

Study about counterfeit in Belgium:  
Evaluation of the scope and measures  
against this phenomenon



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## List of abbreviations

ABAC-BAAN	Belgian Association Anti-Counterfeiting
ADR	Alternative Dispute Resolution
AEO	Authorised Economic Operator
AFA	Application for action
AFA holder	Holder of an application for action
Ag.I.D.	Agenzia per l'Italia Digitale (Agency for Digital Italy)
AML/CFT Act	The Anti-Money Laundering and Countering Financing of Terrorism Act 2009
AMLD	Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [2018] OJ L284/22.
Anti-Piracy Act	(Belgian) Act of 15 May 2007 governing the penalisation of counterfeiting and piracy of intellectual property rights
APEWS	Abuse Prediction and Early Warning System
B2B	Business-to-Business
B2C	Business-to-Consumer
BABM	Belgian Brand Association
BCIP	Benelux Convention on Intellectual Property
BIPT	Belgian Institute for Postal Services and Telecommunications
CASP	Coordinated Activities on the Safety of Products
CEL	(Belgian) Code of Economic Law
CEPANI	The Belgian Centre for Arbitration and Mediation
CITCO	Centro de Inteligencia contra el Terrorismo y el Crimen Organizado (Spanish Intelligence Centre for Counter-Terrorism and Organized Crime)

CJEU	Court of Justice of the European Union.
CNAC	Le Comité National Anti-Contrefaçon (French National Anti-Counterfeiting Committee)
COPIS	Anti-counterfeiting and anti-piracy database of the European Union
DGCCRF	Direction Generale de la concurrence, de la consommation et de la répression des fraudes (French governmental actor concerned with competition, fraud and consumer law enforcement)
DGDDI	Direction générale des douanes et droits indirects (French Customs)
DNS	The Domain Name System
ECC Belgium	The European Consumer Centre in Belgium
EMPACT	European Multidisciplinary Platform Against Criminal Threats
EU	European Union
EUIPO	European Union Intellectual Property Office
Europol	European Union Agency for Law Enforcement Cooperation
FAGG	Federal Agency for Medicines and Health Products
FPS Economy	Federal Public Service Economy
GIR	Groupement d'Intervention régionale
gTLD	generic Top-Level Domain Names
GZD	Generalzolldirektion (German Central Customs Office)
IACC	International Anti-Counterfeiting Coalition
ICANN	Internet Corporation for Assigned Names and Numbers
ICC Belgium	Belgian Committee of the International Chamber of Commerce
ICSMS	Information and Communication System for Market Surveillance
IPEP	Intellectual Property Enforcement Portal of the EUIPO
IPR	Intellectual property right
IPRED	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights
IPRH	Intellectual property rightsholder
KYBC	The Know Your Business Customer
KYC	Know Your Customer
LAC	Italian Anti-Counterfeiting Direct Line
LEA	Law enforcement agency
MoU	Memorandum of Understanding

NANAC	Neen aan Namaak en Piraterij (Belgian No to Counterfeiting and Piracy organisation)
NFT	Non-Fungible Token
NVWA	Nederlandse Voedsel en Waren Autoriteit (Dutch governmental authority for food and product safety)
OCMW (CPAS)	Openbaar centrum voor maatschappelijk welzijn (Centre Public d'Action Sociale) (Public Welfare Centre in Belgium)
OECD	Organization for Economic Cooperation and Development
PHAROS	Plateforme d'harmonisation, d'analyse, de recoupement et d'orientation des signalements (French platform to signal illegal activity on the internet)
RAPEX	Rapid Exchange of Information System Rapid Alert System for non-food consumer products
REACT	Non-profit organization called 'The Anti-Counterfeiting Network' based in various countries worldwide.
SIAC	Sistema Informativo Anti-Contraffazion (Italy's Anti-Counterfeiting Information System)
SIAN	Sistema Informativo Agricolo Nazionale (Italy's National Agricultural Information System)
SMA	Small and medium-sized enterprises
SWOT	Strengths, weaknesses, opportunities and threats
UIBM	Ufficio Italiano Brevetti e Marchi (Italian Trademark Patent Office)
VAT	Value added tax
ZGR	Zentralstelle Gewerblicher Rechtsschutz (German Central Office for the Protection of Intellectual Property Rights)

# Executive Summary

## Summary for policymakers

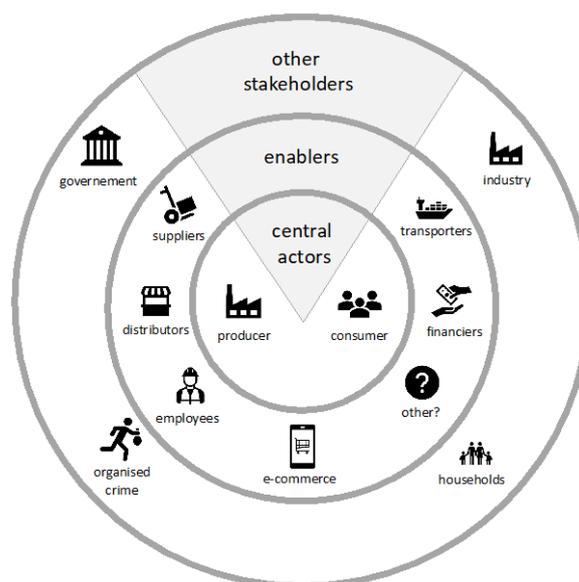
**Context and goals of the study.** Counterfeiting has a significant socio-economic impact within the European Union (EU) and Belgium, resulting notably in substantial economic losses and loss of jobs. Moreover, it can threaten public health and the environment. Hence, the fight against counterfeit is of a high societal importance.

The primary aim of this study is to propose effective measures to step up the fight against counterfeiting in Belgium. Our analysis primarily addresses intellectual property rights protected by trademark law, while also considering instances of piracy of physical goods.

Below we summarize the main elements of our report.

**Setting the scene.** To ensure a holistic view on the counterfeit phenomenon, we conducted an initial **system analysis**. This allowed us to better understand how the counterfeiting value chain works. To this end, we analysed each link of said value chain distinguishing the central counterfeit actors (producers and consumers) from the counterfeit enablers (e.g. transporters, financiers, e-commerce platforms, employees, distributors, etc) and the other stakeholders such as the rightsholders, governments and organised crime organisations. A chain is as strong as its weakest link. Hence, analysing each link of the chain is a first step towards finding ways to disrupt the counterfeiting value chain.

Counterfeiting is often not a stand-alone crime but is instead in many cases linked to other crimes, e.g. terrorism or criminal organisations. Counterfeiting constitutes a potentially important source of funding for terrorism and criminal organisations because of its "low risk, high profit" trait. Counterfeiting in itself can therefore be a form of organised crime, but it can also constitute funding for terrorism and other serious crimes.



## Current framework against the fight of counterfeit

**in Belgium.** The report sets out the existing national and EU measures available in the fight against counterfeiting in Belgium. This investigation enabled the identification of specific "challenges" through a comprehensive value chain assessment, considering various economic, organisational, and technical factors. In-depth interviews provided practical insights in the fight against counterfeit in the Belgian context.

Most stakeholders contacted during the study pointed to Belgium's excellent practices and good organisation in the fight against counterfeit. Our analysis of the Belgian approach confirmed that Belgium achieves a high degree of maturity in many aspects of the fight against counterfeit, both pre-emptively and reactively. The FPS Economy and Customs are very active both online and in the real world. For example, the FPS Economy works closely with registrars and online intermediaries to prevent infringers from registering domain names. Customs has its own Cybersquad facilitating the detection of online infringements; and investigators from the FPS Economy scan local markets in search of counterfeit goods. The FPS Economy and Customs have broad powers allowing them to effectively investigate cases of suspected counterfeit. The Belgian authorities use information campaigns to convey the economic and safety implications of purchasing counterfeit goods to the general public.

IP rightsholders have several means to protect their IP in Belgium. Firstly, Customs procedures allow them to stop counterfeit at the border. Secondly, an infringer can be sued both civilly and criminally. For the criminal prosecution the IP rightsholders are not even required to file a criminal claim against the infringer, as the public prosecutor can prosecute the infringer regardless of the involvement of the IP rightsholders. Thirdly, in addition to a financial sanction, the EU IP Enforcement Directive also provides for the information of the general public on convicted counterfeiters.

**Challenges & needs** – Notwithstanding Belgium’s approach to counterfeiting being generally well received, new and growing challenges in the fight against counterfeit notably - due to the uptake of e-commerce activities - require a continuous realignment of approaches and instruments. More generally, Belgium faces challenges in terms of the limited resources (incl. human resources) dedicated to the fight against counterfeiting. The fight against counterfeiting would be well-served by further improving coordination and information sharing between all involved main stakeholders, including IP rightsholders, authorities, and different law enforcement agencies. Additionally, having no centralised database on IP infringements seriously hinders the identification of repeat infringers. The lack of appropriate training in recognizing counterfeit goods and the absence of standardised workflows for reporting and handling counterfeit cases, limit the contribution of local police officers in the fight against counterfeit.

IP rightsholders bear the cost associated with the enforcement of their IP rights, in particular the costs of destruction of counterfeit goods in criminal or administrative procedures, and the judicial costs in civil procedures. The FPS Economy does, however, bear the costs of storage in criminal or administrative procedures and provide support for the organisation of the destruction of the goods. Yet, even bearing the mere costs of destruction can hinder IP rightsholders’ willingness to enforce their IP rights if the amount of counterfeit of their IP increase.

The implementation of the EU IP Enforcement Directive has allowed to step up actions against online intermediaries, but there is a need for a broader focus on other intermediaries within the e-commerce chain. The absence of ways to hold some actors in the counterfeiting value chain accountable remains worrisome. Yet, this challenge might be more effective to tackle at EU level.

**The socio-economic impact** of counterfeiting is substantial. We initially focused on three product categories (cosmetics, toys & games and smartphones) and complemented this analysis with the results from EUIPO reports for an additional 10 product categories. A first indication of the importance of the socio-economic impact can be found in the share of counterfeit in overall sales. For the set of 13 product categories analysed the mean share of counterfeit in overall sales is estimated to be around 10.55%. For the thirteen categories considered this corresponds to an annual market value of lost sales of around 2 billion euros. Based on these lost sales the report gives a gross estimation of the lost profit. The estimation of the lost jobs is varies substantially depending on the extent of the production located in Belgium.

Apart from the economic losses in the private sector, the public authorities also suffer a loss of revenues from reduced VAT, corporate tax and personal tax revenues. For the 13 categories analysed these lost public revenues were estimated to amount to a total annual loss of 584 million euros. The above figures from the 13 product categories analysed only cover part of the overall losses to the Belgian economy. Even though these product categories cover important counterfeit areas, many more product categories are likely to be affected by counterfeiting activities. In addition, some counterfeited goods may also have health (e.g. pharmaceuticals) and safety (e.g. toys) impacts. Hence, counterfeit has a broader impact than its mere economic dimension.

**Estimating the global value and impact of counterfeiting remains a challenging endeavour as counterfeiting activities are - per definition - part of the largely undocumented ‘hidden’ economy. Hence, it is important to keep in mind that the above-mentioned figures mainly stem from *model* results as reported by the EUIPO, not from actual empirical evidence, and that the impact estimations required**

the use of a set of assumptions. As a consequence, the figures presented above require careful interpretation and can merely be considered as a rough estimation of the importance of counterfeiting in Belgium.

**Long list of options to address challenges** - The identified challenges of Belgium's current framework were used as a starting point to develop a longlist of preliminary ideas and options on measures to address the challenges. We conducted a **benchmark study** of selected countries (France, Germany, Italy, Spain and The Netherlands) as a source of inspiration for identifying relevant measures for Belgium. This exercise focused more specifically on gathering information on how the benchmark countries address the challenges identified for Belgium.

Based on the benchmark results complemented by a targeted desk research and the project team's own experience and expertise, we developed a **list of preliminary ideas on measures to address the key challenges** identified for Belgium. These ideas were presented for discussion and evaluation during a workshop with key stakeholders of the fight against counterfeit. The workshop results helped us develop the set of recommendations below.

**Recommendations - towards an improved policy mix.** To further improve the effectiveness and efficiency of the fight against counterfeiting we suggested a policy mix of measures taking the form of nine key recommendations: 1) define a tailored curriculum for police and magistrates; 2) establish designated / dedicated roles; 3) support the IPEP acceptance, roll-out and use; 4) develop a funneling approach with partners ; 5) earmark the proceeds of fines for the fight against counterfeit ; 6) improve fine collection capabilities; 7) reduce cost barriers for rightholders ; 8) Test and roll-out authentication technologies; and 9) incentivise the participation to a voluntary know your business customer (KYBC) scheme. The summary table below provides an overview of the different recommendations and their contribution to solving key challenges identified. The recommended measures' contribution is evaluated using a scale from low (L), over medium (M) to High (H). In some cases, we use the notation (NA) to indicate that the recommendation does not contribute (nor focus) on solving a particular challenge.

#	Recommendation	Dissuade (preventive pillar)			Detect, prosecute and sentence (repressive/corrective pillar)						
		Appeal for supply side (producers)	Appeal for demand side (consumers)	Appeal for enablers	Difficulty to establish counterfeit	Partial view on multi-faceted criminality	Limited resources	Parcelisation (many small consignments)	New sales channels (e.g. e-commerce)	Varying priority on counterfeit	Storage/destruction cost borne by rightholders
1	Define a tailored curriculum for police and magistrates (people)	L	L	L	M	L	L	L	L	M	NA
2	Establish designated / dedicated roles (people/organisation)	L	L	L	M	L	L	L	L	H	NA
3	Support the IPEP acceptance, roll-out and use (systems)	NA	NA	NA	M	M	L	L	NA	NA	NA
4	Develop a funneling approach with partners (organization)	L	L	L	M	H	M	M	M	M	NA
5	Earmark proceedings of fines for fight against counterfeit (system)	M	M	M	NA	NA	H	NA	NA	L	M
6	improve fine collection capabilities (organisation)	M	M	M	NA	L	M	NA	NA	L	L
7	Reduce cost barriers for rightholders (systems)	L	L	L	M	NA	L	L	L	L	H
8	Test and roll-out authentication technologies (systems)	M	M	M	H	NA	L	M	M	NA	NA
9	Incentivise participation to voluntary KYBC scheme (systems)	M	NA	M	NA	NA	L	M	M	NA	NA

A final, more transversal accompanying recommendation pertains to the **monitoring of the performance** of the law enforcement ecosystem, to allow a continuous improvement and to facilitate the identification of and timely corrective action to new phenomena.

## Samenvatting voor beleidsmakers

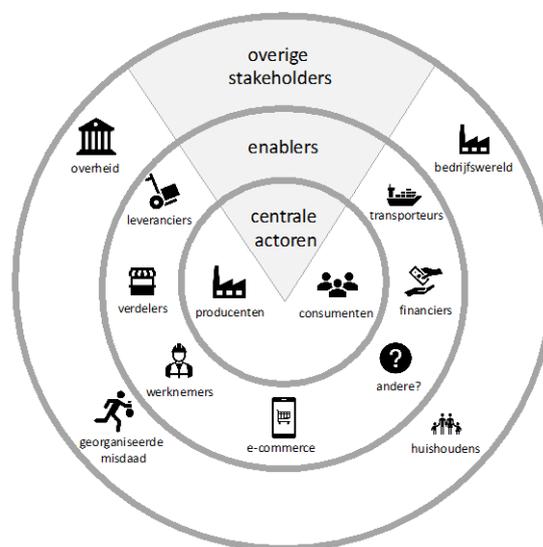
**Context en doelstellingen van de studie.** Namaak heeft een aanzienlijke socio-economische impact in de Europese Unie (EU) en België, wat met name resulteert in aanzienlijke economische verliezen en verlies van banen. Bovendien kan namaak een bedreiging vormen voor de volksgezondheid en het milieu. Daarom is de strijd tegen namaak van groot maatschappelijk belang.

Het hoofddoel van deze studie is om effectieve maatregelen voor te stellen om de strijd tegen namaak in België op te voeren. Onze analyse richt zich in de eerste plaats op intellectuele eigendomsrechten die beschermd worden door het merkenrecht, maar er wordt ook gekeken naar gevallen van piraterij van fysieke goederen.

Hieronder vatten we de belangrijkste elementen van ons rapport samen.

**De context schetsen.** Om een holistisch beeld te krijgen van het fenomeen namaak, hebben we een eerste systeemanalyse uitgevoerd. Hierdoor konden we beter begrijpen hoe de waardeketen van namaak werkt. Hiertoe analyseerden we elke schakel van die waardeketen, waarbij we onderscheid maakten tussen de centrale namaakactoren (producenten en consumenten), de tussenpersonen die namaak mogelijk maken (bijv. transporteurs, financiers, e-commerce platforms, werknemers, distributeurs, etc.) en de andere betrokken partijen, zoals de rechtheouders, overheden en georganiseerde misdaadorganisaties. Een keten is zo sterk als zijn zwakste schakel. Daarom is het analyseren van elke schakel van de keten een eerste stap in het vinden van manieren om de waardeketen van namaak te verstoren.

Namaak blijkt vaak geen opzichzelfstaand misdrijf te zijn maar wordt in vele gevallen gelinkt aan andere misdrijven in het kader van terrorisme of criminele organisaties. Namaak vormt een potentiële belangrijke bron van financiering voor terrorisme en criminele organisaties wegens haar "low risk, high profit" eigenschap. Namaak op zich kan dus een vorm van georganiseerde criminaliteit zijn, maar het kan ook financiering zijn voor terrorisme en andere zware misdrijven.



**Huidig kader voor de strijd tegen namaak in België.** Het rapport geeft een overzicht van de bestaande nationale en EU-maatregelen in de strijd tegen namaak in België. Dit onderzoek maakte het mogelijk om specifieke "uitdagingen" te identificeren met een uitgebreide waardeketenbeoordeling, waarbij verschillende economische, organisatorische en technische factoren in overweging werden genomen. Diepte-interviews leverden praktische inzichten op in de strijd tegen namaak in de Belgische context.

