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Research Article

EXHAUSTION OF TRADEMARK RIGHTS IN KAZAKHSTAN UNDER REGIONAL EXHAUSTION IN THE EURASIAN ECONOMIC UNION

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ABSTRACT

Background: This article aims to examine the trademark rights exhaustion regime for Kazakhstan in the context of a high level of importation of goods and free trade in the Eurasian Economic Union¹ (hereinafter “EAEU”). It addresses consumers’ interests and discusses business and intellectual property (hereinafter “IP”) law in relation to the exhaustion regime. It discusses trademark use in Kazakhstan, the prohibition of such use by trademark owners, and the limits of a trademark owner’s right to prohibit such use. While national and regional legislations introduce the regime of regional exhaustion of trademark rights in Kazakhstan, their legal constructions contain gaps and mutually exclusive provisions which create uncertainty for trademark owners and courts, thereby enabling infringement in the form of parallel import.

Methods: To achieve the goal of this article, the authors applied a set of methods consisting of content analysis and case study. Particularly, the authors analysed the national and regional legislation applicable in Kazakhstan and examined the existing court practice that reveals certain problems with the exhaustion of trademark rights. Moreover, the article includes a comparative analysis of legislation from the United Kingdom (hereinafter “UK”), the European Union (hereinafter “EU”), and select Eastern European countries.

Results: Thus, the paper provides an overview of the currently implemented regime of exhaustion in Kazakhstan and its application in the EAEU and examines the challenges created by uncertainties regarding which rights are being exhausted.

1 The Eurasian Economic Union is an international organization for regional economic integration. It provides for free movement of goods, services, capital and labor, pursues coordinated, harmonized and single policy. The Member-States of the EAEU are Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia. See, *EAEU Eurasian Economic Union* (2023) <<http://www.eaeunion.org/?lang=en>> accessed 4 December 2023.

Conclusions: *Kazakhstan is upholding the regime of regional exhaustion of trademark rights. At the same time, local and regional legislation contradict each other when the regulation concerns the national identification of a trademark. With the national registration of a trademark, the exhaustion regime becomes national. In contrast, in the case of international trademark registration, subject to several conditions, the exhaustion principle is regional.*

1 INTRODUCTION

According to Clause 4 of Article 4 of the Trademark Law of Kazakhstan,¹ no one may use the protected trademark without the owner's consent. That means that by obtaining trademark rights, the trademark owner in Kazakhstan also obtains a right to prohibit the use of that trademark by third parties if such use is made without the owner's consent. However, there are some exclusions when consent is not needed and when the right to prohibit trademark use is exhausted. Exhaustion of trademark rights is an effective instrument for limiting the monopoly over a certain mark. At the same time, the choice of a regime of exhaustion affects the business and its supply chains to the country, as it can either allow or prohibit phenomena such as parallel import of goods, i.e. the import of genuine branded goods that are imported into a market without relevant consent of a trademark owner in that market.²

A high volume of imported manufactured goods indicates that the country is receiving ready-to-use goods, most of which already bear the trademarks. According to the author's private practice, those goods could be imported through official channels controlled by the trademark owners or through parallel import. In this scenario, the choice of an exhaustion regime becomes pivotal as it empowers trademark owners to plan effective import strategies. Allowing parallel importation in a particular country implies lesser protection for the rights of trademark owners or their licensees. Consequently, this could deter investments in establishing proprietary infrastructure within that country.³ In other words, a country's allowance for parallel imports could diminish its attractiveness for investment.

Currently, Kazakhstan uses a regional regime that exhausts trademark rights that apply to the Eurasian Economic Union (EAEU) countries.⁴ Under this regime, when trademark rights are exhausted in one EAEU country, they are considered exhausted in all other EAEU countries. The main advantage of this regime is supposed to support the principle of free movement of goods among the member states of the EAEU, as declared in Article 1 of the

1 Law of the Republic of Kazakhstan no 456 of 26 July 1999 'On Trademarks, Service Marks, Geographical Indications and Appellation of Origin' <https://adilet.zan.kz/eng/docs/Z990000456_> accessed 04 December 2023.

2 International Trademark Association, *Position Paper on Parallel Imports* (INTA 2007) 1.

3 Frederick M Abbott, *Parallel Importation: Economic and Social Welfare Dimensions* (IISD 2007) 7.

4 Lazaros G Grigoriadis, 'Exhaustion of Trade Mark Rights in the Eurasian Economic Union' (2016) 11(8) *Journal of Intellectual Property Law & Practice* 572, doi:10.1093/jiplp/jpw083.

Agreement on the Eurasian Economic Union⁵. However, this approach also causes confusion among trademark owners in the EAEU and those outside of it but have trademarks in all or some countries of the EAEU, including Kazakhstan.

Confusion and problems particularly occur when different entities own the same trademarks in different countries of the EAEU. In this case, it remains unclear whose rights are being exhausted and at what point of time they are exhausted.

Even trademark owners who own a particular trademark in the entire EAEU are uncertain regarding which of their rights are being exhausted, that is, which actions they may prohibit or may not influence after exhaustion.

Last but not least, there is a lack of clarity when an entity is the sole owner of the same trademark across all countries within the EAEU. This presents a dilemma regarding whether the trademark rights are fully exhausted across all EAEU countries if the right is exhausted in just one country.

Thus, the main problems with trademark exhaustion are that (1) it is unclear whose rights are exhausted if the same trademarks in different countries of EAEU are owned by different entities, (2) it is unclear what kind of trademark use can be done after exhaustion – entire use or some partial, and (3) whether the trademark rights exhaust to all the trademarks protected in different countries of EAEU if the owner is the same entity.

Additionally, it may be mentioned that amidst these uncertainties, the licensee of a trademark in a particular country is the most suffering party as they experience the financial losses stemming from the low prices of parallel imported products⁶. Thus, the problem of exhaustion is not only theoretical but directly impacts the business.

The answers to these questions have a practical impact on the brand owner's import strategy because the exhaustion of trademark rights acts as an instrument to regulate the flow of goods within the EAEU and Kazakhstan, as well as between the countries of the EAEU. The latter causes serious concern for trademark owners located outside of the EAEU, who follow their states' international sanction policy and seek to limit the flow of goods from Kazakhstan to certain EAEU countries.

