The future role and influence of the CJEU

A paper by

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THE FUTURE ROLE AND INFLUENCE OF THE CJEU

1. In the woeful litany of ignorance which have bedevilled the public debate about the UK's membership of the EU, no topic has been the subject of more misconception and prejudice than the Court of Justice, the CJEU. The general objection to the CJEU, namely that it represents an interference with the UK's sovereignty, does no more than restate the objection to the UK being a member of the EU: it is inherent in, and fundamental to, the whole concept of the EU that it will have rules which all members must obey; and if there are such rules, there has to be a supranational body which definitively interprets those rules to ensure consistency of application across all member states. As for the specific objections, if you ask those people who complain about the decisions of the CJEU, 99.99% (and that is probably an underestimate) either don't even try to identify any specific judgment they object to because they know they can't, or, if they think they can, they almost always identify a judgment of the European Court of Human Rights.

2. That's not to say that there are no criticisms that can be made of the CJEU. Examples include its tendency to rewrite rather than to interpret legislation and its occasional failure to appreciate member states' constitutional conventions (both

of which were raised in the 2014 Supreme Court *HS2* decision[1]). In addition, there are also its impenetrable decisions in some areas such as trade mark law[2], and its woefully retrograde 2011 *Brüstle* decision[3], which outlawed the patenting of any invention which relied on destruction of any unfertilised human ovum. And there is a view that the CJEU also has a federalist agenda[4], but that is controversial, and has been hotly denied by the Court itself and in particular its current President[5].

3. At the moment, of course, love the CJEU or hate it, its decisions are automatically part of UK law, irrespective of any statutory provision or UK Supreme Court decision to the contrary. But what will be the position after Brexit? Well, the honest answer is: What indeed? Or "You may well ask" – and that's the position with six months to go to B-Day (that's Brexit Day, not the French quasi-lavatory, and I leave it to you to decide whether that is an appropriate description).

4. However, to be fair to the UK Government, they have made provision for the role of CJEU decisions, in some of the sections and Schedules relating to the post-Brexit approach to EU law generally, in the European Union (Withdrawal) Act 2018 which received Royal Assent on 26 June this year. (I draw no conclusions from the fact the 26 June 2018 was the 734th anniversary of the Pied Piper enticing 130 innocent children away from comfort at home in Hamelin to disaster with his seductive music[6].)

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[1] *R (on the application of HS2 Action Alliance Ltd,) v The Secretary of State for Transport & Anor* [2014] UKSC 3

[2] See eg per Sir Robin Jacob: "With the greatest of respect the CJEU and the courts of first instance have not done well in trade marks. Things are much too slow; there is much uncertainty. Being blunt: if this is what the system produces for trade marks who would give patents to it?" – quoted at http://ipkitten.blogspot.com/2007/06/epla-or-bust-robin-jacob-speaks-out.html

[3] C-34/10 *Oliver Brüstle v Greenpeace eV* (GC) 18 October 2011

[4] A particularly popular view among Brexit-supporters, but not confined to them

[5] See eg https://www.ft.com/content/0e132ef8-af0c-11e6-a37c-f4a01f1b0fa1

[6] The Luneburg Manuscript (c 1445) – see eg http://www.liquisearch.com/pied_piper_of_hamelin/history/fifteenth-century_lueneburg_manuscript

5. Before discussing the 2018 Act, it should be emphasised that it sets out what may very well turn out to be something of a default or safety-net framework, which gets overtaken, or at least substantially modified, as a result of subsequent events. Unless you are one of the gallant band of brothers and sisters who contemplate a no-deal scenario with masochistic or deluded relish, it is a framework which it is to be hoped will be radically overhauled once terms governing the UK's withdrawal from, and future relationship with, the EU are agreed and finalized – an outcome which may seem a little more remote after the events in Salzburg last week.

6. Subject to a few exceptions, sections 2 and 3 basically incorporate into UK law all EU law as it exists on B-day or exit day as it is called in the Act[7] (sounds a bit like an old-fashioned school holiday). Such EU law is defined for the purposes of section 6 as "retained EU law"[8], and section 5(2) states that the principle of supremacy applies to that law. The general effect of section 6 is to direct UK courts to interpret this retained law by reference to the general principles laid down by the CJEU and also, where appropriate, to more specific decisions of the CJEU, up to B-day. However, the position in that connection is frozen as at B-day, so subsequent decisions of the CJEU are not to be taken as binding, just as subsequent replacement or amending Directives or Regulations, are generally to be disregarded by UK judges[9].

