

TRADE MARK RIGHT EXHAUSTION IN THE UNITED KINGDOM POST-BREXIT

Res. Assist. Dr. Gamze KUCUKOBA DOGAN¹

ABSTRACT

The necessity of limiting the powers of the trademark right holder in favor of the public interest has led to the emergence of the principle of exhaustion. After the first sale, the right owner's inability to interfere with the subsequent sales of the branded products defines the principle of exhaustion.

In order to talk about the principle of exhaustion, branded products must be put on the market by the right owner. There are three types of exhaustion systems National, regional and international exhaustion. The effect of the chosen exhaustion system is seen on parallel imports. In national and regional exhaustion, it is possible to prevent parallel imports from outside the territory where exhaustion is applied. In places where international exhaustion is practiced, it is not possible to prevent parallel imports.

While the United Kingdom (UK) was a member of the European Union (EU), the regional exhaustion system was applied. During the transition period, regional exhaustion continued to be applied. Nowadays in the UK, which left the EU membership with the Brexit Agreement, a system that can be called asymmetric exhaustion is implemented. The system in question is a unilateral regional exhaustion system implemented by the UK. The aim of our study is to examine the current exhaustion system being implemented in the UK. According to asymmetric exhaustion, trademark right on the products that put on the market for the first time in European Economic Area (EEA) is considered as exhausted within borders of the UK. Parallel imports from the EEA to the UK cannot be prevented by the trademark owner. EEA member states can block parallel imports from the UK.

Keywords: Trade Mark Exhaustion, Parallel Import, Brexit Agreement, Asymmetric Exhaustion.

¹ Artvin oruh Un., Hopa Faculty of Economics and Administrative Sciences, ORCID: 0000-0002-7990-0196, gamzekucukoba@artvin.edu.tr
Arařtırma Makalesi/Research Article, Geliř Tarihi/Received: 29/11/2022–Kabul Tarihi/Accepted: 18/01/2023

BİRLEŞİK KRALLIK'TA BREXİT SONRASI MARKA HAKKI TÜKETİLMESİ

ÖZET

Hak sahibinin yetkilerinin kamu yararı lehine sınırlandırılması gerekliliği, tüketilme ilkesinin ortaya çıkmasına neden olmuştur. İlk satıştan sonra markalı ürünlerin daha sonraki satışlarına hak sahibinin müdahale edememesi tüketilme ilkesini tanımlar.

Tüketilme ilkesinden söz edilebilmesi için markalı ürünlerin hak sahibi tarafından piyasaya sürülmesi gerekmektedir. Ulusal, bölgesel ve uluslararası tüketilme olmak üzere üç tür tüketilme sistemi vardır. Seçilen tüketilme sisteminin etkisi paralel ithalatta görülmektedir. Ulusal ve bölgesel tüketilmeye, tüketilme uygulanan bölge dışından paralel ithalatın önlenmesi mümkündür. Uluslararası tüketilmenin uygulandığı yerlerde paralel ithalatın önüne geçilmesi mümkün değildir.

Birleşik Krallık Avrupa Birliği (AB) üyesi iken bölgesel tüketilme sistemi uygulanmaktaydı. Geçiş döneminde bölgesel tüketilme uygulanmaya devam edildi. Brexit Anlaşması ile AB üyeliğinden ayrılan Birleşik Krallık'ta bugünlerde asimetrik tüketilme diyebileceğimiz bir sistem uygulanmaktadır. Söz konusu sistem, Birleşik Krallık tarafından uygulanan tek taraflı bir bölgesel tüketilme sistemidir. Çalışmamızın amacı, Birleşik Krallıkta uygulanmakta olan mevcut tüketilme sistemini incelemektir. Asimetrik tüketilmeye göre, Avrupa Ekonomik Bölgesi'nde (AEA) ilk kez piyasaya sürülen ürünler üzerindeki marka hakkı, Birleşik Krallık sınırları içinde tüketilmiş sayılır. AEA'dan Birleşik Krallık'a paralel ithalat, ticari marka sahibi tarafından engellenemez. AEA üyesi devletler, Birleşik Krallık'tan yapılan paralel ithalatı engelleyebilir.

