

The UK's future regime for the exhaustion of IP rights Consultation Response Form

After you have read the consultation document, please consider the questions below. There is no expectation or requirement that all questions are completed. You are welcome to only answer the questions that are relevant to you, your business or organisation.

There are two sections on this form:

- A. Questions arising from this consultation
- B. Information about you, your business or organisation

When you are ready to submit your response, please email this form and any other supporting documentation to IPExhaustion@ipo.gov.uk.

The closing date for responses is at 23:45 on 31 August 2021.

SECTION A

We do not seek to respond to all the questions posed. Our responses to those we do wish to respond to are below.

UK's current exhaustion regime

Q6: Are you or your business/organisation aware of the change to the UK's exhaustion regime that came into effect on 1 January 2021 following the end of the transition period?

Yes. We have followed the government's narrative throughout the Brexit negotiations and implementation following the end of the transition period (TP).

Assessment of options for the UK's future exhaustion regime

The government is assessing other regimes compared to the current UK+ regime (option 1): (2) national regime, (3) international regime, or (4) a mixed regime.¹

Q9: If the government was able to change from the current unilateral regional regime (UK+ regime), would your business or organisation prefer a model which either allowed parallel imports from anywhere in the world (without the rights holder's permission)² or prohibited parallel imports into the UK (unless the rights holder's permission is obtained)³? Please outline the regime your business or organisation would prefer and explain the benefits, costs of change and risks of that change.

¹ Please see 'Options for the UK's future exhaustion regime' section in the consultation document for descriptions of the different regimes.

² That is, an international regime.

³ That is, a national regime.

As the professional body for Scottish solicitors, including those operating in the IP sector, it is worth noting that any change in regime will not impact us directly.

The consultation shows strong leanings against the adoption of a National or Mixed regime. The Northern Ireland Protocol and general complexity appear to be cited reasons against these options. The two remaining options are to keep the status quo, referred to in the Consultation as UK+, or adopt an International regime.

Broadly, the options appear to be either a pro-rights holder (UK+) or pro-customer (International). As the government is aware, there are pros and cons to each option – and these largely depend on whether i) control of IP rights or ii) market forces are seen as the preferred state.

We represent an industry which is involved in helping parties/businesses a) obtain and commercialise IP rights; but also b) defend infringement and seek to curtail the scope of the granted monopolies. We are therefore not placed to comment on which ‘state’ is best. However, we wish to make some comments that are relevant to the government’s assessment and which we recommend are considered.

International Regime

Prior to the UK joining the EU, international exhaustion was relied upon. While the way products are moved around the world has changed beyond all recognition since 1973, there is at least a previous base of understanding for this regime. The free-trade approach, where prices are not manipulated so as to be kept artificially high for UK markets appears, ethically, to be desirable. Allowing market forces to determine the price point is fair and balanced.

However, the Consultation makes plain that adopting an International regime is likely to allow cheaper products to enter the UK from a variety of sources. While this is good from the perspective of the consumer, it should be noted that allowing cheap products to flood the market may, in and of itself, dissuade UK based entrepreneurs from starting new businesses in the UK. The International system can also assist in the blurring of the lines between counterfeit goods and legitimate products. Increased resource may be required to police this. It is important that the value in brands is maintained. Counterfeits undermine the value of the product and are costly to the brand owner.

The UK is known for its innovation and creativity. These industries are important to the UK’s culture as well as its economy. IP rights are granted in order to foster innovation and creativity. Implementing a regime which does not adequately incentivise the creation of new works or support start-up businesses does not help the UK maintain its reputation as a world-leading location for new business, technology and innovation. This regime could significantly weaken the control of rights holders’ supply chains into the UK.

The International Regime is attractive to large retailers, such as supermarkets, who can use existing supply chains and distribution networks to move large quantities of cheap goods into the UK at short notice. Adopting an International regime may therefore increase the competitive advantage large retailers have and indeed, widen the gap between SMEs and large companies.

Selecting an appropriate regime must take into account the competing interests of rights holders, the supply chain and customers – but also be cognisant of competition

law rules and in particular, whether the chosen regime facilitates IP being used to stifle the emergence of new products in the market.

The UK is known for its high standards in terms of materials, quality of food products, good working conditions and the like. Allowing unrestricted imports from all territories could, in turn, have associated consequences where goods are offered for sale which do not comply with the standards of quality which the UK is currently known for.

