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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

on the implementation of Council Regulation (EU) No 608/2013

1. INTRODUCTION

Infringements of Intellectual Property Rights (IPR) are a widespread and ever increasing phenomenon worldwide. International trade in counterfeit products represents up to 2.5% of world trade, or as much as EUR 338 billion, based on the latest available data from 2013¹. The impact of counterfeiting is particularly high in the European Union, with counterfeit and pirated products amounting up to 5% of imports, or as much as EUR 85 billion.

A fundamental component of the EU system to enforce IPR at the border is Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning the customs enforcement of intellectual property rights², hereinafter called Regulation (EU) No 608/2013. It entered into application on 1 January 2014.

Article 37 of Regulation (EU) No 608/2013 states that "*...the Commission shall submit to the European Parliament and to the Council a report on the implementation of this Regulation. If necessary, that report shall be accompanied by appropriate recommendations.*

That report shall refer to any relevant incidents concerning medicines in transit across the customs territory of the Union that might occur under this Regulation, including an assessment of its potential impact on the Union commitments on access to medicines under the 'Declaration on the TRIPS Agreement and Public Health' adopted by the Doha WTO Ministerial Conference on 14 November 2001, and the measures taken to address any situation creating adverse effects in that regard."

Regulation (EU) No 608/2013 is accompanied by the EU Customs Action Plan to combat IPR infringements for the years 2013 to 2017³, for which the Commission submits to the Council an annual summary report and will also submit a final report by the end of 2017.

The present document aims at reporting on the feedback gathered by the Commission on the implementation of Regulation (EU) No 608/2013 since 1 January 2014. As regards implementation by Member States, the report covers a three-year period from 1 January 2014 to December 2016, whereas the detailed figures on actions taken at EU borders cover the years 2014 and 2015, as statistics for 2016 were not yet available at the time when this report was prepared.

Section 2 explains the methodology used to prepare the report.

¹ Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact, OECD/EUIPO (2016).

https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Mapping_the_Economic_Impact_study/Mapping_the_Economic_Impact_en.pdf.

² Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning the customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (OJ L 181, 12.6.2013, p. 15-33).

³ Council Resolution establishing the EU Customs Action Plan to combat intellectual property rights (IPR) (OJ C 80, 19.3.2013, p.1).

Section 3 describes the EU legislative framework and focuses on the major novelties introduced by Regulation (EU) No 608/2013.

Section 4 provides an overview of the comments made by the private sector.

Section 5 analyses how Regulation (EU) No 608/2013 has been implemented by Member State, with a specific focus on the novelties and the optional elements introduced by such Regulation. It also includes figures on the concrete application of Regulation (EU) No 608/2013.

Section 6 details the conclusions.

2. METHODOLOGY

The following means and tools were used to prepare the report:

- support visits to Member States and consultation of Member States on the issue of medicines;
- consultation of stakeholders;
- download of information from the central database of the Commission, the so-called COPIS Database (anti-Counterfeit and anti-Piracy Information System).

2.1 Support visits to Member States and consultation of the Member States on the issue of medicines

The EU Customs Action Plan to combat IPR infringements for the years 2013 to 2017 foresees a number of actions to be performed by the Commission and the Member State customs administrations in order to ensure the effective implementation of Regulation (EU) No 608/2013.

One action relates to the conduct of support visits, over the years 2015-2017, by the Commission and national IPR experts to the 28 Member States, in order to establish a dialogue with the authorities in charge of implementing Regulation (EU) No 608/2013, so as to:

- gather information on the implementation of Regulation (EU) No 608/2013;
- facilitate the exchange of experiences and best practices.

In 2015 and 2016 the Commission, together with IPR experts from the Member State customs authorities, conducted 24 support visits to the following countries: BE, NL, FI, EE, SI, HR, LV, LT, MT, IT, EL, CY, SE, DK, DE, AT, SK, CZ, HU, PL, ES, PT, FR and LU. These visits were used to prepare the present document. For the Member States still to be visited in 2017, namely BG, IE, RO and UK, the Commission invited the customs authorities to fill in the questionnaire used on the occasion of the support visits, in order to enable all Member State customs authorities to express their views on the implementation of Regulation (EU) No 608/2013. The completed questionnaires from those Member State customs authorities were received in the course of 2016.

On the occasion of the first meeting of the Customs Expert Group (IPR enforcement section), which was held on 11 July 2016, the Commission also asked Member State customs authorities to report to the Commission any relevant incidents concerning medicines in transit across the customs territory of the Union that might have occurred under Regulation (EU) No 608/2013.

2.2 Consultation of stakeholders

The EU Customs Action Plan to combat IPR infringements for the years 2013 to 2017 has set up a group gathering the Commission, EU customs authorities, right-holders and other stakeholders in the context of its action 1.3.2⁴. The group meets once a year.

