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Chapter 7

FINLAND

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I FORMS OF INTELLECTUAL PROPERTY PROTECTION

The Finnish legislation concerning intellectual property rights is affected by a number of international treaties and multilateral agreements to which Finland has acceded, such as the TRIPS Agreement and the Paris Convention. As an EU Member State, Finland has also implemented the relevant EU intellectual property directives in its domestic legislation and the EU regulations concerning intellectual property are directly applicable in Finland.

The forms of intellectual property protection available in Finland are patents, copyrights, trademarks, utility models, design rights, trade names, trade secrets and unfair business practices legislation, exclusive rights in the layout-design (topography) of integrated circuits, protection of plant varieties, protection of geographical indications and designations of origin and supplementary protection certificates (SPCs). Additionally, data protection and marketing protection is provided for medicinal products.

This chapter will focus on patents in more detail (see Sections III and IV, *infra*). The other most important forms of protection and the related international treaties to which Finland has acceded are described below.

i Copyright

Copyright protection is provided as of the creation of an original and creative work. Copyright is not subject to registration in Finland. Copyright subsists until 70 years have elapsed from the year of the author's death. Neighbouring rights are offered protection for 50 years from the performance, recording, publication or corresponding date. Copyright protection for performers and record producers has been extended from 50 to 70 years

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with an EU directive 2011/77/EU, which has been implemented into national Finnish legislation. Also databases are provided with a specific *sui generis* form of protection for 15 years from the end of the year in which the database was made available to the public. Finland has implemented the EC Copyright Directives and ratified the Berne Convention, the 1952 Universal Copyright Convention, the 1961 Rome Convention, the 1971 Geneva Convention, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

ii Trademarks

Trademark protection can be acquired by domestic registration or international registration designating Finland through the Madrid Protocol. Trademark protection is also available on the basis of an EU-wide Community trademark registration in accordance with EC Regulation No. 207/2009 on the Community trade mark. Further, in Finland, trademark protection may also be acquired without registration by the trademark becoming established through use. Even trademarks that are as such not eligible for registration may in some cases enjoy protection through establishment. However, the holder of an established trademark has the burden of proof regarding its existence. Finland has implemented Directive 2008/95/EC to approximate the laws of the Member States relating to trademarks.

If registered, the trademark registration is effective from the date on which the application was filed until 10 years from the date of registration. The registration may be renewed indefinitely for subsequent 10-year periods at a time. The non-use of a trademark for five years is, however, a ground for revocation.

iii Utility models

A utility model protects minor technical inventions that do not achieve the level of inventive step required for patent rights. To obtain utility model protection the invention has to be new and must differ distinctly from known technology. The application procedure for utility models is faster and simpler than the corresponding procedure for patents, containing only an examination of formalities. A patent application can also be converted into a utility model application in the event that it appears that the patentability criteria are not fulfilled but the invention nevertheless distinctly differs from known technology. A disadvantage of a utility model is a greater risk of the registration being revoked as there is no *ex officio* examination of novelty and distinct difference from known technology. The maximum term of protection of a utility model is 10 years from the filing date. If the life cycle of an invention is short or the commercial value minor, a utility model may offer adequate protection.

iv Design rights

Design right protection may be obtained through domestic registration or through international registration designating Finland in accordance with the Geneva Act of the Hague Agreement. Design protection is also available on the basis of a registered or unregistered EU-wide Community design in accordance with EC Regulation No. 6/2002 on Community Designs.

A registered design can be maintained for a maximum of 25 years from the date of filing. An unregistered Community design provides protection for three years from the date on which the design was first made available to the public within the Community. The scope of protection for an unregistered design is more limited than for registered designs and the holder may also encounter problems in proving its existence. Requirements of novelty and individual character apply to designs. However, a grace period of 12 months is provided for registration of national and Community design rights, meaning that registration can be applied for during 12 months following the first disclosure without destroying the novelty.

v Trade names

Trade name protection is obtained either by registration or establishment through use. Also auxiliary trade names may be registered and used. The registration of a trade name may remain in force indefinitely until the business is closed down. Although trade name registration can be revoked because of non-use, in practice this is rare since non-use would be required for the entire registered field of business and partial revocation is not possible. Therefore, trade names may enjoy wide-ranging protection, for example against trademarks, especially if the registered field of business of the company is broad. A trade name is only transferable in connection with a business transfer.