For copyright holders, concerns from British authors, publishers and bookshops appear legitimate regarding international exhaustion. Cheap international editions of books could flood the UK market. This could potentially significantly reduce the author's ability to recoup royalties and make a living from their work, thereby discouraging professional writers from creating the works in the first place.

UK+ Regime

At a distance, this approach seems a measured compromise between the options of 'National' and 'International' regimes. It means that the goods legitimately released in the market in either the UK or any territory which is part of the EEA can be imported and re-sold in the UK. UK rights holders have control about the release of their products beyond the boundaries of the UK+ area. UK customers benefit from the range of goods available in the EEA which can be re-sold in the UK without permissions being sought.

The main issue with this approach appears to be the forgotten UK exporter. Maintaining the status quo provides an unfair advantage to exporters based in the EEA over exporters based in the UK. This is not desirable. For any goods first put on the UK market, the rights holders can prevent sale in the EEA. Contrarily, for goods released in the EEA, there is no comparable restriction on re-selling goods in the UK.

One of the reasons the IP provisions of Brexit and subsequent negotiations have been relatively uncontentious to date is that they seek to provide comparable rights and reciprocity between the UK and EU. While it is anticipated that over time, certain divergence is expected, the UK+ option makes no progress away from the emergency/ No-deal Brexit position which was published in 2019.

It should be remembered that the EEA framework was created to be homogenous. In the Government's consultation document relating to the UK+ regime, it states that "there is no guaranteed reciprocity from another EEA member state". However, the ECJ has made clear comments (eg E-9/07 and E-10/07, L'Oreal) that Exhaustion may not be determined by each individual state but rather needs to be on a pan-EEA basis. The EEA members have a homogenous approach to Exhaustion. Recognising that the UK is no longer a member of the EEA, it is plain that the EU's approach on this matter is that the UK will not get special treatment. Arguably therefore, there should be clear and persuasive reasons that the EEA should be granted special dispensation by the UK.

The lack of reciprocal undertakings offered by the EU is far from ideal and careful thought should be given prior to selecting an option which is seen to endorse this unfairness. The UK+ option is the UK agreeing to be bound by an EEA construction when the UK is no longer part of the EEA.

Finally, whether International Exhaustion is selected or the UK+ regime is pursued, it should be noted that an EU proprietor of a UK trade mark may be prevented from relying on the UK trade mark registration to prevent imports to the UK of goods manufactured

both in third party countries and the EEA. Arguably therefore, this has the potential to reduce the inherent value of UK trade mark registrations.

Summary

While there are clear consumer advantages to adopting the International Regime, and this approach may be seen as politically favourable, there are a number of indirect consequences which may affect the UK's ability to continue to be a centre of innovation on the world stage. Reducing the control of rights holders could have lasting and negative impacts on the UK economy. On the other hand, the UK+ regime provides some level of control and continues to distinguish between the EEA and the rest of the world. However, it endorses a system which does not value reciprocity. Reciprocity is arguably a cornerstone of trade relationships and without it, the UK is not in a position of strength.

Overall impact on consumers, society and the economy

Q13: Please outline any other issues that the government should consider when deciding on what exhaustion regime to implement, including economic, trade, consumer or societal impacts.

As discussed above, the government is encouraged to consider the impacts from the perspective of competition law, specifically relating to a regime which facilitates abuse of a dominant position.

Consideration should be given to how imported goods are policed and assessed for quality assurance, working conditions at manufacture and the like.

The government is encouraged to review how it will police and control counterfeit goods as these significantly undermine the value of brands and other IP. They also undermine the overall integrity of the market.

SECTION B: Respondent information

Q1: Please give your name (name of individual, business or organisation).

Law Society of Scotland

Q2: Are you responding as an individual, business or on behalf of an organisation?

- a) **Business – please provide the name of your business – Law Society of Scotland**
- b) Organisation – please provide the name of the organisation that you are responding on behalf of
- c) Individual – please provide your name

Q2a: If you are responding on behalf of an organisation, please tell us the name of the group and give a summary of the people that you represent.

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Q3: If you are an individual, which of the following statements best describes you?

- a) Academic
- b) Employer/employed in the private sector
- c) General public
- d) Law professional
- e) Professional in another sector
- f) Public sector official
- g) Other – please specify:

Not applicable.

