained in the previous point) or even abusive, brought by their competitors with the sole aim of harassing them. (35)

32. Secondly, I would point out that, since the European Union is bound to respect international law, including customary law, in the exercise of its powers, the Brussels I bis Regulation must be interpreted in a manner that is consistent with that law. (36) In the light of the explanations given in the previous section, I very much doubt that that regulation can be interpreted in the way suggested by BSH, the French Government and the Commission. The Brussels regime cannot claim to be universal when an EU defendant is involved (37) and at the same time take into account only the sovereignty of the Member States, while ignoring that of third States. (38)

B. The ‘reflexive effect’ theory

33. In the light, on the one hand, of all the pitfalls of the ‘straightforward’ application of Article 4(1) of the Brussels I bis Regulation, but, on the other, of the fact that that regulation does not (yet) contain any express derogation for the matters set out in Article 24 of that regulation, when a third State is involved, I suggested, in point 147 et seq. of my first Opinion, a solution (which would also apply across the board since it would apply to all such matters), (39) inspired by the ‘reflexive effect’ theory developed many years ago by Droz. (40)

34. It would amount, in essence, to saying that while the courts of the Member States have jurisdiction, under the

general rule laid down in Article 4(1) of the Brussels I bis Regulation (in the absence of any provision to the contrary), to hear and determine disputes involving third States in the matters in question, that rule, interpreted in a contextual and teleological manner, nevertheless permits them to not exercise that jurisdiction. Although, as the Court held in the judgment in *Owusu*, that rule is, in principle, ‘mandatory in nature’, I agree with Droz that ‘it would be going too far’ (41) also to impose that ‘mandatory nature’ in such cases.

35. In practice, that would mean that, where the courts of a Member State are seised of a claim against a ‘local’ defendant and having as its object, for example, the validity of a third-State patent, Article 4(1) of the Brussels I bis Regulation would allow those courts to use the powers provided for in their national law (whatever they may be, including those deriving from their rules of private international law) to decline to give judgment. Similarly, where such courts are seised of an infringement action concerning a third-State patent, against such a defendant, and the latter raises an invalidity defence, they could refuse to rule on that defence and, as the case may be, stay that action while waiting until the authorities in the third State which delivered the patent have ruled on its validity, in a manner which ‘reflects’ the solution arising from Article 24(4) of that regulation. (42)

36. As I explained in detail in my first Opinion, I believe that that interpretation has the merit of offering a solution to the problem under discussion which, while respecting the limits of the text, is undeniably pragmatic. (43) In particular, since the courts of the Member States are not completely deprived of jurisdiction, but simply have the option not to give judgment, that solution gives them a degree of flexibility to take into account the circumstances of each individual case and, where appropriate, to exercise that jurisdiction where the parties would not receive a fair trial before the courts of the third State involved, in order to avoid a denial of justice. (44)

37. Contrary to what the French Government argued at the second hearing, that interpretation would not call into question the ‘unified and coherent’ (45) nature of the Brussels regime. First, it is not a matter of excluding the question at issue from that regime and leaving it entirely to the national law of each Member State. It would indeed be governed by that regime. The latter would merely provide, as a response, for a partial and circumscribed reference to the national law of the court seised. (46) Secondly, that interpretation would contribute precisely to the coherence of that regime. It would ensure that, within that framework, similar solutions are applied to similar situations.

38. At the second hearing, BSH, (47) the French Government and the Commission also reiterated the criticisms which they had made in their first observations, to the effect that giving the courts of the Member States an option not to give judgment in the matters at issue, on the basis of their national law, would affect the foreseeability of jurisdiction and, therefore, legal certainty and the uniform application of the

Brussels I bis Regulation, in a manner contrary to the ‘spirit’ of the judgment in *Owusu*.

39. I am still not convinced. First, it would not be a question, as in the case which gave rise to the judgment in *Owusu*, of giving the courts of the Member States wide discretion not to exercise jurisdiction in any ‘external’ disputes (which would seriously undermine the predictability of their jurisdiction), (48) but of acknowledging that they have narrow discretion to refrain from ruling on certain matters, where that ‘would reflect’ the solutions applicable under Article 24 of the Brussels I bis Regulation.

