Unified Patent Court
Einheitliches Patentgericht
Juridiction unifiée du brevet

Reference no:

UPC-CoA-935/2025

DECISION

of the Court of Appeal of the Unified Patent Court

issued on 2 November 2026

HEADNOTES:

1. An alternative method authorised under R. 275 RoP need not be a method prescribed by the internal law of the State of destination for the service of documents in domestic proceedings. Otherwise, the reference in R. 274.1(b) RoP to an alternative method authorised under R. 275 RoP would have no autonomous meaning.

2. Deemed service and actual service are distinct concepts. A determination under R. 275.3(b) RoP that the Statement of claim is deemed served on a particular date does not, by itself, establish actual service within the meaning of R. 277(b) RoP. Actual service may nevertheless be established independently on the basis of the factual circumstances underlying that determination.

3. Actual service does not require proof that the defendant personally opened or retained the documents. As follows from Article 22(1)(b) of Regulation (EU) 2020/1784, delivery to the defendant's residence may suffice. A subsequent refusal does not negate a factual delivery which has already occurred where it does not constitute a valid exercise of the addressee's right under Article 12 of that Regulation to refuse the document on linguistic grounds.

4. In exercising its discretion under R. 9.3(a) RoP, the Court must take account of all the circumstances of the case, including the reasons for the failure to comply with the period, the conduct of the party and its representative, and the promptness with which the Court and the opposing party were informed of the relevant circumstances. A party seeking an extension on account of an unforeseen circumstance should inform the Court without undue delay once that circumstance becomes apparent, where such communication remains reasonably possible.

5. R. 353 RoP permits the Court to rectify clerical mistakes, errors in calculation and obvious slips in a decision or order. The circumstances contemplated by R. 353 RoP presuppose a discrepancy between the decision intended by the Court and its material expression. R. 353 RoP does not permit the Court, under the guise of rectification, to reconsider or alter a substantive legal assessment contained in the decision or to substitute a different legal conclusion for the one originally expressed.

6. Once an application to set aside a decision by default complies with the requirements of R. 356.2 RoP, the Court does not retain a general discretion to refuse it on the ground that the default is considered insufficiently justified or excusable. The explanation required by R. 356.2 RoP does not operate as a plea for relief requiring the applicant to prove that the default occurred without fault or was otherwise excusable. It enables the Court to identify the cause and scope of the default and may inform the exercise of its discretionary powers in the subsequent conduct of the proceedings, including case-management orders, the allocation of costs and a notice under R. 356.3 RoP that a further decision by default shall be final.

7. The notice required by R. 356.3 RoP must be express and clear. It must specifically inform the party that, in the event of a further default, the resulting decision by default shall be final and that the remedy under R. 356 RoP will no longer be available. Mere notice that a decision by default will be issued does not satisfy that requirement.

8. Referral under R. 242.2(b) RoP may be justified where a procedural error prevented the inter partes written procedure from being completed before the Court of First Instance and deciding the action on appeal would require the Court of Appeal to conduct the remaining written procedure for the first time.

KEYWORDS:

Service of statement of claim; extension of time period; rectification of decision and orders; decision by default; referral back

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[redacted]

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PATENT AT ISSUE

EP 1 993 350

DECIDING PANEL

1b
Klaus Grabinski, presiding judge and president of the Court of Appeal
Paolo Catallozzi, legally qualified judge and judge-rapporteur
Emmanuel Gougé, legally qualified judge
Rainer Friedrich, technically qualified judge
Paolo Gerli, technically qualified judge

LANGUAGE OF THE PROCEEDINGS

English

IMPUGNED DECISION AND ORDERS OF THE COURT OF FIRST INSTANCE

□ Decision by default of the Court of First Instance of the Unified Patent Court, The Hague Local Division, dated 21 October 2025

□ Orders of the Court of First Instance of the Unified Patent Court, The Hague Local Division, dated 19 December 2024 (R. 275 RoP), 1 April 2025 (R. 320 RoP), and 9 December 2025 (R. 353 and 356 RoP)

Number attributed by the Court of First Instance: UPC_CFI_499/2024

ORAL HEARING

23 September 2026

SUMMARY OF FACTS

1. The Respondent is the registered proprietor of the patent at issue, which relates to a brown mushroom strain. The Respondent alleges that a mushroom strain marketed by the Appellant under the name “Cayene” falls within the scope of protection of that patent.

2. Prior to the present proceedings, the Respondent applied for provisional measures before The Hague Local Division. By order of 31 July 2024, the Local Division considered that, with a sufficient degree of certainty, the patent was valid and found it more likely than not that the sale or offer of the “Cayene” strain infringed claim 1 of the patent. It therefore granted a preliminary injunction against the Appellant in respect of, inter alia, the Netherlands, Germany, France and Italy. The appeal against that order and a separate revocation action brought by the Appellant before the Milan Central Division both ended in decisions by default.

3. On 30 August 2024, the Respondent commenced the present infringement action on the merits before The Hague Local Division.

4. By procedural order of 19 December 2024, issued pursuant to R. 275 RoP, the judge-rapporteur recorded that the Registry's attempts to serve the Statement of claim on the Appellant by registered letters with acknowledgement of receipt had been unsuccessful, both letters having been returned unopened. The order further recorded that, following deliberations with the Registry, the Respondent had initiated two additional methods of service through a Dutch bailiff. The judge-rapporteur held that the steps taken to bring the Statement of claim to the attention of the Appellant constituted good service, determined that the Statement of claim was deemed served on 25 November 2024 and stated that a decision by default would be issued if the Appellant failed to file a Statement of defence within three months from that date.

5. No Statement of defence was filed within that period. On 4 March 2025, the Appellant filed a Statement of defence together with an application for re-establishment of rights under R. 320 RoP. The application was based on the illness of his representative during the final days preceding expiry of the time limit.

6. By order of 1 April 2025, the panel rejected the application for re-establishment of rights. It assumed, for the purposes of the application, that the representative had been ill and unable to file the Statement of defence on 25 February 2025, but concluded that all due care had not been taken within the meaning of R. 320 RoP. The panel considered, inter alia, that the representative had known the deadline and the consequences of non-compliance well in advance, had had sufficient time to prepare the defence and had failed to take appropriate organisational measures to ensure compliance with the deadline. It therefore held that the Statement of defence was to be considered not filed and that a decision by default would be rendered in the infringement action.

