

**THE CHANGES TO THE REGULATION OF EUROPEAN UNION TRADE MARKS
(EUTMs) AFTER BREXIT: A UNITARY EUTM TURNS INTO TWO, ONE FOR THE
UK AND ONE FOR THE REST OF THE EU27**

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ABSTRACT

After the membership of more than 40 years, the UK's exit from the European Union has generated considerable uncertainties and concerns in various areas. These uncertainties manifest themselves in all legal matters concerning EU law. It is clearly evident that Brexit will have an impact on different fields of law. One of the affected areas of law by Brexit will be intellectual property rights. In this capstone project, I will provide an overview of the influence of Brexit on one of the intellectual property rights, especially trade marks and will examine the critical implications of the Brexit that it will create in the regulation of trade marks. As a member state of the EU, the UK trade mark laws have been designed under the impact of the EU approach. It is fair to state that, in the post-Brexit period, trade mark owners who are planning to use their trademarks in the EU and vice-versa in the UK will face several legal problems since their intellectual property interests will be vulnerable to third-party infringers with significant financial consequences. Taking into account the challenges that Brexit will pose in the regulation of trade marks, the aim of the capstone thesis is to demonstrate how Brexit will change the current situation and have an impact on trademark owners in the EU and the UK. For this purpose, this capstone project will explore the principal question of to what extent the Withdrawal Agreement, which has been signed between the UK and the EU, is effective?

I will examine the relevant legislation, case law, and mainly reports prepared by the legal firms to analyze the implications of Brexit on the regulation of trade marks and I will especially focus on the issues of revocation for non-use and the principle of regional exhaustion post-Brexit. I argue that the Withdrawal Agreement provides minimum standards in trade mark regulation after the transition period, but in practice, the process will be double costly for the brand owners. The examination of the revocation issue for non-use requirement of trade marks shows that the

parties came to compromise and agreed to protect the trade marks which had been solely used in the EU and not been put into genuine use in the territory of the United Kingdom before the end of the transition period. However, the UK still needs to implement a domestic law to regulate the “use” requirement for the trade marks which will be registered after the transition period. Regarding the post-Brexit exhaustion scenario, any regime needs to balance various interests, and this balancing issue can be achieved with the implementation of the international exhaustion regime.

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INTRODUCTION

The creation of a single market in which goods and services and persons are freely moving between Member States without the imposition of internal borders or other regulatory barriers is one of the European Union's major goals since it has been founded.¹ In order to do this, uniform intellectual property law is required, since intellectual property is used to protect many products and services.² This applies especially to trademarks because their purpose is to inform the consumers about the origin of the goods. To put it another way, in order for commerce to function across EU member states, there must be uniform trade mark laws throughout the EU.

The existing structure of the trade mark law has been significantly reshaped within European Union and among its member states. From the perspective of the EU legislation, the regulation of trade marks is based on twofold system. Firstly, the national trade mark laws of the EU Member States have been harmonized by transposition of Trade Marks Directive.³ Secondly, the implementation of EU Trade Mark Regulation⁴ provided effective unitary system of trade marks within the EU. European Union law has had a major impact on intellectual property law in the United Kingdom. There is no field of intellectual property law that is not covered by EU regulations or case law of European Court of Justice (ECJ). In reality, it is perhaps one of the most "Europeanized" fields of private law.⁵ As a result, "Brexit" would inevitably have a significant effect on the UK's existing IP system, especially in the regulation of trade marks.

The transition period relating to the UK's departure from the EU ended on the 31 December 2020. As a result of this process, there have been several changes to the regulation of European

¹ Emily Bolton, "Defining Genuine Use Requirements of Community Trade Marks in Light of an Expanding European Union" (2012)

² Ibid.

³ First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks [1988]

⁴ Regulation (EU) 2017/1001 on the European Union trade mark [2017]

⁵ Justine Pila and Ansgar Ohly, "The Europeanization of Intellectual Property Law: Towards a European Legal Methodology" (2013) Oxford Scholarship Online

Union Trade Marks (EUTMs). As of January 01, 2021, EU laws and regulations including IP rules for trade marks was no longer extended to the UK. Thus, EUTMs which have been registered in the European Union Intellectual Property Office (EUIPO) till 31 December 2020 have no longer provided protection in the UK. The UK Intellectual Property Office (UK IPO) has established “comparable UK trademarks” for all trade mark holders that had registered rights in the EUIPO.⁶ In other words, EUTM holders have been granted an analogous UK-registered trade mark. While the method of cloning IP rights seems straightforward, there can occur a number of challenges in practice.⁷ In addition, Brexit will have an effect on the geographical scope of trade mark protections, putting their safety and ability to uphold them at risk. It is important to fully consider the possible results of ongoing discussions in order to be informed and take the appropriate measures to secure the rights of EU trade mark holders. Not only will the implications of Brexit be researched from a legislative standpoint, but the interests of relevant private parties, such as the owners and trade marks, will be taken into consideration, through analyzing the claims of the different stakeholders and combining them with relevant discussions on this subject.

The aim of this study is to understand the possible consequences of the United Kingdom’s exit from the European Union for a particular field of public policy, namely trade mark security as one of the intellectual property rights. Therefore, I will examine the main question of to what extent the Withdrawal Agreement which has been signed between the UK and the EU is effective?

⁶ Hatty Cui, Rachel Li-Mei Tan, “The Implications of Brexit on EU Trade Marks” (February 2021)

⁷ Rosie Burbidge “UK:Future gazing in a time of global crisis-IP insights” (March 2021) <<https://www.mondaq.com/uk/trademark/1047654/future-gazing-in-a-time-of-global-crisis-ip-insights>> accessed 26 March 2021.

Given the novelty of the topic, mainly based on reports prepared by various law firms and governmental organization, as well as the relevant legislation, case law, I will examine regulation of trade marks from pre-Brexit and post-Brexit perspectives. The capstone paper comprises two chapters.

