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*Committee on International Trade*

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**2011/0137(COD)**

5.12.2011

# **DRAFT OPINION**

of the Committee on International Trade

for the Committee on the Internal Market and Consumer Protection

on the proposal for a regulation of the European Parliament and of the Council concerning customs enforcement of intellectual property rights (COM(2011)0285 – C7-0139/2011 – 2011/0137(COD))

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(\*): Associated committee - Rule 50 of the Rules of Procedure

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## SHORT JUSTIFICATION

In a globalised economy, intellectual property has become a major factor of European competitiveness. Protecting knowledge is about protecting Europe's investment in research, innovation and jobs. At the same time, intellectual property right (IPR) infringements and the resulting global trade in counterfeit goods is an ever growing concern, both in terms of the economic consequences for Europe's industry as well as the risks to its consumers' health and safety.

Statistics<sup>1</sup> of customs detentions recorded at EU external borders show a clear increase in the number of shipments suspected of violating IPR. While lack of reliable data hampers assessing the full scale of the problem, statistics on EU customs actions signal a striking upward trend in particular in seizures of small postal or courier packages resulting from on-line purchases. In 2010, almost 69% of the articles detained in postal traffic were medicines.

At EU borders, customs authorities are both in the frontline and in a privileged position to take action against counterfeiting and the illegal entry of goods into the EU, and thereby to ensure the competitiveness of the European trade environment. As customs rules and practices play a vital role for effective action, the Commission proposal to revise the existing border enforcement Regulation 1383/2003, with the aim of enhancing IPR enforcement while streamlining customs procedures, is welcome.

This proposal forms part of the wider knowledge-based strategy outlined in the Europe 2020 Communication as well as the EU Customs Action Plan to combat IPR infringements for 2009-2012.

### **Your rapporteur's proposals**

As customs formalities have direct implications on international trade, it is of utmost importance that enforcement measures do not themselves become a barrier to legitimate trade. Apart from the overall objectives of trade facilitation, the provision of safeguards against abuse as well as increased legal certainty, these measures must be in line with the EU's international commitments.

These are some of the concerns that underlie my proposals as rapporteur for the Committee on International Trade. There are three aspects of particular interest from the external trade point of view that I wish to highlight in this opinion: goods in transit, parallel trade, and international cooperation.

### **Goods in transit**

Transit related issues merit a specific attention. Recital 17 of the new draft Regulation to replace Regulation 1383/2003 refers to a very particular case: imports of generic medicines. This reference is a result of well-known concerns related to instances of detentions of in-

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<sup>1</sup> [http://ec.europa.eu/taxation\\_customs/customs/customs\\_controls/counterfeit\\_piracy/statistics/](http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/statistics/)

transit medicines, on the basis of alleged patent infringements, and the ensuing disputes in the World Trade Organisation (WTO) against the EU by India and Brazil.

Recital 17 is a welcome reinstatement of the EU's commitment towards facilitating access to medicines in the developing world as well as its obligation, under WTO rules, to guarantee freedom of transit. It thereby introduces further clarity and legal certainty for legitimate stakeholders on the customs treatment of '*in particular*' medicines that are merely transiting the EU and not destined for, nor pose a risk of being diverted onto, the EU internal market.

Under the current proposal, customs officers should, when assessing a risk of an IPR infringement, take account of any '*substantial likelihood of diversion*' of these goods on to the market of the Union. The customs could thus only detain goods coming from non-member States in transit provided there is sufficient evidence that they will be illicitly diverted to the internal market. However, the proposal omits to give any guidance or criteria for interpreting an intention to put goods on sale in the EU. The new Regulation would thus benefit from a further clarification in this regard.

Further, the new regulation should empower customs authorities to detain any suspected counterfeit goods, and even if in transit. Otherwise, illicit goods would continue to enter the EU market as '*goods in transit*', under false statements on the origin and destination, as has been reported by businesses affected.

Guaranteeing freedom of transit was never intended to apply to illicit trade. Moreover, there should not be limits for controls when there is suspicion that public health could be endangered, irrespective of the final place of shipping of goods. Prevention and precaution should guide customs action. While Recital 2 recognises health and safety risks of IPR infringing goods, the Regulation should specify that EU customs authorities may detain any suspected good, even if in transit, when a concrete risk of diversion onto the EU market exists.

