International Trademark Association
Paper
on
The inclusion of counterfeit unsafe products
in
"The European Commission's New Consumer Agenda & the General Product Safety Directive"

October 15, 2020

First of all, the International Trademark Association (INTA) would like to thank the European Commission for the opportunity to provide feedback on its 'New Consumer Agenda'. INTA provided feedback on the Roadmap (see here) as well as to the public consultation (see here).

On top of those, as there was no room to provide extra comments in the public consultation, we would like to provide you with a more detailed paper which notably identifies the provisions, in the legislation - the General Product Safety Directive ('GPSD'- 2001/95/EC) - that could be amended to include counterfeit unsafe products and the rationale behind it.

Purpose. INTA welcomes the EU Commission's Roadmap and public consultation but would like to propose to **include the fight against unsafe counterfeit goods or products in the scope of the upcoming 'New Consumer Agenda', as well as within the provisions of the GPSD** (see Annex I below). The fight against unsafe counterfeit goods or products represents a core consumer protection issue, given the high risk that counterfeits raises for the health and safety of EU consumers and citizens at large, in particular in the current COVID-19 crisis, and the scale of the issue.

Counterfeiting is a concerning and ever-increasing phenomenon. In 2019, the Organisation for Economic Co-operation and Development (OECD) and the European Union Intellectual Property Office (EUIPO) published a study stressing that "*the value of imported fake goods worldwide based on 2016 customs seizure data at € 460 billion, up from € 338 billion in 2013*" (2.5% of world trade). For the European Union, counterfeit trade represented "*6.8% of imports from non-EU countries, up from 5% in 2013*". In 2017, INTA and the International Chamber of Commerce reported that the international trade in counterfeits is € 936 billion (including goods made within borders), expected to continue to increase up to an estimated € 2.2 trillion by 2022. Moreover, this increase is notably fed by the ability for counterfeiters to sell their goods anonymously online, accept credit card transactions from across the globe, and ship the goods directly to the consumer.

Counterfeits represent a risk and a danger for EU consumers' health and safety. Counterfeit, or fake, products are often made from substandard materials and components that do not meet relevant safety standards even though they may falsely be marked as such. It is a myth that counterfeiting only affects the luxury sector. In fact, counterfeiting concerns almost

every sector, as demonstrated by several studies: from consumer goods to food, from alcohol to cosmetics, from pesticides to spare parts, from jewellery to toys, from pharmaceuticals to tyres and batteries, etc[1]. These health and safety risks for the consumers, including children (e.g. counterfeit toys made of toxic chemicals that small children put in their mouth), can range from minor injuries (e.g. skin burns when using fake skin-care products) to more serious ones (e.g. hospitalization due to a fake airbag exploding unintentionally while driving on the highway) or even death (e.g. counterfeit alcohol and counterfeit medicines).

These health and safety risks are real. The EUIPO dedicated, in June 2019, a specific 'Qualitative study on risks posed by counterfeits to consumers' in the EU. Based notably on evidence by the alerts submitted by EU market surveillance authorities (MSAs) in the European Commission's "Rapid Alert System for dangerous non-food products" (RAPEX system), the study "*shows the extent of the dangers to health posed by counterfeit goods*" to EU consumers, such as "*chemical, injuries, strangulation, choking, electric shock, damage to hearing and fire risk*s", adding that "*24% of the dangerous products recorded as counterfeit posed more than one danger to users*".

As a matter of example, the EUIPO showed that:

- Toys are the most "*popular*" type of unsafe counterfeit product, representing "*almost 50% of the RAPEX alerts*". Indeed, the end users of 80% of the products reported to be dangerous and counterfeit were children (toys, childcare items and children's clothing) – ('Qualitative study on risks posed by counterfeits to consumers', June 2019, based on RAPEX data).
- Fake pharmaceutical products, notably antibiotics, lifestyle drugs and painkillers, traded worldwide is estimated to be up to EUR 4.03 billion ('Trade in Counterfeit Pharmaceutical Products', March 2020 – EUIPO and OECD).

Furthermore, EU Commission Taxation and Customs Union in its "Report on the EU customs enforcement of intellectual property rights: Results at the EU border, 2019" stated that products for daily use and products that would be potentially dangerous to the health and safety of consumers accounted for 36.8 % of the total amount of detained articles (referring to suspected trademark infringements concerning food and beverages, body care articles, medicines, electrical household goods and toys).