The first chapter of my capstone project present an overview of the harmonization of EU legislation in the regulation of trade mark and investigate the role of the EU legislator and European Courts in this process. Furthermore, it also examine the notion of EUTMs and their unitary character. The second chapter starts to explore the general implications of Brexit in the regulation of trade marks. It analyzes that after the end of the transition period the EUTM which have been registered till the end of the transition period will be transferred to the “cloned” UK trade marks. The main challenges will occur with regard to the pending application and the renewal of “cloned” UK trade marks. The examination of the relevant provisions shows that it will be double costly process for the brand owners. Following the thesis studies the issue of revocation problem for non-use issue. Despite the different approaches presented by EU and UK judges, the EU and the UK reached to a compromise. Article 54(5)(b) of the Withdrawal Agreement states that “the trade mark shall not be liable to revocation on the grounds that the corresponding European Union trade mark had not been put into genuine use in the territory of the United before the end of the transition period”.⁸ This provision somewhat addresses a solution to the issue. However, the Withdrawal Agreement makes no mention of what would happen to EUTMs that are exclusively used in the UK. It implies that holders of EUTMs who only used them in the UK and not elsewhere in the EU would be vulnerable to revocation procedures for non-use. However, after reviewing reports elaborated by many legal firms, I think the same regulation will apply to EUTMs that are only used in the UK until the transition period ends. Furthermore, the last sub-section of the second chapter discusses the issue of the

⁸ Article 54(5)(b) of the Withdrawal Agreement

doctrine of exhaustion after the Brexit. The EU Exit Regulation 2020 provides the continuation of the regional exhaustion system after Brexit. This is an asymmetrical exhaustion system which applies to cross-border commerce between the United Kingdom and the European Economic Area. This system disadvantages parallel exporters operating in the United Kingdom. Therefore, I am of the opinion that the UK should enact international exhaustion regime which provides balanced approach to the interests of the various parties such as trade mark right holders, consumers, competitors. Finally, in conclusion, I provide a summary of the capstone project's findings followed by recommendations for further research.

CHAPTER 1. OVERVIEW OF TRADEMARK REGULATION IN THE UK AND IN THE EU

In this chapter, I analyze the EU's approach regarding the harmonization and approximation process of laws in the field of IP rights. I start with examining the implemented Trade Mark Directive and Regulation and continue with the analysis of the approach presented by the European Court of Justice to the harmonization process of trade mark regulation. In the last sub-chapter, I will explore European Union Trade Mark's notion and show that it is the sum of 28 national trade marks.

1.1 The impact of EU IP law on trade mark protection in the UK

The history of the Europeanisation of intellectual property through EU legislation is one of ever-increasing convergence. In the 1970s, the first wave of harmonization occurred. As part of this procedure, the Court of Justice of the European Union (CJEU)⁹ focused on clauses in the Treaty on the Free Movement of Goods to eliminate intra-community barriers caused by the territorial presence of the uncoordinated national trade mark actions in force at the time. Intellectual property rights are in place to encourage the development and commercialization of new technologies, products, and creative works. However, this must be weighed against the need to allow competitive markets, consumer choice, and equitable access to intellectual property-protected products for the benefit of society. Consequently, a regional exhaustion principle was developed.¹⁰ In the subsequent step, multilateral standards have been implemented for harmonizing national IP rules at the EU level. One of these measures was

⁹ The Court was titled as "The Court of Justice European Community" before the enter into effect of the Treaty of Lisbon in 2009.

¹⁰ When products containing a trademark are first marketed by or with the owner's permission in any state that is a part of any specific region, the owner cannot preclude subsequent selling in his own state or in any other state that is also belong to that specific region.

Community Patent Convention which was not achieved to come into effect at the EU level, however, it had an impact on the national patent laws of Member States; for instance, the UK Patents Act of 1977 has been influenced by this Convention.¹¹ In addition, the differences between national rules for IP protection in the Member States urged the European Economic Community (EEC) to harmonize IP rights in order to eliminate impediments to the main objectives of the Community such as free movement of goods and competition.¹² Therefore, the disparities between EU law and national IP rights prompted the European Commission to implement Directives to approximate national IP laws. Moreover, the attempts to harmonize domestic IP laws of Member States have been developed by the implementation of EU Regulations such as EU trade mark rights, unregistered design rights, etc.¹³

As I mentioned before, national trade mark laws have been heavily affected by EU laws. The harmonization efforts of the EU in the field of IP rights are closely related to the EU's main aim of founding a single market. With the goal of approximating trade mark laws across EU member states, the Trade Mark Directive was introduced in 1989.¹⁴ The Directive was transposed into the legislation of the UK with the enactment of the UK Trade Marks Act of 1994. Horizontal harmonization was achieved among the Member States with the implementation of the Trade Mark Directive.¹⁵ This resulted in a convergence of Member States' substantive laws, which cover national trade mark rights. So that, apart from the current national trade mark titles, the EUTM, a pan-European title that assures unitary protection of a mark in the EU's whole internal market, was formed.

¹¹ Marc Mimler, Luke McDonagh, "Intellectual property law and the Brexit: a retreat or a reaffirmation of jurisdiction?" (2017) pp159-179

¹² Justine Pila and Ansgar Ohly, "The Europeanization of Intellectual Property Law: Towards a European Legal Methodology" (2013) Oxford Scholarship Online

¹³ Ibid p77

¹⁴ Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks (1988)

¹⁵ Graeme Dinwoodie, "The Europeanization of Trade Mark Law" (2013)

Following this, the Community Trade Mark Regulation (CTMR) has been implemented, which aimed at abolishing impediments to trade by establishing unitary rights in the Member States and this regulation was replaced by the EU Trade Mark Regulation (EUTMR).¹⁶ As it is stated in Recital 4 of the CTMR that “the barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the member states cannot be removed by approximation of laws. In order to open up unrestricted economic activity in the whole of the internal market for the benefit of undertakings, trade marks should be created which are governed by a uniform Community law directly applicable in all member states”. The Regulation provided additional layer of protection based on a single application and operated by the European Union Intellectual Property Office (EUIPO)¹⁷. Furthermore, new forms of marks, such as colors and the shape of products, has started to be given trade mark protection.¹⁸ Therefore, the Regulation could strengthen the harmonization of national trade mark laws since it could be utilized to support the ECJ’s broad and uniform interpretative approach in dealing with cases appealed from the EUIPO, such as in the IP Translator case, in which the UK Registrar of Trade Marks referred to the ECJ, and the issue was related to the use of the Nice Classification class headings in the trade mark applications.¹⁹ Before this ruling, EUIPO had previously taken the position that “the usage of all general signs specified in the class heading of a specific class constitutes a right to all goods or services falling under this particular class.”²⁰ Diverse practices were observed in different EU national trade mark offices, including the United Kingdom. In the light of the EUIPO’s and national offices’ differing approaches, the Chartered Institute of Patent Attorneys filed a UK application to get ECJ’s opinion. In this case, the Court stated that “it is important to identify a common method regarding the identity of products or services, based on

