7 July 2017

Remarks on Commission position papers on “Other Separation Issues”

This paper presents first 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. Governance

1.1. As stated in the Commission’s position paper, the Withdrawal Agreement should establish a Joint Committee, in which the Union and the United Kingdom are represented. However, there is a need for clarity on the appropriate Parliament involvement in this committee, and generally on the status and accountability of the committee. We would insist that this Committee is indeed in the hands of the Union institutions, and not the Member States.

1.2. In this position paper, in section I, point (1), it could be emphasised that the Union and the United Kingdom "supervise jointly the implementation of the Withdrawal Agreement". This would allow a better alignment with section II of the same paper.

1.3. It would be appropriate to further specify the nature of the dispute settlement mechanism - preferably in the shape of a judicial body. Moreover, the negotiating directives of the Council make clear that “*For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union*” (paragraph 42). It would be important to also introduce this concept of independence and impartiality in the paper.

1.4. It is crucial that the enforcement of provisions on citizens' rights is not left to the UK domestic courts alone, as proposed in the UK policy paper on citizens' rights.

1.5. It would be appropriate to better specify the meaning and the scope of the wording "continued application of Union law" (horizontal clause), as a matter that will continue to be subjected to the scrutiny of the Commission and the Court of Justice, in order to avoid - as much as possible - any future conflicts of interpretation between the parties.

2. Ongoing Union judicial and administrative procedures

2.1 The paper could further clarify the status of submissions made by the UK in cases before the Court of Justice where the UK is not a party.

2.2. This paper extends the competences of the Court of Justice on pending procedures at the date of the withdrawal and on future procedures that relate to facts occurred before the withdrawal. Such competence stems from the applicability of EU Law until the withdrawal takes effect. This general principle should be explicitly referred so that it is clear and unequivocal that, for the purpose of the

procedures in question, EU law is the substantive law applicable to the situations that arose/facts that occurred until the withdrawal.

3. Judicial cooperation in civil and commercial matters

3.1. The paper follows the general line that substantive rules, including rules on applicable law, apply as they were at the time, when the contractual or non-contractual event took place that gives rise to the question of what law applies, while procedural rules apply as they are when the procedure is initiated. In this respect, the Withdrawal Agreement should have the form of a common understanding rather than prescribing anything.

3.2. In relation to substantive scope, the paper is not fully clear in respect of the application to Directives, for example Compensation to crime victims (Directive 2004/80/EC).

3.3. We feel it is justified to mention the Regulation No 650/2012 on 'jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession'.

3.4. Mutual recognition of court rulings in civil (and criminal) law should be assured, and the recognition of official documents in civil law matters, such as for marriages, adoptions and inheritance, should be safeguarded through appropriate provisions in the Withdrawal Agreement.

3.5. As regards private international law, the withdrawal will have little effect on the Rome I and Rome II Regulations on the law applicable to contractual and non-contractual obligations, or on the Regulation on wills and succession, because those regulations are universal. There is therefore reason to alter the rules on choice of law so as prevent parties for opting for English law, particularly since this could be advantageous for the remaining Member States.

4. Ongoing Police and Judicial cooperation in criminal matters

4.1. Generally, we are concerned with the listing of 12 legislative instruments. With such a restrictive list, there is the risk that important elements and instruments are missing. One could think of the mentioned Schengen Information System (SIS), Eurodac or cooperation in the context of tackling anti-money laundering or terrorist financing under Directive (EU) 2015/849 in this regard. One could consider an alternative approach to listing the instruments and instead opt for wording along the following lines: "The Withdrawal Agreement should allow for the orderly completion of ongoing procedures based on legislative instruments to which the UK currently participates in the area of police and judicial cooperation in criminal matters".

4.2. Apart from the procedures based on the legal acts mentioned, it should be clarified whether ongoing joint investigation teams set up on the basis of Council Framework Decision 2002/465/JHA of 13 June 2002 investigation teams could continue their work and complete the investigation after the withdrawal of the UK.

4.3. All applicable procedural rights enshrined in Union law should continue to apply. In particular, those procedural rights guaranteed to suspects or accused in criminal proceedings under the Directive on the Right to Information (Directive 2012/13/EU) and the Directive on the Right to Interpretation and Translation (Directive 2010/64/EU) should continue to apply to all criminal proceedings in the United Kingdom, initiated before the withdrawal date. Likewise, the procedural rights granted to

victims of crime should also apply to those victims in all criminal proceedings initiated before the withdrawal date.

