

**Hungary**  
Hongrie  
Ungarn

## **Report Q208**

in the name of the Hungarian Group  
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### **Border Measures and other Measures of Customs Intervention against Infringers**

Before answering the questions below we would like to state that the Hungarian Governmental Decree No. 371/2004. (XII. 26.) on customs actions against goods infringing certain intellectual property rights - being the legal basis in border measure cases – in most respects refers to the Community law, namely to Council Regulation (EC) No. 1383/2003. For this reason most of the answers in the present report are based on provisions of the respective Community law.

#### **Questions**

##### **1) Analysis of current law and case law**

The Groups are invited to answer the following questions under their national laws:

1) *Do the laws of your country provide for border measures?*

Yes.

*If so, what is the legal basis?*

Governmental Decree No. 371/2004. (XII. 26.) on customs actions against goods infringing certain intellectual property rights.

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.

Commission Regulation (EC) No 1891/2004 of 21 October 2004 laying down provisions of the implementation of Council Regulation (EC) No. 1383/2003 of 22 July 2003.

2) *Do the laws of your country provide for other measures of customs intervention against infringers? If so, which ones and what is the legal basis?*

No.

3) *Are border measures and other measures of customs intervention against (collectively referred to as "border measures") only available for pirated copyright and counterfeit trademark goods or also for goods infringing other IP rights?*

Border measures are available for copyright piracy, counterfeit trademark goods and goods infringing other IP rights as well.

*If so, for which types of IP rights are border measures available?*

- patent under the Hungarian national law;

- supplementary protection certificate of the kind provided for in Council Regulation (EEC) No 1768/92 or Regulation (EC) No 1610/96 of the European Parliament and of the Council;
- national plant variety right under the Hungarian national law or Community plant variety right provided for in Council Regulation (EC) No 2100/94,
- designations of origin or geographical indications under the Hungarian national law or Council Regulations (EEC) No 2081/92 and (EC) No 1493/1999;
- geographical designations provided for in Council Regulation (EEC) No 1576/89;
- design rights.

*Are border measures in particular available for goods infringing patents, plant variety rights, common law marks, unregistered design rights, or geographic indications?*

Border measures are mostly available for the above rights. In case of design rights, however, the Hungarian national law requires registration, therefore, even though unregistered design rights are explicitly mentioned in the EU Regulation, the Hungarian customs authorities may not accept an application in the absence of proof of registration unless the concerned right also qualifies as copyright and this is proven.

In case of common law marks the border measures are not available.

*Is actual registration of the IP rights required or is an application to register sufficient?*

Actual registration is required with respect to trademark rights.

Registration is not required with respect to copyright and related rights.

Other types of IP rights are not mentioned in this respect in the relevant laws.

However, according to Article 2 of Commission Regulation (EC) No 1891/2004 of 21 October 2004 laying down provisions for the implementation of Council Regulation (EC) No 1383/2003 proof that an application has been lodged with the relevant office for the application of an IP right shall be sufficient proof of entitlement of the right holder to apply for border measures.

*Does unfair competition, passing off or the like give rise to border measures?*

No.

4) *Are border measures available for parallel imported goods?*

According to the practice of the Hungarian Customs Authorities, once an application is accepted for a specific right, the release of parallel imported goods will also be suspended.

*Are border measures available for goods contained in a travellers' private luggage?*

Where a traveler's personal baggage contains goods of a non-commercial nature within the limits of the duty-free allowance and there are no material indications to suggest the goods are part of commercial traffic, Member States shall consider such goods to be outside the scope of Council Regulation (EC) No 1383/2003.

*Are there any other goods excluded by your border measures legislation?*

Council Regulation (EC) No 1383/2003 shall not apply to goods bearing a trademark with the consent of the holder of that trademark or to goods bearing a protected designation of origin or a protected geographical indication or which are protected by a patent or a supplementary protection certificate, by a copyright or related right or by a design right or a plant variety right and which have been manufactured with the consent of the right-holder but

are placed in one of the situations referred to in Article 1(1) of Council Regulation (EC) No 1383/2003 without the latter's consent.

It shall similarly not apply to goods referred to above and which have been manufactured or are protected by another intellectual property right referred to in Article 2(1) of Council Regulation (EC) No 1383/2003 under conditions other than those agreed with the right-holder.

5) *Who is entitled to file an application for customs action?*

The following right holders are entitled to file an application for customs actions:

- a) the holder of a trademark, copyright or related right, design right, patent, supplementary protection certificate, plant variety right, protected designation of origin, protected geographical indication, and
- b) any other person authorised to use any of the intellectual property rights mentioned in point (a), or a representative of the right-holder or authorised user.