On the occasion of the 4th meeting of this group, which was held in Brussels on 12 July 2016, the Commission invited right-holders and other stakeholders to report on the implementation of Regulation (EU) No 608/2013, with a specific emphasis on the following provisions, which are of direct interest to them:

- chapter II concerning the applications for actions (linked to the content of the applications for actions as detailed in Commission Implementing Regulations (EU) No 1352/2013);
- Article 19 concerning inspection and samplings of goods whose release has been suspended or which have been detained;
- Article 21 concerning the permitted use of certain information by the holder of the decision;
- Articles 23 (standard procedure for the destruction of goods and initiation of proceedings) and 26 (procedure for the destruction of goods in small consignments);
- Article 28 concerning the liability of the holder of the decision;
- Article 29 concerning the costs.

By the end of September 2016, eight answers had been received from the following associations: European Express Association (EEA), Union des Fabricants (UNIFAB), European Communities Trade Mark Association (ECTA), European Federation of Pharmaceutical Industries and Associations (EFPIA), European Semiconductor Industry Association (ESIA), International Trademark Association (INTA), Business Action to Stop Counterfeit And Piracy (BASCAP), the European Association of Trade Mark Owners (MARQUES).

The Commission thanks these associations for the comments sent.

2.3 Use of COPIS (Download of information from COPIS)

Regulation (EU) No 608/2013 foresees that for the purpose of ensuring the processing of the information transmitted by the Member States to the Commission and relating to the decisions

⁴ Action 1.3.2 from the EU Customs Action Plan to combat IPR infringements aims at installing a dialogue between customs authorities and rights holders and stakeholders on customs enforcement of IPR.

granting applications as well as to the suspension of the release of the goods or their detention, the Commission shall establish a central database. The central database COPIS became operational on 1 January 2014. It is under permanent development.

The Commission has access to the information contained in COPIS as appropriate for the fulfilment of its legal responsibilities in applying Regulation (EU) No 608/2013.

For the preparation of the present report, the Commission extracted the required information from COPIS, concerning notably:

- the number of Application for Actions (AFA) per type of intellectual property rights covered by Regulation (EU) No 608/2013 (*see Annex 1*);
- the results of the use of the "standard procedure";
- the use of the "small consignment procedure" (*see Annex 2*).

3. EU LEGISLATIVE FRAMEWORK

3.1 Context

The EU started to regulate border enforcement of IPR at Union level as early as 1987 with Council Regulation (EC) No 3482/86⁵, laying down measures to prohibit the release of counterfeit goods for free circulation. Since then, three regulations⁶ have followed with a view to adjusting the scope and procedures to the evolution of fraud trends. The last revision, which led to the adoption of Regulation (EU) No 608/2013, took notably into account the growing trade in counterfeit goods as a result of the growing e-commerce trade.

Like previous EU Regulations in the field, Regulation (EU) No 608/2013 implements the border enforcement measures contained within the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS), which was approved by the EU Council in 1994 as part of the multilateral negotiations of the Uruguay Round and concluded in the framework of the World Trade Organisation (WTO). The Regulation even implements the non-binding requirements of TRIPS in terms of border enforcement such as controls on counterfeit goods in export and transit, thereby reflecting the EU's commitment to high protection of IPR.

The objective is to prevent goods infringing IPRs from being 'placed on the internal market' and to adopt measures for that purpose 'without impeding the freedom of legitimate trade'.

⁵ Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods (OJ L 357, 18 December 1986, p.1).

⁶ Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods (OJ L 341, 30.12.1994, p. 8), Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ L 196, 2.8.2003, p. 7) and Regulation (EU) No 608/2013.

Regulation (EU) No 608/2013 solely contains procedural rules for customs authorities. Accordingly, this Regulation does not set out any criteria for ascertaining the existence of an infringement of an IPR, which is defined in the concerned substantive law.

Regulation (EU) No 608/2013 empowers EU customs authorities to detain goods which are suspected of infringing an IPR conferred by EU or national IP laws and which are under customs control or customs supervision.

Control by customs authorities must be based on risk analysis and should be proportionate to the risk. It is therefore essential that customs have at their disposal sufficient and relevant information from the right-holders to properly organise their risk analysis.

The customs authorities may act upon “application for action” (AFA) requested by right-holders, or at their own initiative so called “ex-officio”.

An AFA must be submitted to customs authorities by persons entitled to initiate legal proceedings for the determination of an IPR infringement. National AFAs are submitted in a Member State and request its customs authorities to take action in that Member State. Holders of IPR based on Union law producing effects throughout the Union may submit a Union AFA, which will produce effects in more than one Member State.

The application and extension forms are established in Commission Implementing Regulation (EU) No 1352/2013 of 4 December 2013⁷.

Customs authorities take the decision to grant or to reject the AFA.

Where the customs authorities suspend the release or detain suspected goods, they notify the holder of the decision granting the application and the declarant or holder of the goods. Under the "standard procedure", upon confirmation in writing by the holder of the decision that, in his conviction, an IPR has been infringed and upon express or deemed agreement of both parties, the suspected goods can be destroyed. Otherwise, the goods are released, unless the holder of the decision notifies the customs authorities that he has initiated proceedings to determine whether an IPR has been infringed. The deadline for agreeing to destruction or for informing customs on the initiation of proceedings amounts to 10 working days (3 days in the case of perishable goods) and can, in case of initiation of proceedings, where appropriate, be extended by a maximum of another 10 working days.