vi Trade secrets

Trade secret protection may be considered as an alternative to patenting in the event that the disclosure of the invention is undesired. Trade secrets are business or professional secrets and other corresponding business information that an undertaking keeps secret and the disclosure of which would cause financial loss to it or to another undertaking that has entrusted it with the information. An additional benefit of a trade secret is that it is protected for an indefinite period until the criteria for protection are no longer fulfilled. However, trade secret protection requires active measures for keeping the information confidential, which increases the risk that the protection is lost.

vii Data protection and marketing protection of medicinal products

Authorised medicinal products benefit from an eight-year period of data protection and a 10-year period of marketing protection as regards the findings of preclinical and clinical trials or safety and residue testing made in connection with an application for marketing authorisation. The marketing protection period for medicinal products for human use can in certain circumstances be extended to a maximum of 11 years and for veterinary medicinal products to a maximum of 13 years.

If the patent protection of a medicine is poor, the data protection is the only means of ensuring profitability of the research work. Data protection does not, however, mean sole marketing right of the medicinal product.

II RECENT DEVELOPMENTS

The Market Court has, as of 1 September 2013, exclusive jurisdiction with respect to civil litigation and prosecution of all intellectual property rights; it also handles

precautionary measures. In addition, the Market Court has exclusive jurisdiction with respect to appeals over decisions of the Finnish Patent and Registration Office (PRH) concerning registration issues and appeals over the administrative decisions of the Finnish Communications Regulatory Authority regarding the grant of domain names for the top-level domain '.fi'. The Board of Appeals of the PRH was closed down at the end of 2013.

Criminal proceedings remained in the District Court of Helsinki with respect to industrial property rights and in all of the district courts regarding copyright.

Special qualification criteria apply to all permanent members and secondary specialised members of the Market Court. In IP cases, the basic composition of the Market Court is three legally trained judges. In civil cases concerning patents, utility models and integrated circuits, however, the Court comprises of three legally trained judges and a Market Court engineer. Appeals against Market Court decisions on civil matters are heard by the Supreme Court and appeals against administrative IP registration decisions are heard by the Supreme Administrative Court, both subject to a leave to appeal.

III OBTAINING PROTECTION

i Introduction

Finland is a contracting party to the Patent Cooperation Treaty (PCT) and the European Patent Convention (EPC). The PRH and the Finnish courts generally adhere to the European Patent Office (EPO) case law, although they are not formally bound by it.

The basic requirements for patentability of an invention are novelty, inventive step and industrial applicability. Furthermore, the invention must have a technical character, a technical effect and be reproducible.

ii Patent application

Domestic patent applications are filed with the PRH. The application shall include a description, the patent claims and an abstract. Each claim may relate to one invention only. The application may, however, contain many claims, in which case they may be independent or dependent. If an application contains several inventions, they shall be interdependent. The description shall be sufficiently clear to enable a person skilled in the art to carry out the invention. After the filing date no new information that could broaden the scope of protection of the patent may be added to the application. The applicant is not required to submit prior art.

Applications for European patents can be filed either directly with the EPO or with the PRH, which will transmit the application to the EPO. A PCT application may be filed either via the PRH or via the EPO or directly with WIPO.

iii Term of protection

A granted patent may be maintained for 20 years from the filing date by paying a yearly renewal fee. The validity of patents concerning medicinal products and plant protection products can under certain conditions be extended by a maximum of five years through an SPC and medicinal products for paediatric use further by six months.

iv Patentable subject matter

Exclusions from patentability

The exclusions from patentability correspond to the relevant provisions of the EPC. Discoveries, scientific theories and mathematical methods; aesthetic creations; schemes, rules and methods for performing mental acts, playing games or doing business; computer programs; and presentations of information are not patentable as such. Computer programs and business methods with a technical character and a further technical effect are, however, not excluded from patentability.

