

## **Brexit Update: UK customs enforcement from 1 January 2021**

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HM Revenue and Customs ("HMRC") has provided a long-awaited update on the UK Customs Enforcement process which rights holders and representatives will need to follow once the transition period ends. A new form for UK Applications for Actions (AFAs) has been launched and is available for use now. Whilst the UK AFA form will be familiar to many, there are some key changes and we outline these below. Rights holders should consider their existing AFA protection now, to ensure that there is no lapse in protection after 31 December 2020.

### **EU Customs Enforcement post-Brexit**

The European Commission's Notice to Stakeholders dated 17 August 2020 clarified the post-Brexit treatment of EU AFAs which form part of the framework under Regulation (EU) No 608/2013.

From 1 January 2021:

- **Existing EU AFAs filed via an EU27 Customs office** will remain valid and enforceable in the EU27 but will cease to have effect in the UK;
- **Existing EU AFAs filed via HMRC** will remain valid and enforceable in the UK but will cease to have effect in the EU27;
- Any **new EU AFA filed via an EU27 Customs office** will apply across EU27 only and will not be enforceable in the UK. To obtain protection in the UK, the UK national system must be followed.

### **UK Customs Enforcement post-Brexit**

The draft Customs (Enforcement of Intellectual Property Rights) (Amendment) (EU Exit) Regulations 2019 (1 March 2019), offered brands and rights owners some reassurance that the UK system post-Brexit would largely mirror the existing EU process. On 3 December 2020, HMRC clarified a number of the remaining technical details.

- Until 31 December 2020, the existing EU AFA form may be used to amend, extend and file a new UK AFA.
- From 1 January 2021, new UK AFAs must be filed online via the HMRC portal. The content of the form is largely the same as the existing EU AFA form: brands and rights owners will need to provide details of relevant IP rights, evidence of ownership, authority of any representative

to act on their behalf and information to help identify counterfeit products. The system mirrors the user interface of UK registered rights applications forms, presenting the user with a number of multiple choice and data input questions and allowing for documents to be uploaded.

- As noted above, existing EU AFAs filed via HMRC will remain valid and enforceable in the UK: they effectively convert to UK only protection (given the lapse in EU27 protection). The 'residual' AFA will remain valid until the expiry of the existing term and can be enforced until expiry: there is no need to re-file the application in the UK whilst it remains valid. Details of these AFAs will be recorded in the HMRC system but renewals must be processed via the new online system.
- Rights owners should also consider filing a new EU AFA via an EU27 customs office to maintain continuous protection in the EU27 after Brexit.

### **Main changes to the UK AFA process**

- The new UK AFA form can only be accessed using a Government Gateway ID and password. This portal will also allow UK AFAs filed via the system to be extended;
- Applicants must specify whether the AFA is to cover (1) Great Britain and Northern Ireland, (2) Great Britain only or (3) Northern Ireland only;
- Rights holders will need to supply their Economic Operators Registration and Identification (EORI) number – guidance on obtaining an EORI number can be found on the gov.uk website. Crucially, legal representatives filing UK AFAs on behalf of their clients will also need to provide a separate EORI;
- Only UK IP rights can be relied on: where EUTMs or RCDs have been cloned to create equivalent UK registrations, the new UK registration number must be listed – if UK equivalent protection is to be requested for pending EUTMs or RCDs in the period through to 30 September 2021, rights owners must remember to add these new UK registrations to the UK AFA once granted: this will not happen automatically;
- Existing representatives should consider obtaining a new letter of authorisation confirming that they are authorised to file the UK AFA on behalf of the rights owner, under The Customs (Enforcement of Intellectual Property Rights) (Amendment) (EU Exit) Regulations 2019, as well as Regulation (EU) 608/2013 to which the 2019 Regulations refer;
- Rights owners looking to protect geographical indications in Northern Ireland can file an AFA using the EU AFA form either via HMRC or an EU27 Customs office, by virtue of the Protocol on Ireland/Northern Ireland but should be aware that the territorial scope of protection will differ depending on the chosen filing route.

It is important for rights owners to examine their existing AFA protection to pre-empt any potential gaps which could materialise after 31 December 2020. Steps can be taken now to ensure continuous protection and enable a smooth transition and consistent enforcement strategy into the New Year.

### **References:**

For the full HMRC guidance, see <https://www.gov.uk/guidance/apply-for-action-to-protect-your-intellectual-property-rights>  
[https://ec.europa.eu/info/sites/info/files/brexit\\_files/info\\_site/intellectual\\_property\\_enforcement\\_by\\_customs\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/intellectual_property_enforcement_by_customs_en_0.pdf)  
<https://www.gov.uk/guidance/apply-for-action-to-protect-your-intellectual-property-rights>  
<https://www.gov.uk/guidance/apply-to-extend-your-application-to-protect-your-intellectual-property-rights>  
<https://www.legislation.gov.uk/uksi/2019/514/contents/made>

**For more information, please contact:**

*If you have any questions on how this will impact you, please contact Bird & Bird to arrange a discussion with one of our team.*



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