

# Setting the boundaries of a 'fortress Europe' for parallel imports

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## I. Introduction

The present paper addresses the relationship between, on one hand, European Union (EU) law and on the other – third countries' law, in the context of parallel trade.<sup>1</sup>

To this end, the discussion first focuses on how EU law differentiates in the treatment of internal parallel trade (that is to say, parallel imports coming from another Member State where they have been put on the market for the first time by the trade mark owner or with his consent) and external parallel trade (goods which have been first placed on the market in a third country by the mark owner or with his consent) as constituting, respectively, lawful and infringing trade mark use. This approach has been often described as the creation of 'fortress Europe' for parallel imports. Secondly, against this background, the implications of the current regime for countries in Europe alone are analyzed. Those implications are considered in terms of first, the relationship between EU law and the legal order of the European Economic Area (EEA), and secondly, the regime of national and Community trade marks in the EU.

## II. Nature and effects of parallel trade

### 1. The practice of parallel trading

In the context of the present discussion, the term 'parallel trade' refers to the following definition suggested by Warwick Rothnie in its classical book on the matter:

'Parallel imports have two vital, distinguishing features. They are lawfully put on the market in the place of *export*, the foreign country. But, an owner of the intellectual property rights in the place of *importation*, the domestic country, opposes their importation (usually because the goods are sold in the two different countries at quite disparate prices) and, taking advantage of

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\* This publication represents solely the personal view of the author and is not to be perceived as the opinion of the European Commission.

<sup>1</sup> The paper uses the expression European Community rather than the European Union because most of the provisions concerning parallel trade are found in the EC Treaty rather than in the EU Treaty.

the lower price, some enterprising middleman buys stocks in the cheaper, foreign country and imports them into the dearer, domestic country. Hence, the imports could be described as being imported in 'parallel' to the authorised distribution network'.<sup>2</sup>

The activity of parallel trading (importation) is sometimes also described as 'grey trade', especially in the US context. The term is not customary for the legal debate within the EU<sup>3</sup> and might be inappropriate as long as it implies a connection with the 'black market'.<sup>4</sup> Parallel imports are in principle original products, placed in the exporting country by the intellectual property right holder or with his consent. They are legitimately commercialized and acquired<sup>5</sup> and in this sense, they are distinguished from counterfeit goods. The only controversy regarding their status arises from the fact they have reached the importing country without the authorization of the right holder. It is a characteristic of parallel trade that he did not intend the products to appear on that particular market.<sup>6</sup> Thus the goods are 'grey' in only one aspect and this is the uncertainty as to whether they breach intellectual property law, more specifically, in the context of this discussion which is limited to goods protected by trade marks only – trade mark law.<sup>7</sup>

## **2. The clash of interests. The stakeholders in parallel trade**

Parallel trade takes place mainly due to the price differences in the global marketplace,<sup>8</sup> which could be the result of various reasons, such as currency fluctuations, the differing market or legislative power of large-scale buyers, the level of competition among distributors,<sup>9</sup> different price or product regulation, distributions costs or manufacturer's choice.<sup>10</sup>

Price variation gives traders an incentive to import goods purchased in the lower-priced markets for sale in markets where the same goods command a higher price. While the availability of cheaper genuine products would please the consumer, parallel trade at the same time puts at a serious risk the existence of the authorised distributors who are exposed to unrestricted competition in the product distribution, lose consumers and, unlike the 'parallel' distribution channel, have to incur high costs associated with the product commercialization.

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<sup>2</sup> W. Rothnie, *Parallel Imports* (1<sup>st</sup> edn Sweet & Maxwell, London 1993) 1.

<sup>3</sup> H. Kersten, 'Grey market exports and imports under the competition law of the European Economic Community' (1988) 78 TMR 479 *et seq.*

<sup>4</sup> N. Gross, 'Trademark exhaustion – the UK perspective' (2001) 23 IEPR 224, 225.

<sup>5</sup> R. Sacoff, 'Trademark law in the technology-driven global marketplace' (2001) 4 Yale Symp L & Tech 8 *et seq.*

<sup>6</sup> C. Stothers, *Parallel Trade in Europe: Intellectual Property, Competition and Regulatory Law* (1<sup>st</sup> edn Hart Publishing, Oxford and Portland, Oregon 2007) 2.

<sup>7</sup> G. Murphy, 'Who's wearing the sunglasses now' (2000) 21 ECLR 1.