*Is there a centralised system for managing multiple applications for customs action through a single contact point?*

All applications shall be filed with the Central Hungarian Directorate of the Customs and Finance Guard. However, if infringing goods are stopped at the border the competent customs office will be communicating with the right holder or his representative directly.

*What are the conditions for border measures?*

The application for border measures shall be made out on a form established in accordance with the procedure. The application must contain all the information needed to enable the goods in question to be readily recognised by the customs authorities.

The application for action must also contain the declaration required from the right-holder by Article 6 of Council Regulation (EC) No 1383/2003 and also the proof that the right-holder has the right for the goods in question.

In case the application for border measures is filed by a representative, the authorization for representation shall also be enclosed.

*In particular, what level of evidence for alleged infringement and other information is required by customs authorities regarding the application for customs action?*

By way of indication and where known, right-holders should also forward any other information they may have, such as:

- a) the pre-tax value of the original goods on the legitimate market in the country in which the application for action is lodged;
- b) the location of the goods or their intended destination;
- c) particulars identifying the consignment or packages;
- d) the scheduled arrival or departure date of the goods;
- e) the means of transport used;
- f) the identity of the importer, exporter or holder of the goods;
- g) the country or countries of production and the routes used by traffickers;
- h) the technical differences, if known, between the authentic and suspect goods.

Details may also be required which are specific to the type of intellectual property right referred to in the application for action.

*To which extent are customs authorities willing to receive training by the right holder?*

Customs authorities wish to receive as many information as possible on the eventual infringing goods. Since the right holders are often aware of the typical means how their products are infringed all the information obtained from the past infringement cases are very useful for the customs authorities. It is also very important to show the customs authorities the very typical element of the original goods which can help them to recognize the infringing ones.

*Do customs authorities generally require the provision of a security to protect the owner, holder or importer of the allegedly infringing goods?*

The authors are not aware of any such case. Neither the Community Law, nor the Hungarian Law provides for such possibility in the proceedings before the customs authority.

*If so, will such security depend on the type of IP rights?*

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*May the customs authorities take ex officio measures?*

Yes.

*If so, what is the practical relevance of ex officio action in your country?*

Where the customs authorities, in the course of action in one of the situations referred to in Article 1(1) of Council Regulation (EC) No 1383/2003 and before an application has been lodged by a right-holder or granted, have sufficient grounds for suspecting that goods infringe an intellectual property right, they may suspend the release of the goods or detain them for a period of three working days from the moment of receipt of the notification by the right-holder and by the declarant or holder of the goods, if the latter are known, in order to enable the right-holder to submit an application for action in accordance with Article 5 of Council Regulation (EC) No 1383/2003.

In case the identity of right holder cannot be established the customs authority notifies the Hungarian Patent Office in case of industrial property rights and in case of copy right and related right it notifies the collective rights management society in order to obtain information of the identity of the right holder. In the event of failure to identify the right holder within three working days, the goods shall be released and the customs authority shall continue its due proceeding.

*Are customs authorities liable in case of wrongful ex officio detention?*

The exercise by a customs office or by another duly empowered authority of the powers conferred on them in order to fight against goods infringing an intellectual property right shall not render them liable towards the persons involved in the situations referred to in Article 1(1) of Council Regulation (EC) No 1383/2003 or the persons affected by the measures provided for in Article 4 of Council Regulation (EC) No 1383/2003 for damages suffered by them as a result of the authority's intervention, except where provided for by the law of the Member State in which the application is made or, in the case of an application under Article 5(4) of Council Regulation (EC) No 1383/2003, by the law of the Member State in which loss or damage is incurred.

Both Act CXL of 2004 on General Rules of Administrative Procedures and Services as well as the Hungarian Civil Code provide for the right to claim damages caused by an administrative authority or an officer acting on behalf of the administrative authority. Based on these provisions, the customs office acting as administrative authority shall be liable for damages caused by unlawful proceeding. Although the Hungarian Group is not aware of any specific case in this regard, it shall be noted that the mere fact that the ex officio action of the customs authority did not bring any result, may not be sufficient in itself for the liability for damages.

- 6) *Are customs authorities properly equipped to identify goods which infringe patents, plant variety rights, common law marks, unregistered design rights, geographic indications or the like?*

The Hungarian Group is not aware of any problem related to the equipments of the customs authorities.

