

Brexit Background: notes for Global Digital Encounter no 9

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1. Overview timeline

A very useful schematic showing notable dates from 2017 to 2025 is available at

<https://www.herbertsmithfreehills.com/latest-thinking/beyond-brexit-legal-guide-2021#timeline>

2. More detailed chronology

23 June 2016: referendum; a narrow majority of voters favour leaving the EU.¹

24 January 2017: UK Supreme Court rules² that, to serve notice under Art 50 TFEU to quit the EU, the executive must be authorised by Parliamentary legislation. Parliament subsequently enacts statutory legislation

29th March 2017: Prime Minister Teresa May serves Art 50 notice

20 June 2018: European Union (Withdrawal) Act 2018 provides for repeal of the European Communities Act 1972 upon the UK's eventual exit from the EU (extended to end 2020), converts directly applicable EU law at that moment into 'retained' domestic law (including EU case-law) and empowers detailed secondary legislation to implement withdrawal arrangements

14 November 2018: draft Withdrawal Agreement agreed (revised October 2019)

¹ The UK Government "had pledged to honour the result and it has since been treated as politically and democratically binding": *Cherry v Advocate General for Scotland* and *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 at [7].

² *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

23rd January 2020 European Withdrawal (Agreement) Act 2020 amends and extends the European Union (Withdrawal) Act 2018 and approves agreement

24 January 2020 Withdrawal Agreement signed by EU and UK

31 January 2020 Exit Day, but transitional 'Implementation Period' agreed until end 2020, during which the UK and the EU maintained the *status quo*

8 April 2020 UK applies to accede to the Lugano Convention on civil jurisdiction and judgments. This resembles the Brussels Convention which preceded the EU's Regulations on the matter.

Note: Events to *late autumn 2020* and some of the laws prepared to take effect at the end of the Implementation Period are detailed in A Firth, P Cornford and AP Griffiths 'Brexit and COVID-19, ch17 in Trade Marks: Law and Practice (5th edn 2020, LexisNexis) at 17.14 to 17.25, kindly made available as a free excerpt by the publishers at <https://www.lexisnexis.co.uk/store/products/trade-marks-law-and-practice-fifth-edition-skuuksku9781784734268TMLP582472/details>

24 December 2020: Trade and Cooperation Agreement (TCA) concluded³

29 December 2020: EU Council adopts decision⁴ for provisional application from 1 Jan 2021; procedures in the European Parliament etc to be taken by end Feb 2021

30 December 2020: European Union (Future Relationship) Act 2020 receives Royal assent, having been passed by both Houses of the UK Parliament.⁵

³ full text available at

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf)

[UK Trade and Cooperation Agreement 24.12.2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf)

https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/tca-20-12-28.pdf

⁴ <https://www.consilium.europa.eu/en/press/press-releases/2020/12/29/eu-uk-trade-and-cooperation-agreement-council-adopts-decision-on-the-signing/>

⁵

https://www.legislation.gov.uk/ukpga/2020/29/pdfs/ukpga_20200029_en.pdf

30 Decembe 2020r: Trade and Cooperation Agreement signed by EU and UK

23.00 31 Dec 2020 (GMT) / 00.00 1 Jan 2021 (CET): Trade and Cooperation Agreement in force (provisionally in EU)

3. General remarks about the Trade & Cooperation Agreement ("TCA")

Note on sources:

UK government guidance giving very broad-brush introduction

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948093/TCA_SUMMARY_PDF.pdf

The websites of several UK and international law firms have excellent Brexit pages; some are listed in the readings, see also, <https://www.herbertsmithfreehills.com/latest-thinking/hubs/brexit>; that firm has remarked optimistically that the TCA provides "a good basis for restoring a greater depth of co-operation between the UK and EU in due course"⁶ and discusses many of the key points noted below

- TCA is an 'association agreement' under Art 217 TFEU
- It does not have direct effect within the EU legal order⁷
- In general there is to be no horizontal direct effect: Article COMPROV16 - TCA not to create rights for private parties⁸
- Its text has much in common with other EU agreements, such as the Canada-EU Trade Agreement, CETA, but lacks some of CETA's useful provisions⁹
- It is strong on trade in goods, providing for tariff- and quota-free trade in 'qualifying'¹⁰ goods

⁶ <https://hsfnotes.com/brexit/2021/01/04/initial-commentary-on-the-new-trade-and-cooperation-agreement/>

⁷ sections 29 and 30 of the European union (Future Relations) Act 2020 contain provisions enabling domestic law to be modified or interpreted where necessary to give effect to the Agreements.

⁸ But, see level playing field provisions, noted at

<https://www.herbertsmithfreehills.com/latest-thinking/the-view-from-brussels-eu-uk-trade-and-cooperation-agreement-level-playing-field>

⁹ Eg TCA does not have CETA-style provisions for mutual recognition of product conformity assessment; rather, the UK is resorting to WTO Annex 1A

- Like many other EU FTAs, it does not provide for free movement of services,¹¹ though there are declarations and mechanisms for creating memoranda of understanding on specific sectors¹²
- At the same time there is emphasis on 'liberalisation of digital trade'
- The Withdrawal Agreement established a Joint Committee with many specialist sub-committees, called 'specialised committees' to manage the relationship¹³ and the TCA also relies on joint partnership councils
- Automatic reviews are to take place every 5 years, although there will be rolling negotiation in the fisheries sector
- Each side may terminate the agreement on 12 months notice from either side.