<sup>8</sup> L. Friedman, 'Business and Legal Strategies for combating gray-market imports' (1998) 32 Int'l Law 27, 28.

<sup>9</sup> W. Cornish, 'Trademarks: Portcullis for the EEA' (1998) 20 EIPR 173.

<sup>10</sup> Stothers, *supra* note 6, at 3.

Trade mark owners try to combat parallel importation which for them equals loss of control over product distribution and loss of profit that could be generated through sales in the official distribution network.

### **III. Controlling parallel trade via intellectual property rights. The 'exhaustion' of rights doctrine**

The exclusive rights of use that the mark owner enjoys under the trade mark would entitle him to repel parallel trade as trade mark infringement, as long as his rights have not been 'exhausted'. Exhaustion is a basic concept, applicable in regard to different types of intellectual property which in the context of trade marks provides that once the protected product has been put on the market by the mark owner or with his consent (that is, after a first consensual sale has taken place), the owner no longer has the right to control the product's further distribution (sale, importation, exportation).

'Exhaustion' is considered a justifiable limitation on exclusivity in view of the interests of free trade and in order to prevent use of the mark as a means of market isolation in contradiction with its role to serve as a distinctive indicator of product origin.<sup>11</sup> Exhaustion qualifies the owner's exclusivity by providing that it does not extend beyond the first sale of the goods, thus setting the 'demarcation line' between the trade mark rights of the proprietor and the proprietary rights of the buyers.<sup>12</sup>

Various jurisdictions apply the exhaustion doctrine, though with a different scope. Most of them provide that the first domestic marketing of the goods by the owner or with his consent triggers exhaustion of rights for that market and hence, he could not oppose the further commercialization of genuine products there.<sup>13</sup> In cases where the first consensual sale has taken place outside the domestic market, the relevant hypothesis in the context of paralleled trade, jurisdictional attitudes vary. Under a rule of *international* exhaustion, rights are exhausted following the first consensual sale of the product anywhere on the global market and hence, the mark owner does not enjoy the right to block parallel trade. In contrast, if a jurisdiction operates *national* exhaustion, rights are not exhausted if the product has been marketed outside that jurisdiction and the owner will be able to repel imports altogether as trade mark infringement.

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<sup>11</sup> I. Calboli, 'Trademark exhaustion in the European Union: Community-wide or International. The saga continues' (2002) 6 Marq Intell Prop L Rev 47, 48.

<sup>12</sup> I. Stamatoudi and P. Torremans, 'International Exhaustion in the European Union in the Light of Zino Davidoff: Contract versus Trade Mark Law?' (2000) 2 IIC 123, 136.

<sup>13</sup> Stothers, *supra* note 6, at 41.

*Regional* exhaustion, a third possibility, provides that exhaustion takes place only if the first sale has taken place within a certain area. Accordingly, the mark proprietor could bring an infringement action against parallel importation from outside that area. This is the current approach of the European Union, as discussed in detail below.

## **IV. Exhaustion and parallel importation in the EU context**

### **1. The exhaustion regime of the European Union**

The EU at present operates a rule of 'Community'-wide<sup>14</sup> exhaustion under which once the goods have been placed in any Member State by the mark owner or with his consent, he can no longer obstruct their further commercialization.

This regime has evolved as a 'regional compromise'<sup>15</sup> designed to meet the specific needs of the Union. Parallel importation, generally a highly controversial phenomenon because of the strong opposition of economic interests that it involves, represents even a greater challenge for the EU than for other jurisdictions. This is a result of the conflict that arises between the free movement of goods, a basic instrument for creating an integrated Common market, and national intellectual property rights, which, due to their territorial and exclusive nature, can function as effective barriers to trade.<sup>16</sup> In the EU context a national law-based entitlement of a trade mark proprietor to bring an action for infringement against a parallel importer would contradict with the fundamental principle of free movement of goods and Articles 34 and 35 TFEU which prohibit, respectively, quantitative restrictions on imports and exports and all national law measures having 'equivalent effect'.<sup>17</sup>

The Community exhaustion principle was first developed through the case-law of the Court of Justice of the European Union (hereinafter, "the Court of Justice")<sup>18</sup> and later on codified in secondary legislation. According to Article 7(1) of the Trade Mark Harmonization Directive:

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<sup>14</sup> The paper refers to 'Community exhaustion' rather than 'Union exhaustion', despite the entry into force of the Treaty on the Functioning of the European Union, since the secondary legislation and the case-law discussed herein use the former term.

