

## Proposed EU Border Enforcement Regulation: Counterfeit Goods in Transit Must Be Covered Effectively

### The problem

The failure of the proposed Border Enforcement Regulation to address the need to stop counterfeit goods in transit at the EU's borders is a major flaw that must be corrected immediately.

The ongoing practice of allowing known counterfeit products that are seized by EU Customs to be released back into commercial circulation – whether for sale abroad or indeed for re-import into the EU – is simply incongruent with the EU's manifold commitment to fight counterfeiting and piracy. This practice sends the message worldwide that the illegal business of counterfeiting and piracy is tolerated by the European Commission and the European Parliament.

Allowing this practice to continue for even one more day hurts the European companies whose products are being counterfeited and distributed within the EU and abroad, through what can only be described as the *assistance* of the EU's Customs system. This undermines the good work of law enforcement and Customs officers, wastes taxpayer money, and exposes consumers in countless countries to harmful counterfeit products.

Moreover, this practice is a discredit to the citizens of Europe, in that it suggests that the EU is willing to pass on the known and harmful problem of counterfeiting to people of other countries – notably those who receive fake products in developing countries, which often lack resources to fight counterfeiting effectively. Any EU policies that allow and even encourage counterfeits to remain in circulation – whether domestically or abroad – damage Europe's international credibility, contradict its heretofore strong commitments to IP protection and are, quite simply, unacceptable.

Such a lapse in the EU Customs regime has important repercussions for the fight against serious crime internationally. On the global stage, the EU's failure to address the issue of goods in transit simply aids and abets organized criminals in exploiting the world's trading channels for their ill-gotten gain, at the expense of consumers, legitimate businesses and public order.

Border seizures in several non-EU countries show that counterfeits (e.g. originating from China) came in via the EU in order to except them from random controls of Chinese goods. We are very concerned about this development to use the EU for diluting counterfeit trade channels. The free passage of counterfeits through European Customs should be no longer tolerated.

### The solution

The EU must seize the opportunity to remedy this problem by amending the draft Border Enforcement Regulation (Regulation of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, COM(2011)285) in order to ensure that goods under Customs supervision can be

intercepted and prevented from further transit if they are counterfeited in the Member State in which they were seized, or in the countries of origin or destination. The broad cross-section of industries, sectors and businesses listed above – which generate substantial growth and employment in Europe – agree that the following amendments are imperative.

## **Amendments needed in the Proposed Border Enforcement Regulation**

### **1. AMENDMENT CONFIRMING THAT CUSTOMS REGULATION COVERS GOODS IN TRANSIT** *(from draft International Trade Committee report)*

#### **Committee of International Trade Amendment 4 (Draft Report) Proposal for a regulation**

*Text proposed by the Council*

*Amendment*

#### **Article 1 – paragraph 4 a (new)**

***4a. This Regulation shall apply to goods in transit through the customs territory of the Union which are suspected of infringing an intellectual property right.***

*Justification*

*For the sake of clarity, the treatment of goods in transit should be explicitly addressed in the new Regulation. Where there is suspicion of infringement of the rights conferred by the EU's and Member States' substantive IP law and a concrete risk of diversion of the goods onto the internal market while in transit, or of infringing manufacture or distribution of such goods under other applicable laws as specified in the Regulation, customs may legitimately detain the goods.*

## 2. AMENDMENT ADDRESSING PROOF OF DESTINATION FOR GOODS IN TRANSIT

### Committee of International Trade Amendment [1] Proposal for a regulation

*Text proposed by the Council*

*Amendment*

#### Article 1 – paragraph 4b (new)

***4b. In determining the likelihood of diversion of goods in transit, the declarant, holder and owner of the goods shall bear the burden of proving the final destination of the goods. The final destination of the goods shall be presumed to be the market of the Union absent clear and convincing evidence to the contrary provided by the declarant, holder or owner of the goods.***

#### *Justification*

*The Regulation should make clear that the declarant, holder or owner of the goods ultimately bears the burden of proving the destination of the goods. In the absence of such proof, Customs may legitimately presume that the goods in transit are destined are at risk of diversion onto the internal market.*

### 3. AMENDMENTS ADDRESSING APPLICABLE LAW TO BE CONSIDERED IN DEALING WITH GOODS IN TRANSIT

#### Amendment [1]

#### Proposal for a regulation

*Text proposed by the Council*

*Amendment*

#### Article 3

#### Applicable Law

*Without prejudice to Article 8 of Regulation (EC) No 864/2007<sup>25</sup>, the law of the Member State where the goods are found in one of the situations referred to in Article 1(1) shall apply for the purpose of determining whether the use of those goods gives rise to suspicion of infringement of an intellectual property right or has infringed an intellectual property right.*

*[deleted]*

- (1) When determining whether an intellectual property right has been infringed under this Regulation, reference shall be made to:
  - (a) the law of the Member State within whose territory the goods have been placed in one of the situations referred to in Article 1(1); and*
  - (b) the laws of the countries of origin and destination of the goods.**
- (2) With respect to determinations made under Article 3(1)(b), the applicant shall provide confirmation of the existence of intellectual property rights in the goods, and of the fact that the manufacture or distribution of the goods is infringing, under the applicable law in the relevant country or countries.*
- (3) When determining the applicable laws, the declarant, holder and owner of the goods shall bear the burden of proving the final destination of the goods. Pending the proceedings referred to in*

***Article 20, the detention of the goods shall not be ended as long as no conclusive evidence of the country of destination of the goods has been produced.***

#### *Justification*

*In support of European rights owners' efforts to deter the infringing manufacture and distribution of goods incorporating their trademarks or other intellectual abroad, customs should not be blind to goods in transit which have not been authorised or otherwise lawfully manufactured or distributed in the country of production or destination. The Regulation should make clear that the laws of the relevant Member state or of the countries of origin and destination are relevant in any determination as to whether an intellectual property right has been infringed and goods in transit should be seized. Consistent with current procedure for goods destined for the internal market, the applicant with respect to goods in transit should be required to provide confirmation to customs of the existence of intellectual property rights in the goods, and of the infringing nature of goods (including any lack of authorisation to manufacture or distribute) in the relevant country of production or destination. The declarant, holder, and owner bear the burden of proving the final destination of the goods.*

**Amendment [2]**  
**Proposal for a regulation**

*Text proposed by the Council*

*Amendment*

**Article 2(7) Definitions**

(7) ‘goods suspected of infringing an intellectual property right’ means goods with regard to which there is adequate evidence to satisfy customs authorities that, in the Member State where these goods are found, are *prima facie*:

- (a) goods which are subject of an action infringing an intellectual property right under the law of the Union or of that Member State;

(7) ‘goods suspected of infringing an intellectual property right’ means goods with regard to which there is adequate evidence to satisfy customs authorities that, in the Member State where these goods are found, are *prima facie*:

- (a) goods which are subject of an action infringing an intellectual property right under the law of the Union or of that Member State, ***or of the countries of origin or destination of the goods;***

**Amendment [3]**  
**Proposal for a regulation**

*Text proposed by the Council*

*Amendment*

**Recital 17**

Under the "Declaration on the TRIPS Agreement and Public Health" adopted by the Doha WTO Ministerial Conference on 14 November 2001, the TRIPS Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In particular with regard to medicines the passage of which across this territory of the European Union, with or without transshipment, warehousing, breaking bulk, or changes in the mode or means of transport, is only a portion of a complete journey beginning and terminating beyond the territory of the Union, customs authorities should, when assessing a risk of infringement of intellectual property rights, take account of any substantial likelihood of diversion of these goods onto the market of the Union.

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