4.4. As regards the ongoing criminal procedures, where one or several EU legislative instruments mentioned in point I of the paper have been applied, the Withdrawal Agreement should allow for their orderly – and efficient – completion. In other terms, all evidence gathered on the basis of one of these instruments before Brexit should remain relevant after it. However, a distinction should be made between legislative instruments related to procedural rules and those creating databases. Concerning the latter, the logic should be that from the withdrawal date, UK has no more access to the EU databases.

4.5. If the United Kingdom is allowed to process data obtained before the Brexit, EU law on data protection should continue to apply, and the Court of Justice of the European Union should continue to have jurisdiction.

4.6. Regarding the mentioned procedural stages to be included in the Withdrawal Agreement, it is not clear whether the procedural stage will be set in the Withdrawal Agreement for each of the instruments in the list, or whether there will be a general rule applicable for all or several instruments, for example, after transmitting the request from the issuing Member State.

4.7. Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) should be included as part of the Union legislative instruments mentioned in Section II part 2.

4.8. The last sentence under section I could be further clarified as follows: All applicable procedural rights enshrined in Union law should continue to apply *to the procedures pending at the date of the withdrawal until their completion*.

5. Goods placed on the Market under Union law before the withdrawal date

5.1. There should be no discrimination against EU products on the UK market and vice versa.

5.2. We agree with the principles outlined and consider that mechanisms for the mutual exchange of relevant information and cooperation would be particularly important for pharmaceuticals and medical devices.

5.3. It is of the utmost importance to stress that the principle laid out in point (1) paragraph 2 applies to both harmonized sector and the goods under the mutual recognition.

5.4. There is a missing reference to the rules on "placing on the market", which is crucial as they create very important liabilities for economic operators when making a product available on the market for the first time (e.g, labelling, i.a. language requirements for that). Therefore, it could be suggested to illustrate these remarks with a change in the text as below: “This principle addresses only product rules (i.e. rules governing the manufacturing, characteristics and placing on the market of goods) and covers both harmonized sector and that under the mutual recognition regime. It does not address modalities of sale. This principle is without prejudice to rules on custom procedures, tariffs and taxes, as well as the possible applicability of intellectual property rights.... “

5.5. There is a difference of treatment for live animals and animal-derived food, but also before the withdrawal date and as of the withdrawal date.

5.6. We would like - where possible - a number of clarifications in relation to this particular paper:

- In the first paragraph, does "initiated" refer to the start of the physical movement of live animals and certain germinal products, or does this refer to when an agreement to move these goods has been signed?
- In the second paragraph, could further clarity be provided on what "applicable rules for importation" means?
- Should rules for importation not apply to all goods entering the single market after withdrawal and not just animal products? Why is there only a reference to animal products?
- Why is there a distinction between food from animals and food in general?
- It is important that the authorisation procedures be transferred for these types of goods, but it would be useful to know whether these transfers could delay the authorisation process for these goods. Could the Commission provide further data in relation to how many of these authorisation processes could be ongoing on the withdrawal date?
- As regards the footnote, why should this possibility to request the transfer of documentation held by the UK only be possible "in exceptional cases"? Should the Withdrawal Agreement not provide the possibility to request this transfer of documentation in more general terms?
- The marketing authorisation procedures for biocidal products, plant protection products and medicinal products have been included, but would it not be clearer to cover all goods requiring pre-market authorisation? Or are these the only products concerned by pre-market authorisations?
- Is there also a need to consider labelling regimes applicable to goods, including specific regimes requiring pre-market authorisation such as health claims
- Why has the Commission made a distinction between live animals and germinal products, which would continue to enter the EU or UK based on existing rules provided movement is initiated before the withdrawal date and animal-derived feed, which would automatically be subject to new importation rules and no longer deemed to be EU goods?

6. Functioning of the Union Institutions, Agencies and Bodies

6.1. The European Parliament is currently working on a proposal for the distribution of seats for the EP 2019-2024.

6.2. In section III, we would suggest the following deletion: "Agreement should provide that the United Kingdom and the Union institutions, agencies or bodies treat any requests for access to these documents under ~~the same conditions as under~~ Regulation (EC) 1049/2001."

6.3. The protection of personal data should be enforced. The following small addition at the end of the first part of the paper ("Privileges and immunities of Union institutions, agencies and bodies in the United Kingdom") would be helpful in this regard: *"This should also cover the protection of personal data of members, officials and other servants of Union institutions, agencies and bodies in line with Regulation (EC) No 45/2001."*

7. Euratom

7.1 Our main concern is that the UK should continue to observe EU standards for nuclear safety, radioactive waste and radiation protection, and should assume responsibility for liabilities. These aspects are properly addressed in the paper.