¹⁶ Council Regulation (EC) No 40/94 on the Community trade mark (December 1993)

¹⁷ Previously known as the Office for Harmonization in the Internal Market (OHIM)

¹⁸ Ibid, Recital 4

¹⁹ Case C-307/10, Chartered Institute of Patent Attorneys v Registrar of Trade Marks [2012]

²⁰ Communication No 4/03 of the President of the OHIM, (2003)

if the application involves the registration of a national trade mark in the different Member States or a Community Trade Mark” and this common method necessitates horizontal harmonization.²¹ The examination of the harmonization process in the EU in the field of IP shows that all efforts were towards creating harmonized rules in all member states of the EU in order to mitigate the risks against the fundamental freedoms, in this regards free movement of goods and services and to ensure competition.

1.2 The role of European Courts in the harmonization process of trade mark protection

EU Court is also involved in the harmonization process of regulation of trade mark. EU Courts are involved in the ruling of cases appealed from the decision of EUIPO. In the adjudication of the EU trade marks resulting from EUIPO appeals, the General Court and the CJEU have direct involvement.²² Through extensive case law, the ECJ has provided even stricter harmonization than the EU legislation suggests²³, meaning that the Court helped to fulfill the loopholes in the regulation of trade marks. In addition, domestic courts have referred to the EU courts under the preliminary procedure on the interpretation of the provisions of the Trade Mark Directive and Regulation.²⁴ As a member of the EU, the UK courts viewed intellectual property issues in compliance with the EU Court of Justice.²⁵ However, in some cases, domestic courts have not supported the European court rulings, especially on trade mark issues. Some UK judges believe that the EU courts lack the competence to rule on complicated issues such as trade mark. For

²¹ Case C-307/10, Chartered Institute of Patent Attorneys v Registrar of Trade Marks [2012], para 59, <<https://curia.europa.eu/juris/document/document.jsf?docid=124102&doclang=EN>> accessed 07 April 2021

²² Oonagh E. Fitzgerald, Eva Lein, “Complexity’s Embrace: The International Law Implications of Brexit” (April 2018), pp191-209

²³ Richard Arnold, “An Overview of European Harmonization Measures in Intellectual Property Law” (2013) in “the Europeanization of Intellectual Property Law” by Ansgar Ohly and Justine Pila, p31

²⁴ Ibid

²⁵ Oliver Tidman, “Brexit: what next for intellectual property?” (2016) Scots Law Times

instance, before the ruling on the case of *L’Oreal v. Bellure*, the view of United Kingdom courts have traditionally been that trade mark law does not protect every element encompassed by the brand.²⁶ In the case of *L’Oreal v. Bellure*, the Court of Appeal of England and Wales asked the ECJ to explain the conditions in which comparable ads would constitute trade mark infringement, and the central question was whether Bellure was unfairly taking advantage of the reputation of L’Oreal’s marks.²⁷ In this case, the CJEU clarified that trade mark protection was not limited to the origin function but also can “safeguard the quality of the products or services, as well as those of communication, investment, or advertisement.”²⁸ The ECJ’s interpretation of Article 5(2) of the Trade Mark Directive forced the UK courts to find infringement, despite concerns about extending trade mark protection to the protection of the brand.

In general, trade mark harmonization through the EU legislative process has result in comprehensive Europeanization of national legislations. In addition, ECJ has also contributed to the harmonization process of trade mark regulation. UK national trade mark laws have also been considerably affected by the EU approach despite the disagreements on some trade mark decisions.

1.3 The notion of “European Union Trade Mark (EUTM)”

As examined by previous sub-chapters, as a result of the harmonization process in the European Union, the concept of the European Union Trade Mark (EUTM) has been created to provide an

²⁶ Luke McDonagh, “From brand performance to consumer performativity: Assessing European Trade Mark Law after the rise of anthropological marketing” (2015), p617-620

²⁷ Case C-487/07 *L’Oreal Sa and others v. Bellure NV and others* [2009]

²⁸ *Ibid.*

additional layer of protection in addition to the trade mark protection offered at the national level.

A EUTM is a trade mark for products or services that has been registered in line with requirements of the EU Trade Mark Regulation.²⁹ The EUTM, previously known as the Community Trademark (CTM), offers a standardized registration process and ensures that a mark is protected uniformly across the whole EU internal market, which means that it is more than just a collection of national rights granted by member states. The notion of the EUTM's unitary nature is a cornerstone of the system, and it serves as one of its pillars. Expressly, it is stipulated in Article 1(2) of the EUTMR, which states that "An EU trade mark shall have a unitary character. It shall have equal effect throughout the Union: It shall not be registered, transferred, or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be prohibited, save in respect of the whole Union."³⁰

Both at the EU and at the national level, the same trade mark may be registered. This dual system is designed to satisfy the needs of businesses of varying sizes, markets, and geographic locations. If brand owners only do business in one country, they can only register a national trademark in that country. This mark grants the brand owner exclusive rights to distinguishing indications - such as names, logos, colors, pictures, patterns, forms, goods packaging, or sounds - that identify their products and differentiate them from others. If brand owners want to protect their brand across all EU nations, they should register their trade mark as an EU Trademark within the EUIPO, which implies that they may do so with a single registration. Small and medium-sized companies (SMEs) and local businesses that do not need EU-wide protection may find that national trade marks are preferable. On the other hand, the EUTM protection is

²⁹ Article 1(1) of the Regulation of the EU Trade Mark

³⁰ Regulation 2017/1001 on the European Union trade mark (June 2017)

better for large or multinational companies that aim to operate in a number of EU member states.³¹

In the event of an infringement, the owner of the EUTM may seek redress across the whole European Union.³² A EUTM application may be submitted directly to the EUIPO in Alicante in any of the EU's official languages. The application is reviewed for denial on the basis of absolute reasons, and then it is published. One of the most important aspects of the EUTM system is that the office does not analyze the substance of the requirements. If no objection or third-party remarks are lodged within three months following the publication of the EUTM, the EUTM is considered to have been registered. The protection for EUTM is considered valid for ten years and it is possible to renew forever for an additional charge.³³

The impact of Brexit on EUTMs is perhaps the most visible. Brexit will have a direct impact on EUTMs because they are governed by the EUTMR. The first set of issues arises because the protection of EUTM provided by the Trade Mark Directive and EUTMR will no longer extend to the UK after the transition period and, as a result, will cease to have effect in the UK, which I will discuss in detail in the next chapter.

