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THE AGREEMENT ON A UNIFIED PATENT COURT CANNOT BE RATIFIED BY HUNGARY, THE CONSTITUTIONAL COURT SAYS

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In a decision delivered on 26 June (Decision no. 9/2018 AB – the official English translation was released on the Court's website this week), the Hungarian Constitutional Court found that the Agreement on a Unified Patent Court (signed by Hungary in 2013, but not yet ratified) violates the Hungarian Fundamental Law (FL), as it would transfer to the new Unified Patent Court (UPC) the jurisdiction over a group of private law disputes, drawing them off the jurisdiction of national courts, while Art. 25 (2) a) FL provides that private law litigations shall be decided by national courts. The Constitutional Court also found a violation of Art. 24 (2) c) and d) FL, which provide for the possibility of lodging constitutional complaints against judicial decisions with the Constitutional Court, because it would not be possible against the UPC's decisions.
The UPC has been established in the ambit of enhanced cooperation with the participation of 25 Member States (Croatia, Poland, and Spain did not sign the Agreement). The plan of creating a common European patent system and a common patent court has been on the agenda of the European Union (EU) for many years now, and it had already triggered criticism and litigation. The first draft agreement on the European and

Community Patents Courts was declared to be incompatible with EU law by the Court of Justice of EU (CJEU) in 2013 (Opinion no. 1/09 of 8 March 2011) on the ground that it would have given exclusive jurisdiction to an international court which is outside the institutional framework of the EU over the application and interpretation of secondary EU law in the field of patents. Two years later, a new Council Decision authorising enhanced cooperation in this area was challenged by Italy and Spain on several grounds (among others they contested the language regime), but in that occasion the CJEU dismissed their applications (Joined Cases C-274/11 and C-295/11). Another two years later, Spain tried to challenge the legal instruments creating unitary patent protection once again, but the CJEU rejected all seven pleas (Case C-146/13, for a comment by Aurora Plomer see here). Currently there is a constitutional complaint (lodged by a patent attorney) pending before the German Federal Constitutional Court challenging the UPC agreement claiming, among others, that it would violate Germany's sovereignty and questioning the independence of the UPC's judges (read more about it here).

Thus, the Hungarian constitutional challenge does not come as a surprise, especially considering the harsh Euroscepticism expressed by the Hungarian government on several occasions. Indeed, the case before the Constitutional Court originates from an application presented by the Minister of Justice, acting on behalf of the Government. The Minister requested the interpretation of two constitutional provisions. In Hungarian constitutional justice certain public figures may request the interpretation of the provisions of the Fundamental Law in relation to a concrete constitutional issue (art. 38 of the Constitutional Court Act). In this case, the provisions in question were Articles E) (the FL's EU clause) and Q) (on obligations under international law), while the concrete constitutional issue was the ratification of the UPC Agreement. In particular, the Minister of Justice wondered whether it violates Hungary's constitutional identity if an international treaty which is not included among the founding treaties of the EU sets up an international court with exclusive jurisdiction over a group of private law disputes and without the possibility of appeal against its decisions before national courts or even

the CJEU.
In its reasoning, the Constitutional Court further elaborates on the presumption of maintained sovereignty established in its Decision no. 22/2016 (the same in which it discusses the concept of constitutional identity – see my previous post on this blog commenting on that decision). The presumption of maintained sovereignty means that, by joining the EU, Hungary did not give up its sovereignty but only allowed for the joint exercise of certain powers (para. 60 of Decision no. 22/2016). Now the Court states that the presumption is to be interpreted restrictively: as long as an international treaty stipulated by the EU Member States does not become part of the *acquis communautaire*, it is to be examined whether Article E) or Q) provides the constitutional legal basis for it. Furthermore, the Constitutional Court distinguishes between an internal and an external point of view on sovereignty. The first one concerns the supreme power within the state, while the second one means the sovereign equality of states in international relations (para. 31).
From the external perspective there is a further distinction to be made, the Court argues. Transfer of sovereignty to the EU is to be treated separately from international law, as EU law has a *sui generis* nature. At the same time, the form of enhanced cooperation requires special consideration. While EU measures authorising or implementing such cooperation clearly fall within the scope of EU law, i.e. under Art. E) FL, it is less clear whether the international treaties concluded within the framework of enhanced cooperation do, or they remain in the realm of international law. According to the Constitutional Court it is not possible to answer this question in abstract terms, on the basis of the FL only, but the EU's founding treaties are to be examined. If the Treaties specify the power to establish the UPC, the Agreement is to be considered under Art. E) FL, otherwise it is to be treated as an international treaty. In other words, Hungary is free to enter an international treaty to which only EU member states are parties, and which sets up an institution that applies EU law, but this treaty is to be treated under the EU clause only if its legal basis can be found in the EU Treaties (para. 32 of the decision). The Court also notes that this interpretation is in line with the CJEU's case-law, in

particular with its judgment in *Spain v. Parliament and Council* (C-146/13) (para. 33-34).