40. Secondly, as regards the uniform application of the Brussels I bis Regulation in all the Member States, it is widely recognised, in those States, that national courts should not hear and determine the matters in question when another State is involved. (49) Thus, the courts of the Member States generally have the power, in their national law, to decline to rule in such situations. (50) Lastly, while the precise conditions under which they do so may, in principle, vary from one Member State to another, I recall that EU law would circumscribe national law to quite a significant extent, as explained in points 150 to 152 of my first Opinion. That would ensure that such a solution is applied in a sufficiently consistent way throughout the European Union.

41. The French Government also argued, at the second hearing, that establishing such a ‘reflexive effect’ of the rules of exclusive jurisdiction would require the resolution of numerous practical issues (the circumstances in which a court should stay proceedings rather than decline jurisdiction, the possibility for that court to decide on such a measure of its own motion, and so forth), which the Court of Justice could not do by judicial decision. In fact, I consider that the Court would not have to invent an exhaustive regime for declining jurisdiction, but would have to set certain requirements arising from EU law and refer, as for the rest, to the national law of each Member State (51) (all while waiting for the EU legislature to itself add such a regime to the Brussels I bis Regulation).

C. The possible ‘third way’

42. That said, some of the questions put by the Court with a view to the second hearing and the responses given by the Commission suggest the possibility of a ‘third way’, which would be both more targeted (on the registration and validity of patents) and more radical than the response I have suggested (and which, I admit, did not occur to me when I drafted my first Opinion).

43. That ‘third way’ would consist in interpreting Article 4(1) of the Brussels I bis Regulation, in the light of its context (see point 23 above), and customary international law (see points 14 to 18 above), as meaning that it does not confer any jurisdiction on the courts of the Member State of the defendant to hear and determine actions concerned with the registration or validity of third-State patents. (52) Moreover, where, as in the present case, the question of the validity of such a patent is raised as a defence in an infringement action, that provision would confer jurisdiction on those courts to determine that issue only as an incidental question, (53

) for the sole purpose of ruling on the action. (54) It would not give them the power to attach erga omnes effect to the grounds relating to the validity of the title (or, a fortiori, to make a declaration in that regard, having such an effect, in the operative part of their judgment). (55)

44. In practice, that would mean that, while the Brussels I bis Regulation would apply to such claims (or defences) where the defendant is domiciled in the European Union, it would not give jurisdiction (or such a power to make an erga omnes declaration) to any court of a Member State. Consequently, where such a court is seised of such a claim against a ‘local’ defendant, it would have to declare that it has no jurisdiction to hear and determine the matter (or, as regards an invalidity defence raised in an infringement action, to limit the effects of its decision to the parties), on the basis of that regulation. (56)

45. That interpretation would have several merits. First of all, from a theoretical point of view, by stating that the courts of the Member States do not derive any jurisdiction from the Brussels regime to invalidate third-State patents (or, in an infringement action, to give erga omnes effect to some of their findings), the Court would be drawing conclusions that would indeed be radical, but would nevertheless be logical (and therefore entirely defensible), from the considerations of customary international law set out in points 14 to 18 of this Opinion.

46. Next, that interpretation would ensure, in practice, a degree of consistency between the solutions applicable ‘intra-EU’ and those applicable to relations with third States, again while respecting the text of Article 24(4) of the Brussels I bis Regulation. (57) It would also reflect those existing in comparative law, in particular in the law of the Member States. (58)

47. Lastly, that interpretation would have the merit of offering a solution to the issue raised which is perfectly uniform (since the lack of jurisdiction of the courts of the Member States would derive directly from the Brussels I bis Regulation, applying in the same way throughout the European Union) and predictable (since no discretion would be left to those courts as regards the possibility to adjudicate). Therefore, it would be fully in line with the ‘spirit’ of the judgment in *Owusu*.

48. Such an interpretation of the Brussels I bis Regulation would, however, be open to some criticism. First of all, from a theoretical point of view, it could be argued that it would conflict with the logic of the rule on jurisdiction laid down in Article 4(1) of the Brussels I bis Regulation. That rule is based on the personal links between the designated courts and a particular defendant. On that basis, as I stated in point 6 of this Opinion, the jurisdiction of those courts extends, in principle, to all claims brought against that defendant. That rule does not, in itself, make any distinction according to the matter at issue.

49. That objection does, however, have its limits. In fact, in ‘intra-EU’ situations, certain matters are excluded from the jurisdiction of the courts of the defendant’s Member State, by virtue of other provisions of the

Brussels I bis Regulation (in particular Article 24 thereof). Thus, it would simply be a matter of recognising that the same sometimes applies in disputes involving third States, by acknowledging, within Article 4(1) itself of that regulation, that there are certain implicit limitations on that jurisdiction, dictated by international customary law.