7. On 21 October 2025, the Local Division issued a decision by default. On the basis of the facts put forward by the Respondent and referring to the reasoning of the order on provisional measures, the Court found the patent valid and infringed. It granted a permanent injunction and several ancillary measures, determined that the Appellant was liable for the damage caused by the infringement and awarded the Respondent EUR 50,000 as an interim award of damages. It also ordered the Appellant to bear the costs of the proceedings and set the value of the action at EUR 500,000.

8. The Appellant subsequently lodged an application under R. 356 RoP seeking to have the decision by default set aside. By order of 9 December 2025, the Local Division held that the application was inadmissible on the ground that the Appellant had to be considered as having been put on notice, through the R. 275 and 320 RoP Orders, that a further decision by default would be final within the meaning of R. 356.3 RoP. In the alternative, it dismissed the application on the ground that the same panel,

assessing the same factual and legal circumstances already considered in the R. 320 RoP proceedings, would not reach a different conclusion. In the same order, acting under R. 353 RoP, the Local Division rectified the information concerning the legal remedy available against the decision by default and indicated that the appropriate remedy was an appeal.

9. By Statement of appeal filed on 22 December 2025 and Statement of grounds of appeal filed on 20 February 2026, the Appellant appeals against the decision by default of 21 October 2025 and the orders of 19 December 2024 under R. 275 RoP, 1 April 2025 under R. 320 RoP and 9 December 2025 under R. 353 and 356 RoP. The Appellant specifically requests to
   - set aside
     - the decision by default of 21 October 2025,
     - the order of 19 December 2024 pursuant to R. 275 RoP,
     - the order of 1 April 2025 pursuant to R. 320 RoP, and
     - the order of 9 December 2025 regarding R. 356 and R. 353 RoP,
   - have the permanent injunction requested by the Respondent refused in its entirety
   - dismiss the action in its entirety or, alternatively, refer the case for re-examination by a different panel of the CFI, taking into account the evidence and arguments omitted in the first instance
   - re-examine all evidence submitted in the proceedings before the CFI
   - set the value of litigation at EUR 200,000, and
   - award costs for the court fees and representation costs in the first instance and appeal proceedings.

10. In substance, the Appellant submits that the Statement of claim was not validly served and that the period for filing the Statement of defence had therefore not expired when the defence was lodged. In the alternative, he submits that relief from the late filing should have been granted under R. 320 RoP or, alternatively, under R. 9.3(a) RoP. He further argues that the decision by default should have been set aside under R. 356 RoP and challenges the findings on infringement and validity contained in that decision.

11. The Appellant also requested suspensive effect in respect of points III, IV and VIII of the operative part of the decision by default. A first application for suspensive effect, lodged with the Statement of appeal, was rejected by order of the Court of Appeal of 16 January 2026. A second application, lodged with the Statement of grounds of appeal, was declared inadmissible by order of 24 March 2026 because it was based on submissions which had been, or could reasonably have been, included in the first application.

12. In its Statement of response filed on 20 May 2026, the Respondent requests that the appeal and the Appellant's requests be dismissed or declared inadmissible and that the Appellant be ordered to bear the Respondent's reasonable and proportionate legal costs and other expenses incurred in the appeal proceedings.

13. The Respondent submits, in substance, that the Court of First Instance correctly determined the date of deemed service of the Statement of claim, rejected the application for re-establishment of rights and issued a decision by default following the failure to file a timely Statement of defence. It further supports the order of 9 December 2025, submitting that the warnings contained in the earlier orders were sufficient for the purposes of R. 356.3 RoP, even though they did not use the word "final", and that the information concerning the available legal remedy was properly rectified. The Respondent also submits that the patent is valid and that the "Cayene" strain infringes its sole claim. According to the Respondent, the Appellant's invalidity objections are in any event inadmissible because no valid counterclaim for revocation formed part of the first-instance proceedings.

14. By application of 18 May 2026, the Respondent requested that the Appellant be ordered to provide security for legal costs and other expenses in the amount of EUR 56,000 or, alternatively, in an amount to be determined by the Court. By order of 2 July 2026, the Court of Appeal ordered the Appellant to provide security in the amount of EUR 28,000 within three weeks of service of that order.

GROUNDS FOR THE DECISION

Service of the Statement of Claim.

15. By its first and second grounds of appeal, the Appellant submits that the judge-rapporteur wrongly determined that the Statement of claim was deemed served on 25 November 2024. According to the Appellant, valid service was effected only on 21 January 2025 through the Regional Court of Pszczyna (Poland), with the consequence that the Statement of defence filed on 4 March 2025 was submitted within the period prescribed by R. 23 RoP.

16. The Appellant further argues that the incorrect determination of the date of service deprived him of the opportunity to lodge a preliminary objection within the period prescribed by R. 19.1 RoP.

17. He submits that the conditions for recourse to alternative service under R. 275 RoP were not met and that delivery through the private carrier was incompatible with R. 275.4 RoP because that method is not prescribed by Polish law for the service of judicial documents in domestic proceedings. He further challenges the retrospective determination of 25 November 2024 as the date of deemed service and submits that the order did not adequately specify the alternative method or place of service, as required by R. 275.3 RoP. Finally, he contends that the conditions laid down in R. 277 RoP for issuing a decision by default were not fulfilled.

18. By order of 19 December 2024, the judge-rapporteur held that service pursuant to R. 274.1(a)(i) RoP had initially been attempted by the Registry through registered letters with acknowledgement of receipt. According to the order, both letters were

returned unopened. The judge-rapporteur further found that, following deliberations with the Registry, the Respondent had initiated two additional methods of service through a Dutch bailiff. Under the first method, the Dutch bailiff acted as transmitting agency and used the competent receiving agency in Poland. Under the second method, the Dutch bailiff used a well-established private carrier for in-person delivery against acknowledgement of receipt. The order records that the packages sent through each channel reached the Appellant's address but were subsequently returned. On that basis, the judge-rapporteur concluded that the steps taken to bring the Statement of Claim to the Appellant's attention respected the Appellant's rights of defence and constituted good service within the meaning of R. 275 RoP. The Statement of claim was therefore deemed served on 25 November 2024.

