

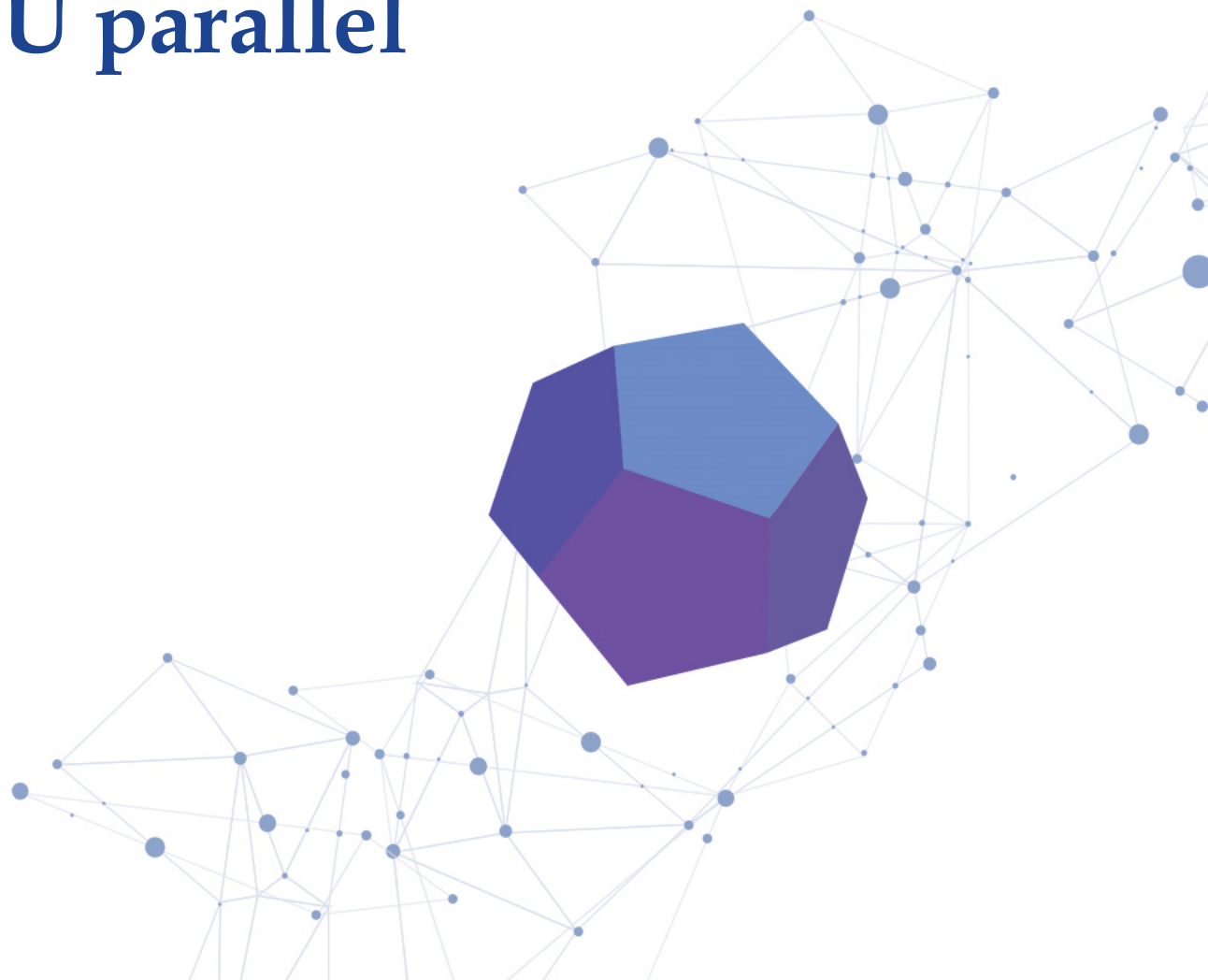


UK competition law and EU parallel imports post-Brexit

AICIPI Conference

Milan, 8 May 2024

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Outline

1. EU Competition Law and Distribution Agreements
2. UK Competition Law post-Brexit
3. Exhaustion of IP rights post-Brexit

EU competition law and distribution agreements



What is a vertical agreement?