4. *The 'level playing field'*

Fears on behalf of the EU that the UK would enjoy unimpeded access to its markets but improve its competitive position by lowering standards, subsidies, etc, seem to have led to various provisions which may affect IP directly or indirectly, including

- Competition; here there will be reliance on domestic enforcement and on cooperation. Regarding restrictive agreements¹⁴ and abuses of dominance, the UK's Competition Act 1998 is already aligned with EU law to reduce regulatory burden; this plus the extra-territorial effect of EU rules on these provisions¹⁵ mean that UK enterprises have to comply with EU competition law if they are to trade in the EU.
- Subsidies - the provisions reflect EU state aid rules that now affect "trade and investment between the EU and the UK"; UK and EU legislation will

¹⁰ Qualify by % rule of origin (UK and/or EU); this requires tracking and paperwork. <https://www.gov.uk/government/publications/rules-of-origin-for-goods-moving-between-the-uk-and-eu>

¹¹ In fact many service matters are left to EU member states. UK musicians' ability to work in the EU is said to be hampered by the lack of an EU-wide policy, see <https://lordslibrary.parliament.uk/impact-of-brexit-on-uk-musicians-performing-in-the-eu/> and links therein

¹² non-binding declarations on this and many other matters, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948105/EU-UK_Declarations_24.12.2020.pdf

¹³ See John Curtis, Stefano Fella 'The UK-EU Withdrawal Agreement Joint Committee: functions and tasks' (2020) House of Commons Library Briefing Paper Number 8996, 2 September 2020, available at <https://commonslibrary.parliament.uk/research-briefings/cbp-8996/>

¹⁴ The Commissions R&D bock exemption Regulation (EU) No 1217/2010 is sympathetic to research collaborations.

¹⁵ *Woodpulp* [1988] 4 CMLR 901; *Gencor v Commission* [1999] 4 CMLR 971 and subsequent cases

be needed; the UK government's Secretary of State for Business, Energy and Industrial Strategy launched a consultation on the new approach on 3 February 2021.

- Maintenance of a 'level playing field' in various areas is subject to a variety of dispute resolution mechanisms. Some areas have none, some rely on private enforcement in domestic courts; for some there will be a joint arbitration procedure if the matter cannot be resolved in partnership committee.
- The TCA also contemplates unilateral action by one side or the other, called "remedial measures" (where there appears to be breach of agreement), and "rebalancing" (where measures apparently compliant with TCA, etc, are thought to have an undue effect on trade). These are subject to arbitration procedures under arts 170,171 of Withdrawal Agreement¹⁶

5. *Other issues*

- Data - 4 months (extendable by 2) before the UK will be treated as 3rd country
- Mutual recognition only up to 31 December 2020 re medicines and products¹⁷, professional qualifications

6. *Some Intellectual property provisions of TCA*

Articles

IP1 objectives

- "to facilitate the production, provision and commercialisation of *innovative* and creative products and *services* between the Parties by reducing distortions and impediments to such trade, thereby contributing to a more sustainable and inclusive economy; and
- ensure an adequate and effective level of protection and enforcement of intellectual property rights."

IP2 Scope

Minimum standards equal to or higher than other IP treaties¹⁸

¹⁶ If the Joint Committee established under Art 164 WA cannot resolve. See John Curtis, Stefano Fella 'The UK-EU Withdrawal Agreement Joint Committee: functions and tasks' (2020) House of Commons Library Briefing Paper

Number 8996, 2 September 2020, available at

<https://commonslibrary.parliament.uk/research-briefings/cbp-8996/>

¹⁷ <https://hsfnotes.com/brexit/2021/01/12/the-trade-and-cooperation-agreement-and-its-impact-on-ip-pharma-and-medical-devices/>

¹⁸ see also Art IP54 on consistency with GATT 1994 and WTO TRIPs

IP3 definitions, including

e. "intellectual property rights" means all categories of intellectual property that are covered by Articles IP.7 [Authors] to IP.37 [Protection of plant varieties rights] of this Title or Sections 1 to 7 of Part II of the TRIPS Agreement. The protection of intellectual property includes protection against unfair competition as referred to in Article 10bis of the Paris Convention¹⁹

IP4 international agreements

1. Affirm commitment to international agreements to which the EU and UK²⁰ are party", but with some oddities

- Berne Convention; [nb moral rights get in here?] EU not a party, but speaks for bloc

2. all reasonable efforts to ratify or accede to

(a) the Beijing Treaty on Audiovisual Performances, adopted at Beijing on 24 June 2012; EU and UK have signed but not ratified

(b) the Singapore Treaty on the Law of Trademarks adopted at Singapore on 27 March 2006. EU has not signed or ratified, UK has (2012)

What's missing?