Anahtar Kelimeler: Marka Hakkı Tüketilmesi, Paralel İthalat, Brexit Anlaşması, Asimetrik Tüketilme

INTRODUCTION

Brexit is the agreement that starts process of the UK exiting the EU. The word Brexit consists of English words "Britain" and "exit". As a result of the referendum held on 21.06.2016, 51.89% of people voted yes and the UK decided to leave the EU. On 31.01.2020, the UK left EU membership (What is Brexit, 10.10.2022; Hayes, 2021).

The UK member states are England, Scotland, Wales and Northern Ireland (United Kingdom, 10.11.2022). Therefore, with Brexit Agreement, these countries also left EU membership.

After the Brexit Agreement, some changes have occurred in the field of intellectual property law as in most laws in the UK. In the UK, which is no longer bound by EU laws, different principles are also applied on the exhaustion of trademark rights. Regional trademark exhaustion is no longer applied. In our study, new exhaustion system implemented in the UK will be examined.

1. THE CONCEPT OF TRADE MARK AND TRADE MARK RIGHT

A trademark is a sign that distinguishes goods and services of one enterprise from goods and services of other enterprises (Aslan Düzgün, 2018: 144; WIPO, 15.11.2022). According to the definition of the United States Patent and Trademark Office (USPTO), a trademark is a sign that can be displayed in any way, including words, shapes, combinations, that enables products and services of a business to be distinguished by the customers of brand from products and services of other businesses where it is offered for sale (USPTO, 15.11.2022).

According to the article 15 of TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement, words, letters, numbers, color combinations including personal names can be registered as trademarks.

Trademark right is absolute so, it gives the right owner exclusive authority to use the trademark (Karaca, 2015:44; Aslan Düzgün, 2018:144). Such exclusive authority gives trademark owner the right to use, benefit and dispose of trademark (Çamlıbel Taylan, 2001:34), as well as preventing unauthorized use of trademark by third parties (Karaca, 2015:43).

In order to use the powers granted to trademark owner, trademark must be registered. Thus, the exclusive trademark right can only be claimed against anyone by registration. With the registration process, the right owner gains the usage of trademark right (Aslan Düzgün, 2018: 145; Küçükali, 2020: 121).

2. THE PRINCIPLE OF EXHAUSTION

The right owner who registers his trademark has a monopolistic and exclusive right to use his trademark. Although it is natural for the right owner to use his trademark in commercial life as he wishes, usage of the trademark right should not be unlimited. After the first sale, trademark owner should not interfere with the consumer's usage of products as he wishes, or even destroying them (Dobrin and Chochia, 2016:29-30).

The main purpose of exclusive right granted to owner of the trademark, which can be claimed against everyone is to prevent usage of the trademark by third parties without permission of the owner. Trademark owner's intervention to the subsequent circulation of products that put on the market may adversely affect continuity of commercial life. Therefore, need of limiting the trademark owner's rights in direction of public interest has emerged (Çamlıbel Taylan, 2001:92). In terms of the continuity of free trade and balanced functioning of rights of trademark holder regarding trademark, principle of exhaustion has been accepted in legal systems (Verma, 1998:537; Aslan, 2004:20).

Exhaustion of the trademark right means that; once branded products are put on the market for the first time by right holder or third party with the consent of right holder, subsequent circulation, import and export of branded goods cannot be prevented by the right holder (Dobrin and Chochia, 2016:39; Liebelt, 2021; Bonadio, 2011, 153).

Principle of exhaustion is also called the principle of first sale, was put forward for the first time in *Kölnish Wasser*² case of German Imperial Court. The Court stated that in the case in question, trademark owner's right on the products will be exhausted after first sale of the branded products (Trogh, 2002:10).

In order to talk about exhaustion of the trademark right, first of all, trademark must be registered. In addition, products belonging to the trademark must be put on the market and presentation to the market must be made by the right owner or a third party with the consent of right owner.