1. An agreement or concerted practice...
2. between undertakings at different levels of the production or distribution chain
3. which relates to the conditions under which the parties may purchase, sell or resell certain goods or services

Vertical agreements are inherently less likely to raise competition law concerns, unless they restrict retail prices or impose prohibited resale restrictions (eg restricting cross-border sales or online sales)



Legal framework

- Article 101 TFEU prohibits anticompetitive agreements, unless they deliver counterbalancing efficiencies
- Generous EU ‘block exemption’ safe harbour for vertical agreements (**Vertical Agreements Block Exemption Regulation/VBER**), supported by detailed Guidelines (updated in 2022)
- VBER protects all vertical agreements from Article 101 prohibition, provided that:
 - parties are **not competitors** (unless dual distribution exception applies)
 - parties’ market shares **do not exceed 30%**
 - agreement does not contain any **hardcore restrictions**:
 - RPM
 - Territorial or customer restrictions (restrictions on ‘where and to whom sold’)
 - Restrictions on active or passive sales within SDS



Application to common European distribution models

- **Exclusive distribution**
 - Brand allocates territories (or customer groups) to a single reseller ('exclusive distributor') and restricts each reseller's ability to make *active* sales into other territories (or customer groups) that the brand has exclusively allocated to another reseller or reserved to itself
 - *Passive* sales (including unsolicited online sales) into exclusive territories/customer groups within the EEA must be permitted
 - Only works where *target territory* has been exclusively allocated or reserved
- **Selective distribution**
 - Brand limits access to its products to resellers who have been selected on the basis of specified criteria
 - Creates closed system from brand to end customer
 - All resellers must be free to sell actively and passively to other SDS members
 - Products concerned must be sold *only* via SDS
- **Open or free distribution**
- **Agency**

Key changes under new VBER

1. Exclusive distribution

- supplier may require distributor to flow down resale restrictions to its *direct* customers
- supplier may appoint up to *five* exclusive distributors within the same territory ('shared exclusivity')

2. Selective distribution

- Greater ability to prevent sales from outside SDS territory to unauthorised resellers within territory
- Greater flexibility for suppliers to apply different criteria for on- and offline sales

3. Dual distribution exception

- Extended to cover more levels of the supply chain (brands, importers, wholesalers)
- Information exchange in dual distribution included in safe harbour but only where it is directly related to implementation of agreement *and* necessary

4. Marketplace restrictions

- Additional guidance confirming *not hardcore* restriction, so suppliers free to decide whether to prohibit altogether or reserve marketplaces to themselves or a sub-group of resellers