19. The Respondent contends that the conditions for recourse to R. 275 RoP were fulfilled. It submits that the carrier's tracking information showed that the package was initially accepted and recorded as delivered on 18 November 2024 but was subsequently refused and returned on 25 November 2024. The Respondent further argues that both registered postal service and delivery through the private carrier were consistent with Art. 18 and Recital 29 of Regulation (EU) 2020/1784, and that the subsequent service through the Regional Court of Pszczyna did not affect the validity of the R. 275 Order or the date of deemed service established by that order.

20. The first and second grounds of appeal are unfounded.

21. The Appellant submits, first, that the conditions for recourse to R. 275 RoP were not met because the methods of service available under R. 274 RoP and Regulation (EU) 2020/1784 had not first been exhausted. He relies in that regard on the fact that service was subsequently completed through the Regional Court of Pszczyna on 21 January 2025.

22. That submission cannot be accepted. R. 273 and 274 RoP govern service of a Statement of claim outside the Contracting Member States. Under R. 274.1(a) RoP, service is to be effected by the Registry by any method provided for by Regulation (EU) 2020/1784, where that Regulation applies, by the Hague Service Convention or another applicable convention or agreement, where it applies, or, where no such instrument is in force, through diplomatic or consular channels. Where service in accordance with R. 274.1(a) RoP cannot be effected, R. 274.1(b) RoP permits service by any method allowed by the law of the State in which service is to be effected or as authorised by the Court under R. 275 RoP.

23. R. 275 RoP provides for two forms of alternative service. Under paragraph 1, the Court may prospectively authorise service by a method or at a place not otherwise permitted by Chapter 2. Under paragraph 2, it may retrospectively order that steps already taken to bring the Statement of claim to the attention of the defendant constitute good service.

24. Since the Statement of claim was to be served on the Appellant in Poland, an EU Member State which is not a Contracting Member State, Regulation (EU) 2020/1784 applied. Accordingly, under R. 274.1(a)(i) RoP, service was to be effected by the Registry by a method provided for by that Regulation. Art. 18 of the Regulation expressly provides that service of judicial documents may be effected directly by postal services on persons present in another Member State by registered letter with acknowledgement of receipt or equivalent. The attempts initially made by the Registry by that method therefore constituted attempts to effect service under R. 274.1(a)(i) RoP.

25. The Appellant does not specifically dispute the factual finding in the order of 19 December 2024 that the Registry twice attempted service by registered letter with acknowledgement of receipt and that both letters were returned unopened. Nor does he submit that registered postal service is not a method permitted by Regulation (EU) 2020/1784.

26. In its order of 29 July 2024 in *NEC v TCL* (UPC_CoA_69-70/2024) the Court of Appeal held, in the context of service under the Hague Service Convention, that, as a rule, a prior attempt at service is required before recourse to alternative service under R. 275 RoP is permitted. In the present case, that requirement was satisfied because, before the application under R. 275 RoP was made, the Registry had twice attempted service by registered letter with acknowledgement of receipt, a method expressly provided for by Regulation (EU) 2020/1784, and both attempts had failed.

27. The fact that service through the Regional Court of Pszczyna was completed on 21 January 2025 did not invalidate the order by which the judge-rapporteur had previously recognised, under R. 275.2 RoP, the steps already taken as good service. The lawfulness of that order must be assessed in the light of the circumstances existing at that time. The subsequent completion of service through a different channel did not retrospectively invalidate that assessment.

28. In those circumstances, the judge-rapporteur could properly consider the Respondent's application under R. 275.2 RoP.

29. The Appellant submits, second, that delivery through the private carrier was incompatible with R. 275.4 RoP because that method is not prescribed by Polish law for the service of judicial documents in domestic proceedings. In support of his submission, he relies on Art. 131 § 1 of the Polish Code of Civil Procedure.

30. That submission does not take sufficient account of the distinction drawn by R. 274 and 275 RoP. Where service under R. 274.1(a) RoP cannot be effected, R. 274.1(b) RoP permits either service by a method allowed by the law of the State in which service is to be effected or by an alternative method authorised by the Court under R. 275 RoP. Those are separate alternatives.

31. It follows that an alternative method authorised under R. 275 RoP does not necessarily have to be a method prescribed by the internal law of the State of

destination for the service of documents in domestic proceedings. Otherwise, the reference in R. 274.1(b) RoP to an alternative method authorised under R. 275 RoP would have no autonomous meaning.

32. This conclusion is confirmed by the different wording of R. 275.4 and 277(a) RoP. R. 277(a) RoP expressly refers to a method prescribed by the internal law of the State addressed for the service of documents in domestic proceedings. R. 275.4 RoP does not use that formulation. It provides only that no order for alternative service may permit service in a manner contrary to the law of the State in which service is to be effected.

33. The two provisions therefore lay down different requirements. R. 277(a) RoP requires service by a method prescribed by the internal law applicable to domestic service. R. 275.4 RoP imposes a negative limitation on the Court's power to authorise alternative service: the method must not be contrary to the law applicable in the State where service is to be effected.

34. The fact that delivery through a private carrier is not a method prescribed by Polish internal law for service in domestic proceedings is therefore not sufficient, in itself, to establish an infringement of R. 275.4 RoP. The relevant question is whether that method was contrary to the law applicable in Poland.

35. Regulation (EU) 2020/1784 is relevant to that assessment. It was binding in its entirety and directly applicable in Poland and formed part of the legal framework governing cross-border service there.

36. Art. 18 of Regulation (EU) 2020/1784 permits direct service by postal services using a registered letter with acknowledgement of receipt or equivalent. Recital 29 clarifies that the postal service used for that purpose may be either private or public.

37. In the R. 275 Order, the judge-rapporteur found that the documents sent through the private carrier had been delivered to the Appellant with acknowledgement of receipt on 18 November 2024 and that, according to a subsequent report from the carrier, the recipient later refused the package, which was returned to the sender. The judge-rapporteur also found that the documents were accompanied by Polish translations and Form L pursuant to Regulation (EU) 2020/1784.

38. The Appellant does not specifically dispute these factual findings, including that the package reached his address, was recorded as delivered and was subsequently refused by the recipient. He disputes the legal effect attributed to these facts and maintains that they did not constitute valid or actual service.