Exceptions to patentability

The exceptions to patentability correspond to the relevant provisions of the EPC. First, patents shall not be granted for inventions the commercial exploitation of which would be contrary to public policy or morality, especially processes for cloning human beings, for modifying the germ line genetic identity of human beings or for modifying the genetic identity of animals and that are likely to cause them suffering without any substantial medical benefit to man or animal; animals resulting from such processes as well as uses of human embryos for industrial or commercial purposes are considered unpatentable on this basis.

Second, patents shall not be granted for plant or animal varieties or for essentially biological processes for the production of plants or animals. A process for the production of plants or animals shall be considered essentially biological if it consists entirely of natural phenomena such as crossing or selection. Inventions that concern a microbiological or other technical process or a product obtained by means of such a process, however, are not excluded from patentability.

Third, methods for surgical or therapeutic treatment or diagnostic methods, practised on humans or animals, are not patentable inventions. Products such as substances and compositions for use in these methods, however, are not excluded from patentability.

Biotechnological inventions

Finland has implemented Directive 98/44/EC on the legal protection of biotechnological inventions. Biotechnological inventions are inventions that concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used. Biological material is defined as any material containing genetic information and capable of reproducing itself or being reproduced in a biological system.

In addition to the unpatentable biotechnological inventions mentioned (see Section III.iv, *supra*), the human body at the various stages of its formation and development and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot be patented.

Inventions are in general patentable even if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used. In addition to the patentable biotechnological inventions mentioned (see Section III.iv, *supra*), the following biotechnological inventions are patentable:

- a* inventions that concern plants or animals, if the technical feasibility of the invention is not confined to a particular plant or animal variety;
- b* biological material that is isolated from its natural environment or produced by means of a technical process, even if it previously occurred in nature; and
- c* an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, even if the structure of that element is identical to that of a natural element.

v Novelty and inventive step

Patents may only be granted for inventions that are new in relation to what was known before the filing date of the patent application. Everything made available to the public in writing, in lectures, by public use or otherwise shall be considered as known. An absolute novelty requirement is applied in Finland.

There are two exceptions from the novelty requirement. A patent may be granted for inventions made available to the public within six months before the filing date of the application, if the disclosure of the invention was the result of an evident abuse in relation to the applicant or his or her predecessor in title or the fact that the applicant or his or her predecessor in title had displayed the invention at an official, or officially recognised, international exhibition falling within the terms of the Convention on International Exhibitions. Further, the first and further medical uses of a known substance or composition are exceptional as regards the novelty requirement.

Patents may only be granted for inventions that differ essentially from what was known before the filing date. This criterion of an inventive step is examined in accordance with the EPC (i.e., an invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art).

vi Analogy process patents

Before 1 January 1995 product patents were not available for nutrients and pharmaceuticals in Finland, but these could be protected by process patents and analogy process patents, namely patents granted for a known process for the manufacture of a new product. Analogy process patents are relevant in Finland until the year 2019, when the last SPCs granted on the basis of the analogy process patents will expire. The analogy process patents have had a great impact on the pharmaceuticals business in Finland and most patent litigations during the last years have concerned analogy process patents.

IV ENFORCEMENT OF RIGHTS

i Possible venues for enforcement

The Market Court has exclusive jurisdiction in the first instance with regard to all patent disputes. The Market Court does not have jurisdiction over any criminal cases. Helsinki District Court remains the exclusive venue for all criminal cases related to patents and all other industrial property rights. The court is competent to hear proceedings in respect of, for example, infringement, invalidity and transfer of a patent, proper title to the invention for which a patent is sought, grant of compulsory licence and certain declaratory judgments. In addition, the Market Court is the competent court in matters

concerning the right to an invention for which a European patent under the EPC has been applied.

Appeals against the decisions of the Market Court may be made, with leave, to the Supreme Court. In practice, the Supreme Court, which sets precedents on issues of law, has rarely made decisions on patent matters.

Appeals against administrative decisions of the PRH in patent prosecution and opposition matters may be made to the Market Court. Appeals against administrative decisions by the Market Court may be made to the Supreme Administrative Court, subject to a leave to appeal.

ii Requirements for jurisdiction and venue

The international jurisdiction of Finnish courts in IP matters is determined by EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation) and the related case law.