50. Next, it could be noted that several of the official reports on the Brussels instruments, (59) a passage from Opinion 1/03 (60) and the second paragraph of recital 24 of the Brussels I bis Regulation (61) suggest that the courts of the Member States do in fact have jurisdiction, on the basis of Article 4(1) of that regulation, to hear and determine claims relating to matters such as the registration or validity of patents, where a third State is involved.

51. That said, that objection, again, has its limits. First, the reports in question, aside from the fact that they do not substantiate their position, do not provide the authentic interpretation of the Brussels regime, but are, at most, a non-binding guide in that regard. (62) Secondly, since Opinion 1/03 does not, as such, relate to the issue which is at the heart of the present case, (63) the passage in question could be regarded as obiter dictum, open to various nuances and precisions, rather than as a fully settled position of the Court on the subject. (64) Thirdly, the tension with recital 24 of the Brussels I bis Regulation would be very limited. (65)

52. Lastly, from a practical point of view, a criticism that might be levelled at such an interpretation of Article 4(1) of the Brussels I bis Regulation is the rigidity of the resulting solution. Since the courts of the Member States would have (absolutely) no jurisdiction to rule on claims concerning the registration or validity of third-State patents, those courts would have no discretion to assess whether it is appropriate to decline jurisdiction. They would be required to do so in every instance. In some cases, that could require litigants to go before a court of a third State which does not offer the guarantees of a fair trial. Those courts would not be able to hear and determine the dispute in such cases.

53. Again, the strength of that criticism is limited. Although such discretion is, in my view, indispensable in certain contexts, (66) its appropriateness is more questionable in the specific case at issue here. The courts of the Member States would exceed the limits set by customary international law if they were to make an erga omnes declaration on the invalidity of a third-State patent even for reasons of ‘necessity’ (because the courts of the latter State cannot offer guarantees of a fair trial), and their judgment would still have no real practical value. (67) Moreover, if it were to follow, in particular, that a competitor of a holder of third-State patents domiciled in the European Union could never bring an action for invalidity of such a patent before the courts of the Member States, such a competitor could always challenge the validity of that patent indirectly, for example, in any infringement action brought against it (provided that it is itself domiciled in the European Union), or in the context of an application for a ‘negative declaration’ of liability brought against that holder. It

would not therefore be deprived of all protection, before those courts, against third-State patents which lack foundation.

III. Conclusion

54. In the light of all the foregoing considerations, I propose that the Court should answer the third question referred for a preliminary ruling by the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden) as follows: Article 24(4) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

must be interpreted as meaning that that provision does not apply in respect of the validity of a patent registered in a third State. However, the courts of the Member States, where they have jurisdiction under another rule of that regulation, are entitled to not adjudicate on that issue.

1) Original language: French.

(2) Opinion in BSH Hausgeräte (C-339/22, EU:C:2024:159) ('my first Opinion').

(3) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1; 'the Brussels I bis Regulation').

(4) In accordance with the procedure laid down in the Convention on the Grant of European Patents, signed in Munich (Germany) on 5 October 1973 ('the EPC').

(5) See recital 13 and Article 4(1) of the Brussels I bis Regulation.

(6) At least where, as in the present case, no international convention governs the matter between the European Union (or the Member State of the court seised) and the third State concerned (see points 23 and 135 to 138 of my first Opinion).

(7) See, to that effect, judgment of 8 September 2022, IRnova (C-399/21, 'the judgment in IRnova' EU:C:2022:648, paragraphs 40 and 48 and the case-law cited).

(8) An infringement is (necessarily) localised in the territory of the State which granted the patent concerned, since, in accordance with the principle of territoriality, the scope of the rights conferred by it is limited to that territory.

(9) Judgment of 1 March 2005 (C-281/02, 'the judgment in Owusu', EU:C:2005:120, paragraphs 10, 11 and 24 to 26). That judgment relates to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Brussels on 27 September 1968 (OJ 1978 L 304, p. 36), which was subsequently replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), itself replaced by the Brussels I bis Regulation. That being so, continuity of interpretation must be ensured in respect of

the scope of those instruments and their equivalent provisions (see, inter alia, the judgment in IRnova (paragraphs 29 and 37)).