³¹ Trade Mark Protection in the EU, https://ec.europa.eu/growth/industry/policy/intellectual-property/trade-mark-protection_en

³² Benedikt Herz, Malwina Mejer, "Effects of the European Union Trademark: Lessons for the harmonization of intellectual property systems" (April 2019), p8

³³ Ibid.

CHAPTER 2. POST-BREXIT CHANGES TO THE EUROPEAN UNION TRADE MARKS (EUTMS)

The second chapter starts to examine the general implications of Brexit for the regulation of trade marks in the United Kingdom. Following that, it investigates the likelihood that the most difficult issues would arise in connection with the pending applications and renewal of “cloned” UK trade marks. Following this chapter, I will investigate the issue of revocation for non-use and how it is handled. Furthermore, the last sub-section addresses the problem of the concept of exhaustion in the wake of the Brexit.

2.1 The future of trade mark protection in the UK after Withdrawal

Agreement: general implications

On February 28, 2018, the European Commission released its draft text for the Withdrawal Agreement, which would control the United Kingdom’s exit from the European Union. Since the draft text included provisions for the future of EU intellectual property rights in the United Kingdom, it was of considerable concern to owners of EU IP rights, especially those planning to operate in the United Kingdom.³⁴ The United Kingdom formally ceased to be a member of the European Union on February 1, 2020. It then established itself as a third party after the transition period that concluded on December 31, 2020. During the transition phase, EU legislation continued to be applied in the UK while the specifics of the UK-EU future relationship were discussed. As a result of negotiations between the UK and the EU, the Withdrawal Agreement was approved by the Parliament of the UK and the European

³⁴ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (February 2018): <https://ec.europa.eu/info/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en>

Parliament.³⁵ Thus, the possibility of a “No-Deal Brexit” has been eliminated. The relevant provisions of the Withdrawal Agreement which deal with IP protection and enforcement procedures, have been placed under Articles 54-61.³⁶ According to this Withdrawal Agreement, after 31st of December 2021, the changes to the regulation of trade marks have been placed. The first direct result is that European Union Trade Marks (EUTMs) will no longer protect trade marks in the United Kingdom. Instead, the Intellectual Property Office of the United Kingdom (UKIPO) will create “cloned” local copies of registered EUTMs as provided by Article 54(1)(a) of the Withdrawal Agreement.³⁷ After the end of the transition period, the holder of a European Union trade mark registered in accordance with Regulation 2017/1001 before the end of the transition period is to become the holder of a comparable (cloned) registered and enforceable trade mark in the United Kingdom under the UK legislation comprising of the same sign, for the same goods or services.³⁸ In other words, before the official exit date, the EUTM covered the 28 EU countries, but after the official exit date, it will cover the UK and EU27. This cloning is limited to trademarks registered prior to January 1, 2021. These trade marks will be registered in the UK trade mark registry. They will maintain the initial priority date³⁹. One of the positive factors is that the trade mark owners do not need to pay for getting comparable UK trade mark if their brands have been registered before the end of the transition period. One of the lawyers in the IP field commented on the issue of “cloned” trade marks and stated that “there will be two trade marks that are totally independent of each other, but identical when previously existed only one”.⁴⁰ I do agree with this opinion in the sense that even if EUTM is called unitary right, in reality, it is the sum of traditional trade

³⁵ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019)

³⁶ Allen & Overy, “Brexit certainty at last? An overview of the new EU-UK trading relationship” (January 2021), <[<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/brexit-certainty-at-last-an-overview-of-the-new-eu-uk-trading-relationship#Intellectual%20property%20\(IP\)>](https://www.allenoverly.com/en-gb/global/news-and-insights/publications/brexit-certainty-at-last-an-overview-of-the-new-eu-uk-trading-relationship#Intellectual%20property%20(IP))>

³⁷ Article 54(1)(a) of the Withdrawal Agreement

³⁸ Ibid.

³⁹ UK intellectual Property Office, “EU trade mark protection and comparable UK trade marks” (January 2020)

⁴⁰ Olivier Marcombes “Brexit: When Cloning saves European Trade Marks” (June 2019)

marks, and in the case of the UK, it will be a separate national trade mark which will not be subject to the regulations and injunctions of the EUIPO.

One of the issues which will emerge as a result of Brexit is related to the renewal date of EUTM. As stated in Article 54(4) of the Withdrawal Agreement, the UK cloned right will not be required to be renewed until the next renewal of the EU-wide right, which will be the case if the renewal date of the EU-wide right came on or before exit day and if the EU-wide registration was renewed before exit day.⁴¹ Consider the following scenario: If there existed a EUTM registration with a renewal date of 29 December 2020 and that registration was renewed prior to departure day, both the EUTM registration and the cloned registration in the United Kingdom had a next renewal date of 29 December 2030. In contrast, if the renewal date of the EU-wide registration occurs after exit day, a renewal fee will be required to keep the UK comparable right. For example, if EUTM registration expires on 2 January 2021, a renewal cost for the UK cloned right will be charged, even if the EUTM registration was renewed before 31 December 2020. Thus, a separate renewal procedure will be double costly for the trade mark owners since they have to pay for the EUTM for protecting their trade marks in the 27 member countries of the EU and in the UK. One solution to this challenge would opt out of getting the UK comparable right.⁴² In this case, it will be considered that trade mark owner has never been registered in the UK. In order to be entitled to the right to opt-out, the trade mark should not be used in the UK and it should not be a subject of a license agreement. The request for opt-out should be confirmed by the UKIPO, if it is denied, it will be converted into the UK comparable right.⁴³

⁴¹ Mark Holah, “The impact of Brexit on trade mark protection in the UK and EU” (February 2021)

⁴² Norton Rose Fulbright, “Brexit: The impact on the trade marks and designs” (November 2020)

⁴³ Ibid.