Where detained suspected goods are not covered by an AFA (ex-officio action), the customs authorities have to notify the detention to the persons concerned, providing them with the opportunity to submit an AFA.

Regulation (EU) No 608/2013 also foresees a simplified procedure for small parcels carried by post or courier ("small consignment procedure"), applicable upon request by the holder of

⁷ Commission Implementing Regulation (EU) No 1352/2013 of 4 December 2013 establishing the form provided for in Regulation (EU) No 608/2013 of the European Parliament and of the Council concerning customs enforcement of intellectual property rights (OJ L, 18.12.2016, p.10).

the decision granting the application, in which the goods may be destroyed with the express or presumed agreement of the sole declarant or holder of the goods.

AFA's and detention information are managed through COPIS. Based on the data transmitted by the Member State customs authorities via COPIS, the Commission publishes on a yearly basis the results of customs actions at the EU external borders⁸.

3.2 New features introduced by Regulation (EU) No 608/2013

The **major new features** introduced by Regulation (EU) No 608/2013, which complete the scheme already contained in past regulations, are the following:

- Extension of the rights and infringements covered by customs actions: in order to strengthen the enforcement of IPR, customs intervention has been extended to other type of rights and other type of infringements than those covered in Regulation (EC) No 1383/2003. The other types of protected rights are trade names, topographies of semiconductor products and utility models. The Geographical Indications covered now encompass not only agricultural, but also possible future non-agricultural products and the Regulation specifically mentions the geographical indications as provided for in Agreements with third countries. The scope of the Regulation has also been extended to cover more infringement cases, namely all possible trademark infringements (such as confusingly similar trademarks and well-known trademarks), and not only counterfeit goods as in previous Regulations, as well as infringements via circumvention devices (devices which are primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of technological measures that prevent or restrict acts in respect of works which are not authorised).
- The scope and specificity of information to be provided within the AFA has been extended in comparison with the previous Regulation.
- The simplified procedure for destruction has become the mandatory standard procedure. Under this procedure, which already existed as an optional procedure under Regulation (EC) No 1383/2003, upon confirmation in writing by the holder of the decision that, in his conviction, an IPR has been infringed and upon express agreement of both parties, the suspected goods can be destroyed without there being any need to determine whether an IPR has been infringed. It provides for a quick and cost-effective destruction of goods. Already in the past this had been a successful tool in the practical management and handling of “clear cases” of IPR infringements; making it the standard procedure proves it has been equally successful in all Member States.

Contrary to the simplified procedure described in Regulation (EC) No 1383/2003, the new standard procedure does not request that the holder of the decision obtains directly the written agreement from the holder of the goods/declarant to abandon the goods for destruction, but it is now the customs authority which is responsible for notifying the holder of the

⁸ http://ec.europa.eu/taxation_customs/business/customs-controls/counterfeit-piracy-other-ipr-violations/ipr-infringements-facts-figures_en

goods/declarant and the customs authority may deem the agreement of the holder of the goods/declarant to have been given where he has not explicitly opposed the destruction.

- The specific small consignment procedure was introduced to address the increasing trend towards small consignment of counterfeit and pirated goods, usually entering the Union through the postal service or via a commercial courier company, and to reduce costs and administrative burdens for the handling of such cases to a minimum. It applies to the small consignments as defined in Article 2(19) of Regulation (EU) No 608/213, namely postal or express courier shipments containing a maximum of three units or having a gross weight of maximum two kilograms.
- “Deemed agreement”: both the standard and the small consignment procedure foresee the possibility of using the deemed agreement of the holder of the goods/declarant instead of his explicit agreement to destruction. In other words, where the declarant or the holder of the goods has not confirmed his agreement to the destruction of the goods, nor notified his opposition to destruction to the customs authorities within the defined deadline, the customs authorities may deem the declarant or the holder of the goods to have confirmed his agreement to the destruction of the goods.
- Costs: given that customs authorities take action upon application, Article 29 of Regulation (EU) No 608/2013 provides that customs authorities may decide that the holder of the decision should reimburse all the costs incurred by the customs authorities in taking action to enforce his intellectual property rights. This remains the decision of the Member State customs authorities.
- Article 22 of Regulation (EU) No 608/2013 introduces a provision on the sharing of information and data with the relevant authorities in third countries, with a view to contributing in this manner to combating international trade in goods infringing IPR. In order to activate the procedure, the Commission shall adopt implementing acts defining the elements of the necessary practical arrangements concerning the exchange of data and information.
- Customs enforcement of IPR within the European Union entails the exchange of data on decisions relating to AFA. The exchange of such data as well as of customs actions had to be made available via a central electronic database. To that end, the central database COPIS was established by the Commission and has been operational since 1 January 2014.

