

# Theoretical Aspects of Parallel Imports' Situational Impact on the Range of the Shadow Economy

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## Summary

Contemporary international trade experiences an increasing part of export and import operations comprised by goods referring to intellectual property. A significant problem in this area is a certain contradiction of how parallel imports run in the national market of Ukraine. Such contravention provokes monopolization and brings the intellectual property market underground. The purpose of the paper is comprehensive justification of the "parallel import" as an economic category, and determination of the optimal mechanism for state regulation of the movement of foreign goods of intellectual property across the customs border of Ukraine. The article analyzes the problems and theoretical issues related to the flow of parallel imports, counterfeit and fake goods across the customs border of Ukraine. Our analysis of markets proves that the implementation of an international or transnational principle opens the market for an unlimited number of sellers, which should guarantee the minimal margins. Our research on the intellectual property market in Ukraine reveals a certain contradiction between legislative decisions and their practical implementation. It is discovered that Ukraine actually has the national principle of exhaustion of intellectual property rights, backed up by customs regulation through such an instrument as the customs register. In our opinion, the best solution would be to implement a legally established international principle saving the option for a national principle, for example, for industries with low inter-brand competition.

**Key words:** digitalization, intellectual property rights, customs register, counterfeit goods, parallel import, shadow economy.

## 1. Introduction

The current stage of development of world trade is characterized by the following trend: an increasing part of export and import operations covers goods containing intellectual property (IP). That is to say, the intellectual determinant of expanding international economic cooperation becomes essential in the context of complex interaction of economic, production and trade potentials of the world market.

Therefore, the problem of intellectual property rights (IPR) protection becomes extremely important, since under the formation of a global competitive environment the results of creative intellectual work can be copied and introduced by competitors almost instantly. As a result of

which, the IP market is moving underground making the actual producers suffer significant economic losses. Therefore, in our opinion, the economic aspect of the IPR protection is of paramount importance in terms of growing globalization of economic processes.

## 2. Literature Review

Some analytical theoretical aspects reflecting the behavior of parallel imports in a country's economic system have become the subject of investigation for many researchers. According to Malueg and Schwartz [13], parallel import might benefit a country if the demand dispersion is relatively large. Richardson [16] confirms that a company holding the IP rights is by definition a monopolist, since it has control over production of the unique good. Duso et al. [5], explore the welfare effects of parallel imports in the pharmaceutical market. Dubois and Saethre [4] find that retailer incentives play a key role in stimulating parallel trade. There are some arguments that parallel imports impede innovations and reduce investments in research and development. That is, banning such trade would raise the welfare [12]. Ganslandt and Maskus [9] prove that parallel trade may reduce manufacturing price only when the trade costs are low. Whereas Huang et al., [11] argues that parallel importation hurts the customer surplus and social welfare in the low-price market, and benefits them in the high-price market. Valetti and Szymanski [23], distinguishing between patents and trademarks, argue that international exhaustion policy differs depending on the type of intellectual property right considered.

## 3. Results and Discussion

The role of information and communication technologies is gaining importance. Digital transformations present both opportunities and risks for countries at all levels of development. Apart from the benefits, that digitalization provides for the society, it may also expose businesses to competition, change skills requirements of workers and result in job losses, widen existing income



inequalities and lead to a further concentration of power and wealth. That is to say, that digitalization contributes to some extent to the formation of the shadow economy through activating its main drivers, such as the lack of guilty conscience, ease of participation, and low detection risk. A new branch of the shadow economy is emerging, which some of the scientists and researchers define as the digital shadow economy.

Protection of the IPR is one of the most pressing issues of the existing economic relations in the international services market. Ensuring compliance with the IP Law not only raises the standards of safety and health protection in a country, but also actively contributes to innovative development and investment attractiveness of a state.

One of the main problems in this field, in our opinion, is a certain contradiction in the functioning of parallel imports in the national market of Ukraine – this problem exists de facto, and de jure it's just started to be coordinated. It is obvious that when the state does not legally establish any types of exhaustion of IP rights, it causes business conflicts, corruption, deterioration of business climate, and ultimately to the growth of shadow of economic relations in the IP.