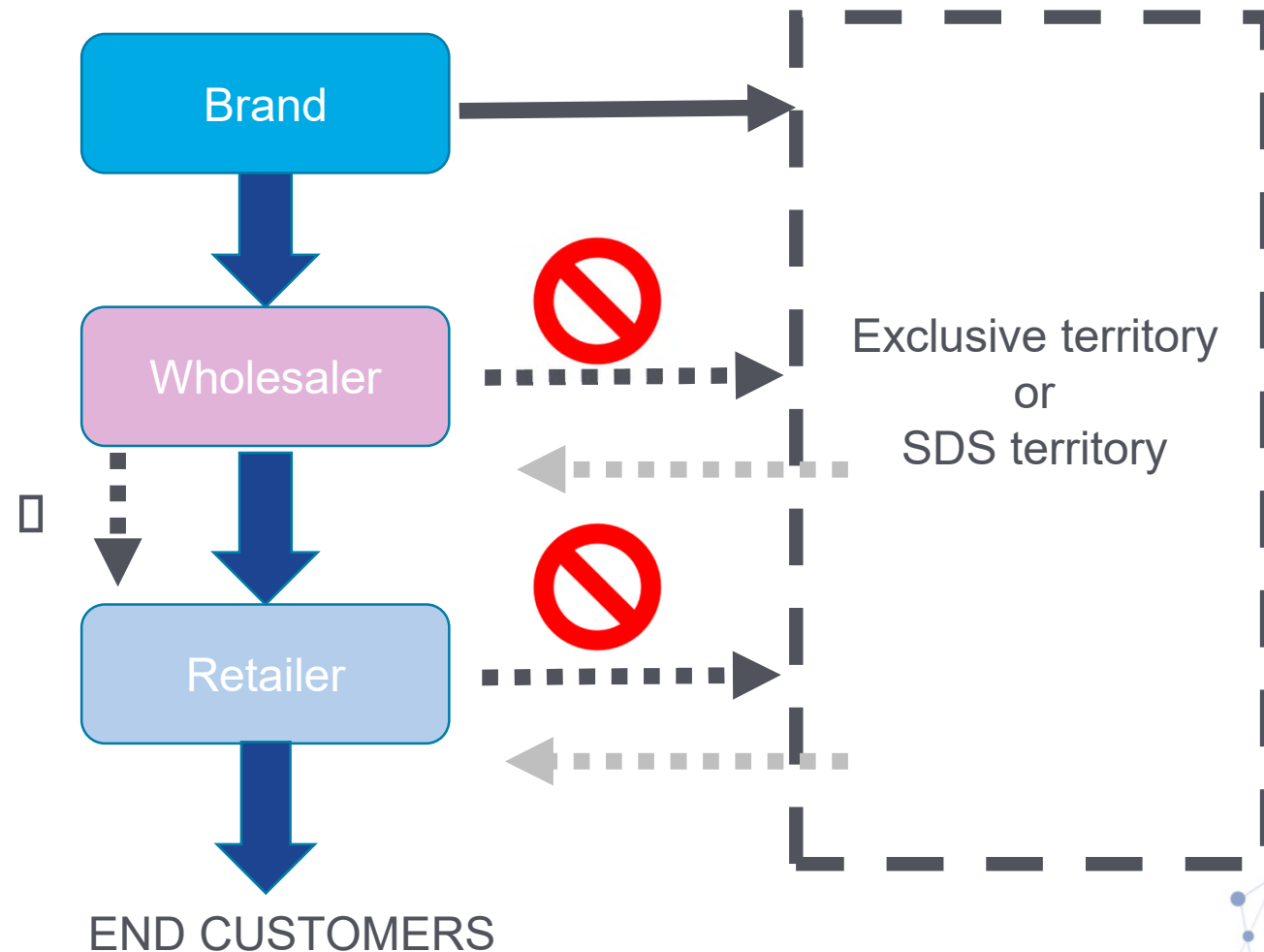
Flow through of restrictions

Brands now free to:

- restrict *active* sales into exclusive territories by their customer and *their customer's direct customers*
- prohibit *all sales* to unauthorised distributors in SDS territories by *their customer and all of their customers' customers*

Passive sales into exclusive territories must still be permitted, as must retailers' active and passive sales to end customers in SDS territory

Restriction of *active or passive* sales to *authorised* distributors in SDS territory not permitted but SDS members can be obliged to purchase only from other SDS members





UK competition law post-Brexit

The impact of Brexit on the UK verticals framework

UK as Member State



Brexit day

End of transition period

Expiry of current VBER



New VBER

VBER

Parallel exemption

VBER

Parallel exemption

VBER

'retained VBER'