In addition to the patent proprietor, a licensee has an independent right to bring an action in infringement matters and declaratory judgment lawsuits. A licensee is, however, required to notify the patent proprietor of the action. Furthermore, anyone wishing to bring an action for invalidation of a patent, transfer of a patent or grant of a compulsory licence is required to advise the PRH and to notify all registered licensees or pledgees thereof.

An invalidity action may be brought by anyone suffering prejudice on account of the patent or, on grounds of public interest, by a public authority. Anyone can also file an opposition with the PRH against a granted patent; no particular interest is required. In the event that an invalidity action is brought before the end of the opposition period or before a final decision has been issued on the opposition, the court may postpone the proceedings at its discretion.

iii Obtaining relevant evidence of infringement and discovery

Discovery proceedings are not available under Finnish law. However, by virtue of general procedural law provisions, it is possible to request a court order for the adverse party or a third party to produce a document that is in its possession. A precondition for such an order is that the requested document is sufficiently identifiable on the basis of the request and it can be assumed to be relevant as evidence in a pending matter.

In infringement proceedings the court may, at the request of the claimant, order the defendant who has been found to infringe an intellectual property right on a commercial scale to provide information on the origin and distribution networks of the infringing goods or services.

It is also possible to obtain a pretrial order for securing evidence as a precautionary measure. The preconditions for such an order are roughly equivalent to those of a pretrial preliminary injunction (see Section IV.ix, *infra*).

iv Trial decision-maker

The composition of the Market Court in patent matters is normally three judges and one Market Court engineer. If no technical expertise is required in the case, three judges suffice. In cases concerning patent appeals against PRH decisions, the court comprises

one judge, one Market Court engineer and in addition another Market Court engineer or a secondary specialised member. The court may also decide to handle an appeal against a PRH decision in a composition of one judge and one Market Court engineer. The Market Court may also use one or two secondary specialised members in its compositions, if required by the nature of the case. In matters concerning precautionary measures, the court consists of a single judge. Special qualification criteria apply to all permanent members and secondary specialised members of the Market Court.

The Helsinki District Court tries criminal cases relating to patent infringements normally in a composition of one or three judges. At the discretion of the court, it may be assisted by one or two secondary specialised members of the Market Court, who provide a written opinion on the questions stated by the court. They are also entitled to question the parties and witnesses but do not have a voting right.

v Structure of the trial

Patent infringement and invalidity actions are usually consolidated. The court will generally not stay the infringement proceedings to await the final decision in invalidation proceedings. Infringement proceedings are stayed only at the Market Court's discretion, and the parties are given the possibility to state their opinions prior to decision on a stay.

The court proceedings commence with a pretrial phase, in which briefs are exchanged and written evidence is submitted by the parties. The Market Court may conduct a preparatory hearing, which is normally held if it is likely that a hearing in order to accept evidence will be required in the case. In the eventual main hearing the parties make their oral statements and present their evidence. The fact and technical witnesses of the parties are heard and may be cross-examined. Finnish courts follow the legal principle of free evaluation of evidence. There are few restrictions as to the type of evidence considered admissible. Written statements that have been created by witnesses or experts solely for the purpose of the trial are generally not admissible as evidence, unless there are special reasons for admitting them. However, in complex patent matters written statements prepared by expert witnesses regarding technical issues are in practice admitted although such expert witnesses are as a general rule also required to testify in the main hearing. As a general rule new evidence cannot be introduced after the pretrial phase.

The burden of proof normally lies with the plaintiff. However, with respect to analogy process patents, a reversed burden of proof applies. Any identical product produced without the consent of the patentee shall be deemed to have been obtained by the patented process, unless the defendant is able to submit sufficient proof to the contrary.

vi Infringement

As for product patents, direct infringement is committed by making, offering, putting on the market or using a product protected by the patent, or importing or possessing such product for these purposes. As for process patents, using a process protected by the patent constitutes a direct infringement. Also offering such a process for use constitutes an infringement if the infringer knew that the use without the consent of the proprietor of the process was prohibited or this was evident from the circumstances. The protection

of process patents also extends to products obtained through the patented process. This indirect product protection has international applicability as it extends to the said products regardless of where they are manufactured.

