

PIERRE VÉRON*

What Price Crime? A European hit parade of patent infringement damages

A survey was conducted to identify judgments granting damages for patent infringement in the six most active European countries in patent litigation (Germany, Spain, France, Italy, the Netherlands and the United Kingdom) between 2000 and 2019. The total number of decisions granting damages was found to be 574 and the total amount granted 198.718.636 Euro: France (380 decisions, 113.934.191 Euro), Spain (79 decisions, 45.560.121 Euro), Italy (76 decisions, 19.191.968 Euro), Germany (29 decisions, 13.578.101 Euro), the Netherlands (6 decisions, 4.833.585 Euro) and the United Kingdom (4 decisions, 1.620.669 Euro). The highest amount ever granted by a court in Europe was granted by the court of Lyon (25.320.946 Euro in a textile case in 2016). The 10th largest amount was granted by the court of Barcelona (3.418.745 Euro in a cooking case in 2013).

I. Introduction

The author of this paper had the privilege of arranging for the translation and the publication in French legal reviews of two essential articles about patent infringement damages written by Peter Meier-Beck:

- “Damages for Patent Infringement According to German Law – Basic Principles, Assessment and Enforcement”, IIC (International Review of Intellectual Property and Copyright Law) vol. 35, No. 2/2004, p. 113; published in French as “Les dommages-intérêts pour contrefaçon de brevet en droit allemand – Principes fondamentaux, évaluation et mise en œuvre” in *Propriété industrielle*, Nov. 2004, p. 11, No. 19;
- “Schadenskompensation bei der Verletzung gewerblicher Schutzrechte nach dem Durchsetzungsgesetz”, WRP 2012, 503; published in French as “Allemagne: les dommages-intérêts pour contrefaçon des droits de propriété industrielle après la loi sur l’amélioration du respect des droits de propriété intellectuelle” in *Propriété industrielle*, Nov. 2013, p. 19, No. 17.

Is there a better way to pay a tribute to Peter Meier-Beck’s decisive activity in this area than to present the results of a statistical survey of patent infringement damages granted between 2000 and 2019 by the courts of the six countries in Europe dealing with the largest number of such cases (Germany, France, Italy, the Netherlands, Spain and the United Kingdom)?

Various national surveys have been published on patent infringement damages;¹ however, no survey has so far aimed at comparing the decisions handed down by various courts of European countries.

The aim of this paper is to deliver such a comparative view. After the methodology and the results of the survey have been presented, some comments will be added.

II. Methodology

The data reviewed hereafter were obtained from the specialist database Darts-ip along a specific protocol.

1. The source of data: Darts-ip database

The data were obtained from the company Darts-ip www.darts-ip.com, which maintains a unique global da-

tabase of judgments handed down in intellectual property cases.

They collect cases from more than 3000 courts around the world (more than 140 countries); early 2020, the database includes more than 5.000.000 cases, of which more than 1.600.000 patent cases. Their collecting methods range from face-to-face meetings with court clerks, scanning decisions in physical archives, to automated electronic downloads.

A team of more than 170 legal analysts around the world reads cases and codifies certain information in each document; for patent infringement cases, such information includes the amount of damages granted.

2. The survey

This section presents the goal and the scope of the survey, some remarks on the geographical coverage and the data gathered.

a) Goal of the survey

The goal of the survey was to identify judgments granting patent infringement damages in the six European countries known to be the most active in patent litigation, namely, in EU protocol order, Germany, Spain, France, Italy, the Netherlands and the United Kingdom.

Another aim of the survey was to provide a list of the “top 10” judgments, i. e. the 10 judgments granting the highest amount of damages in each country.

b) Scope of the survey

For practical reasons, only the judgments granting patent infringement damages handed down in first instance were taken into account, excluding the decisions given by the appellate courts; as a result, some of the decisions in the list do not reflect the outcome of the case.²

The survey encompassed all the judgments granting damages for patent infringement whatever the procedural scenario leading thereto: where the initial action was an action for patent revocation, which caused the patent holder to counterclaim successfully for patent infringement, the judgment granting damages was included.