4. COMMENTS FROM THE PRIVATE SECTOR

Associations of right-holders and of express courier companies **praise most of the novelties** introduced by Regulation (EU) No 608/2013 and **give a generally positive feedback** on its functioning.

The inclusion of additional IP rights within the domain of customs control is deemed helpful, enabling an alignment between Regulation (EU) No 608/2013 and Directive 2004/48/EC on the enforcement of IP rights, and minimising the discrimination against IPR other than trademarks.

The lodging of AFAs is not considered overly complex. The Union AFA procedure (submitting in one Member State and spreading to the other Member State by the Member State having granted it) is also considered helpful.

The new standard procedure with its “deemed agreement option” seems to be particularly appreciated and considered a very practical tool.

In general, the answers received reveal a positive view on the way customs authorities fulfil their duties with regard to the Regulation.

Issues which **raise some concerns** are the following:

- The information to be submitted in the AFA would not always be clearly defined (for instance, what is to be considered as an “authorised distributor”?) or the information referred to would be obsolete and would not take into account modern global sourcing and supply chain practice or even for some could be difficult to collect (place of production, involved companies, traders, etc.). In addition, the distinction between the mandatory and optional fields in the forms annexed to the implementing Regulation (EU) No 1352/2013 would not be reflected in Regulation (EU) No 608/2013.

As regards the update of the information contained in the AFA, it would not appear efficient that the holder of the decision has to report to customs authorities any modifications to any information referred to in Article 6 (in view of the significant extent of information required in the said Article).

Some answers suggest simplifying the language regime for Union AFA by accepting submission either in English, French or German across the 28 Member States.

- The return of the samplings as foreseen in Article 19(2) would not be possible in all cases, as conduct of analysis often incurs a damaging of the samples.

If samples cannot be provided by customs authorities within the first ten working days, it is suggested that the ten-day deadline for the holder of the decision to initiate proceedings be extended accordingly.

- The ten-day deadline to initiate proceedings would be too short (standard procedure - Article 23). Some answers suggest that the holder of the decision should be given the opportunity to initiate legal proceedings during a lapse of time which should be calculated from the day of the customs notification of the objection to the destruction by the holder of the goods/declarant (and not from the notification of the suspension of the release or the detention of the goods).

- The storage of the goods (whose release has been suspended or which have been detained at the premise of an express courier company) would incur additional indirect costs.

- The costs of destruction (Article 29) would be difficult to assess in advance (notably in the small consignment procedure as the holder of the decision is not consulted on each detention) and would be increasing. Some answers suggest that the holder of the decision should be

given the opportunity to determine the conditions of storage and destruction in a cost-effective way or that the costs related to action concerning counterfeit goods should be paid by the infringer/the importer or to put the burden on the intermediaries (consignor/shipper/transporter).

As regards the small consignment procedure, while certain answers consider it very useful, others conclude that it cannot be used for certain kinds of products (like medicines, as there is an obligation for the pharmaceutical industry to report detentions of medicines to the authorities, or semi-conductors as infringement is complex to assess) or that it cannot be used at all as it would not ensure in return a sufficient level of information on the detentions made.

- The list of allowed uses of information transmitted by customs authorities to the holder of the decision would lack clarity in its wording.
- Concerning the “early release of goods” procedure and the definition of guarantee, the price of the licence obtained from the right-holder's website should not be considered a reasonable guarantee.
- Concerning the liability of the holder of the decision, no general comment was made. Few answers refer to the liability in relation with the specific issue of the non-return of samples, the main idea being that the holder of the decision should not be considered liable for samples not being returned, or being damaged, except in the case where the holder of the goods/declarant opposes the destruction and the goods in question are subsequently found not infringing an IPR.

The answers provided also **raise some questions of interpretation** on certain aspects of Regulation (EU) No 608/2013, which have been or will be addressed directly with the stakeholders.

Lastly, the answers provided refer to a **lack of common EU-wide implementation** on certain issues, like the information which is considered to be mandatory in an AFA, the deadline to request a renewal of the customs decision granting the AFA, the way to implement the standard procedure (including on transmission of information to the holder of the decision), the reason recognised as being valid for not initiating proceedings, the implementation of the small consignment procedure (which would not be applied by all Member States), the lack of use of the information given by the holder of the decision in the AFA and contained in COPIS for risk analysis purposes.

5. IMPLEMENTATION BY MEMBER STATES

While customs legislation is adopted at EU level, its implementation is the responsibility of the Member States via their national customs administrations. Member States also have the competence over the organisation of their customs administration, including on the organisation of training of customs officials. Regulation (EU) No 608/2013, however, indicates in its recital 7 that Member States should, in cooperation with the Commission, provide appropriate training for customs officials in order to ensure the correct implementation of this Regulation.