7. There are two arguable ironies, two potential confusions, and two significant qualifications which I should mention to give a bit more accuracy and a bit more colour to this rather bare description.

8. The first irony is one of the strands of justification underlying Brexit is that the CJEU approach, which largely reflects civil law, is different from, indeed alien to, the common law approach - a point of view which I might interpose is, at best, an

[7] See section 20(1), which even identifies a time of day – 11.00 am

[8] For the purposes of section 6 – see subsection (7)

[9] Section 6(1) and (3) of the 2018 Act

oversimplification and, at worst, historically inaccurate. However, more to the point for present purposes, the civil law approach is often seen as an unchanging set of detailed rules in contrast to the common law approach, which treats the law as a flexible and capable of responding to changes in society, technology and business. As Lord Thomas, the former Lord Chief Justice, pointed out in the House of Lords[10], the approach embodied in section 6 of the 2018 Act amounts to an ossification of the law, which is the antithesis of the approach of the common law, and more consistent with our idea of civil law.

9. The second irony is that, when it was being discussed as proposed legislation, the 2018 Act was grandiosely referred to as the Great Repeal Bill. However, it now transpires that it is the antithesis of a repeal bill, as it entrenches existing EU law into UK law and, subject to working out what section 6(6) means, appears to ensure that it cannot be changed.

10. So far as the first potential confusion is concerned, while subsections (1) and (3) of section 6 stipulate that UK courts must decide cases by reference to retained EU law (ie by reference to CJEU decisions up to, but not after B-day), section 6(2) permits the courts to "have regard to" subsequent decisions of the CJEU and indeed subsequent EU legislation "so far as it is relevant to any matter before the court". In fairness to the drafters, I think that subsection (2) may be simply intended to confirm that, although EU law is treated as ossified or petrified as at B-day, a court is not prevented from looking at subsequent CJEU decisions in the same way as it might look at non-binding decisions of other foreign courts to give assistance or insights. However, as I shall shortly mention, that apparently unobjectionable provision gives rise to a potential can of worms.

11. The second potential confusion arises from section 6(6), which states that section 6(3), which emphasizes that post-B-day EU law changes are not to be treated as part of UL law "does not prevent the validity, meaning or effect of any retained EU law which has been modified on or after exit day from being decided as

[10] Hansard 23rd April 2018 https://www.theyworkforyou.com/lords/?id=2018-04-23a.1343.4&p=10212

provided for in that subsection if doing so is consistent with the intention of the modifications". I am not sure that I understand that provision rightly, which is why I have quoted it verbatim. However, I think it is there to permits a UK court to interpret retained law which has subsequently been modified (presumably by the UK legislature) in a way which is consistent with the modification. It strikes me as unnecessary, unless it has in mind unintended or indirect modifications, and even then I am unconvinced that it would be needed.

12. The ossification which I have mentioned is subject to two important qualifications. First, while no other court in the UK can escape from the rigours of applying retained EU law, the Supreme Court, but only the Supreme Court (and in Scottish criminal matters the High Court of Judiciary) can change, or in effect overrule, retained EU law[11]. There are two unsatisfactory aspects of this. The first is that it is potentially rather inconvenient as it could force all sorts of otherwise inappropriate cases to go the Supreme Court. The second problem is that the Supreme Court (and High Court of Judiciary) is given very little assistance or guidance as to when it should not follow the CJEU in relation to retained law. It is merely told that it must apply the same principles as it applies when deciding whether to follow its own previous decisions[12]. That sounds fine, but unlike the normal type of case, the Supreme Court may be asked to change previous decisions for political or economic reasons – eg to enable closer cooperation between the EU and the UK in areas such as defence, or to bring UK practices in line with changed EU practices to ensure that certain goods or services can be exported to the EU.

