Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure[(1)],

Whereas:

(1) The Council requested, in its Resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan, that 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[(2)], be reviewed.

(2) The marketing of goods infringing intellectual property rights does considerable damage to right-holders, users or groups of producers, and to law-abiding manufacturers and traders. Such marketing could also be deceiving consumers, and could in some cases be endangering their health and safety. Such goods should, in so far as is possible, be kept off the Union market and measures should be adopted to deal with such unlawful marketing without impeding legitimate trade.

(3) The review of Regulation (EC) No 1383/2003 showed that, in the light of economic, commercial and legal developments, certain improvements to the legal framework are necessary to strengthen the enforcement of intellectual property rights by customs authorities, as well as to ensure appropriate legal certainty.

(4) The customs authorities should be competent to enforce intellectual property rights with regard to goods, which, in accordance with Union customs legislation, are liable to customs supervision or customs control, and to carry out adequate controls on such goods with a view to preventing operations in breach of intellectual property rights laws. Enforcing intellectual property rights at the border, wherever the goods are, or should have been, under customs supervision or customs control is an efficient way to quickly and effectively provide legal protection to the right-holder as well as the users and

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groups of producers. Where the release of goods is suspended or goods are detained by customs authorities at the border, only one legal proceeding should be required, whereas several separate proceedings should be required for the same level of enforcement for goods found on the market, which have been disaggregated and delivered to retailers. An exception should be made for goods released for free circulation under the end-use regime, as such goods remain under customs supervision, even though they have been released for free circulation. This Regulation should not apply to goods carried by passengers in their personal luggage provided that those goods are for their own personal use and there are no indications that commercial traffic is involved.

(5) Regulation (EC) No 1383/2003 does not cover certain intellectual property rights and certain infringements are excluded from its scope. In order to strengthen the enforcement of intellectual property rights, customs intervention should be extended to other types of infringements not covered by Regulation (EC) No 1383/2003. This Regulation should therefore, in addition to the rights already covered by Regulation (EC) No 1383/2003, also include trade names in so far as they are protected as exclusive property rights under national law, topographies of semiconductor products and utility models and devices which are primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of technological measures.

(6) Infringements resulting from so-called illegal parallel trade and overruns are excluded from the scope of Regulation (EC) No 1383/2003. Goods subject to illegal parallel trade, namely goods that have been manufactured with the consent of the right-holder but placed on the market for the first time in the European Economic Area without his consent, and overruns, namely goods that are manufactured by a person duly authorised by a right-holder to manufacture a certain quantity of goods, in excess of the quantities agreed between that person and the right-holder, are manufactured as genuine goods and it is therefore not appropriate that customs authorities focus their efforts on such goods. Illegal parallel trade and overruns should therefore also be excluded from the scope of this Regulation.

(7) Member States should, in cooperation with the Commission, provide appropriate training for customs officials, in order to ensure the correct implementation of this Regulation.

(8) This Regulation, when fully implemented, will further contribute to an internal market which ensures right-holders a more effective protection, fuels creativity and innovation and provides consumers with reliable and high-quality products, which should in turn strengthen cross-border transactions between consumers, businesses and traders.

(9) Member States face increasingly limited resources in the field of customs. Therefore, the promotion of risk management technologies and strategies to maximise resources available to customs authorities should be supported.

(10) This Regulation 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 intellectual property right.

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(11) Under the 'Declaration on the TRIPS Agreement and Public Health' adopted by the Doha WTO Ministerial Conference on 14 November 2001, the Agreement on Trade-Related Aspects of Intellectual Property Rights (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. Consequently, in line with the Union's international commitments and its development cooperation policy, with regard to medicines, the passage of which across the customs territory of the Union, with or without transhipment, 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 such medicines onto the market of the Union.

(12) This Regulation should not affect the provisions on the competence of courts, in particular, those of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[(3)].

(13) Persons, users, bodies or groups of producers, who are in a position to initiate legal proceedings in their own name with respect to a possible infringement of an intellectual property right, should be entitled to submit an application.

(14) In order to ensure that intellectual property rights are enforced throughout the Union, it is appropriate to allow persons or entities seeking enforcement of Union-wide rights to apply to the customs authorities of a single Member State. Such applicants should be able to request that those authorities decide that action be taken to enforce the intellectual property right both in their own Member State and in any other Member State.

(15) In order to ensure the swift enforcement of intellectual property rights, it should be provided that, where the customs authorities suspect, on the basis of reasonable indications, that goods under their supervision infringe intellectual property rights, they may suspend the release of or detain the goods whether at their own initiative or upon application, in order to enable a person or entity entitled to submit an application to initiate proceedings for determining whether an intellectual property right has been infringed.