The reading of the questionnaire and the exchange of views conducted during the support visits enabled a discussion on the administrative organisation of the customs departments dealing with IPR enforcement, be it at central or local level (including human resources involved, training provided, use of database, etc.), on the cooperation with the various stakeholders and on the implementation of all procedures foreseen by the Regulation.

Regulation (EU) No 608/2013 contains both mandatory and optional provisions. The latter leave to the Member States the decision to use one or the other option. This is the case with the decision to use the “deemed agreement” mentioned in both the standard and the small consignment procedure (Articles 23 and 26), the decision to ask the holder of the decision to bear the costs incurred by the customs action (Article 29) and the decision whom to notify between the holder of the goods or the declarant for both the standard and the small consignment procedure (Articles 17 and 26). The support visits gave the opportunity to gather a global picture of the choice made by Member States vis-à-vis the flexibility offered by the Regulation.

5.1 Human resources/organisational aspects

Member States face increasingly limited resources in the field of customs.

Human resources dedicated to IPR are very much linked to the level of priority given to IPR in each Member State, to the number of AFA received at national level, to the organisation of the IPR-competent customs department (IPR CCD - department in charge of handling the Applications for Action) and to its role.

In most Member States, the IPR CCD is located at central level.

Its role can be defined in such a way that it implies a very high centralisation of the IPR tasks within the Member State (including the level of handling the procedures of notification to right-holders and holder of the goods/declarant for detentions initiated by the local customs offices).

The staffing of the IPR CCD can vary from a team of maximum 20 members to a single person.

Examples of the roles dedicated to a very large IPR CCD, playing a rather centralised role, are as follows:

- *Consultation in the preparation phase of EU Legislation on IPR or of national IPR acts;*
- *Drafting internal instructions to provide explanations on Regulation (EU) No 608/2013 to local customs offices or on the concepts linked to IPR infringements;*
- *Handling of AFA – support to right-holders in the preparation of the AFA, adoption of decision granting or refusing the AFA and registration of AFAs in the concerned database;*
- *Supervision of the database;*

- *Service provider for right-holders and economic representatives (the IPR CCD plays the intermediary role between the right-holders and the local customs office, in order to centralise the contacts with the right-holders);*
- *Support of customs offices, with IPR actions (explanations on content of AFA, support in ex-officio procedure, support in early release of the goods by defining the guarantee to be provided by the declarant);*
- *Infringement: ex-officio actions, identification of the right-holders concerned;*
- *Contribution to risk management;*
- *Training (at the national customs high school - Conception of learning content/material, Creating learning content, Training);*
- *Public relations activities:*
 - *Publishing statistics (on a yearly basis);*
 - *Press inquiries, interviews;*
 - *Sensitising of consumer and economy (round tables, press conferences, lectures, brochures);*
 - *Cooperation with national and international associations.*

In the majority of cases, however, the IPR CCD plays mainly the role of handling the AFA.

In some Member States, IPR specialists are posted at local level (main offices encountering IPR cases).

Training on IPR is foreseen in all Member States, be it during the initial (for all customs officials) or the vocational training phase (for IPR experts). The e-learning training module developed in cooperation between the Commission, Member States and EUIPO is used in some cases. There is a recurrent demand from many Member States to receive help with training on IP substantive law.

5.2 Cooperation with stakeholders

5.2.1 Public sector

Cooperation between customs authorities and other authorities intervening in IPR enforcement is not foreseen by Regulation (EU) No 608/2013, but was evoked during the support visits, as it is an element which is essential to enhance global results on IPR enforcement.

On average, the level of cooperation between the customs authorities and the other authorities involved in IPR enforcement was described as medium to low. The different competences and roles attributed to the various authorities may explain the situation.

In the Member States reporting good cooperation, this is organised via agreements installed at national level (via cooperation instances set up at policy level between different ministries, also including sometimes an operational component).

The cooperation between authorities is to be further addressed via a knowledge building event organised in cooperation with the EUIPO.

5.2.2 Private sector

In general, cooperation between the customs authorities and the right-holders or their representatives is described as good, even if in some cases difficulties have been reported (see AFA section below).

Article 30 of Regulation (EU) No 608/2013 foresees that Member States shall ensure that the holders of decisions comply with the obligations set out in Regulation (EU) No 608/2013, where appropriate by laying down provisions establishing penalties. For the time being, few (6) Member States have adopted (or already had) national legislation on penalties as defined in Article 30. In case of incidents with holders of decision, most Member States favour seeking first the dialogue in order to find acceptable solutions.

5.3 Application for Action (content/quality of information)

The administrative enforcement system for customs, put in place via Regulation (EU) No 608/2013, functions on the basis of the request right-holders have to lodge with customs authorities. The entire customs action derives from these AFA. It is therefore essential that the information they contain is of sufficient quality to enable efficient customs intervention. This holds true especially in the case of Union AFAs issued by one Member State which are to apply in other Member States.

Most Member State customs authorities consider that, on average, the AFAs they receive still lack the necessary quality information.

This leads, in a low percentage of cases, to refusal of the decision granting the AFA.