One of the amendments adopted by the UK government is that applicants who wish to register their trade mark at the UKIPO should have a UK address. According to the UKIPO guidelines, an address for service is “an address that you use to communicate with the UKIPO and also for the purposes of proceedings under the IP legislation.”⁴⁴ Whereas under the previous regulations, the applicants who would like to pursue business activities in the UK could have had a service address in the European Economic Area (EEA), which means a communication address could have been used inside any of the remaining EEA nations.⁴⁵ However, the new regulation requires a separate address for business in the territory of the UK, which would be a double burden for the brand owners. There is only one exception to this rule is that only the owners of cloned trade marks will not be required to have a correspondence address in the following three years after the end of the transition period pursuant to Article 55(2) of the Withdrawal Agreement.⁴⁶

One of the issues that I would like to discuss is related to international registrations. First of all, I would like to give information about the Madrid International Registration System. The Madrid International Registration System may contribute after Brexit to the streamlining of applications seeking trademarks in both the EU and Great Britain. The Madrid System is a global system that allows applicants from one country to apply for trademark registration in other participating countries based on existing applications or registrations in their home jurisdiction. It consists of the Madrid Agreement and the Madrid Protocol, and citizens of the signatories to each document may apply for trademark registrations in other countries that are signatories to the same instrument via the registration system of trademarks.⁴⁷

⁴⁴ UKIPO guideline on address for service for intellectual property rights (November 2020), <https://www.gov.uk/guidance/address-for-service-for-intellectual-property-rights>

⁴⁵ Brexit and IP: Understanding the UKIPO address for service rule change (April 2021)

⁴⁶ Article 55(2) of the Withdrawal Agreement

⁴⁷ International trademarks: Is the Madrid system right for you? (March 2021)

In 1995, the United Kingdom ratified WIPO's Madrid Protocol on the International Registration of Trademarks. The Protocol enables trademark holders and applicants in the Member States to apply for international protection of their trademarks in other Madrid Protocol jurisdictions using a single application based on a domestic trademark's priority date.⁴⁸ Trademark holders and applicants seeking to utilize the Madrid Protocol must identify all members of the Madrid Protocol in which trademark registration is desired. The application is filed with the World Intellectual Property Organization's International Bureau, and it is then sent to the specified Madrid Protocol countries for assessment in accordance with their national laws.⁴⁹ If the application is rejected by one or more of the nominated jurisdictions, it may still be considered for registration in other nominated countries if it passes the examination procedure in those jurisdictions. Once a national trademark is registered, it becomes a component of the "international registration" that is recorded by the World Intellectual Property Organization (WIPO) on the International Register of Marks. Regarding the impact of Brexit on internationally registered trade marks, Article 56 of the Withdrawal Agreement states that for the EU designation of international marks, Brexit will not have any effect on that, and brand owners will enjoy the protection in the UK for their trade marks.⁵⁰ As far as I understood, the reason why Brexit will not have any impact on international registration of trademarks is that the EU designation of trade marks is considered as a national trade mark for every member state, so that the given protection for trade marks in the UK will be the same.

One of the occurred issues is concerned with the pending applications for the European Union trade marks. Regarding pending EUTM applications, they will not be transformed into a "comparable" UK application. Pursuant to Article 59(1) of the Withdrawal Agreement if the EUTM application is still pending at IP completion day, a business owner will have nine months

⁴⁸ Brexit Agreement: Implications of the end of the transition period for Madrid System users (July 2020)

⁴⁹ Ibid.

⁵⁰ Article 56 of the Withdrawal Agreement

to make a fresh application to the UKIPO for a comparable UK mark retaining the priority date for the original EU application.⁵¹ In other words, trademark applicants will have nine months to apply for registration of trademarks within the UKIPO and retain the earlier filing date of the pending EUTM.⁵² After this period ends, trademark applications will need to be filed separately with both the EUIPO and UKIPO to ensure protection in both jurisdictions. The critical point, in this case, is that if the businesses are late reapplying again before the UKIPO, they should fill applications two times in order to get protection in the remaining members of the EU and in the UK.

2.2 The revocation problem for non-use issue

One of the emerged issues after Brexit concerns the revocation problems for non-use. Before examining the non-use problem, I would like to analyze the “use” obligation of trade mark under EU legislation. One of the basic principles of trademark law is that trademark protection is justified by its use.⁵³ Article 18(1)(a) of the EUTMR and Article 16(1) of the European Union Trade Mark Directive include a “use” requirement in relation to the products and services for the registered EUTM.⁵⁴ The “use” criterion is justified by the fact that trade marks only enable customers to make right decisions. In general, an EUTM must be utilized within five years after its registration. This use requirement was designed specifically to prevent EUTM holders from circumventing the usage restrictions by just utilizing an EUTM once in the first five years of its registration and then suspending such use permanently while maintaining the EUM rights. As a result, the Article also states that valid grounds for non-use must be provided, otherwise an EUTM will be liable to revocation if it is not used or suspended for continues period of five

⁵¹ Article 59(1) of the Withdrawal Agreement

⁵² Managing IP Correspondent, “Practical preparations for Brexit: a global perspective” (April 2019)

⁵³ Lionel Bently and Brad Sherman, “Intellectual Property Law” (2014), pp1016–1030

⁵⁴ Article 18(1)(a) of the EUTMR

years.⁵⁵ The justified grounds for non-use are not explicitly stated in the Article, but I assume that these reasons should not be under the control of the trade mark owner. The CJEU ruled in the *Länsförsäkringar AB v Matek A/S* case that an owner of EU trade mark has market exclusivity for five years after the mark is registered. As a result, where there is a risk of misunderstanding, the proprietor retains the right to exclude anyone from using a similar or equivalent sign to his trademark, without needing to justify genuine usage of that mark. Nevertheless, in order to find a reasonable compromise between a monopoly of an owner of trade mark and the aims of the internal market, a trade mark owner must establish genuine usage after the grace period expires. As a result, the applicable five-year duration following the registration of the EUTM may be seen as a “grace period” within which any revocation is not acceptable.⁵⁶

One of the important issues concerning the use requirement is the “territorial” scope of the use. It is clear from the text of the relevant Articles⁵⁷ for the “use” requirement that the “genuine use” should be in the European Union. In the light of Brexit, holders of EUTM are concerned about this territoriality requirement because of the different views of EU and UK judges with regard to the territoriality requirement. The *Leno Marken case* is a key decision in EU law that attempts to address the geographical extent of the “use” criterion.⁵⁸ It was the outcome of an order for reference sought by the Hague Regional Court of Appeal in a matter of objection filed by Leno Marken against Hagelkruis Beheer’s application of OMEL in the Benelux Office for Intellectual Property, which Leno Marken was the proprietor of previous EUTM ONEL. The complainant had asked for evidence of legitimate usage of the EUTM. The defendant was solely able to show use requirement in the Netherlands. Therefore, the Court asked the ECJ if use of

⁵⁵ Ibid.