Counterfeit and fake products present therefore a higher risk of being unsafe. As such, they are a key consumer protection issue and, should therefore be included in the New Consumer Agenda as it will look at "*rogue trading practices such as (...) unsafe products (...)".*

The rise of counterfeiting during the 2020 COVID-19 pandemic presents a danger for consumer protection. In line with the Roadmap's aim to have the new Consumer Agenda "*look at the impact of the COVID19 pandemic on consumers and draw the lessons for the future consumer policy*", one such impact was that counterfeit products were at the core of the current COVID-19 crisis. During the crisis, there have been countless reports highlighting the concerning trend of counterfeiters taking advantage of the shortage or lack of medical equipment to produce and sell fake and unsafe COVID-19 related medical products, regardless of the dangerous impact it could have on EU consumers and citizens. This is evidenced recently by several international bodies, among others:

[1] See European Intellectual Property Office (EUIPO), Impact of counterfeiting and piracy: Sectorial studies at https://euipo.europa.eu/ohimportal/en/web/observatory/quantification-of-ipr-infringement

- OLAF. A case opened on March 19 by the European Anti-Fraud Office (OLAF) "*in relation to the imports of fake products used in the fight against the COVID-19 infection, such as masks, medical devices, disinfectants, sanitisers and test kits*".
- WHO. The World Health Organization (WHO) also highlighted that a growing volume of fake medicines linked to coronavirus are on sale in developing countries.
- WCO. Seizures of fake COVID-19 tests and personal protective equipment such as facemasks and hand sanitizers have been reported by the World Customs Organization (WCO), the US Customs Border Protection and customs of other member countries. The WCO even launched a dedicated IPR CENcomm Group' to "*globally enhance real-time intelligence sharing on fake medical supplies and medicines and enable Customs worldwide to fight illicit trade*".
- INTERPOL. The week of March 3, 2020, INTERPOL conducted Operation Pangea XII, which coordinates the law enforcement efforts of 90 countries worldwide targeting counterfeit medicines and medical products. The Operation resulted in 2,000 sites selling products related to coronavirus, with 30% selling counterfeit surgical masks. The Operation resulted in the seizure of 34,000 counterfeit and substandard products related to COVID-19. The products seized in this one week amounted to €12.5 million and lead to 121 arrests for one sector of counterfeiting.
- EUROPOL. Its report on Pandemic Profiteering stresses the "*particularly high demand for certain types of healthcare and sanitary products (masks, gloves, cleaning products, pharmaceutical products),* "*both online and offline*".
- Private sector. A statement by the Transnational Alliance to Combat Illicit Trade (TRACIT), in collaboration with INTA, the UK Anti-counterfeiting Group (ACG) and Elipe, stressing "*a surge in ineffective, fraudulent products (…) which includes (…) fake, falsified and substandard medical products such as surgical masks, hydro-alcoholic gels, testing kits and thermometers, (…)high demand healthcare and consumer products prone to counterfeiting, including cleaning solutions, toilet paper, anti-bacterial wipes, indoor sports equipment, refrigeration appliances, food products and reading materials*" but also "*illicit offerings of falsified versions of treatments such as Hydroxychloroquine and Azithromycin that will harm or kill already vulnerable patients*".

While fake COVID-19 related products is the most recent and salient example of fake products, the health and safety concerns raised by counterfeit products are not new and did not appear with the current crisis, though this crisis gave it more prominence. As stressed above, fake toys, counterfeit medicines, fake spare parts or counterfeit consumer products can – and most often will- trigger minor to serious injuries and should therefore be considered and treated as unsafe and dangerous. The pandemic will cause an increase of counterfeits in all industries as the supplies of goods have decreased due to the halt of non-essential manufacturing. With consumers' demands staying identical, counterfeits will fill the gaps with unsafe products.

False claims and therefore fake unsafe products should be included in the new Consumer Agenda. Finally, with regards the scope of the new Consumer agenda, notably as it looks at "*the impact of the COVID19 pandemic on consumers and draw the lessons for the future consumer policy*", the Roadmap mentions that the Agenda "*will build on the experience drawn from the immediate measures taken by Member States and the European Commission in response to problems*" and gives a list of examples which includes "*false health claims*". Therefore, if the Commission deems, rightly so, that the mere false claims should be part of the scope of the new Agenda, it seems that actual products that are counterfeit, dangerous and unsafe should be too.