(10) The question also arises, mutatis mutandis, where a court of the European Union is seised of a dispute covered by an exclusive choice-of-court agreement. Article 25 of the Brussels I bis Regulation provides that the courts of the Member States must, in principle, give effect to such an agreement where it designates the courts of another 'Member State', without mentioning the scenario of an agreement in favour of the courts of a third State. Given the focus of this Opinion, I shall concentrate on disputes related to the registration and validity of third-State patents, but will occasionally touch on those other scenarios.

(11) Similarly, the courts of the defendant's Member State would have jurisdiction, and be obliged to give judgment, where they are seised of an action despite an exclusive choice-of-court agreement in favour of the courts of a third State, in the absence of any contrary rule in the Brussels I bis Regulation.

(12) See, inter alia, Parrish, A., 'Adjudicatory jurisdiction and public international law: The fourth restatement's new approach', in Stephan, P.B. and Cleveland, S.A. (eds), *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law*, Oxford Academic, New York, 2020, pp. 303 to 318; Roorda, L. and Ryngaert, C., 'Public international law constraints on the exercise of adjudicatory jurisdiction in civil matters', in Forlati, S. and Franzina, P. (eds), *Universal Civil Jurisdiction – Which Way Forward?*, BRILL, Leyde, 2020, pp. 74 to 95; and Mills, A., 'Rethinking jurisdiction in international law', *The British Yearbook of International Law*, 2014, Vol. 84, No 1, 2014, pp. 187 to 239.

(13) Some foreign courts consider that customary international law or international comity (comitas gentium) prevents them from ruling on the infringement of a foreign patent (see, inter alia, United States Court of Appeals for the Federal Circuit, 1 February 2007, Jan K. Voda, M.D. v. Cordis Corp., 476 F.3d 887, 905 (Fed. Cir. 2007)). That is not the case. With regard to customary law, I have just explained why. As regards comitas gentium, the fact that a court of one State gives effect to a title of another State constitutes, on the contrary, an act of comity towards it (see Supreme Court (United Kingdom), 27 July 2011, Lucasfilm Limited and others v Ainsworth and another (2011) UKSC 39, §§ 104, 105 and 109).

(14) See, by analogy, the judgment in Owusu (paragraphs 30 and 31).

(15) Sufficient connections, for the purposes of customary law, may exist with different States, as in the present case. States may mitigate the risk of parallel proceedings and contradictory decisions inherent in such an overlap of jurisdiction either by adopting internal solutions (such as the 'forum non conveniens' doctrine in common law countries or the lis pendens rules in civil law countries), or by concluding mutual international treaties allocating jurisdiction in civil and commercial matters between their respective courts.

(16) See point 61 of and footnote 52 to my first Opinion and the references cited. See, also, Droz, G., *Compétence judiciaire et effets des jugements dans le Marché commun*, Paris, Dalloz, 1972, § 156; Mayer, P., ‘*Droit international privé et droit international public sous l’angle de la notion de compétence*’, *Revue critique de droit international privé*, No 54, 1979, pp. 362 and 374 to 376; and Pataut, E., *Principe de souveraineté et conflits de juridictions (Étude de droit international privé)*, LGDJ, Paris, 1999, §§ 4 to 11, 48, 97 and 359. Such considerations of customary international law apply in most of the other matters referred to in Article 24 of the Brussels I bis Regulation. Accordingly, the courts of a Member State cannot rule on a claim concerning the validity of an entry in another type of foreign public register (Article 24(3)), for the reasons given in point 16 above. Nor may those courts rule on a claim concerned with the enforcement of a judgment (Article 24(5)) in another State, in view of the exclusive jurisdiction of each State to implement coercive measures on its territory (see Permanent Court of International Justice, judgment in *France v. Turkey* (‘*Case of the S.S. Lotus*’), 7 September 1927, 1927 P.C.I.J., Series A, No 10, p. 18). Lastly, it would (probably) be contrary to customary international law for a court of a Member State to rule on the validity of a right in rem in immovable property (first phrase of Article 24(1)), located abroad, given the links between such a decision and the territorial sovereignty of each State (see Mills, A., cited above, p. 204). By contrast, such issues of customary law do not arise in relation to residential tenancies (second phrase of Article 24(1)) or the validity of the constitutions of companies or the decisions of their organs (Article 24(2)).

(17) Notwithstanding the jurisdiction of the EPO (see Articles 99 to 105 of the EPC), such a patent can be revoked only ‘part’ by ‘part’ before the national courts. Again, only a court of the State in which a ‘part’ is registered may declare it invalid and order its removal from the national register, regardless of the fact that the grounds for revocation of European patents are provided for in the EPC (Article 100) and that, as in the present case, the Turkish ‘part’ of the patent concerned has the same content as the Swedish ‘part’.