This article aims to understand the limits of exclusive trademark rights in Kazakhstan and the extension of such limits among the countries of the EAEU. It is an attempt to analyse the possible legislative discrepancies and find solutions for the practical application of the exhaustion. Moreover, since the EAEU is a regional integration unit, the regulation of trademark exhaustion in the other integration units, such as the EU, may also be valuable for this article.

5 Agreement on the Eurasian Economic Union (adopted 29 May 2014) <<https://adilet.zan.kz/eng/docs/Z1400000240>> accessed on 4 December 2022.

6 Sneha Jain, 'Parallel Imports and Trademark Law' (2009) 14(1) *Journal of Intellectual Property Rights* 16.

2 MEANING OF TRADEMARK EXHAUSTION IN KAZAKHSTAN IN TERMS OF THE EAEU AGREEMENT

Kazakhstan is a developing economy whose main imports are manufactured goods, and its main exports are natural resources such as fuels and mining. According to the trade statistics of the World Trade Organization (hereinafter “WTO”), in 2021, Kazakhstan imported manufactured goods worth 32.9 billion USD, while its exports amounted to only 9.9 billion USD.⁷

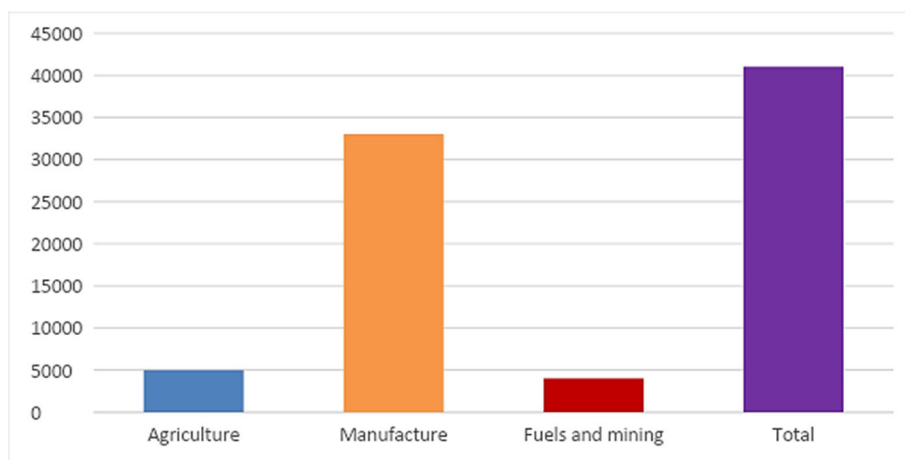


Figure 1. Merchandise imports by product group – annual – 2021 (Million USD)

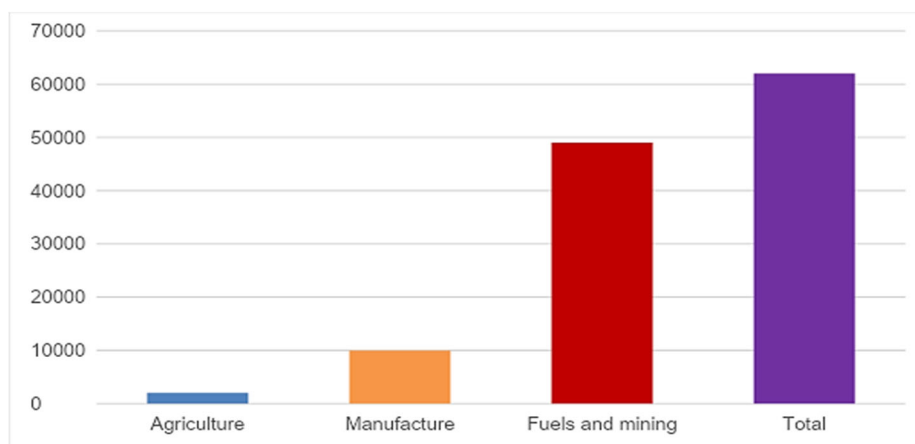


Figure 2. Merchandise exports by product group – annual – 2021 (Million USD)

⁷ ‘Kazakhstan and the WTO: Trade statistics’ (World Trade Organization (WTO), 2021) <https://www.wto.org/english/thewto_e/countries_e/kazakhstan_e.htm> accessed 29 November 2023.

According to the Trademarks Law of Kazakhstan, the exhaustion of exclusive trademark rights is provided in Article 43-1 as follows:

*“The use of the trademark in relation to products that have been lawfully put into circulation in the territory of any of the member states of the Eurasian Economic Union directly by the owner (right holder) of the trademark or by other persons with his consent shall not be a violation of the exclusive right to a trademark.”*⁸

Article 43-1 of the Trademarks Law of Kazakhstan is the starting point of our research on the exhaustion regime in Kazakhstan. It specifically explains that a trademark is not infringed if it is being used in relation to the product bearing that trademark, provided that the product was brought into the market either by the trademark owner himself or with his consent in the territory of EAEU countries.

Article 43-1 generally corresponds to the requirements of the higher level legislation, that is, to the Agreement on Eurasian Economic Union, and particularly to its Annex 26,⁹ which provides the principles of exhaustion of exclusive rights to a trademark, trademark of the Union:

*“Principle of exhaustion of exclusive right to the trademark, trademark of the Union shall be applied in the territories of the member states in accordance with which the use of this trademark, trademark of the Union in relation of goods, which were legally introduced to the civil circulation in the territory of any of the member states directly by the right holder of the trademark and (or) trademark of the Union or other persons with its consent, is not a violation of the exclusive right to the trademark, trademark of the Union.”*¹⁰

The only difference between Article 43-1 and Article 16 of Annex 26 is that Annex 26 also addresses the Union's trademark,¹¹ an analogue of the EU trademark. The key conditions that must be met to invoke the exhaustion under Article 43-1 are (1) the presence of a trademark, (2) which is used in relation to products/goods, (3) that had been put into [market] circulation (4) in the territory of EAEU (5) by a trademark owner or with his consent.