⁵⁶ Case C-654/15 *Länsförsäkringar AB v Matek A/S* [2016]

⁵⁷ Article 18(1) of the EUTMR; Article 16(1) of the European Union Trade Mark Directive

⁵⁸ Case C-149/11, *Leno Marken BV v Hagelkruis Beheer BV* [December 2012]

an EUTM inside a single Member State may be considered “genuine use” in the EU, and if not, what are the criteria in terms of territorial scope.⁵⁹ The CJEU ruled that the geographical boundaries of the Member States should not be taken into consideration when determining whether a trade mark has been placed into “genuine use” throughout the Union. It is considered “genuine use” of an EUTM when it is utilized in line with its fundamental function and for the goal of preserving market share for the products or services covered by it within the European Union.⁶⁰ It is evident from the judgement that the borders of Member States should be ignored while evaluating territorial scope since giving special consideration to the borders of Member States would undermine the aim of establishing single market and would be detrimental to the EUTMs’ unitary character.⁶¹ However, UK jurisprudence is contrary to the implemented principles in this decision. The UK judges are of the opinion that “use” in a single state is only appropriate in rare situations, and that “use” should be required in two or more countries. This view has been represented in the recent case of *the Sofa Workshop Ltd v. Sofaworks Ltd*.⁶²

In this case, the plaintiff held EUTM registrations for Sofa WORKSHOP, which were to be used in conjunction with a range of products and services. The trade mark was solely used in the United Kingdom. When the defendant started using the mark SOFAWORKS for comparable products and services, the plaintiff filed a claim for EUTM infringement. The defendant contended that the SOFA WORKSHOP mark, which had been registered for more than five years, had not been put to genuine use in the EU and therefore should be cancelled for non-use.⁶³ Judge Hacon stated that “genuine use” in just one Member State will not suffice to qualify as genuine use in the EU.⁶⁴ Moreover, it was stated that it is fair to anticipate that EUTM

⁵⁹ Ibid, ¶24.

⁶⁰ Ibid ¶57-58

⁶¹ Ibid ¶42

⁶² *The Sofa Workshop Ltd v Sofaworks Ltd* [2015]

⁶³ Ibid

⁶⁴ Ibid ¶22

will be used in a wider geographical region than a national trade mark. This implies that use in more than one member state is a baseline condition for genuine use in the EU.⁶⁵

Despite the different approaches presented by EU and UK judges in different cases, the EU and the UK achieved to agree on a solution. Article 54(5)(b) of the Withdrawal Agreement states that “the trade mark shall not be liable to revocation on the grounds that the corresponding European Union trade mark had not been put into genuine use in the territory of the United Kingdom before the end of the transition period”.⁶⁶ This provision solves the problem partly. In case of revocation for non-use, two cases should be differentiated: there can be a case that brand owner has an EUTM which it has not been used in the UK and only has been used in other parts of the EU. In another case, brand owner can have an EUTM which has only been used in the UK and not anywhere else in the EU. The question arises in this case if EUTM turns into a UK trade mark and a comparable UK mark, so one of those will be revocable for non-use. The Withdrawal Agreement does not contain any provision of what will happen to the EUTMs which are only used in the UK. It means that the holders of EUTMs that they solely used in the UK, not any part of the EU would be subject to the proceedings of revocation for non-use. However, after the examination of reports made by several law firms, I believe the same rule will apply to the EUTMs which solely used in the UK till the end of transition period. In other words, in a revocation suit which involves non-use of a comparable UK trade mark, it is adequate to show genuine use of the EUTM in the EU rather than necessarily in the UK. The mark does not need to be used in the UK before January 1, 2021, since use outside the UK will be satisfactory to demonstrate genuine use in the EU. However, this regulation does not apply to trademarks registered at the UKIPO on or after January 1, 2021.⁶⁷

⁶⁵ Ibid ¶23

⁶⁶ Article 54(5)(b) of the Withdrawal Agreement

⁶⁷ Paulina Mleczak, Lena Marcinowska, Monika Wieczorkowska, Sandra Lipinska, “Intellectual Property after Brexit” (December 2020): <https://codozasady.pl/en/p/intellectual-property-after-brexite>

2.3 The principle of Exhaustion is the primary post-Brexit “red flag”

The principle of exhaustion is also one of the challenged areas after Brexit. Before analyzing the impact of Brexit on the principle of exhaustion with regard to trade mark protected goods or services I will examine what is parallel trade and the role of the principle of exhaustion in parallel trade in the EU. Parallel trade is the term used to refer to the importation and exportation into a state within the European single market of products that have been put on the market in another country by the IP rights owner or with its permission by a third-party trader. In other words, the sale or exchange of products across international borders by third-party merchants operating inside the European Union’s single market.⁶⁸ Parallel imports engage in two concepts namely between freedom of movement of goods which is one of the fundamental principles in the EU and on the other side intellectual property rights.⁶⁹ IP rights provide monopoly which have a geographical scope. One of the possible actions for infringing this right is importation. In other words, for instance if a business owner import eyeglasses protected with a trade mark from the US into the UK, so this act will as a rule infringe the owner of a UK trade mark owner. But if the importation is from another country within the EU, for example of the good has been out on the market in Poland with the right owner’s consent, then the rights holder cannot prevent the importation into the UK because free movement of goods outweigh national trademarks. The concept which strikes the balance between this fundamental freedom and intellectual property rights is the principle of exhaustion of rights (first-sale rule).⁷⁰ When a product had been put on the market the rights on that product are said to have been exhausted.