- 7) *Is only the right-holder or also the owner, holder or importer of the allegedly infringing goods notified once the customs authorities detain goods?*

In case goods are detained by the customs authority both the right holder and also the owner, holder, or importer of the allegedly infringing goods are notified.

*How can the alleged infringer obtain information about the status of border measures and what information is provided by customs authorities to the alleged infringer?*

The alleged infringer is informed by the customs authority about the border measure together with the right holder according to Article 9 of Council Regulation (EC) No 1383/2003. The alleged infringer is also informed if the goods are not released due to the maintenance of the customs detention in the event the right holder initiates the due proceedings for the establishment of the infringing nature of the goods. By this, the infringer learns if infringement proceedings are launched against them. The infringer is also notified if the goods are released.

Generally, the alleged infringer is entitled to access the files of the Customs Authorities in accordance with the general rules of administrative procedures.

- 8) *What happens after notification? Briefly describe the procedure following notification.*

- The right-holder or it's representative checks the goods.
- The right-holder shall prove at the customs authorities, that an action has been initiated for the establishment of the infringement of its IP right. If, within 10 working days of receipt of the notification of suspension of release or of detention, the customs office referred to in Article 9(1) of Council Regulation (EC) No 1383/2003 has not been notified that proceedings have been initiated to determine whether an intellectual property right has been infringed under national law in accordance with Article 10 or has not received the right-holder's agreement provided for in Article 11(1), where applicable, release of the goods shall be granted, or their detention shall be ended, as appropriate, subject to completion of all customs formalities.
- Simplified procedure for the destruction of the goods is also possible according to Article 11 of Council Regulation (EC) No 1383/2003.

*Is the inspection of the allegedly infringing goods following notification usually carried out by the right holder or by an expert?*

The inspection is carried out mostly by the right-holder or by the representative of the right-holder.

*Does your border measures legislation provide for a simplified procedure allowing the destruction of the goods without there being any need to determine whether IP rights have been infringed?*

Yes. In Hungary, there is a simplified procedure according to Article 8 of Governmental Decree No. 371/2004 and Article 11(1) of Council Regulation (EC) No 1383/2003.

*If so, in which cases?*

According to Article 11(1) of Council Regulation (EC) No 1383/2003 where customs authorities have detained or suspended the release of goods which are suspected of infringing an

intellectual property right in one of the situations covered by Article 1(1) of Council Regulation (EC) No 1383/2003, there may be a simplified procedure, to be used with the right-holder's agreement, which enables customs authorities to have such goods abandoned for destruction under customs control, without there being any need to determine whether an intellectual property right has been infringed under national law.

*Are samples of the goods preserved for evidence purposes?*

In case of destruction of the goods it must be systematically preceded by the taking of samples for keeping by the customs authorities in such conditions that they constitute evidence admissible in legal proceedings in the Member State in which they might be needed.

*If proceedings must be issued to determine whether the goods infringe IP rights, are both civil and criminal proceedings available to determine infringement?*

Yes.

*What are the advantages and disadvantages of the respective proceedings?*

Criminal proceedings are faster but right owners do not have the possibility to dispose of the case.

The disadvantage of civil proceedings is that it takes much to obtain a court decision than in criminal procedure.

*What is the impact of a nullity action seeking to invalidate IP rights on the application for customs action?*

As long as the IP right is not deleted from the register due to a final decision made in the subject of the invalidation, it is eligible as a basis of border measures. The Hungarian Group is specifically aware of a case where customs application was accepted by the customs authority based on a patent that was already the subject of a revocation procedure.

*May customs authorities release goods suspected of infringing IP rights on provision of a security by the owner, holder or importer of such goods?*

Yes.

*If so, will such release depend on the type of IP rights?*

Yes, it depends on the type of IP rights.

Article 14 of Council Regulation (EC) No 1383/2003 defines that in the case of goods suspected of infringing design rights, patents, supplementary protection certificates or plant variety rights, the declarant, owner, importer, holder or consignee of the goods shall be able to obtain the release of the goods or an end to their detention on provision of a security, provided the fulfilment of some further conditions defined in the Council Regulation.

9) *If goods are found to infringe IP rights, may a right holder oppose*

- *exportation of infringing goods from your country;*
- *infringing goods in transit;*
- *placement of infringing goods in a free trade zone or free trade warehouse?*

Goods found to infringe an intellectual property right at the end of the procedure shall not be:

- allowed to enter into the Community customs territory,
- released for free circulation,
- removed from the Community customs territory,

- exported from Hungary,
- re-exported from Hungary,
- placed under a suspensive procedure or
- placed in a free zone or free warehouse.

