THE 6 IP ELEMENTS YOU NEED TO KNOW ABOUT THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT

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Lauching negotiations in 2009, Europe and Canada signed a tentative agreement on October 18, 2013 towards the ratification of a Comprehensive Economic and Trade Agreement (CETA) in 2015.

With 28 member states, Europe represents a total population of over 500 million and is Canada's second-largest trading partner in goods and services.

CETA's objective is to foster trade between Europe and Canada, notably in terms of trade liberalization, investment protection, public procurement, labor mobility, environment and intellectual property. With respect to intellectual property, we must distinguish patents, copyright, trademarks, geographical indications, anti-counterfeiting measures and plant varieties.

The final text of CETA has not yet been published since the translated texts required by the 28 Member States must first be accepted by all the parties, each text having equal force of law. This article is thus based on the texts published by the Canadian government and the European Union, and some texts that have been leaked.

Geographical designation: Europe requested official recognition of its geographical indication system covering ove one hundred food products, such as alcoholic products, cheese, meats and oils. Currently, registered trade-marks in Canada, including certification marks, have priority. However, Canada recognizes a few number of geographical indications for European wines and spirits. CETA will add several European products to the list of geographical indications, such as Grana Padano, Roquefort cheese, Elia Kalamata olives or "Aceto balsamico di Modena" balsamic vinegar, notably in association with the place of origin, as the common name (such as Asiago, Feta, Fontina, Gorgonzola, Munster) will be continue to be used in Canada, alone or preceded by " kind", " type", "style", etc. In addition, some products with geographical indications that are well known, such as Prosciutto di Parma and Prosciutto di San Daniele, will finally be marketable under their name in Canada, which was not the case for over 20 years - registration of such marks not

*From ROBIC, LLP, a multidisciplinary firm of Lawyers, and Patent and Trade-mark Agents. Published in the Winter 2013 (Vol. 17, no. 3) Newsletter of the firm. Publication 068.170E.

being accepted in view of already registered some Canadian trademarks. Interestingly, it is not clear whether, conversely, Europe will recognize Canadian geographical indications.

Trademarks and industrial designs: CETA contains a commitment on behalf of Canada to make all possible efforts to comply with international standards and agreements, such as the Singapore Treaty, the Protocol Relating to the Madrid Agreement and the Geneva Act of the Hague Agreement. However, it does not appear that Canada has committed to sign these treaties.

Anti-counterfeit trademark and copyright law fight: Bill C-8 is currently before the Canadian Parliament and should meet the requirements of CETA on this point.

Copyright law: Amendments to the Copyright Act in 2012 have already helped to harmonize Canadian law with international treaties of WIPO. No changes to the Act are required by CETA.

Patents: The issues affect mainly the pharmaceutical field, regarding the duration of patent protection, market access for generic companies following patent expiry and data protection. The economic stakes are high since generic companies provide lower costs for patients while innovators promise more investment in research and development in Canada.

In Canada and Europe, the term of protection granted by a patent is 20 years from the filing date. However, in Europe, to overcome the limits imposed by regulatory requirements (clinical trials) for marketing, the duration of patents in the pharmaceutical field may be extended up to five years thanks to the supplementary protection certificate. Canada has committed to implement a similar process; the duration of which could not, however, exceed two years. The calculation will take into account the date of filing of the patent application and the date of first marketing authorization in Canada. No retroactivity will be allowed to products already sold in Canada.

In Canada, the Notice of Compliance (“NOC”) required for authorization to market for the generic is related to patents listed in the Register ("Patent linkage "). The generic must mention in the NOC application that the patents related to the product it wishes to place on the market are either no longer in force or are invalid. The titleholder of these patents then has 45 days to object to the issuance of an NOC by Health Canada for authorization to market. A simplified and accelerated procedure is then initiated, of a maximum of two years, after which the generic company may appeal, but not the innovator. In the case where the innovator loses, his only recourse is to file further proceedings in court, according to the usual procedure, which is longer. This could result in conflicting decisions for a patent involving the same two parties: a favorable decision for the generic at first followed by a separate decision favorable to the innovator. In the meantime, the generic will have entered and taken a share of the market. CETA would grant a right of appeal to the innovator. With this new

procedure, it is expected that there would be less conflicting decisions, but it is not clear if the duration of the procedure would still be limited to two years.

Discussions also focused on the duration of protection afforded to data gathered by innovators in their clinical trials. While in Europe the term of protection is ten years, Canada will continue to provide eight years of market exclusivity to the innovator: a six-year period during which an application for a generic using clinic data conducted by the innovator may not be filed and an additional period of two years during which the generic company may commence proceedings, but cannot sell the product. A six month protection can also be added for pediatric indications.

Plant Breeder's Rights: Canada is a member of the UPOV Convention (1978 version) but does not seem to be required to ratify the 1991 version under CETA. However, C-18 Bill "an act to amend certain acts relating to agriculture and agrifood" has just been presented before the House of Commons on December 9, 2013 and contains amendments to the Plant Breeders' Rights Act to amend certain aspects of the plant breeders' rights granted under that Act, including the duration and scope of those rights and conditions for the protection of those rights. It also provides for exceptions to the application of those rights and codifies the farmers' privilege.

Conclusion

Hopefully, the process of ratification, planned for 2015, is not delayed by issues not addressed by the CETA (the imposition of visas to nationals of certain EU member states, the seal hunt, genetically modified organisms (GMOs)) . On the other hand, it is desirable that Canada now modifies its Patent Act to implement the agreement and make changes not required by the agreement, but expected by Canadian users, including the harmonization of the utility requirement (the promise doctrine and the doctrine of sound prediction) with other countries.

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