39. As regards R. 275.4 RoP, that objection cannot be accepted. In the light of Art. 18 and Recital 29 of Regulation (EU) 2020/1784, the factual findings made by the judge-rapporteur show that the method used corresponded to the type of private postal service contemplated by that Regulation.

40. This conclusion does not mean that the steps taken through the private carrier constituted service effected by the Registry under R. 274.1 RoP. Those steps had been initiated by the Respondent through the Dutch bailiff, following deliberations with the Registry.

41. Since these steps had not been carried out as service by the Registry under R. 274.1 RoP, an order under R. 275.2 RoP was required to attribute procedural effect to them under the Rules of Procedure. That provision empowered the judge-rapporteur retrospectively to recognise the steps already taken as good service.

42. Art. 131 § 1 of the Polish Code of Civil Procedure, on which the Appellant relies, does not lead to a different conclusion. That provision concerns the methods prescribed for service in Polish domestic proceedings and may therefore be relevant to the separate condition laid down in Rule 277(a) RoP. It does not, however, show that the use of a private postal operator for cross-border service is contrary to the law applicable in Poland for the purposes of R. 275.4 RoP. The Appellant has not identified any other provision of Polish law capable of establishing such contrariety.

43. Accordingly, the material relied upon by the Appellant does not demonstrate that the R. 275 Order permitted service in a manner contrary to the law of the State in which service was effected. The requirement laid down in R. 275.4 RoP was therefore satisfied.

44. The Appellant submits, third, that the judge-rapporteur wrongly determined that the Statement of claim was deemed served on 25 November 2024, although the order recognising the steps already taken as good service was issued only on 19 December 2024. He further submits that the order did not comply with R. 275.3(a) RoP because it failed to adequately specify the alternative method or place of service.

45. Neither submission can be accepted. The fact that the order was issued on 19 December 2024 did not preclude the judge-rapporteur from determining that the Statement of claim was deemed served on an earlier date. R. 275.2 RoP expressly empowers the Court retrospectively to recognise as good service steps already taken to bring the Statement of claim to the defendant's attention. Where the Court exercises that power, R. 275.3(b) RoP requires that the order specify the date on which the Statement of claim is deemed served.

46. The determination of 25 November 2024 as the date of deemed service is supported by the material before the Court of First Instance. Exhibit VB35 recorded that the package had been delivered at the Appellant's address on 18 November 2024 and that, on 25 November 2024, the recipient refused it, following which it was designated for return to the sender. The judge-rapporteur selected the latter date because that was the date on which the refusal was recorded. That determination was, in any event, more favourable to the Appellant than the use of the earlier date on which the package had been recorded as delivered.

47. The objection under R. 275.3(a) RoP is likewise unfounded. Read as a whole, the R. 275 Order adequately specifies the method and place of service. It refers to delivery through a Dutch bailiff using a private carrier supported by the carrier's tracking system and identifies the Appellant's address as the place of delivery. The order also specifies the date of deemed service and the corresponding period for filing the Statement of defence. It therefore contains the elements required by R. 275.3(a), (b) and (c) RoP.

48. The Appellant submits, fourth, that service through the Regional Court of Pszczyna on 21 January 2025 constituted the only valid service and that the period under R. 23 RoP therefore began to run on that date.

49. That submission cannot be accepted. For the reasons set out above, the completion of a separate service procedure on 21 January 2025 did not retrospectively invalidate the R. 275 Order or supersede the date of deemed service established under R. 275.3(b) RoP. Since the period for filing the Statement of defence had already begun to run on the date established by that valid order, the later service did not cause a new period under R. 23 RoP to begin.

50. Finally, the Appellant relies on R. 277 RoP. He submits that delivery through the private carrier was not a method prescribed by Polish internal law for the service of documents in domestic proceedings within the meaning of R. 277(a) RoP. He further argues that the determination under R. 275.3(b) RoP that the Statement of claim was deemed served on 25 November 2024 did not establish that it had actually been served on him for the purposes of R. 277(b) RoP.

51. R. 277 RoP concerns a question distinct from the validity of the R. 275 Order. It precludes the entry of a decision by default unless one of two alternative conditions is satisfied: either the Statement of claim was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic proceedings, or it was actually served on the defendant under Chapter 2 of the Rules of Procedure.

52. The structure and wording of R. 277 RoP correspond in substance to Art. 22(1) of Regulation (EU) 2020/1784. Under that provision, where a defendant has not entered an appearance, judgment shall not be given until it is established that either the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic proceedings, or the document was in fact delivered to the defendant or to the defendant's residence by another method provided for by the Regulation. In either case, service or delivery must have been effected in sufficient time to enable the defendant to enter a defence.

53. The Court agrees with the Appellant that deemed service and actual service are distinct concepts. A determination under R. 275.3(b) RoP that the Statement of claim

is deemed served on a particular date does not, by itself, establish actual service within the meaning of R. 277(b) RoP.

54. The conditions referred to in R. 277(a) and (b) RoP are alternative. The Court will first examine whether, independently of the determination of deemed service, the factual circumstances establish actual service under Chapter 2 for the purposes of R. 277(b) RoP. If that condition is satisfied, it will be unnecessary to determine whether delivery through the private carrier constituted a method prescribed by Polish internal law within the meaning of R. 277(a) RoP.

55. Actual service does not require proof that the defendant personally opened or retained the documents. As follows from Article 22(1)(b) of Regulation (EU) 2020/1784, delivery to the defendant's residence may suffice.

56. In the present case, the conclusion under R. 277(b) RoP is not based merely on the legal effect of the R. 275 Order. It is based on the factual circumstances underlying that order and on the supporting documents submitted with the application under R. 275 RoP.

57. The judge-rapporteur found that the package delivered through the private-carrier route contained the Statement of claim and the accompanying procedural documents, Form L and Polish translations. He further found that the package had reached the Appellant's correct address, had been recorded as delivered and had subsequently been returned because the recipient refused it. The Appellant does not specifically dispute those factual findings, including the finding that the package was refused after it had been recorded as delivered. Nor has he provided an alternative factual explanation capable of calling into question the carrier's records. He disputes the legal conclusion that those circumstances amounted to actual service.

58. A refusal may preclude a finding of actual service where it constitutes a valid exercise of the addressee's right under Art. 12 of Regulation (EU) 2020/1784 to refuse a document on linguistic grounds. In that event, Art. 12(5) provides that service may be remedied by serving the document together with the required translation and determines the date on which the remedied service takes effect.