De meeste belanghebbenden met wie tijdens de studie contact werd opgenomen, wezen op de uitstekende praktijken en goede organisatie van België in de strijd tegen namaak. Onze analyse van de Belgische aanpak bevestigde dat België een hoge mate van maturiteit bereikt in vele aspecten van de strijd tegen namaak, zowel preventief als reactief. De FOD Economie en de Douane zijn zowel online als in de echte wereld zeer actief. De FOD Economie werkt bijvoorbeeld nauw samen met registrars en online tussenpersonen om te voorkomen dat overtreders domeinnamen registreren. De douane heeft haar eigen Cybersquad die het opsporen van online overtredingen vergemakkelijkt; en onderzoekers van de FOD Economie scannen lokale markten op zoek naar namaakgoederen. De FOD Economie en de Douane hebben ruime bevoegdheden om gevallen van vermoedelijke namaak effectief te onderzoeken. Bovendien gebruiken de Belgische autoriteiten informatiecampaagnes om het grote publiek te wijzen op de economische en veiligheidsimplicaties van het kopen van namaakgoederen.

Rechthebbenden van intellectuele eigendom (IE) hebben verschillende middelen om hun IE in België te beschermen. Ten eerste kunnen ze met douaneprocedures namaakgoederen aan de grens tegenhouden. Ten tweede kan een inbreukmaker zowel civielrechtelijk als strafrechtelijk vervolgd worden. Voor de strafrechtelijke vervolging hoeven de rechthebbenden niet eens een strafrechtelijke vordering tegen de inbreukmaker in te dienen, aangezien de openbare aanklager de inbreukmaker kan vervolgen ongeacht de betrokkenheid van de rechthebbenden. Ten derde voorziet de EU IP-handhavingsrichtlijn naast een financiële sanctie ook in het informeren van het grote publiek over veroordeelde namakers.

**Uitdagingen en behoeften** - Hoewel de Belgische aanpak voor namaak over het algemeen goed ontvangen wordt vereisen nieuwe en groeiende uitdagingen in de strijd tegen namaak, met name - als gevolg van de opkomst van e-commerce activiteiten - een voortdurende aanpassing van deze aanpak en instrumenten. Meer in het algemeen staat België voor uitdagingen wat betreft de beperkte middelen (incl. personeel) die worden ingezet in de strijd tegen namaak. De strijd tegen namaak zou gebaat zijn bij een verdere verbetering van de coördinatie en informatie-uitwisseling tussen alle betrokken hoofdrolspelers, waaronder houders van intellectuele-eigendomsrechten (IER), autoriteiten en verschillende rechtshandavingsinstanties. Bovendien vormt het ontbreken van een gecentraliseerde databank over inbreuken op intellectuele-eigendomsrechten een ernstige belemmering voor de identificatie van recidivisten. Het gebrek aan geschikte training in het herkennen van namaakgoederen en het ontbreken van gestandaardiseerde werkstromen voor het melden en behandelen van namaakzaken, beperken de bijdrage van lokale politieagenten in de strijd tegen namaak.

De houders van IER dragen de kosten in verband met de handhaving van hun intellectuele-eigendomsrechten, meer bepaald de kosten voor de vernietiging van de namaakgoederen in strafrechtelijke of administratieve procedures en de gerechtelijke kosten in civiele procedures. De FOD Economie draagt echter wel reeds de kosten voor de opslag in strafrechtelijke of administratieve procedures en biedt ondersteuning bij de vernietiging van de goederen. Maar zelfs het dragen van de kosten van vernietiging op zich kan de bereidheid van houders van IER om hun IER te handhaven belemmeren als de hoeveelheid namaak van hun intellectuele eigendom toeneemt.

De implementatie van de EU IP-handhavingsrichtlijn heeft het mogelijk gemaakt om de acties tegen online tussenpersonen op te voeren, maar er is behoefte aan een bredere focus op andere tussenpersonen in de e-commerceketen. Het gebrek aan manieren om sommige actoren in de waardeketen van namaak aansprakelijk te stellen, blijft zorgwekkend. Toch is het misschien doeltreffender om deze uitdaging op EU-niveau aan te gaan.

**De sociaaleconomische impact van namaak is aanzienlijk.** We hebben ons aanvankelijk gericht op drie productcategorieën (cosmetica, speelgoed & spelletjes en smartphones) en hebben deze analyse aangevuld met de resultaten van het Bureau voor Intellectuele Eigendom van de EU (EUIPO)-rapporten voor nog eens 10 productcategorieën. Een eerste indicatie van het belang van de sociaaleconomische impact is te vinden in het aandeel van namaak in de totale verkoop. Voor de 13 geanalyseerde productcategorieën wordt het gemiddelde aandeel van namaak in de totale verkoop geschat op ongeveer 10,55 %. Voor de dertien onderzochte categorieën komt dit overeen met een jaarlijkse marktwaarde van de gederfde omzet van ongeveer 2 miljard euro. Op basis van die gederfde omzet geeft het rapport een bruto schatting van de gederfde winst. De schatting van het banenverlies varieert aanzienlijk afhankelijk van de omvang van de productie in België.

Naast de economische verliezen in de privésector lijdt de overheid ook inkomstenverlies door verminderde inkomsten uit btw, vennootschapsbelasting en personenbelasting. Voor de 13 geanalyseerde categorieën werden deze gederfde overheidsinkomsten geschat op een totaal jaarlijks verlies van 584 miljoen euro. De bovenstaande cijfers voor de 13 geanalyseerde productcategorieën dekken slechts een deel van de totale verliezen voor de Belgische economie. Hoewel deze productcategorieën belangrijke namaakgebieden bestrijken, worden waarschijnlijk veel meer productcategorieën getroffen door namaakactiviteiten. Bovendien kunnen sommige nagemaakte

goederen ook gevolgen hebben voor de gezondheid (bijv. farmaceutische producten) en de veiligheid (bijv. speelgoed). Namaak heeft dus een bredere impact dan alleen de economische dimensie.

**Het ramen van de totale waarde en impact van namaak blijft een uitdagende onderneming, aangezien namaakactiviteiten per definitie deel uitmaken van de grotendeels ongedocumenteerde “verborgen” economie. Daarom is het belangrijk om in gedachten te houden dat de bovengenoemde cijfers voornamelijk afkomstig zijn van modelresultaten zoals gerapporteerd door EUIPO, en niet van feitelijk empirisch bewijs, en dat de impactraming het gebruik van een reeks aannames vereisten. De hierboven gepresenteerde cijfers vereisen dus een voorzichtige interpretatie en kunnen slechts worden beschouwd als een ruwe schatting van het belang van namaak in België.**

**Lijst van opties om uitdagingen aan te pakken** - De geïdentificeerde uitdagingen van het huidige Belgische kader werden als uitgangspunt gebruikt om een lijst van voorlopige ideeën en opties te ontwikkelen voor maatregelen om de uitdagingen aan te pakken. We voerden een benchmarkstudie uit van geselecteerde landen (Frankrijk, Duitsland, Italië, Spanje en Nederland) als inspiratiebron voor het identificeren van relevante maatregelen voor België. Die oefening was meer specifiek gericht op het verzamelen van informatie over de manier waarop de benchmarklanden de voor België geïdentificeerde uitdagingen aanpakken.

Op basis van de benchmarkresultaten, aangevuld met een gericht deskresearch en de eigen ervaring en expertise van het projectteam, ontwikkelden we een lijst van voorlopige ideeën over maatregelen om de belangrijkste uitdagingen voor België aan te pakken. Die ideeën werden ter discussie en evaluatie voorgelegd tijdens een workshop met de belangrijkste belanghebbenden in de strijd tegen namaak. De resultaten van de workshop hielpen ons bij het ontwikkelen van de onderstaande reeks aanbevelingen.

**Aanbevelingen - naar een verbeterde beleidsmix.** Om de effectiviteit en efficiëntie van de strijd tegen namaak en piraterij verder te verbeteren, stelden we een beleidsmix van maatregelen voor in de vorm van negen belangrijke aanbevelingen:

- 1) definieer een op maat gemaakt leerplan voor politie en magistraten;
- 2) stel speciale/aangewezen functies in; 3) ondersteun de acceptatie, uitrol en het gebruik van IPEP;
- 4) ontwikkel een *funnelling*-aanpak met partners;
- 5) gebruik de opbrengsten van boetes voor de strijd tegen namaak;
- 6) verbeter de mogelijkheden voor het innen van boetes;
- 7) verlaag de kostenbarrières voor houders van rechten;
- 8) test en rol authenticatietechnologieën uit;
- 9) stimuleer de deelname aan een vrijwillige Know Your Business Customer (KYBC)-regeling.

De samenvattende tabel hieronder geeft een overzicht van de verschillende aanbevelingen en hun bijdrage aan het oplossen van de belangrijkste uitdagingen. De bijdrage van de aanbevolen maatregelen wordt beoordeeld aan de hand van een schaal van laag (L), over gemiddeld (M) tot hoog (H). In sommige gevallen gebruiken we de notatie (NA) om aan te geven dat de aanbeveling niet bijdraagt (noch gericht is) op het oplossen van een bepaalde uitdaging.

#	Recommendation	Ontmoedig (preventieve pijler)			Detecteer, vervolg en bestraf (repressieve/correctieve pijler)						
		Verminder aantrekkingskracht voor aanbodzijde (producenten)	Verminder aantrekkingskracht voor vraagzijde (consumenten)	Verminder aantrekkingskracht voor enablers	Moelijkheid om namaak vast te stellen	Gedeeltelijke visie op veelzijdige criminaliteit	Beperkte middelen	Evoluatie naar veel kleinere zendingen	Nieuwe verkoopkanalen (bijv. e-commerce)	Variërende prioriteit m.b.t. bestrijding namaak	Opslag-/vernieuwigingskosten ten laste van de rechthebbenden
1	Definieren van curriculum op maat van politie en magistraten (mensen)	L	L	L	M	L	L	L	L	M	NA
2	Instellen van gespecialiseerde rollen (mensen / organisatie)	L	L	L	M	L	L	L	L	H	NA
3	Ondersteunen van IPEP-acceptatie, -uitrol en -gebruik (systemen)	NA	NA	NA	M	M	L	L	NA	NA	NA
4	Ontwikkelen van een funneling/getrapte aanpak met partners (organisatie)	L	L	L	M	H	M	M	M	M	NA
5	Oormerken van inkomsten uit boetes voor de bestrijding van namaak (systeem)	M	M	M	NA	NA	H	NA	NA	L	M
6	Verbeteren van de inningsmogelijkheden inzake boetes (organisatie)	M	M	M	NA	L	M	NA	NA	L	L
7	Verminderen van de kostendrempel voor rechthebbenden (systemen)	L	L	L	M	NA	L	L	L	L	H
8	Testen en uitrollen van authenticatietechnologieën (systemen)	M	M	M	H	NA	L	M	M	NA	NA
9	Aanmoedigen van deelname aan vrijwillige KYBC-regeling (systemen)	M	NA	M	NA	NA	L	M	M	NA	NA

Een laatste, meer transversale begeleidende aanbeveling heeft betrekking op het monitoren van de prestaties van het rechtshandavingsecosysteem, om een voortdurende verbetering mogelijk te maken en de identificatie van en tijdige corrigerende maatregelen voor nieuwe fenomenen te vergemakkelijken.

## Résumé à l'intention des décideurs

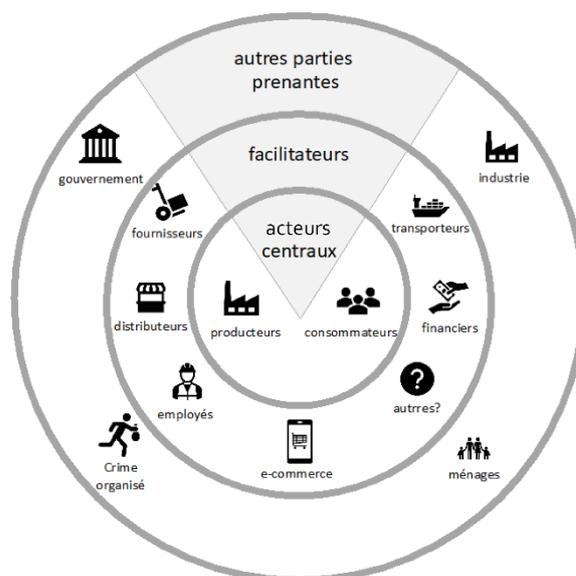
**Contexte et objectifs de l'étude.** La contrefaçon a un impact socio-économique important au sein de l'Union européenne (UE) et de la Belgique, entraînant notamment des pertes économiques substantielles et des pertes d'emplois. De plus, elle peut menacer la santé publique et l'environnement. La lutte contre la contrefaçon revêt donc une grande importance sociétale.

L'objectif principal de cette étude est de proposer des mesures efficaces pour renforcer la lutte contre la contrefaçon en Belgique. Notre analyse porte principalement sur les droits de propriété intellectuelle protégés par le droit des marques, tout en tenant compte des cas de piratage de biens physiques. Nous résumons ci-dessous les principaux éléments de notre rapport.

**Cadre de l'analyse.** Afin d'assurer une vision globale du phénomène de la contrefaçon, nous avons effectué une première analyse de système. Cela nous a permis de mieux comprendre le fonctionnement de la chaîne de valeur de la contrefaçon. Nous avons analysé ici chaque maillon de ladite chaîne de valeur en distinguant les acteurs centraux de la contrefaçon (producteurs et consommateurs) des facilitateurs de la contrefaçon (par exemple, les transporteurs, les financiers, les plateformes de commerce électronique, les employés, les distributeurs, etc.) et les autres parties prenantes telles que les titulaires

de droits, les gouvernements et les organisations criminelles. Une chaîne est aussi solide que son maillon le plus faible. Par conséquent, l'analyse de chaque maillon de la chaîne est une première étape vers la recherche de moyens de perturber la chaîne de valeur de la contrefaçon.

La contrefaçon n'est pas un délit isolé, elle est souvent liée à d'autres délits dans le contexte du terrorisme ou des organisations criminelles. La contrefaçon constitue une source de financement potentiellement importante pour le terrorisme et les organisations criminelles en raison de sa caractéristique "faible risque, grand profit". La contrefaçon en elle-même peut donc être une forme de criminalité organisée, mais elle peut aussi servir à financer le terrorisme et d'autres crimes graves.



### Cadre actuel de la lutte contre la contrefaçon en Belgique.

Le rapport présente les mesures nationales et européennes existantes en support de la lutte contre la contrefaçon en Belgique. Cette analyse a permis d'identifier des « défis » spécifiques grâce à une évaluation de la chaîne de valeur, en tenant compte de divers facteurs économiques, organisationnels et techniques. Des entretiens approfondis ont fourni des informations pratiques sur la lutte contre la contrefaçon dans le contexte belge. La plupart des parties prenantes contactées au cours de l'étude ont souligné les excellentes pratiques et la bonne organisation de la Belgique dans la lutte contre la contrefaçon. Notre analyse de l'approche belge a confirmé que la Belgique atteint un degré élevé de maturité dans de nombreux aspects de la lutte contre la contrefaçon, tant de manière préventive que réactive. Le SPF Economie et les Douanes sont très actives à la fois en ligne et dans le monde réel. Par exemple, le SPF Economie travaille en étroite collaboration avec les bureaux d'enregistrement et les intermédiaires en ligne pour empêcher les contrefacteurs d'enregistrer des noms de domaine. Les Douanes disposent de leur propre Cybersquad qui facilite la détection des infractions en ligne; et les enquêteurs du SPF Economie scrutent les marchés locaux à la recherche de produits contrefaits. Le SPF Economie et les Douanes disposent de pouvoirs étendus leur permettant d'enquêter efficacement sur les cas où la contrefaçon est suspectée. Les autorités belges lancent des campagnes d'information pour faire connaître au grand public les implications économiques et sécuritaires de l'achat de produits contrefaits.

Les titulaires de droits de propriété intellectuelle disposent de plusieurs moyens pour protéger leur propriété intellectuelle en Belgique. Premièrement, les procédures douanières leur permettent d'arrêter la contrefaçon à la frontière. Deuxièmement, un contrevenant peut être poursuivi à la fois au civil et au pénal. Pour les poursuites pénales, le titulaire de droits de propriété intellectuelle n'est même pas tenu de déposer une plainte pénale contre le contrevenant, car le procureur peut poursuivre le contrevenant indépendamment de l'implication des titulaires de droits de propriété intellectuelle. Troisièmement, outre une sanction financière, la directive de l'UE sur l'application des droits de propriété intellectuelle prévoit également l'information du grand public sur les contrefacteurs condamnés.

**Défis et besoins – Bien que l'approche de la Belgique en matière de contrefaçon** soit généralement bien accueillie, les défis nouveaux et croissants dans la lutte contre la contrefaçon, notamment en raison de l'adoption des activités de commerce électronique, nécessitent un réalignement continu des approches et des instruments. Plus généralement, la Belgique est confrontée à des défis en termes de ressources limitées (y compris humaines) consacrées à la lutte contre la contrefaçon. La lutte contre la contrefaçon serait bien servie en améliorant encore la coordination et l'échange d'informations entre toutes les principales parties prenantes, y compris les titulaires de droits de propriété intellectuelle, les autorités et

les différents organismes chargés de l'application des lois. En outre, l'absence de base de données centralisée sur les atteintes à la propriété intellectuelle entrave sérieusement l'identification des contrevenants récidivistes. Le manque de formation appropriée à la reconnaissance des marchandises contrefaites et l'absence de procédures standardisées pour le signalement et le traitement des cas de contrefaçon, limitent la contribution de la police locale à la lutte contre la contrefaçon.

Les titulaires de droits de propriété intellectuelle supportent les coûts associés à la défense de leurs droits de propriété intellectuelle, y compris les coûts de destruction des marchandises contrefaites dans les procédures pénales ou administratives, et les frais judiciaires dans les procédures civiles. Toutefois, le SPF Economie prend déjà en charge les coûts de stockage dans le cadre de procédures pénales ou administratives et fournit une aide à la destruction. Mais même la prise en charge des coûts de destruction en soi peut entraver la volonté des détenteurs de DPI de maintenir leurs DPI si le nombre de contrefaçons de leur propriété intellectuelle augmente.

La mise en œuvre de la directive de l'UE sur l'application des droits de propriété intellectuelle a permis d'intensifier les actions contre les intermédiaires en ligne, mais il est nécessaire de se concentrer davantage sur d'autres intermédiaires au sein de la chaîne du commerce électronique. L'absence de moyens de responsabiliser certains acteurs de la chaîne de valeur de la contrefaçon reste préoccupante. Toutefois, il semble plus efficace de relever ce défi au niveau de l'UE.