The methods of assessment of damages were not discriminated: profits lost by the patentee, reasonable royalties, and disgorgement of the infringer’s profits were equally taken into account.

* Avocat à la cour de Paris. Honorary President European Patent Lawyers Association (EPLAW). – With the collaboration, for the statistical survey, of Mihnea Hanganu (Head of Data and Analytics, Darts-ip) The author would like to thank also Éric Sergheraert, Legal Patent Manager, Darts-ip for his valuable contribution.

¹ E.g. in France: Patent Litigation in France – Statistical Study 2000–2009. https://www.pierre-veron.com/wp-content/uploads/Patent_litigation_France_Stats_2000-2009_Veron_Associes.pdf. Patent Litigation in France Statistical Study 1990–1999, https://www.pierre-veron.com/wp-content/uploads/Patent_litigation_in_France_statistical_study_1990_1999_COL.pdf.

² This is the case for the decision identified by the survey as granting the highest amount of damages (TGI Lyon, France, 8 September 2016, *Chavanoz Industrie v. Mermet*). This decision was later reversed by the court of appeal (CA Lyon, France, 12 September 2019), which found the patent to be invalid for lack of novelty.

When the judgment listed separately several amounts of money granted for various causes of damage or for separate periods of time, all these amounts were aggregated such that only the total sum was taken in consideration.

The survey took no account of the decisions ordering the patent holder (or the licensee) to pay damages to the defendant (unjustly) accused of infringement (e. g. damages granted to a defendant for abuse of proceedings or when a preliminary injunction ordering a defendant to stop the alleged infringement was later reversed because the patent was found invalid or not infringed³).

As already mentioned, the survey covered six European countries: Germany, Spain, France, Italy, the Netherlands and the United Kingdom.

The time period is 2000–2019 (as the survey was conducted in September 2019, some decisions handed down in 2019 may be missing).

c) Comments on the geographical coverage

In the six countries surveyed the judgments are given in open court; however, they are not readily available to the public.

For many reasons (ranging from pressure of work on the court clerks, making them unable to provide information, to privacy protection) not all the judgments granting patent infringement damages are available for data providers.

In some countries, only the judgments deemed to have a legal interest are made easily available to the public (through an electronic access) and judgments dealing merely with the assessment of damages are not often deemed worth of interest by the legal analysts who decide to publish or not.

Having this in mind, the following remarks can be made about the six countries surveyed:

- Germany: good coverage (however, some courts, including the court of Mannheim, which deals with a significant number of patent cases, do not provide access to their decisions).
- Spain: the judgments of the first instance courts are not always published; this was circumvented by using the information on the first instance judgments contained in the decisions of the courts of appeal.
- France: excellent coverage (almost 100 % for the most recent years; 80–90 % for previous years, because, until 2009, courts other than the Paris court could hear patent cases).
- Italy: good coverage (> 75 %).
- Netherlands: excellent coverage (> 90 %).
- United Kingdom: excellent coverage (> 90 %).

d) Data gathered

The survey identified 574 decisions granting patent infringement damages and the amount granted by each of these decisions.

In addition, for each of the “top 10” judgments, i. e. the 10 judgments granting the highest amount of damages in each country, the survey provided the following data:

- the judgment date
- the court of origin
- the plaintiff’s name
- the defendant’s name
- the total amount granted (converted into euros and current value to take into account monetary depreciation)
- the patent(s) at stake
- the technological field.

Only 50 “top 10” judgments were reported, not 60 as expected according to arithmetic (6 countries surveyed): the reason is that in two countries less than 10 decisions on damages were found in the database (Netherlands: 6–UK: 4).

Chart 7, at the end of this paper, includes the data available for these 50 “top 10” decisions of the European courts.

III. Results

The information provided by the survey concerns the total “turnover” and the “top 10” awards.

1. Total turnover (volume and value)

Chart 1 shows the total number of decisions granting damages: 574 decisions.