59. On the basis of the factual findings referred to above, the refusal recorded by the carrier did not constitute the exercise of the right provided for in Art. 12 of Regulation (EU) 2020/1784. Neither Form L nor a written declaration refusing the documents on linguistic grounds was returned.

60. The subsequent refusal therefore did not negate the factual delivery which had already occurred. It explains why the package was later returned to the sender and confirms that the return did not result from an inability to locate the address or to effect delivery.

61. In those specific circumstances, the Court considers that the requirement of actual service under R. 277(b) RoP was satisfied. That conclusion is based on the factual delivery of the package containing the Statement of claim and the accompanying documents to the Appellant's correct address and on the absence of a valid refusal under Article 12 of Regulation (EU) 2020/1784. It is independent of, although consistent with, the determination under R. 275.3(b) RoP that the Statement of claim was deemed served on 25 November 2024.

62. The Court therefore finds that the R. 275 Order complied with R. 274 and 275 RoP and that the condition laid down in R. 277(b) RoP was satisfied. The subsequent service completed on 21 January 2025 did not invalidate or replace the date of deemed service established by the R. 275 Order.

Re-establishment of rights.

63. By its third ground of appeal, the Appellant submits that the Court of First Instance wrongly rejected his application for re-establishment of rights under R. 320 RoP. He argues that the failure to file the Statement of defence within the prescribed period resulted from the sudden illness of his representative, a circumstance outside his control, and that the Court applied an excessively stringent standard in assessing whether all due care had been taken. The Appellant further submits that the Court relied on case law concerning Art. 122 EPC without taking into account that the EPC also provides for further processing as an additional remedy against loss of rights.

64. The Appellant also submits that, in addition to the application under R. 320 RoP, he lodged a separate request under R. 9.3(a) RoP for an extension of the period for filing the Statement of defence, which the Court of First Instance did not determine.

65. By its order of 1 April 2025, the Court of First Instance assumed that the Appellant's representative had been ill between 24 and 27 February 2025 and had therefore been unable to file the Statement of defence on 25 February 2025. It nevertheless concluded that the requirements of R. 320 RoP were not met because the representative had not taken all due care to avoid non-observance of the applicable period. In particular, it relied on the representative's prior knowledge of the deadline, the warning contained in the R. 275 Order, the time available for preparing the defence, the failure to request an extension and the absence of appropriate organisational measures.

66. The Respondent supports that conclusion. It submits that the Court of First Instance expressly accepted the occurrence of the illness and based its decision solely on the absence of all due care. According to the Respondent, the representative had several weeks in which to prepare the defence and failed to take readily available organisational measures which could have ensured timely filing notwithstanding the illness.

67. Following the R. 320 Order, the Court of Appeal clarified the relationship between Rules 9.3(a) and 320 RoP in its order of 10 March 2026 in *Angelalign v Align*

Technology (UPC_CoA_37/2026). The Court of Appeal held that a failure to comply with a period for filing a written submission in pending proceedings is governed by R. 9.3(a) RoP. Under that provision, a request for an extension of a time period for submitting a written statement may be submitted after the relevant period has expired and the period may be extended retrospectively. R. 320 RoP applies where failure to observe a time limit directly results in the loss of a right or means of redress.

68. The time period at issue in the present case concerned the filing of the Statement of defence in pending first-instance proceedings. The Appellant's request for relief from the consequences of the expiry of that period therefore falls to be assessed under R. 9.3(a) RoP.

69. The Court of First Instance did not determine that request. It examined only the application under R. 320 RoP and applied the cumulative requirements that the failure resulted from circumstances outside the Appellant's control and occurred despite all due care having been taken.

70. Although the Court of First Instance did not exercise the discretion conferred by R. 9.3(a) RoP, it is not necessary to refer the matter back for that purpose. The relevant factual circumstances have been established, the parties have had the opportunity to address them in the appeal proceedings and the Court of Appeal is therefore in a position to determine whether a retrospective extension should be granted.

71. In this regard, it is noted that R. 9.3(a) RoP confers a discretionary power on the Court to extend, including retrospectively, a period prescribed by the Rules of Procedure or imposed by the Court. The fact that the request was filed after the expiry of the relevant period does not, by itself, preclude the grant of an extension.

72. In exercising that discretion, the Court must take account of all the circumstances of the case, including the reasons for the failure to comply with the period, the conduct of the party and its representative, the promptness with which the Court and the opposing party were informed of the relevant circumstances, the stage of the proceedings and the consequences of an extension for the efficient and fair conduct of the proceedings.

73. In the present case, it may be assumed, as the Court of First Instance did, that the representative was ill between 24 and 27 February 2025 and was unable to file the Statement of defence on 25 February 2025.

74. No request for an extension was filed on 24 or 25 February 2025, nor was the Court otherwise informed before expiry of the period that the representative was unable to complete or file the Statement of defence. The Court was first informed of the illness on 4 March 2025, when the application under R. 320 RoP was lodged together with the late Statement of defence. The separate request under R. 9.3(a) RoP was lodged only on 1 April 2025, and no explanation has been provided for that further delay.

75. A party seeking an extension on account of an unforeseen circumstance should inform the Court without undue delay once that circumstance becomes apparent, where such communication remains reasonably possible. Prompt notification enables the Court to manage the proceedings and avoids leaving the other party uncertain as to whether the procedural timetable will be observed.

76. This does not mean that a representative who is suddenly unable to work must personally prepare a fully reasoned application while ill. Where reasonably possible, the Court should nevertheless be promptly informed, by the representative or by another person acting on the representative's behalf, of the difficulty encountered and of the possible need for an extension.

77. The Appellant has not explained why no such communication could have been made in the present case, either by the representative or by another person acting on the representative's behalf.

78. The absence of prompt notification is particularly relevant in the circumstances of this case. The representative had known the date fixed for filing the Statement of defence since the R. 275 Order of 19 December 2024, had registered in the CMS and obtained access to the case file on 6 January 2025 and knew that failure to file the defence within the prescribed period could lead to a decision by default.

79. In those circumstances, the Court does not consider it appropriate to exercise its discretion under R. 9.3(a) RoP by extending retrospectively the period for filing the Statement of defence.