<sup>15</sup> Calboli, *supra* note 11, at 49.

<sup>16</sup> T. Hays, *Parallel Importation under European Union Law* (1<sup>st</sup> edn Sweet & Maxwell, London 2004) 266.

<sup>17</sup> According to Article 34 TFEU: 'Quantitative restriction on imports and all measures having equivalent effect shall be prohibited between Member states.' Article 35 TFEU provides that: 'Quantitative restriction on exports, and all measures having equivalent effect shall be prohibited between Member states'.

<sup>18</sup> See *Centrafarm BV v. Winthrop BV*, Case No. 16/74 [1974] ECR 1183, *Hoffmann-La Roche v Centrafarm*, Case No. 102/77 [1978] ECR 1139.

‘The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.’<sup>19</sup>

## **2. Defining the scope of the exhaustion rule**

### **2.1. The ambiguity of the Trade Mark Directive on international exhaustion**

EU Member States applied various exhaustion regimes prior to the Trade Mark Directive, with international exhaustion being the predominant one.<sup>20</sup> In the light of Article 7(1) of the Directive, it became hotly debated whether national approaches might still vary and some countries could continue to operate international exhaustion. National legislatures and courts were divided in their understanding.<sup>21</sup> Legal commentators understood the provision controversially as either setting a ‘maximum standard’<sup>22</sup> or imposing a ‘minimum requirement’ that EU members could go beyond,<sup>23</sup> preserving the freedom to choose their exhaustion rules as it was enjoyed prior to the Directive and under Article 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>24</sup> According to Article 6 of the TRIPS, which is the only provision on the multi-lateral level addressing exhaustion, ‘... nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights’.

### **2.2. The status of extra-market imports in the understanding of the Court of the European Free Trade Association (EFTA)**

Interestingly enough, it was not for the Court of Justice but for the EFTA Court first to address the relationship between Article 7(1) and national rules of exhaustion. Article 7 of the Directive

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<sup>19</sup> Directive 2008/95 of the European Parliament and of the Council of October 22, 2008 to Approximate the Laws of the Member States relating to Trade Marks [2008] OJ L299/25, hereinafter, ‘the Trade Mark Directive’ or ‘the Directive’.

<sup>20</sup> For the situation in the various EC Member States, see generally C. Baudenbacher, ‘Trademark Law and Parallel Imports in a Globalised World-Recent developments in Europe with special regard to the Legal situations in the United States’ (1999) 22 *Fordham Int’l LJ* 645 *et seq*, Gross, *supra* note 4, at 229, W. Alexander, ‘Exhaustion of trade mark rights in the European economic area’ (1999) 24 *ELRev* 56, 58-59.

<sup>21</sup> Gross, *supra* note 4, at 230, Alexander, *supra* note 20, at 59, A. Kur, ‘Harmonization of the Trademarks Laws in Europe - An Overview’ (1997) 28 *IIC* 1, 16, H. Jehoram, ‘Prohibition of parallel imports through Intellectual Property Rights’ (1999) 30 *IIC* 495, 504.

<sup>22</sup> See J. Rasmussen, ‘Exhaustion of Trademark Rights pursuant to Directive 89/104 (and Regulation 40/94)’ (1995) 17 *EIPR* 174, 175-176.

<sup>23</sup> see F. Beier, ‘Industrial Property and the Free Movement of Goods in the Internal European Market’ (1990) 21 *IIC* 131, 159-169, N. Shea, ‘Does the First Trademark Directive allow international exhaustion of rights’ (1995) 17 *EIPR* 463, 463.

<sup>24</sup> Annex 1C to the Marrakesh Agreement Establishing the World Trade Organisation 1994, 1867 UNTS 154.

is effective in the countries belonging to the European Economic Area, including the EFTA countries, through the Agreement on the European Economic Area.<sup>25</sup> *Mag Instrument v. California Trading*<sup>26</sup> considered whether Norwegian trade mark law, which recognized international exhaustion, was compatible with the Directive.<sup>27</sup> Noting that the Court of Justice had not yet determined the scope of Article 7, the EFTA Court held in its Advisory Opinion that the EFTA states could decide, as an exercise of their independent foreign policies, whether to apply the principle of international exhaustion of trade mark rights in cases concerning goods originating from outside the EEA.