France was by far the first country for the number of decisions granting damages (380), followed by Spain and Italy in a tie (79–76); Germany was well behind (29); both the Netherlands and the United Kingdom handed down a very small number of judgments (6 and 4, respectively):

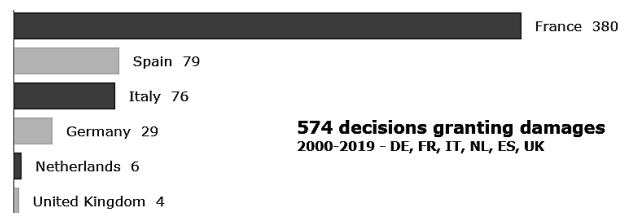


Chart 1: Number of decisions of European courts granting patent infringement damages in 2000–2019 per country

Chart 2 features the amount granted by the decisions.

The ranking of the countries based on the amount granted was the same as that based on the number of decisions: France, Spain, Italy, Germany, the Netherlands and the United Kingdom.

The chart indicates also the total amount granted: the sum of all the damages granted by a court judgment in compensation for patent infringement between 2000–2019 for the six countries reviewed reaches 198.718.636 Euro.

This is the “crime price” in Europe:

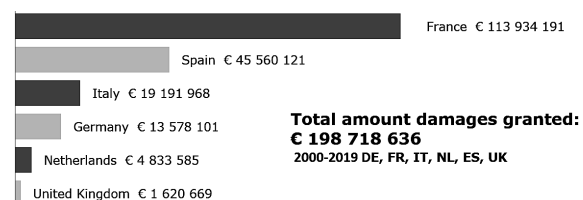


Chart 2: Total amount of damages for patent infringement granted in 2000–2019 by European courts per country

³ As a result, the highest amount of damages ever granted in a patent infringement case in the United Kingdom, 17.500.000 GBP, on 9 October 2008 (*Les Laboratoires Servier v. Apotex* [2008] EWHC [Ch] 2347) is not included. Similarly, the French judgment *Biogaran v. Laboratoire Medidom, Laboratoires Negma*, TGI Paris, 27 January 2012, Case No. 09/17355, granting more than 3.000.000 Euro to Biogaran is not mentioned.

Chart 3 shows this information on a map including for each country reviewed (Germany, France, Italy, the Netherlands, Spain and the United Kingdom) the number of judgments and the total amount granted:

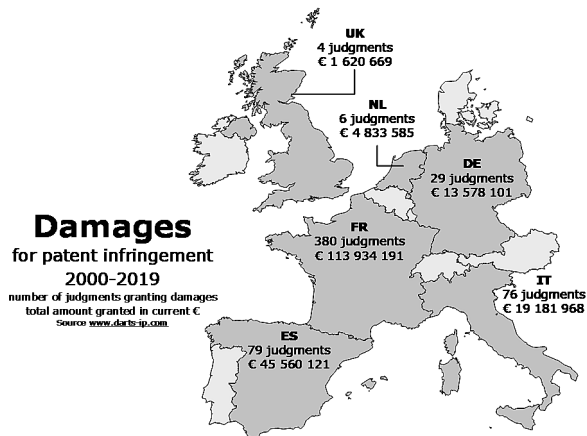


Chart 3: Map with the number of judgments and the total amount of damages for patent infringement granted in 2000–2019 per country

2. The hit-parade: the European “top 10” awards

Chart 4 features the European “top 10” awards in the six countries reviewed.

The highest amount ever awarded by a court in Europe was granted by the court of Lyon (25.320.946 Euro in a textile case in 2016).

French courts count 5 decisions in the European “top 10”, Spanish courts 4 decisions, the tenth one coming from a Dutch court.

The technical domain is pharma for 3 awards, the 7 others being textile, cosmetics, construction, air filtration, electric and cooking.

