



Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

Webinar: Options for the UK's Future IP Exhaustion Regime

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Introduction

IP exhaustion and why we're consulting on the issue

Introduction to exhaustion rights:

- Exhaustion rights: IP framework provides rights holders with the rights to control distribution of a product – but once that genuine product has been distributed into a specified third party territory, the rights holder cannot prevent the further resale and distribution and onwards journey of the product in that territory.
- Prior to the UK leaving the EU: parallel goods were able to move in both directions from the EEA to the UK and vice versa; we were privy to the regional exhaustion regime in place within the EEA.
- Current situation: while goods from the EEA can continue to enter the UK market, rights holders of any nationality are able to prevent equivalent parallel exports from the UK to the EEA, if they own the rights within the EU.

Importance of the exhaustion rights regime:

- The government wishes to use its new regulatory autonomy to decide whether the current regime best serves the UK (even though there is a legal default in place).
- Any change to the IP exhaustion regime will impact all traded goods in the UK.

Options for the UK's future regime

Four possible options:

- The current arrangement (UK unilaterally applies the EEA's regional regime (the 'UK+ regime'));

- National regime (Prohibits unauthorised in-bound parallel imports from the rest of the world – the IPO do not view this option as feasible – it cannot be reconciled with the N.I. protocol);
- International regime (Would permit parallel imports of goods from anywhere in the world); and
- Mixed regime (Might treat specific IP rights / goods / sectors differently).

How can the public contribute to the debate?

Consultation

- The IPO have recently published a consultation on the future of the UK's regime ([Consultation document on the UK's future regime for exhaustion of IP rights - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/consultation-document-on-the-uk-s-future-regime-for-exhaustion-of-ip-rights))
- Any option chosen will be based on this consultation, and on evidence that the IPO is gathering in parallel.
- The consultation closes on 31 August 2021 (the deadline cannot be extended, but information received outside this period may still be considered).
- Law firms have the duty to raise awareness of this consultation among clients – the consultation will likely impinge upon all sectors, parts of supply chains, and consumers.
- The more diverse the views submitted as part of the consultation, the better.
- Opinions as well as evidence will be accepted by the IPO.

Questions

Q: *What is the predicted timing of the consultation?*

A: We hope for around the beginning of 2022 (especially as the consultation has now started) for a decision. However, any change would require primary legislation.

The consultation period cannot be extended beyond the 31 August.

Q: *One of the challenges is that parallel trade is not just an IP issue (it is also a competition law and regulatory issue). As we have already seen issues in other fields, how much is the IPO speaking to other bodies (i.e. the CMA) and trying to coordinate?*

A: IPO is speaking with other departments. DHSC / DCMS are being spoken to.

Any change to the UK's exhaustion regime will go through a process to obtain collective agreement across government.

Q: *One of the first moves following the end of the transition period was the removal of Satellite Decoder cards, for EU audiences. Why was this done so rapidly for this sector?*

A: A slightly different issue – this was in devices for EU audiences, and therefore related to the free movement of services. The consultation is looking more broadly at a range of sectors.

Q: *Why is national exhaustion 'off the table', in terms of the N.I. protocol?*

A: The issue derives from Article 7(1) of the Protocol (applies Articles 34 and 36 of the TFEU). It applies those provisions on the parallel export of goods from Northern Ireland into the EU.

There may be space in which to interpret the N.I. protocol; the government welcomes different views/interpretations of the N.I. protocol in relation to exhaustion of IP rights.

The consequences of this are that the IPO will have to determine what the appropriate regime is for the entire UK.

Q: *The TIGR Report had a lot of suggestions regarding the exhaustion regime. How influential are government reports on the IPO's thinking?*

A: It acts as one more view on this issue.

Q: *Smaller economies, such as Switzerland and New Zealand, will allow certain goods to be subject to exhaustion rights or not depending on the strength of their domestic sectors' ability to produce that product themselves, and on whether the economy instead needs those goods to flood in from elsewhere. How could the UK mirror this in some ways, without damaging relationships with trading partners?*

A: This is one of the issues to be considered in relation to a 'mixed regime'. A mixed regime creates business uncertainty and may not be easy to justify.

Q: *How is the consultation going to address issues with counterfeit products being mixed in with parallel trade? It will be harder to monitor this (especially under an international regime (and under the issue of interpretation under the N.I. protocol)).*

A: The government has an existing programme of work on countering counterfeit goods. However, the issue of counterfeit goods being mixed in with parallel goods will be considered.

Q: *How is the customs' regime going to change in relation to the regime?*

A: The government wishes to avoid a hard border between the Republic of Ireland and Northern Ireland, so this should be borne in mind.

The execution of the enforcement of IP rights is not entirely within the IPO's remit (although it is within their interest). IP rights owners can enforce their rights within the country and some goods can be seized on arrival.

Q: *As another mixed solution, could exhaustion within the British Isles be floated (i.e. not with the rest of the EU)? Or – would this be politically problematic?*

A: The IPO cannot really see the Irish Government agreeing to this as it could create problems for the Republic of Ireland with their obligations to the EU.