80. The Appellant's complaints concerning the standard of all due care applied by the Court of First Instance, its reliance on the case law concerning Art. 122 EPC and the availability of further processing under the EPC are not relevant. As follows from the case law referred to above, the late filing of a written submission in pending proceedings falls outside the scope of R. 320 RoP and must instead be assessed under R. 9.3(a) RoP.

81. The Court of First Instance therefore erred in examining the late filing of the Statement of defence exclusively under R. 320 RoP and in failing to determine the separate request lodged under R. 9.3(a) RoP. Those errors do not, however, affect the outcome. Having assessed the request under the applicable provision, the Court concludes that a retrospective extension is not justified.

Application to set aside the decision by default.

82. By its fourth and fifth grounds of appeal the Appellant challenges the order of 9 December 2025 concerning his application to set aside the decision by default under R. 356 RoP and the rectification of that decision under R. 353 RoP.

83. The Appellant submits that the application to set aside the decision by default, lodged on 28 October 2025, met the requirements of R. 356.2 RoP and therefore had

to be allowed pursuant to R. 356.3 RoP. He argues that the application was lodged in accordance with the information concerning the available legal remedy contained in the decision by default, identified that decision, contained an explanation for the default and was accompanied by the Statement of defence, and that the applicable fee was paid.

84. The Appellant further submits that the exception in R. 356.3 RoP was not applied. According to the Appellant, the decision of 21 October 2025 was the first decision by default in the present proceedings and he had not been put on notice in an earlier decision that a further decision by default would be final. In particular, neither the R. 275 Order nor the R. 320 Order contained such a notice or used the word "final".

85. The Appellant also challenges the rectification made under R. 353 RoP. He submits that replacing the information concerning an application under R. 356 RoP with information concerning an appeal did not correct a clerical mistake, an error in calculation or an obvious slip. According to the Appellant, the rectification altered the substance and procedural effect of the decision by default by treating it as a final decision against which only an appeal could be lodged.

86. The Appellant further submits that the rectification was made after expiry of the one-month period referred to in R. 353 RoP and without affording the parties an effective opportunity to be heard. He states that the parties were invited on 8 December 2025 to submit comments within one day, but that all three members of the panel signed the order before the end of the following day and two of them did so before his comments were filed.

87. In its order of 9 December 2025, the Court of First Instance found that the formal and material requirements of R. 356.1 and 356.2 RoP were met. It nevertheless held that, in the circumstances of the case, the Appellant had to be considered as having been put on notice, through the R. 275 and 320 Orders, that a further decision by default would be final within the meaning of R. 356.3 RoP.

88. The Court of First Instance concluded that the decision by default was a final decision against which only an appeal could be lodged. It therefore declared the application under R. 356 RoP inadmissible.

89. On that basis, the Court further held that the information in the decision by default identifying an application under R. 356 RoP as the available legal remedy constituted a clerical error. Acting ex officio under R. 353 RoP, it rectified that information by replacing the reference to an application under R. 356 RoP with information concerning the right of appeal.

90. In the alternative, the Court of First Instance dismissed the application under R. 356 RoP. It held that, even if the exception in R. 356.3 RoP were interpreted differently, the same panel, assessing the same factual and legal circumstances already considered in the R. 320 proceedings, would not reach a different conclusion.

91. The Respondent disputes these grounds of appeal. It submits that the Appellant has not adequately challenged the reasoning by which the Court of First Instance concluded that the earlier warnings were sufficient for the purposes of R. 356.3 RoP. It argues that the absence of the word “final” from the earlier orders is not decisive and, in the circumstances identified by the Court of First Instance, the Appellant had been sufficiently put on notice of the consequences of his default.

92. The Respondent further submits that the rectification under R. 353 RoP was permissible and did not adversely affect the Appellant’s procedural rights, since the Appellant was able to lodge an appeal within the applicable period. As regards the right to be heard, the Respondent argues that the Appellant’s comments were filed before the judge-rapporteur gave the final sign-off to the order on the evening of 9 December 2025 and could therefore have been taken into account.

93. The fourth and fifth grounds of appeal are well founded.

94. R. 353 RoP permits the Court to rectify clerical mistakes, errors in calculation and obvious slips in a decision or order. It does not permit the Court, under the guise of rectification, to reconsider or alter a substantive legal assessment contained in the decision.

95. The circumstances contemplated by R. 353 RoP presuppose a discrepancy between the decision intended by the Court and its material expression, where that discrepancy can be identified by comparing the part affected by the error with the reasoning of the decision. Such errors do not concern the identification or assessment of the relevant elements of the case or the formation of the Court’s judgment, but only its external expression.

96. This interpretation is consistent with the rulings of the Court of Appeal of 21 August 2025 in *Microsoft v Suinno* (UPC_CoA_363/2025, para. 14) and of 13 July 2026 in *Fujifilm v Kodak* (UPC_CoA_473-474-873/2025 and UPC_CoA_881/2026, para. 401), confirming that rectification cannot be used to add a notice which was not included in the decision or otherwise to make a substantive alteration to it.

97. In the present case, the information given in the decision by default concerning the availability of an application under R. 356 RoP did not constitute a clerical mistake, an error in calculation or an obvious slip. Nothing in the reasoning or operative part of the decision indicates that the Court intended to identify an appeal as the applicable remedy but inadvertently referred to an application under R. 356 RoP.

98. On the contrary, the replacement of that information required that the Court of First Instance undertake a new legal assessment. In its order of 9 December 2025, the Court interpreted the word “further” in R. 356.3 RoP, examined the significance of the corresponding French term “ultérieure”, assessed the effects of the earlier orders under the R. 275 and 320 RoP and concluded that the decision by default had to be treated as a final decision open only to appeal.

99. The detailed legal reasoning required to reach that conclusion itself demonstrates that the original indication was not a clerical mistake or an obvious slip. The rectification did not bring the material expression of the decision into conformity with an intention already apparent from that decision. It substituted a different legal conclusion for the one originally expressed.

100. The purported rectification therefore fell outside the scope of R. 353 RoP.

101. The Appellant also relies on the one-month period referred to in R. 353 RoP. That period is expressly linked to an application for rectification made by a party, whereas the Court of First Instance purported to act of its own motion. It is unnecessary to determine whether and to what extent the same temporal limitation applies to an *ex officio* rectification, since the alleged error did not in any event fall within the substantive scope of R. 353 RoP.