### **Small consignments**

As countering IPR violations in transit remains a challenge for Member States' customs authorities, a welcome novelty is the introduction of a mandatory EU wide application of the simplified procedure to destroy counterfeit goods without the need to formally establish an infringement in court. This can be considered a significant improvement in terms of reducing the burden both on right-holders and customs administrations alike - with expected results in trade facilitation.

This applies in particular to small consignments of suspected goods - resulting from internet sales and entering the EU through the postal service or via a commercial courier company - considering the value of the infringing goods against the burden of cost of storage and judicial procedures.

However, the notion of '*small consignments*' and the related procedural deadline might benefit from further looking into. It is equally important that customs authorities inform right-holders about any significant movements of small counterfeit consignments to help them track the routes and trends of counterfeiting.

## **Parallel trade**

The further extension of the scope of infringements covered by the draft Regulation is welcome. Empowering EU customs authorities to detain parallel imports, placed on the EU market without the right-holder's authorisation, should result in an improved level of IPR enforcement. While customs authorities are in a unique position to control illicit parallel trade, intercepting "grey market goods" and establishing actual infringements is likely to remain problematic.

In fact, the risk of hindering legitimate trade could increase. In order to avoid unfounded confiscations, right-holders should provide the customs with all information necessary to allow customs to seize parallel imports at the border. The expanded scope of the Regulation will need to be matched with adequate resources and training for customs.

## **International cooperation**

Combating IPR infringements at the EU border must be combined with targeted actions at source to prevent the exportation of illicit goods to the EU. This requires cooperation both with third countries and at international level, including within the WTO, the World Customs Organization, and the World Intellectual Property Organization.

Customs cooperation with both source and other consuming countries is already an EU reality by way of specific initiatives such as the EU-China Action Plan on customs cooperation on IPR enforcement. Despite dialogues and efforts on technical cooperation, data exchange, cooperation with industry, as well as some progress in legislation, real impact is missing. In fact, China<sup>1</sup> continues to be the main source of IPR infringing goods to the EU. In 2010, 85% of all IPR infringing articles detained by EU customs came from China (64% increase compared to 2009).

While the 2004 EU Strategy for the Enforcement of Intellectual Property Rights in Third Countries is undergoing revision, and the new FISCUS program is awaited, your rapporteur sees a clear need to step up especially the targeted and customised technical cooperation on IP with the EU's partners, and in particular with priority countries such as China, to ensure the maximum level of IPR protection for both legitimate businesses and consumers.

Further operational cooperation between customs in the EU and with third countries, including exchange of information, as well as cooperation with industry should be stepped up. Moreover, when negotiating IPR provisions in trade agreements, the EU should strive towards identical levels of protection to that within the Union.

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[http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics/statistics\\_2010.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/statistics_2010.pdf)

## AMENDMENTS

The Committee on International Trade calls on the Committee on Internal Market and Consumer protection, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a regulation Recital 17 a (new)

*Text proposed by the Commission*

*Amendment*

***(17a) Transit through the customs territory of the Union and possible diversion onto the internal market of goods suspected of infringing an intellectual property right, and in particular of counterfeit goods, entail not only considerable losses for legitimate Union businesses but also health and safety risks for consumers. Customs authorities should therefore be empowered to inspect and detain any suspected goods by way of precaution. In order to assess the substantial likelihood of such diversion, customs authorities should take into account circumstances such as an offer for sale or advertising of the goods directed at Union consumers, a lack of information on the manufacturer or consignor of the goods or a lack of information on their destination or consignee.***

Or. en

#### *Justification*

*In addition to addressing concerns related to access to medicines for all and the incidents of detentions, on the basis of alleged patent infringements, of generic medicines in transit through EU customs territory, the Regulation should address the transit and risk of diversion into the EU internal market of counterfeit goods entailing health and safety risks for consumers. The European Court of Justice has provided i.a. in its recent judgement on the*

*Nokia and Philips cases<sup>1</sup> certain criteria for assessing a risk of diversion.*

## **Amendment 2**

### **Proposal for a regulation**

#### **Recital 17 b (new)**

*Text proposed by the Commission*

*Amendment*

***(17b) Countering intellectual property rights infringements at the Union's external borders should be combined with targeted efforts at source. This requires cooperation both with third countries and at international level, where the Commission and Member States should build respect and promote high standards of protection for intellectual property rights. This should consist of endorsing the inclusion and enforcement of intellectual property rights in trade agreements, of technical cooperation, of encouraging discussion in the various international fora, of communication and exchange of information, as well as of further steps in operational cooperation with third countries and the industries concerned.***

