

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 4*bis*) 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 rättsskydd*, 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 immovable property (see Pataut, E., cited above, §§ 374 to 377).