**L'impact socio-économique** de la contrefaçon est considérable. Nous nous sommes d'abord concentrés sur trois catégories de produits (cosmétiques, jouets et jeux, smartphones) et avons complété cette analyse par les résultats des rapports de l'Office de l'Union européenne pour la propriété intellectuelle (EUIPO) pour 10 autres catégories de produits. Une première indication de l'importance de l'impact socio-économique peut être trouvée dans la part de la contrefaçon dans les ventes globales. Pour l'ensemble des 13 catégories de produits analysées, la part médiane de la contrefaçon dans les ventes globales est estimée à environ 10,55 %. Pour les treize catégories considérées, cela correspond à une valeur de marché annuelle des ventes perdues d'environ 2 milliards d'euros. Sur la base de ces ventes perdues, le rapport donne une estimation brute du manque à gagner. L'estimation des emplois perdus varie considérablement en fonction de l'importance de la production située en Belgique.

Outre les pertes économiques dans le secteur privé, les pouvoirs publics subissent également une perte de recettes due à la réduction de la collecte de la TVA, de l'impôt sur les sociétés et de l'impôt sur les personnes physiques. Pour les 13 catégories analysées, ces pertes de recettes publiques ont été estimées à une perte annuelle totale de 584 millions d'euros. Les chiffres ci-dessus pour les 13 catégories de produits analysées ne couvrent qu'une partie des pertes globales de l'économie belge. Bien que ces catégories de produits couvrent d'importants domaines de la contrefaçon, de nombreuses autres catégories de produits sont susceptibles d'être touchées par les activités de contrefaçon. En outre, certains produits contrefaits peuvent également avoir des répercussions sur la santé (par exemple, les produits pharmaceutiques) et la sécurité (par exemple, les jouets). Par conséquent, la contrefaçon a un impact plus large que sa simple dimension économique.

**Estimer la valeur et l'impact global de la contrefaçon reste une entreprise difficile, car les activités de contrefaçon font - par définition - partie de l'économie « cachée » largement non documentée. Il est donc important de garder à l'esprit que les chiffres susmentionnés proviennent principalement de résultats des modèles, tels que communiqués par l'EUIPO, et non de données empiriques réelles, et que les estimations d'impact ont nécessité l'utilisation d'un ensemble d'hypothèses. Par conséquent, les chiffres présentés ci-dessus doivent être interprétés avec prudence et ne peuvent être considérés que comme une estimation approximative de l'importance de la contrefaçon en Belgique.**

**Liste préliminaire d'options pour répondre aux défis** - Les défis identifiés dans le cadre belge actuel ont été utilisés comme point de départ pour élaborer une liste préliminaire d'idées et d'options sur les mesures à prendre pour répondre auxdits défis. Nous avons mené une **étude benchmark** dans des pays de référence sélectionnés (France, Allemagne, Italie, Espagne et Pays-Bas) comme source d'inspiration

pour identifier des mesures pertinentes pour la Belgique. Cet exercice s'est concentré plus spécifiquement sur la collecte d'informations concernant la manière dont les pays de référence relèvent les défis identifiés pour la Belgique.

Sur la base des résultats du benchmark complétés par une recherche documentaire ciblée et de l'expérience et de l'expertise de l'équipe de projet, nous avons élaboré une **liste préliminaire d'idées/options de mesures à prendre pour relever les principaux défis** identifiés pour la Belgique. Ces idées ont été présentées pour discussion et évaluation lors d'un atelier avec les principales parties prenantes de la lutte contre la contrefaçon. Les résultats de l'atelier nous ont aidés à élaborer l'ensemble des recommandations ci-dessous.

**Recommandations - vers un meilleur policy mix.** Afin d'améliorer encore l'efficacité et l'efficience de la lutte contre la contrefaçon, nous avons proposé un ensemble de mesures prenant la forme de neuf recommandations clés :

1. définir un programme d'études adapté pour la police et les magistrats
2. établir des rôles désignés / dédiés
3. soutenir l'acceptation, le déploiement et l'utilisation de l' IPEP
4. développer une approche d'entonnoir avec les partenaires
5. affecter le produit des amendes à la lutte contre la contrefaçon
6. améliorer les capacités de recouvrement des amendes
7. réduire les obstacles financiers pour les ayants droit
8. tester et déployer des technologies d'authentification
9. encourager la participation à un programme volontaire de connaissance de l'entreprise cliente (KYBC).

Le tableau récapitulatif ci-dessous donne un aperçu des différentes recommandations et de leur contribution à la résolution des principaux défis identifiés. La contribution des mesures recommandées est évaluée à l'aide d'une échelle allant de faible (L) à élevé (H) en passant par moyen (M). Dans certains cas, nous utilisons la notation (NA) pour indiquer que la recommandation ne contribue pas (ni ne se concentre) sur la résolution d'un défi particulier.

#	Recommandation	Décourager (pilier préventif)			Détecter, poursuivre et punir (pilier répressif/correctif)						
		Réduire l'attrait du côté de l'offre (producteurs)	Réduire l'attrait du côté de la demande (consommateurs)	Réduire l'attrait pour les facilitateurs	Difficulté à détecter la contrefaçon	Vision partielle sur une criminalité multi forme	Ressources limitées	Évolution vers de nombreuses petites expéditions	Nouveaux canaux de vente (p. ex. commerce électronique)	Priorités variables en matière de lutte contre la contrefaçon	Frais de stockage/destruction à la charge des titulaires de droits
1	Définir un programme de formation adapté à la police et aux magistrats (personnes)	L	L	L	M	L	L	L	L	M	NA
2	Instaurer de rôles spécialisés (personnes / organisation)	L	L	L	M	L	L	L	L	H	NA
3	Soutenir l'adoption, le déploiement et l'utilisation du IPEP (systèmes)	NA	NA	NA	M	M	L	L	NA	NA	NA
4	Élaborer une approche en entonnoir avec les partenaires (organisation)	L	L	L	M	H	M	M	M	M	NA
5	Affectation des recettes provenant des amendes à la lutte anti-contrefaçon (système)	M	M	M	NA	NA	H	NA	NA	L	M
6	Améliorer les possibilités de recouvrement des amendes (organisation)	M	M	M	NA	L	M	NA	NA	L	L
7	Réduire les coûts pour les titulaires de droits (systèmes)	L	L	L	M	NA	L	L	L	L	H
8	Tester et déployer des technologies d'authentification (systèmes)	M	M	M	H	NA	L	M	M	NA	NA
9	Encourager la participation au programme volontaire KYBC (systèmes)	M	NA	M	NA	NA	L	M	M	NA	NA

Une dernière recommandation plus transversale, concerne le **suivi de la performance de l'écosystème de l'application de la loi**, afin de permettre une amélioration continue et de faciliter l'identification et la prise de mesures correctives en temps opportun face aux nouveaux phénomènes.

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# Introduction

## Background and methodology

Counterfeiting, i.e. the infringement of intellectual property rights in particular, inflicts significant harm on the economy of and on employment within the European Union and in Belgium in particular. According to the latest statistics from the European Observatory on Infringements of Intellectual Property Rights<sup>1</sup>, counterfeiting causes an annual loss of 15 billion euros in government revenue within the EU, an annual loss of 1.315 million euros in direct sales for Belgian companies and a loss of more than 7.000 jobs in Belgium. Counterfeiting also poses a risk to public health and the environment. A recent joint study carried out by The Organization for Economic Cooperation and Development (OECD) and the European Union Intellectual Property Office (EUIPO) also shows that our country is one of the first destinations of any hazardous counterfeit goods. Belgium is part of a preferred route for the distribution of such goods in other Member States of the European Union<sup>2</sup>.

In this preparatory section, we wish to establish the reference framework within which we intend to identify and analyse the counterfeiting problem in Belgium as well as propose (additional) measures to tackle counterfeiting activities. The reference framework will therefore outline the elements that are essential to an effective and efficient performance of that task and, as such, will apply focus to the study.

The reference framework relates to inter alia the following elements:

- The objective of the study;
- Terminological definition – definition of the concept of counterfeiting;
- A brief overview of the fight against counterfeiting operations in Belgium;
- The specific research questions and proposed response method.

## Objective of the study

The ultimate goal of this study is to arrive at relevant proposals that can help improve the effectiveness and efficiency of the fight against counterfeit in Belgium.

This objective is key and will be the guiding principle throughout the project process. It is the reference point around which the activities are organised as well as the benchmark against which the end result of the study can be assessed.

In addition to this objective, the scope of this study prioritises a number of other activities, which will likewise be specified and carried out with the realisation of the end goal in mind. For example, the targeted and efficient organisation of a country-specific benchmark requires going beyond simply drawing up a general description of the relevant country but rather focusing on the aspects that are relevant in the context of formulating improvement proposals. For example, we are particularly interested in solutions that have been proposed in the benchmark countries in relation to difficulties and problems that we have identified in the Belgian context. In the same sense, the assessment of the current impact of counterfeiting in Belgium must likewise be aligned with its relevance for the formulation of improvement proposals.

<sup>1</sup> EUIPO, 'IP in Europe' ([euiipo.europa.eu](https://euiipo.europa.eu)) <<https://euiipo.europa.eu/ohimportal/fr/web/observatory/ip-in-europe>> accessed 5 October 2022.

<sup>2</sup> OESO and EUIPO, *Dangerous Fakes Trade in Counterfeit Goods That Pose Health, Safety and Environmental Risks* (OECD Publishing, 2022).

The activities of the study are therefore organised in a targeted manner, ensuring that they can make the maximum contribution to realising the objective.

## Terminological definition and scope of the study

In order to avoid confusion, it is vital that a number of key terms should be defined in greater detail. Furthermore, it is vital to define the scope of the study. For example, the specific interpretation of the definition of 'counterfeiting' and 'piracy' will partly determine the definition of the scope of the study.

### Definition of counterfeiting and piracy

#### Customs Regulation No 608/2013

The Customs Regulation No 608/2013 aims to amend Council Regulation (EC) No 1383/2003 which already granted customs authorities in the European Union (EU) certain powers with regard to goods suspected of infringing intellectual property rights.<sup>3</sup> However, the definitions of counterfeit and pirated goods are not new definitions and were already laid down in Article 2(1)(a) and (b) of the Council Regulation (EC) No 1383/2003. Article 2(5)(a) of the Customs Regulation shows that the definition of counterfeit goods is restricted to trademark infringements<sup>4</sup> and protected geographical indications<sup>5</sup>. The definition 'pirated goods', on the other hand, refers to infringements of copyright, related rights or design.<sup>6</sup>

Nevertheless, the Customs Regulation significantly expands the scope for customs actions against counterfeiting. Henceforth, there is no more specific reference to 'pirated goods' or 'counterfeit goods' in relation to customs actions, rather, reference is made to suspected infringement of intellectual property rights. Article 2(1) of the Customs Regulation therefore specifies that intellectual property rights are no longer limited to trademarks, copyright or related rights, models and designs, but that it also extends to infringements of trade names, topographies of semiconductor products, plant variety rights, utility models, patents and protection certificates.<sup>7</sup>

#### Act of 15 May 2007 governing the penalization of counterfeiting and piracy of intellectual property rights

The Act of 15 May 2007 or Anti-Piracy Act ('*Antipiraterijwet*') was introduced to combat and penalise counterfeiting and piracy<sup>8</sup> in response to Council Regulation No 1383/2003. The necessity to extend

<sup>3</sup> Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning customs enforcement of intellectual property rights' COM (2011) 285 final. 1.

<sup>4</sup> Art. 2(2) 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 [2013] OJ L181/15 (Customs regulation).

(Hereinafter: Customs regulation).

<sup>5</sup> See for a concrete definition, see 'geographical indication' Art. 2(4) Customs regulation.

<sup>6</sup> Art. 2(6) Customs regulation.

<sup>7</sup> Art. 2(1) Customs regulation.

<sup>8</sup> Draft on the punishment of counterfeiting and piracy of intellectual property rights, *Parliamentary Papers*, Chamber 2006-07, nr. 2852/001, 6.

the scope of the principle of counterfeiting to patents and supplementary protection certificates,<sup>9</sup> plant variety rights<sup>10</sup>, and pirated models and designs<sup>11</sup> likewise played a key role in the drafting of the Anti-Piracy Act.

It is vital to note that a distinction should be made between counterfeiting as a criminal offence and counterfeiting as a customs offence. For example, counterfeiting (with regard to trademark infringements) and piracy (with regard to copyright infringements) were already subject to criminal sanctions, however the penalties proved insufficiently effective.<sup>12</sup> The law therefore provided for the strengthening of criminal sanctions for counterfeiting and piracy with regard to all intellectual property rights in a general sense.<sup>13</sup>

The Act of 19 April 2014 inserting Book XI, 'Intellectual Property' in the Code of Economic Law, and inserting provisions specific to Book XI, in Books I, XV and XVII of the same Code<sup>14</sup> saw the transfer of the criminal provisions regarding counterfeiting and piracy, as stipulated in the Anti-Piracy Act, to the new Book XI 'Intellectual Property' of the Belgian Code of Economic Law ('*Wetboek Economisch Recht*'). The only provisions of the Anti-Piracy Act still applicable and in force relate to counterfeiting as offences against customs legislation.

In respect of the customs offence, the scope of application of the old Regulation 1383/2003/EC was essentially applied. However, given that this was replaced by the new Customs Regulation, it can be assumed that the scope of application for this customs offence has been extended to that of the new Regulation.

### Belgian Code of Economic Law

The Code of Economic Law (does not contain a general definition of counterfeiting or piracy. Within the Code of Economic Law, counterfeiting is not only regarded as a criminal offence but also as an infringement that may give rise to civil proceedings.

The counterfeiting offence is essentially an infringement of intellectual property rights, with the exception of copyright and related rights (art. XV.103 of the Code of Economic Law). More specifically, this relates to infringements of the invention patents and supplementary protection certificates<sup>15</sup>, plant

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<sup>9</sup> Ibid, 17.

<sup>10</sup> Ibid.

<sup>11</sup> NB This concerned the extension of counterfeiting under criminal law; rightsholders continued to have civil law options to take action against infringements of their IPR.

<sup>12</sup> Draft on the punishment of counterfeiting and piracy of intellectual property rights, *Parliamentary Papers*, Chamber 2006-07, nr. 2852/001 16-17.

<sup>13</sup> Draft on the punishment of counterfeiting and piracy of intellectual property rights, *Parliamentary Papers*, Chamber 2006-07, nr. 2852/001, 18.

<sup>14</sup> Act of 19 April 2014 inserting Book XI, 'Intellectual Property' in the Code of Economic Law, and inserting provisions specific to Book XI, in Books I, XV and XVII of the same, *Official Gazette* 12 June 2014.

<sup>15</sup> Art. XI. 29 in conjunction with section XI.60 of the Code of Economic Law; art. 5 of the Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products [2009] OJ L152/1; art. 5 of the Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products [2013] OJ L198/30.

breeder's certificates<sup>16</sup>, designs<sup>17</sup> and trademarks<sup>18</sup>. This follows the transposition of the older art. 8 of the Anti-Piracy Act.<sup>19</sup>

Infringements of copyright or related rights are more likely to be excluded under the stricter definition of counterfeiting, as this is more likely to relate to piracy, which is penalised separately under art. XV.104 of the Code of Economic Law. Infringements of the rights of producers of databases<sup>20</sup> and computer programs are likewise sanctioned separately.

In addition, the civil injunction to cease activities of counterfeiting applies in a similar way to infringements of topographies or semiconductor products.<sup>21</sup> Please find more information on the civil-law options under the State of Affairs section.

## Focus boundaries in the context of this study

In the context of this study, this particularly broad scope of the definition of counterfeiting *sensu lato*, i.e. including piracy, requires to be limited for the purpose of this study. For that reason, the focus will be on the intellectual property rights applicable to the 3 sectors selected for this study: the toys sector, the cosmetics sector and the electronics sector (with a particular focus on smartphones and their electronic accessories).

The focus will primarily be on the intellectual property rights protected by the definition of counterfeiting in the stricter sense, namely by focusing on trademarks and design law. However, piracy in relation physical goods shall also be taken into account to the extent that this proves relevant. In practice, however, most counterfeiting cases appear to relate to trademark or design infringements as well as to patent infringements to some extent.<sup>22</sup> According to an analytical report of the FPS Economy, most companies have a registered trademark (national, international, European), yet only hold to a limited extend a patent or design right.<sup>23</sup> The customs datasets also show that the vast majority of infringements relate to trademark law.<sup>24</sup>

## Research questions & methodologies

### Specifying the research questions

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<sup>16</sup> Section XI.113 of the Code of Economic Law; art. 13 of the Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.

<sup>17</sup> Art. 3.16 of the Benelux Convention on Intellectual Property of 25 February 2005 approved by law of 22 March 2006 (BCIP); Art. 19 Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1. (Hereinafter CDR)

<sup>18</sup> Art. 2.20 s 1, a)- c) BCIP; art. 9 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1. (Hereinafter : EUTMR)

<sup>19</sup> André Decourriere, *Droits intellectuels: contentieux de la validité et de la contrefaçon* (Kluwer, 2020) 745.

<sup>20</sup> Art. XV.106 of the Code of Economic Law.

<sup>21</sup> Art. XI.334(1) of the Code of Economic Law.

<sup>22</sup> Interview with FPS Economy (6 September 2022); Interview with ABAC-BAAN (25 November 2022).

<sup>23</sup> FPS Economy, S.M.E., Middle class and Energy, *Econometrische analyse van het gebruik van systemen ter bescherming van intellectuele eigendom in België* (Brussel, Séverine Waterbley, 2022) 29.

<sup>24</sup> See Table 4.

The collection of relevant data requires a considerable effort. In order to ensure that this collection is organised as efficiently as possible and to tailor it to the requirements of the study, each research question must be refined in order to determine the required granularity of the information and to calibrate the data collection (scope; method, etc.) accordingly. That is why we have specified the research questions of the scope of the study in greater detail.

We distinguish between the following question clusters:

### 1) Research questions relating to the current state of affairs

- How does the system of counterfeiting work (system approach)? A systems analysis based on a value chain analysis and an analysis of the contextual elements and actors within the counterfeit system.
- Who are the actors and what are their roles? Counterfeiters; Intermediaries, service providers (online platforms, payment services), the Belgian and foreign institutions involved; the victims (natural persons or economic actors), the consumers (buyers, whether or not 'consciously' so).
- What are the essential characteristics/key figures of the current situations?
  - What are the key product categories (volume and value) + contextual information: according to seizure, sector by sector, according to the various channels used, etc.);
  - What factors lead to an increased risk of counterfeiting?
  - How can counterfeit goods be identified at every link of the chain?
  - What is the origin (key countries/regions) of the counterfeit goods, including manufacture and transit countries?
- What is the current status of the fight against counterfeiting in Belgium?
  - Legal framework (key rules and instruments)
  - What risk management measures do companies have in place?
  - What are the key difficulties?

