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Update Brexit – Exit triggered on March 29, 2017

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The notification by the UK Government of March 29, 2017, delivered to the EU Council, is now setting the stage for the exit negotiations. These have to be concluded between the parties and ratified by the Member States and the British Parliament within a term of two years. The parties will have to consider multi-faceted issues, including IP, as we already reported in our Bulletin of July 1, 2016. Draft negotiating guidelines have been published by the Secretariat of the Council on March 31, 2017.

No breaking news yet

Nothing substantial has changed yet for IP owners but it is worthwhile to note that we seem to be getting a “hard” Brexit, meaning the UK will be withdrawing from the entire EU legal system and its freedoms in general, including the Single Market. We will provide regular updates and guidance from the perspective of a European firm serving many client interests in the UK. Brexit uncertainty is hitting business confidence, albeit not very hard so far: The number of UK trade mark applications increased by about 10% compared to the years preceding Brexit, as recently reported by UK IPO. Numbers at EUIPO have also increased, however. Also, there has been a slowdown in business investment in the UK which fell by 1% by the end of 2016 compared with the three months up to the end of September, according to the UK Office for National Statistics. Economy in general and IP owners more specifically apply a “wait and see”-approach which seems reasonable for the time being.

No news is not good news

However, due to political dispute and measures taken by the parties, the starting point for exit negotiations is not promising. Even though all stakeholders seem to agree that IP rights are too important to lose sight of, we do not know how EU Trade Marks, Registered Community Designs and Plant Varieties will be addressed and “converted” into the national UK legal system and what costs the right owners will have to incur. Different approaches are discussed by stakeholders, including

- entering EU rights into the UK registers automatically by Brexit instrument,
- entering them upon right owners’ request only, or
- establishing continuation of effect of EU rights and legal framework in the UK,

to name the most popular. These are models that have been seen in the past and which should not cause many implementation issues. Some augurs predict a “dirty” Brexit without a formal agreement with the EU. This would almost certainly exclude the models 1 and 3 above, and model 2 would be available upon payment of a fee. But there is little evidence so far to suggest that a dirty Brexit is going to happen. The far more relevant practical issues for right owners post-Brexit include

- Extent of “conversion” – all registered and unregistered EU rights covered?
- Limitations on free movement of goods with the UK potentially leaving the Common Market entirely?
- Extended territorial scope of EU licenses and IP rights agreements?
- Enforcement of EU judgments in the UK with European courts losing authority, and vice versa?
- Further prosecution of pending cases at EU institutions and UK IPO, with loss of registrations?
- Transitional periods for IP owners to adapt to new situation post-Brexit?
- procedural issues considered, e.g. re-examination required, grace period of non-use transferred or renewed, novelty grace periods considered, priorities and seniorities accepted, domicile rules met and professional representation possible?

Patience required – and keeping track of developments

Whatever the outcome may be, right owners are well advised to accept that there will be no quick fix to these complex issues and that the best part of the two years’ term may very well have expired before these issues become clearer. In most cases, a down-to-earth analysis from the more neutral European perspective will do for the time being. Do not make hasty decisions by over-nationalizing your portfolio. However, where there are pending projects that may emphasize the UK, it is sensible to seek advice on how to best navigate the situation and obtain the best possible result for your IP portfolio and IP contracts.

Checklist

- do not risk a territorial gap in filing and watch services,
- do not abandon existing trade marks,
- check existing IP-related contracts,
- check use situation,
- check legal basis of pending matters,
- secure useful domains,
- verify residence/representation in EU/the UK.



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