Understanding and interpreting each of these key conditions is essential for the research on the current exhaustion regime in Kazakhstan. Hence, an observation of each condition is warranted at this point.

8 Law of the Republic of Kazakhstan no 456 (n 1) art 43-1.

9 Agreement on the Eurasian Economic Union (n 5) annex 26.

10 *ibid*, ann 26, art 16.

11 *ibid*, ann 26, art 14. According to Article 14 of the ANNEX No. 26 of the Agreement on Eurasian Economic Union the legal protection shall be provided to the trademark of the Union simultaneously in the territories of all member states.

The words “goods” or “products”¹² in both cited pieces of legislation do not have exact interpretations and are not defined by case law. They could be interpreted in the same sense as in European countries, where “goods” means any product valued in money that could be subject to commercial transactions. It implies that free-of-charge products supplied to the market by a trademark owner, such as free samples, may not be the subject of the transaction and are not “goods.”¹³

“Putting the product in market circulation” is also not defined in the national legislation of any country of the EAEU or the EAEU Agreement. The Civil Code of Kazakhstan¹⁴ prescribes that any introduction of a trademark into circulation shall be considered as use of the trademark, which includes production, use, import, storage, offer for sale, sale of trademark or goods designated by the mark, and use in signs, advertising, printed materials or other business documents. However, purely putting goods into market circulation and putting a trademark into market circulation might have different meanings. In *Peak Holding*,¹⁵ goods bearing a trademark cannot be regarded as being put into the market even if the trademark owner imported them to a certain market and offered them to consumers but did not actually sell them. This means that the goods shall be considered as being put into market circulation only after they are sold, and other preparations before the selling itself shall not be considered as putting into the market. This is probably the best example of goods being “put into circulation” under the Trademarks Law of Kazakhstan and goods being “introduced into the civil circulation” under Annex 26 of the EAEU Agreement.

The meaning of the words “in relation to products/goods” will be examined further in the article. In this section, the combined meaning of a “trademark” and “the territory of EAEU” is of greater interest.

According to the Trademarks Law of Kazakhstan, a “trademark” may be defined as a sign registered according to Law or protected without registration by the international agreements to which the Republic of Kazakhstan is party, serving to distinguish goods (services) of certain legal entities or individuals from goods (services) of the same kind of other legal entities or individuals.¹⁶

12 In the original language there is no difference between the word ‘products’ in Article 43-1 and the word ‘goods’ in Article 16 of Annex 26.

13 *Commission of the European Communities v Italian Republic* Case 7-68 (Court of Justice, 10 December 1968) cl B, para 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61968CJ0007>> accessed 5 December 2023; *L’Oréal SA and Others v eBay International AG and Others* Case C-324/09, EU:C:2011:474 (Court of Justice (Grand Chamber), 12 July 2011) operative pt, para 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0324&qid=1713386945612>> accessed 5 December 2023.

14 Civil Code of the Republic of Kazakhstan (Spec pt) no 409 of 1 July 1999. <https://adilet.zan.kz/eng/docs/K990000409_> accessed 5 December 2023.

15 *Peak Holding AB v Axolin-Elinor AB, formerly Handelskompaniet Factory Outlet i Löddeköpinge AB* Case C-16/03 (Court of Justice (Grand Chamber), 30 November 2004) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0016&qid=1713389790364>> accessed 5 December 2023.

16 Law of the Republic of Kazakhstan no 456 (n 1) art 1, para 8.

Currently, Kazakhstan is party to three international agreements that regulate international trademark registration – the Madrid Agreement¹⁷ and its Protocol¹⁸ and the EAEU Agreement. While the Madrid Agreement and Protocol to it regulate international registrations in a broad range of countries, the EAEU Agreement regulates the registration of the so-called “trademark of the Union”, meaning the trademark and service mark of the Eurasian Economic Union. The legal protection of the trademarks of the Union shall be provided simultaneously in the territories of all member states.¹⁹

Thus, two types of trademark registrations are available in Kazakhstan: registration according to the procedure provided by the Law (national registration) and protection under international agreements (international registration).²⁰

As provided in the Preamble to the Trademarks Law of Kazakhstan, the Law regulates the relations arising from the registration, legal protection and use of trademarks, service marks, and appellations of origin in the Republic of Kazakhstan.²¹

The conjunction of the Preamble to the Trademarks Law of Kazakhstan and the definition of “trademark” clearly shows that at least a trademark with national registration is protected only in the territory of Kazakhstan. In other words, a “trademark” under national registration under the Trademarks Law of Kazakhstan is not valid outside of Kazakhstan; in other countries, the mark is either treated as an unregistered mark or protected by the laws of those countries.

This point of establishing the territorial effect of trademark laws in general, particularly of trademark rights, has been confirmed by theorists for ages. In particular, Graham B. Dinwoodie wrote about this in his book *Trademarks and Territory: Separating Trademark Law from the Nation State*.²² Kazakhstan uses a continental legal system and does not recognise case law, but still affords the owners of national trademark registrations a territoriality principle of exclusive trademark rights protection because the same principle is provided by Article 3 of the Paris Convention²³ and Article 3 of Agreement on Trade-

17 Madrid Agreement Concerning the International Registration of Marks (amended 28 September 1979) <<https://www.wipo.int/wipolex/en/text/283530>> accessed 5 December 2023.

18 Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (adopted 27 June 1989, amended 12 November 2007) <<https://www.wipo.int/wipolex/en/text/283484>> accessed 5 December 2023.

19 Agreement on the Eurasian Economic Union (n 5) annex 26, art 14.

20 Law of the Republic of Kazakhstan no 456 (n 1) art 1, para 8.

21 *ibid*, Preamble.

22 Graeme B Dinwoodie, “Trademarks and Territory: Detaching Trademark Law from the Nation-State” (2003) 41(3) HOUSTON LAW REVIEW 885.

23 Paris Convention for the Protection of Industrial Property (amended 28 September 1979) <<https://www.wipo.int/wipolex/en/text/288514>> accessed 5 December 2023.

Related Aspects of Intellectual Property Rights (hereinafter “TRIPS Agreement”),²⁴ as Kazakhstan is a member of both these international legal acts.