VABEO

23 June 2016

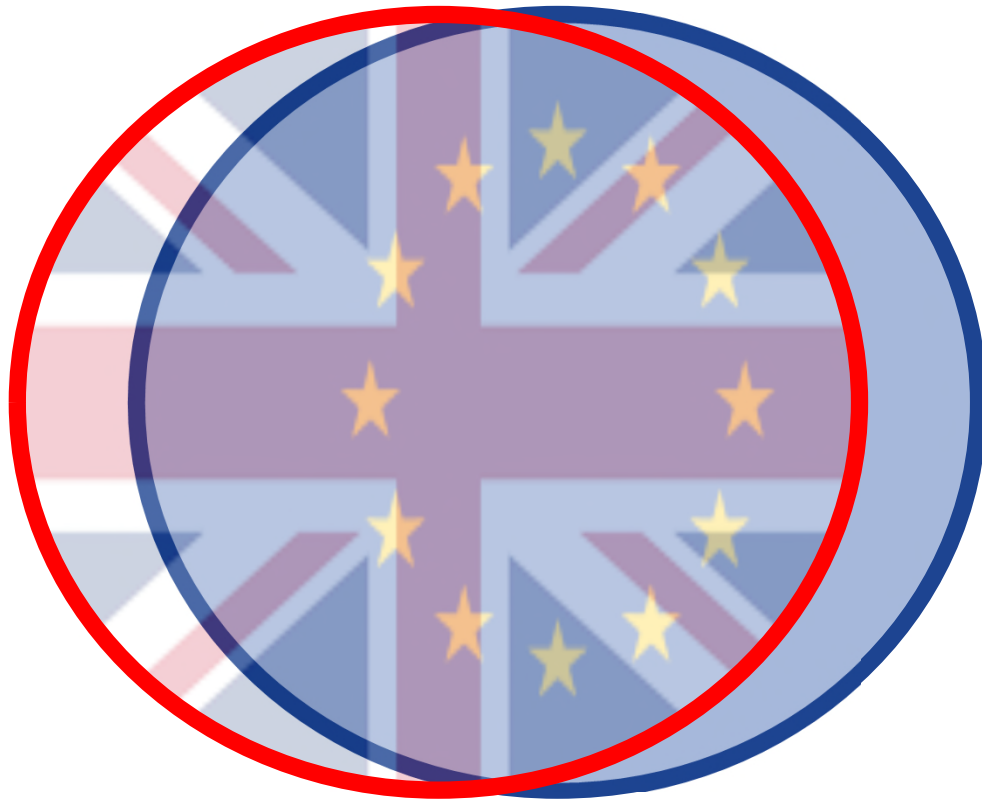


31 January 2020

31 December 2020

1 June 2022

Where we are now



Almost
nothing
has
changed



Everything
has
changed

Divergence points

	EU VBER	UK VABEO
Treatment of hybrid online platforms	Service agreements excluded from VBER safe harbour	No specific limitation
Shared exclusivity	Maximum of 5 buyers	“Limited number of buyers”
MFNs/parity clauses	Wide online MFNs excluded restriction	Wide offline and online retail MFNs hardcore restriction
Combination of exclusive and selective distribution in same territory	Not permitted	Permitted
Tacit renewal of non-competes	Permitted	Excluded

Status of absolute bans on parallel trade between UK and EU

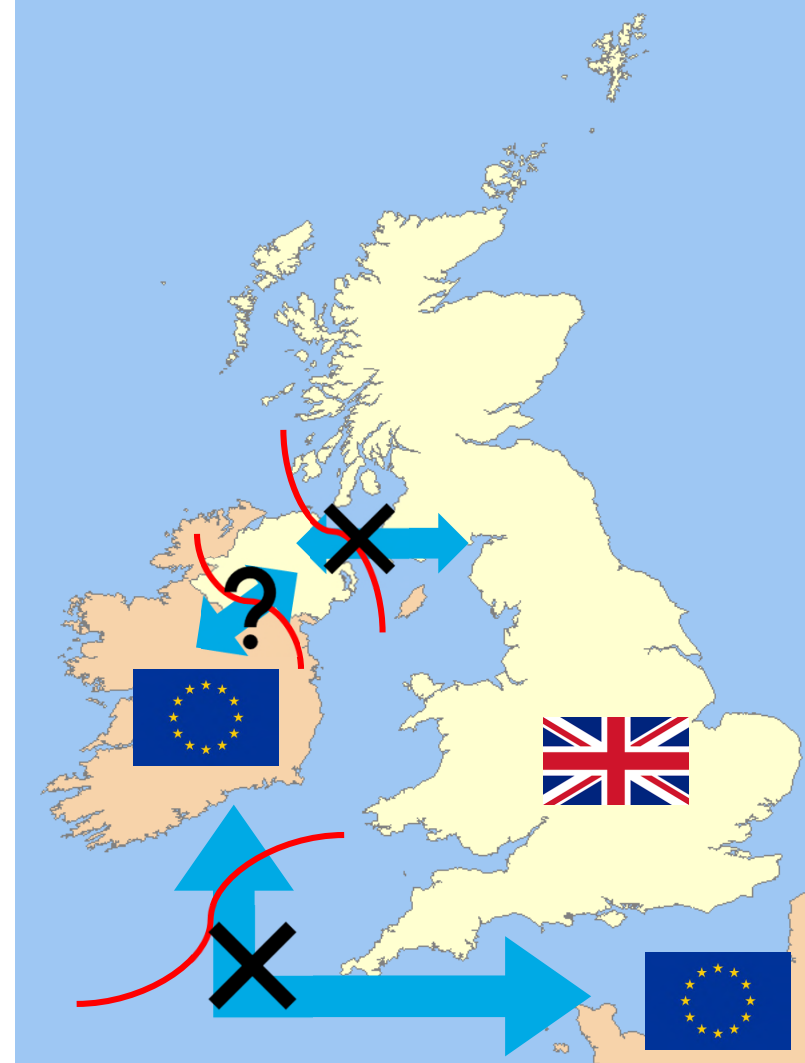
- Total ban on sales into and out of the UK unlikely to infringe *EU* competition law (cf *Javico*)
- How will the CMA treat bans on sales from EU into the UK under UK law?
 - UK competition law currently applies only where an agreement affects trade within the UK *and* is implemented in the UK (but test due to change to direct, substantial and foreseeable effects)
 - Restrictions on sales *within* the UK (including NI/GB) will be hardcore restrictions
 - CMA view is that restrictions on sales into UK to be analysed as effect, not object, cases