Or. en

#### *Justification*

*Countering intellectual property right infringements should benefit from enhanced bilateral cooperation as well as coordinated international action.*

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<sup>1</sup> Judgment in Joined Cases C-446/09 Koninklijke Philips Electronics NV v Lucheng Meijing Industrial Company Ltd and others and C-495/09 Nokia Corporation v Her Majesty's Commissioners of Revenue and Customs

### **Amendment 3**

#### **Proposal for a regulation Recital 17 c (new)**

*Text proposed by the Commission*

*Amendment*

*(17c) With a view to eliminating international trade in goods infringing intellectual property rights, Article 69 of the TRIPS Agreement provides that WTO Members are to promote the exchange of information between customs authorities on trade in goods infringing intellectual property rights. Such exchange of information should allow trafficking networks to be tracked in order to stop the manufacture and distribution of goods infringing intellectual property rights at an earlier stage of the supply chain. It is therefore necessary to establish the conditions for the exchange of information between customs authorities in the Union and relevant authorities in third countries, including on data protection.*

Or. en

#### *Justification*

*Due to the international nature of counterfeiting and counterfeiters' expansive networks across borders, it is critical that the customs authorities be able to share and use information, including with third countries, in order to track networks and routes used by counterfeiters.*

### **Amendment 4**

#### **Proposal for a regulation Article 1 – paragraph 4 a (new)**

*Text proposed by the Commission*

*Amendment*

*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, customs may legitimately detain the goods.*

**Amendment 5**

**Proposal for a regulation**

**Article 6 – paragraph 3 – subparagraph 2 – point g**

*Text proposed by the Commission*

g) specific and technical data on the authentic goods, including images where appropriate;

*Amendment*

g) specific and technical data on the authentic goods, including **marking, such as bar-coding, and** images where appropriate;

*Justification*

*In order to facilitate the traceability of parallel imports, right-holders and their representatives should provide the customs with all information relevant for the identification of genuine products such as marking and the authorized distributors.*

**Amendment 6**

**Proposal for a regulation**

**Article 6 – paragraph 3 – subparagraph 2 – point i**

*Text proposed by the Commission*

i) any information relevant to the customs authorities' analysis and assessment of the risk of infringement of the intellectual property right(s) concerned;

*Amendment*

i) any information relevant to the customs authorities' analysis and assessment of the risk of infringement of the intellectual property right(s) concerned, **such as the authorised distributors;**

*Justification*

*In order to facilitate the traceability of parallel imports, right-holders and their representatives should provide the customs with all information relevant for the identification of genuine products such as marking and the authorized distributors.*

**Amendment 7**

**Proposal for a regulation**  
**Article 19 a (new )**

*Text proposed by the Commission*

*Amendment*

**Article 19a**

***Sharing of information and data between customs authorities***

***Subject to appropriate data protection safeguards, the Commission may decide that information and data collected under Article 18(3) is to be shared between customs authorities in the Union and relevant authorities in third countries and establish the conditions of such sharing.***

Or. en

*Justification*

*Cooperation with third countries is essential for countering the proliferation of trade in IPR infringing goods. In order for this cooperation to be effective, EU customs authorities should be able to share information and data on IPR violations with their counterparts in third countries, under confidentiality, and provided stringent data protection safeguards are in place.*

**Amendment 8**

**Proposal for a regulation**  
**Article 27 - paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. Where requested by the customs authorities, the holder of the decision granting the application shall reimburse all

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costs incurred by the customs administration in keeping goods under customs supervision in accordance with Articles 16 and 17 and in destroying goods in accordance with Articles 20 and 23.

costs incurred by the customs administration in keeping goods under customs supervision in accordance with Articles 16 and 17 and in destroying goods in accordance with Articles 20 and 23. ***The costs incurred shall be reimbursed by the holder of the goods such as a carrier or forwarder, in the event of failure to supervise the accurate handling of shipping documents.***

Or. en

*Justification*

*Include responsibility of intermediaries as concerns costs.*

**Amendment 9**

**Proposal for a regulation  
Article 27 - paragraph 3**

*Text proposed by the Commission*

***3. The holder of a decision granting a Union application shall provide and pay for any translation required by the customs authorities which are to take action concerning the goods suspected of infringing an intellectual property right.***

*Amendment*

***3. The holder of the decision granting the application shall not reimburse storage costs incurred by the holder of the goods.***

Or. en

*Justification*

*Include responsibility of intermediaries as concerns costs.*