In the autumn of 2016, a Customs 2020 seminar between Member State customs authorities was organised on IPR customs enforcement/ Harmonisation in the process of granting and handling AFA/ liability of customs administration vis-à-vis the AFA.

On that occasion it was recommended that an AFA should always contain the following mandatory elements:

- Information on identification of original and infringing goods;
- Security features;
- Distribution/supply chain information.

It was also recommended, in order to enhance the quality and content of the AFA, to ensure a better promotion of the "Manual for the Completion of Applications for Action and Extension Requests"⁹.

Member States have highlighted the discrepancies between some of the form boxes and COPIS fields. This will be addressed by the Commission in a future release of COPIS.

5.4 Use of procedure

5.4.1 Standard procedure (Article 23)

The "standard procedure" is used in all Member States. In most Member States the procedure is used from the beginning to the end. In one Member State, the detention procedure is started under Regulation (EU) No 608/2013 but then always pursued under the national criminal procedure, said to supersede the administrative procedure foreseen by Regulation (EU) No 608/2013. Article 1(6) of Regulation (EU) No 608/2013 indicates that it shall not affect national or Union law on intellectual property or the laws of the Member States in relation to criminal proceedings.

Some Member States may need to update the way they implement the standard procedure, in order to fully adapt to the details of the procedure defined in Regulation (EU) No 608/2013.

5.4.2 Small consignment procedure (Article 26)

All Member States use the "small consignment procedure" with the exception of two Member States, which base their actions on small consignments on criminal proceedings. Four Member States have had no seizure so far with the "small consignment procedure" even though they use it, one of them explaining the lack of results by the lack of human resources engaged to implement the procedure.

The general reply by customs authorities to the question why some right-holders do not request the "small consignment procedure" was that, in certain cases, in view of the costs involved and the lack of information (as they will not be notified of the detention) they refrain from opting for the procedure.

5.4.3 Notification to the declarant or the holder of the goods (Articles 17 and 26)

In general, being it under the "standard procedure" or the "small consignment procedure", when a customs declaration is lodged, customs authorities notify the declarant directly on the occasion of the control performed (as the declarant is often present).

5.4.4 Use of the "deemed agreement" (Articles 23 and 26)

The deemed agreement is widely used for the standard procedure (by around 60% of the Member States in all cases where the declarant or the holder of the goods have not confirmed

⁹ See http://ec.europa.eu/taxation_customs/business/customs-controls/counterfeit-piracy-other-ipr-violations/defend-your-rights_en

their agreement to destruction of the goods nor notified their opposition it, and by another 30% in certain cases only). For the small consignments procedure, it is used by around 57% of the Member States in all cases where the declarant or the holder of the goods have not confirmed their agreement to destruction of the goods nor notified their opposition to it. Two Member States have opted not to use it at all, in one case following a policy decision, in the other case as it is not authorised by a transversal administrative rule.

The use of the deemed agreement has not led to any major concern in the Member States using it and is considered essential by those who apply it for the effective use of the small consignment procedure.

5.4.5 Costs (Article 29)

Around 85% of the Member States ask the holder of the decision to bear the costs for the destruction under the standard procedure.

Around 46% of the Member States ask the holder of the decision to bear the costs both for the destruction under the standard procedure and the small consignment procedure.

Two Member States bear the costs incurred by their actions on storage and destruction of goods under Regulation (EU) No 608/2013 for the standard procedure.

Some Member States act on an ad hoc basis concerning the cost for the destruction under the small consignment procedure.

5.4.6 Early release of goods (Article 24)

Article 24 foresees that, where the customs authorities have been notified of the initiation of proceedings to determine whether a design, patent, utility model, topography of semiconductor product or plant variety has been infringed, the declarant or the holder of the goods may request the customs authorities to release the goods or put an end to their detention before the completion of those proceedings, provided that the declarant or the holder of the goods has provided a guarantee sufficient to protect the interest of the holder of the decision.

The early release of goods does not apply to trade marks, which represent the vast majority of customs seizures (in 2014 and 2015, 94% of all goods detentions concerned trade marks). This is probably why the procedure has been very rarely used across the Union (on one occasion by one Member State and on a more regular basis by another one).

5.5 Use of COPIS

COPIS became operational on 1 January 2014. Since then, customs authorities have taken steps to adapt to it. Modifications to the first release of the tool were made to ease its use. Even though Member States recognise the improvement given to COPIS in the past two years, there are still some general concerns about the efficiency and user-friendliness of certain functions of the database. Further modifications to COPIS are in development to ensure that it responds better to the needs of the customs authorities.

Throughout the development of the COPIS database project, requests have been made for COPIS to allow for the electronic submission of AFA. As the Enforcement Data Base (EDB), a database developed by the European Observatory on IPR infringements, contains relevant information for the submission of AFAs, that database has been considered as a suitable source for the delivery of the required AFA information in an electronic format. Further to contacts between the Commission and the European Observatory on IPR infringements, a proposal to implement the functionality of the 'pre-AFA' within COPIS was developed to ease the work of both the applicants and the customs authorities.

