

Remarks on Commission position papers on “Other Separation Issues”

This paper presents remarks and questions which the Brexit Steering Group would like to share with the EU negotiator, in view of the transmission of the position papers to the UK. They are the result of careful examination and discussion with relevant EP committee chairs.

1. Use of Data and Protection of information obtained or processed before the withdrawal date

- 1.1 The Commission deals in this position paper with two very different elements: the use/protections of data and the protection of EUCI and classified information. However the link between the two topics could be subject to discussion.
- 1.2 The focus of the paper is on the rules applicable after the withdrawal to the use of personal data and information obtained before the withdrawal from the EU. However, it seems confusing that there is also a recommendation to apply the same regime (mutatis mutandis) to personal data and information obtained after the withdrawal on the basis of the Withdrawal Agreement, which concerns a different and future situation. Therefore, specific guiding principles from the Commission on possible UK access to EU databases after the withdrawal date would be extremely useful.
- 1.3 Some clarification might also be needed on the scope of the paper and the type of data it refers to. Since data that is not ‘personal data’ is not in the scope of the GDPR or any other legal act, is the ‘data’ in the paper referring to ‘personal data’? Also, considering the different rules applicable, does it apply to commercial personal data, all personal data covered by the General Data Protection Regulation 2016/769 (GDPR), personal data covered by Directive 2016/680 (the Police Directive), and personal data in large IT systems such as Eurodac or Europol and Eurojust data bases?
- 1.4 In this light, further clarifications could be given on “the provisions of Union Law on personal data protection applicable on the withdrawal date” that should continue to apply. In order to avoid legal uncertainty it would be useful if the paper would list the EU acts that would continue to apply in this regard and also in relation to Section III.
- 1.5 The Commission states that if the UK does not comply with the principles in the paper, the information and personal data in possession of the UK should be destroyed or erased. However, there are no further details as to how to this would take place and which authority would be competent for such verification, or the sanctions that would apply in case of non-compliance.
- 1.6 Furthermore, it might be necessary to emphasise that all the data processing principles, including the essential data processing principles (purpose limitation, accuracy, proportionality, quality, retention, legal basis, not onward transfers) should be strictly complied with. In particular, the UK should process personal data collected before the withdrawal for the sole purpose for which they had been processed before this date. Any further processing should not be authorised without the prior authorisation of the EU controller or the data subject. No further onward transfer should be authorised. Likewise, the list of Union Rules restricting the use or access to data should be exhaustive.

- 1.7 In addition, the paper does not make any difference between EU personal data already processed in ongoing procedures by the UK, and the possible use of personal data which were in databases kept by EU agencies and obtained by the UK before the date of withdrawal. As regards the latter, since they could not be kept up-to-date, they should be deleted or destroyed without delay.
- 1.8 Regarding international transfers, the paper refers to the GDPR, but no mention is made of the police directive or other instruments.
- 1.9 Lastly, the Withdrawal agreement should also lay down the mechanisms to ensure the enforceability of the rights of data subjects in clear terms in a manner equivalent to that established by Union data protection law.

2. Guiding principles for the Dialogue on Ireland/Northern Ireland

- 2.1 Overall, the BSG supports the paper of the Commission and agrees that the onus of presenting solutions remains with the UK. The UK needs to come forward with substantive commitments and workable solutions for the Irish border.
- 2.2 In accordance with the European Council guidelines, the EU is however ready to consider “flexible and imaginative solutions” in the context of the Dialogue on Ireland and Northern Ireland. We should indeed avoid putting at risk the Good Friday Agreement. Nevertheless, we should at the same time ensure that the ‘Irish border issue’ will not have a negative impact on the functioning of the Internal Market and Customs Union. In particular, we should avoid any negative consequences on the level of our customs controls and movement of goods.

3. Intellectual property rights (Including geographical indications)

- 3.1 The BSG agrees with overall approach and aims of the Commission, the principles outlined in the position paper and their implications in relation to those IPRs (including geographical indications) that are addressed. The outcome of negotiations should ensure legal certainty for businesses and rights holders, continuity of rights and prevent imposition of additional administrative burdens and costs.
- 3.2 However, the rights of IP rights *users* via exception mechanisms (be it for copyright or for other types of IP rights) should be added.

The BSG proposes the following wording: *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; (a1) the uses allowed by limitations and exceptions under these intellectual property rights are similarly not undermined;*

- 3.3 As a general observation, the position paper does not actually cover all IPRs; it seems that the general principles set in the position paper deal only with "intellectual property rights having unitary character within the Union" and databases.
- 3.4 This means the position paper does not cover unitary patent, enforcement of IPR and copyright related questions. The possible reasons for not covering copyrights is that these are "non-

registered" IPRs and the Commission might be of the opinion that unitary patent should be addressed in the second phase of the negotiations.

- 3.5 That being said, while the agreement on the Unified Patent Court (UPC) was concluded as an international treaty, under EU law it was established by an enhanced cooperation. Even though the Brexit vote delayed the implementation, the UK has announced in November 2016 that it will ratify the UPC Agreement. The specific legal nature of the UPC raises a number of questions in relation to possible amendments and national ratification. The enforcement of rights and rulings of patent cases is a further challenge, which will need to be addressed.
- 3.6 Protection of trade secrets is quite novel and established in common law systems like the UK one, less in the EU. The paper might be working on the assumption that the standard of protection is equivalent, nevertheless it does not mention this specific kind of IP rights, recently harmonized at the EU level via Directive on Trade Secrets 2016/943.
- 3.7 The relations between the UKIPO and EUIPO (UK and EU intellectual property offices), UK participation to the EU-wide database for Orphan Works or to the works of the European Observatory on Infringements of IPRs are some other examples of issues related to IPR which might need consideration at the later stages of negotiations. In particular, UK participation to the upcoming EUIPO Observatory report on trade-secret litigation trends would help better assess the specificity of the newly harmonised rights on trade-secrets compared to the protection in place before Directive 2016/943, notably under the UK common-law system.

4. Public Procurement

- 4.1 The BSG agrees with the Commission's approach by addressing the most critical aspects in order to provide legal certainty at the time of withdrawal. The position paper rightly concentrates on the period for public procurement procedures which will be launched before the UK's withdrawal and where the contract award will not occur before the withdrawal. Union law must continue to apply to those procedures that are on-going on the withdrawal date.
- 4.2 Some clarification could be considered in relation to the 'General Principles and material scope' where a specific reference to the e-Invoicing Directive (Directive 2014/55/EU) could be considered and the obligations for UK under that Directive for the transitional period could be defined.
- 4.3 Furthermore under point 'III. Cooperation' it could be necessary to make specific references also to the TED (Tenders Electronic Daily) tool, as well as to the European Single Procurement Document (ESPD) service.

5. Customs related matters needed for an orderly withdrawal of the UK from the Union

- 5.1 The BSG supports the approach taken by the Commission in this paper; it tackles the relevant concerns and provides further clarity on how the transactions and economic flows that will be under way at the date of withdrawal of the UK will be treated. It rightly provides the solution of treating any operation initiated before the withdrawal as an intra-EU operation up to its end, regardless of the date of conclusion.