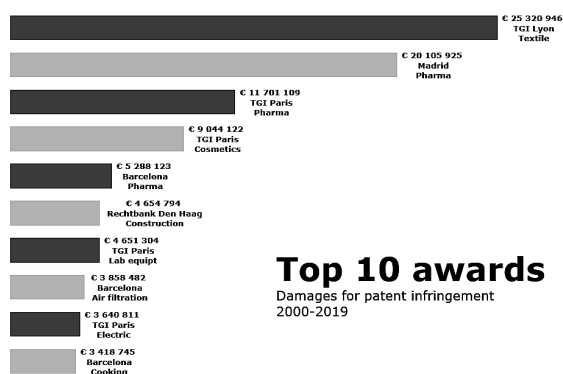


Chart 4: “Top 10” damages awards for patent infringement in 2000–2019

IV. Comments

In itself, the survey does not permit to draw decisive conclusions about the reasons why France, dealing with less patent cases than Germany,⁴ issues ten times more judgments about damages, nor why the Netherlands and the United Kingdom issued only around 5 decisions on damages in 20 years.

The following tentative explanations do not arise from the survey, but rather from the author’s personal experience (much more a gut feeling than a scientific conclusion).

One conclusion is, however, beyond any dispute: European courts and United States courts stand on different continents!

1. Tentative explanations

Parties often settle on damages: this is the main reason⁵ why there are few decisions on damages as compared to the number of decisions on the merits (in France, the leading country for the number of decisions on damages, only about 10 % of the patent infringement cases decided by a judgment on the merits give rise to a decision on damages).

In the author’s experience, the following explanations can be put forward:

- *Primum cessare, deinde retaliare* (first cease, then compensate): the first goal of a patent owner faced with infringement is generally to put an end to it as quickly as possible; when this goal is quickly achieved, e. g. when the infringement is stopped in a matter of weeks or months, the damage suffered may not justify further proceedings; this may explain the very low number of patent damages decisions in the Netherlands where many cases end after a preliminary injunction quickly granted in *kort gedding* or accelerated proceedings on the merits; on the contrary, countries where the enforcement of a patent takes a longer time have more damages cases because the infringement has lasted longer.
- *Further information often needed*: in some cases, the court deciding on infringement is also in a position to make a rough evaluation of damages; however, this court does not usually have all the information needed to make a final decision also on damages; it is therefore often necessary to obtain more information through another phase of proceedings, be it by laying the infringer’s books open or appointing a court expert to gather this information.
- *Justice must not only be done, it must also be paid to be done*: if, in addition, the legal costs for this step of assessment of damages stand at a high level (as it is the case, on this side of the Atlantic Ocean, in the United Kingdom), parties are encouraged to settle on damages.
- *The only thing standing between parties is money*: assessing damages is usually easier than assessing the validity of a patent and infringement; well established caselaw exists on the assessment of damages in most of the countries reviewed; for example, it is common knowledge that German courts usually compensate the plaintiff with reasonable royalties based on the infringing sales; they are very reluctant to grant damages based on the patentee’s lost profit, as they do not accept easily that, had the infringer not infringed, the patentee would have made the infringing sales; as a result, it is generally not too difficult for the parties to anticipate what the court’s decision on damages will be; on a more psychological note, the personal questions, which are sometimes involved when validity or infringement is at stake (e. g.

⁴ A survey conducted by EU DG Markt in 2010 for years 2007, 2008 and 2009 indicated around 1000 patent infringement cases per year for Germany and less than 500 for France. http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf. See also Harhoff, Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System, 26.2.2009, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.180.5997&rep=rep1&type=pdf>.

⁵ There may be other reasons, like the bankruptcy of one of the parties after the judgment finding infringement.

when the person who made the decision to launch the accused product is later the person managing the infringement case), are no longer crucial when the only problem is to assess the damages to be paid.

These are, again in the author’s personal view, the reasons explaining why the number of judgments granting damages for patent infringement is so different between the six European countries under review. The difference is still more striking between Europe and the USA.

2. Europe and the USA are two different continents

European courts and United States courts stand on different continents also when patent infringement damages are concerned!