### 2) Research questions on the impact of counterfeiting in Belgium

- What is the impact on the economy (loss of revenue/employment/reputational damage):
  - Which sectors are primarily affected today?
  - What is the segmentation of the businesses within the sectors (small-medium – large)?
- What is the impact of public health, security, the environment?
- What is the impact on the government: loss of revenue (tax) and what are the costs of the fight against counterfeiting?
- What explanatory factors account for the identified impact? (e.g. position of the Port of Antwerp).

### 3) Research questions relating to experiences abroad (benchmark)

- What measures exist in benchmark countries (France, the Netherlands, Germany, Italy and Spain), in particular measures that can help solve the bottlenecks identified in Belgium?
- What is the impact of the identified measures and what is their relevance in the Belgian context?

#### 4) Research questions relating to areas of improvement

- What measures can help tackle the bottlenecks?
- Which measures are the most relevant (evaluation of measures)?

## Response methodology and data acquisition plan

In conclusion to this preparatory section, we will set out how we intend to respond to the research questions (the response methodology) and what information/data is required (data acquisition plan), as well as whether it is accessibly for use within the scope of the assignment.

In practical terms, for each research question we will be formulating (see Annex A) one (or more alternative) method(s) in which the question can be answered, taking into account the available budget, the data that must be collected for that purpose and the data sources that can be relied on to acquire that data.

# Section 1. State of affairs in the fight against counterfeiting in Belgium

## 1.1. Initial systems analysis

### 1.1.1. Why conduct a system analysis?

Counterfeiting is a dynamic phenomenon. The actors who counterfeit or distribute products are not tied to a specific product, production country or distribution channel. For example, if a product no longer generates the desired profit margins or circumstances make sales more difficult, then the counterfeiter will often switch to other – more lucrative – products, production countries or channels. Any ‘switching costs’ involved can quickly be digested due to the high illegal profit margins. This, therefore, means that policies that focus exclusively on tackling certain types of goods or products, from certain countries, or through certain channels, do not provide a systematic response to the issue of counterfeiting. In the best case, a temporary disruption of a specific counterfeiting chain will occur, after which this chain will recover through other chains or with other products. Let us suppose, for example, that we were to succeed to significantly reducing the amount of counterfeit goods entering our country through sea freight, we would subsequently risk such goods entering our country via other means (road/air). This would simply result in a ‘displacement’ of the counterfeiting problem.

This is not a novel observation, and it remains a precarious task to identify truly structural measures that are more difficult to circumvent. For each potential measure, we should therefore ask ourselves whether this product/country/distribution channel is specific or whether it may have a more generic impact across product, country and distribution channel boundaries.

Please note that this does not mean that it may not be beneficial to put measures specific to a product, country or distribution channel in place to combat certain counterfeit phenomena that are particularly harmful from a social point of view (e.g., counterfeit medicinal products or protective equipment).

A systemic approach of the counterfeiting phenomenon allows the various links, factors and dynamics that give rise to or enable counterfeiting activities to be identified. By identifying the driving factors and enablers, we can then start thinking more specifically about the systemic elements in relation to which we can take the most effective and efficient action to disrupt the counterfeiting system and tackle it at a structural level.

A systems analysis also makes it easier to break away from an overly case-by-case-based approach that is limited to specific groups of products, distribution channels, countries of origin, etc., thereby neglecting the overall picture.

By delving into the actors, driving factors and enablers of the counterfeiting system in greater detail, we would like to briefly outline a number of key figures of the counterfeiting phenomenon in Belgium.

## 1.1.2. Key figures relating to counterfeiting in Belgium

In order to situate the problem of counterfeiting in Belgium, we have provided a number of key figures to give an initial indication of its scope.

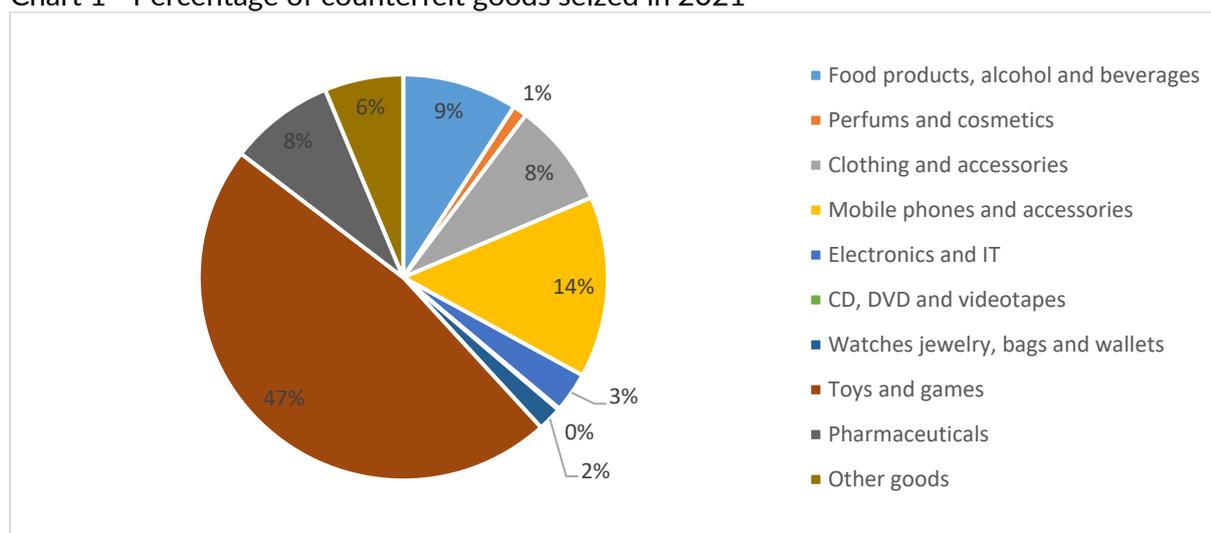
We distinguish between the following:

- 1) counterfeit goods that are intercepted before they are placed on the Belgian market or in transit to other countries. This mainly concerns the operating domain of customs;
- 2) counterfeit goods that are already on the Belgian market. This mainly concerns the operating area of FPS Economy and the police.

Counterfeit goods that have been stopped before they enter the Belgian market

In 2021, 838,934 counterfeit goods were seized.<sup>25</sup>

Chart 1 - Percentage of counterfeit goods seized in 2021



Source: FPS Finances, 'Jaarverslag 2021 FOD Financiën' (2022)

Chart 1 shows the number of counterfeit goods by type. Toys and video games are the most counterfeited goods, alongside counterfeit mobile phones and accessories (roughly 14%), representing more than half (by number) of counterfeit goods seized. In addition, significant numbers of counterfeit goods in the categories of pharmaceuticals, food products, alcohol and beverages and clothing and accessories (each approx. 70,000 items) were seized.

The seized good mainly relate to products of major brands. This indicates that, at least for certain segments, the major (usually multinational) brands are exposed to the risk of counterfeiting in practice. Many of these goods are not intended for the Belgian market.

<sup>25</sup> FPS Finances, 'Jaarverslag 2021 FOD Financiën' (2021) <<https://www.2021.jaarverslag.financien.belgium.be/pdf/RA2021-NL-20220712.pdf>> accessed 22 August 2022.

We will be taking a closer look at some of the relevant characteristics of the 22,354 shipments that were detained by customs in 2021 below. We will inter alia be focusing on:

- The percentage of detained consignments intended for the Belgian market;
- The means of transport used for the detained consignments;
- The handling of the detained consignments (what happens to them?);
- The nature of the intellectual property rights being infringed.

#### Percentage of consignments intended for the Belgian market

Approximately 2/3<sup>rd</sup> of the shipments that were detained were intended for foreign countries. This confirms that Belgium is largely a transit country. Moreover, this illustrates that, in addition to its own internal market, Belgian customs also protect foreign market against counterfeiting. Conversely, this also indicates that the fight against counterfeiting in neighbouring countries can have a beneficial impact on the Belgian market.

Table 1 - Belgian market vs foreign markets

Destination	Number of shipments detained
Import	7.435
Export	512
Transit	116
Transshipment	14.294

#### Means of transport of detained shipments

Table 2 shows the number of detained consignments by means of transport. This shows that the number of shipments being detained is highest for consignments sent by air or post. These figures do not in themselves speak to the size of the individual consignments (which are considerably larger at the seaports and in rail transport), however mainly signify the atomisation of the shipments. This phenomenon can largely be accounted for by the increase in e-commerce.

Table 2 - Detained consignments by means of transport

Means of transport	Number of shipments detained
Sea	66
Rail	9
Road	36
Air	15.069
Postal delivery	7.173

#### Handling of detained shipments

In terms of the shipments that have been detained, it is interesting to ascertain what happens to them. Table 3 shows that more than 90% of these goods are destroyed. A limited number of detained shipments were found not to be counterfeit goods following inspection (2%). It can be concluded from both sets of statistics above that the detention of shipments takes place in a very targeted manner and that there are generally sufficient grounds to support the suspicion of counterfeiting. In addition, in approximately 5% of cases, the shipment is released due to the fact that the rightsholders do not take any action. Conversely, this means that in the vast majority of cases, the rightsholders do take action, which is the

result of effective cooperation between the government and the rightsholders. The effective cooperation between the government and rightsholders was similarly generally confirmed during our interviews with the stakeholders.

Table 3 - Handling of detained shipments

Nature of handling	Number of shipments detained
Court case has been initiated	15
Destruction under standard procedure	12,139
Destruction under small consignment procedure	8,578
Release of goods because rightsholder does not take action	1,060
Out of court settlement	10
Original products	534

#### Infringed rights

In order to determine the focus of the study, and in particular to analyse the relevance of the legal instruments, it is useful to determine which rights primarily are infringed by counterfeiting activities. We can conclude from Table 4 that the shipments that are detained are almost always related to an infringement of trademark law.

Table 4 - Rights infringed by counterfeiting activities

Violated rights	Number of shipments detained
National Copyright and related Right	24
National Trademark	631
European Union Trademark	18,723
International registered Trademark	2,951
Registered National Design	1
Registered Community Design	6
International registered Design	9

### 1.1.3. Counterfeit goods seized on the Belgian market

A percentage of the imported counterfeit goods actually does end up on the Belgian market. In addition, goods that were counterfeited in Belgium can likewise end up on the market.

Table 5 - Key figures on goods seized on Belgian market (2021)

Product categories	Number of seizures	Number of items	Estimated value of goods (€)	market original
Bodycare products	12	4.459	244.626	
Clothing and accessories	189	37.333	5.912.045	
Footwear	30	6.142	1.427.800	

Personal accessories	66	1.904	1.948.575
Mobile phones and accessories	73	14.628	501.795
Electric or electronic devices/computers	8	2.034	175.855
Toys, games and sports equipment	22	16.493	251.235
Tobacco products	2	1.850	12.380
Other	31	19.333	704.972
Furniture	14	753	160.406
Online infringements	1	5	40.000
<b>Total</b>	<b>448</b>	<b>104.934</b>	<b>11.379.689</b>

These key figures provide an initial indication of the extent of the counterfeiting activities. In a later part of this study, this scope will be specified in greater detail and there will be a more in-depth focus on the socio-economic impact of counterfeiting in Belgium.

## 1.2. Actors & stakeholders of the counterfeiting system

As a starting point for the systems analysis, it makes sense to identify the various actors in play. In this context, we will be distinguishing between principal actors, enablers and other stakeholders.

Figure 1 - Principal actors, enablers and other stakeholders of the counterfeiting system



### 1.2.1. Principal actors

The manufacturer and their customer (the consumer) are the principal actors within the counterfeiting system and constitute its engine: there can be no supply without demand and vice versa.

The manufacturers of counterfeit goods

Who are they and where are they?

The EUIPO and the OECD examined the international flows of counterfeit goods<sup>26</sup>, with the exception of counterfeit goods produced in the EU and counterfeit goods exported to other EU countries. This includes the possibility that illegal production facilities can also regularly be found within the EU<sup>27</sup>.

Broadly speaking, it can be concluded from the foregoing 2017 study that counterfeit goods mainly come from China and a number of other Asian countries, including India, Vietnam and Thailand, which is particularly the case for counterfeit medicinal products. Occasionally, the source may also be closer to the destination countries, as is the case for food products and cosmetics and optical and photographic materials that are often also manufactured in Turkey. Shoes, clothing and accessories, bags and leather products, as well as toys, games and sports products occasionally come from North African countries or Turkey.

Certain economies, on the other hand, are chosen as transit locations, which, for example, is the case for Singapore, a number of Chinese cities such as Honk Kong or Macau, as well as Saudi Arabia and some of its neighbouring countries. Occasionally, counterfeiters will use transit zones that are closer to the destination country, which, for example, is the case for perfumes and cosmetics, shoes, jewellery, electronic and IT materials, optical, photographic and electrical materials as well as toys, games and sports products. Northern African countries, Turkey and the Balkan states will sometimes act as transit territories for counterfeit goods with an EU destination.

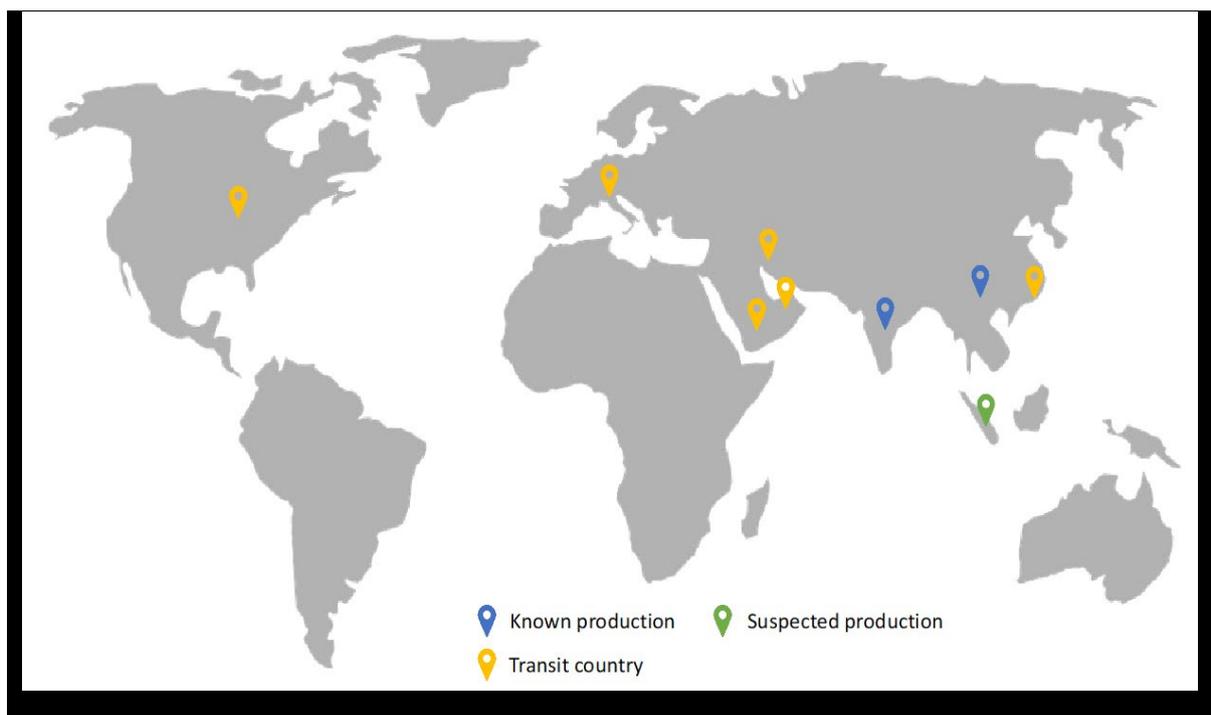
## Figure 2 - Production and transit of counterfeit pharmaceuticals

Example: pharmaceuticals

Pharmaceuticals are primarily produced in China, India and (presumably) Singapore. Counterfeit pharmaceuticals will often stop en route in transit countries or cities such as Hong Kong, Yemen, the United Arab Emirates or Iran before reaching their final destination. Since 2020, Switzerland and the United States have also been identified as transit countries for counterfeit pharmaceutical products intended for the EU.<sup>28</sup>

<sup>26</sup> OECD and EUIPO, *Mapping the Real Routes of Trade in Fake Goods* (OECD Publishing 2017) [22](#).

<sup>27</sup> Knack editorial team, 'Namaakproducten gaan steeds sneller over the (online) toonbank' (*weekend.knack.be*, 18 March 2022) <<https://weekend.knack.be/lifestyle/mode/nieuws-trends/namaakproducten-gaan-steeds-sneller-over-de-online-toonbank/>> accessed 23 August 2022.: 'According to the report, the illegal products still largely come from outside the EU and from China and other parts of Asia in particular. The authors do point to an increasing number of illegal laboratories within the EU. Imported counterfeit packaging materials and semi-finished products are also increasingly being intercepted, which, according to the researchers, points to the presence of illegal production facilities within the EU.'; EUIPO and Europol, 'Intellectual Property Crime Threat Assessment 2022' (*euiipo.europa.eu*, 2022) <[IP Crime Threat Assessment 2022 FullR en.pdf \(europa.eu\)](#)> accessed 23 August 2022 3: "While most counterfeit goods distributed in the EU are produced outside the EU, there are indications that the production of counterfeit and substandard goods increasingly takes place within Member States. The frequent seizure of counterfeit packaging materials and semi-finished products at the border clearly points to the presence of manufacturing facilities within the EU – some for partial assembly and other running full production cycles".



Most counterfeit goods that are distributed in the EU come from abroad and therefore enter the EU as end products.<sup>29</sup> Nevertheless, these days more and more laboratories and other production centres are located within the EU itself. In addition to the manufacturing sites for counterfeit tobacco that were discovered in Spain and France,<sup>30</sup> the EUIPO and the European Union Agency for Law Enforcement Cooperation (Europol) have determined that more and more counterfeit packaging and semi-assembled counterfeit products are being intercepted.<sup>31</sup> This implies that counterfeit goods are also at least partly manufactured within the EU itself.<sup>32</sup> As such, we must also take into account local production facilities in Belgium and the rest of the EU in the fight against counterfeiting.

#### What drives them?<sup>33</sup>

Below we have outlined the factors and driving forces that encourage counterfeiting activities or at least provide a breeding ground for counterfeiting. We distinguish between the following: 1) market characteristics, 2) aspects related to production, technology and distribution and institutional characteristics.

#### Market characteristics:

- Profitability: significant profitability per unit and/or high volume (can be very significant, especially if cheap ingredients are used);
- Market size: large potential market;
- Brand strength: a high level of brand recognition.