Consequently, the settlement of this controversy requires to settle a number of issues. These are not only local issues related to price, quality and assortment discrimination of national consumers, but also an important factor in stimulating the development of small and medium-sized businesses and attracting foreign investment into the country.

It should be noted that parallel import as a social economic phenomenon arose at the end of the twentieth century. German pharmacist, Andreas Moringier, traveling around the UK in 1975, noticed that prices for German medicines there were almost 3 times lower than in Germany itself. This was his motivation for creating a company that would specialize in imports of pharmaceutical products.

A few months later, he imported the first batch of “Valium” to Germany, repacked it at home and sold in the market without the consent of the manufacturer of that medicine, that is, with actual copyright infringement. In the future, legalizing his activities, registering the company “Eurim Pharma”, he would take into account the legislation in the field of copyright and trademarks. Specializing exclusively in parallel imports, this company has become one of the largest importers of medicines to Germany [6].

The emergence of alternative trade flows has become an advantage for most participants in the pharmaceutical market: importers, pharmacy chains, consumers and the state. When writing out a prescription for a “branded” drug, doctors began to prescribe expensive patented drugs at a lower price, indicating a parallel importer in the prescription. Offering medicines of identical health-improving effect at a lower price, pharmacy chains have demonstrated their professional competence, while maximizing sales volumes. With the help of branded pharmaceuticals from Eurim

Pharm, consumers have solved the price/quality dilemma in their favor – high quality at the best price. In addition, the German labor market has also benefited significantly, as pharmaceutical importers such as Eurim Pharm, have created more than 3,000 jobs in Germany [7].

Consequently, parallel imports began to be understood as the import of goods to the national market of a country where they had been previously produced and exported abroad. That is, in fact, the goods were returned to the country of production at a lower price than similar products released for sale in domestic circulation.

Therefore, some economists consider parallel trading as a form of speculation on difference in prices for the same branded goods in different international markets. In the context of free trade, parallel imports do not allow monopolistic suppliers to participate in international price discrimination. In other words, it effectively eliminates price discrimination against consumers in the domestic market [23].

The purpose of such parallel trading is:

- making a profit at the expense of lower (competitive) prices and minimizing delivery time;
- meeting consumer demand among different layers of the population with high-quality products;
- gaining a market segment with already established demand.

The internationalization of economic life, increasing integration of economic systems and globalization of social economic relations have become the drivers of the development of parallel imports in most countries worldwide. But the main dominant feature of this process, in our opinion, is the intensive development of internet technologies and e-commercialization of international trade.

Digitalization of economic processes has created perfect conditions for analyzing the price situation for any product, to any person, in any market. With an easy access to world prices for various goods, and therefore the ability to compare them with national prices, not only importers, suppliers or intermediaries, but also consumers have increasingly begun to turn to parallel imports. This is evidenced not only by the growing number of marketplaces or online stores, but also by the dynamic growth of the share of e-commerce in world trade and the positive dynamics of the growth rate of postal traffic volumes.

Since there is no definition of “parallel import” as economic category in the Ukrainian regulatory documents, it provokes a different interpretation of this concept in the scientific economic literature.

There is a whole group of scientists who define parallel import depending on the method of importation of goods into the customs territory of Ukraine, that is, identifying it with “gray” import, or illegal import into the country. Thus, M. Ortynska interprets “parallel import as “gray import” — the import for the purpose of selling original goods that were put into civil circulation on the territory of another



country” [14]. She gives an example with cars manufactured for the United Arab Emirates market and subsequently imported for sale in Ukraine. As the author notes, in this case, “gray” car dealers claim that the goods are original, and therefore can be sold in Ukraine.

In this definition, in addition to the controversial criterion for determining parallel imports, the issue of “civil circulation” is also debatable. In our opinion, this definition allows various interpretations of the latter, which in turn does not contribute to unambiguous understanding of this term. Under the concept of “civil circulation”, lawyers consider a transaction concluded between its participants, as a result of which the property passes from one person to another.

