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Implications of CJEU ruling on Brexit withdrawal notification for the Unified Patent Court

Wouter Pors (Bird & Bird) · Tuesday, December 11th, 2018

Early on Monday 10 December 2018, the Court of Justice of the European Union issued its judgment in *Wightman et al v Secretary of State for Exiting the European Union* (C-621/18), on whether the UK can unilaterally withdraw its Brexit notification. Although of course the judgment is strictly a legal reasoning, it also comes as close to a political statement as the CJEU will probably ever get. The answer was: yes, the UK can do that unilaterally.

Later on the day this was followed by political events in the UK House of Commons, where Prime Minister Theresa May admitted that a vote on the draft UK Withdrawal Agreement of 14 November 2018 would inevitably face defeat, and therefore decided to postpone the vote. She announced that she would go back to the EU Commission and Council to renegotiate. There were immediate statements on Twitter, as is now the fashion. Donald Tusk said “we will not renegotiate the deal”. Dutch Minister of Foreign Affairs Stef Blok, when asked for a comment on the Dutch 8 o’clock news, said: “you can’t refuse to give her a cup of coffee”. In fact, May will travel to The Hague today, so she will be able to have that cup of coffee.

However, leaving politics aside, the judgment also contains a paragraph that may shed new light on the options for the UK to continue participation in the Unified Patent Court if it chooses Brexit (in whatever form) after all. The CJEU first of all held that there was a sufficient interest to answer the question whether the withdrawal of the notification could be unilateral, despite the fact that the UK argued that this was only a hypothetical question. The CJEU held that it was for the referring Court to determine whether the order for reference was made in accordance with rules of national law governing the organization of the courts and legal proceedings. If the referring Court found this to be the case, it is not for the CJEU to refuse to answer the question. Besides, since the question at hand concerns the interpretation of a provision of EU law, which is the point at issue in dispute, there is no doubt as to its relevance, according to the CJEU.

This is an important ruling, as it would probably also apply to the UPC, if that Court would refer a question to the CJEU in accordance with the UPC Agreement, which both forms its constitutional basis and its basic procedural law. At the recent EPLAW Congress on 30 November 2018, Pierre Véron pointed out that the CJEU has held in its opinion 1/00 of 18 April 2002 with regard to the European Common Aviation Area (paragraphs 32 and 33), also referring to its opinion 1/91 of 14 December 1991 on the European Economic Area (paragraphs 59 and 51-65) and 1/92 of 10 April 1992 on the EFTA Court (paragraphs 33-35), that a Court which is not a national Court of an EU Member State can refer questions to the CJEU if this has been agreed and the Court is bound by the CJEU ruling. It seems that in today's judgment the CJEU has added that it cannot refuse to answer such questions if they have been put in accordance with the laws that govern the referring Court. Under the combined effect of these CJEU rulings, that should also apply to questions referred by the UPC. This may not be a big surprise, but it is reassuring.

But there's more. On the substance the CJEU of course rules that EU law is autonomous and has given rise to a structured network of principles, rules and mutually interdependent legal relations, binding the EU and the Member States. The question at hand – and, I would say similar constitutional questions as well – should therefore be examined in the light of the EU Treaties taken as a whole. But not only those. The CJEU comes to the conclusion that, based on an autonomous interpretation of EU law, the UK can indeed unilaterally withdraw its Brexit notification. But it also takes into account that this is corroborated by the Vienna Convention on the Law of Treaties, which – as the CJEU specifically remarks – was taken into account in the preparatory work for the Treaty establishing a Constitution for Europe. This indicates that the Vienna Convention, in as far as it contains relevant provisions, can be taken into account when deciding EU law issues.

Currently there seem to be three options for the UK. It may ratify the Withdrawal Agreement, which today seems unlikely, it may go for a hard Brexit, or – backed up by today's CJEU judgment – it may withdraw the Brexit notification and stay within the EU. If the UK stays within the EU, the UPC can start as soon as the German constitutional case is resolved, since the UK has already ratified the UPC Agreement and with the German ratification the required number will be met. On the other hand, if the UK leaves the EU, that doesn't automatically mean that it also has to leave the UPC Agreement. That Agreement itself doesn't contain any provisions on termination or expulsion.

Prof. Winfried Tilmann in previous publications has expressed the view that this issue needs to be assessed under the Vienna Convention. This is confirmed in his massive commentary on the UPC, "Unified Patent Protection in Europe" (at page 63). According to that view, the loss of EU membership is not a fundamental change of circumstances within the meaning of article 62 Vienna Convention which would open up the termination under article 65 and 67 of the Vienna Convention. The continued EU Membership of the UK was not an essential basis of the consent of the other participating countries to be bound by the UPC Agreement. In fact it seems quite clear that they all would prefer the UK to remain part of the system, because that makes the system stronger, both because of the size of the population and economy that will be covered and because of the quality of the UK judges. The UK leaving the EU also doesn't radically change the extent of the obligations which the UK has to perform under the UPC Agreement, since the UK will still accept the UPC's jurisdiction, which is based on the UPC Agreement itself.

Until today however it was unclear whether the CJEU, when faced with such questions, for instance if asked for an advice in addition to opinion 1/09 of 8 March 2011, or if a question would

be referred to it by either a national Court or the UPC itself, would take the Vienna Convention into account. That question has now been answered: the Vienna Convention was taken into account in the preparation of the EU Constitution for Europe and is therefore relevant for the interpretation of the EU Treaties and thus also for the question whether the UPC Agreement and the UK's participation in that Agreement after Brexit is in conformity with EU law. The basis for that has become more solid today.

Obviously, the UK shouldn't leave the EU, which apart from its economic benefits has guaranteed peace in Europe for many decades, a peace for which the grandparents of the current UK politicians have made huge sacrifices that deserve to be respected. However, if it does leave the EU, it can still remain part of the UPC, which at least in my view is an honourable cause.

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