Insofar as the Chapter I prohibition is engaged, where a vertical agreement only concerns restrictions relating to exports outside the UK or imports/re-imports from outside the UK, the CMA is unlikely to regard it as having the object of restricting competition within the UK. The CMA would instead assess whether such a vertical agreement has the effect of restricting competition within the UK, taking into account the nature of the products or services, as well as the real operating conditions and the structure of the market concerned.

CMA VABEO Guidance

How to deal with Northern Ireland?

- Restrictions on sales *within* the UK (including NI/GB) will be hardcore restrictions under VABEO, so may **infringe UK law**
- Restrictions on sales between NI (*de facto* in Single Market) and Ireland difficult to police and potentially incompatible with pan-Ireland distribution networks
- Restrictions on sales between Ireland and rest of EU hardcore restrictions under VBER so may **infringe EU law**
- What about impact of different regulatory regimes between NI and GB?



How to deal with Northern Ireland?





Exhaustion of IP rights post-Brexit

EU law principle of exhaustion

1. Core principle of EU Single Market rules is that the ability of an IP rights owner to control distribution of a product (for example, by asserting its trade mark rights) is **exhausted when that product is first placed on the market** within the EEA with its consent
2. Limits ability of rights holder to use IP rights to control distribution and resale once a product is in free circulation within the Single Market (subject to argument that consent not actually given, eg in event of sale in breach of SDS agreement)

UK position post-Brexit

1. As a matter of **EU law**, UK is now a third country and so is no longer in the Single Market, therefore first sale in the UK is *not* a sale in the EEA, so **no exhaustion of rights under EU law**
2. General UK approach to post-Brexit **UK law** regime was to cut and paste entire EU *acquis* and ECJ case law into UK law at the point of departure, as 'retained EU law' (now 'assimilated law'), meaning that EU exhaustion rules continued to apply in UK, *as a matter of UK law*
3. Means that first sale in the UK or EEA leads to **exhaustion of rights under UK law**

UK position post-Brexit

The **Retained EU Law (Revocation and Reform) Act 2023** weakened links with pre-Brexit EU law from 31 December 2023, with objective that all retained EU law would **automatically disappear** at that date unless expressly replaced
→ Government needed to address what would replace this situation

1. **31 August 2021** – Closing of Government consultation on new UK IP exhaustion regime
2. **January 2022** - Government website stated that “*Further development of the policy framework needs to happen before reconsidering the evidence and making a decision on the future exhaustion of IP rights regime. **We do not currently have a timeframe for a decision**, but we will provide a further update to stakeholders and businesses in due course.*”
3. **November 2023** - EU exhaustion principles restated in UK law by **the Intellectual Property (Exhaustion of Rights)(Amendment) Regulations 2023** to “**preserve the current exhaustion regime** while the government makes a decision on the UK’s future exhaustion regime”

“*Following the UK’s withdrawal from the EU, the UK created a bespoke regional exhaustion regime where it applied the principle of exhaustion to goods that had been legitimately placed on the market in either the UK or EEA. This was done to **give stability for businesses whilst a decision was being made on the UK’s future exhaustion regime. At the time of writing no decision has been made on the future regime.***”

(Explanatory Memorandum to Regulations)