Other authors focus not on the way of movement, but on the object: “this is the import of original goods produced by the brand owner or with his consent, with all customs duties and taxes paid, which are moved in parallel with the same goods imported by copyright holders and their authorized distributors” [25].

S. Iskandarian adheres to a similar doctrine in defining the concept of parallel import, interpreting it as “the import into the territory of Ukraine of genuine goods that companies legally purchased in other countries, paying taxes and customs duties” [1].

There is also a universal definition of this economic category in accordance with international law – “... goods manufactured legally (i.e. not pirated) abroad and imported without the permission of the owner of IPR (for example, a trademark or patent owner)” [24].

In our opinion, all these definitions have a significant weakness. It is the absence of one of the main classification features of import that deals with bringing the goods in for free use, which is the purpose of moving goods across the customs border – moving for sales to make a profit.

Conceptually, a different approach is taken by those authors who focus on the subject of movement of goods – “parallel import” is defined as “the importation for the purpose of selling genuine goods that has been put into civil circulation on the territory of other countries without the consent of the trademark owner and without the participation of authorized importers/dealers” [14].

The weak point of the definitions mentioned above, in our opinion, is that they are focused on separate aspects of this economic category: the object, subject and method of moving goods across the customs border. And this significantly narrows the range of relations that are regulated through the customs tariff system.

Therefore, we suggest parallel imports to be interpreted as the import of any kind of registered IP goods intended for sales on the market where they are protected by IPR provided that such goods have been produced and put into civil circulation on the territory of any foreign country. This definition clearly outlines terms under which parallel import occurs as an economic phenomenon.

First, parallel import can take place only if the goods have already been put into civil circulation on the territory of a certain country, meaning that they were imported for free circulation and sale on its market.

Secondly, parallel import is the import of goods when the owner of a trademark or patent cannot prohibit the movement of a certain product to the territory of the country of import.

Third, in case of parallel import, goods can be brought into the country not only by an official dealer, but also by other importers or business entities.

That is to say, most researchers of this economic category consider parallel imports as alternative supply channels to the national market compared with those used by official manufacturers or accredited distributors. It is clear that the situation on the sales market of imported goods of foreign production, with or without the presence of a parallel market, will be radically different. In the first case, this is a highly competitive environment and the lowest price for imported goods, in the second it is the presence of a monopoly and the highest price for foreign-made goods. Therefore, in the world practice, there is the following systematization of countries according to the mechanism of introducing parallel imports:

- the first group includes states where the free movement of goods across the customs border of the country is allowed, regardless of who is the owner of the goods (Japan, Canada);
- the second group includes countries that have introduced a regime for imports only for brand owners or their representatives (the Russian Federation and the EAEC countries);
- the third one applies a combined option for importing goods, i.e. free movement, but with certain restrictions (EU).

In our opinion, parallel import’s behaviour depends on the model chosen by a government for applying the principle of exhaustion to IP objects for a given country. At the same time, the essence of the exhaustion principle of IPR infers that after the copyrighter puts genuine IP goods on the market he forfeit his sole right to prohibit third parties from using these goods in a way they need. Therefore, such products are of free use on the market facing no restrictions, and the owner cannot influence their further resale.

According to world practice, the following methodological approaches to the principle of exhaustion of rights can be distinguished: national, international and regional principles. It should be noted that when applying each of these principles, a number of both positive and negative aspects arise.

If the national principle is applied, the rights to sell goods on the territory of the state belong exclusively to the owner of the trademark rights and to the representatives to whom this owner has granted such a right. In fact, the application of the national principle leads to the



establishment of a monopoly of the official representative of the manufacturer of goods, and thus the principle of exhaustion of rights occurs at the time of the first sale of goods in any country of the world, regardless of where such goods were placed on the market.