At the same time, a conflict arises between the legal construction and the territoriality principle when the legislator attempts to expand the territorially bound rights to other territories. This is shown in the key conditions for the exhaustion of trademark rights under Kazakhstan’s legislation. Indeed, under Article 43-1 of the Trademarks Law of Kazakhstan and Article 16 of Annex 26 to the EAEU Agreement, the trademark rights are exhausted when the goods bearing that trademark are put into circulation in the territory of any member-state of the EAEU. However, that may not happen to the national registration of the Kazakhstani trademark since it does not exist in any country of EAEU (except Kazakhstan) as a trademark, that is, as a separate complex of legal rights and obligations. A trademark under Kazakhstani national registration may only be exhausted outside of Kazakhstan since there is nothing to exhaust.

The national territoriality principle in terms of exhaustion would mean that, for instance, two national trademarks in two different countries of EAEU, even if owned by the same entity, look identical and are protected to the same goods – but remain two different complexes of legal rights and obligations, and the exhaustion of rights to one national trademark in one country does not lead to the simultaneous exhaustion of rights to another national trademark in another country.

Notwithstanding that, intellectual property law experts call the exhaustion principle that applies to a whole region, such as the EU, or in this particular case in the EAEU, “a regional exhaustion principle”²⁵, the principle that relates to trademarks registered under a national procedure and that is bound to the national territory of a certain country still remains national, that is the “national exhaustion principle”.

At the same time, the legal construction proposed by Article 43-1 of the Trademarks Law of Kazakhstan creates confusion as to what is involved in the exhaustion of national trademark rights in a region’s territory. That confusion has already been seen in practice from a negative perspective for a national trademark owner.

In a decision of the Supreme Court of Kazakhstan of 21 February 2022, in the case of individual entrepreneur Ivan Krugovykh v Zdorovaya Eda LLP,²⁶ Mr. Krugovykh, as the owner of the national registration for the trademark “Chyorniy Prince” (Black Prince) was

24 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (amended 23 January 2017) <<https://www.wipo.int/wipolex/en/treaties/details/231>> accessed 5 December 2023. This Agreement constitutes Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, which was concluded on April 15, 1994, and entered into force on January 1, 1995.

25 Kimberly Reed, ‘Levi Strauss v Tesco and EU Trademark Exhaustion: A Proposal for Change’ (2002) 23(1) *Northwestern Journal of International Law & Business* 139.

26 The decision on *Krugovykh v Zdorovaya Eda* (Case No. 6001-21-00-3r/7728) is not available in English language; a brief overview in English is done in this article.

protected, *inter alia*, in relation to a cheese product. He was authorised to prohibit Zdorovaya Eda LLP (Healthy Food LLP) from importing and selling the cheese bearing that trademark from Belarus to Kazakhstan. The court found that in Belarus, another entity called Kobrin Butter and Cheese Making Factory owned the trademark "Black Prince" used for cheese. This resulted in two identical trademarks being protected for the same goods but owned by different trademark owners. The court decided that since the trademark rights were exhausted when the product had been put into circulation for the first time in the EAEU member state (Belarus), the use of that trademark shall not lead to infringement in another EAEU member state (Kazakhstan).

In that case, the court overlooked the fact that the exhaustion happened in relation to the trademark of Belarus. Once the product crossed the border into Kazakhstan, the trademark of Belarus no longer existed. In its place was a trademark of Kazakhstan, and even though nothing physically happened to the product, the legal regime had changed. One way or another, this case shows that even the Supreme Court of Kazakhstan may be unclear by the existing legal construction of Article 43-1 of the Trademarks Law of Kazakhstan.

Another situation concerns the exhaustion of trademarks protected in Kazakhstan under an international procedure. As discussed above, there are at least two ways to obtain an international registration of a trademark with protection in Kazakhstan – under the Madrid Agreement and its Protocol and the EAEU Agreement. Under the Madrid Agreement and Protocol, the right owner may obtain trademark protection in a wide range of countries, which might also include the EAEU member-states. If, for example, such an international trademark registration would cover at least two EAEU member-states, it would mean that the same trademark, owned by the same entity, in relation to the same goods (in most cases) would be protected. Consequently, the exhaustion of rights to an international trademark protected in at least two member-states of the EAEU would lead to the exhaustion of those rights to that trademark in both member-states. The same would happen with international trademark registration under the EAEU Agreement. Through registration within the Union, trademark owners would possess trademark rights in all EAEU member-states, with these rights emerging simultaneously and, therefore, would be exhausted simultaneously across all member-states.

Therefore, in the case of national registration of a trademark, the exhaustion principle in Kazakhstan would be "national", though the legislation is rather arguable. However, in the case of international trademark registration, either under the Madrid Agreement, its Protocol or the EAEU Agreement, the exhaustion principle in Kazakhstan would be "regional". It could be said that depending on the type of trademark, Kazakhstan applies a dual exhaustion principle – national and regional.

The national principle of trademark rights exhaustion in relation to national trademark registrations conflicts with the main principle of the EAEU Agreement – the free movement of goods between the member countries. Simultaneously, it serves the national interests of those Kazakhstani trademark owners who do not have international registrations all over the EAEU.

It is also worth mentioning that Article 43-1 of the Trademarks Law of Kazakhstan and Article 16 of Annex 26 of the EAEU Agreement are quite similar to Article 12 of the UK Trade Marks Act²⁷ and EU legislation related to trademarks, such as Article 13 of Council Regulation (EC) No 207/2009,²⁸ Article 7 of EU Directive 2008/95/EC,²⁹ and also Article 15 of the EU Directive 2015/2436³⁰ – all of these UK and EU legislations regulate the exhaustion of trademark rights in UK and EU, and propose a so-called “regional exhaustion regime”.³¹ The wording in the UK and EU legislations covering the exhaustion principle is rather similar to the wording of the Trademarks Law of Kazakhstan and Annex 26 of the EAEU Agreement.