Chart 5 lists the “top 5” damages awarded by US courts during the time period 2000–2019, as published by a US firm specializing in patent information⁶ with their conversion in euros, and the “top 5” damages awarded in Europe during the same time period, as identified by this survey:

Parties	Court	Year	Amount in US \$	Amount in €
Idenix vs Gilead Sciences		2016	\$ 2 540 000 000	€ 2 267 857 143
Pfizer vs Teva & Sun		2013	\$ 2 150 000 000	€ 1 919 642 857
Centocor vs Abbott		2009	\$ 1 672 000 000	€ 1 492 857 143
Alcatel-Lucent vs Microsoft		2007	\$ 1 500 000 000	€ 1 339 285 714
Carnegie Mellon Univ. vs Marvell		2012	\$ 1 170 000 000	€ 1 044 642 857
Total all EU courts 2000-2019			\$ 198 718 636	€ 198 718 636
Chavanoz vs Mermet	TGI Lyon	2016	\$ 28 359 460	€ 25 320 946
Merck Sharp & Dohme vs Chemo Ibérica	Madrid	2014	\$ 22 518 636	€ 20 105 925
Ethypharm vs Fournier	TGI Paris	2007	\$ 13 105 242	€ 11 701 109
L'Oréal vs Bourjois & Geka	TGI Paris	2009	\$ 10 129 417	€ 9 044 122
Pfizer vs Bexal	Barcelona	2008	\$ 5 922 697	€ 5 288 123

Chart 5: “Top 5” damages for patent infringement awarded by US courts and European courts (2000–2019)

Chart 6 illustrates the same information in a graphic format:

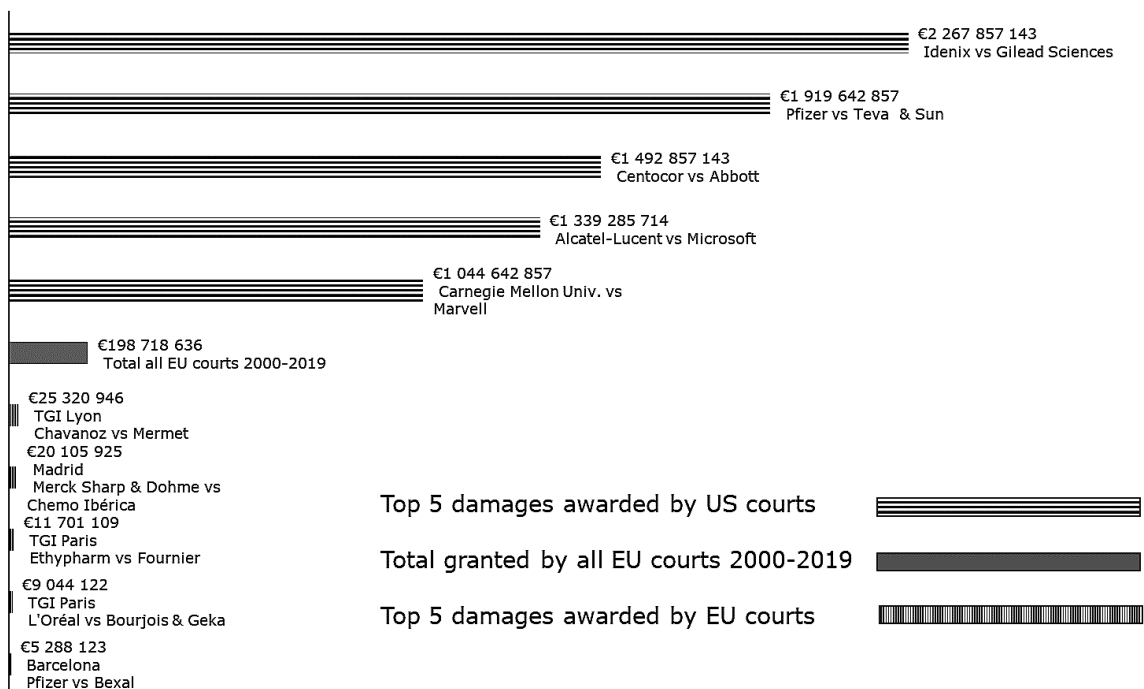


Chart 6: “Top 5” damages awarded by US courts versus (i) total granted and (ii) top 5 damages awarded by EU courts

⁶ <https://www.greyb.com/largest-patent-infringement-awards/>.