For example, in the Russian Federation, the introduction of the principle of national exhaustion of rights makes it possible for copyright holders and official distributors to strictly control parallel imports, since in this case the imported goods are treated as counterfeit goods.

The main negative consequences of the lack of official parallel imports, in our opinion, are the emergence of shadow economic operations in the import of foreign goods

and monopolization of the national market. Due to the demand for imported goods and the lack of national supply, their illegal import will lead not only to the fiscal effect loss, but also to reduction of jobs in the area that serviced legal parallel imports.

In addition, the burden on state institutions controlling parallel imports is increasing. In other words, the customs authorities should determine the priority of customs control at the border – parallel import, counterfeit goods or smuggling. It is implied through the following figures of Ukrainian customs work concerning customs controls imposed to protect the IP at the state borders.

Table 1: Trend data on the protection of IPR merchandise that cross the customs border of Ukraine

|                                                                                                                       | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|-----------------------------------------------------------------------------------------------------------------------|------|------|------|------|------|------|------|
| Total number of IPR merchandise recorded in the Customs Register by the right holders.                                | 2429 | 2916 | 3321 | 3612 | 3967 | 4131 | 4704 |
| Orders enforced to suspend customs processing of goods suspecting IPR violations relying on the Customs IPR Register. | 3074 | 3368 | 7117 | 9687 | 7259 | 7000 | 1900 |
| Orders enforced by the Customs to suspend customs processing suspecting IPR infringement.                             | 8    | 10   | 16   | 77   | 16   | 31   | 52   |

Source: Developed by the authors.

If there is a monopoly, there is another potential danger since overpricing affects both foreign goods and nationally manufactured goods. However, in a market economy, where the principles of fair competition dominate, goods from one manufacturer compete with goods from the others, regardless of their status – residents or non-residents. And if the prices of the product are too high, buyers will simply switch to similar products from other manufacturers, of course, if they are available on the market. Of course, the manufacturer is not interested in reducing the volume of sales on the market, but it will not radically change the monopoly price.

The positive thing in this situation is that an official representative, as a rule, provides: the appropriate level of quality of the product; its labeling; certification of products, in accordance with regulations of the country of import, otherwise it will not be allowed to enter the market; invests in brand promotion; after-sales service, and so on.

It should be noted that an unofficial distributor only purchases a certain amount of goods, but does not purchase production or service technology. Based on the above, the service may not be carried out competently, without taking into account the features of a particular model. It is clear that as the price decreases, the warranty conditions for a particular product also decrease. Therefore, this option is potentially dangerous for the buyer.

The basis for applying the international principle makes the following: anyone who has officially purchased the original product has the right to sell it. That is, a product placed on the market anywhere in the world can then be resold anywhere else.

For example, the purchase of mobile phones from an official distributor in China or the United States provides an opportunity for any entities of foreign economic activity not only to legally import them into the customs territory of Ukraine, with payment of all customs duties due and application of non-tariff regulation measures for foreign trade, but also to freely sell them for profit. It is clear that the price will be set in accordance with the current legislation and the interests of the importer.

In most countries of the world, the international principle of rights exhaustion is established by the law, but its main purpose is not to prevent imports, but not to allow counterfeit goods to enter the national market. As for the sale of goods that are “sensitive” to the country and may pose a danger to human health and life in case of improper transportation or sale (pharmaceuticals, alcohol, etc.), non-tariff regulatory measures such as licensing or certification may be introduced.

Our analysis of markets where parallel imports are allowed made it possible to identify the following patterns:

Firstly, these states are usually characterized by a liberal model of foreign economic policy and in-depth integration



into the world economic system. By lobbying their interests through the WTO, they hope that goods produced under their license, and which cannot yet be imported into national markets due to current laws on IPR, will be permitted for export to increase the licensee's profit [23].

Secondly, most of these countries focus on the interests of consumers in the national market, that is, on buyers who do not care who is the manufacturer of the product as long as the goods are of appropriate quality and meet their needs.