Such a similarity in legal regulations of two different regions evokes a thought. Although it is not the goal of this particular study, the exhaustion principle applied in the UK and the EU member-states could also be reconsidered from pure “regional” to “national + regional”, especially considering that in the UK and the EU, the same as in Kazakhstan and the EAEU, there are national and also international registrations of trademarks (again under Madrid Agreement, Protocol to it, and also under EU Directives and Council Regulations). That means that the UK and the EU legislation currently deal with parallel import problems similar to those of Kazakhstan and EAEU countries – by introducing only the regional principle of trademark exhaustion without clarifying that national exhaustion shall apply to the cases of national registration of trademarks.

In other countries of the world, for example, in Ukraine, the wording of the national legislation regulating the exhaustion of trademark rights might differ, though it has the same meaning. As stated in the Trademarks Law of Ukraine,³² the exclusive right of a certificate holder to prohibit other persons from using the registered mark without his consent does not apply to the use of the trademark for a product put into civil circulation under this trademark by the certificate holder or by his consent.³³

27 UK Trade Marks Act 1994 (amended 23 January 2020) <<https://www.gov.uk/government/publications/trade-marks-act-1994>> accessed 5 December 2023. This Act make up part of the Trade Mark Legislation in the UK (Ch. 26).

28 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark (codified version) (Text with EEA relevance) <<http://data.europa.eu/eli/reg/2009/207/oj>> accessed 5 December 2023.

29 Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating to Trade Marks (codified version) (text with EEA relevance) <<http://data.europa.eu/eli/dir/2008/95/oj>> accessed 5 December 2023.

30 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to Approximate the Laws of the Member States Relating to Trade Marks (recast) (Text with EEA relevance) <<http://data.europa.eu/eli/dir/2015/2436/oj>> accessed 5 December 2023.

31 Carsten Fink, ‘Entering the Jungle of Intellectual Property Rights Exhaustion and Parallel Importation’ in Carsten Fink and Keith E Maskus (eds), *Intellectual Property and Development: Lessons from Recent Economic Research* (World Bank OUP 2005) 189.

32 Law of Ukraine no 3689-XII of 15 December 1993 ‘On Protection of Rights to Marks for Goods and Services’ (amended 27 July 2023) <<https://zakon.rada.gov.ua/laws/show/3689-12#Text>> accessed 5 December 2023.

33 *ibid*, art 16, para 6, cl 2.

Notwithstanding the relative similarity of Ukrainian legislation and, at first glance, the obvious “national” exhaustion regime, the decision of the High Commercial Court of Ukraine in *Kaeser Kompressoren SE*³⁴ showed that the country proposes an “international” exhaustion regime. In particular, the High Commercial Court said that:

“The norms of part 6 Article 16 of Law No. 3689 does not relate exhaustion of trademark rights with the introduction of goods onto the market by the trademark owner (or with its consent) exclusively on the territory of Ukraine. Therefore, the introduction of goods under a certain trademark onto the market by the trademark owner (or with its consent) could be conducted on the territory of other country(ies) and after that the owner can not limit or prohibit further resale of this product in a country where its rights are protected (including in Ukraine). The aforesaid, in the absence of territorial restrictions, gives grounds to affirm the existence in Ukraine of an international approach to exhaustion of rights.”

In that regard, the trademark rights exhaustion regime of Eastern Europe striving to become a member of the EU, such as Ukraine in this case, should be clearly amended to the “regional” and/or “national” regime because the legislation of EU does not recognise the “international” exhaustion regime.

3 ACTIONS WHICH A TRADEMARK OWNER MAY NOT PROHIBIT AFTER EXHAUSTION OF TRADEMARK RIGHTS

According to Trademarks Law, infringement of trademark rights is understood as the introduction of a trademark into circulation without the consent of the owner (right holder) or the use of similar designations that may confuse, with respect to homogeneous products or services, and in the case of a well-known trademark, in relation to all products and services.³⁵ Thus, in a general sense, infringement constitutes unconsented circulation of a trademark or using similar designations concerning similar goods and services.

Putting or introducing³⁶ a trademark into circulation is described in the Civil Code of Kazakhstan and includes any type of use of a trademark, specifically production, use, import, store, offer for sale, sale of trademark or goods designated by the mark, and use in signs, advertising, printed materials, or other business documents.³⁷ It is rather hard to imagine how exactly the “production of a trademark” or “import of a trademark” can be

34 *Kaeser Kompressoren SE v Komprig Ltd* Case no 904/2029/15 (High Commercial Court of Ukraine, 20 November 2015) <<https://reyestr.court.gov.ua/Review/52489825>> accessed 5 December 2023.

35 Law of the Republic of Kazakhstan no 456 (n 1) art 43.

36 In the original texts of the Trademarks Law and the Civil Code of Kazakhstan ‘putting into circulation’ and ‘introduction into circulation’ have the same meaning.

37 Civil Code of the Republic of Kazakhstan no 268-XIII of 27 December 1994 (amended 23 December 2023) art 1025, para 2 <https://adilet.zan.kz/eng/docs/K940001000_> accessed 25 December 2023.

done in practice. In this regard, the Trademarks Law of Kazakhstan clarifies the list of actions that are defined as the “use of a trademark” and structures them as follows:

1. placement of a trademark on a product in respect of which [it is]³⁸ protected;
2. placement of a trademark in the provision of services in respect of which [it is] protected;
3. placement of a trademark on the packaging of products;
4. manufacturing of products with the designation of the trademark;
5. use of the product with the designation of the trademark;
6. importation of product with the designation of the trademark;
7. storage of product with the designation of the trademark;
8. offer for the sale of the product with the designation of the trademark;
9. sale of products with the designation of the trademark;
10. the use of the trademark in signboards;
11. the use of the trademark in advertising;
12. the use of the trademark in printed materials;
13. the use of the trademark in business documentation;
14. other introduction [of a trademark or goods bearing that trademark]³⁹ into circulation⁴⁰.