102. It is likewise unnecessary to determine whether the procedure followed fully complied with the requirement that the parties be heard. The parties were invited on 8 December 2025 to submit comments within one day. All three members of the panel signed the order on 9 December 2025 before the end of that day, and two of them signed it before the Appellant's comments were filed. The rectification must in any event be set aside because it concerned a substantive legal reassessment rather than an error capable of rectification under R. 353 RoP.

103. It remains to examine whether the Court of First Instance correctly rejected the Appellant's application to set aside the decision by default under R. 356 RoP.

104. Under R. 356.1 RoP, a party against whom a decision by default has been given may lodge an application to have that decision set aside within one month of service of the decision. R. 356.2 RoP requires that the application contain the party's explanation for the default, identify the date and number of the decision by default, and be accompanied by payment of the applicable fee. Where the decision was issued under R. 355.1(a) RoP, the application must also be accompanied by the procedural step which the party failed to take.

105. R. 356 RoP gives effect to and further specifies the general principle laid down in Article 37 of the Statute. Under that provision, a party against which a decision by default has been given may lodge an objection within one month of notification of that decision. The objection does not stay enforcement of the decision by default unless the Court decides otherwise.

106. The requirement to provide an explanation for the default does not confer on the Court a discretion to assess whether the circumstances described sufficiently justify or excuse the default. R. 356.2 RoP does not make the allowance of the application dependent on such an assessment. Had that been intended, the Rule would have specified the applicable criteria.

107. This conclusion is reinforced by comparison with R. 320 RoP. That Rule governs re-establishment following the direct loss of a right or means of redress as a result of the expiry of a time limit and expressly applies only where the failure has occurred, despite all due care having been taken, for a cause outside the party's control. R. 356 RoP, by contrast, establishes a specific remedy against a decision already given by default, with the purpose of reopening the proceedings before the court which issued that decision. The absence from R. 356 RoP of the conditions expressly laid down in R. 320 RoP must be given effect.

108. According to a different interpretation, relied on by the Respondent, the requirement to explain the default is inherent in a procedural system in which time limits must remain effective and entails an assessment of whether the circumstances described are capable of justifying the default. Under that interpretation, the applicant must establish that the default resulted from circumstances outside its control, such as unforeseeable circumstances or force majeure, rather than from its own fault.

109. That interpretation is supported by legitimate considerations concerning the effectiveness of procedural time limits and the fair and efficient conduct of proceedings. If any account of the default, irrespective of its content, were sufficient, a party could deliberately allow a period to expire, await the decision by default and then obtain the reopening of the proceedings simply by completing the omitted procedural step and describing what had occurred.

110. Those concerns must be taken seriously. They do not, however, justify making the allowance of an application under R. 356 RoP dependent on a substantive condition which is absent from its wording. In particular, interpreting the required explanation as proof of force majeure, unforeseeable circumstances, absence of fault or circumstances outside the party's control would substantially assimilate the remedy under R. 356 RoP to re-establishment under R. 320 RoP, notwithstanding the different wording, structure and functions of those provisions.

111. This does not mean that the requirement to provide an explanation under R. 356.2 RoP is devoid of content. The Court must verify that the application contains a genuine and truthful explanation of how and why the default occurred. The explanation must identify the circumstances which caused the default and must be intelligible, sufficiently complete and causally connected with the procedural omission concerned. A merely apparent statement, an account unrelated to the default, a deliberately incomplete explanation or a knowingly false representation would not satisfy that requirement.

112. The explanation enables the Court to identify the cause and scope of the default and to assess its consequences for the further conduct of the proceedings. Although it does not operate as a plea for relief requiring the applicant to prove that the default was without fault or otherwise excusable, it may inform the exercise of the Court's discretionary powers as the proceedings continue.

113. In particular, the explanation may be relevant to the adoption of case-management orders, the allocation of costs caused by the default, the assessment of the party's subsequent procedural conduct and the decision whether to put the party on notice under R. 356.3 RoP that a further decision by default shall be final. Those powers enable the Court to respond to the consequences of the default and to discourage repeated, opportunistic or abusive procedural conduct without making the setting aside of the decision dependent on the excusability of the initial default.

114. R. 356.3 RoP determines the consequence of compliance with R. 356.2 RoP. It provides that the application "shall be allowed", unless the party was put on notice in an earlier decision that a further decision by default would be final. Paragraph 2 identifies the requirements which the application must satisfy, while paragraph 3 provides the consequence of compliance with those requirements and one express exception.

115. The words "shall be allowed" are mandatory. Once the Court has established that the application contains an explanation satisfying the requirements described above and complies with the other requirements of paragraph 2, it does not retain a general discretion to refuse the application because the default is considered insufficiently justified or excusable.

116. The express exception in paragraph 3 specifically addresses the risk of repeated default, in addition to the discretionary powers available to the Court in the subsequent conduct of the proceedings. The Court may put the party on notice that a further decision by default shall be final. That mechanism would lose much of its autonomous function if an application could already be refused on the basis of an unstated requirement that the default be free from fault.

117. In its order of 9 December 2025, the Court of First Instance found that the formal and material requirements of R. 356.1 and 356.2 RoP were met. It nevertheless concluded that the application could not be allowed because the Appellant had previously been put on notice, within the meaning of R. 356.3 RoP, that a further decision by default would be final.

118. That conclusion cannot be upheld.

119. The exception in R. 356.3 RoP requires that the party have been put on notice in an earlier decision that a further decision by default shall be final. The wording of the provision, read in its context, indicates that the earlier decision is itself a decision by default. The word "further" must be read together with the words "decision by default" and "shall be final". This is particularly apparent from the German version, which refers to a "neuerliche Versäumnisentscheidung" and is also in line with the English and French versions of the Rules of Procedure.

120. This interpretation is consistent with the logic and purpose of the remedy provided for in Article 37 of the Statute and R. 356 RoP which enables a party to

obtain the setting aside of a first decision by default where the applicable procedural requirements are met. The notice thus marks the distinction between the remediable consequences of the first default and the final consequences of a repeated default.