So, the implementation of an international or transnational principle opens the market for an unlimited number of sellers, which should guarantee the minimal margins, and the principle of exhaustion occurs at the moment when the goods are imported with the permission of the copyright holder to a certain country (territory).

At the same time, it is worth noting that in the pursuit of minimal prices, distributors can significantly lose the quality of the goods offered (violating the conditions of transportation and storage, using inappropriate sales channels, as well as poor-quality service). This is due to the marketing budgets of individual small sellers are significantly smaller than that of the one large official representative.

An example of the application of the regional principle of exhaustion of IPR is the European Union, where this principle, along with the free movement of goods, has become the legal basis for the existence of parallel imports. It is worth noting that parallel trade in the EU was legalized, within its economic zone, by the Treaty of Rome back in 1957 [3] marking the beginning of the existence of the European Economic Community between its first six member countries, this international document abolished all tariff and non-tariff barriers to the free movement of goods in this economic zone.

The backbone of the regional principle is that anyone has the right to sell goods, provided that the goods have been legally purchased from the manufacturer or trader exclusively on the territory of the European region member states.

As mentioned above, a country's application of a certain regulatory mechanism for parallel imports can bring not only certain dividends, but also losses. An illustrative example is the use of this mechanism in Sweden. Prior to joining the EU, the country had the principle of international exhaustion (the first sale rule) of IPR, which allowed parallel imports from any country in the world. That is, if Levi branded jeans could be bought in the US cheaper than in Europe, the Swedish importer could freely buy them in the US and resell them in Sweden, even if the product was primarily intended by the manufacturer (Levi Strauss & Co.) for sale in the US market.

However, when joining the EU, Sweden was obliged to respect the rights of each trademark owner of the community in order to prevent parallel trade flows from outside the EU. A study conducted by the Swedish

Competition Authority in 1999 showed that certain goods of parallel import were 10 to 30% cheaper than similar goods in the domestic market (this concerned spare parts for motorcycles, snowmobiles, sports equipment, tires, clothing, footwear and pharmaceutical products), and the abolition of parallel trade with countries outside the EU brought an average of 0,4-5% increase in prices in the domestic market [23].

This research enables us to classify countries according to the way they treat the parallel imports:

- states supporting the free movement of goods crossing the customs border, regardless of who is the owner of the goods (Japan, Canada);
- countries that permit the entry of goods only for brand owners or their representatives (the Russian Federation and EAEU);
- countries that apply a combined treatment for imported goods propagating a free goods flow yet with some restrictions (EU).

International treaties and agreements signed by Ukraine allow it independently determine the principle of exhaustion of rights. Accordingly, the Article 160 "Exhaustion of rights" of the Association agreement between Ukraine and the European Union, European Atomic Energy Community and their member states of 27.06.2014 (hereinafter referred to as the Agreement with the EU), defines that "the parties may establish their own regime of exhaustion of IPR, taking into account the provisions of the TRIPS Agreement" [19].

In turn, the Article 6 "Exhaustion" of Annex 1C to the Agreement Establishing the World Trade Organization of 15.04.1994 (hereinafter referred to as the WTO Agreement), Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) of 06.12.2005 (hereinafter referred to as the TRIPS Agreement) define that for the purposes of resolving disputes under these agreements nothing is used to resolve the issue of exhaustion of IPR [15]. Thus, the TRIPS Agreement gives WTO countries a free hand to choose the exhaustion regime.

Our systematic research on the import market revealed the situation that developed in Ukraine before 2017. The legal status of parallel imports was not defined, but current practice showed that the existence of such an economic phenomenon as "parallel import" in Ukraine has all legal grounds, since everything that is not prohibited is deemed allowed. This means that parallel imports are not always a serious threat to the copyright holder of the product.

The first attempt to legally solve this problem was the initiation of two diametrically opposite bills in 2017. One of them banned the import of genuine goods to Ukraine enacted without the trademark owner's consent, and the other one, on the contrary, permitted it.

