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Subject: Position paper transmitted to EU27 on **Intellectual property rights (including geographical indications)**

Origin: European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU

Objective: For discussion at the Council Working party (Art. 50) of 7 September 2017

Remarks: The attached position paper on **Intellectual property rights (including geographical indications)** contains the main principles of the EU position in this regard, to be presented to the UK in the context of negotiations under Art. 50

Intellectual property rights (including geographical indications)

The withdrawal of the United Kingdom from the European Union will create uncertainty for UK and EU27 stakeholders alike in relation to the scope of protection in the United Kingdom of certain intellectual property rights; to the treatment of applications for certain rights and to the exhaustion of rights conferred by intellectual property rights. This uncertainty will significantly affect the conditions under which goods that are placed on the market in the Union before the withdrawal date could continue to circulate between the EU27 and the UK.

The Withdrawal Agreement should ensure that: (a) the protection enjoyed in the United Kingdom on the basis of Union law by both UK and EU 27 holders of intellectual property rights having unitary character within the Union before the withdrawal date is not undermined by the withdrawal of the United Kingdom from the European Union; (b) procedure-related rights (e.g. right of priority) in relation to an application for an intellectual property right having unitary character within the Union still pending on the withdrawal date are not lost when applying for an equivalent intellectual property right in the United Kingdom; (c) applications for supplementary protection certificates or for the extension of their duration in the United Kingdom on-going before the withdrawal date are completed in accordance with the conditions set out in Union law; (d) databases protected in the EU27 and the UK before the withdrawal date continue to enjoy protection after that date and (e) exhaustion before the withdrawal date within the Union of the rights conferred by intellectual property rights is not affected by the withdrawal of the United Kingdom from the European Union.

I. General Principles

The following General Principles should apply in accordance with Union law, as interpreted by the Court of Justice of the European Union on the date of entry into force of the Withdrawal Agreement:

(1) Intellectual property rights having unitary character within the Union.

- The holder of any intellectual property right having unitary character within the Union and granted before the withdrawal date should, after that date, be recognised as the holder of an enforceable intellectual property right in relation to the United Kingdom territory, comparable to the right provided by Union law – if need be on the basis of specific domestic legislation to be introduced.

In the specific case of protected geographical indications, protected designations of origin and other protected terms in relation to agricultural products (traditional specialities guaranteed and traditional terms for wine) protected under Union law before the withdrawal date, this principle should also imply that the United Kingdom puts in place, as of the withdrawal date, the necessary domestic legislation providing for their continued protection. Such protection should be comparable to that provided by Union law¹.

- The implementation of this principle should include, in particular, the automatic recognition of an intellectual property right in the United Kingdom on the basis of the existing intellectual property right having unitary character within the Union.

¹ N.B. there is currently no domestic legislation in the United Kingdom on the protection of designations of origin and geographical indications as well as on other protected terms in relation to agricultural products.

- Where applicable to the relevant right, the implementation of this principle should also include:
 - the determination of the renewal dates;
 - the respect of priority and seniority principles;
 - the adaptation of 'genuine use' requirements² and 'reputation' rules³ to the specific situation under consideration.
- The implementation of this principle should not result in financial costs for the holders of intellectual property rights having unitary character within the Union. Any related administrative burden for such holders should be kept to a strict minimum.

(2) Applications for Intellectual property rights having unitary character within the Union. Where an application for an intellectual property right having unitary character within the Union has been submitted before an Union body in accordance with Union law before the withdrawal date and the administrative procedure for the grant of the right concerned is still on-going on that date, the applicant should be entitled to keep the benefit of any priority date in respect of such pending application when applying after the withdrawal date for an equivalent intellectual property right in the United Kingdom.

(3) Applications for supplementary protection certificates or for an extension of their duration. After the withdrawal date, a person should continue to be entitled to obtain in the United Kingdom a supplementary protection certificate or an extension of the duration of a supplementary protection certificate (so-called paediatric extensions) where such person had submitted before the withdrawal date an application for a supplementary protection certificate or an extension of its duration before a United Kingdom authority in accordance with Union law and the administrative procedure for the grant of the certificate concerned or its extension is still on-going on the withdrawal date.

Any certificate so granted or extended should provide for protection equivalent to that provided for by Union law.

(4) Legal protection of databases. Makers or rightholders of databases protected pursuant to Article 7 of Directive 96/9/EC in the EU Member States before the withdrawal date should continue to enjoy protection after that date in the EU27 Member States and in the UK in relation to those databases. For this purpose, the requirements of Article 11(1) and (2) should be waived in the EU27 Member States in respect of UK nationals and UK companies and firms; conversely, the UK should not exclude EU27 nationals and EU27 companies and firms from legal protection of databases in the UK on nationality or establishment grounds.

² E.g. the recognition of a trade mark in the United Kingdom should not be refused on the ground that the equivalent EU trade mark had not been put into genuine use in the territory of the United Kingdom before the withdrawal date.

³ E.g. the owner of an EU trade mark having reputation in the European Union should be allowed, after the withdrawal date, to temporarily exercise in the United Kingdom rights equivalent to those foreseen in Article 9(2)(c) of Regulation (EC) No 207/2009 and Article 5(3)(a) of Directive 2015/2436 in respect of the equivalent national trade mark even if the equivalent national trade mark in question does not yet have a specific reputation within the United Kingdom.

(5) Exhaustion of rights. Rights conferred by intellectual property rights which were exhausted in the European Union territory before the withdrawal date should, after that date, remain exhausted in both the EU27 territory and in the UK territory. The conditions for exhaustion concerning each intellectual property right should be those defined by Union law. For instance, in relation to trade marks, the rights conferred by the trade mark to prohibit its use in relation to a good are exhausted when such good (to which the trade mark is related) was put on the market in the Union before the withdrawal date by the proprietor of the trade mark or with the proprietor's consent.

II. Definitions

For the purpose of this paper, the notion of '*Intellectual property right having unitary character within the Union*' refers to any of the following rights:

- a 'European Union trade mark' registered in accordance with Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark⁴;
- a 'registered Community design' registered in accordance with Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs;
- an 'unregistered Community design' made available to the public in the manner provided for in Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.
- a 'Community plant variety right' granted pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.
- a 'protected geographical indication' or a 'protected designation of origin' registered in accordance with Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs;
- a 'protected geographical indication' or a 'protected designation of origin' registered in accordance with Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products;
- a 'geographical indication' registered in accordance with Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks;
- a 'geographical indication' registered in accordance with Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products.

For the purpose of this paper, 'traditional speciality guaranteed' registered in accordance with Regulation (EU) No 1151/2012 and 'traditional terms for wine' registered in accordance with Regulation (EU) No 1308/2013, collectively referred to as '*other protected terms in relation to agricultural products*' should be assimilated to intellectual property rights having unitary character within the Union and also be covered by the material scope of the paper.

⁴ N.B. this Regulation will be repealed on 1 October 2017 by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.

'*Supplementary protection certificate*' means a certificate in accordance with Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products or with Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products. It also includes certificates that benefit from an extension of their duration pursuant to Regulation (EC) No 1901/2006 of the European Parliament and of the Council of 12 December 2006 on medicinal products for paediatric use.

III. Data transfer and cooperation

For the purpose of facilitating the implementation of General Principle (1), the Withdrawal agreement should provide for adequate cooperation and the transfer of relevant data between the entities charged with the registries of intellectual property rights in the UK and in the EU27.

Any such transfer of data should comply with the general principles set out in the paper on 'Essential Principles on the Protection of Data and Information Obtained or Processed before the Withdrawal Date'.

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