

UK Music Exhaustion Submission

Summary:

UK Music is the collective voice of the UK's world-leading music industry. UK Music represents all sectors of the music industry – bringing them together to collaborate, campaign and champion music. UK Music promotes the music industry as a key national asset to all levels of Government and publishes research on the economic and social value of music.

UK Music urges government to revert to national exhaustion following the withdrawal from the European Union. National exhaustion provides the flexibility for the UK music industry to differentiate for market advantage, in particular with regards to pricing according to the conditions in the respective market and without jeopardising revenues.

The internationally successful UK music industry is a net exporter of our music globally (one out of three net exporters of music, the other being United States and Sweden). Net exporting industries or countries benefit from national exhaustion controlling the exports whilst net importing industries or countries prefer international exhaustion controlling the imports.

In addition to this economic reality for net exporting industries it also follows politically from the withdrawal from the European Union to apply the status quo ante, i.e. before the United Kingdom joined the European Economic Community. The UK Copyright Act 1956 provided for national exhaustion which was replaced by regional, i.e. European Economic Community, wide exhaustion after 1973. Additionally, any option for a future exhaustion regime impacts the Northern Ireland protocol given the diverging exhaustion regimes between the United Kingdom and the European Union resulting from the withdrawal of the United Kingdom.

Q1: Is there parallel trade¹ in your sector?

Yes; first and foremost we stress that the principle of exhaustion (or in the US the first sales doctrine) is limited to physical goods. It does not apply to licensing activities, nor on the provision of digital music services online.

The main occurrences of parallel trade in our sector relate to physical products such as CDs, DVDs, or Vinyls as well as sheet music (including hire).

Q1a: If so, how do parallel imports from the EEA impact on your organisation in terms of (a) choice, (b) availability of supply and (c) competition in your marketplace?

Parallel imports from the EEA impact on the physical goods listed above. Parallel imports from the EEA lead to various concerns:

¹ The government defines parallel goods as goods that are lawfully manufactured by the rights holder or under licence and are lawfully first placed on the market then moved across territorial borders.

Commercially, parallel imports sold in the United Kingdom at a lower price than the same UK destined cultural products damage the level playing field for the UK music industry.

Practically, parallel imports are often indistinguishable from counterfeit products and make the enforcement of rights very difficult.

The UK music industry provides relevant licensing schemes enabling seamless parallel trading between countries without affecting the business of UK music companies. Given such licensing schemes a national exhaustion framework has no impact on choice for consumers. To the contrary, without the threat of undue competition from parallel imports from other countries UK music companies can offer cultural goods more targeted in other countries reflecting their specific economic situation. This enables consumers globally to afford UK produced cultural goods; this benefits UK business economically but also as regards soft power. We posit that without the ability to cater for specific markets by differentiated pricing the price for cultural products will be the highest achievable in the most affluent territory; this will impact on the availability and choice for consumers in less well-off countries.

Q2: If you are able to, please provide the current volume or value of total imports to your organisation in the UK. If possible, please estimate the percentage of the total imports accounted for by parallel imports?

N/A. As a trade association we are unable to provide such figures and refer to the submissions of individual members.

Q3: In your business, how do you exert control over supply chains?

N/A. As a trade association we are unable to provide information of business practices of individual companies; this would infringe competition law principles.

Q4: For your business or organisation, how do right holders become aware and seek to stop their products being parallel imported from outside the EEA without permission?

N/A. As a trade association we are unable to provide information of business practices of individual companies; this would infringe competition law principles.

Prices

Q5: Are there international price differentials for goods in your sector? If yes, what are the factors that influence differences in prices between countries?

As trade association we do not have access to the business factors influencing differentiated pricing we assume that it would be generally questions of demand; available income, and similar considerations.

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 are aware of the current approach to exhaustion which we understand to be temporary.

Q7: What are the costs and benefits of the current regime to your organisation? For example, in terms of choice and availability of suppliers, prices paid and regulatory standards.

Any exhaustion regime other than national exhaustion benefits net importers of cultural products at the expense of net exporters (notably, to different degrees between UK plus and international exhaustion). Given the international success of UK music the current system of unilaterally applying a regional EEA regime disadvantages the UK music industry if the EEA continues not to reciprocate. We note from the impact assessment that sectors such as the National Health Service benefit from UK plus exhaustion, importing many pharmaceutical products (at the best price); this seems to disadvantage the producers of pharmaceutical products in the UK. This is a political decision weighing up the benefits of the various systems for different UK interest. In the UK music industry, there are no different interests to be considered; not reverting to national exhaustion disadvantages the UK music industry without benefit to other UK sectors.

Q8: If possible, please provide examples if your business:

- a) has prohibited or has considered prohibiting parallel exports or
- b) has been prevented from parallel exporting from the UK to the EEA since 1 January 2021.