2.1 Types of Exhaustion

Principle of exhaustion is classified according to the territory where branded products are offered for sale for the first time. Principle of exhaustion is valid according to legislation of the territory or country where it is applied. Therefore, territory where branded products are offered for sale for the first time is very important. Three different exhaustion systems have been adopted, depending on where the branded products are first offered for sale by the right holder: National, regional and international exhaustion (Schovabo, 2010:5).

2.1.1 National Exhaustion

Systems where national exhaustion is applied, trademark right on the branded goods is exhausted after the first sale within borders of the country where products are put on the market. Offering branded goods in other countries is not considered as exhaustion. Trademark right holder may interfere with the circulation of products in other countries (Schovabo, 2010:5; Trogh, 2002:13; Bonadio, 2011, 154).

The right holder, who puts his products on the market in territories where national exhaustion is applied, does not have right to interfere with the subsequent trade of products. However, he can prevent parallel imports of products from other countries to his own country (Calboli, 2016: 48). For example, let's assume that trademark owner puts his products on the market in country X where national exhaustion is adopted. Right holder's trademark right is exhausted in country X after first sale. He has the right to ban parallel imports from country Y where he does not put his products on the market, to country X. Because the right holder did not put his branded products on the market in country Y, so his trademark right in country Y has not been exhausted yet.

2.1.2 Regional Exhaustion

Regional exhaustion is applied in the regions formed by countries that come together with international agreements. Trademark right is exhausted on products that put on the market by right owner, within the borders of the region where they are offered for sale (Çamlıbel Taylan, 2001:95).

² German Imperial Court, *Kölnish Wasser*, 50/229, 28.02.1902.

Regional exhaustion is applied in the EU. When branded goods are put on the market by a right owner in one of the member countries of the Union country, trademark right is also considered exhausted in other member countries. Goods can move freely between member countries and parallel imports cannot be prevented. However, trademark owner has right to ban the importation of products put on market for the first time outside European Economic Area³ (EEA) borders to the EEA borders (Schovabo, 2010:5; Gill and Power, 2021; Bonadio, 2011, 154).

Regional exhaustion was first introduced with the *Centrafarm v. Sterling*⁴ case. European Union Court of Justice (CJEU) composed the fundamental features of regional exhaustion in this case (Harris and Carter, 2022) . With *Silhouette*⁵ case regional exhaustion was adopted by the EU member states. After the lawsuit, all member countries of the union were obliged to adopt regional exhaustion and harmonize it with their domestic legislation (Calboli, 2016:8; Trogh, 2002: 30).

2.1.3 International Exhaustion

According to international exhaustion regime, trademark right is exhausted globally with the first sale. Regardless of the fact that, when branded goods are offered for sale in any country or region of the world, trademark right is exhausted with the first sale. After first sale, free movement of the goods is possible on a global scale, and it is not possible for right holder to interfere with subsequent trade of the products (Bonadio, 2011: 154; Schovabo, 2010:5).

The effect of chosen exhaustion regime is important for parallel imports. Because, exhaustion regime has an effect on liberalization or prevention of parallel imports. The benefit of legal protection for products subject to parallel importation in the country where they are offered for sale depends on the chosen exhaustion regime (Bonadio, 2011: 154)

3. CONCEPT OF PARALLEL IMPORT

Products with intellectual property protection are brought to the market from a different country without consent of trademark right holder, where same products are offered for sale, is called parallel importation (Aslan, 2004:93; Liebelt, 2021).

Parallel imported goods are original and importation of counterfeit or pirated products is not considered as parallel import. In addition, in order for parallel imports to be in question, original products must be put on the market by trademark owner or by a third party with his consent (Aslan, 2004:49; Liebelt,2021). Putting goods on the market by trademark right holder has significant importance. Because, trademark rights are not exhausted on goods that are not offered for sale by right owner or by a third party with his permission.

