

The New Customs Enforcement Regulation

Issues of Concern for the European Industries

Introduction

The effective enforcement of Intellectual Property Rights (IPRs) is vital for our knowledge based European economy. A central means of enforcement are border seizures of counterfeit goods, conducted by the customs authorities under Regulation (EC) No. 1383/2003. However, the current scheme leaves room for improvements. We therefore welcome the decision of the European Parliament and Commission to review the law. That said, as it currently stands the new regulation is not where it could and should be.

Goods in Transit

Under the current law counterfeit goods in transit through the EU are not subject to border measures, if there is no specific proof that the goods will be redirected onto the European market. This law applies no matter how obvious the IPR infringement might be and this appears to be – at minimum – odd.

To quote the Max Planck study on the Overall Functioning of the Trade Mark System (page 111):

"If the relevant shipment concerns clear counterfeit goods, it would amount to misuse if the argument of free transit is invoked, even if it is obvious that the goods must be kept off the market in any case. There is no reason for guaranteeing free passage of fake goods to the country of destination, where they are equally illegal."

However, if this position was not to be followed, we believe that the proposal of the IMCO committee, to shift the burden of proof onto the declarant or holder of the goods, that the final destination is beyond the EU, would at least be a move into the right direction, even if it still implies that what is illegal outside the EU is not of concern.

Parallel Trade

We welcome the original proposal of the Commission to include parallel trade into the regulation. It is settled law (2008/95/EC art.7) that parallel trade is an IPR infringement. It affects virtually every sector in our economy. It would therefore only be consequent if customs had the possibility to intervene in these cases when they have sufficient grounds and information from the right holders. In addition, parallel trade often: provides a "backdoor" for real counterfeits; supplies the European market with goods which are not suited for it, *e.g.* goods complying to different technical standards; have labels or utilise ingredients not complying with EU legislation; have their lot number deleted jeopardising traceability.

The inclusion of parallel trade in customs procedures is already part of the national law in some member states, *e.g.* Germany. Experience shows that the common concern that an inclusion would over-burden customs is unfounded if the right holders provide the information necessary for a swift inspection. This, by the way, being in their very own interest.

Prior Procedure

The inclusion of a prior procedure in article 16 (3) of the new regulation will lead to a massive increase of administrative workload for the customs authorities. This outright contravenes the original goal of the regulation to speed up and streamline proceedings.

We therefore support the proposal of the Rapporteur, Mr. Creutzmann MEP, to simply delete Article 16 (3) from the new regulation. The right to be heard of those who introduce counterfeit goods into the EU is sufficiently preserved during the main proceedings. Final steps, such as the destruction of the goods will only be taken after the recipient has been given adequate time and opportunity to object those measures.

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