Whilst we are not able to provide detailed examples from business practice for obvious reasons, we highlight that licensing solutions are already in place enabling parallel trading (also see UK Music members' submissions for business impact evidence).

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.²

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)³ or prohibited parallel imports into the UK (unless the rights holder's permission is obtained)⁴? Please outline the regime your business or organisation would prefer and explain the benefits, costs of change and risks of that change.

All UK Music members, representing the UK's music industry, favour national exhaustion from a business perspective. We stress again that parallel imports into

² Please see 'Options for the UK's future exhaustion regime' section in the consultation document for descriptions of the different regimes.

³ That is, an international regime.

⁴ That is, a national regime.

the UK will continue to be allowed with the permission of the right holder. National exhaustion provides maximum flexibility for our business to cater for the requirements in individual countries without damaging the business.

Q10: Of the 4 options that the government is assessing, which exhaustion regime would you be most opposed to for your business or organisation? Please explain the reasons and set out the costs to your business or organisation and risks of that change.

The most damaging option to our industry is (3) international exhaustion. It will remove the ability to determine the price for our products and to protect from imports which undercut our sector and directly impact UK SMEs most particularly. This regime would also negatively impact consumers because it will invariably lead to uniform pricing based on the highest achievable price, removing choice and wallet-share or currency appropriate pricing. In the short term this will deprive customers who cannot afford such prices from enjoying UK music. Furthermore, experience shows that hampered legitimate markets encourage illegitimate alternatives and in the long term, consumers may find different sources for content which do not remunerate creators nor meet trading standards, so damaging a future successful and sustainable UK music industry. International exhaustion constitutes a lose-lose situation.

Q11: Is there clear and verifiable evidence in favour of different treatment for specific sectors, goods or IP rights to the UK economy?

Yes; it is evident that sectors mainly importing goods benefit from parallel imports because they can procure the product from the cheapest market; net importing sectors or countries benefit from international exhaustion. Sectors mainly exporting goods need to control parallel imports; they benefit from national exhaustion. The UK music industry is a globally successful net exporting sector and should be treated differently to net importing sectors. Outside the European Union, there are examples of different treatment for specific sectors, goods or IP rights; e.g. Switzerland.

Q12: What new activities would your business have to undertake if the government changed the current exhaustion regime? What would be the costs and benefits of such activities?

Whilst as trade association we are not privy to information about business activities of individual companies. We expect business to streamline the pricing structure along the lines of the highest achievable price. UK government will need to provide assistance to counter increasing import of counterfeit products.

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.

We refer the UK government to the negative experiences with international exhaustion in other creative sectors such as the successful UK book publishing industry in Australia and the United States (both providing international exhaustion albeit with specific additions).

Implementation of any change

Q14: If the government were to change its exhaustion regime, what factors would affect the amount of time your business or organisation would need to implement a change? This may include but is not limited to changes to supply chains, contracts, product development, manufacturing processes or investment decisions. Please provide information to support your comments.

Reverting to a purely national exhaustion regime will be the least cumbersome activity for the UK music industry. The situation of imports into the UK from the whole world including the EEA will not require noteworthy investment. The situation of exports into the EEA or the rest of the world will help the UK music industry avoiding the threat of unauthorised parallel imports.

Q15: If the government were to change its exhaustion regime, what length of time would your business or organisation need to implement the change (for example, 1 year or 3 years)? Please provide information to support your answer.

This depends on their nature of the change; as mentioned in our response to question 14 a change to a purely national exhaustion for cultural products will be quick. On the other hand of the spectrum change to an international exhaustion regime for cultural products will require market adjustment for UK companies which will take considerable time of research and analysis.

Legal

Q16: Do you have any views on the government's assessment⁵ of UK legislation and international treaties that are relevant to the UK's choice and implementation of an exhaustion regime?

Under international treaties amongst others the TRIPS Agreement 1994, countries are free to choose their exhaustion regime; this is also reflected in bi or multilateral trade agreements. Under the 1956 UK Copyright act, a successful national exhaustion regime was in operation (until joined the European Economic Community).

Q17: Do you have any views on the government's assessment⁶ that the Northern Ireland Protocol will mean that the regime ultimately selected by the UK government will need to allow parallel imports into Northern Ireland from the Republic of Ireland and other EEA countries?

⁵ Please see 'Current legislation and treaties' section in the consultation document outlining the relevant legislation and treaties.

⁶ The government considers that the Northern Ireland Protocol preserves the position of allowing parallel goods to travel into Northern Ireland from the Republic of Ireland and any other EU member state.

In our view the question of parallel imports from the Republic of Ireland and other EEA countries into Northern Ireland is equally problematic under each of the options provided. They depend on the approach of the European Union which is outside the influence of the United Kingdom. These problems are a consequence of the withdrawal from the European Union and need to be addressed by cooperation between the European Union and the United Kingdom under each of the available options alike.