The perceived importance of the decision is shown by the fact that it is the first one officially translated into English since the constitutional identity case of 2016. In other words, these are the only two decisions also published in English in the last two and a half years (the new policy seems to be to publish short press releases in English on the most relevant decisions). Interestingly, though, this time the separate opinions are omitted in the translation. They are mentioned, but not translated, which goes against the Hungarian Constitutional Court's practice. There are two dissenting opinions and one concurring opinion attached to the decision.

The concurring opinion is authored by Judge Pokol, who argues that the Court should have offered a more complete argumentation. He agrees that transferring the jurisdiction over a group of private law disputes to an institution not mentioned in the EU Treaties, such as the UPC, violates Art. 25 FL, but he would go even further in the reasoning. According to Judge Pokol, the transfer of jurisdiction is unconstitutional not simply because it implies the exclusion of Hungarian courts' jurisdiction, but mainly because it violates the prohibition on sovereignty-transfer outside the European Union (see para. 56 of the original Hungarian version of the decision). He would have included a statement of principle in the holding of the decision declaring that sovereignty-transfer is not possible in the ambit of Art. Q) FL, i.e. in an international treaty that does not fall within the scope of EU law (para. 57). Judge Pokol leaves no doubt about his views on the nature of EU law. He claims that the founding treaties of the EU are part of international law, and the only feature that makes EU law special is that it is created with the continuous participation of the Hungarian government. This would be the reason for allowing sovereignty-transfer to the EU in certain areas (para. 58).

Judge Dienes-Oehm, on the other hand, disagrees with the majority in all points. He claims that the EU clause (Art. E) (2)) of the FL can be the basis for the ratification of the UPC Agreement (para. 61) and does not find any violation of Art. 25 FL, which according to him does not imply that jurisdiction over private law disputes would not be transferable, as indeed

it has been done e.g. for matters subject to international arbitration (para. 63-65). He also emphasizes that Hungary approved the EU measures adopted in the ambit of enhanced cooperation without having raised concerns regarding constitutional self-identity (para. 61 and 71). While Judge Dienes-Oehm shared the opinion that constitutional self-identity poses a limit to the primacy of EU law, in this dissent he argues that the concept should be used sparingly, in the most important issues only (such as immigration policy and the setting up of a European Public Prosecutor's Office), and consequently throughout the whole decision-making process, so that it can be employed effectively (para. 72).

The other dissenter, Judge Stumpf, contested the inclusion of Art. 24 FL in the holding of the decision as a basis for the Court's finding that the UPC Agreement cannot be ratified. Art. 24 FL is the one that provides for the possibility of lodging constitutional complaints with the Constitutional Court, that according to the majority would be violated by excluding the constitutional review of the UPC's judgments. Judge Stumpf argues that Art. 24 FL simply establishes the Constitutional Court's jurisdiction over constitutional complaints against judicial decision, but it does not require that constitutional complaints shall be available against decisions of international courts as well (para. 77). Moreover, the Minister of Justice did not request the interpretation of Art. 24 FL in its application, so the Court should have exercised self-restraint in answering the petitioner's question (para. 78). Finally, Judge Stumpf makes the important observation that the UPC Agreement was signed by Hungary, and its entry into force is conditional upon ratification by at least 13 Member States, therefore there is no reason to examine the violation of Hungary's sovereignty or constitutional self-identity (para. 81).

The Hungarian Constitutional Court's decision does not put at risk the setting up of a Unified Patent Court but only Hungary's participation in the common European patent system. The success of the plan is, however, still endangered by the pending German constitutional complaint (in relation to which decision is expected in the second half of this year), because Germany, France and the UK (and at least other 10 Member States) must have ratified the UPC Agreement for it to enter into force.

France ratified it already in 2014, while the UK's ratification was an open question for a long time after the Brexit referendum. It finally arrived in April of this year. Now only Germany's ratification is awaited, and the Agreement will enter into force, with or without Hungary's participation.