The order of magnitude of the damages for patent infringement is completely different on both sides of the Atlantic Ocean!

The largest amount ever granted by a US court is 2.540.000.000 US-Dollar (2.267.857.143 Euro), a 10 % royalty, in a battle over Gilead’s blockbuster Hepatitis C drugs, Sovaldi and Harvoni (*Idenix Pharmaceuticals Inc. v. Gilead Sciences Inc.*, Delaware Federal District Court December 2016).

The fifth largest amount is still over 1.000.000.000 US-Dollar (1.170.000.000 US-Dollar, i. e. 1.044.642.857 Euro), in a dispute about patents related to increasing the accuracy of reading data by hard drive circuits (*Carnegie Mellon Univ. v. Marvell*, 2012).

Compared to this, the total amount granted as patent infringement damages by the courts of the six European countries dealing with the largest patent cases during the time period 2000–2019 is just under 200.000.000 Euro (precisely 198.718.636 Euro, the sum of the damages awarded by the 574 judgments identified by this survey).

In other words, the total sum granted by 574 judgments of European courts is less than 10 % of the largest US verdict and less than 20 % of the fifth one.

A case-to-case comparison speaks also for itself: the largest amount ever granted in Europe, 25.320.946 Euro (TGI Lyon, France, 8 September 2016, *Chavanoz Industrie v. Mermet*) is roughly 1 % of the largest amount ever

granted by a US court, 2.540.000.000 US-Dollar (*Idenix Pharmaceuticals Inc. v. Gilead Sciences Inc.*), Delaware Federal District Court, December 2016).

Explaining such difference could be the topic of an article in itself.

The size of the markets is not that different: 325.000.000 consumers in the United States versus more than 500.000.000 in the European Union; the HFCE (Household Final Consumer Expenditure) of the United States is 13.000.0000 M\$ while that of the European Union is 9.600.000 M\$.

The legal principles governing the damages for patent infringement are not that different either: the most common calculation methods that the courts apply are the profit lost by the patentee or reasonable royalties (the latter being the basis of calculation of the highest award in the US, in *Idenix Pharmaceuticals Inc. v. Gilead Sciences Inc.*); admittedly, the legal provision allowing the US courts to order treble damages in case of wilful infringement is a major legal difference, but this method was not apparently used in any of the “top 5” US judgments.

Maybe the most pertinent factor is that most US cases attack the infringer in the country from where he sells to the whole world: accordingly, the turnover at stake is global rather than limited to the US territory.

But, again, explaining these differences would deserve a further study.