(18) Although the courts of the defendant’s Member State may hear and determine an infringement action concerning a third-State patent, they must necessarily assess the infringement (and the validity) of the title in the light of the law of that latter State. While all States may establish a patent law, each State has exclusive prescriptive jurisdiction in respect of the titles it grants for its territory. Only the State concerned may determine the rights conferred by those titles and the conditions for their validity (see, to that effect, Mayer, P., cited above, pp. 349 to 351).

(19) See points 44 and 62 of my first Opinion. Contrary to Electrolux’s submissions, the principle of the territoriality of patents, recognised in particular by the Paris Convention for the Protection of Industrial Property, signed in Paris (France) on 20 March 1883, last revised at Stockholm (Sweden) on 14 July 1967 and

amended on 28 September 1979 (United Nations Treaty Series, Vol. 828, No 11851, p. 305) (Article 4bis) and the EPC (Article 2(2)), does not affect the adjudicatory jurisdiction of the Member States. Those treaties are, in fact, neutral on that point. While, under that principle, a patent offers protection limited to the territory of the State which granted it and depends on the law of that State, that does not prevent foreign courts from ruling on the infringement or even on the validity (indirectly) of the title in question (see, by analogy, judgment of 19 April 2012, *Wintersteiger*, C-523/10, EU:C:2012:220, paragraph 30). That principle requires only that they do so in the light of the law of that State, a requirement which, moreover, already derives from customary law (see footnote 18 above).

(20) The rule of exclusive jurisdiction in proceedings which have as their object the validity of entries in public registers and the enforcement of judgments set out in paragraphs 3 and 5 of that article, or even those which have as their object rights in rem in immovable property set out in the first phrase of paragraph 1 thereof, also reflect, in my view, customary international law. By contrast, the rule in proceedings which have as their object residential tenancies and the validity of the constitution of companies (and so forth), set out respectively in the second phrase of paragraph 1 and in paragraph 2 of that article, arise from simple considerations of the sound administration of justice. See footnote 16 to this Opinion; point 126 of and footnote 113 to my first Opinion and the references cited; and Pataut, E., cited above, §§ 4 to 11, 357 and 385.

(21) In accordance with their rationale, those rules are of a mandatory nature ‘the application of which is specifically binding on ... courts’ (judgment of 13 July 2006, *GAT*, C-4/03, ‘the judgment in *GAT*, EU:C:2006:457, paragraph 24). The courts of a Member State, seised of a claim which is principally concerned with, inter alia, the validity of a patent from another Member State, must declare of their own motion that they have no jurisdiction (see Article 27 of the Brussels I bis Regulation). Moreover, a judgment given by those courts in breach of those rules cannot be recognised or enforced in another Member State (see Article 45(1)(e) of that regulation).

(22) See, for criticism of that solution, points 41 to 63 of my first Opinion.

(23) See the judgment in *IRnova* (paragraphs 34 and 35).

(24) The judgment in *Owusu* (paragraph 37).

(25) See the judgment in *Owusu* (paragraphs 48 to 52) and points 119 and 155 of my first Opinion. In so doing, the Court followed the Opinion of Advocate General Léger in that case (C-281/02, EU:C:2004:798, points 69 to 71, 217 and 280).

(26) This is clear from a combined reading of Article 4(1) and Article 5(1) of the Brussels I bis Regulation.

(27) See Droz, G., cited above, § 165, de Vareilles-Sommières, P., ‘The mandatory nature of Article 2 of the Brussels Convention and derogation from the rule it lays down’, in de Vareilles-Sommières, P. (ed), *Forum*

Shopping in the European Judicial Area, Hart Publishing, London, 2007, pp. 101 to 114; Schauwecker, M., ‘Extraterritorial patent jurisdiction: Can one sue in Europe for infringement of a U.S. patent?’, TTLF Working Paper, No 10, 2011, p. 43; and Mills, A., ‘Private international law and EU external relations: Think local act global, or think global act local?’, The International and Comparative Law Quarterly, Vol. 65, No 3, 2016, pp. 541 to 579, in particular pp. 541, 542, 568 and 569.

(28) See point 118 of and footnote 108 to my first Opinion and the references cited.

