28 June 2017

Subject: Position paper transmitted to EU27 on Goods placed on the Market under Union law before the withdrawal date

Origin: European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU

Objective: For discussion at the Council Working party (Art. 50)

Remarks: The attached position paper on Goods placed on the Market under Union law before the withdrawal date contains the main principles of the EU position in this regard, to be presented to the UK in the context of negotiations under Art. 50

Essential Principles on Goods placed on the Market under Union law before the withdrawal date

The Withdrawal Agreement should ensure that a good which has been lawfully placed on the single market before the withdrawal date can continue to be made available on the market of the United Kingdom and on the single market after the withdrawal date, i.e. once the United Kingdom has left the single market, under the conditions set out in the relevant Union law on product rules applicable on the withdrawal date. This means that a good lawfully placed on the market before the withdrawal date and still in the distribution chain in the United Kingdom or in the single market after the withdrawal date can in principle continue to be made available if it complies with Union product rules applicable on the withdrawal date.

I. General principles

The following general principles should apply in accordance with Union law, as interpreted by the Court of Justice of the European Union on the date of entry into force of the Withdrawal Agreement:

(1) Any good lawfully placed on the single market before the withdrawal date can, after that date, continue to be made available on the market of the United Kingdom or on the single market under the conditions set out in the relevant Union law on product rules applicable at the withdrawal date and circulate between these two markets. Where provided in Union legislation, such a good should keep the faculty of being lawfully put into service in the United Kingdom or in the single market after that date.

This principle addresses only product rules (i.e. rules governing the manufacturing and characteristics of goods). 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.

This principle is without prejudice to the possibility for either party to take non-discriminatory measures to prohibit or restrict the making available of a good on their market justified on serious grounds of health or safety of persons or other serious aspects of public interest protection.

(2) The Withdrawal Agreement should also provide for continued oversight of these goods.

II. Definitions

Placing on the market[1] is defined as the "*first making available on the market*" (by the manufacturer or the importer).[2]

[1] In the case of marine equipment, the equivalent notion refers to "placing on board".

[2] Article R1(2) of Annex I to Decision No 768/2008/EC of the European Parliament and of the Council.

Making available on the market is defined as "*any supply of a product for distribution, consumption, or use on the […] market in the course of a commercial activity, whether in return for payment or free of charge*".[3] A good is "placed on the market" only once, but may be "made available"[4] several times throughout the supply chain (first wholesaler, second wholesaler, etc., retailer) before it reaches the final user (consumer or professional user) or is further processed into another product.

The concept of placing on the market refers to each individual good, not to a type of good, and whether it was manufactured as an individual unit or in series.[5]

"Putting into service" refers to the moment of first use by the end user for the purposes for which the good was intended.

III. Material scope

Without prejudice to section (IV), the principles in section (I) apply to all goods in the scope of the fundamental freedom of movement of goods as set out in the Treaties. By way of illustration this covers the following (non-exhaustive list):

- food, feed, products of animal origin, and plants;
- consumer products (toys, textiles, cosmetics, etc.);
- health products (pharmaceuticals (human and veterinary use), medical devices, incl. in-vitro diagnostics);
- products used in/for transport (aircraft, automotive vehicles, railway vehicles, vessels, marine equipment, etc.);
- chemicals (industrial chemicals, and special chemicals such as plant protection products and their active substances, biocidal products and their active substances, fertilisers, detergents, drug precursors, explosive precursors, etc.);
- machinery, lifts, electrical equipment, and construction products.

IV. Live animals and animal products

The Withdrawal Agreement should specify that live animals and certain germinal products[6] the movement of which has been initiated before the withdrawal date can enter the United Kingdom and the single market on the basis of rules governing intra-EU movements.

All animal-derived food and animal-derived feed, as well as animal by-products entering the single market as of the withdrawal date should be subject to the applicable rules for importation.

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3 Article R1(1) of Annex I to Decision No 768/2008/EC of the European Parliament and of the Council.

4 For more guidance on these definitions see the detailed Commission notice of 2016 ("Blue Guide") on the implementation of EU product rules, OJ C272, 26.7.2016, p. 1.

5 *Idem*, p. 18.

6 Hatching eggs and fresh semen, oocytes and embryos.

V. Ongoing marketing authorisation procedures

The Withdrawal Agreement should ensure that risk assessments, approvals and authorisation procedures of biocidal products, plant protection products, and medicinal products (human and veterinary) led by a United Kingdom authority which are ongoing on the withdrawal date are transferred where appropriate to another national competent authority.[7]

VI. Continued oversight

As of the withdrawal date the United Kingdom will no longer be bound by the EU *acquis* on market surveillance, including the rules governing the communication of the results of such market surveillance to the Commission or Member States. The Withdrawal Agreement should therefore establish mechanisms for the mutual exchange of relevant information and for cooperation, after the withdrawal date, on market surveillance carried out in the United Kingdom and in the single market as regards non-compliant goods placed on the single market before the withdrawal date.

The Withdrawal Agreement should also provide for the possibility to request the communication of information in certification files of notified bodies located in the United Kingdom to a notified body established in the EU27 and *vice-versa*.

[7] In exceptional cases, the possibility to request the transfer of documentation held by the United Kingdom should be provided for in relation to procedures completed before the withdrawal date.