Indirect or contributory infringement takes place when a person, without the patent holder's consent, supplies or offers to supply any person not entitled to exploit the invention with the means of working the invention in Finland in relation to an essential element of the invention. It is further required that the supplier knows that the means are suitable and intended for working the invention or that this is evident from the circumstances. Indirect infringement does not take place when the means are staple commercial products, unless the supplier attempts to induce the receiver to infringe the patent in accordance with the above. The provisions on indirect infringement have rarely been the subject of litigation in Finland.

The scope of protection is determined by the patent claims and also takes into consideration the description and drawings. The doctrine of equivalents has, however, been widely discussed in the legal literature and it has been confirmed in case law that the scope of protection may extend beyond the literal interpretation of the claims.

In conjunction with invalidity proceedings in court or opposition proceedings before the PRH, the patent holder may request the patent to be limited. In invalidity proceedings the request for limitation shall be resolved as a preliminary issue before continuing the proceedings.

vii Defences

The most common defence against an infringement action is a counterclaim regarding invalidity. The invalidity defence can be asserted either by bringing a counteraction in court or by filing an opposition with the PRH. A patent can be invalidated by a court or revoked by the PRH on the following grounds:

- a* The patent relates to an invention that does not satisfy the requirements for patentability. These requirements (see Sections III.iv and III.v, *supra*) relate, for example, to novelty, scope of prior art and the nature of the invention.
- b* The description of the invention that the patent relates to is not sufficiently clear for the invention to be carried out by a person skilled in the art.
- c* The patent contains subject matter that was not included in the application as it was filed.
- d* The scope of protection of the patent has been extended after the notice of grant was issued.

There is no formal obligation for the patent applicant to disclose prior art and consequently no sanction for non-disclosure.

In infringement proceedings the defendant can also bring a negative declaratory action on non-infringement. Less common potential defences include, for example, non-commercial use, exhaustion of rights, prior use, licence and compulsory licence, experimental use and the *Bolar* exemption.

Failure by the claimant to assert patent rights against an infringer within a given time or tolerance of the infringement is not considered a valid defence. However, this may affect the amount of damages potentially awarded.

viii Time to first-level decision

Generally the length of patent infringement proceedings is up to two years from the filing of the statement of claims, although the Market Court endeavours to give its decision within a year of the filing.

ix Remedies

Finland has implemented Directive 2004/48/EC on the enforcement of intellectual property rights and the legal remedies available conform to the requirements of the said directive.

The main legal remedies available against an infringer are injunctions and damages, which are discussed in more detail below. In addition, the court may order that the infringing products, or objects whose use would constitute patent infringement, be altered, impounded, destroyed or, in the case of patented products, surrendered against payment of their value to the injured party. Such an order does not, however, apply to persons who have obtained the object in good faith and have not themselves infringed the patent. The court may also order that information concerning the judgment be published at the expense of the infringer. The Patent Act further provides for a prohibition against intermediaries facilitating the infringement of a patent.

Also criminal law sanctions and remedies apply to deliberate patent infringements. However, in practice, criminal charges for patent infringement are very rare.

The main pretrial remedy is a preliminary injunction, which can be granted as a precautionary measure either before or during the trial. If the purpose of the preliminary injunction could otherwise be compromised, for example because of the urgency of the matter, it can be granted provisionally until further notice on an *ex parte* basis without hearing the counterparty. The prerequisites for a preliminary injunction are as follows:

Claim requirement

The claimant shall establish that he has a patent right enforceable against the counterparty. The fulfilment of the claim requirement is based on probability assessment. According to court praxis, the claim requirement is deemed to be fulfilled in the event that the court deems an infringement by the counterparty at least somewhat more likely than the opposite eventuality.

Danger requirement

It is required that the counterparty hinder or undermine the realisation of the claimant's right or decreases essentially the value or significance of said right. It is not usually required that actual existence of the danger be proven; a reasonably justified claim suffices.

Weighing of interests

The interests of both parties are weighed by the court, which assesses whether the defendant would suffer undue inconvenience as a result of the preliminary injunction in comparison to the benefit to be secured. In principle, the more harm the infringement is deemed to cause to the claimant in comparison with the harm caused by the injunction to the alleged infringer, the lower the threshold for granting a preliminary injunction, and vice versa.