(29) I note, in that regard, that the French delegation to the Council also suggested that the Brussels I bis Regulation should expressly state that, where a court of a Member State is seised of a dispute in a matter in respect of which Article 24 of that regulation provides for exclusive jurisdiction, but involving a third State, the general rule laid down in Article 4(1) of that regulation applies (see document 8205/12, 27 March 2012, Note from the French delegation to Working Party on Civil Law Matters (Brussels I), p. 5; ‘Article 34(1)’). However, the EU legislature did not include that clarification either. Clearly, the EU legislature’s intention was not to make a ‘clear-cut’ determination, but, on the contrary, to leave open the question at issue here.

(30) I refer to the note from the German delegation stating that it opposed the French delegation’s proposal on the ground that ‘the Brussels I Regulation does not definitively regulate the international jurisdiction of courts in the Member States vis-à-vis courts in third States’, and that it should remain so (Council of the European Union, document 13756/11 ADD 1, 9 September 2011, Note from German delegation to Working Party on Civil Law Matters (Brussels I), p. 3).

(31) See Hess, B., ‘The Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)’, Think Tank European Parliament, 2011, p. 13: ‘The Commission did not endorse the proposal of the literature that the exclusive heads of jurisdiction in Article 22 [of the Brussels I Regulation] should also exclude the jurisdiction of EU-courts in corresponding situations taking place in third states (so-called effet réflexe). ... This solution seems to be acceptable as the determination of an effet réflexe can be qualified as an issue of interpretation of the Regulation which can be elaborated – if necessary – by the ECJ ...’ (Emphasis added).

(32) The most dramatic consequence (because it is particularly significant from a practical and economic point of view) of that reading would be to reduce drastically the effectiveness of choice-of-court agreements in favour of the courts of third States (since there is no specific derogation for such agreements in the regulation). I demonstrated sufficiently, in points 129 to 131 of my first Opinion, the untenable nature of that reading in that regard.

(33) Contrary to what the French Government maintains, by acting in that way, the Court would not be ‘pre-empting [the] trade-off by the EU legislature’. There is nothing to prevent the legislature from (eventually) addressing the issue when it next recasts the Brussels regime and adopting, in that regard, express rules which would supersede the interpretation adopted by the Court.

(34) This enables one and the same court to give a comprehensive ruling on ‘multi-State’ infringement claims concerning national patents with the same or similar subject matter and claims (in particular the different ‘parts’ of European patents), as raised by BSH in the present case, thus avoiding the risk of conflicting decisions.

(35) See, to that effect, Droz, G., cited above, § 168.

(36) See, inter alia, judgments of 16 June 1998, Racke (C-162/96, EU:C:1998:293, paragraph 46); of 27 February 2018, Western Sahara Campaign UK (C-266/16, EU:C:2018:118, paragraph 47); and of 26 April 2022, Poland v Parliament and Council (C-401/19, EU:C:2022:297, paragraph 70).

(37) See points 5 and 6 of this Opinion.

(38) Or observe that sovereignty in a very partial and indirect manner in the context of the *lis pendens* mechanism provided for in Articles 33 and 34 of the Brussels I bis Regulation, on the basis of circumstances as random and arbitrary as whether the courts of the third State concerned have been seised, and whether they were seised before the courts of the defendant’s Member State (see point 25 of this Opinion).

(39) While the considerations of customary international law discussed above concern only certain of those matters (see footnotes 16 and 20 to this Opinion), the justifications for the ‘reflex effect’ based on the system and objectives of the Brussels I bis Regulation apply in the same way to all of them. Moreover, that solution would also apply (but for different reasons) to disputes covered by an exclusive choice-of-court agreement in favour of the courts of a third State.

(40) See Droz, G., cited above, §§ 164 to 169.

(41) Droz, G., cited above, § 167.

(42) See, in respect of that solution, points 77 to 94 of my first Opinion. In the context of the ‘reflexive effect’ theory, the situations in which the courts of the Member States are authorised not to give judgment coincide with the material scope of Article 24 of the Brussels I bis Regulation. It is true that that would amount to extending, in the international order, this solution relating to defences of invalidity, even though customary international law does not require it (and I have criticised it in points 41 to 63 of my first Opinion). Nevertheless, such an outcome is required for the sake of the consistency of the ‘internal’ and ‘external’ solutions which that theory seeks to ensure (the latter ‘reflecting’ the former). In any event, that objection is counterbalanced by the fact that, contrary to what is required ‘intra-EU’, the proposed solution does not oblige the courts of the Member States not to rule on

such a plea. They may do so where they consider it appropriate (which is less problematic).