³ European Economic Area consists of EU countries and Iceland, Liechtenstein, Norway. These countries together form European single market. Switzerland is not a member of EEA or EU but it Switzerland also contributes European single market (Countries in the EU and EEA, 15.11.2022).

⁴ CJEU, *Centrafarm BV & Anr. v. Sterling Drug Inc and Centrafarm BV & Anr. v. Winthrop BV*, 31.10.1974, 16/74.

⁵ CJEU, *Silhouette International GmbH and Co KG v. Hartlauer Handelsgesellschaft*, 16.07.1998, 355/96.

Therefore, the importation of a product that is not legally offered for sale cannot be considered as parallel importation (Harris and Carter, 2022; Karşlıođlu, 2019: 2737-2738).

The most important reason for parallel importation is price differences between countries. Branded goods are offered for sale in different countries at different prices. Bringing the products for sale from the countries where they are offered for sale at a cheaper price to countries where they are offered for sale at a more expensive price means benefit for the parallel importer (Bonadio, 2011: 154; Karşlıođlu, 2019: 2735).

The fact that parallel importer offers the products brought at cheap prices to the domestic market, creates intra-brand competition with right holder. The cheaper the products offered for sale by parallel importer than the products offered for sale by right holder in the domestic market, the higher the profit is. This situation, which is called free riding, creates unfair competition between trademark owner and parallel importer (Jehoram, 1999: 501).

We have stated that parallel importation and chosen exhaustion regime are in a close relationship. Because the chosen exhaustion system determines whether parallel imports can be prevented or not. In territories where national exhaustion is adopted, trademark right is exhausted with the first sale. Parallel imports to domestic market from territories where products have not been placed on the market can be prevented by the right holder (Kyle, 2012:340). Parallel imports from outside the region, can also be prevented by the right holder in regional exhaustion (Kyle, 2012: 348). In systems where international exhaustion is applied, right holder does not have right to prevent parallel imports, since trademark right considered as exhausted globally after the first sale (Kyle, 2012:340).

4. TRADEMARK EXHAUSTION IN THE UK

Exhaustion of trademark rights in the UK can be examined in three separate periods.

4.1 Period when the UK was an EU Member

Before the adoption of regional exhaustion across the EU with the *Silhouette* case, international exhaustion was practiced in the UK. According to the article 12 of British Trademark Act, which came into force in 1994, trademark right on the branded product is exhausted globally with the first sale (Stobbs, 2021; Harris and Carter, 2022).

While the UK was a member of the EU, regional exhaustion was adopted. However, in period when regional exhaustion regime was adopted, it is seen that English Courts made decisions pointing to international exhaustion. In *Zino Davidoff*⁶ decision, the court decided in favor of international exhaustion and stated that parallel imports from outside the EEA to the UK could not be prevented (Aslan Düzgün, 2008:58; Çamlıbel Taylan, 2001:58).

⁶ CJEU, *Zino Davidoff S.A v. AveG Imports Ltd.*, 18.05.1999, 1998/4517.

4.2 Transition Period

Time from 31.01.2020 which is the final date of leaving EU, to 31.12.2020, was considered as a transitional period and the EU laws continued to be applied in the UK (What is Brexit, 10.10.2022; Stephens, 2021; Liebelt, 2021). The implementation of regional exhaustion continued within the framework of the laws in force regarding trademark rights. The issue of free movement of goods, persons and services was applied in the same way in the transition period (Stephens, 2021).

4.3 Exhaustion Post Brexit

As a result of the Brexit Agreement, the UK preferred an asymmetrical exhaustion system in terms of the exhaustion of rights. According to mentioned system, trademark right on products that are put on the market within the UK with the consent of right holder for the first time, as of 01.01.2021 is not considered to exhausted within the EEA borders. The consent of trademark owner is required for products that are put on the market for the first time within borders of the UK to be brought to EEA through parallel imports and offered for sale (Exhaustion of IP Rights and parallel trade, 10.10.2022; Stephens, 2021; Brankin and Headdon, 2022).

