

# **CONSULTATION ON THE UK'S FUTURE REGIME RE EXHAUSTION OF RIGHTS AND PARALLEL TRADE**

Parallel imports are genuine products which are imported from another country without the permission of the intellectual property owner, often in order to benefit from price differentials in different markets (alongside other contributing factors)\*

\*doesn't cover counterfeits or goods put on the market in breach of contract

Key sectors for parallel trade include fast-moving consumer goods, luxury goods, print and publishing, pharmaceuticals and automotives

Parallel imports are most commonly controlled via (Intellectual Property) IP Rights, such as trade marks, copyright, patents and designs which provide monopoly rights

IP Rights can make parallel imports an infringing activity

IP rights are unable to stop parallel trade when they are “exhausted”

Exhaustion can occur after IP owner puts goods on the market (or they are put on the market with their consent)

The rules of exhaustion depend on the territory of import, different approaches are:

**National Exhaustion** (only goods put on the market in that country/territory can be freely resold)

**Regional Exhaustion** (for example the EEA, which does not permit national exhaustion for its members)

**International Exhaustion** (goods put on the market anywhere can be freely resold in that territory)

## **Prior to 1 January 2021 (Pre-Brexit)**

The UK was part of the EU which applies a regime of EEA-wide exhaustion

When an IP owner puts goods on the market (or they are put on the market with their consent) within the EEA, they cannot enforce their IP rights in relation to those goods to prevent their resale in the EEA (except in limited circumstances)

## **After 1 January 2021 (Post-Brexit)**

On leaving the EU, the UK decided unilaterally to participate in the EEA-wide exhaustion regime

Goods put on the market in the EEA can continue to be imported into the UK without requiring the consent of the relevant IP owner

As the UK is now no longer in the EEA, the same does not apply for goods put on the market in the UK

The relevant IP owner may be able to prevent goods put on the market in the UK being exported to the EEA

Goods purchased in UK can be freely resold in the UK

Goods purchased in the EEA/EU can be freely resold into the UK and EEA/EU

IP Rights owner could challenge re-sale of goods purchased outside UK/EEA/EU

Option	Type of regime	Inbound parallel import of goods	Outbound parallel export of goods
1	UK's unilateral application of a regional EEA regime, otherwise known as a "UK+" regime	Only automatically permitted from EEA countries (assuming there is separate authorisation for regulated goods such as medicines)	Not automatically permitted except to countries with an international regime
2	National	Not automatically permitted from any country	Not automatically permitted except to countries with an international regime
3	International	Automatically permitted from any country (assuming there is separate authorisation for regulated goods such as medicines)	Not automatically permitted except to countries with an international regime
4	Mixed <sup>[footnote 2]</sup>	Ability to parallel import will depend on any decision on treatment for a specific IP right, good or sector	Not automatically permitted except to countries with an international regime



## Key features include:

Appears to be least costly option for businesses reliant on supplies of goods and raw materials (with IP Rights) from the EU/EEA

Same as current system, which means same level of choice for consumers as at present

But asymmetry - not possible to export parallel goods to EU/EEA countries without a rights holder's consent (potentially discriminatory in favour of EU businesses, places UK agents and distributors at a disadvantage, and provides UK brand owners with less control than EEA brand owners)

## **Key features include:**

Easier to take action against infringers, control quality and ensure that products meet regulatory standards

Benefits for licensees

UK consumers may benefit from more investment in innovation and product/pricing developed for their specific needs

However, potential for reduced supply (alongside delays in supply) and choice for consumers, alongside price increases (due to less competition)

## Key features include:

Access to a larger international market of suppliers should lead to increased choice, competition and lower prices for manufacturers, importing businesses and consumers

Possibility of consumer confusion or safety issues, increased consumer search costs and lost access to pre/post-sales services, it would also be difficult to object using IP rights

Could lead to less investment in product development, marketing and innovation

Increased levels of shipments of legitimate parallel goods could be used to mask counterfeit goods

**Key features include:**

Exceptional protection could be provided to reserved sectors where international exhaustion could be shown to have severe detrimental effect

The regime might be complex and could therefore increase costs and uncertainty for businesses and consumers, particularly where products are used in more than one industry, or are protected by more than one IP Right

Might need further regulation and monitoring to mitigate the risk of reduced competitive pressure in affected sectors, and could lead to increased litigation

### **The chosen exhaustion regime will have significant impact to brand owners and their businesses**

The government has not conducted an economic analysis on the impact of any change (also, 2019 EY UKIPO qualitative study was inconclusive with few respondents)

International exhaustion is likely to be an attractive option to the UK government as it appears to favour consumers, however, studies and anecdotal evidence suggest harmonisation of prices and less benefit to consumers than anticipated

Government's position is that national exhaustion is ruled out due to issues with the Northern Ireland Protocol but this conflicts with the EU Commissions view of the Protocol

# THANK YOU QUESTIONS?

LINK TO BFC, UKFT & WALPOLE SURVEY: [WWW.SMARTSURVEY.CO.UK/S/NSXKNI/](http://WWW.SMARTSURVEY.CO.UK/S/NSXKNI/)

LINK TO CONSULTATION: [WWW.GOV.UK/GOVERNMENT/CONSULTATIONS/UKS-FUTURE-EXHAUSTION-OF-INTELLECTUAL-PROPERTY-RIGHTS-REGIME](http://WWW.GOV.UK/GOVERNMENT/CONSULTATIONS/UKS-FUTURE-EXHAUSTION-OF-INTELLECTUAL-PROPERTY-RIGHTS-REGIME)