Work on the development of a trader portal for the submission of an electronic AFA is in progress and will lead in future to a paperless AFA.

The operational connection between COPIS and EDB is in place since 1 July 2015. For the applicant, this connection will reduce the burden of multiple submissions of information.

21 Member States use COPIS for the management of AFAs and infringements.

6 Member States use, for the management of AFAs and infringements, national systems which are automatically linked to COPIS.

One Member State uses only for infringements a national system which is automatically linked to COPIS but uses COPIS for the management of AFAs.

Some Member States give full access to COPIS to their customs officials; others give a limited access to it, promoting rather the use of their national database in case a national database exists on IPR within the customs administration. This may be the source of mistakes in the transfer of information and certainly leads to additional workload.

Many Member States report a difficulty to use the information given by the holder of the decision in the AFA and contained in COPIS for risk analysis purposes.

5.6 Implementation by the Commission

As foreseen in Article 6, paragraph 1 of Regulation (EU) No 608/2013, a Commission Implementing Regulation¹⁰ establishing the form provided for in Regulation (EU) No 608/2013 was adopted on 4 December 2013. An update is foreseen in 2017.

The Commission has not yet adopted any implementing acts as referred to in Article 22 of Regulation (EU) No 608/2013.

5.7 Results at the EU borders for 2014 and 2015

The annual publication of the report on EU customs enforcement of intellectual property rights¹¹ at the EU external borders provides an opportunity to measure the scale of customs

¹⁰ Commission Implementing Regulation (EU) No 1352/2013 of 4 December 2013 establishing the forms provided for in Regulation (EU) No 608/2013 of the European Parliament and of the Council concerning customs enforcement of intellectual property rights (OJ L 341, 18.12.2013, p.10-31).

actions to enforce IPR. The report contains statistical information about the detentions made under customs procedures and includes data on the description, quantities and value of the goods, their provenance, the means of transport and the type of IPR that may have been infringed.

The statistics are established by the Commission, based on the data transmitted by the Member State administrations via COPIS.

5.7.1 General results

DETENTIONS	2012	2013	2014	2015
Cases	90.473	86.854	95.194	81.098
Procedures	Not available	Not available	105.488	95.313
Articles	39.917.445	35.940.294	35.568.982	40.728.675
Domestic retail value	€ 896 million	€ 768 million	€ 617 million	€ 642 million

Each detention is referred to as a case that may contain one or more articles. Each case may contain articles of different product categories and from different right-holders. In COPIS, Member States register each case with information per category of goods and per right-holder. For each category of goods and each right-holder a detention procedure will be initiated, which explains why there are more procedures than cases.

According to the 2015 report on EU customs enforcement of IPR at the EU external borders, the volume of goods infringing IPR seized at the border increased by 15% between 2014 and 2015.

5.8 Results on medicine in transit

The Commission asked Member State customs authorities to report to the Commission any relevant incidents concerning medicines in transit across the customs territory of the Union that might have occurred under Regulation (EU) No 608/2013.

27 Member States reported that no relevant incidents had occurred on the control of medicines in transit across the customs territory of the Union.

One Member State reported a detention case on medicines in transit concerning medicines covered by a patent, where the information on the shipment contained clear indications that the goods were destined for the internal market and therefore the goods were detained. These goods were finally destroyed with the agreement of both parties involved.

¹¹ http://ec.europa.eu/taxation_customs/business/customs-controls/counterfeit-piracy-other-ipr-violations/ipr-infringements-facts-figures_en

5.9 Application for Actions and seizures relating to the intellectual property rights covered by Regulation (EU) No 608/2013

The rights newly covered by Regulation (EU) No 608/2013, namely the utility models, the trade names and the topographies of semi-conductors have not generated a high number of AFAS.

On 15 September 2016, trade names were covered by 8 active AFAs and utility models by 15 active AFAs. Topographies of semi-conductor have not generated any AFA.

Consequently, the number of detentions of goods infringing the newly added rights is quite low.

For example, in 18 cases goods were detained on the basis of a suspicion of an infringement of a trade name and in two cases goods were detained on the basis of a suspicion of an infringement of a utility model. No detentions were made for goods on the suspicion of an infringement of the topography of semi-conductors.

No detentions were made for circumvention devices.

Concerning the rights which were already covered under Regulation (EC) No 1383/2003, the number of AFAs covering geographical indications remains low.

5.10 Results of the use of the “standard procedure”

In 2014, 69.12% of all cases were handled under the "standard procedure" and 30.88% under the "small consignment procedure".

This has led to the following results:

- goods were destroyed under the "standard procedure" after confirmation by the right-holder and agreement of the holder of the goods (58.43%);
- goods were destroyed under the "small consignment procedure" after agreement of the holder of the goods (27%);
- a court case was initiated by the right-holder to determine the infringement (6.14%);
- goods were released as they appeared to be non-infringing original goods (2.8%);
- goods were released because the right-holder did not react to the notification by customs (5.5%);
- a settlement out of court was reached between the right-holder and the holder of the goods, after which the goods were released (0.11%).