This was based on the argument that since the EEA Agreement does not entail a common commercial policy and does not transfer treaty-making powers to a supranational body, EFTA countries remain free to conclude foreign trade treaties with third states. The aim of the EEA Agreement is to create a free trade area and requiring EFTA members to apply Community exhaustion would impose restraints beyond that aim.<sup>28</sup>

Importantly, the ruling's second line of reasoning considered whether the nature of the trade mark as such prevents the application of international exhaustion. The Court emphasized that the function of the mark is to identify the origin of the goods and this function could not justify a ban on the lawful importation of genuine goods put into commerce outside of EFTA.<sup>29</sup> Thus the EFTA Court applied the approach that the Court of Justice had already followed in its internal parallel trade jurisprudence, namely, imposing restrictions on parallel trade only as long as they are necessary in view of the essential function of the mark to serve as a guarantee of origin.<sup>30</sup> The ruling further rationalized its conclusion with the argument that international exhaustion is in accordance with the interests of consumers and competition.

### **2.3. The Court of Justice of the European Union setting the limits of exhaustion**

The Court of Justice finally addressed the scope of Article 7 of the Directive in *Silhouette v. Hartlauer*<sup>31</sup> which established that the Directive prohibits the application of international

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<sup>25</sup> Agreement on the European Economic Area [1994] OJ L1/3, Article 65(2) and Annex XVII, point 4. c).

<sup>26</sup> *Mag Instrument v. California Trading Norway*, Case E-2/97 [1998] 1 CMLR 331, hereinafter. 'Mag'.

<sup>27</sup> For further discussion of the case, see A. Carboni, 'Cases about spectacles and torches: Now can we see the light?' (1998) 20 EIPR 470, 472.

<sup>28</sup> *Mag*, para 27.

<sup>29</sup> *Mag*, paras 15-18, 20.

<sup>30</sup> See, for example, *Hoffmann-La Roche v. Centrafarm*, Case No. 102/77 [1978] ECR 1139, *Bristol-Myers Squibb v. Paranova*, Joined Cases No. C-427, 429 & 436/ 93, *Pfizer v. Eurim-Pharm* Case No. 1/81 [1981] ECR 2913, *Bristol-Myers Squibb v. Paranova*, Joined Cases No. C-427, 429 & 436/ 93.

<sup>31</sup> *Silhouette International v. Hartlauer Handelsgesellschaft*, Case No. C-355/96 [1998] ECR I-4799, hereinafter, 'Silhouette'.

exhaustion by the EEA members and that any national rules providing for exhaustion of trade mark rights in respect of products put on the market outside the EEA by the mark proprietor or with his consent are contrary to Article 7(1) of the Directive.<sup>32</sup> Subsequent case-law precluded the possibility to claim the effects of international exhaustion in the EC by reliance on the notion of consent. *Sebago Inc v. GB-Unic SA*<sup>33</sup> strengthened the position of brand owners vis-à-vis parallel traders by clarifying that for there to be consent within the meaning of Article 7(1), the defendant should prove that such has been given in regard to each individual item of the product in relation to which exhaustion is claimed.<sup>34</sup> Later on in *Zino Davidoff v. A & G Imports*<sup>35</sup> the Court of Justice held consent to be a notion of Community and not national law. It further ruled that, on a proper construction of Article 7(1), the consent of the proprietor to the marketing in the EC of goods which have been previously placed on the market outside the EC by the proprietor or with his consent, could be expressed positively, but may be also implied, if it could be inferred from evidence prior to, simultaneous with, or subsequent to, the placing of the goods on the market outside the EC that will unequivocally demonstrate that the proprietor has renounced any intention to enforce his exclusive rights.<sup>36</sup> It is for the trader alleging consent to prove it and not for the mark owner to demonstrate its absence.<sup>37</sup>

### **3. The effect of the jurisprudence of the Court of Justice on external parallel trade**

The joint effect of the *Silhouette*, *Sebago* and *Davidoff* rulings is to entitle the mark owner to block external imports altogether as trade mark infringement, unless the defendant could prove the owner's express or implied, but unequivocally demonstrated, consent for their EU sale. Thus the application of the doctrine of exhaustion of trade mark rights in the EU has resulted in differentiating the legal status of internal and external imports as constituting, respectively, perfectly lawful economic activity and trade mark infringement. This dissimilar treatment has led to bifurcation of parallel trade in the EC, creating a 'fortress Europe', where products imported from other Member States move freely within the Union, while those coming from third countries are not allowed to enter.

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<sup>32</sup> *Silhouette*, para 31.