Rank	Country	Court	Date	Patent application	Technology	Total amount granted
1	France	TGI Lyon	2016	EP97915635(A)	Textile	25 320 946 €
2	Spain	Madrid	2014	ES87109919(T)	Pharma	20 105 925 €
3	France	TGI Paris	2007	FR8611540(A)	Pharma	11 701 109 €
4	France	TGI Paris	2009	FR8616626(A)	Cosmetics	9 044 122 €
5	Spain	Barcelona	2008	EP87302767(A),ES520389(A)	Pharma	5 288 123 €
6	Netherlands	Rechtbank Den Haag	2006	NL8200282(A)	Construction	4 654 794 €
7	France	TGI Paris	2009	EP87114091(A)	Lab equipment	4 651 304 €
8	Spain	Barcelona	2007	ES94902698(T),EP94902698(A)	Air filtration	3 858 482 €
9	France	TGI Paris	2009	FR8911964(A)	Electric	3 640 811 €
10	Spain	Barcelona	2013	ES03748142(T)	Cooking	3 418 745 €
11	France	TGI Paris	2010	FR8517809(A)	Welding	2 969 347 €
12	Italy	Milano	2010	EP00962427(A)	Batteries	2 388 495 €
13	Germany	LG Düsseldorf	2010	EP95926193(A)	Medical device	2 214 418 €
14	France	TGI Paris	2009	EP92913443(A),EP94905908(A)	Diagnostic kits	2 205 884 €
15	France	TGI Paris	2004	FR7925736(A),FR8311127(A)	Taximeters	2 144 653 €
16	France	TGI Paris	2016	EP92402233(A)	Trellising wire for vine	2 114 192 €
17	Spain	Madrid	2010	EP91201373(A),ES96926545(T),ES91	DVD	1 883 714 €
18	Italy	Milano	2016	ITRE20100062(A)	Clothes	1 802 321 €
19	Italy	Bologna	2013	ITVR990047(A)	Automotive industry	1 726 115 €
20	France	TGI Paris	2003	FR7919503(A)	Teeth scaling machine	1 654 349 €
21	Italy	Torino	2011	EP95107055(A),ITMI980933(A)	Waste treatment	1 629 155 €
22	Germany	LG Düsseldorf	2017	EP86113172(A),EP86113173(A)	Door lock	1 633 531 €
23	Germany	LG München	2002	EP91107223(A)	Garden device	1 385 402 €
24	Spain	Madrid	2010	ES200300492(U)	Waste container	1 302 793 €
25	Germany	LG Düsseldorf	2009	DE3806895(A),DE4006212(A)	Door lock	1 250 678 €
26	Italy	Milano	2016	EP01109757(A)	Mechanical element	1 217 199 €
27	Spain	Bilbao	2008	ES90310949(T)	Cement composition	1 049 136 €
28	Germany	LG Frankfurt am Main	2003	EP89109137(A)	Sawing machines	987 453 €
29	Italy	Bologna	2010	EP97929196(A)	Road construction machine	980 179 €
30	Spain	Barcelona	2006	ES9200160(A)	Machine	911 142 €
31	Spain	Barcelona	2016	ES06706230(T)	Packaging film	878 190 €
32	Germany	LG Düsseldorf	2015	EP89104226(A)	Toilet pump	868 196 €
33	Germany	Mannheim	2007	DE4326049(A)	Tension element	860 903 €
34	Italy	Torino	2014	EP00109067(A)	Apparatus for sewers	827 628 €
35	Germany	LG Düsseldorf	2013	EP00111766(A)	Radio-controlled wristwatch	814 130 €
36	Italy	Venezia	2013	EP97944827(A)	Seat	806 171 €
37	Germany	LG Düsseldorf	2013	EP98116534(A)	Ink jet cartridge	803 304 €
38	Spain	Bilbao	2009		N/A	766 518 €
39	Italy	Bologna	2010	ITVR20000027(A),ITVR990047(A)	Automotive industry	611 277 €
40	United Kingdom	IP Enterprise Court / Patents County Court	2016	G80715585(A)	Disk brakes	603 502 €
41	United Kingdom	IP Enterprise Court / Patents County Court	2014	EP05816011(A)	Display panels	597 496 €
42	Spain	Barcelona	2010	ES200003029(U)	Civil engineering	553 333 €
43	Italy	Milano	2014	ITB020030460(A)	Cardboard machine	471 410 €
44	Germany	LG Düsseldorf	2003	DE3405997(A)	Environmental technology	466 021 €
45	United Kingdom	Eng & Wales High Court C.Div	2007	EP96928076(A)	Medical technology	428 359 €
46	Germany	LG Düsseldorf	2011	EP97118610(A)	Lamp base	393 647 €
47	United Kingdom	IP Enterprise Court / Patents County Court	2013	EP02726331(A)	Rolling platform	292 131 €
48	Germany	LG München	2004	EP90911404(A)	Mixing chamber	243 027 €
49	United Kingdom	Eng & Wales High Court C.Div	2010	G89930323(A)	Self-service display cabinet	206 674 €
50	The Netherlands	Rechtbank Den Haag	2002		N/A	70 427 €

Chart 7: List of the 50 “top 10” judgments identified (i.e. the 10 judgments granting the highest amount of damages in each of the following European countries: Germany, Spain, France, Italy, the Netherlands and the United Kingdom) (50 judgments, not 60 as expected according to arithmetic [6 countries surveyed]: because in two countries less than 10 decisions on damages were found in the database: Netherlands: 6 – UK: 4)