⁶⁸ Beatriz San Martin, Shishu Chen and John Schmidt, “End of Brexit transition period: Exhaustion of Intellectual Property Rights and Parallel Trade in the UK and EU” (December 2020)

⁶⁹ UK IPO, “UK’s future exhaustion of intellectual property rights regime” (June 2021)

⁷⁰ Darren E. Donnelly, “Parallel Trade and International Harmonization of the Exhaustion of Rights Doctrine” (1997)

Exhaustion of rights is a concept that has been embraced by a number of jurisdictions across the world and three types of exhaustion doctrine should be differentiated what are national, regional and international.⁷¹ In the context of the impact of Brexit, I will examine regional exhaustion principle. The concept of regional exhaustion of intellectual property rights is related to the European single market.

When it comes to the European Economic Area (EEA), the concept of “exhaustion of rights” is used to refer to the promotion of free movement of commodities across borders.⁷² According to Article 34 of the Treaty of Rome, intellectual property rights have the capacity to obstruct the free circulation of goods. In order to avoid intellectual property rights from degrading this fundamental concept, it has been determined that once a product has been put on the market with the permission of the IP right holder, he or she is prohibited from limiting any future circulation of the product.⁷³ This means that the IP right holder will not be able to prevent any future resale or circulation of such goods in the European Economic Area. To provide an example, the owner of a trade mark cannot prohibit the sale of certain goods by claiming his or her trademark rights. Consequently, the existing legal framework presents itself as a system of regional exhaustion, in which intellectual property rights are no longer enforceable after they have been placed on the market in the European Economic Area (EEA) by the right holder.⁷⁴ The exhaustion principle has been incorporated into the EU legislation regulating trade marks. Article 15.1 of the TMD and EUTRM states that the owner of a trade mark is not entitled to restrict the use of that trade mark in connection to products that have been placed on the market

⁷¹ Irene Calboli, “Trade mark Exhaustion in the European Union: Community-wide or International? The Saga Continues” (2002) pp47-49

⁷² Travers Smith LLP, “Brexit: implications for holders of intellectual property and domain names

⁷³ TMD Article 7(1), EUTM Article 13(1)

⁷⁴ Marc Mimler, Luke McDonagh, “Intellectual property law and the Brexit: a retreat or a reaffirmation of jurisdiction?” (2017) pp159-179

in the Union by the proprietor or with his permission.⁷⁵ The concept of exhaustion of rights under a registered trademark has been also incorporated into the domestic legislation of the UK. Section 12(1) of the Trade Marks Act stipulates that the use of a registered trade mark in regard to products that have been placed on the market in the European Economic Area under that trade mark by the owner or with his permission does not constitute infringement.⁷⁶ One of the prominent cases concerning the principle of exhaustion is *Silhouette v Hartlaur* which helped to clarify the exhaustion principle. The language of the Trade Mark Directive was ambiguous as to whether the concept of EEA-wide exhaustion is simply a minimum requirement that allows Member States to apply more liberal standards such as international exhaustion, or if it should be used as the general criteria to all intra-EEA commerce. The CJEU ruled in this case that EU member states were not allowed to establish an international exhaustion system in which products may be transported into a country from any other country, and that they must only have the regional EEA regime. As a consequence, EU member states must maintain a regional EEA exhaustion system, and no rights may be exhausted for products put on the market in a third country that is not a member.⁷⁷

Returning back to the effect of Brexit on the concept of exhaustion, the UK has become a “third nation” and was no longer a member of the EU when the transition period ended. During the transition phase, EU law applied to and in the UK in its full. However, after the transition period ended, EU legislation governing the exhaustion of intellectual property rights was no longer apply to the UK.⁷⁸ Article 61 of the Withdrawal Agreement explicitly states that intellectual property rights that were exhausted under EU law in both the EU and the UK before the

⁷⁵ Article 15.1 of the Directive (EU) 2015/2436 of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (December 2015); Article 15.1 of Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark (June 2017)

⁷⁶ Section 12(1) of the Trade Marks Act 1994

⁷⁷ Case C355/96, *Silhouette International Schmied v Hartlauer Handelsgesellschaft GmbH* [1999] ¶¶25-30

⁷⁸ Mark Webster, Hugh Dunlop, “UK Government to hold consultation on exhaustion of IP rights” (February 2021)

conclusion of the transition period, before January 1, 2021, stay exhausted in both the EU and the UK. As a result, products put on the market in the UK by or with the permission of the intellectual property right holder by 31 December 2020 will be considered exhausted in the rest of the EU, and in the UK as well.⁷⁹ Following IP completion day, the UK may unilaterally choose which exhaustion regime to use inside its borders. The UK government has enacted legislation to continue to recognize EEA exhaustion.⁸⁰ According to this law, trade mark holders in the UK will be unable to prohibit parallel imports from the EEA into the UK when products are legally put on the market by the trade mark owners or with their permission. However, since the UK will no longer be a member of the EEA, intellectual property rights in products that have already entered the UK market will not be considered exhausted in the EEA after the transition period.⁸¹ This implies that an intellectual property rights holder in the EU may object to the importation of products into the EU even if those items have been legally placed on the market in the United Kingdom by that same intellectual property rights holder or with his permission.⁸² I will try to explain this regime with an example. If a trade mark owner has a factory in the UK and it produces IP protected wafers. The company shipped 100 boxes to a buyer in Germany from the UK factory. After a few months the German buyer is left with 50 boxes. A company in France buys 30 boxes from them and sells them back into the UK. At the moment, once a company sell goods within the EEA any intellectual property rights such as trade mark on the packaging are exhausted. This means that you cannot use your trade mark or any other IP rights to stop the resale or distribution of your goods. Traders can freely transport products around the EEA without the permission of the IP holder. Those 30 boxes of wafers from France can legally move across the EEA. After the Brexit, the UK will no longer be part

⁷⁹ Article 61 of the Withdrawal Agreement

⁸⁰ EU Exit Regulation 2020, <https://www.legislation.gov.uk/ukdsi/2020/9780348209839/contents>

⁸¹ Ibid.