<sup>33</sup> *Sebago Inc and Ancienne Maison Dubois v. GB-Unic SA*, Case No. C-173/98 [1999] 2 CMLR 1317, hereinafter, 'Sebago'.

<sup>34</sup> *Sebago*, para 22.

<sup>35</sup> *Zino Davidoff SA v. A&G Imports and Levi Strauss and others v Tesco and others*, Joined Cases No. C-414/99 to C-416/99 [2001] ECR I-8691, hereinafter, 'Davidoff'.

<sup>36</sup> *Davidoff*, para 53.

<sup>37</sup> *Davidoff*, para 54.

## V. Setting the internal boundaries of the current regime

The existence of a 'fortress Europe' for parallel imports has been remarked by many legal commentators. However, the repercussions of the regime within Europe alone have received less attention. In this regard, the forthcoming sections of the paper note two specificities which concern respectively, the interaction between EU law and the European Economic Area (EEA), and the relationship between national and Community trade marks in the EU. Those specificities relate to the scope and application of two secondary legislation instruments, regulating trade mark rights in the EU, namely – the Trade Mark Directive<sup>38</sup> and the Community Trade Mark Regulation.<sup>39</sup>

### 1. International exhaustion is precluded for all EEA members

The EEA Agreement has enabled EFTA members<sup>40</sup> to join the internal market without joining the European Union. The EEA Agreement has extended the scope of Article 7 of the Trade Mark Directive to provide for EEA-wide instead of Community-wide exhaustion. Pursuant to Article 65(2) EEA and Annex XVII, point 4(c), Article 7(1) of the Trade Mark Directive in the EEA context is replaced by the following:

'The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in a Contracting Party under that trade mark by the proprietor or with his consent.'

Given this extension of the scope of Community exhaustion and the *Mag* and *Silhouette* rulings, it is questionable whether the exhaustion situation of all EEA members is identical. In particular, the situation in the EFTA states displays certain level of legal uncertainty. While the EFTA Court in *Mag* held that EFTA members could still operate international exhaustion under the Directive, the Court of Justice in *Silhouette* ruled that all EEA countries are precluded from applying such a regime. Since the two rulings happened in the 'wrong order', the first ambiguity that arises is whether EFTA countries could still lawfully adhere to international exhaustion, that is to say, whether *Silhouette* eliminates or alters the effect of *Mag*, if at all.

The Court of Justice's reasoning did not make any reservation as to the situation of EFTA states and did not seem to indicate that whether the goods originate within or outside the EEA is of

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<sup>38</sup> *Supra* note 19.

<sup>39</sup> Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1, hereinafter, 'the Trade Mark Regulation'.

<sup>40</sup> Namely, Norway, Iceland and Lichtenstein, Switzerland opted out of the EEA Agreement.



any significance whatsoever. The relevance of *Mag* was not even discussed by the Court. An acknowledgement of EFTA Court's jurisprudence would have contributed to the EEA Agreement's goal of ensuring a homogeneous development of the law in the EEA.<sup>41</sup>

Legal commentators claim that the EFTA Court would have reached the same decision in *Mag*, had *Silhouette* already been delivered, because the fundamental distinction between the aims of the EEA and EU, on which the EFTA Court relied, remains valid irrespective of the subsequent jurisprudence of the Court of Justice.<sup>42</sup> In practical terms, this would mean that *Mag* would remain good law after *Silhouette* and would be applicable to situations of trade towards and between the EFTA members of the EEA, while *Silhouette* would govern trade towards and between the EU states of the EEA. However, such a possibility was finally discarded when the issue about the relationship between *Silhouette* and *Mag* came before the EFTA Court in *L'Oréal Norge AS*,<sup>43</sup> with the EFTA Court deciding to follow the reasoning of the Court of Justice.

The case concerned genuine goods, marketed in the United States with the agreement of L'Oréal and then parallel traded into Norway via third parties, without L'Oréal's consent. The defendants argued that the importation in question did not amount to trade mark infringement as Article 7(1) did not prohibit international exhaustion; the products had been put on the market in the US by L'Oréal or with its consent and consequently, L'Oréal's trade mark rights were exhausted according to the rule of international exhaustion applicable under Norwegian trade mark law.