The abovementioned pieces of Kazakhstani legislation make it clear that, in a general sense, the trademark owner has the right to request the court to prohibit any unconsented type of trademark use based on the Trademarks Law of Kazakhstan. In conjunction with definitions of “infringement” and “exhaustion” of trademark rights, it is worth mentioning that the right to prohibit particular actions can be exhausted. As stated in Article 43-1, “*The use of the trademark in relation to products... shall not be a violation of the exclusive right to a trademark*”.⁴¹ Thus, the trademark owner may not call certain actions a “violation” after the exhaustion. At the same time, the owner’s rights to use the trademark and allow the third-party use (by virtue of license or in any other way) shall remain as conferred by the trademark registration. Only the right to prohibit certain actions is exhausted.

Concerning the exhaustion of trademark rights, it is important to understand which types of “use of a trademark” the owner may prohibit after the trademarked goods are put into circulation, that is, after the sale of goods. The available case law in Kazakhstan is rather

38 Original text relates not only to trademarks but also to appellations of origin and uses words ‘they are’ meaning trademark and appellation; since the article observes the exhaustion of trademark rights and does not relate to appellations of origin the words ‘they are’ are replaced with ‘it is’, and the appellations of origin are omitted.

39 Original text uses words ‘their other introduction’ covering the trademarks, the appellations of origin and goods bearing such trademarks and appellations of origin; for the purpose of this article the word ‘their’ is replaced with ‘trademark’ and ‘goods bearing the trademark’.

40 Law of the Republic of Kazakhstan no 456 (n 1) art 1, para 1, cl 9.

41 *ibid*, art 43-1.

scarce on this particular question, and the national legislation also does not provide any clarity. One may think, and the existing legislation gives reason to such thoughts, that after the sale of a trademarked product, that is, after the right to trademark rights on that product is exhausted, the trademark can be used without the trademark owner's consent in any way, including the production of similar products, importation of other similar products, and different types of "use of a trademark". However, the available research (e.g. Lazaros G. Grigoriadis, *Trade Marks and Free Trade. A Global Analysis* [2014]⁴²) shows that the right can be exhausted only with respect to a particular trademarked product and not to all the products of the trademark owner (or his subsidiary, licensee, or distributor).

The deeper analysis of Article 43-1 of the Trademarks Law of Kazakhstan focusing on the words "*use of the trademark in relation to products that have been lawfully put into circulation*" confirms that the exhaustion relates only to particular products and not to the whole production line or the entire, exclusive trademark rights. This also confirms that exhaustion does not relate to services. Consequently, such trademark use as "placement of a trademark in the provision of services in respect of which [it is] protected" may not be exhausted.

Since exhaustion relates to particular products rather than the whole production line, such trademark use as "manufacturing of product with the designation of the trademark" may not be a subject of exhaustion. A consumer who buys a trademarked product does not receive the right to manufacture new products with that trademark, as he only has the rights over the purchased trademarked product. Therefore, it may be concluded that the consumer does not receive the right to place the trademark on the purchased product onto other products and their packaging without infringement, and thus exhaustion also does not apply to "placement of a trademark on the product in respect of which [it is] protected" and to "placement of a trademark on the packaging of products."

On the other hand, the "use of product with the designation of the trademark" is a primary goal from the consumer's perspective. Consumers, in most cases, buy a product to use it. In this context, exhaustion unequivocally applies. Once a product is sold by a trademark owner, whether by its subsidiary, licensee, or distributor, it can be used according to its direct purpose without infringement of trademark rights.

In general, "storage", "offer for sale", and "sale of product with the designation of the trademark" as types of trademark use also relate to the trademarked product itself and not to trademark rights. In this regard, these types of trademark use may also be exhausted under Article 43-1 of the Trademarks Law of Kazakhstan.

Another issue is the "importation of product with the designation of the trademark". If a trademarked product had never been imported to Kazakhstan and the entire EAEU, and such an import is unconsented, then according to exhaustion, the trademark owner's rights

42 Lazaros G Grigoriadis, *Trade Marks and Free Trade: A Global Analysis* (Springer 2014) 52-3.

to that product are not exhausted. As observed in the first part of this article, if there is a national trademark registration, the exhaustion does not apply when the goods are imported to Kazakhstan from any country. However, suppose there is an international trademark registration (including the trademark of the Union), the trademark rights shall be deemed exhausted by Article 16 of Annex 26 to the EAEU Agreement in the country of the first import on the EAEU condition that the international trademark spreads also to Kazakhstan in the name of the same owner as in the country of the first import of the EAEU.

Therefore, a trademark right, particularly the right to prohibit the use of a trademark, is not exhausted if the product bearing the trademark is imported to Kazakhstan (or, in some cases, to an EAEU country member) without the trademark owner's consent. This phenomenon is called "parallel import" in most research papers.⁴³ As it can also be seen from Article 43-1 of the Trademarks Law of Kazakhstan and from Article 16 of Annex 26 to the EAEU Agreement, the parallel import in EAEU generally, and in Kazakhstan mainly, causes a trademark infringement, and therefore may be prohibited by the trademark owner.

A slight difference could come in sight when the product has been manufactured and trademarked in Kazakhstan, exported to another country, and then reimported back. As the author's practice shows, this might happen when Kazakhstani manufacturers seek to do business in the closest developing markets, such as Kyrgyzstan or Uzbekistan, and for that purpose, might provide those countries' consumers with lower prices than in Kazakhstan. Parallel importers, who engage in carrying out parallel imports to Kazakhstan, may buy whole batches of goods at relatively low prices and import them back to Kazakhstan, causing the Kazakhstani manufacturers to compete with their products and lose consumers in the market where the exported products were initially intended.

Initially, trademark rights may appear exhausted in such situations, but the answer is in the words "put into circulation", which needs clarification in the legal acts or the local case law, currently silent. However, as shown in *Peak Holding*,⁴⁴ goods are not considered to be put into circulation until they are sold in the local market. Thus, if the goods are not sold in the territory of Kazakhstan and were produced for sale in another country, their reimport would come into collision with the consent of the trademark owner – the consent was given for export from Kazakhstan and import to another country, and not to import to and further circulation in Kazakhstan. Therefore, the reimportation of trademarked goods would constitute trademark infringement, and the trademark rights would not be exhausted.