For the enforcement of a preliminary injunction it is required that the claimant deposit a security, which is usually a bank guarantee. The purpose of the security is to cover the potential strict liability of the claimant for an injunction that may later prove to be unfounded.

When the court establishes that an infringement has taken place, final injunctive relief will, as a general rule, be granted at the request of the claimant if there is a risk of continuance or repetition of the infringing act.

As regards compensation for damage, the infringer is liable to pay reasonable remuneration for the exploitation of the invention and damages for other injury caused by the infringement. The amount and type of compensation depends on the degree of culpability. In the case of only slight negligence, the compensation may be adjusted. If there is no negligence at all, the infringer is liable to pay compensation only in the case and to the extent that this is considered reasonable. The purpose is to compensate for actual losses only. Punitive damages are not awarded or enforceable in Finland. Compensation proceedings for patent infringement shall only refer to damage during the last five years prior to institution of proceedings. Claims pertaining to damage caused prior to this period are time-barred.

The reasonable remuneration is often calculated as corresponding to a royalty, which can be based on hypothetical or actual licences. Compensation for potential additional damage is calculated taking into account all other relevant losses, such as loss of profit and possibly also loss of goodwill. In practice, the amounts awarded tend to be at the lower end.

Generally the losing party is obliged to compensate in full the reasonable litigation costs of the winning party.

Also border measures in accordance to EC Regulation 608/2013 concerning customs enforcement of intellectual property rights are available. Infringing goods may be detained by the customs authorities. The new Regulation provides for a number of amendments in favour of the patent proprietor, such as a procedure for a simplified destruction, which thus far has been unavailable in Finland. The types of intellectual property rights are also extended to cover the topography of semiconductor products, utility models and trade names.

x Appellate review

The appeals to the Supreme Court are subject to a leave to appeal. Leave to appeal may be granted if it is important to bring the case before the Supreme Court for a decision with regard to the application of the law in other, similar cases or because of the uniformity of legal practice. Secondly, a leave may be granted if there is a special reason for this because of a procedural or other error that has been made in the case on the basis of which the judgment is to be reversed or annulled. Finally, a leave to appeal may be granted if there is another important reason for granting the leave.

As a whole, less than 150 leaves to appeal are granted per year (in all case types, not merely the IP-related ones), which means that only a fraction of appealed cases are heard in the Supreme Court. However, it is expected that the Supreme Court will grant a leave to Market Court slightly more easily than with cases from other courts.

xi Alternatives to litigation

An opposition to the grant of a patent may be filed with the PRH within nine months from the granting and publication date. An oral hearing may take place if the PRH considers that there are sufficient grounds for it, for example because of the complexity of the invention. After the grant of the patent, administrative re-examination procedures are not available in the PRH.

While arbitration may also be used to resolve patent disputes, in practice this is uncommon. Arbitration is mainly employed in relation to licensing contracts and other contractual issues. Invalidity claims and other claims affecting registration of rights cannot be arbitrated.

With regard to employee inventions, it is possible to request from the Employee Inventions Board a non-binding opinion on issues regarding the application of the Employee Invention Act. Such an opinion may be requested by the employer, by the employee, by a court in respect of a pending dispute concerning the invention or by the PRH in the event that a patent application regarding the invention is pending.

V TRENDS AND OUTLOOK

New legislation on authorised industrial property agents will enter into force on 1 July, 2014 and the former patent agent system will be abolished at the same time. In order to ascertain the quality of industrial property services, there will be an authorisation procedure for agents including an examination. Furthermore, supervision and sanction systems are established in the Industrial Property Agent Board of the PRH. Authorisation will be voluntary, but the occupational title is protected and confidentiality regulation will apply only to authorised agents.

On 19 February 2013, Finland signed the Agreement on a Unified Patent Court. The Agreement is part of the development of a unitary patent system for the EU. The Agreement requires ratification in 13 Member States to enter into force. The unified patent system also includes the EU regulations concerning unitary patent protection (Regulation No. 1257/2012) and translation arrangements (Regulation No. 1260/2012). Once the Agreement, and with it the Regulations, enter into force, it will be possible to obtain a European patent with unitary effect.

Appendix 1

ABOUT THE AUTHORS

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