#### Production, technology and distribution

<sup>29</sup> EUIPO/Europol, 'Intellectual property crime threat assessment 2022', o.c., 3.

<sup>30</sup> ibid 27 & 29.

<sup>31</sup> ibid 3 & 31.

<sup>32</sup> Ibid 3 & 31-32.

<sup>33</sup> OECD, The Economic Impact of Counterfeiting and Piracy (OECD Publishing 2008).

- Required investment: simple, cheap equipment;
- Required technology: Not sophisticated, easy to acquire (manufacturing technology, packaging and labelling vary);
- Logistics: Simple and cheap; Low shipping costs; free trade zones have facilitated the trade of counterfeit products;
- Marketing and sales of products: Easy to set up/infiltrate distribution channels;
- (the internet has facilitated the trade in counterfeit products);
- Ease with which operations can be concealed: this can easily be achieved in the case of small-scale operations;
- Ease with which consumers can be misled: Easy to deceive visually; anti-counterfeiting technology can make this much harder.

#### Institutional characteristics

- Legal and regulatory framework: Weak laws; complicated situation in many countries makes prosecution difficult;
- Sanctions: Weak sanctions; many countries do provide for criminal sanctions; in many countries, fine are generally a manageable cost item for businesses;
- Enforcement: Weak enforcement; the level of enforcement varies from country to country; smart counterfeiters often succeed to circumventing enforcement.

#### The buyers/consumers of counterfeit

##### Who are they?

A recent study<sup>34</sup> shows that 7% of Belgian participants have intentionally bought counterfeit products of these respondents, 32% believe that the availability of affordable original products would be a reason no longer to purchase counterfeit products.

Young people between the ages of 15 and 24 in particular indicate that they have purchased counterfeit goods in the past. This demographic usually lives with their parents and still go to school. Young people are also more likely to unintentionally buy counterfeit goods or are less likely to question whether goods they purchase online are actually original and genuine. Despite the fact that young people appear to buy counterfeit goods more readily than other age demographics, counterfeit goods are also purchased in these other age groups.

##### What drives them?

Buying counterfeit goods is also often accompanied by the intentional consumption of illegal online content. The principal reasons for buying counterfeit goods are the following (in descending order):

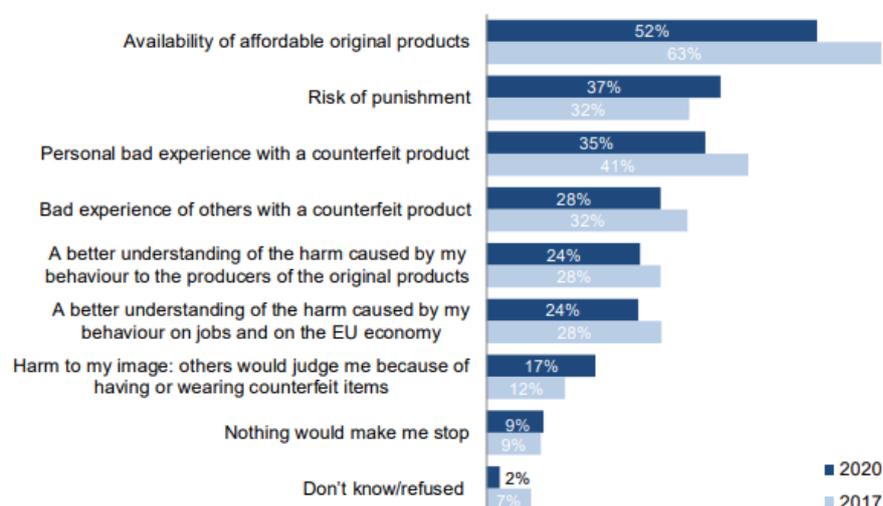
1. Rejecting the market economy and major premium brands;
2. The price of the original product is too high;
3. The original product is not (yet) available in the country of origin;
4. The quality of the relevant product is immaterial;
5. Purchases relate to luxury goods.

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<sup>34</sup> EUIPO, 'European Citizens and Intellectual Property: Perception, Awareness, and Behaviour' (*euiipo.europa.eu*, November 2020) <Perception\_study\_full\_en.pdf (europa.eu)> accessed 22 August 2022.

The study also put forward arguments that could persuade buyers not to buy counterfeit goods anymore, e.g. if the price of the original product were lower. The fear of repressive measures as well as a negative experience with counterfeit goods take second and third place respectively.

Chart 2 - Drivers of the purchase of counterfeit goods



Source: EUIPO, 'European Citizens and Intellectual Property: Perception, Awareness, and Behaviour -2020' (2020)

The analysis of the drivers underpinning the purchase of counterfeit goods shows that a percentage of consumers who purchase counterfeit goods today would not necessarily purchase the original product if they had access to counterfeit products. For example, some consumers will not be willing to pay a higher price for the purchase of original goods. If the consumer no longer had access to counterfeit goods, they would at least be able to make the following decisions:

- To switch to the purchase of the original brand product
- To switch to the purchase of the original brand product, but to make fewer purchases (one pair of shoes from a well-known brand instead of two pairs of shoes from a less well-known brand)
- To switch to purchasing a cheaper product instead of the more expensive branded product (substitution)
- To forego the purchase of the branded product and its alternatives.

These consumer choices will affect the economic impact of counterfeiting in Belgium. What economic damage does a brand manufacturer actually incur if a consumer is, for example, not prepared to pay the price of an original branded product and is only prepared to purchase a cheaper counterfeit product? This observation calls for a degree of caution when assessing the economic damage suffered by the Belgian economy – and the loss of turnover/profit of rightsholder in particular – as a result of counterfeiting. After all, not all purchases of counterfeit goods would automatically translate into the purchase of original goods if access to counterfeit goods were to be prevented.

### Enablers

This group relates to persons who in one way or another facilitate the transaction between buyers and sellers (see second circle of Figure 1). Measures aimed at these actors can make the manufacturing of counterfeit goods, getting them to the consumer or cashing in on counterfeit profits increasingly difficult. The following enablers have been identified in most counterfeiting systems:

## Suppliers

Suppliers are an essential link in the counterfeit value chain. These may range from owners making their real estate available to manufacturers or counterfeit goods to suppliers of goods and services needed to manufacture counterfeit goods. Suppliers are not engaged in illegal activities as such (unless they themselves are guilty of counterfeiting activities), rather, they provide a customer with goods/services without necessarily being aware that the services, products and raw materials they provide are used by their customers to produce counterfeit goods. Suppliers are often located abroad and generally do not suffer any direct adverse impact if counterfeit goods are seized and destroyed. After all, their payment is linked to the provision of services, products and raw materials rather than to the production of counterfeit goods.

## Distributors

Distributors are responsible for bringing the goods to consumers, which may involve itinerant (often small volumes) or fixed points of sale (please see below for e-commerce). In certain cases, distributors may experience adverse effects of counterfeiting activities. In addition to the economic damage resulting from the seizure of counterfeit goods and potential administrative/criminal fines, they may also suffer reputational damage in certain cases. The distributor will often be aware that they are dealing with counterfeit goods (getting an indication from the country of origin, prices, terms of delivery, etc.). However, this does not preclude the possibility that a distributor may act in good faith and may be unaware of the fact that they are distributing counterfeit goods. In the latter case, they are more likely to be victims than (co-)perpetrators and the reputational damage may even exceed the direct economic damage suffered.

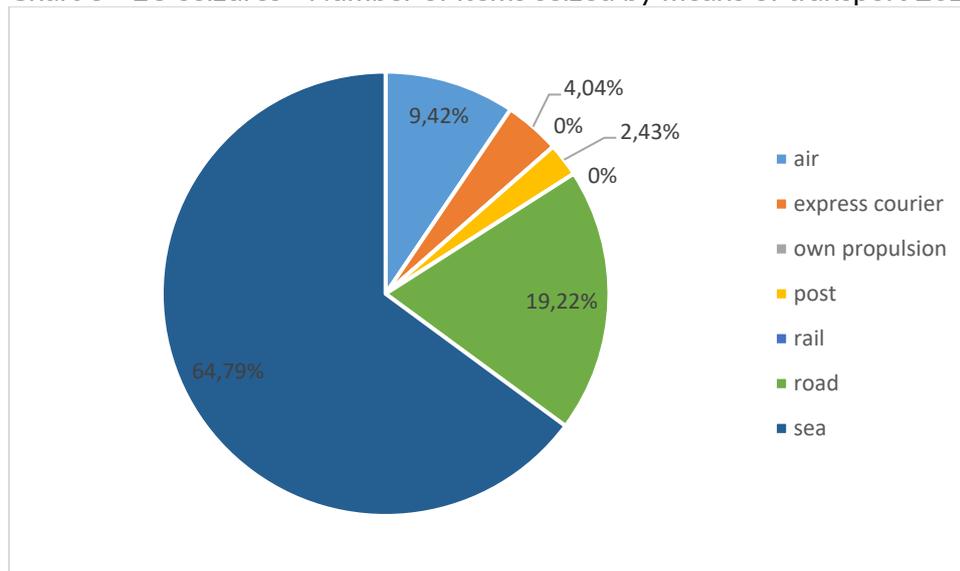
## Employees

Employees provide the labour and intellectual capacities required for the manufacturing process in exchange for a – generally meagre – wage. Employees do not experience any direct economic damage as such as a result of the seizure and destruction of counterfeit goods. On the contrary, to them, it is a source of income (wages). The production of counterfeit goods, however, often does take place in countries with occasionally very precarious working conditions and relies on workers who often have few alternative employment opportunities. Due to their cheap labour, they increase the margins that manufacturers of counterfeit goods can realise. Better wages and better working conditions increase relative wage costs and reduce the appeal of the production of counterfeit goods. However, the improvement of working conditions requires an initiative or at least the cooperation of the authorities of the country in which production of counterfeit goods takes place.

## Transporters

Almost two-thirds of all of the counterfeit goods seized in the EU or at its borders are transported via the sea. Road transport accounts for 20% of the items seized, while postal and express delivery services account for respectively for approximately 2,5% and 4 % of the items seized (see chart below).

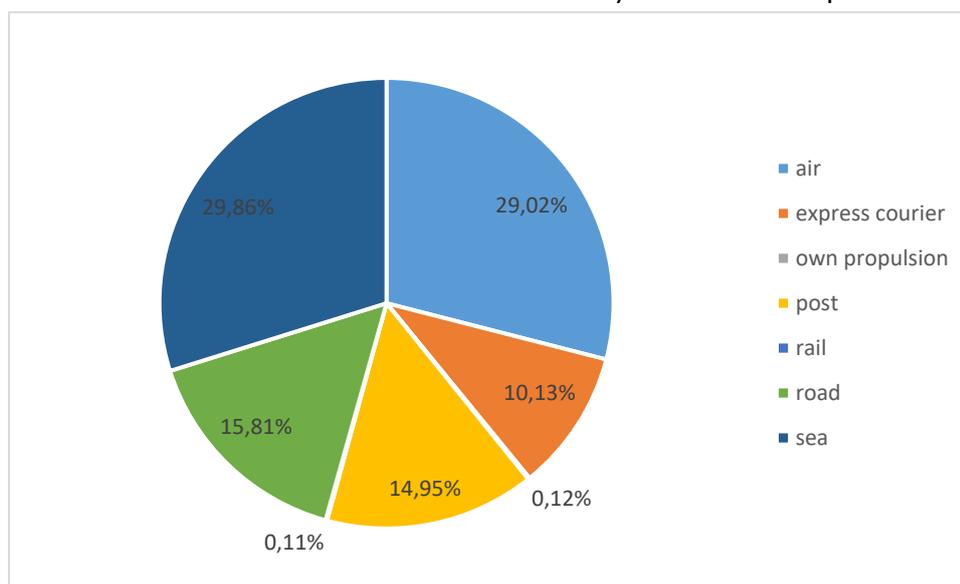
Chart 3 - EU seizures - Number of items seized by means of transport 2021



Source: EUIPO, 'EU enforcement of intellectual property rights: results at the EU border and in the EU internal market 2021' (2022)

Looking at the value of items seized we obtain a somewhat different perspective. For example, sea transport accounts for 29,86 % of the value while it covers 64,79% of all items seized; air transport while only covering 9,42% of items seized, accounts for 29,02% of the value seized.

Chart 4 - EU seizures - Value of items seized by means of transport 2021



Source: EUIPO, 'EU enforcement of intellectual property rights: results at the EU border and in the EU internal market 2021' (2022)

## E-commerce:

In addition to the enablers cited in the above, which may also be present in an e-commerce context,<sup>35</sup> the following intermediaries and service providers may also be mentioned as enablers for counterfeiting activities in an e-commerce context:

- Internet providers that provide access to the internet.
- Hosting providers that provide the technologies and services needed to upload third-party content, such as servers and software tools to build and store websites for users to access.
- Domain name registries, organisation that manage the assignment, registration and operation of internet domain names and ensure that only one person at a time owns a domain name.
- Advertising service provider that process, sell and postpaid and promotional content for their customers.
- Search engines that allow users to search for content on the internet.
- Online payment service providers that provide electronic payment services to internet companies and act as intermediaries between merchants and financial institutions.
- Online marketplaces or e-commerce websites where products or services are provided by multiple sellers, but transactions and other services are facilitated by the administrator of the marketplace.
- Social media platforms that offer stand-alone or integrated media services that facilitate the creation and sharing of information through virtual communities and networks.
- Messaging applications, platforms that enable messaging, calls and other services, typically used through smartphone applications.

## Financiers

Financiers are a special group of service providers that are used to provide counterfeiting operations with the necessary funds or to launder the proceeds thereof. Counterfeiters use cash, crypto coins and money remittance to launder illegally earned money.<sup>36</sup> This money laundering also takes place through expensive purchases of goods and property.<sup>37</sup> In these ways, the illegal income is linked to legal transactions and it becomes more difficult to trace the illegal cash flows. Another way to avoid the money being traced is to switch bank accounts regularly.<sup>38</sup> In addition, counterfeiters usually rely on intermediaries, including financial advisers, to assist them in their financial transactions.<sup>39</sup>

## Other enablers

Within this category, we can identify other enablers who, for example, may create a situation in which the counterfeiting system can thrive through their inaction. This may include the government of the country in which products are being counterfeited ('counterfeit country') or which is used as a transit point for counterfeit goods ('transit country').

The inaction of these countries is often motivated by the economic benefits they enjoy from the counterfeit system in terms of employment and economic growth. On the other hand, there is a rather limited disadvantage to the country's own economy, society, etc. This is in stark contrast to, for example, China's action against the illegal import of waste. China, which prior to 2019 was still the largest importer of plastic waste in the world, has since halted the import of plastic waste due to the introduction of an

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<sup>35</sup>BASCAP and AIM, 'Joining forces in the fight against counterfeiting: intermediaries "best practices"' (*aim.be*, March 2019) <[https://www.aim.be/wp-content/themes/aim/pdfs/Joining\\_forces\\_in\\_the\\_fight\\_against\\_counterfeiting\\_Intermediaries\\_best\\_practices-1.pdf](https://www.aim.be/wp-content/themes/aim/pdfs/Joining_forces_in_the_fight_against_counterfeiting_Intermediaries_best_practices-1.pdf)> accessed 25 August 2022..

<sup>36</sup> EUIPO/Europol, 'Intellectual property crime threat assessment 2022' (2022) <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2022\\_IP\\_Crime\\_Threat\\_Assessment/IP\\_Crime\\_Threat\\_Assessment\\_2022\\_FullR\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2022_IP_Crime_Threat_Assessment/IP_Crime_Threat_Assessment_2022_FullR_en.pdf), 3535 accessed on 25 August 2022.

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

import ban as well as a consequence of vigorous enforcement of that ban. Originally, these waste shipments were tolerated, just as counterfeits are today, due to their economic benefits. The adverse environmental and health impact, however, has persuaded the Chinese government and resulted in a drastic change in course. It is possible that lessons can be drawn from this case in relation to the counterfeiting issue.

The phenomenon of free trade zones is an issue that requires particular attention. These types of zones entail real benefits to businesses and host countries but can facilitate counterfeiting trade as a result of lax regulatory scrutiny. A recent study<sup>40</sup> shows that the greater the role of free trade zones in a country's economy, the greater the value of counterfeiting is in that economy's exports.

## 1.2.2. Other stakeholders

In addition to the principal actors and enablers, there are other stakeholders who have an interest in the existence or disappearance of counterfeiting operations (see outer circle of Figure 1). Involving these actors may likewise be beneficial. For example, actors who have an interest in the eradication of counterfeiting could be involved in the fight against the practice. As such, they are considered to be potential partners. By contrast, those who have an interest in counterfeiting will encourage the practice. Focusing on this group of stakeholders can therefore contribute to a further reduction of counterfeiting.

### Businesses that suffer losses due to counterfeiting

For businesses, counterfeiting translates into economic damage, which arises as a result of loss of revenue and ultimately loss of profit. In addition, they may suffer reputational damage if the counterfeit goods lead to quality, safety and health problems without consumers realising that they are dealing with counterfeit products.

Although counterfeiting can in principle also affect smaller businesses, in practice, it is mainly the products of the major brands that are counterfeited. In terms of comparison, this constitutes an additional difficulty in assessing the actual economic damage of counterfeiting.

Businesses can also contribute to the fight against counterfeiting – both at a technical level (products), but in particular by working with authorities to combat counterfeiting activities effectively. For example, by cooperating in the identification of goods that are detained by customs or FPS Economy.

In addition to individual businesses, reference can also be made to (membership) organisations that campaign against counterfeiting, such as the Belgian Anti-Counterfeiting Association (Belgische Associatie Anti-Namaak, ABAC-BAAN: [www.abac-baan.com](http://www.abac-baan.com)) or the Belgian Association of Branded Products Manufacturers (BABM: [www.babm.be](http://www.babm.be)), which act on behalf of affiliated rightsholders faced with instances of counterfeiting.

When calculating the impact of counterfeiting on the Belgian economy (see Section 2), the fact that Belgium acts as a major transit country for counterfeit products should be taken into account. A large percentage of the counterfeit goods that are detained here (particularly in the Port of Antwerp and the Brussels Zaventem and Liège airports) are therefore intended for foreign countries and a limited or no adverse impact on the Belgian economy.

### Government of affected country

The government of any country in which the counterfeit products are put on the market will also incur a loss, for example, as a result of lost income, both direct (VAT; excise duties) and indirect (through

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<sup>40</sup> OECD and EUIPO, *Trade in Counterfeit Goods and Free Trade Zones: Evidence from Recent Trends* (OECD Publishing 2018).

corporate and personal income tax) and as a result of the costs related to counterfeiting activities (e.g. fight against counterfeiting; health and environmental costs).