13. Further, and more broadly, should the Supreme Court adopt a different approach to interpretation of retained EU law from that adopted by the CJEU? After all, EU legislation is drafted in a much more open-textured way than domestic legislation, and the retained EU law is now UK law, and there is an argument (which I do not agree with, but it is an argument) that retained EU law should be interpreted as if

[11] Section 6(4) of the 2018 Act

[12] Section 6(5) of the 2018 Act

it was UK legislation. But, even putting that to one side, EU legislation is interpreted by the CJEU taking into account factors such as ever closer union or the strengthening of the internal market, which should, one might have thought, play no part in the UK Supreme Court's approach, freed as it is by section 6(4). Section 6(2), mentioned earlier, could raise the same sort of problems.

14. Over and above the power of the Supreme Court to change retained law, it is self-evident that Parliament can subsequently change the law or authorise the courts to do so, and, as I have mentioned, that will almost certainly happen if there are further negotiated agreements between the EU and the UK.

15. It naturally follows from the above approach that it is not open to a UK court to make a reference to the CJEU after B-Day[13], although I think section 6(2) may enable a UK court to take account of post-B-day CJEU decisions made pursuant to a reference made pre-B-day. However, does this apply to pre-B-day references in other cases? And will the CJEU proceed to deal with references from UK courts after B-day?

16. Now, I have so far been discussing primarily the effect of CJEU on UK courts under the 2018 Withdrawal Act. I have not discussed the likely effect if there are transitional and long-term deals; nor have I discussed the wider effect of CJEU decisions. I make no apology for concentrating on the UK courts: I am an ex-judge talking to judges; and I make no apology for concentrating on the known rather than the speculative. But it would be wrong simply to ignore these two very big topics.

17. There is no doubt but that the UK will be affected by future decisions of the CJEU even if there is a no-deal Brexit. To take two examples, a substantial proportion of our exports go to the EU and manufacturers will therefore have to comply with many EU laws, and there would be obvious problems if our data protection laws significantly deviated from those of the EU – especially if our laws were more lax. Equally clearly, if there is a deal, then the closer our relationship under any

[13] Section 6(1)(b) of the 2018 Act

transitional or final deal, the more we are likely to be affected by decisions of the CJEU.

18. Patent law provides an interesting lens through which to focus on the post-Brexit decisions of the CJEU, as well as the dilemmas faced by, and the confused thinking of, the UK government, in that connection. EU law appears at first sight to be irrelevant, because, while UK patents are governed by the European Patent Convention, which is the basis of the European Patent Organisation, the EPO, the Convention is not an EU construct. So the fact that the UK is to exit from the EU does not mean that the UK is exiting from the EPO. Indeed, it is plain that the UK will remain in the EPO and become one of twelve non-member states signatories to the Convention.

19. Having said that, it is clear that the CJEU will still have a significant part to play in relation to UK patents. Thus, the EU Biotechnology Directive was interpreted by the CJEU in the 2011 *Brüstle* case, to which I have referred, and that will, unless overruled by legislation or the Supreme Court, remain our law. But more to the point, even when it comes to future decision of the CJEU on patents, the EPO, whose decision that a patent is invalid is binding on all EPC signatory states, is, and has shown itself to be, in practice likely to regard itself as bound by CJEU decisions. That is unsurprising, given that every member state of the EU has signed up to the Convention.

20. The Convention is unwieldy in its operation in that it fails to achieve that much uniformity across Europe. It ensures that there is one set of patent law rules across Europe, but does little to ensure that the rules are interpreted consistently by different national courts. This problem has of course now been recognised and the proposed new EU Unified Patent Court (UPC) Agreement is in place. The UPC is intended to enable patent validity, interpretation and enforcement to be harmonised across the EU. Unless the UK is prepared to accept the jurisdiction of the CJEU (which is currently and unsurprisingly intended to be the ultimate court for determining EU-related legal issues under the UPC Agreement) or the EU is prepared to agree (and is held by the CJEU to be entitled to agree) to some supra-

CJEU arbitration scheme, it is hard to see how the UK could sign up, or stay signed up to, the UPC post-Brexit.

21. Having said that, despite this, in April 2018, the UK formally ratified the UPC Agreement and confirmed that it wishes to remain in the UPC[14]. This attitude on the part of the UK suggests that contrary to the rhetoric, the UK government is prepared to accept the jurisdiction of the CJEU in some circumstances, unless either the government has a cunning and subtle plan which enables it to remain an effective party to the UPC without submitting to the jurisdiction of the CJEU, or the right hand and left hand of the government each does not know what the other is doing. However, it is ironic that it is the supposedly EU-hostile UK which is holding fast to the UPC, and it is the generally EU-supportive Germany which is dragging its feet[15], for domestic constitutional reasons, about signing up.

