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Brexit: where next for EUTMs?

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All conversation (about trade marks at least) in the UK relates to Brexit at the moment. A lot has been written when in all honesty there is very little to say. [Verena's post on 28th June](#) is excellent – the only thing I would add is that whilst I am sure that no current EUTM owners will find themselves in a position where they no longer own rights where they did before, there are many ways in which this could be achieved. One option that does not seem to be mentioned is that EUTMs obtained before the UK

leaves the EU would continue to have effect in the UK. Whilst it would perhaps be odd that a right relating to the EU would have effect in a non EU country, there is no formal legal reason why it could not be the case, and this situation is an odd one!

And it makes me wonder as to whether trade mark protection should as a matter of course be limited only to follow political unions. If the UK does leave the EU what will follow? Will Scotland and/or Ireland leave the UK? Will other countries leave the EU? One thing is certain is that how trade marks operate will not be high on the list of issues to resolve.

So it would serve those heavily involved in the trade mark world to think what systems and unions would be beneficial to brand owners and to see how these could be achieved rather than leaving it to be worked out as a legislative after thought in a time of political upheaval.

The EUTM system has undoubtedly been a huge success. It is the main way that brand owners protect their marks in the EU if they have an interest outside of one or two countries. The main attractions of low cost, unitary protection, simplified/unified enforcement (in certain circumstances), and being able to support rights on the basis of use that does not extend throughout the EU are still as useful as they were.

However, as the EU has grown, some of these features have also caused problems. Should protection be refused on the basis of a lack of distinctive character in one country out of 28? Should an opposition or other attack succeed on the basis of a prior right in one country? Should an EUTM be kept valid by use in one country (an issue which in any case has been questioned by various courts)? These are bigger issues because of the huge number of countries now involved, and in reality the diversity of the cultural and legal systems of EU countries, despite apparent

harmonisation through EU legislation.

Would brand owners be better served by smaller groupings of countries? Can we develop a union which keeps the good aspects of the EUTM system, but apply it to more limited ranges of countries? What about a Scandinavian TM with unitary effect across Norway, Finland, Sweden and Denmark? What about an Eastern European TM? What about a Western European version covering the UK, Germany, France, Spain, Benelux and Italy?

Because of closer cultural and legal approaches of the countries in question, such systems might work more closely in line with the commercial realities of the brands that the systems are there to protect. Because of the more restricted range of countries in each system, issues of the unitary nature of the right are less problematic. Arguably, being prevented from owning the right because of an issue in one country feels proportionate where we are talking about 4-6 countries. Wide enforcement across countries that are closely linked economically seems sensible. Maintaining a right on the basis of use in one country also feels more reasonable when you are talking about a right that extends to neighbouring ones. It would also force brand owners to engage a little more with the reality of where they really need protection.

I appreciate that this would not be easy to achieve. Indeed many may disagree with the approach. But the Benelux system shows that this approach is possible. The fact that it would be far easier to stick to existing systems or alignment with political unions is not a reason not to engage with whether we could improve the way things are done to create a better system for brand owners. Leaving our systems in the hands of politicians does not seem like the right way to go!

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