As a key EU transit country, not all counterfeit products that end up on Belgian territory are intended for the Belgian market. In this respect, only the percentage of counterfeit products intended for the Belgian market should be taken into account when determining certain aspects of the impact (e.g. loss of income).

#### Households / Society

The interest of private households (and, more broadly, society) in fighting the counterfeiting network lies inter alia in relation to health and safety aspects. In addition, there are a number of ethical considerations. Indirectly, households are also affected by the impact on the economy, with counterfeiting, for example, having an impact on employment.

#### Organised crime

The illegal trade in counterfeit goods is often linked to other forms of serious crime<sup>41</sup>. It provides criminals with an additional source of income and a way to launder money.

Compared to the trade in illegal narcotics, the trade in counterfeit goods is subject to rather limited penalties in Belgium and abroad. Given the high street value of certain counterfeit products and the aforementioned relatively lenient penalties, the trade in counterfeit goods is relatively attractive an endeavour. From our interviews with the police, we understand that counterfeit products are sometimes found to be used as payment for illegal services (e.g. drug deals).

## 1.3. The counterfeit value chain

The engine of the counterfeiting system is the pursuit of profit: counterfeiters try to make a profit on the products they sell. This margin must be sufficient to compensate for the risk involved. As such, one way to combat counterfeiters is to examine how value is created and then to define actions that reduce the margin to unappealing levels. In addition, from the point of view of potential consumers, the original products are in actual fact in competition with their counterfeit alternative. As long as this competition in terms of the purchase price carries on, the original product will often not stand a chance against a 'well-made' copy. Manufacturers of original products therefore have an interest in shifting components to other aspects (value components) of the product.

The concept of the value chain as put forward by Michael Porter<sup>42</sup> can be used as a guideline for the analysis of the components that add values to the original products (into a unique value proposition). Products go through a chain of activities and acquire a degree of value with each activity. The chain of activities as a whole gives the product more added values than the sum of the separate parts (systemic view at company level).

In addition to primary activities, Porter also identifies a number of other supporting activities (see Figure 2).

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<sup>41</sup> UNODC, 'Focus on - The Illicit Trafficking of Counterfeit Goods and Transnational Organised Crime' <[https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit\\_focussheet\\_EN\\_HIRES.pdf](https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf)> accessed 7 September 2022.

<sup>42</sup> This concept was first described in 1985 by Michael Porter in his book '*Competitive Advantage: Creating and Sustaining Superior Performance*'.

Figure 3 - The value chain and its components



Source: Michael Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (A Division of Simin & Schuster Inc, 1985) 37.

In the context of the fight against counterfeiting, we believe the following aspects to be of particular relevance:

(Technological) development – Counterfeiters generally have little difficulty copying even high-tech products that require complex manufacturing processes. Often this take place through the purchase of a single product, which is then reverse engineered or the software (including protection mechanisms) is copied. Very complex and highly secured products are likewise counterfeited. Occasionally the release of counterfeit products follows the release of the original products so rapidly that there are suspicions of industrial espionage. Technological developments may in themselves preclude certain less sophisticated counterfeiters, however, do not form a major obstacle to well-organised counterfeiters who counterfeit products on an industrial level.

Marketing & Sales – The marketing of counterfeit goods mainly takes place online. Counterfeiters make use of social media and instant messaging to market their products.<sup>43</sup> As stated in the foregoing, counterfeiters also attempt to infiltrate the legal production chain. 60% of hazardous products intended for the EU that were seized around the world were purchased online.<sup>44</sup> The sellers use similar email addresses as the original products and will also occasionally use very similar domain names (with a difference of a single letter or character).<sup>45</sup> The sales of counterfeit goods can occasionally also take

<sup>43</sup> UNODC, 'Focus on – The Illicit Trafficking of Counterfeit Goods and Transnational Organised Crime' <[https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit\\_focussheet\\_EN\\_HIRES.pdf](https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf)> accessed 7 September 2022.

<sup>44</sup> Alexandra Di Maggio, 'Nieuwe OESO/EUIPO-studie brengt risico's van namaakproducten voor gezondheid, veiligheid en milieu aan het licht' (2022) <[Nieuwe OESO/EUIPO-studie brengt risico's van namaakproducten voor gezondheid, veiligheid en milieu aan het licht | Novagraaf](#)> accessed on 22 August 2022.

<sup>45</sup> EUIPO/Europol (n 40) 12.

place on the *dark web* (although this is not very common), primarily in the case of cosmetics and pharmaceuticals.<sup>46</sup>

In addition to online channels, certain counterfeit goods are also sold physically, with food products, alcohol and beverages being good examples of this. Counterfeiters occasionally succeed in being approached as a reliable supplier by supermarkets and other outlets.<sup>47</sup> They also occasionally may benefit from events such as festivals to sell their products.<sup>48</sup> Counterfeiters of pharmaceutical products, pesticides and occasionally perfumes also rely on this method. As regards toys, festivals also provide the perfect opportunity to sell counterfeit goods.

It should be noted that (part of) the marketing that is carried out for the original products also immediately benefits any counterfeit products.

After-sales service – After-sales services include offering options to exchange products, warranties, spare parts, free access to value added services (e.g. software updates), membership to a customer community, etc. Counterfeiters almost by definition do not offer any after-sales services. This means that suppliers of original products in this link of the value chain can make a difference in order to arrive at a value proposition of original products that is more resistant to the price competition of the counterfeit variety. In order to compete to win against counterfeit varieties, it may be beneficial to shift the battleground away from price and the product in the narrow sense to after-sales services that define the unique value proposition. Naturally, this is easier to do for certain products than for others.

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<sup>46</sup> *ibid* 17 & 21.

<sup>47</sup> See e.g. food products; *ibid* 13-15.

<sup>48</sup> *ibid* 15.

## 1.4. Current status of the fight against counterfeiting in Belgium

A recent report by the OECD and EUIPO shows that Belgium ranks second as the final destination economy for hazardous counterfeit goods that are imported into the EU.<sup>49</sup> Belgium therefore appears to be a prominent transit country where the goods arrive and from which they are subsequently distributed onwards to the rest of the EU. The largest categories of goods that qualify as hazardous counterfeit goods and which were intercepted by the customs authorities are perfumes, cosmetics and toys, which are mainly transported in small shipments.<sup>50</sup> The statistics provided in the report also show that most shipments of dangerous counterfeit goods are the result of e-commerce transactions.<sup>51</sup> The statistics shows that counterfeit goods purchased through e-commerce are transported by regular post and occasionally by air in almost all cases. Other means of transport remain relevant if the counterfeit goods were not purchased online.<sup>52</sup>

In order to gain insight into how counterfeiting is currently being combatted in Belgium, we will be providing a brief outline of the current arsenal of legal, technical and organisational measures that are deployed throughout the value chain in the fight against counterfeiting. In addition, we will identify the key players in this fight. This assessment of the current state of affairs will act as a baseline measurement, as it were, and will serve as a starting point for the subsequent identification of any relevant additional measures in the fight against counterfeiting.

For this purpose, we have provided a dozen interviews with relevant parties (including with trade associations of the most affected sectors, FPS Economy, Belgian customs and the Directorate General for Economic Inspection...). In this discussion, in addition to providing an overview of the measure, we also wish to carry out an initial evaluation of the strengths and weaknesses of the current fight against counterfeiting in Belgium (initial SWOT analysis).

### 1.4.1. Legal remedies in the fight against counterfeiting

Protection at the external borders of the EU and Belgium: customs legislation

In 2021, the customs authorities in Belgium seized 395.998 items of counterfeit toys and games and 121,223 counterfeit mobile phones and their accessories. Cosmetics and perfumes accounted for a far smaller percentage, i.e. 9,430 items.<sup>53</sup> Customs play an essential role in detaining counterfeit goods at the external borders of the EU and importing and exporting counterfeit goods into or from Belgium. Several initiatives have already been taken at national and European level to combat counterfeiting and piracy. These initiatives will therefore be discussed in greater detail in the following points.

Regulation No 608/2013 on customs enforcement of intellectual property rights forms the basis of the harmonised customs procedure.<sup>54</sup> The Regulation principally serves to improve the enforcement of intellectual property rights by the customs authorities and to provide more legal certainty.<sup>55</sup> It is not

<sup>49</sup> OECD and EUIPO, *Dangerous Fakes Trade in Counterfeit Goods That Pose Health, Safety and Environmental Risks* (OECD Publishing 2022) 48, 53.

<sup>50</sup> *ibid* 58.

<sup>51</sup> *ibid* 66.

<sup>52</sup> *ibid* 67.

<sup>53</sup> [FPS Finance, 'FPS Finance Annual Report 2021' \(2021\)](https://www.2021.jaarverslag.financien.belgium.be/pdf/RA2021-NL-20220712.pdf) <<https://www.2021.jaarverslag.financien.belgium.be/pdf/RA2021-NL-20220712.pdf>> accessed 22 August 2022.

<sup>54</sup> *ibid* (n 4).

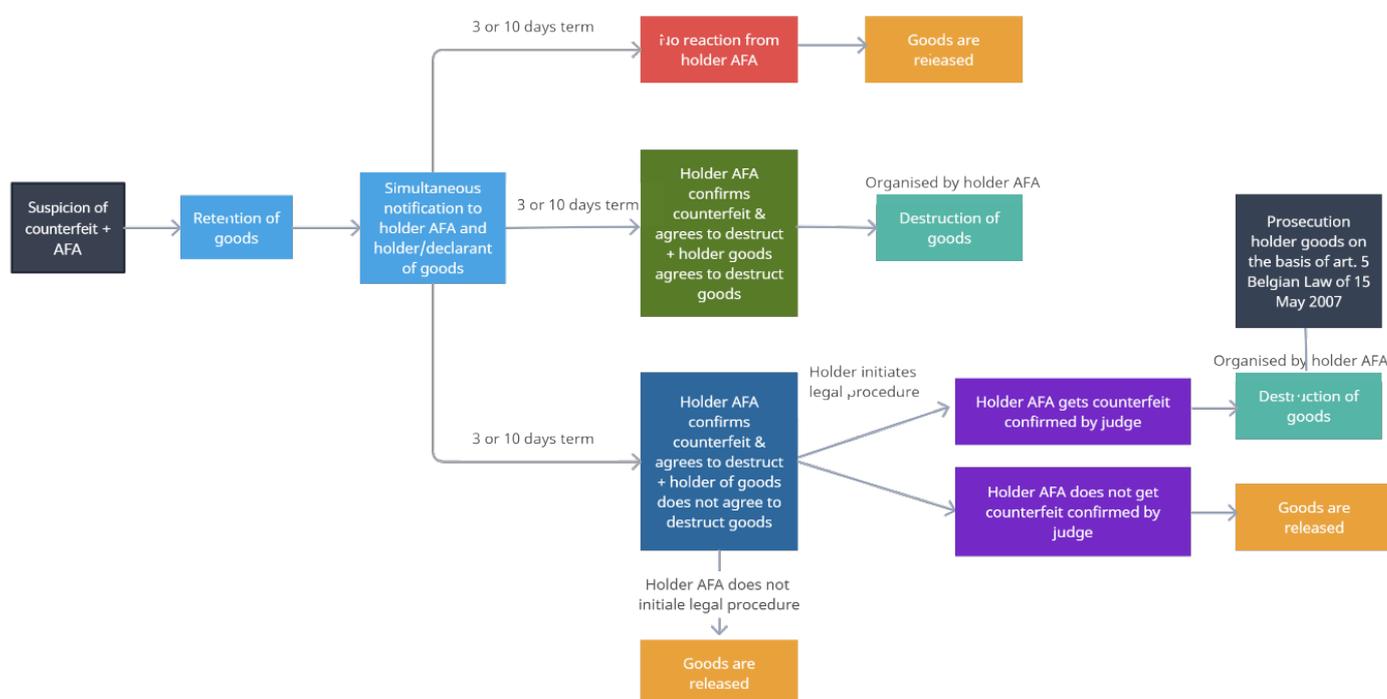
<sup>55</sup> Recital 3, Customs Regulation.

aimed at establishing the existence of infringements of intellectual property rights but at providing procedural rules for customs authorities that are uniform throughout the European Union.<sup>56</sup> The ultimate goal is to improve cooperation between IPR rightsholders and the customs authorities and make it more efficient in order to optimise enforcement at the external borders of the European Union and within the internal market.<sup>57</sup>

The Belgian customs authorities are responsible for handling applications to take action in respect of infringement submitted by IPR rightsholders. This takes place in a centralised manner and is executed by a single national agency. The actual determination, verification, data registration and handling of procedures involving counterfeit goods takes place at the local level at local and regional offices. For example, there are specialised counterfeit offices at the airports of Zaventem, Bierset and at the seaport of Antwerp.<sup>58</sup>

## Application for action

Figure 4 - Procedural route of a standard intervention based on an application for action



The Customs Regulation provides for a centralised procedure for an application for action (AFA) (at national or EU level) by the customs authorities in respect of enforcement of intellectual property rights. (See Figure 3) The two types of applications (i.e. national or at EU level) can be initiated by the rights-holder, intellectual property collective rights management bodies, professional defence bodies

<sup>56</sup> Recital 10, Customs Regulation.

<sup>57</sup> EUIPO, 'EU enforcement of intellectual property rights: results at the EU border and in the EU internal market 2020'(euiipo.europa.eu, December 2021) <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2021\\_EU\\_enforcement\\_intellectual\\_property\\_rights/2021\\_EU\\_enforcement\\_intellectual\\_property\\_rights%20\\_FullIR\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_EU_enforcement_intellectual_property_rights/2021_EU_enforcement_intellectual_property_rights%20_FullIR_en.pdf)> 13.

<sup>58</sup> Second interview with Belgian Customs (12 April 2023).

representing the interests of certain groups and product groups.<sup>59</sup> However, the latter relates to breeder's rights, which falls outside the scope of this study. Furthermore, licence holders can also submit an application, however, only if this relates to a national application.<sup>60</sup> In the event of an exclusive licence that covers two or more Member States, a Union application can likewise be submitted by the exclusive licence holder.<sup>61</sup>

The application form is subject to a number of requirements regarding its content which are set out in Article 6 of the Regulation. For example, there must be information and evidence that demonstrate that the applicant is entitled to submit the application on their own behalf or on behalf of the holder of the valid intellectual property rights as well as the necessary information for customs to be able to assess the risk of infringement.<sup>62</sup> These information requirements are crucial for the effective and smooth cooperation between the holder or licence holder of the IPR and the customs authorities.<sup>63</sup>

The applications are then registered in the COPIS database (Anti-counterfeiting and anti-piracy database) of the European Union<sup>64</sup>, which is also used by the customs authorities in Belgium. IPR rightsholders can submit their application electronically (using IPEP) or on paper. The IP Enforcement Portal (IPEP) is a communications system with a dual function: firstly, the portal can be used to submit applications for action and, secondly, it can be used to communicate reports of potential infringements to the competent authorities (e.g. police and customs).<sup>65</sup> The system also works in reverse. For example, if it is the customs authorities who suspect an IP infringement pursuant to Article 5 of the Regulation, they will be able to contact the holders of the IPR about their suspicions using the IPEP.

In Belgium, the customs authorities use COPIS in which the electronic applications submitted through IPEP are retained. There is no national database for national applications for action. Moreover, it is still not mandatory in Belgium to submit an application electronically.<sup>66</sup> The European Union does have plans to make this a legal requirement in the future.<sup>67</sup>

Finally, figures from the EUIPO show that these applications appear to be decreasing at both EU and national level since 2020.<sup>68</sup>

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<sup>59</sup> Art. 3(1) of the Customs Regulation.

<sup>60</sup> Art. 3(2) of the Customs Regulation in conjunction with Recital 14 of the Customs Regulation.

<sup>61</sup> Art. 3(3) of the Customs Regulation.

<sup>62</sup> Art. 6 of the Customs Regulation.

<sup>63</sup> EUIPO, 'EU enforcement of intellectual property rights: results at the EU border and in the EU internal market 2020' (2021) <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2021\\_EU\\_enforcement\\_intellectual\\_property\\_rights/2021\\_EU\\_enforcement\\_intellectual\\_property\\_rights%20\\_FullR\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_EU_enforcement_intellectual_property_rights/2021_EU_enforcement_intellectual_property_rights%20_FullR_en.pdf)> 13.

<sup>64</sup> *ibid* 12.

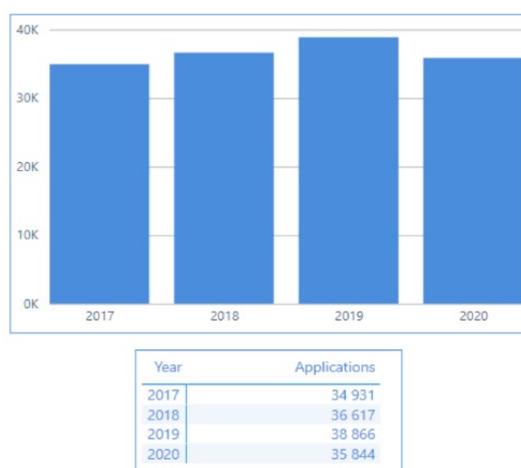
<sup>65</sup> *ibid*.

<sup>66</sup> Second interview with Belgian Customs (12 April 2023).

<sup>67</sup> See *supra*.

<sup>68</sup> EUIPO (n 67) 13-14.

Chart 5 - Number of applications to take action in EU 2017-2020



Source: EUIPO, 'EU enforcement of intellectual property rights: results at the EU border and in the EU internal market 2020' (2021).

### Destruction of goods (Article 23)

The Customs Regulations goes quite far with regard to the possibility of destruction of goods. Under the Regulation, a suspicion of infringement is sufficient to have the goods destroyed, i.e. infringement need not be established. This makes this customs measure preventive in nature.<sup>69</sup> Nevertheless, there are 3 conditions attached to the destruction.

