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TURKEY: NEW DEVELOPMENTS IN COMBAT AGAINST SMUGGLED COUNTERFEIT PRODUCTS

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The smuggling police and customs enforcement officers take ex-officio action against smuggling offenses as per Anti-Smuggling Law no.5607, the basic purpose of which is fighting customs tax evasions. All smuggled products seized by such enforcement bodies are delivered to customs liquidation directorates for storage and sale.

In contrast, trade mark infringement is set forth in Industrial Property Law no.6769 as an offense being subject to a "criminal complaint" to be filed by IP owners, in other words, the police cannot actually seize counterfeit products ex-officio.

The examinations conducted on the smuggled products put on sale by customs liquidation directorates revealed that the majority of such smuggled products are actually counterfeit products and the customs liquidation officials were not paying any attention to this point.

As a result of several meetings held by IP owners with the Ministry of Customs and Trade, a circular was published last year, enabling the IP owners to record their IP rights with Customs Liquidation Headquarters as well as the customs liquidation officials to inform the IP owners whenever they come across products that are suspected of being counterfeits.

The Customs Liquidation Headquarters started to accept petitions of IP owners and the local customs liquidation directorates started to inform the relevant IP owners before putting the products bearing their trade marks on sale, accordingly.

The Ministry published a new circular on July 12 2017 in order to harmonise the relevant practice of Customs Liquidation Directorates and also put into force some new rules.

With the new system, all local customs liquidation officials are given access to the database of general customs IP applications filed before Customs General Directorate by the IP owners. The local customs liquidation officials are also obliged to check that database whenever they receive a product bearing a trade mark and to inform the relevant IP owners.

Due to the unifying nature of the new system, there is no need for the IP owners to file a separate IP application to Customs Liquidation General Directorate. By way of explanation, the general customs IP applications will also cover the products being processed by customs liquidation directorates.

The officers will send notifications to the relevant IP owners immediately after the smuggling raids and/or before proceeding with liquidation procedures. As per the new circular, the customs liquidation officials should inform the IP owners with a temporary decision, providing 10 work days to the latter to consider checking the products and obtaining a court

decision. The officials may even inform an IP owner who has not filed a proper customs IP application ex-officio and provide him/her three days to file a general customs IP application. However, it is still more than optimistic to expect customs liquidation officials to take such ex-officio steps without a proper customs IP application being filed. In fact, it became a must to file a customs IP applications from now on in Turkey, bearing in mind that customs liquidation directorates are also integrated into Customs' ongoing IP protection system.

There will of course be some differences in practice or legal consequences in comparison to regular customs IP actions against fake products being imported or exported. For instance, if the relevant IP owner does not obtain a court decision within 10 working days as of service of the Customs Liquidation Directorate's decision, those fake products will most likely be sold on a tender and the potential buyer might be able to use the reluctance of the IP owner as a defence if the buyer is later caught with those fake products in the future.

As to evidence gathering, IP owners are also entitled to obtain photos or samples of the suspected smuggled products to determine whether those are counterfeit or not within the same time frame.

The new circular also regulates how such the fake products would be stored. The enforcement units should deliver the counterfeit products to National Estate Service Warehouses instead of the Customs Liquidation Services' facilities as per Art 163 of the new IP Law. But in practice, the National Estate Services do not currently have enough facilities or warehouses for such storage. Thus it is not currently possible to apply Art 163 of the IP Law for smuggled counterfeit goods and the local prosecutors' offices are currently forcing Customs Liquidation Services to accept such products until further notice.

The actions taken against such counterfeits among seized smuggled products enable the right holders to easily and cost-effectively stop and destroy millions of counterfeit products that would have been sold into the Turkish market or exported to other markets straight away.

Despite several difficulties faced in practice, this new approach allows the right holders to take action against smuggled counterfeits, the number of which is tens of times more than the counterfeit products suspended during regular customs IP procedures. The new circular enhanced the effectiveness of the regulations regarding the smuggled counterfeit products and the number of cases notified by the customs directorates increased.

With respect to the struggle against smuggling offenses, the smugglers of counterfeit products started to face a second trial based on trade mark infringement on top of their smuggling cases, thereby the deterrence of that struggle has also been increased. We expect that such additional cases against smuggled counterfeits will also increase the awareness of customs officers towards counterfeit products in time and eventually increase the number of suspensions based on IP rights in general.

With these recent alterations, it can be clearly seen that cooperation between Customs and the right holders become more powerful and customs IP protection in Turkey has been increased immensely.



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