In 2015, 72.14% of all cases were handled under the "standard procedure" and 27.86% under the "small consignment procedure". This has led to the following results:

- goods were destroyed under the "standard procedure" after confirmation by the right-holder and agreement of the holder of the goods (59.93%);
- goods were destroyed under the "small consignment procedure" after agreement of the holder of the goods (22.05%);
- a court case was initiated by the right-holder to determine the infringement (9.21%);
- goods were released as they appeared to be non-infringing original goods (2.77%);
- goods were released because the right-holder did not react to the notification by customs (5.75%);
- a settlement out of court was reached between the right-holder and the holder of the goods, after which the goods were released (0.29%).

5.11 Use of the “small consignment procedure”

On 15 September 2016, 48% of the national AFAs contained a request to use the small consignment procedure (726 out of 1502), while 33% of the Union AFAs also contained such a request (393 out of 1184).

In total, 41% of the AFA contain a request for the use of the small consignment.

Private sector representatives explained that for a certain kind of rights (for which infringements are too complex to assess and for which they consider the expertise of the right-holder as essential), the use of the small consignment procedure is not deemed appropriate and therefore not opted for.

In 2015, in slightly more than 22% of the detentions initiated, the goods were destroyed under the procedure for small consignments. In 2014, the destruction under the same procedure represented 27% of the result of all detention cases.

For the complete details of the 2014 and 2015 reports see TAXUD website:

http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2015_ipr_statistics.pdf

https://ec.europa.eu/taxation_customs/sites/taxation/files/2016_ipr_statistics.pdf

6. CONCLUSIONS

At this stage, the Commission considers that the implementation of Regulation No 608/2013 is functioning satisfactorily. It provides for a wide range of protection and procedures which are correctly used across the 28 Member States.

There is certainly a need to reinforce the efforts made in certain areas such as:

- the quality of the information contained in the Applications for Action, notably the Union AFA;
- the use of the standard procedure in coherence with the details of the procedure defined in Regulation (EU) No 608/2013.

This will be further discussed in the context of the actions foreseen by the EU Customs Action Plan to combat IPR infringements for the years 2013/2017 and in the follow-up exercise to the Customs 2020 Seminar on Application for Actions.

Small consignment functioning and handling certainly remains a challenge as sales over internet are constantly increasing, notably sales of IPR infringing products. Work on this issue will be pursued in the already existing working group on small consignment, whose activities will be resumed in 2017.

The concerns raised by the private sector will also be discussed with Member State customs authorities with a view to assessing if they are well established and if solutions could then be envisaged.

The Commission concludes that, for the time being, there would be no justification to revise any provisions of Regulation (EU) No 608/2013.

The EU Customs Action Plan to combat IPR infringements for the years 2013-2017 will be assessed later this year. It may be opportune, in order to better address the challenges the EU is facing with IPR infringements, to consider a future global action plan on EU enforcement of IPRs, which would encompass not only customs actions, but also the actions presently covered by the July 2014 Communication “Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan”¹² as well as the activities developed by the European Observatory on Infringements of Intellectual Property Rights.

¹² COM (2014) 392: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee : Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan

Annex 1

Number of Application for Actions (AFAs) per type of rights – Situation on 15 September 2016

	Active	Expired	Revoked	Total
Geographical indications				
For aromatised drinks based on wine products	0	0	0	0
For products listed in agreements with 3 rd countries	1	0	0	1
For agricultural products and foodstuff	5	0	0	5
For spirit drinks	2	1	0	3
For wine	3	2	0	5
National GI for other products	0	0	0	0
Design				
Registered community design	627	398	58	1083
Unregistered community design	11	11	0	22
International registered design	109	73	4	186
National design	128	63	2	193
TM				
EU trademark	2326	1596	118	4040
International trademark	1053	832	55	1940
National trademark	1220	771	20	2011
Copyright and related right	206	103	7	316
Patent				
National patent	115	72	6	193
Union patent	110	75	6	191
Utility model	15	10	0	25
Supplementary certificate for medicines	23	17	0	40
Supplementary certificate for plant protection product	4	12	1	17
National plant variety right	8	8	2	18
Community plant variety right	1	1	0	2
Trade name	8	10	0	18
Topography of semiconductor product	0	0	0	0

Annex 2

Number of Application for Actions (AFAs) containing a request to use the “small consignment procedure” - Situation on 15 September 2016

	Active	Expired	Revoked	Total
Number of AFAs :				
NAFA	1502	2395	82	3979
UAFA	1184	406	103	1693
Total	2686	2801	185	5672
AFAs with small consignment procedure:				
NAFA	726	510	30	1266
UAFA	393	152	15	560
Total	1119	662	45	1826
% NAFAs with SC of total:	48%	21%		
% UAFAs with SC of total:	33%	37%		
% AFAs with SC of total:	41%	24%		