Consequently, according to the draft law of 17.11.2016 No. 5419 "On amendments to certain legislative acts of



Ukraine on ensuring publicity and preventing abuse in the field of registration and circulation of marks for goods and services, as well as protecting and creating conditions to enforce the owners' rights", the introduction of the national principle was initiated on the territory of Ukraine. And the initiative of the Cabinet of Ministers of Ukraine to submit a draft law of 23.01.2017. No. 5699 "Draft law on amendments to certain legislative acts of Ukraine concerning the improvement of legal protection of intellectual (industrial) property" offered to guaranty the international principle of exhaustion of trademark rights in Ukraine. However, these bills have never been adopted by the Verkhovna Rada of Ukraine.

A new attempt to resolve the issue at the legal angle was the submission of a new draft law of Ukraine No. 2258 "Draft law on amendments to certain legislative acts of Ukraine on strengthening the safety and protection of rights to trademarks and industrial designs and combating patent trolling" and its reading in the Verkhovna Rada of Ukraine of the 9th convocation on 11.10.2019 and finally on 21.07.2020. The law of Ukraine No. 815-IX "On amendments to certain legislative acts of Ukraine concerning strengthening the safety and protection of rights to trademarks and industrial designs and combating patent abuse" was adopted and entered into force on 16.08.2020.

However, the requirements of Article 16 of the law of Ukraine "On the protection of trademark rights for goods and services" do not link the exhaustion of the trademark owner's rights when he (or his assignee) puts goods into civil circulation exclusively on the territory of Ukraine. Consequently, the trademark owner can also put trade marked goods into civil circulation of another state (or states). After that, the owner cannot restrict or prohibit the subsequent resale of these goods on the territory of another country, where his rights are also protected (including Ukraine). This, in the absence of territorial restrictions, gives grounds to assert the existence of an international approach to the exhaustion of rights in Ukraine.

Our research on the IP market in Ukraine has figured out at least two antagonistic categories of stakeholders. These include both individuals and legal entities that have a legitimate interest in the organization's activities, that is, they depend on it to a certain extent or may influence its functioning. That is, interested parties in accordance with the principle of exhaustion of IPR.

It is obvious that parallel imports bring losses to distributors, manufacturers and large multinational companies that are official dealers of such brands as Apple, Xiaomi and others. In fact, these are representatives of the protection of IPR with regard to trademarks (marks for goods and services).

First of all, for an official manufacturer, parallel import is financially unprofitable, since another business entity can sell its products on more attractive terms. In such a situation, a foreign manufacturer is forced to lobby the interests of

official representative offices to monopolize the market in the country.

Moreover, official distributors are increasing their expenses aimed at eliminating the consequences of parallel imports: promoting their own brand, increasing marketing budgets, covering losses associated with a decrease in purchasing power, and so on. And as a result, the distributor reduces the volume of orders for the manufacturer's products. Thus, the manufacturer begins to lose its consumer attractiveness, since its products are sold by the importer, who, in order to dump (reduce the price of goods), reduces the cost of warranty service.

After all, manufacturers are not very much drawn into collaboration with retailers because their cooperation model with wholesalers allows them to set the highest selling price with lowest expenditures, and enables the monopolistic dictatorship. This is owing to unofficial importers, normally, import goods to Ukraine for selling them at much lower prices than official dealers.

This situation, according to the owners of trade brands, is nothing more than dumping in relation to their goods. Dumping created by parallel imports reduces the competitiveness of foreign manufacturers of genuine products and their official retailers, as the manufacturer actually begins to compete with its own goods.

In our opinion, the main methods to tackle parallel imports can be: markets monitoring; tracking the case of parallel imports; initiating entries in the unified register of pre-trial investigations of the detected events abusing the IPR, counterfeit goods, etc.; recording information on IP objects in the customs register; monitoring the pricing policy for identical products.

One of the most active lobbying groups in the IP market in most countries of the world is pharmaceutical companies and pharmacy chains. It should be noted that the pharmaceutical market is one of the most "sensitive" when it comes to selling genuine products. According to our research, at least 30% of this market stays in the shadow in Ukraine, and this is not only due to counterfeit products.