(16) Regulation (EC) No 1383/2003 allowed Member States to provide for a procedure allowing the destruction of certain goods without there being any obligation to initiate proceedings to establish whether an intellectual property right has been infringed. As recognised in the European Parliament Resolution of 18 December 2008 on the impact of counterfeiting on international trade[(4)], such procedure has proved very successful in the Member States where it has been available. Therefore, the procedure should be made compulsory with regard to all infringements of intellectual property rights and should be applied, where the declarant or the holder of the goods agrees to destruction. Furthermore, the procedure should provide that customs authorities may deem that the declarant or the holder of the goods has agreed to the destruction of the goods where he has not explicitly opposed destruction within the prescribed period.

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(17) In order to reduce the administrative burden and costs to a minimum, a specific procedure should be introduced for small consignments of counterfeit and pirated goods, which should allow for such goods to be destroyed without the explicit agreement of the applicant in each case. However, a general request made by the applicant in the application should be required in order for that procedure to be applied. Furthermore, customs authorities should have the possibility to require that the applicant covers the costs incurred by the application of that procedure.

(18) For further legal certainty, it is appropriate to modify the timelines for suspending the release of or detaining goods suspected of infringing an intellectual property right and the conditions in which information about detained goods is to be passed on to persons and entities concerned by customs authorities, as provided for in Regulation (EC) No 1383/2003.

(19) Taking into account the provisional and preventive character of the measures adopted by the customs authorities when applying this Regulation and the conflicting interests of the parties affected by the measures, some aspects of the procedures should be adapted to ensure the smooth application of this Regulation, whilst respecting the rights of the concerned parties. Thus, with respect to the various notifications envisaged by this Regulation, the customs authorities should notify the relevant person, on the basis of the documents concerning the customs treatment or of the situation in which the goods are placed. Furthermore, since the procedure for destruction of goods implies that both the declarant or the holder of the goods and the holder of the decision should communicate their possible objections to destruction in parallel, it should be ensured that the holder of the decision is given the possibility to react to a potential objection to destruction by the declarant or the holder of the goods. It should therefore be ensured that the declarant or the holder of the goods is notified of the suspension of the release of the goods or their detention before, or on the same day as, the holder of the decision.

(20) Customs authorities and the Commission are encouraged to cooperate with the European Observatory on Infringements of Intellectual Property Rights in the framework of their respective competences.

(21) With a view to eliminating international trade in goods infringing intellectual property rights, the TRIPS Agreement provides that WTO Members are to promote the exchange of information between customs authorities on such trade. Accordingly, it should be possible for the Commission and the customs authorities of the Member States to share information on suspected breaches of intellectual property rights with the relevant authorities of third countries, including on goods which are in transit through the territory of the Union and originate in or are destined for those third countries.

(22) In the interest of efficiency, the provisions of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters[(5)], should apply.

(23) The liability of the customs authorities should be governed by the legislation of the Member States, though the granting by the customs authorities of an application should

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not entitle the holder of the decision to compensation in the event that goods suspected of infringing an intellectual property right are not detected by the customs authorities and are released or no action is taken to detain them.

(24) Given that customs authorities take action upon application, it is appropriate to provide 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. Nevertheless, this should not preclude the holder of the decision from seeking compensation from the infringer or other persons that might be considered liable under the legislation of the Member State where the goods were found. Such persons might include intermediaries, where applicable. Costs and damages incurred by persons other than customs authorities as a result of a customs action, where the release of goods is suspended or the goods are detained on the basis of a claim of a third party based on intellectual property, should be governed by the specific legislation applicable in each particular case.

(25) This Regulation introduces the possibility for customs authorities to allow goods which are to be destroyed to be moved, under customs supervision, between different places within the customs territory of the Union. Customs authorities may furthermore decide to release such goods for free circulation with a view to further recycling or disposal outside commercial channels including for awareness-raising, training and educational purposes.

(26) Customs enforcement of intellectual property rights entails the exchange of data on decisions relating to applications. Such processing of data covers also personal data and should be carried out in accordance with Union law, as set out in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[(6)] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data[(7)].

(27) The exchange of information relating to decisions on applications and to customs actions should be made via a central electronic database. The entity which will control and manage that database and the entities in charge of ensuring the security of the processing of the data contained in the database should be defined. Introducing any type of possible interoperability or exchange should first and foremost comply with the purpose limitation principle, namely that data should be used for the purpose for which the database has been established, and no further exchange or interconnection should be allowed other than for that purpose.

(28) In order to ensure that the definition of small consignments can be adapted if it proves to be impractical, taking into account the need to ensure the effective operation of the procedure, or where necessary to avoid any circumvention of this procedure as regards the composition of consignments, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amending the non-essential elements of the definition of small consignments, namely the specific quantities set out in that definition. It