First of all, the holder of the AFA must confirm in writing within 10 or 3 days (in the case of perishable goods) their conviction that an intellectual property has been infringed. Secondly, they must confirm their agreement with the destruction of the goods. Finally, the declarant of the goods must likewise agree to the destruction of the goods. In principle, this means renouncing their claim on the goods. In addition, in such cases, a specific deadline applies for this party to provide either consent or indicate their opposition and in the absence of a timely response, implicit consent is presumed.<sup>70</sup> If these conditions are not fulfilled, the goods shall be released.<sup>71</sup>

If the holder of the goods does not waive their claim on the goods and the holder of the AFA decides to initiate legal proceedings within the deadline of 10 or 3 days for a court to confirm the counterfeiting, the AFA holder must notify the customs authorities. If they do not, the goods will be released. In the event that the court has determined that an IP right has been infringed, customs will permanently seize the goods and they will be destroyed under the responsibility of the holder of the AFA and under the supervision of the customs authority<sup>72</sup>

Goods intended for destruction are subject to a number of prohibitions. For example, the goods may not be brought out of the customs territory of the EU, nor may they be released for free circulation, with exceptions under the conditions of awareness-raising, training and educational purposes.<sup>73</sup>

<sup>69</sup> Recital 19, Customs Regulation.

<sup>70</sup> Art. 23 of the Customs Regulation.

<sup>71</sup> *ibid.*

<sup>72</sup> Art. 23(3)-(5) of the Customs Regulation; Interview with Belgian Customs (2 September 2022).

<sup>73</sup> Art. 25 of the Customs Regulation.

## Detention of the suspected infringing goods

### Notification in the event of suspicion with application for action

First and foremost, there is the option for the customs authorities to detain goods suspected of infringing intellectual property rights for which an application for action has been granted.<sup>74</sup> The customs authorities must notify both the declarant and the holder of the AFA of such detention on the same day.<sup>75</sup> In the event that notification of the holder of the goods is elected and there are multiple holders, then notifying one of these holders is sufficient.<sup>76</sup> This notification will contain information regarding the procedure for the destruction of the goods in accordance with Article 23 of the Customs Regulation<sup>77</sup>.

### Notification in the event of suspicion without an application to take action

Figure 5 - Procedure in the event of suspicion before an application has been granted

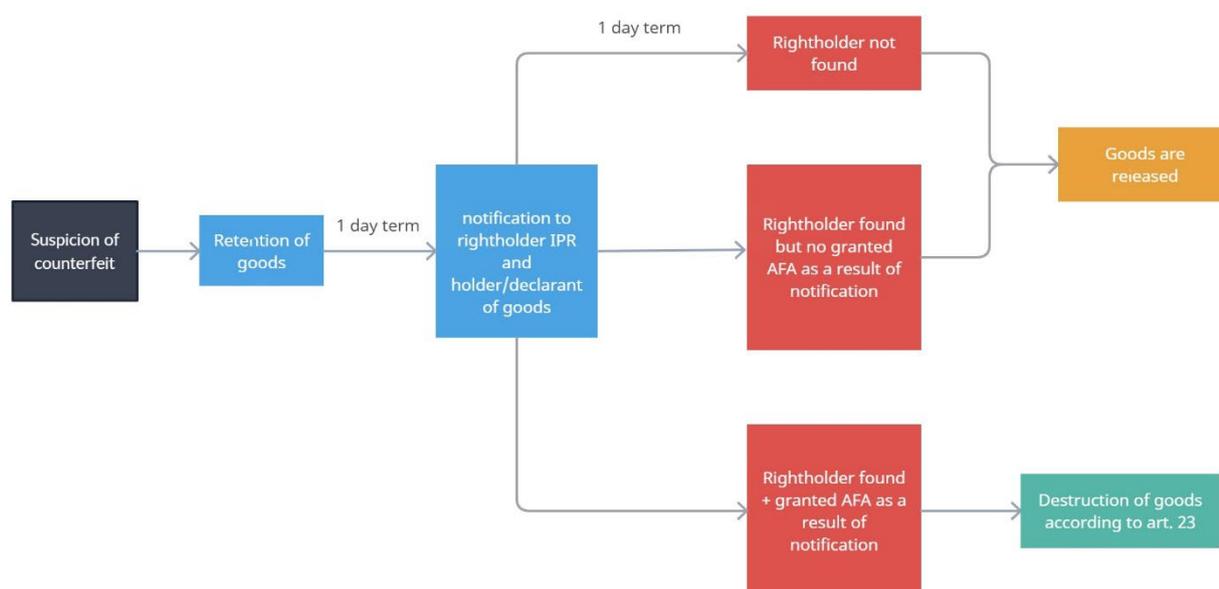


Figure 5 shows how the customs authorities can also detain the suspected infringing goods without an approved application for action. This will not be possible in the case of perishable goods.<sup>78</sup> In such cases, the rightsholder of the IPR must be found within 1 working day.<sup>79</sup> In order to identify the IP rightsholder, the customs authorities may rely on other competent government authorities.<sup>80</sup> In this case, similarly, the notification will state the intention to destroy the goods in accordance with Article 23 of the Customs

<sup>74</sup> Art. 17 (1)-(2) of the Customs Regulation.

<sup>75</sup> Art. 17 (3) of the Customs Regulation.

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

<sup>78</sup> Art. 18(1) of the Customs Regulation.

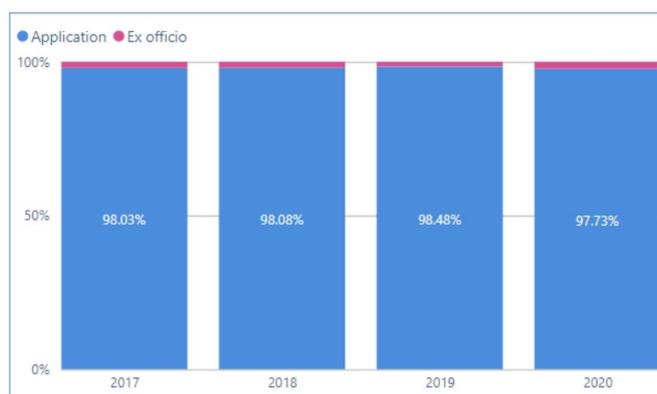
<sup>79</sup> Art. 18(4) (a) of the Customs Regulation.

<sup>80</sup> *ibid.*

Regulation.<sup>81</sup> If the rightsholder has submitted a national application<sup>82</sup> no later than 4 days<sup>83</sup> after notification by the customs authorities, the customs authorities have two working days to investigate this application and grant the application or not.<sup>84</sup> The goods will be released if the customs authorities are unable to find the rightsholder of the IPR within one working day or if no application to take action was submitted or granted following notification.<sup>85</sup>

Figures show that this *ex officio* procedure is still the exception. Most customs actions are still based on applications for action rather than on the initiative of the customs authority if it suspects there may be an infringement of IPR. The EUIPO does indicate that the number of interventions on independent initiative is slowly rising. However, in 44% of these *ex officio* procedures, the goods were released due to the fact that the holder of the IPR could not be timely identified or there was no AFA submitted or granted within the timeframe as set out above.<sup>86</sup>

Chart 6 - Number of procedures in EU based on intervention type 2017-2020



Source: EUIPO, 'EU enforcement of intellectual property rights: results at the EU border and in the EU internal market 2020' (2021)

<sup>81</sup> *ibid.*

<sup>82</sup> Art. 5(3) (b) of the Customs Regulation.

<sup>83</sup> Art. 5(3) (a) of the Customs Regulation.

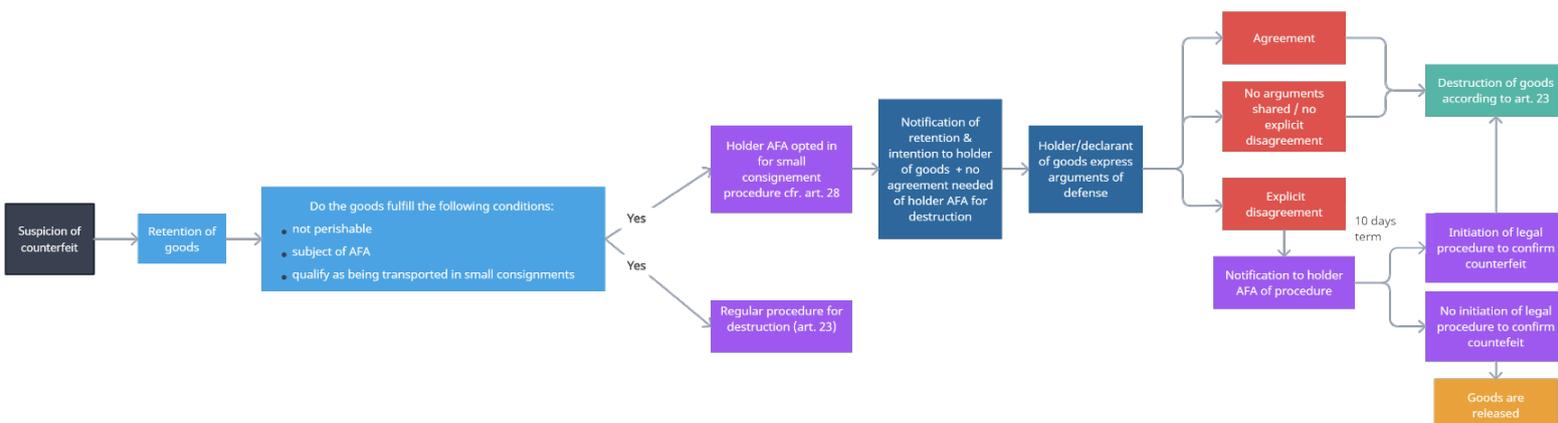
<sup>84</sup> Art. 9(2) of the Customs Regulation.

<sup>85</sup> Art. 18(4) - (5) of the Customs Regulation.

<sup>86</sup> EUIPO (n 67) 14-15.

## Destruction of goods in small consignments (Article 26)

Figure 6 - Procedure for the destruction of goods in small consignments



There is a separate procedure (see Figure 6) for the destruction of goods in small consignments which represents an attempt to significantly reduce the administrative costs and burden<sup>87</sup> and to tackle counterfeit products sent by postal or express courier more efficiently. Under this procedure, the counterfeit or pirated goods can be destroyed by the customs authorities without the explicit consent of the holder of the AFA.<sup>88</sup> A 'small consignment' is defined as a 'a postal or express courier consignment, which: (a) contains three units or less; or (b) has a gross weight of less than two kilograms.'<sup>89</sup>

In order for the procedure to be initiated, the consignment must meet five cumulative conditions. Firstly, the goods must be suspected of being counterfeit or pirated goods. Secondly, the goods must not be perishable goods. Thirdly, the goods must be covered by a decision granting an application. Fourthly, the holder of the AFA must have requested the use of the procedure. Finally, the goods must relate to a small consignment as defined in the foregoing.<sup>90</sup> The figures from the EUIPO show that at present one third of application relate to an application for the use of this procedure.<sup>91</sup>

Within this procedure, notification of the holder or declarant of the goods must similarly take place. This notification must clearly reflect the intentions of the customs authorities to destroy the goods as well as the rights of the declarant or holder of the goods. These rights, for example, include expressing his or her point of view within a deadline set out by law.<sup>92</sup> In the absence of a response, agreement regarding the destruction of the goods may likewise be assumed.<sup>93</sup> If an objection is nevertheless raised, the holder of the AFA will be informed immediately. Notification will be accompanied by information regarding the number of goods and the nature of the goods and potentially images if appropriate.<sup>94</sup> At the request of the holder of the AFA, personal information may also be requested from consignees, the consignor and the declarant or holder of the goods.<sup>95</sup>

<sup>87</sup> Recital 17, Customs Regulation.

<sup>88</sup> *ibid.*

<sup>89</sup> Art. 2(19) of the Customs Regulation.

<sup>90</sup> Art. 26(1) of the Customs Regulation.

<sup>91</sup> EUIPO (n 67) 21.

<sup>92</sup> Art. 26(5) of the Customs Regulation.

<sup>93</sup> Art. 26(6) of the Customs Regulation.

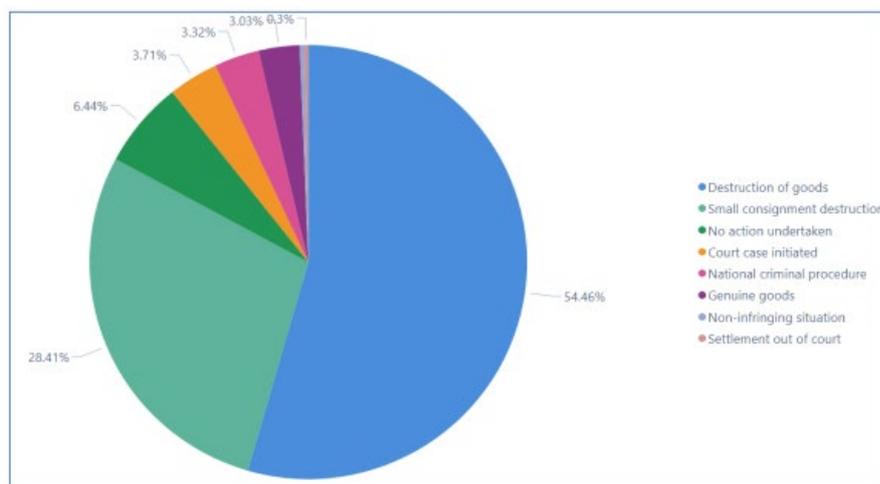
<sup>94</sup> Art. 26(8) of the Customs Regulation.

<sup>95</sup> *ibid.*

The goods must be released if, within the legal period of 10 days of notification regarding objection against the destruction, the holder of the AFA has not notified the customs authorities that it has initiated a substantive procedure to determine whether an intellectual property right has been infringed.<sup>96</sup> However, this does not mean that the goods cannot be detained under other legislation<sup>97</sup>, such as under sector-specific legislation regarding product safety.<sup>98</sup>

Figures from the EUIPO show that the majority of goods that are detained are destroyed under the standard destruction procedure or under the procedure for the destruction of goods in small consignments. Holders of the IPR not taking steps against the goods or initiating a civil case or criminal case in connection with the goods occurs to a lesser extent.<sup>99</sup>

Chart 7 - Outcomes or interventions by customs authorities in 2020



Source: EUIPO, 'EU enforcement of intellectual property rights: results at the EU border and in the EU internal market 2020' (2021)

### Customs offence prosecution

If the holder or the declarant of the goods does not waive his claims on the goods by consenting to the destruction of the goods, legal proceedings (civil or criminal) must therefore be initiated by the holder of the AFA within the period outlined above. Notifying the customs authorities that such proceedings have been initiated means that the goods will not (yet) be released. If a court subsequently determines that an IP right has been infringed by counterfeiting, the holder or declarant of the counterfeit goods can be prosecuted for violating the customs offence outlined in Art. 5 of the Anti-piracy Act, which is punishable by a fine of half the value up to the full value of the goods.<sup>100</sup> A mere suspicion will not be enough for

<sup>96</sup> Art. 26(9) of the Customs Regulation.

<sup>97</sup> EUIPO (n 67) 21.

<sup>98</sup> See *supra*.

<sup>99</sup> *ibid* 22.

<sup>100</sup> Art. 25 of the Customs Regulation in conjunction with Art. 5 of the Anti-Piracy Act in conjunction with Art. 231(2) of the General Law on Customs and Excise of 18 July 1977; Article 25 of the Customs Regulation is the transposition of former Art 16 of the Council Regulation No 1383/2003/EC.

the person to be prosecuted.<sup>101</sup> In the case of a repeat offence, these penalties may be doubled.<sup>102</sup> Attempting this customs offence is likewise punishable in accordance to Art. 5(3) of the Anti-piracy Act.

It should be noted that in most cases (99%) rights to these goods are waived, as a result of which customs no longer have a legal basis to prosecute under the Anti-Piracy Act.<sup>103</sup> As a result, there is no official conviction and repeat offence is not discouraged despite the legal provision of more severe penalties available for repeat offenders. Once caught, the offender is likely to make use of the option of waiving his rights to the goods without any other consequences (with the exception of bearing the costs of destruction if the holder or declarant of the goods can be found and is solvent).

Nevertheless, data is retained in two cases. With regard to shipments coming in from outside the EU, the risk assessment service of the Belgian authorities will retain the data in a database of persons and companies who have previously been caught for or are suspected of infringements on intellectual property rights. In this way, all future consignments of these individuals can be detained.<sup>104</sup>

The Investigations Service (Administratie Opsporingen) of the Belgian customs authorities similarly have their own database containing data on offenders.<sup>105</sup> Whether this database is shared with other authorities (such as police services, FPS Economy, public prosecutors, etc.) is unclear

### Liability of the holder of the AFA and costs

The holder of the AFA will be liable for any damage resulting from any discontinued detention or destruction procedure arising due to an act or omission on his part. Failure to comply with the rules regarding samples taken will likewise lead to liability on the part of the holder of the AFA. Finally, the holder of the AFA will also be liable for any damage suffered as a result of the procedure towards the holder or declarant of the goods if it subsequently is determined in the substantive proceedings that there was no infringement of the IPR.<sup>106</sup>

The costs of the detention procedure (e.g. storage, handling of the goods, etc.) and destruction are always borne by the holder of the AFA. The holder of the AFA can in principle recover the costs from the offender<sup>107</sup> but in practice they appear to be borne by the holder of the IPR in most cases. This means that only those who are able financially bear the costs of the destruction procedure are effectively able to tackle counterfeiting. In other cases, counterfeit goods will simply continue to flow in and circulate on the internal (Belgian) market.

Tackling counterfeit goods circulating on the Belgian market.

EUIPO statistics shows that there is an ongoing trend where it is not the customs authorities that detect that majority of the goods for detention for counterfeiting or piracy, but rather the authorities who are responsible for combating counterfeiting and piracy within the internal market<sup>108</sup>, except for Member States such as Malta, Poland and the Czech Republic where the statistics do not reflect this. In Belgium,

<sup>101</sup> Interview with Belgian Customs (2 September 2022).

<sup>102</sup> Art. 5(2) of the Act of 15 May 2007.

<sup>103</sup> Interview with Belgian Customs (2 September 2022).

<sup>104</sup> Second interview with Belgian Customs (12 April 2023).

<sup>105</sup> Ibid.

<sup>106</sup> Art. 28 of the Customs Regulation.

<sup>107</sup> Art. 29 of the Customs Regulation.

<sup>108</sup> EUIPO (n 67) 43.

it is FPS Economy that is responsible for this and in Belgium likewise the majority of counterfeit goods appear to have been detected on the Belgian market, after which they are seized and destroyed.<sup>109</sup> The relevant provisions are set out in the Belgian Code of Economic Law and the Belgian Judicial Code (*Gerechtelijk Wetboek*).