121. Since such a notice removes the remedy otherwise granted by R. 356.1 RoP, it must be express and clear. It must specifically inform the party that a further decision by default shall be final and that the remedy under R. 356 RoP will no longer be available. Mere notice that a decision by default will be issued does not satisfy that requirement. As a general rule, the inclusion of such a notice must be requested in the proceedings concerning the decision by default (see Court of Appeal, order of 21 August 2025, *Microsoft v Suinno*, UPC_CoA_363/2025, para. 15).

122. Neither of the earlier procedural acts relied upon by the Court of First Instance, both of which were issued as orders, contained the express and clear notice required by R. 356.3 RoP.

123. The R. 275 Order warned only that a decision by default would be issued if the Appellant failed to file a Statement of Defence within the prescribed period. It did not state that a further decision by default would be final or that the remedy under R. 356 RoP would no longer be available.

124. The R. 320 Order likewise stated that a decision by default would be issued but contained no notice concerning the finality of a further decision by default or the unavailability of the remedy under R. 356 RoP.

125. The Court of First Instance therefore erred in treating the general warnings contained in the R. 275 and R. 320 Orders as equivalent to the specific notice required by R. 356.3 RoP.

126. In the present case, the application under R. 356 RoP was lodged on 28 October 2025, within the period prescribed by R. 356.1 RoP. It identified the decision by default, was accompanied by payment of the required fee and included a new version of the Statement of defence.

127. The application also contained an explanation for the default. It referred to the representative's illness, to the circumstances set out in the earlier application under R. 320 RoP and to the filing of the Statement of defence on 4 March 2025, which had not been treated as timely filed. That explanation was intelligible, sufficiently complete and causally connected with the procedural omission which led to the decision by default.

128. Since, as the Court of First Instance itself found, the requirements of R. 356.1 and 356.2 RoP were met, and since the Appellant had not been given the notice required by R. 356.3 RoP, the application had to be allowed.

129. The alternative reasoning of the Court of First Instance does not lead to a different result. By relying on the conclusion previously reached under R. 320 RoP, the Court conflated two distinct remedies. The stricter conditions governing re-establishment under R. 320 RoP could not justify refusing to set aside the decision by default, since the application satisfied the requirements of R. 356.2 RoP.

130. The Court of First Instance therefore erred, first, in rectifying under R. 353 RoP the information concerning the remedy available against the decision by default. The original indication did not result from a clerical mistake, an error in calculation or an obvious slip, but reflected the legal assessment originally adopted by the Court.

131. It erred, second, in treating the general warnings contained in the R. 275 and R. 320 Orders as equivalent to the specific notice required by R. 356.3 RoP.

132. It erred, third, in alternatively dismissing the application by applying, in substance, the stricter conditions governing re-establishment under R. 320 RoP to the distinct remedy provided by R. 356 RoP.

133. The decision by default of 21 October 2025 and the order of 9 December 2025 must be set aside and the Appellant's application under R. 356 RoP must be allowed.

Further grounds of appeal.

134. As a consequence of the setting aside of the decision by default, it is no longer necessary to examine the remaining grounds of appeal.

135. Those grounds challenge the findings made in the decision by default concerning the validity and infringement of the patent and the assessment of the evidence. They also allege a failure to apply the limitation period under Art. 72 UPCA, a failure to consider the Appellant's submissions and evidence and an infringement of his rights of defence.

136. Since the decision containing those findings has been set aside, no ruling on those grounds is required in the present appeal. The matters to which they relate must, where maintained by the parties, be examined in the resumed proceedings on the basis of the submissions and evidence properly admitted in those proceedings.

Referral back to the Court of First Instance.

137. It remains to determine whether the Court of Appeal should itself decide the case or refer it back to the Court of First Instance.

138. Under Art. 75(1) UPCA, where an appeal is well founded, the Court of Appeal shall, as a rule, give a final decision. In exceptional cases and in accordance with the Rules of Procedure, it may refer the case back to the Court of First Instance for decision. R. 242.2(b) RoP likewise permits the Court of Appeal, in exceptional

circumstances, to refer the action back to the Court of First Instance for decision or retrial.

139. Such exceptional circumstances exist in the present case.

140. The procedural error identified above prevented the *inter partes* written procedure from being completed before the Court of First Instance. Following the late filing of the Statement of Defence and the rejection of the application under R. 320 RoP, the Court of First Instance proceeded to issue the decision by default before the parties had completed the exchange of written pleadings provided for by the Rules of Procedure.

141. The setting aside of the decision by default and the allowance of the application under R. 356 RoP therefore require that the parties be afforded the opportunity to fully present their respective submissions before the Court of First Instance.

142. The present case goes beyond the mere failure of the Court of First Instance to decide an issue which it is necessary for the Court of Appeal to decide on appeal, as mentioned in the final sentence of R. 242.2(b) RoP.

143. It would not be appropriate for the Court of Appeal to conduct the remaining written procedure for the first time on appeal. That would require it to determine the admissibility and scope of the Statement of defence and of the parties' subsequent written submissions, and then to decide issues of infringement, validity, evidence and remedies which have not yet been examined by the Court of First Instance in *inter partes* proceedings.

144. The action must therefore be referred back to The Hague Local Division.

145. Pursuant to R. 243.1 RoP, the action shall continue before the same panel of The Hague Local Division. No circumstance has been identified which would require the appointment of a different panel.

146. The Hague Local Division shall give the procedural directions necessary for the continuation and completion of the written procedure, taking into account that the application under R. 356 RoP has been allowed and that the procedural step accompanying that application was filing of a Statement of defence.

147. It will be for the Court of First Instance, in the exercise of its case-management powers, to determine the timetable and scope of the further written submissions, to decide any procedural questions concerning the Statement of defence and, following completion of the written procedure, to continue the proceedings in accordance with the Rules of Procedure.

Costs.

148. No decision on the reimbursement of legal costs shall be made at this stage, since the present decision does not conclude the action. The Court of First Instance shall include the costs of the present appeal proceedings in its final assessment of costs, taking into account the outcome of the appeal.

DECISION

The Court of Appeal:

i) sets aside the decision by default of 21 October 2025 and the order of 9 December 2025

ii) allows the Appellant's application under R. 356 RoP;

iii) refers the action back to The Hague Local Division for continuation of the proceedings;

iv) dismisses all other requests.

Issued on 2 November 2026.

KLAUS STEFAN MARTIN Grabinski
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Klaus Grabinski, presiding judge and President of the Court of Appeal

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