Paris, EU not a contracting state but incorporation by reference of substantive provisions into TRIPS

Brussels satellite (neither EU nor UK have signed)

Madrid source (UK not EU)

Nairobi (neither UK nor EU)

PLT (UK not EU; EPO signed but not ratified)

Phonograms (Geneva) UK not EU

Nice, but see IP18 TM classification

Lisbon, EU acceded to Geneva Act in Feb 2020,

Budapest, PCT - EPC/EPO

UPOV but see IP37

IP.5: Exhaustion

"This Title does not affect the freedom of the parties to determine whether and under what conditions the exhaustion of intellectual property rights applies."

Rights already exhausted in the UK or EU rules to remain so: Art 61

Withdrawal Agreement

¹⁹ but trade secrets in fact get different, specific treatment, under IP34 and enforcement Chapter

²⁰ UK 1 Jan 2021 declarations regarding treaty application to IoM, Guernsey, Gibraltar here

https://www.wipo.int/treaties/en/notifications/tlt/treaty_tlt_60.html

IP6 National treatment

Chapter 2: Standards concerning intellectual property rights

Note Art 54 of the Withdrawal Agreement provides for continued protection in the UK of registered or granted rights; The UK IP Office set up mechanisms for rights corresponding to unitary EU registered rights²¹ automatically to arise in the UK on 1 January 2021, along with mechanisms to enable UK rights to be obtained where the EU had been designated in pending International trade mark and design applications.²²

Section 1 copyright and related rights

Arts 7-14 authors rights, related, rights, collective management
Many of the well-known Directive rights are listed here, though not Public Lending Right. The extensive prior harmonisation of rights forms part of retained EU law, along with permitted defences that have transposed into UK law.

IP11 - sharing of equitable remuneration between "relevant" performers and phonogram producers²³

IP 12 Term- freedom to choose mechanism to calculate term for musical compositions with words, joint authorship, cine and AV.

IP15 E&L 3 step test - may provide scope for divergence, subject to rebalancing/ remedial measures

Section 2 Trade Marks ²⁴

IP18 TM Classification 'consistent' with NICE

IP19 eligible signs (with Directive version of Sieckmann criteria)

IP20 TM rights - double-identity and anti-confusion, but not dilution; border measures

IP22 Well-known TMs (WIPO Joint Recommendation)

IP23 defences TRIPs plus EU

Scope for divergence?

²¹ Art 55 WA and set up in the event of a no-deal situation.

²² Art 56 WA,; Art 57 preserves rights of priority for pending applications

²³ Case C-265/19 RAAP v A-G ECLI:EU:C:2020:677 forms part of retained EU law

²⁴ Note that UK registered rights

TM dilution provisions?²⁵

Possibly TM defences: Art 1P23 recites TRIPS general²⁶ as well as listing

GIs - not agreed but a review clause²⁷ in Art IP57; EU GIs to be protected in the UK

Section 3 designs

IP27 Designs - registered, as per directive

IP28 duration 25y

IP29 unregistered designs at least 3 years' protection against copying, not under UK "design right" ie extension of unregistered EU design protection

IP30 exceptions 3 step test, exclusions "solely dictated by technical or functions considerations" must-fit save modular

IP31 cumulation with copyright

Section 3: Civil judicial procedures and remedies of trade secrets

Section 4 Patents

IP32 Patents and public health A nod to Doha

IP33 SPC - type protection

Section 5: protection of undisclosed information

Reflects Trade Secrets Directive, already transposed into UK law

Cope for development of UK action for breach of confidence in line with Commonwealth jurisprudence?

Chapter 3 Enforcement

Reflects IP rights Enforcement Directive 2004/48/EC, much of which was consistent with pre-existing UK law on procedures and remedies.

²⁵ Art IP20 does not include dilution provisions, BUT Art IP22 requires UK and EU to apply WIPO 1999 Joint Recommendation as regards protection of well-known marks under Paris and TRIPs. EU TMs with established reputation at end 2020 will continue to enjoy protection, thereafter reputation based on UK.

²⁶ IP23(1) may allow the UK to adopt Singapore/New Zealand type defence of non-trade-mark use; this would probably be consistent with the specific defences from the Directive carried over into ART IP23(2) and (3)

²⁷ <https://www.walkermorris.co.uk/publications/geographical-indications-in-the-uk-post-brexit/> Note: Ireland has cross-border GIs and will continue to be protected by RoI EU GIs

IP47 damages diverges somewhat from IPRED Art 13

IP53 Border measure fairly brief provisions reflect EU border measures regime and stress continued cooperation and information-sharing

7. Cross-border Litigation – something missing??

As of midnight on 31 December 2020 (CET) the UK fell out of the Brussels Regulation regime for jurisdiction and enforcement in civil and commercial matters, and the Rome I and Rome II regimes for law applicable to contract and tort disputes, save for pending cases.

The Hague Convention on choice of court agreement was already effective as regards the UK (from 2015). The outcome is awaited of the UK's application to accede to the Lugano Convention (we hope to be decided by April 2021). The UK government's web pages on these matters is helpful: <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals>

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