(43) The force of the French Government's argument that that solution would resolve the problem only partially, since there is nothing to prevent the courts seised from not exercising that option and, for example, declaring a third-State patent invalid, is limited. First, the risk is more theoretical than real, as the courts of the Member States traditionally do not consider that they have jurisdiction to rule on the validity of foreign patents (see footnote 49 below). Secondly, if the courts of a Member State were to act in that way, the resulting infringement of customary international law would be attributable only to that Member State, and not to the EU legislature, since the latter would not have imposed that infringement.

(44) A problem which cannot, in principle, arise 'intra-EU', having regard to the mutual trust that the Member States accord to each other's judicial institutions (see point 110 of my first Opinion).

(45) Opinion 1/03 (New Lugano Convention), of 7 February 2006 ('Opinion 1/03', EU:C:2006:81, paragraph 148).

(46) Likewise, it cannot be argued that this would call into question the primacy of the Brussels I bis Regulation over national law. Indeed, the latter would apply by virtue of the former. See, by analogy, Opinion 1/03 (paragraph 148).

(47) Moreover, although BSH criticises the 'reflexive effect' theory, the solution it suggests is very close to it. That company proposes that the Court should rule that, while the courts of the defendant's Member State have jurisdiction and are obliged to rule on claims concerning third States, under Article 4(1) of the Brussels I bis Regulation, those courts could nevertheless refuse to rule on claims concerning the validity of a third-State patent, on the ground that the applicant has no interest in bringing proceedings (given that it is impossible for those courts to order a foreign IPO to remove such a title from its register), on the basis of their national procedural rules.

(48) See the judgment in *Owusu* (paragraphs 38 to 42).

(49) Under their national law, the courts of the Member States generally consider that they have no jurisdiction to rule on the validity of a foreign patent or of a right of ownership in immovable property situated in another State, or on the enforcement of decisions in the territory of such a State. See, in general, Nuyts, A., *Study on Residual Jurisdiction*, General Report, 2007, §§ 93 to 96 and 103. For examples, see (i) in Belgium, with regard to the validity of patents, the second paragraph of Article 86 of the Law of 16 July 2004 'on the Code of Private International Law' (Numac 2004009511, *Moniteur Belge* of 27 July 2004, p. 57340); (ii) in France, with regard to immovable property, *Pataut, E.*, cited above, §§ 139, 148, 360, 361 and 374 to 377, and, with regard to the validity of patents, *Mayer, P., Heuzé, V. and Remy, B.*, *Droit international privé*, 12th edition, LGDJ, Paris, 2019, §§ 329 and 330; (iii) in the United Kingdom, concerning immovable property, *House of Lords* (United Kingdom), 8 September 1893, *British South*

Africa Co v Companhia de Moçambique (1893) AC 602, and, with regard to the validity of patents, *Supreme Court (United Kingdom)*, 27 July 2011, *Lucasfilm Limited and others v Ainsworth and another*, §§ 54 and 56; and (iv) in Sweden, with regard to the validity of patents, *Lundstedt, L.*, 'Jurisdiction and enforcement outside of the Brussels System with a focus on IPR', *Nordiskt immateriellt rättskydd*, Vol. 76, No 4, pp. 348 to 364, § 3.2.1.

(50) See, a contrario, the judgment in *Owusu* (paragraph 43).

(51) See, in respect of those requirements, points 149 to 152 of my first Opinion. What is more, a number of the questions raised by the French Government are purely procedural (whether a court can decide to decline jurisdiction of its own motion, and so forth). In general, such questions are not governed by the Brussels regime, but are left to the *lex fori*, provided that the effectiveness of that regime is not impaired (see judgment of 15 May 1990, *Hagen, C-365/88*, EU:C:1990:203, paragraphs 17, 19 and 20). That is what I am recommending.

(52) The same would apply to the other provisions of the Brussels I bis Regulation. In addition, although it is focused on the validity of third-State patents, that response could, in my view, be transposed, by analogy, to claims concerned with the validity of a right of ownership of immovable property situated in a third State, the validity of an entry in another public register in a third State, or an enforcement measure taken by that State on its territory, since all of those matters raise questions of State sovereignty in international law. However, it cannot apply to disputes which do not raise such questions (residential tenancies, the validity of the constitution of companies), or disputes covered by exclusive choice-of-court agreements in favour of the courts of a third State. For the latter cases, only the reflexive effect argument seems to me to be appropriate.