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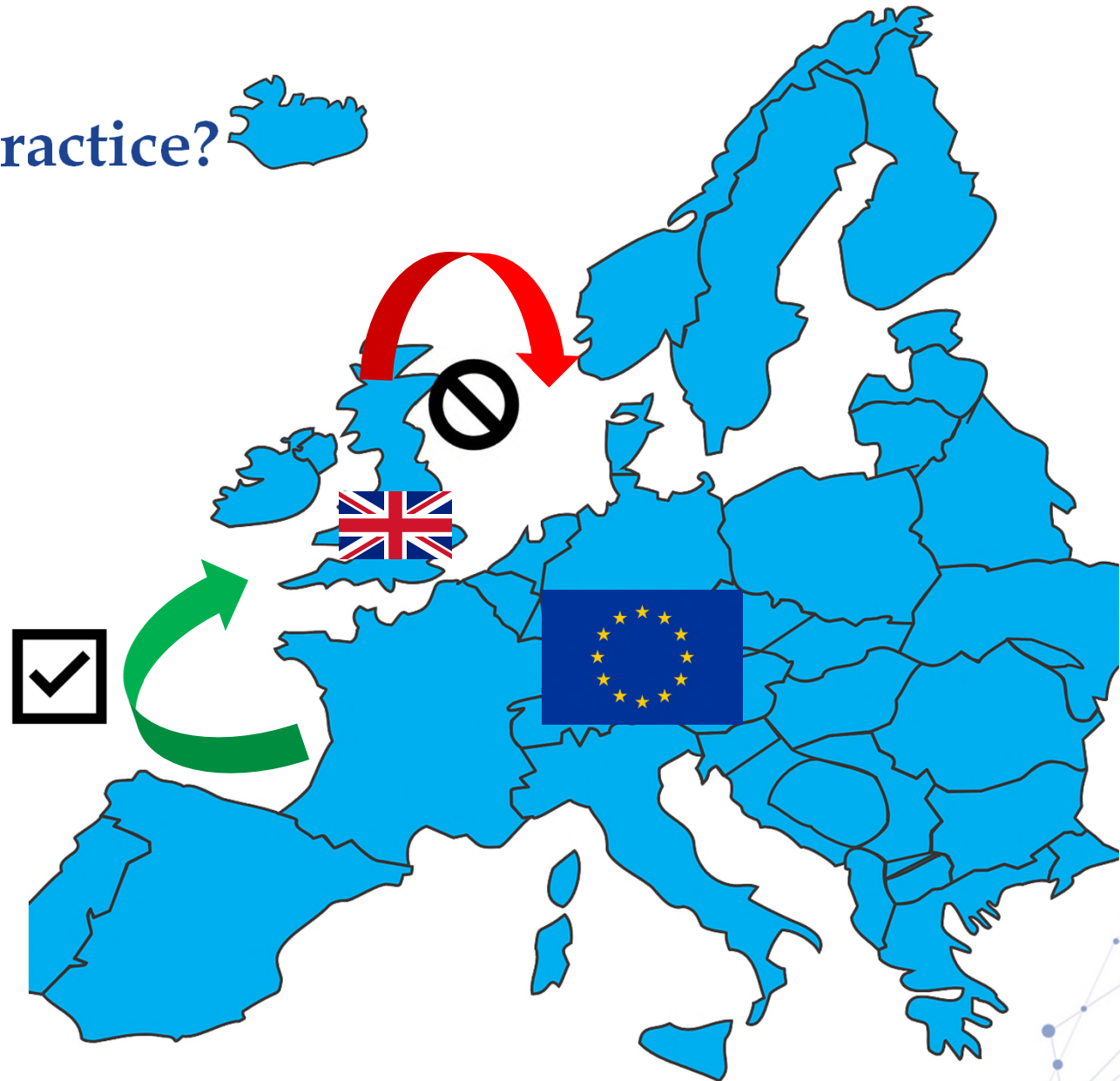
What does this mean in practice?

Goods placed in market in UK:

- Exhaustion under UK law
- No exhaustion under EU law
- EU rights holder *can* use IP rights to stop sale into EEA

Goods placed in market in EEA:

- Exhaustion under both EU and UK law
- EU rights holder *cannot* use IP rights to stop sale into UK



Any questions?