For example, one of the most expensive factors for the imports of medicines is the logistic delivery of pharmaceutical products – if the vaccine is transported without proper storage, then there is a high risk that the end user will receive a product with minimal medicinal effect. Due to the interest in maximum profit small importers of pharmaceuticals often minimize transportation costs till the customs territory of the country.

In particular, there are other threats as the pharmaceutical product may not be adapted to local climate; it may not meet technical standards; there can be no labeling or instruction in the consumer's language. At the same time, claims and complaints will be addressed not to the importer, but directly to the manufacturer, since the product is genuine. This covers not only reputational losses, but also



financial losses for well-known manufacturers of imported products.

It is worth noting that the majority of countries have quite severe state regulation systems for the national health protection markets. For example, in the EU countries, even if there is a high degree of integration of economies, there are separate state health systems that control not only the quality of pharmaceutical products, but also their prices based on the interests of national policies and priorities. Some of the countries (Greece) set price thresholds for pharmaceuticals, some (Germany, Great Britain) negotiate fixed prices with manufacturers [10]. But, paradoxically, the emergence of certain contradictions in the regulatory system, and especially in price fluctuations of individual countries, becomes the economic basis for the existence of parallel drug trade.

In particular, the adoption of legislative norms that create a competitive environment also encourages the process of parallel import. Therefore, the Swiss Competition Commission (COMCO) systematically holds accountable brand copyright holders for restricting parallel imports. In 2011, punitive decisions were made against the following companies: Electrolux/VZug (declaring the points of the agreement prohibiting the online sale of household appliances illegal) and Nikon (held liable through fines at 12.5 million Swiss Francs for restrictions on imports of cameras and lenses). In 2012, BMW was held liable through fines at 156 million Swiss Francs for restricting direct and parallel car imports.

The pharmaceutical market is no exception. Back in 1992, the German Federal Cartel Office banned major German wholesalers of pharmaceuticals (Gehe, Anzag and Sanacorp) from refusing to distribute parallel imported genuine medicines to pharmacies, claiming that this was discrimination against the importer and a violation of the free competition law [20].

In 2015, upon an initiative of the European Medicines Agency, an open register of applications for parallel distribution was created, which provided more transparent and convenient access to information about centrally permitted medicines entering the European Union market through parallel trade. Today, according to this register, there are about 140 companies in the union that are engaged in parallel distribution of prescription drugs [8].

At the same time, the parallel distribution means that a centrally permitted medicine on the market in one EU member state is distributed in another union member state by a company which is independent of the keeper of the marketing permit. In order to be able to sell medicines in other member states, parallel distributors must ensure that the medicines are properly packaged and labeled, for example, that the label, box and packing list are up-to-date and available in the language required.

Overall, the research firm IMS Health, headquartered in Danbury, Connecticut, estimated the European market for

parallel pharmaceutical imports at \$7.9 million a year. This makes around 3% of the total prescription medicine market in Europe, which is estimated at \$198 billion [2].

It is worth noting that pharmaceutical companies are active “players” in the Ukrainian market as well. In 2020, they attempted to legally regulate the issue of parallel import of medicines on the Ukrainian market. Thus, the “Draft law on amendments to certain legislative acts of Ukraine concerning improving the availability of medicines for citizens” No. 2089 of 06.09.2019, defines parallel import of a medicinal product as “import of medicine that has been already registered in Ukraine and has characteristics of IP (invention, utility model, industrial design, trademark, etc.) protected by Ukrainian law, provided that this product is manufactured and/or put into civil circulation on the territory of any country in the world other than Ukraine by the holder of IPR against this product” [22].

According to the authors of this draft law, parallel import of medicines in the customs territory of Ukraine will not violate IPR. In all other cases, the movement of medicines across the customs border will be illegal.

It is clear that the antagonists of the copyright holders of trade brands are almost all economic entities dealing with the import of foreign-made goods for sale on the Ukrainian market. Therefore, the group of those who advocate the operation of the international principle of exhaustion of rights is always more numerous. In our opinion, this group can be structured as follows.

