

QUESTIONS AND ANSWERS

on the implementation of Regulation (EU) No 608/2013 of 12 June 2013

concerning customs enforcement of intellectual property rights.

This document contains questions posed by the Customs administrations of the Member States to the Commission services and the answers given by the Commission services reflecting their view.

The document will be supplemented and updated as appropriate to include new questions that the Customs Administrations might address to the Commission services in the future.

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Recital 11. Medicines/goods in transit

Last updated on 23.01.2014.

Q. Since recital 11 makes reference only to medicines in transit, how does the Regulation apply to goods, other than medicines, in transit?

A. Recital 11 is the result of a dispute settlement with India following the European Court of Justice Nokia ruling. No element within the Regulation contradicts the Nokia ruling and some of its elements have been incorporated into it. Customs may detain goods where these are suspected of being involved in infringements of intellectual property rights as conferred by European Union law and the national law of the Member States. According to the Nokia ruling, there is no infringement of IPR where the goods in question are not intended to be put on sale in the EU market. The DG TAXUD guidelines published on 01.02.2012 on its website remain valid.¹

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Article 2(16). Destruction of IPR infringing goods: donation to charitable institutions

Last updated on 23.01.2014.

Q. Can IPR infringing goods be donated to charitable institutions, in accordance with article 2(16) which targets goods "outside the commercial channels"?

A. According to Art 25 (1) (a), in order to be able to give goods infringing IPR to charity, goods have to be released for free circulation with the agreement of the holder of the decision. In the absence of his agreement, donation to charity would not be possible.

In case of donation of goods to charity, goods might, in certain circumstances, enjoy relief from the application of import duties according to EU law.

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http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/legislation/guidelines_on_transit_en.pdf

Article 23(1) (c). Consideration of carriers as holders of goods

Last updated on 23.01.2014.

Q. May the transporter be considered as “holder of the goods” (i.e. “the person who has physical control over the goods”) in cases where the address of the importer is unknown or invalid, in order for the competent customs office to apply the procedure described in article 23 (1c): “Where [...] the holder of the goods has not confirmed his agreement to the destruction of the goods nor notified his opposition thereto to the customs authorities, within those deadlines, the customs authorities may deem [...] the holder of the goods to have confirmed his agreement to the destruction of those goods”.?

A. The concept of “holder of the goods” is laid down in article 2 (14) of Regulation 608/2013 and is identical to the definition laid down in article 5 (34) of Regulation 952/2013. This is the person who is the owner of the goods or who has a similar right of disposal over them or who has physical control of them. This encompasses the carrier of the goods. Generally, the carrier is considered as someone having physical control over the goods and normally assumes the obligation to present the goods to the Customs authorities but the circumstances may vary and must be assessed on a case by case basis.

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Articles 23(3) and 26(6) and (8). Cases in which the declarant or the holder of the goods has not been deemed to have confirmed his agreement to the destruction.

Last updated on 23.01.2014.

Q. In which cases in article 23 (3) and article 26 (6) and (8), shall the declarant or the holder of the goods not be deemed to have confirmed his agreement to the destruction?

A. It is up to the Customs authorities of each MS to decide if they deemed agreement or not in case of no response (under articles 23 (1) and 26)

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Article 23(5). Question regarding the reference to “proceedings”

Last updated on 23.01.2014.

Q. Does the term "proceedings" referred to in article 23 (5) of the Regulation target only judicial proceedings or also may concern administrative proceedings? According to the Administrative Law of some MS, IP infringement is an administrative offense if there is evidence that the goods are counterfeit.

A. Regulation 608/2013 refers to legal proceedings, which would encompass administrative and judicial proceedings. Nevertheless, the European Court of Justice is currently examining case C-583/12 (Sintax trading) that touches on this issue. The answer to this prejudicial question could have an impact on our interpretation of Regulation 608/2013.

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Article 26. Application of the small consignments procedure concerning AFAs granted under Regulation 1383/2003

Last updated on 23.01.2014.

Q. Is it possible applying the small consignments procedure of Article 26 of Regulation 608/2013 to AFAs granted under Regulation 1383/2003.