Q4: If you are responding on behalf of your business or organisation, which of the following statements best describes your business or organisation? Please select all that apply

- a) Academic institution
- b) Distributor of goods
- c) Distributor of licensed goods
- d) IP rights holder
- e) Manufacturer reliant on IP-protected goods
- f) Retailer
- g) Trade body representing 'IP rights holders'
- h) Other – please specify: Professional body for Scottish solicitors**

Q5: If you are responding on behalf of a business or organisation, which of the following best describes your organisation?

- a) **UK only based organisation (if so, please specify whether your organisation's head office is based in England, Scotland, Wales or Northern Ireland). – Scotland**
- b) Multinational organisation based in the UK (if so, please specify whether your organisation's head office is based in England, Scotland, Wales or Northern Ireland).
- c) Multinational organisation based in an EEA country outside of the UK, which operates in the UK (if so, please specify the country your organisation's head office is based in).
- d) Multinational organisation based in a non-EEA country outside of the UK, which operates in the UK (if so, please specify the country your organisation's head office is based in).
- e) Other (please specify).

Q6: If your business or organisation trades in IP protected goods, which one of the following best describes the destination of IP goods?

- a) Trade with EEA countries only
- b) Trade with non-EEA countries only
- c) Trade with both EEA and non-EEA countries

Not applicable.

Q7: If your business or organisation trades in IP-protected goods, which one of the following best describes your organisation's trade?

- a) Importer of IP-protected goods
- b) Exporter of IP-protected goods
- c) Importer and exporter of IP-protected goods (both finished goods and transformed goods)

Not applicable.

Q8: Which one of the following best describes the sector of your business or organisation?

- a) Agriculture, forestry & fishing
- b) Automotive or Aerospace
- c) Business administration
- d) Civil society
- e) Construction
- f) Creative industries
- g) Distribution
- h) Education / Academia
- i) Finance
- j) Food and drink
- k) Health (human or animal)
- l) Information technology

- m) Production/ Manufacturing
- n) Public administration & defence
- o) Retail
- p) Transport & Storage
- q) Wholesale
- r) **Other – please specify - Legal**

Q9: How many people work for your business or organisation across the UK as a whole? Please estimate if you are unsure.

- a) Fewer than 10 people
- b) 10–49
- c) 50–249
- d) 250–999
- e) 1,000 or more

Not applicable as we are a professional body. The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

Q10: The Intellectual Property Office may wish to contact you to discuss your response. Would you be happy to be contacted to discuss your response?

Yes.

Q11: If you are happy to be contacted by the Intellectual Property Office, please provide a contact email address.

Policy@lawscot.org.uk

Q12: Would you like an acknowledgement of receipt of your response?

Yes

Data table

In addition to the questions in this consultation, the government currently holds some of the information listed in this table but would welcome further information on these topics if it is available. If you are providing information in relation to this table, please mark any information to correspond to the numbered section as below and include attachments with your response form in your email to IPExhaustion@ipo.gov.uk.

	THE ECONOMY
i	Openness of UK economy to trade and the extent of trade in IP-protected products.
ii	Value of the IP-protected sector in the UK economy.
iii	Value and scale of parallel trade to the UK economy (including parties involved in parallel trade and effects on those parties).
iv	Prevalence of parallel importation in the UK economy (including number of affected businesses and number of jobs).
	CONSUMERS
v	Current welfare impacts on consumers from parallel importation: price, availability of choice, quantity and quality consumed.
vi	Opportunities for arbitrage based on UK consumer price levels in relation to the rest of the world.
vii	Potential impact on consumers following a change in the UK's exhaustion regime: change in price, availability of choice, quantity and quality consumed.
	BUSINESSES THAT RELY ON PARALLEL IMPORTS
viii	Transition activities and associated costs of moving to a new exhaustion regime, e.g. legal fees.
	PRACTICES BY RIGHTS HOLDERS
ix	Management of first sale of goods by rights holder (or licensee): information on supply controls or sale through wholesalers.
x	Costs of current controls on distribution channels (e.g. monitoring and legal enforcement costs).
	INTERNATIONAL COMPARISONS
xi	Evidence on impact in countries which changed exhaustion regimes (for example, change in the US on textbooks, change in copyright in Australia and New Zealand and change on pharmaceuticals in Switzerland).

Nil.