Example in past legislation. The inclusion of counterfeit unsafe products in an EU 'Product Safety' legislation is not new. On February 13, 2013, the EU Commission proposed its 'Product Safety and Market Surveillance' legislative package, which included:

- Proposal for a Regulation of the European Parliament and of the Council on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC, 2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council
- Proposal for a Regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC. This proposal was therefore amending the GPSD 2001/95.

It is worth noting that the European Parliament reached a position in first/single reading on April 15, 2014 on the 'Consumer Product Safety' Proposal, which included the following provisions:

- Recital 13: "*(13)* ***The safety of products should be assessed taking into account all the relevant aspects, in particular*** *their characteristics, composition,* ***authenticity****, materials, components, and presentation of the product and its packaging as well as the categories of consumers who are likely to use the products taking into account their vulnerability, in particular children, the elderly and the disabled*" [*Emphasis added*].
- Article 3 ("Definitions") 1) ***"'safe product' means any authentic product which is compliant with Union harmonisation legislation relating to health and safety****. In the absence of such legislation it means any product which , under normal or reasonably foreseeable conditions of use of the product concerned, including the duration of the use and, where applicable, its putting into service, installation and , maintenance, training and supervision requirements, does not present any risk or only the minimum risks compatible with the product's use, considered acceptable and consistent with a high level of protection of health and safety of persons*;"
- Article 5 ("Presumption of Safety"): (aa) "***if it is authentic, meaning that the product or any presentation of the product does not bear a trade mark without the authorisation of the trade mark owner that is identical or similar to a registered trade mark for that product, thereby misleading consumers as to the true identity of the product****;".*
- Article 6 ("Aspects for assessing the safety of products") §1 "*1. In the absence of Union harmonisation legislation, European standards or health and safety requirements laid down in the law of the Member State where the product is made available on the market as referred to in points (a), (aa), (b) and (c) of Article 5, the* ***following aspects shall be taken into account when assessing whether a product is safe, in particular****:*
  (a) ***the characteristics of the product, including its authenticity,*** *composition, packaging, instructions for assembly and, where applicable, for installation and maintenance*;".

These provisions demonstrate that the EU Parliament was in favour of including in the scope of the legislation authentic goods, making the authenticity of a product an element of the definition of a 'safe product', as well as a criteria to presume its safety based on a definition of authenticity linked to the product not being counterfeited (i.e. not bearing a trademark without authorisation).

The Council could not reach a position, solely for the lack of political compromise on the sensitive 'made in' provisions, and therefore the legislative process on those proposals was put on hold. Nonetheless, it is worth noting that the Parliament clearly voted in favour of the inclusion of counterfeit/unauthentic unsafe products in the Consumer Product Safety proposal and the Council itself was not opposed in principle to these provisions.

Conclusion. Therefore, and in light of all the reasons listed above, INTA would kindly ask the EU Commission **to include, in the scope of the upcoming 'New Consumer Agenda', as well as within the provisions of the GPSD, the fight against unsafe counterfeit products**.

With the current COVID-19 crisis, but also looking beyond that crisis, the European Union needs, more than ever, a strong Consumer agenda, dedicated to provide strong consumer protection against all health and safety dangers to EU consumers and citizens, including unsafe counterfeit products.

ANNEX I – Proposals to amend the GPSD in order to include counterfeit unsafe products in its scope

General Product Safety Directive ('GPSD'- 2001/95/EC	Proposal for Amendment
Recital 8 *(8) The safety of products should be assessed taking into account all the relevant aspects, in particular the categories of consumers which can be particularly vulnerable to the risks posed by the products under consideration, in particular children and the elderly.*	**Recital 8** *The safety of products should be assessed taking into account all the relevant aspects, in particular **their characteristics, composition, authenticity, materials, components, and presentation of the product and its packaging as well as** the categories of consumers which can be particularly vulnerable to the risks posed by the products under consideration, in particular children and the elderly.*
Article 2 ("Definitions") b) *(b) "safe product" shall mean any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:* *(i) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;* *(ii) the effect on other products, where it is reasonably foreseeable that it will be used with other products;* *(iii) the presentation of the product, the labelling, any warnings and instructions for its use and disposal*	**Article 2 ("Definitions") b)** *(b) "safe product" shall mean **any authentic product which is compliant with Union harmonisation legislation relating to health and safety and** which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:* *(i) the characteristics of the product, including its composition, **authenticity**, packaging, instructions for assembly and, where applicable, for installation and maintenance;* *(ii) the effect on other products, where it is reasonably foreseeable*