A. It should be noted that different views exist. According to a number of MS, in order to apply for the new small consignments procedure, an AFA based on Regulation 608/2013 is needed and the old AFA has to be revoked.

The view of COM is that, in accordance with Article 39 of Regulation 608/2013, applications made according to the current Regulation 1383/2003 shall remain valid until this latter expires. It is possible to update/amend the current application before it expires.

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Article 23. Date in which parties concerned must be notified of the suspension of the release, or detention, of suspected infringing goods.

Last updated on 23.01.2014.

Q. Is it possible for the holder of the decision to request an extension of the period to initiate legal proceedings if the declarant or holder of the goods opposes the destruction of detained goods? This is of particular relevance when the holder of the goods notifies on the last day of the detention period his opposition to destruction.

According to Article 23 of the Regulation, the holder of the decision or the declarant has 10 working days from the notification of the decision to confirm agreement to the destruction of the goods (or 3 working days for perishable goods). The holder of the decision has also 10 working days, or 3 working days in the case of perishable goods, from notification of the suspension of the release or the detention of the goods, to initiate proceedings to determine whether an intellectual property right has been infringed.

A. The customs authorities must notify the holder of the decision on the same day as or promptly after the declarant is notified (Article 17), the objective being to ensure

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 (recital 19). The determination of the date of notifications is laid down in national law. Where the customs authorities notify the holder of the decision one day after notifying the declarant or holder of goods, there is always one day for the holder of the decision to initiate legal proceedings or to ask for an extension of the period for that purpose.

According to the Regulation, detentions of perishable goods are limited to 3 working days and cannot be extended.

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Article 29. Cost of storage incurred by Customs or other parties acting on behalf of Customs

Last updated on 23.01.2014.

Q. The fast parcels industry in certain MS has been looking specifically at article 29 of the Regulation regarding costs which foresees that "the holder of the decision reimburses costs incurred by Customs or other parties acting on behalf of Customs" and article 20 which specifies that the conditions of storage should be determined by Customs. This industry argues that fast parcel operators incur substantial costs when Customs detains a consignment. Should Customs be liable for the storage costs incurred by the operator? Do the fast parcels operators "act on behalf of Customs" when they draw the attention of Customs on suspicious consignments?

A. Article 29 indicates that "the holder of the decision shall reimburse the costs incurred by the customs authorities, or other parties acting on behalf of customs authorities"; according to recital 24, "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".

The question whether a person is acting on behalf of the customs authority must be answered on a case by case basis; however, the mere fact that a person fulfils his obligations under customs legislation or in the framework of a customs authorisation does not make him a person acting on behalf of the customs administration.

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Article 39. AFAs submitted at the end of December 2013.

Last updated on 23.01.2014.

Q. Is it possible submitting a request for extension in December 2013 for an AFA that will expire in January 2014 and would such extension remain valid for a full year.

A. Regulation 608/2013 shall not apply to procedures started before the date it becomes applicable (1 January 2014). Those procedures will be governed by Regulation 1383/2003.

Applications for actions and extension requests regularly submitted to the competent customs department before 1 January 2014 will be processed in accordance with Regulation 1383/2003, regardless of the moment (before or after 1 January 2014) of adoption of the decision concerning those applications or requests.

The decisions granting those applications and the decisions for which those extension requests have been granted will be considered “applications granted in accordance with Regulation (EC) No 1383/2003 and shall remain valid for the period specified in the decision granting the application during which the customs authorities are to take action and shall not be extended” (Art 39 Regulation 608/2013).

For detention of goods the same rules apply:

- Detentions of goods before 1 January 2014 are governed by Regulation 1383/2003, even if part of the procedure takes place in 2014.
- Detentions of goods after 1 January 2014 are governed by Regulation 608/2013, regardless the Regulation under which the corresponding application for action was granted.

To avoid unintended consequences as to the length of the period of coexistence of decisions granting applications for action under Regulations 1383/2003 and 608/2013, it is suggested to the Customs Administrations of the Member States to promote informal understandings with the right holders and their associations to avoid the submission of extension requests concerning decisions granting applications adopted under Regulation 1383/2003 expiring after January 2014.

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