Trademark right on the products that put on the market for the first time in EEA is considered as exhausted within borders of the UK (Exhaustion of IP Rights and parallel trade; Stephens, 2021; Liebelt, 2021; Harris and Carter). Parallel imports from the EEA to the UK cannot be prevented by the trademark owner. However, EEA member states can block parallel imports from the UK (Brankin and Headdon, 2022; Stobbs, 2021; Stephens, 2021). This situation shows that the UK applies regional exhaustion unilaterally (Roberts, 2021; Gill and Power, 2021).

Exhaustion of the trademark right on the products released within the borders of the UK is based on the 2019 The Intellectual Property (Exhaustion of Rights) (EU Exit) Regulation. According to the law, placing original goods on the market in the UK or the EEA will continue to exhaust the rights of the trademark owner in the UK, unless otherwise agreed in the UK (Harris and Carter).

British right holders could not prevent parallel importation of products that were put on the market within the EEA borders for the first time since 01.01. 2021. It can be said that, UK continues in the same way as it was a member of the EU (Love and Smalley-Gordon, 2021). The fact that parallel importation of the products that are put on market in the UK for the first time to the EEA can be prevented by the EU trademark holders creates asymmetry (Stephens, 2021; Love and Smalley- Gordon, 2021; Brankin and Headdon, 2022; Liebelt, 2021).

Upon criticism of the current exhaustion system, the UK government requested opinions on exhaustion regime from many different business lines between 07.06.2021 and 31.08.2021. As a result of the consultation, it was seen that four different exhaustion regimes were proposed: Continuing the existing asymmetric exhaustion, international exhaustion and national exhaustion, as well as a mixed exhaustion system that envisages different restrictions in different industries (Stobbs, 2021; Roberts, 2021).

Asymmetric exhaustion system which is also called as ‘‘UK+’’ permits parallel imports from EEA member countries but it does not allow parallel import from other countries. For the UK government this system is the least costly option for EEA trademark holders (Gill and Power, 2021).

The current asymmetric exhaustion system is particularly at the expense of rights holders in industries where licensing is important. In asymmetric exhaustion system, it seems likely that right holders will have difficulty in issuing licenses and suffer financial losses within borders of the UK (Stobbs, 2021).

The international exhaustion system has also been criticized by the rights holders. It has been argued that adoption of such an exhaustion will weaken trademarks and rights holders within borders of the UK, and even protection of the trademark integrity will become very difficult for the right holders (Stobbs, 2021). According to the government, international exhaustion has advantages like lowering product prices and providing customers a variety of branded products. However, it seems to create confusion for branded product customers about increasing product accessibility in the market (Brankin and Headdon, 2022).

Adopting national exhaustion is disapproved by UK Government. According to the government, national exhaustion does not comply with Northern Ireland Protocol (Roberts, 2021; Stobbs, 2021).

The Northern Ireland Protocol is signed between the EU and the UK during the post-Brexit transition period. According to the protocol, once Brexit Agreement is signed, the UK's departure from the EU will not affect product circulation between Northern Ireland and the Republic of Ireland (EU Exit and Northern Ireland Protocol, 10.11.2022). Therefore, it can be said that the circulation of branded goods between Northern Ireland and the Republic of Ireland continues as in the period when the UK was a member of the EU.

According to Northern Ireland Protocol, product circulation between the EU and Northern Ireland, which is a member state of the UK, is not affected. Therefore, the UK does not adopt national exhaustion system, stating that there will be incompatibility between national exhaustion and Northern Ireland Protocol.

Another reason why national exhaustion system is not adopted by the UK Government is the idea that consumers will be deprived of product supply and diversity, as national exhaustion does not allow parallel imports (Brankin and Headdon, 2022).

National exhaustion is criticized by some pharmaceutical industry workers. Drugs coming through parallel imports make up five percent of the pharmaceutical industry and are worth £1 billion annually in the UK market. According to drug distributors, the implementation of national exhaustion may cause drug shortages. According to the opposite views, national exhaustion encourages the right holders to creativity. Thus, the trademark owner can make new investments by earning profit (Gill and Power,2021).