The types of trademark use, such as in signboards, advertising, printed materials, and business documentation, mostly relate to product marketing. In this type of use, too, a wrong impression could exist that once a trademarked product is purchased, the buyer may then use the trademark in any type of marketing activity. However, Article 43-1

43 Irene Calboli and Edward Lee (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports* (Edward Elgar Pub Ltd 2016) 17.

44 *Peak Holding AB v Axolin-Elinor AB, formerly Handelskompaniet Factory Outlet i Löddeköpinge AB* (n 15).

strictly exhausts the trademark rights on a particular product, not the trademark itself. The use of a trademark in marketing is not infringement as long as the use is not purely of the trademark but of the trademarked product already in possession of the seller, on the condition that such marketing activities are not damaging the trademark's reputation. For example, when the seller uses only the trademark on a signboard or an official letterhead without any reference to the product, it means the seller is pretending to be associated with the trademark owner. The court came to the same conclusion in *Parfums Christian Dior v Evora*:

*"It follows that, where a reseller makes use of a trade mark in order to bring the public's attention to further commercialisation of trade-marked goods, a balance must be struck between the legitimate interest of the trade mark owner in being protected against resellers using his trade mark for advertising in a manner which could damage the reputation of the trade mark and the reseller's legitimate interest in being able to resell the goods in question by using advertising methods which are customary in his sector of trade."*⁴⁵

Therefore, using a trademark to commercialise the trademarked product after exhaustion in Kazakhstan and in EAEU is not infringing if it refers to that particular trademarked product and does not threaten to damage its reputation. In all other cases of commercialisation, the trademark right shall not be deemed exhausted with the sale of the trademarked product.

The last, and probably the broadest type of trademark use provided by the Trademarks Law of Kazakhstan, is "other introduction of a trademark or goods bearing that trademark into circulation". This could refer to a broad range of actions. The trademark itself could be the subject of an assignment agreement, pledged to the bank as a security for a loan, or could even be used as a share capital payment. However, all these actions with the trademark are not connected to actions with the product and, therefore, may not be subject to exhaustion.

Dissimilar to the actions with the trademark itself, the actions with the trademarked goods shall be examined separately. "Introduction of the goods bearing a trademark" could entail a variety of actions such as a pledge of the trademarked product to the bank, offering a trademarked product as a prize, or rent of a trademarked product, and so on. In terms of exhaustion, since these actions are being done with the products that were put into circulation, they may not constitute infringement and, therefore, may not be prohibited by the trademark owner. However, the legislation and the case law of Kazakhstan are silent on situations wherein the initial condition of the goods was changed or worsened after putting into circulation. An example could be relabeling or removing excise stamps. The legislation

45 *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* Case C-337/95 (Court of Justice (Grand Chamber), 4 November 1997) para 44 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0337&qid=1713451341354>> 5 December 2023.

of Kazakhstan needs further improvement in this part. A good example could be the UK Trade Marks Act 1994, which provides the following regulation:

“Subsection (1)⁴⁶ does not apply where there exist legitimate reasons for the proprietor to oppose further dealings in the goods (in particular, where the condition of the goods has been changed or impaired after they have been put on the market).”⁴⁷

Thus, UK legislation has prearranged the situation, where the condition of a trademarked product could be changed to the extent that further use of such a product either changes its initial aim or worsens the quality and usability of the product. Though there are currently no precedents in Kazakhstan in which such a regulation would be needed, the appearance of such situations may not be excluded. Thus, prearrangement would be preferable rather than correcting the faults when they appear.

In summary, trademark rights could be exhausted in Kazakhstan as a result of trademark uses such as the use of a trademarked product as it is intended, the importation of a product from another EAEU country subject to the trademark having an international registration and covering the other country and Kazakhstan simultaneously, on the condition that the product was initially sold in the other country after the trademark owner's consent. In all these cases, the trademark rights are not deemed to be infringed. Moreover, the trademark owner may not prohibit the storage, offering for sale, and selling of the product which was put into circulation by him or with his consent. Using a trademark in signboards, advertising, printed materials, or business documentation may not constitute an infringement on the condition that commercialisation refers to a particular trademarked product, the right over which has been exhausted and does not lead to damage to the trademark's reputation. Finally, other ways of introducing trademarked products, whose trademark rights are exhausted, into market circulation shall not constitute infringement. However, it is advisable to create legal regulations to prevent the change and impairment of the product's condition.

4 EXHAUSTION AS AN INSTRUMENT OF BRAND PROTECTION

From the above analysis, it is clear that the exhaustion of trademark rights is an instrument which limits the monopoly of the trademark owner over a particular trademark. This limitation relates to the trademark owner's right to prohibit certain types of trademark use, which is definitely a positive point for consumers because at least they do not have to ask the trademark owner's consent to use a trademarked product as intended. Such a use would not constitute an infringement when the trademark rights are exhausted. As Donnelly noted, for any purchaser, the exhaustion also works as an instrument that allows reselling

46 UK Trade Marks Act (n 27) art 12, subs (1). Act provides the definition for 'Exhaustion of rights conferred by registered trade mark'.

47 *ibid*, art 12, subs (2).

the product without being liable for infringement.⁴⁸ Bonadio also stressed that without exhaustion, the trademark owner could maintain control over sales, transfer, and use of relevant trademarked products, as well as influence commercial relations.⁴⁹

At the same time, when the exhaustion does not happen, as in the case of the national or regional regime used in Kazakhstan, the trademark owner's right to prohibit trademark use, including the import and further sale of trademarked genuine products in the territory of Kazakhstan, shall prevail. Such importation is called "parallel import", and the exhaustion regime is usually adapted to prevent it. A sufficiently clear definition of parallel import could be: "...genuine goods sold in the country of export with the permission of the rights holder, but imported by a reseller without the authority of the rights holder in the country of importation".⁵⁰

There are various possible reasons for parallel imports in Kazakhstan. Parallel imported products might have quality differences in comparison to the authorised products⁵¹. Such products could be cheaper variations, outmoded varieties, or non-adapted to the local market requirements and customers' tastes.⁵² Moreover, parallel imported products could come from countries with lower taxation regimes to Kazakhstan.⁵³ Another reason could be attempts by the local trademark owner's licensee to obtain higher profit margins from the local market in the absence of licensee competition, leading to higher prices.⁵⁴ Finally, parallel imports may occur due to parallel importers capitalising on marketing expenses as parallel importers do not bear the costs for marketing the products and, as a result, can offer products at lower prices – a practice known as free riding.⁵⁵

Irrespective of the reasons for parallel imports, the exhaustion regime helps prevent parallel imports to Kazakhstan in most cases, reducing the negative effects of parallel trade. It serves as an instrument of brand protection policy and enables better sales planning. Referring again to Fink, it can be concluded that a ban on parallel import enables the transfer of technology and speeds up the licensing process while allowing parallel import leads to the reluctance of trademark owners to issue a license.⁵⁶

48 Darren E Donnelly, 'Parallel Trade and International Harmonization of the Exhaustion of Rights Doctrine' (1997) 13(2) Santa Clara High Technology Law Journal 447.