First, the network companies – a coalition of the largest retail chains in Ukraine founded by companies with foreign capital - Metro Cash & Carry, Silpo food, Novus Ukraine, Auchan Ukraine Hypermarket, Billa Ukraine and other supermarket companies that have an extensive regional network.

Secondly, the marketplaces acting as the intermediaries between sellers and buyers in the field of e-commerce. The most famous examples of global marketplaces are Amazon and Alibaba Group, including such Ukrainian ones as Rozetka.ua and Prom.ua. Apart from them, there is a large group of companies that work exclusively through online stores.

Third, this includes a large group of individual entrepreneurs who are engaged in retail sales of foreign-made consumer goods.

Fourth, the largest group is made of national consumers whose main strategy is to solve the dilemma of price&quality, which motivates their behavior in the consumer market in the country of import. With low purchasing power, parallel imports allow them to meet their needs at the expense of foreign-made goods at a minimum quoted price.

Our research on the IP market in Ukraine has shown that there is a certain contradiction between legislative decisions and the system of their implementation in practice.



Consequently, with the international approach to the exhaustion actually operating for parallel imports in Ukraine, there is an unspoken implementation of the national principle through such a tool as the customs register. Nowadays, this register is used not so much to combat counterfeit goods as to oust competitors from the market.

Therefore, on 14.11.2019, the law of Ukraine No. 202-IX "On amendments to the Customs Code of Ukraine concerning the protection of IPR when moving goods across the customs border of Ukraine" came into force. This law amended paragraph 1 of part three of Article 397 of the Customs Code of Ukraine, according to which, measures to promote the protection of IPR provided for in part one of this article do not apply to genuine goods, that is, goods that were manufactured with the consent of the rightholder, or goods manufactured by a duly authorized entity, including the exceeding amount agreed between this person and the rightholder [18].

However, the procedural issue is still open for confirming the ingenuity of the product and the documents that have to confirm it. If the trademark is included in the register, and the official representative is not carrying this product, the customs officer has the right to stop processing the goods and demand that the copyright holder agree to import the goods. Then you can initiate legal proceedings or continue processing the product. At the same time, even in the second case, the goods will be detained at the border for at least 10 days.

From the analysis of the customs register data, as of 17.08.2020, it is established that 1298 of IP entries are valid in the customs register, and at the beginning of its introduction, a total of 4504 IP entries were registered. Among these entries, the trademarks prevail as the most "commercially attractive", composing over 70% [17].

If we divide nominally IP objects recorded in the customs register according to the customs goods status, that is, whether they belong to Ukrainian or foreign entities of IPR, the foreign IP entities would make up more than 60%, where more than 80% registered as trademarks (signs for goods and services, combined and pictorial signs and others).

Consequently, we can conclude that putting IP goods in the customs register opens up a wide range of guarantees for the copyright holders. This gives them an opportunity to control the process of moving original goods across the customs border of Ukraine and contributes to the establishment of fair competition. This mechanism allows baffling violations of IP rights in order to prevent pirated and counterfeit goods from crossing the customs border.

## 4. Conclusions

Our research has shown that parallel import should not be understood as any intellectual property goods that cross the customs border. It can only refer to the import of genuine goods brought into the customs territory of a country for sales without a special consent of the trademark owner and provided that these goods have been sold by the distributor or manufacturer in this market.

A systematic analysis of the existing mechanisms to regulate parallel imports worldwide has shown that each of them is based on the introduction of the principle of exhaustion of IPR. The variability of models depends on the level of economic development and the competitive environment in the country. At the same time, each of the models has both its own advantages and disadvantages.

In our opinion, the best solution, given the situation with IP in Ukraine, is to enforce a legally established international principle yet saving an option of applying a national principle, for example, for industries with low inter-brand competition. This will allow not only to bring the market of IP goods from the shadow in Ukraine, but also to control the situation in this field and make effective decisions on state regulation of the IP market as a whole.

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