Mixed exhaustion system, which includes different applications according to different sectors, is not found appropriate. Switzerland is an example of the system. International exhaustion is applied for exhaustion of trademark rights in Switzerland. However, national exhaustion system has been adopted in pharmaceutical sector (Brankin and Headdon, 2022).

Although it seems logical in theory, a mixed system adopted by each different industries is a difficult system to implement. In addition, it is thought it will be difficult for rights holders and customers to understand the mixed system (Roberts, 2021).

On 18.01.2022, the UK government announced its opinion on the proposals made. According to the Government, there is insufficient data on economic consequences of proposed exhaustion systems. In addition, it is seen that no future studies have been carried out on adoption of any exhaustion system (Brankin and Headdon, 2022).

As a result of the evaluations, it is seen that no preference has been made on proposed systems. The existing asymmetrical exhaustion system still continues to be applied within the borders of the UK (Harris and Carter, 2022).

CONCLUSION

Trademark right gives its owner absolute right to use and benefit. Right owner, based on the trademark right, has the right to use or even destroy the products as he wishes. However, the monopolistic rights of the right holder on products should not be unlimited. Because after the first sale, person who buys the product should be able to use the product as he wishes. Exposure of the products to intervention of right holder after first sale may adversely affect the ordinary course of commercial life.

Consumer who buys products of the brand should has right to use products as he desires. Principle of exhaustion has been adopted in order to balance the rights of trademark owner and customer who purchases the product. According to principle, after first sale, trademark owner loses the right to interfere with the further circulation of products in the market.

Countries choose exhaustion regimes they accept most suitable for their trade systems in their domestic legislation. The UK adopted regional exhaustion regime when it was an EU member. After leaving EU with Brexit Agreement, asymmetric exhaustion system is applied.

Exhaustion regime should be preferred by considering benefit of both the trademark right holders and the consumers. Because, it is seen that exhaustion regime affects economy of the region where it is applied. Asymmetrical exhaustion system, which is being implemented in the UK after Brexit, has been criticized by trademark rights holders. It can be said that system is a regional exhaustion regime applied unilaterally.

When rights holders in the UK offer their branded products for sale within the EU, trademark rights on their products are exhausted. Therefore, they do not have right to prevent parallel imports from EEA to the UK borders.

However, same is not a case for the EU trademark holders. Trademark rights in the UK are not exhausted when the EU trademark holders offer their products for sale within the EEA.

Current exhaustion system, which creates asymmetry in the exhaustion of rights, is a preference against the UK trademark rights holders. Current asymmetric system has still continued to be implemented, although the UK has received suggestions from many different business and industry lines regarding exhaustion system.

The effect of chosen exhaustion regime determines whether parallel imports are liberal or not. In countries where international exhaustion is adopted, trademark right is exhausted after the first sale. Therefore, right holder does not have right to prevent parallel imports to the the country where products are offered for sale. In territories where parallel imports are free, consumers can access branded products at affordable prices.

It may not be an appropriate decision to adopt international exhaustion regime for the UK. Because laws and regulations applied within the borders of the UK have stricter rules than many other parts of the world. International exhaustion regime implemented within the borders of the UK may also seriously endanger brands of the UK trademark holders.

Similarly, national exhaustion is not at favor of the UK consumers. In an economic system where parallel imports are prevented, consumer's access to branded products at affordable prices is restricted.

In our opinion, exhaustion system for trademark rights in the UK should be like the system applied in Switzerland. Exhaustion system, which will be chosen according to the needs of each sector, is a suitable system in terms of maintaining balance between the right holders and consumers. Despite the implementation of international exhaustion on trademark rights in Switzerland, national exhaustion is adopted in the pharmaceutical sector. Best system for the UK is a hybrid system which national exhaustion is applied in sectors where protection of the rights holders is important for continuity of their trademarks, such as automotive, information, technology and pharmaceutical sectors. International exhaustion can be adopted for trademarks in general.

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