and any other indication or information regarding the product; *(iv) the categories of consumers at risk when using the product, in particular children and the elderly.* *The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be "dangerous";*	*that it will be used with other products;* *(iii) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;* *(iv) the categories of consumers at risk when using the product, in particular children and the elderly.* *The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk shall not constitute grounds for considering a product to be "dangerous";*
Article 3 1. Producers shall be obliged to place only safe products on the market. 2. A product shall be deemed safe, as far as the aspects covered by the relevant national legislation are concerned, when, in the absence of specific Community provisions governing the safety of the product in question, it conforms to the specific rules of national law of the Member State in whose territory the product is marketed, such rules being drawn up in conformity with the Treaty, and in particular Articles 28 and 30 thereof, and laying down the health and safety requirements which the product must satisfy in order to be marketed. A product shall be presumed safe as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the Commission in the Official Journal of the European Communities in accordance with Article 4. The Member States shall publish the references of such national standards. 3. In circumstances other than those referred to in paragraph 2, the	**Article 3** 1. Producers shall be obliged to place only safe products on the market. 2. A product shall be ***presum***ed safe***:*** *a) as far as the aspects covered by the relevant national legislation are concerned, when, in the absence of specific Community provisions governing the safety of the product in question, it conforms to the specific rules of national law of the Member State in whose territory the product is marketed, such rules being drawn up in conformity with the Treaty, and in particular Articles 28 and 30 thereof, and laying down the health and safety requirements which the product must satisfy in order to be marketed.* ~~A product shall be presumed safe~~ b) as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the Commission in the Official Journal of the European Communities in accordance with Article 4. The Member States shall publish the

conformity of a product to the general safety requirement shall be assessed by taking into account the following elements in particular, where they exist: (a) voluntary national standards transposing relevant European standards other than those referred to in paragraph 2; (b) the standards drawn up in the Member State in which the product is marketed; (c) Commission recommendations setting guidelines on product safety assessment; (d) product safety codes of good practice in force in the sector concerned; (e) the state of the art and technology; (f) reasonable consumer expectations concerning safety. 4. Conformity of a product with the criteria designed to ensure the general safety requirement, in particular the provisions mentioned in paragraphs 2 or 3, shall not bar the competent authorities of the Member States from taking appropriate measures to impose restrictions on its being placed on the market or to require its withdrawal from the market or recall where there is evidence that, despite such conformity, it is dangerous.	references of such national standards. c) ***if it is authentic, meaning that the product or any presentation of the product does not bear a trade mark that is identical or similar to a registered trade mark without authorisation, for that product, thereby misleading consumers as to the true identity of the product***.. 3. In circumstances other than those referred to in paragraph 2, the conformity of a product to the general safety requirement shall be assessed by taking into account the following elements in particular, where they exist: (a) voluntary national standards transposing relevant European standards other than those referred to in paragraph 2; (b) the standards drawn up in the Member State in which the product is marketed; (c) Commission recommendations setting guidelines on product safety assessment; (d) product safety codes of good practice in force in the sector concerned; (e) the state of the art and technology; (f) reasonable consumer expectations concerning safety. 4. Conformity of a product with the criteria designed to ensure the general safety requirement, in particular the provisions mentioned in paragraphs 2 or 3, shall not bar the competent authorities of the Member States from taking appropriate measures to impose restrictions on its being placed on the market or to require its withdrawal from the market or recall where there is evidence that, despite such conformity, it is dangerous.

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About INTA. The International Trademark Association (INTA) is a global association of brand owners and professionals dedicated to supporting trademarks and related intellectual property (IP) to foster consumer trust, economic growth, and innovation.

INTA's members are more than 6,500 organizations from 187 countries, including 1,370 in the European Union and in the United Kingdom. INTA members collectively contribute almost €8.8 trillion to global GDP annually. The Association's member organizations represent some 31,000 trademark professionals and include brand owners from major corporations as well as small- and medium-sized enterprises, law firms, and nonprofits. There are also government agency members, as well as individual professor and student members. Headquartered in New York City, INTA also has offices in Brussels, Santiago, Shanghai, Singapore, and Washington, D.C. and representatives in Geneva and New Delhi.

INTA would be pleased to answer any questions that the Commission may have and is available to discuss our recommendations in more detail. Please contact INTA Anticounterfeiting Manager, Maysa Razavi at mrazavi@inta.org or +1-212-642-1779 or INTA Policy Officer –Europe, Hadrien Valembois, at hvalembois@inta.org or +32-2-880-3720.