22. It would be regrettable if the UK did not join the UPC. The aim of the UPC is very hard to quarrel with. One can readily see why industries such as pharmaceuticals want as close an alignment between the UK and the EU in relation to patent law both in principle and practice: a single court which determines all questions of validity and infringement and any other patent issue for almost the whole of Europe. It is easy to understand why the UK government is also keen on the notion: it will be good for pharmaceutical companies, many of which have big bases in the UK, and it will reduce the possibility of their relocating to the EU. Such a court is, however, I think, bound to be an EU court for two reasons. First, politically, the UPC already is an EU venture, and I would not have thought there was much prospect of the EU giving up ownership. Secondly, practically, if the UPC were not an EU body, it might develop a non-EU compatible jurisdiction, and its decisions would in practice be susceptible to being overruled within, but not outside, the EU by the CJEU, which would undermine the value of having a single court.

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[14] https://www.gov.uk/government/news/uk-ratifies-the-unified-patent-court-agreement

[15] For constitutional reasons – see eg https://www.stjerna.de/cc/?lang=en The Hungarian Supreme Court has held it to be unconstitutional for the Hungarian government to sign up to the UPC – see https://alkotmanybirosag.hu/uploads/2018/06/sz_x_1514_2017_alairt_sk_st.pdf

23. Quite apart from these factors, the UK played a big part in setting up the UPC; our judges, lawyers and agents are among the leaders in the field; we have secured that the section of the Central Division of the UPC dealing with pharmaceuticals, life sciences, metallurgy and chemistry, will be based in London; and physically there is a new court ready for that purpose.

24. Two other aspects of patent law following Brexit may be worth mentioning. The first is supplementary protection certificates, SPCs, which are important to the pharmaceutical industry. SPCs are an EU concept[16], policed by the CJEU, and they enable patents for medicinal and plant protection products to be extended for up to 5.5 years. It is completely unclear what will happen in relation to SPCs so far as the UK is concerned after B-day. The EU Commission has said that they will have no application to the UK after Brexit – subject to any transitional arrangement[17].

25. Secondly, there is the law in relation to exhaustion of rights: what is the position in the EU if patented product is placed on the UK market (and vice versa). If the UK is part of the single market, there would be no problem about exhaustion applying in such cases. Otherwise both treating and not treating the UK as part of the EU for exhaustion purposes would each have its problems. No exhaustion would be a bit odd if the UK and the EU were part of the same patent convention, whereas exhaustion would also be odd if they were two separate markets (though the US Supreme Court might not think so in the light of last year's *Impression Products v Lexmark* decision[18]). The difficulty will be particularly acute if the UK is successful in persuading the EU to let the UK stay in the single market for goods but not services: a patented product is a good, but its essential economic nature or value is not the good itself but in its IT, which is obviously to be

[16] See Regulation (EC) No 469/2009 and Regulation (EC) No 1610/96

[17] See the Commission's *Notice to Stakeholder, Withdrawal of the United Kingdom and EU legislation in the field of supplementary protection certificates for medicinal products and plant protection products*, 27 April 2018

[18] *Impression Products, Inc. v. Lexmark International, Inc.*, 581 U.S. ___ (2017), 137 S. Ct.1523

classified as a service. The EU Commission paper I have just referred to[19] suggests that EU exhaustion will not occur if a product is placed on the UK market post-Brexit.

26. Patents have their special features and no doubt that is true for many other areas of business, but I think that my brief discussion about the position in which the UK government finds itself in the patent field highlights the dilemma in which this country will find itself when it comes to the role of the CJEU after B-day. Unless we are prepared to make a potentially substantial and long-term economic sacrifices, we are going to have to accept that we will be in some significant respects legally bound, and in many areas effectively bound, by a number of future decisions of a court, on which we no longer have any representation. A peculiarly idiosyncratic way, some may think, of taking back control.

27. Thank you.

David Neuberger

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[19] See footnote 16 above