⁸² European Commission, “Withdrawal of the United Kingdom and EU rules in the field of Exhaustion of Intellectual Property Rights” (June 2020)

of the EEA. After Brexit any wafer sold in the EEA for the first can still be imported back into the UK. The German company can still parallel import any of those wafers back to the UK as the IP rights will be considered exhausted in the UK. If the UK reseller wants to export 20 boxes of wafers which were originally marketed in the UK to a company located in the EEA, then the IP rights attached to those goods may not be considered exhausted in the EEA after Brexit. IP right holder may use their right to stop the entering of those goods into the EEA. Consequently, rights holders may prevent the parallel import of products into the European Economic Area, and anybody that is located in the UK wishing to parallel export these goods into the European Economic Area should first acquire permission from the rights holder in the EEA. As a result, an asymmetrical exhaustion system will apply to cross-border commerce between the United Kingdom and the European Economic Area. This regime places the parallel exporters which are in the UK in a disadvantage position. Therefore, the principle of exhaustion which will be applied in the UK needs to be reexamined. Following I will explore national and international regimes for the exhaustion principle and will try to come to a result for balancing interests of different parties.

The United Kingdom may reintroduce the international exhaustion system. In this situation, IP rights are usually exhausted when the products have been placed on the market by or with the agreement of the right holder. A theory of international exhaustion like this would make no distinction between EEA members and non-EEA nations.⁸³ Should the United Kingdom adopt an international exhaustion system it would enable the import of products placed on the market worldwide. This alternative is consistent with those who want to make the UK a center for global free trade after Brexit, and it is believed to benefit consumers owing to low priced goods.

⁸³ Kate O'Rourke and Olivia Gray, "Brexit: changes ahead for exhaustion of rights (August 2017)

On the other side, an alternative system of national exhaustion would be implemented. Under the doctrine of national exhaustion, once branded goods are put on the market by the owner or with his permission, the owner's rights are deemed exhausted only within the country in which the products are sold. However, the owner will still have the option of challenging the importation of real products carrying his trademark that have been placed on the market outside of the territory of the country, in this case, the UK.⁸⁴ In other words, only products that are introduced for the first time on the domestic market in the United Kingdom would be sufficient to exhaust the rights of the IP holder. For products that have been put on the market anywhere in the globe, the IP holder has the right to prevent these things from being resold in the United Kingdom. The transition from a unilateral regional exhaustion system to a national framework is expected to benefit rights holders by giving them more control over the inflow of products.⁸⁵ A concept of national exhaustion would indicate a strong protection of domestic right holders by prohibiting parallel imports. Nevertheless, national exhaustion would cause a reduction in cross-border competition and a rise in protectionism in the UK. Overall, it seems to be debatable whether a national exhaustion system that protects the home market will convey the necessary signals to prospective future trading partners in a positive way.

International exhaustion regime would represent a shift away from the pre-Brexit notion of regional exhaustion and toward a more expansive system that maintains the market open for parallel importers from the European Union while also opening it up to parallel importers from non-EU countries. An international exhaustion system may serve as a sign of a country's willingness to engage in fair competition. Consequently, any solution must properly balance the many interests at stake. A suggested theory of international exhaustion would accomplish

⁸⁴ Luke McDonagh and Marc Mimler, "Intellectual Property Law and Brexit: A Retreat or a Reaffirmation of Jurisdiction?" (2017) p.179

⁸⁵ Mark Mimler, "the Effect of Brexit on Trademarks, Designs and other "Europeanized" Areas of Intellectual Property law in the UK" (December 2017)

this balancing act by creating an open market to the globe while protecting the legitimate interests of trade mark holders.

CONCLUSION

The ongoing volatility around Brexit is leading an increasing amount of businesses to reconsider how they handle brand protection. From an intellectual property perspective, Brexit necessitates reformation of British domestic laws in the field of trade marks in response to the loss of access to EU intellectual property registration and enforcement regimes. It would also lead to British intellectual property laws diverging from the EU standards they complied with pre-Brexit. As a result, trade marks owners will be deprived of benefits that EU intellectual property legal framework provided. Even if their laws were then to diverge through subsequent legislative action and judicial interpretation, the limitations imposed by international agreements should guarantee that the intellectual property rules of the United Kingdom and the European Union remain largely standardized after the Brexit. In addition, the decisions of the EU courts will no longer apply to UK. In my view, it can be considered one of the main drawbacks of leaving the EU since EU jurisprudence has contributed a lot to the interpretation of laws and by this way to the harmonization of trade mark law. In practice, judicial rulings will probably lead to diverse interpretations in different jurisdictions, disparities will probably emerge between British and EU applications of intellectual, property laws, and British and EU intellectual property law may start to diverge on particular points.

The analysis of the relevant provisions of the Withdrawal Agreement shows that the document provides minimum standards for the post-Brexit regulation of EUTMs, but even if the immediate effect is not costly, at least after ten years it will be double costly for the owners of “cloned” UK trade mark rights. Although the “cloned” UK trade marks will initially be free, trade mark owners will have to pay the renewal fees for UK trade marks including to payments for the renewal of the EUTM for the remaining 27 member states of EU in the future. If a trade mark is infringed upon in more than one European country, the trade mark owner must file a

separate lawsuit in the United Kingdom, while before Brexit it was possible to file a single lawsuit in a single EU court in respect of all EU28 Member States and get EU-wide remedy. Regarding the issue of revocation problem for non-use, the Withdrawal Agreement provides a provision which states that the trade marks will not be liable for revocation based on the fact that they have been used in the EU solely, not in the UK. Despite the fact that this provision solve the issue partly. There can be a case of cancellation for non-use issue which the trade mark solely used in the UK, not in the remaining part of the Europe. In this case, I suggest that the same rule will apply to this case at least for the duration of five years period. Furthermore, concerning the issue of the principle of exhaustion, the EU Exit Regulation 2020 ensures that the regional exhaustion system will continue to operate when the United Kingdom leaves the EU. Cross-border trade between the United Kingdom and the European Economic Area is subject to an asymmetrical exhaustion system, which is defined as follows: A drawback of this method is that it disadvantages parallel exporters who operate in the United Kingdom. Therefore, I believe that the United Kingdom should adopt an international exhaustion system that takes a balanced approach to the interests of different stakeholders, including trade mark right holders, customers, and competitors.

Regarding the further research with regard to the impact of Brexit on trade mark regulation, I would advise to continue research on the topic of the impact of Brexit in the registration of non-conventional trade marks and the approach of UK judges on this issue since the courts in the United Kingdom are skeptical regarding the ability of non-conventional marks such as shapes, scents colors to function as trademarks.

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