(53) Thus, the courts of the Member States would not be obliged, where a plea of invalidity is raised in an infringement action concerning a third-State patent, to stay proceedings until the authorities of that State determine the validity of the title, as those courts must often do under Article 24(4) of the Brussels I bis Regulation when a patent of a Member State is at issue (see points 77 to 94 of my first Opinion). Besides, as I stated in point 63 of that Opinion, that solution should also be abandoned, *de lege ferenda*, in 'intra-EU' disputes. I therefore call on the EU legislature to amend the Brussels regime to that effect.

(54) At the second hearing the Court asked the interveners whether Article 17(2) of the Charter of Fundamental Rights of the European Union could preclude such jurisdiction. I do not think so. That fundamental right does indeed imply that the courts of the Member States are to implement the rights conferred by third-State patents when seised of a claim to that effect. However, they must do so only where those titles are valid. That provision does not prevent them from verifying this. If, in an infringement action, those courts were to find such a patent invalid, and to dismiss the action on that ground, the holder would certainly no

longer be able to exercise the rights conferred by the patent against the alleged infringer thus acquitted. However, that would not be a case of ‘deprivation of property’, but merely the consequence of the finding of invalidity. The fact that such a decision is *inter partes*, with the patent otherwise remaining valid, is inherent in the limits of the adjudicatory jurisdiction of the Member States in that regard. The resulting situation cannot in itself be regarded as contrary to Article 17(2) of the Charter.

(55) A (hypothetical) rule of national procedural law giving *erga omnes* effect to findings of validity made in such a judgment should therefore be disregarded as contrary to Article 4(1) of the Brussels I bis Regulation.

(56) The court seised cannot declare that it has jurisdiction on the basis of its national law. Since the Brussels I bis Regulation applies, having regard to the defendant’s domicile in the European Union, national rules of jurisdiction are disregarded (see judgment of 25 February 2021, *Markt24*, C-804/19, EU:C:2021:134, paragraph 32).

(57) At the same time, it avoids extending to the international sphere the excessive solution provided for by that provision in respect of pleas of invalidity (see footnote 53 above). See, by way of comparison, footnote 42 above.

(58) See footnote 49 above.

(59) See Jenard, P. and Möller, G., Report on the Lugano Convention (OJ 1990 C 189, p. 57), paragraph 54, and de Almeida Cruz, M., Desantes Real, M. and Jenard, P., Report on the Convention of San Sebastián (OJ 1990 C 189, p. 35), § 25.

(60) See paragraph 153 of Opinion 1/03 and point 112 of my first Opinion.

(61) Articles 33 and 34 of the Brussels I bis Regulation provide that, ‘where jurisdiction is based on Article 4’, a court of a Member State may decline jurisdiction, in the event of concurrent proceedings in a third State, where that is consistent with the proper administration of justice. The second paragraph of recital 24 of that regulation states that that could be the case if ‘the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction’. That therefore implies that a court of a Member State could have jurisdiction on the basis of Article 4 of that regulation even in respect of claims concerning, for example, the validity of third-State patents.

(62) See, to that effect, judgment of 30 September 2021, *Commerzbank*, C-296/20, EU:C:2021:784, paragraph 58.

(63) That decision was concerned with whether the European Union had exclusive competence to conclude the Lugano II Convention (see point 112 of my first Opinion).

(64) Moreover, in the passage in question, the Court referred, in very general terms, to all the matters for which a rule of exclusive jurisdiction is laid down in Article 24 of the Brussels I bis Regulation and to the case of choice-of-court agreements. It did not address in detail whether, for some of those matters (including the

registration and validity of third-State patents), in view of their specific features, the jurisdiction of the courts of the defendant’s Member State is excluded or limited (see also, in that respect, the following footnote).

(65) Even if Article 4(1) of the Brussels I bis Regulation were to be interpreted in the manner suggested in this section of this Opinion, there would still be situations in which the courts of the Member States would have jurisdiction under that provision, even though a court of a third State would, at the same time, have exclusive jurisdiction, reflecting those foreseen by the regulation in question. That could be the case with regard to residential tenancies or the validity of the constitution of legal persons or, by analogy, in the case of an exclusive choice-of-court agreement in favour of the court of the third State in question.

(66) In particular where the courts of the Member States are seised despite an exclusive choice-of-court agreement in favour of the courts of a third State.

(67) See point 30 above. The solution is not unknown in comparative law. For example, in French law, the forum of necessity does not exist in matters of immoveable property (see *Pataut, E.*, cited above, §§ 374 to 377).