49 Enrico Bonadio, 'Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?' (2011) 33(3) European Intellectual Property Review 153.

50 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement: Final Report ... to Senator the Hon Nicholas Minchin Minister for Industry, Science and Resources and the Hon Daryl Williams AM QC MP Attorney-General* (IP Australia 2000).

51 Joint Group on Trade and Competition, *Synthesis Report on Parallel Imports* (OECD 2002) 6, note 14.

52 *ibid.*

53 Goods coming to Kazakhstan from UAE are relatively cheaper because of a number of tax exemptions in UAE that are more favorable than in Kazakhstan.

54 Joint Group on Trade and Competition (n 52) 7, note 17.

55 *ibid.*, note 18.

56 Fink (n 31) 180.

As parallel imports increase the possibility of counterfeit goods entering the country,⁵⁷ the brand protection role of the exhaustion mechanism increases.⁵⁸ At the same, the Organization for Economic Co-operation and Development (hereinafter “OECD”) treats counterfeiting along the same line as other types of organised crime and illicit trade, claiming that counterfeiting is more profitable and less risky:

Illicit activities (total) 770 billion	Figures (billions USD)
Drug trafficking	320.0
Counterfeits	461.0*
Forced labour by private enterprise	150.0
Illicit oil trade	10.8
Illicit wildlife trade	10.0
Fish	9.5
Timber	7.0
Art & cultural property	6.3
Gold (3 countries only)	2.3
Human organs	1.2
Small arms/ light weapons	1.0
Diamonds	0.9

Figure 3. Estimated revenues for illicit trade by sector⁵⁹

Therefore, parallel import of genuine trademarked products could become another way to import counterfeit ones. Though the treatment of counterfeit goods and parallel imports is proposed to be different,⁶⁰ their routes might still be congruent, and thus, the threat of counterfeit goods hidden among parallel products in the same shipment may persist. The exhaustion regime in such a situation again favours the brand protection policy of the trademark owners.

Therefore, although the exhaustion of trademark rights in Kazakhstan limits the rights of trademark owners, it allows them to effectively structure the licensing strategy, fight against parallel imports, plan a brand protection policy and protect themselves from counterfeiting.

57 Joint Group on Trade and Competition (n 51) 186, note 24.

58 UNICRI, *Counterfeiting: A Global Spread, a Global Threat* (advanced unedited edn, UNICRI 2011) 58. Moreover, from authors’ practice, the parallel importers of auto spare parts from UAE were not sure in the quality of those products claiming that 50% of those parts could be counterfeit since UAE was offering a large amount of fakes. See, Zainab Mansoor, ‘Counterfeit Toyota parts worth Dhs10.5m confiscated in the UAE in 2020: A total of 21 raids were conducted for counterfeit parts during 2020’ (*Gulf Business*, 16 March 2021) <<https://gulfbusiness.com/counterfeit-toyota-parts-worth-dhs10-5m-confiscated-in-the-uae-in-2020/>> accessed 5 December 2023.

59 OECD, *Illicit Trade: Converging Criminal Networks* (Reviews of Risk Management Policies, OECD Pub 2016) 24.

60 Bonadio (n 49).

5 CONCLUSIONS

Kazakhstan is upholding the regime of regional exhaustion of trademark rights, a concept encouraged by the Eurasian Economic Union. At the same time, local and regional legislations come into contradiction when the question is about the nationality of a trademark. With national trademark registration, the exhaustion regime becomes national, while in the case of international trademark registration, subject to a number of conditions, the exhaustion principle is regional. Though the political and economic intentions of the EAEU countries are to strive for regional exhaustion, there is still a position that such exhaustion is possible only in truly harmonised markets,⁶¹ and Kazakhstan, before fully applying the regional regime of exhaustion, should bring the market conditions in harmony with other members of the EAEU. Before that, it should be clearly understood that national exhaustion is also in place and should be considered.

As a result of exhaustion in Kazakhstan, trademark owners may struggle to prohibit actions such as using a trademarked product for its intended purpose or conditionally importing a product from another EAEU country. Exhaustion also leads to allowing the storage, offering for sale, and selling of products put into circulation by the trademark owner or with their consent. If trademark rights are exhausted for a particular product, further commercialisation of that product through the use of the trademark in signboards, advertising, printed materials, or business documentation might also go unprohibited.

However, although exhaustion is advantageous to legitimate consumers and resellers, it might still serve as a trademark owner's brand protection against parallel import and hidden counterfeiting, enabling the effective planning of protection strategies and leading to potential license transfer.

To improve the situation with exhaustion, Kazakhstan should consider amending its national legislation, particularly the Trademarks Law, by clarifying that exhaustion applies only when trademarked goods are placed into the market by the trademark owner or with their consent in the territory of Kazakhstan (not the EAEU). Additionally, clarification is needed regarding permissible actions with a trademark after exhaustion happened. These amendments could be done in Article 43-1 of the Trademarks Law of Kazakhstan. This recommendation could be a subject for discussion among other EAEU countries and other regional integration units worldwide. Such clarity would benefit trademark owners and their customers, ensuring a clear understanding of what actions can be done with a trademark post-exhaustion and on which territory those actions could be done.

61 International Trademark Association, *Position Paper on Parallel Imports* (INTA 2007) 5.

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