Strictly speaking, the EFTA Court was under no formal obligation to follow jurisprudence of the Court of Justice delivered after the signing of the EEA Agreement,<sup>44</sup> as is the case with the *Silhouette* judgment. Yet, the EFTA Court noted that 'the consequences for the internal market within the EEA are the same in that situation as in a situation where the Court of Justice has ruled on an issue first and the EFTA Court subsequently were to come to a different conclusion', which required interpretation of EEA law in line with new case law of the Court of Justice regardless of whether the EFTA Court has previously ruled on the question.<sup>45</sup> Finding that '[b]oth sets of arguments [*Mag* and *Silhouette*] are equally valid in a Community law context and an EEA law context', the EFTA Court continued to examine if there were differences in scope and purpose between Community law and EEA law which would constitute 'compelling grounds for divergent interpretations of Article 7(1) of the Directive' in EEA law and EU law.

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<sup>41</sup> Baudenbacher, *supra* note 20, at 667.

<sup>42</sup> Carboni, *supra* note 27, at 473.

<sup>43</sup> *L'Oréal Norge AS v. Per Aarskog AS*, Joined Cases E-9/07 & E-10/07-40, hereinafter '*L'Oréal Norge AS*'.

<sup>44</sup> In this sense, Agreement on the European Economic Area [1994] OJ L1/3, Protocol 28, Article 2 (1).

<sup>45</sup> *L'Oréal Norge AS*, para 29.

The Court found that Article 2(1), first sentence, of Protocol 28, stipulating that 'the Contracting Parties shall provide for such exhaustion of intellectual property rights as laid down in Community law', allows for the incorporation into Annex XVII of legal acts providing for mandatory EEA-wide exhaustion of rights, irrespective of the origin of the goods to which the rights relate. It was thus reasoned that the EEA Agreement foresees the possibility of mandatory EEA-wide exhaustion of intellectual property rights, also in relation to goods originating from outside the EEA and that the differences between the EEA Agreement and the Treaty with regard to trade relations with third countries do not constitute compelling grounds for divergent interpretations of Article 7(1). Accordingly, the Court held that '... Article 7(1) of the Trade Mark Directive is to be interpreted to the effect that it precludes the unilateral introduction or maintenance of international exhaustion of rights conferred by a trade mark regardless of the origin of the goods in question.'<sup>46</sup>

## **2. Community Trade Mark Regulation regime**

National and Community trade marks in the EU coexist and are regulated, respectively, through the Trade Mark Directive<sup>47</sup> and the Community Trade Mark Regulation.<sup>48</sup>

The doctrine of Community-wide exhaustion applies equally to both types of marks. In its Article 13(1) the Community Trade Mark Regulation contains a twin provision to the exhaustion rule of the Directive.<sup>49</sup>

Yet, there is lack of correspondence in the scope of exhaustion under the Directive and the Regulation which further blurs the exact internal boundaries of 'fortress Europe' for parallel imports. The EEA Agreement, while extending the scope of Article 7(1) of the Directive to provide for EEA instead of Community-wide exhaustion, did not broaden similarly the scope of Article 13(1) which thus remains restrained to a Community exhaustion rule. As a consequence of the lack of symmetry between Articles 7(1) and 13(1), if the goods have been marketed in an EFTA state (Norway, Liechtenstein or Iceland), the mark owner that has a Community trade mark possibly could rely on it to prevent parallel imports from these countries into an EU country.

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<sup>46</sup> *L'Oréal Norge AS*, para 38.

<sup>47</sup> *Supra* note 19.

<sup>48</sup> *Supra* note 40.

<sup>49</sup> According to Article 13(1) of the Regulation 'A Community trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.'

## **VI. Conclusion**

The present discussion has considered the regulation of parallel trade in the European Union. It has demonstrated how EU trade mark law has developed a differentiated treatment of parallel trade where imports between EU Member states are allowed, while the entry of original trade marked goods coming from outside the EU is banned altogether as trade mark infringement.

While the external boundaries of this 'fortress Europe' have been set quite firmly, the internal ones have required some additional clarification as far as the relationship between the legal regimes of the EU and the EEA is concerned. Recently, the EFTA Court has chosen not to uphold difference in the exhaustion regimes of EEA states that are EU Members and countries that although part of the EEA have not joined the EU. As a result, EFTA countries cannot be used as a stepping stone by parallel traders to import into the EU and circumvent the geographical limitations of Community exhaustion, as originally set by the Court of Justice of the European Union. However, the lack of correspondence between the scope of the Trade Mark Directive and the Community Mark Regulation for the purposes of exhaustion however could signify different level of trade mark protection for trade mark owners in Europe.