10) *If goods are found to infringe IP rights, do the judicial or customs authorities of your country generally order the destruction of the goods or do they have the authority to dispose of the goods outside commercial channels (e.g. to charity)?*

Courts may order the destruction of the infringing goods, which happens more and more often. Court order is not necessary for the destruction of the goods in the framework of the so-called simplified procedure defined in Article 11 of Council Regulation (EC) No 1383/2003. Courts have the right to dispose of the goods outside commercial channels.

*May the competent authorities also order the infringer to give the names of his accomplices, upstream or downstream in the channels of production and distribution?*

Yes. The right owner may demand that the infringing party provide information on parties taking part in the production of and distribution in goods infringing its IP rights, as well as on business relationships developed for the use of the infringing party.

11) *May judicial or customs authorities order the applicant to pay the owner, holder or importer of goods appropriate compensation for any injury caused by wrongful detention? What is considered appropriate compensation and does it include attorney fees or other expenses?*

Yes, Courts may order the applicant to pay the owner of the goods compensation in case of wrongful detention according to the right-holder's civil liability.

## **II) Proposals for adoption of uniform rules**

The Groups are invited to put forward proposals for adoption of uniform rules regarding border measures and other measures of customs intervention against infringers. More specifically, the Groups are invited to answer the following questions:

1) *Do you think that the adoption of uniform rules and best practice of customs authorities in the area of border measures and better coordination between countries and at an international level are desirable to improve enforcement?*

Yes. With respect of IP rights co-existing in several countries, uniform rules of border measures would be more transparent and cost-effective for right holders as well as those involved in international distribution.

2) *What should the scope of border measures be? Do you think that border measures should be available also for goods infringing IP rights for which your national law currently does not provide border measures? If so, which IP rights? Should unfair competition give rise to border measures? Which goods should be excluded by border measures legislation?*

The Hungarian Law and the Community law currently do not provide for border measure based on infringement of competition law. However, passing off is very similar in other civil and criminal law consequences to the infringement of IP rights, therefore uniform enforcement tools for right holders shall also include availability of border measures for based on alleged passing off.

3) *What rules should apply in relation to the lodging and processing of applications for customs action? Should there be a centralised system for managing multiple applications for customs action through a single contact point?*

*Should there be uniform rules on the provision of information by the applicant? What should the required level of evidence for alleged infringement be?*

*Should there be uniform rules on the provision of information by the customs authorities?*

Hungary is part of the EU regime, which provides sufficient level of the above requirements.

4) *What rules should apply in relation to the procedure following notification?*

*Should there be a simplified procedure allowing the destruction of the goods without there being any need to determine whether IP rights have been infringed?*

*Should there be uniform rules on the examination of the goods by the right holder, security and compensation in the case of wrongful detention of goods and disposal of infringing goods?*

Hungary is part of the EU regime, which provides sufficient level of the above requirements.

### **Summary**

Border measures against infringers are regulated in Hungary by the Hungarian Governmental Decree No. 371/2004. (XII. 26.) on customs actions against goods infringing certain intellectual property rights the legal background of which is the Council Regulation (EC) No. 1383/2003.

The Hungarian legislation on border measures provides for a simplified procedure based on to Article 11(1) of Council Regulation (EC) No 1383/2003.

### **Résumé**

Les mesures à prendre à la frontière contre les contrefacteurs sont réglementées en Hongrie par l'Ordonnance no 371/2004 (XII.26.) du Gouvernement concernant l'intervention des autorités douanières à l'égard de marchandises portant atteinte à certains droits de propriété intellectuelle, dont la base légale est le Règlement (CE) du Conseil no 1383/2003.

La législation hongroise sur les mesures à prendre à la frontière prévoit une procédure simplifiée sur la base de l'Article 11(1) du Règlement (CE) du Conseil no 1383/2003.

### **Zusammenfassung**

Grenzmassnahmen gegen Verletzung wurden in Ungarn durch die ungarische Regierungsverordnung Nr. 371/2004. (XII. 26.) über das Vorgehen von Zollbehörden gegen Waren, die bestimmte Rechte geistigen Eigentums verletzen, geregelt. Der rechtliche Hintergrund dieser ist die Verordnung (EG) Nr. 1383/2003 des Rates vom 22. Juli 2003.

Die ungarische Rechtsgebung über Grenzmassnahmen verfügt über das sogenannte vereinfachte Verfahren entsprechend der Verordnung (EG) Nr. 1383/2003.