## Public law provisions in the Code of Economic Law

### Definition of counterfeiting as an offence

#### *General*

Art. XV.103 of the Code of Economic Law stipulates that a person is guilty of the offence of counterfeiting if he commits a (1) violation of intellectual property rights (2) in the course of business (3) with malicious or fraudulent intent. These intellectual property rights relate to industrial rights, i.e. trademark law, breeder's rights, patent law and supplementary protections certificate infringements and design law as determined by specific treaties and conventions (e.g. the Benelux Convention on Intellectual Property<sup>110</sup> in the case of trademarks) or the specific provision(s) of the Code of Economic Law<sup>111</sup>. The material elements are always therefore equated with civil law infringements of intellectual property rights. This offence is penalised with the highest level of sanctions (level 6) of the Code of Economic Law, i.e. a criminal fine of a minimum of 500 EUR up to a maximum of 100,000 EUR or 6% of total annual turnover of the most recently closed financial year prior to the imposition of the fine if this would result in a higher amount or a custodial sentence between one and five years or one of those sentences alone.<sup>112</sup>

Anyone who unlawfully and with fraudulent or malicious intent pretends to be the holder of one of the rights listed in the above will also be penalised, however with a less severe sanction<sup>113</sup>, i.e. a criminal fine of a minimum amount of 26 euros up to a maximum amount of 5,000 euros or up to 4% of annual turnover in the most recently closed financial year prior to the imposition of the fine if this were to be a higher amount.<sup>114</sup>

The offence of piracy in Art. XV.104 of the Code of Economic Law (e.g. counterfeiting of works subject to copyright and works infringing on related rights) is similarly penalised with level 6 sanctions.<sup>115</sup> This specifically concerns the deliberate circumvention of technical measures to protect copyright<sup>116</sup>, infringements of the rules of collective copyright management<sup>117</sup> and maliciously or fraudulently committing a copyright violation, including a violation of the moral right of attribution, knowingly renting, selling stocking or importing goods for commercial purposes that constitute copyright infringement.<sup>118</sup> The offence of counterfeiting related to computer programmes<sup>119</sup> and databases<sup>120</sup> is also penalised but will not be discussed further.

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<sup>109</sup> *ibid.*

<sup>110</sup> Art. 2.20(1) (a) – (c) of BCIP.

<sup>111</sup> E.g. Art. XI.32, XI.33, XI.34 (1), and XI.36 of the Code of Economic Law with regard to patents.

<sup>112</sup> Art. XV.70, para 1 6° of the Code of Economic Law.

<sup>113</sup> Art. XV.107 of the Code of Economic Law.

<sup>114</sup> Art. XV.70, para 1 1° of the Code of Economic Law.

<sup>115</sup> Art. XV.104 of the Code of Economic Law.

<sup>116</sup> Art. XI.291, §1 of the Code of Economic Law.

<sup>117</sup> Art. XI.292 of the Code of Economic Law.

<sup>118</sup> Art. XI.293 of the Code of Economic Law.

<sup>119</sup> Art. XV.105 of the Code of Economic Law.

<sup>120</sup> Art. XV.106 of the Code of Economic Law.

### *Elements to be proven in addition to violation of the IPR*

Prosecution of counterfeiting requires proof of the moral element that is harmonised when dealing with physical counterfeit goods.<sup>121</sup> Fraudulent intent is defined in parliamentary papers as ‘the will to provide oneself or another party with an unlawful, even non-financial and indirect advantage’.<sup>122</sup> According to the explanatory notes to the Bill, this would not require too much effort from the public authorities to prove. The evidence can already be established during checks taking into account the specific circumstances of the situation.<sup>123</sup> Profit motive is sufficient to prove this: actual profit or loss does not need be demonstrated.<sup>124</sup> Malicious intent is defined as ‘the will to harm the material or immaterial interests of the rights-holder’<sup>125</sup> and often coincides with fraudulent intent, however, the presence of both types of intent is not required for the application of criminal proceedings.<sup>126</sup>

Secondly, there is the material element of ‘in the course of business’ for Art. XV.103 of the Code of Economic Law and ‘for commercial purposes’ in Art. XV.104 of the Code of Economic Law (relating to piracy) when it comes to selling, renting, etc. Both requirements prevent that individuals who violate an intellectual property right without a profit motive can be prosecuted. This is remarkable given that the legislator is aware that the vast majority of the counterfeit trade is financed by consumer purchasers who are very aware that they are purchasing counterfeit goods. Instead of a repressive approach, the legislator decided to focus on awareness-raising campaigns to educate ordinary citizens about the economic damage caused by counterfeiting.<sup>127</sup>

It is of particular importance that if the intellectual property right (e.g. trademark, patent, design...) underlying the counterfeit product has been declared invalid, has lapsed or has been abolished as a result of a final judicial decision or an administrative decision or by the volition or negligence of the holder of the intellectual property right, no penalty can be imposed for acts committed after the date of the nullity, lapse or invalidity of the right.<sup>128</sup> The statute of limitations for criminal proceedings may also be suspended on the basis of the validity of the intellectual property right.<sup>129</sup>

### **Powers of Customs and FPS Economy in detection and investigation of counterfeiting**

The FPS Economy<sup>130</sup> and the Belgian customs authorities<sup>131</sup> have been given certain general and specific powers under the Code of Economic Law with regard to the supervision and detection and determination of infringements in the Code of Economic Law. At FPS Economy, these are the officials of the Directorate

<sup>121</sup> André Decourrière, *Droits intellectuels : contentieux de la validité et de la contrefaçon* (Luik, Wolters Kluwer Belgium 2020) 746.

<sup>122</sup> Draft on the punishment of counterfeiting and piracy of intellectual property rights, *Parliamentary Papers*, Chamber 2006-2007, n. 2852, 36.

<sup>123</sup> *ibid.*

<sup>124</sup> Corr. West-Vlaanderen (afd. Brugge), 18 April 2018, *Jaarboek Marktpraktijken* 2018, afl. 1, (875) 875.

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid.*

<sup>127</sup> Draft on the punishment of counterfeiting and piracy of intellectual property rights, *Parliamentary Papers*, Chamber 2006-2007, n. 2852 37.

<sup>128</sup> Art. XV.111, §1 of the Code of Economic Law.

<sup>129</sup> Art. XV.111, para 2 subpara 2 of the Code of Economic Law.

<sup>130</sup> Art. XV.2, para 1 Code of Economic Law.

<sup>131</sup> Art. XV.25/1 of the Code of Economic Law.

General for Economic Inspection, Inspectorate of the Federal Public Service Economy, SMEs, Self-Employed and Energy who were appointed by Ministerial Decree of 25 April 2014.

Art. XV.3 of the Code of Economic Law assigns a number of general powers to FPS Economy and Customs, which are powers that do not specifically contribute to the fight against counterfeiting or piracy, but which are still very applicable in combating counterfeiting. These general powers are specified by Art. XV.22 up to Art. XV.25/3 in the context of the fight against counterfeiting and piracy.

#### Inspection and searches of means of transport (special inspection authorisation)

One of the initial powers relates to gaining access to locations and means of transport that officials of FPS Economy and Customs believe to contain goods that infringe on the intellectual property rights, insofar as this is reasonably permitted.<sup>132</sup> During this type of search or inspection of the vehicle, all documents, information, papers, books, etc. may be requisitioned.<sup>133</sup> In the event that the search relates to an inhabited property, the search or inspection will also require authorisation from the Examining Magistrate.<sup>134</sup> If the information request through these enquiries is accessible via a computer system or through any other electronic device, they may request that this data be presented in a legible and intelligible format in a form stipulated at their discretion against delivery of a receipt.<sup>135</sup> However, in the context of an investigation into counterfeiting and piracy, it will again be required that there should be compelling indications of an infringement of an intellectual property right.<sup>136</sup>

Nevertheless, if the official in charge assumes – and is reasonably permitted to do so – that counterfeit goods or goods acquired by piracy are present in the vehicle, then he or she may even detain the vehicle and request the necessary assistance to examine the means of transport correctly according to their nature and quantity. If it is not possible to inspect the load of the vehicle in situ, this official will also be able to order that the load be transferred to another location where verification can take place. The relevant costs will always be recovered from the transporter insofar as counterfeiting or piracy is established.<sup>137</sup>

This inspection authorisation gives FPS Economy (and Customs) a significant advantage, i.e. in the circumvention of lengthy procedures that are applied during regular investigations. In this case, authorisation from the Examining Magistrate will still be required for a search of a property or of a vehicle, however the investigation will not be qualified as a ‘judicial investigation’, as a result of which a large number of formalities will not have to be met.<sup>138</sup>

#### General investigative measures (opening packages, interviews, inspections, identification of perpetrators...)

In the context of counterfeiting and piracy, all necessary searches<sup>139</sup>, inspections<sup>140</sup> and interviews<sup>141</sup> may be carried out.

<sup>132</sup> Art. XV.22, para 1 Code of Economic Law.

<sup>133</sup> Art. XV.3, 5° of the Code of Economic Law.

<sup>134</sup> Art. XV.4 of the Code of Economic Law.

<sup>135</sup> Art. XV.3, 5° of the Code of Economic Law.

<sup>136</sup> Art. XV. 22, para 2 of the Code of Economic Law.

<sup>137</sup> Art. XV. 25 of the Code of Economic Law.

<sup>138</sup> Interview with Public prosecutor's office Halle-Vilvoorde (23 November 2022).

<sup>139</sup> Art. XV.3, 2° of the Code of Economic Law.

<sup>140</sup> *ibid.*

<sup>141</sup> Art. XV.3, 3° of the Code of Economic Law.

In addition, parcels, boxes, barrels and all other types of packaging may be opened and searched<sup>142</sup> if the officials of FPS Economy and Belgian Customs believe that these are subject to an infringement of an intellectual property right.<sup>143</sup> Furthermore, the findings in the context of an investigation into counterfeiting and piracy can be established through the creation of visual and audio material, provided the necessary authorisation has been granted by the Examining Magistrate, in the case of inhabited properties.<sup>144</sup> With regard to the suspected perpetrators of the offence or other persons involved, identification measures can be requested of these persons free of charge.<sup>145</sup>

In relation to e-commerce and counterfeiting, we wish to note the power to make test purchases of the contested goods or service online, if necessary, using a fictitious identity. In such cases, officials may pose as (potential) customers without having to disclose their true identity and capacity as well as without having to disclose that certain findings have been made.

Finally, inventories can be drawn up or directed to be drawn up. Under certain conditions determined by Royal Decree<sup>146</sup> samples can be taken (in order to determine the composition of the product) and necessary tests, inspections, etc. can be carried out on the goods and services in question.<sup>147</sup>

### Seizure

A significant power of officials is the possibility of seizure set out in Art. XV.23 of the Code of Economic Law in conjunction with Art. XV.5 of the Code of Economic Law if there is a suspicion that the goods violate intellectual property rights. This seizure takes place at the risk of the owner, holder or the consignee of the goods.<sup>148</sup> The seizure has a broad scope and does not only involve the counterfeit goods themselves but also the means of transport, equipment, tools and other objects that led to committing the infringement. Seizure can also be imposed on goods owned by a third party.<sup>149</sup> It also includes the possibility of premises to be sealed if officials deem this to be necessary to provide evidence of an infringement or if there is a risk that the infringement will continue or new violations will be committed through the use of the goods present on the premises.<sup>150</sup>

In contrast to seizure or the use of seals for other infringements of the Code of Economic Law, seizure or the use of seals in the context of an investigation into counterfeiting or piracy cannot simply be lifted at any time by the Public Prosecutor's Office (Openbaar Ministerie), even if it ordered or confirmed that intervention itself and even if the offender has waived its rights to the goods and is no longer offering them in a manner that led to the investigation.<sup>151</sup> A judicial decision of acquittal or simple dismissal with effect of *res judicata* will automatically result in the suspension of the intervention.<sup>152</sup>

The costs for the retention of the seized goods are recovered in accordance with a cascade system. First and foremost, the owner of the goods will be required to past the costs. If the owner has no assets or is

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<sup>142</sup> Art. XV.3, 4° of the Code of Economic Law.

<sup>143</sup> Art. XV.22, para 2 of the Code of Economic Law.

<sup>144</sup> Art. XV.4 of the Code of Economic Law.

<sup>145</sup> Art. XV.3, 5/1° of the Code of Economic Law.

<sup>146</sup> See Royal Decree of 25 March 2016 regarding the taking of samples, as provided for in Art. XV.3, 7° of the Code of Economic Law, *Official Gazette* 12 April 2016.

<sup>147</sup> Art. XV.3, 8° of the Code of Economic Law.

<sup>148</sup> Art. XV.23 of the Code of Economic Law.

<sup>149</sup> Art. XV.5, para 1 Code of Economic Law.

<sup>150</sup> Art. XV.5, para 2 Code of Economic Law.

<sup>151</sup> Art. XV.24 in conjunction with XV 5, para 4 of the Code of Economic Law.

<sup>152</sup> Art. XV.5 of the Code of Economic Law.

simply unknown, the holder of the goods, the consignee and the rights-holder of the intellectual property rights that have been infringed by the counterfeiting practices will jointly and severally bear the costs.<sup>153</sup>

The owner or holder of the goods, the rights-holder of the infringed intellectual property rights or any third party who claims to be entitled to the goods may be appointed by the Public Prosecutor as a judicial custodian.<sup>154</sup>

#### Potential measures for online environments (block, deactivate, restrict)

If none of the foregoing measures suffice to halt or prohibit the IPR violation and there is a danger that collective consumer interests could be seriously harmed, officials will be allowed to remove online content or to block/restrict access to such content or show consumers a warning about the (risk of the) sales of counterfeit goods:

- (1) have hosting platforms deactivate, block or restrict access to an online interface;
- (2) order domain registers or registration authorities to delete a fully qualified domain name and
- (3) have the relevant competent authority register that domain name.

These measures must likewise be confirmed by the Public Prosecutor's Office (within 48 hours).<sup>155</sup> However, the company responsible for the online interface will be given the opportunity to respond, and to take the necessary measures to protect the collective interests of consumers from any serious harm, after being informed at least one day (24 hours) in advance of the determination of counterfeiting and/or piracy.<sup>156</sup> This provision is, yet again, highly relevant to the fight against counterfeiting and piracy, in particular with regard to e-commerce. Similarly, the measures may be lifted at any time by the Public Prosecutor's Office<sup>157</sup> e.g. acquittal or dismissal.<sup>158</sup>

#### Powers of the police forces

The police similarly contribute to the fight against counterfeiting. However, this does not appear to take place in a deliberate or targeted manner. Most instances of counterfeiting identified by police officers that end up at the Public Prosecutor's Office or FPS Economy relate to determinations in the context of unrelated counterfeiting procedures.<sup>159</sup> It also appears that not all instances of counterfeiting that are detected are referred to FPS Economy or to the Public Prosecutor's Office because the community police officers have not informed their competent department that they have detected counterfeit goods. In most cases, the officers do not even realise that they are dealing with counterfeits and the goods, for example in a drugs case, are classified as capital gains resulting from drugs offences, after which they are simply confiscated.<sup>160</sup> The officers do not appear to have a sufficient degree of knowledge of what counterfeiting actually entails, of the importance of the fight against counterfeiting despite the fact that it is not a visibly harmful phenomenon and, principally, of what to do if they have identified counterfeiting practices in other cases that are not related to counterfeiting.<sup>161</sup>

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<sup>153</sup> Art. XV.30/1, para 2 subpara 1 of the Code of Economic Law.

<sup>154</sup> Art. XV.30/1, para 2 subpara 3 of the Code of Economic Law.

<sup>155</sup> Art. XV.5/1, para 1 of the Code of Economic Law.

<sup>156</sup> Art. XV.5/1, para 2 of the Code of Economic Law.

<sup>157</sup> Art. XV.5/1, para 4 of the Code of Economic Law.

<sup>158</sup> Art. XV.5/1, para 5 of the Code of Economic Law.

<sup>159</sup> Interview with Public prosecutor's office Halle-Vilvoorde (23 November 2022); Interview with Public prosecutor's office Antwerp (7 December 2022).

<sup>160</sup> Interview with Antwerp Police (8 December 2022).

<sup>161</sup> *ibid.*

The issue of resources is similarly relevant in this instance. The availability of personnel would allow the police to carry out more targeted interventions in areas or locations where counterfeit products are known to be circulating, however, at present there is too little manpower to tackle these issues. At present, due to limited budgets and people, priorities have been shifted to more visible crime.<sup>162</sup>

## Powers of the Public Prosecutor's Office

### Destruction

After FPS Economy has seized goods, the goods that have been seized may be destroyed. This takes place on the authority of the Public Prosecutor (Procureur des Konings) if this should be required for reasons of public safety or if the retention or storage of such goods should constitute a threat to public order. Destruction may likewise be requested if retention or storage should simply be problematic due to the volume or nature of the goods or due to the manner in which they are stored. However, this is only possible if no third party comes forward to claim the goods within one month after seizure was imposed by means of recovery. However, in the case of goods with a limited best-before date, this period is shortened from one month to 15 days.<sup>163</sup>

The Public Prosecutor may also require that the owner or the holder of the goods that have been seized or the rights-holder of the intellectual property rights that have been violated be held personally responsible for the destruction of the relevant goods.<sup>164</sup> The costs of destruction are recovered in accordance with a cascade system in the same way as for storage.<sup>165</sup> One general remark that should be made in this regard is that in many cases the costs will ultimately be recovered from the rights-holder or the State, given that the owner of the goods can often not be identified. Parties will regularly provide false information, which leads the authorities to a dead end.<sup>166</sup>

### Disposal as an alternative to destruction

By way of derogation from the destruction of goods, the Public Prosecutor may also opt to have the goods disposed of. The disposal procedure<sup>167</sup> can only be initiated if the rights-holder of the intellectual property rights does not suffer any damage as a result.<sup>168</sup> This likewise requires an accurate description of the goods. The taking of samples is likewise permitted in this instance.<sup>169</sup>

### Provisional closure

The Public Prosecutor's Office can also order the temporary closure of the offender's company or establishment if counterfeiting and piracy have been detected. In principle, the closure period may not exceed the date on which a court rules on the infringement.

If this measure is elected, FPS Economy can no longer choose to apply the transaction procedure.<sup>170</sup>

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<sup>162</sup> *ibid.*

<sup>163</sup> Art. XV.30/1, para 1 subpara 1 of the Code of Economic Law.

<sup>164</sup> Art. XV.30/1, para 1 subpara 2 of the Code of Economic Law.

<sup>165</sup> Art. XV.30/1, para 1 subpara 3 of the Code of Economic Law.

<sup>166</sup> Interview with FPS Economy (6 September 2022); Interview with ABAC-BAAN (25 November 2022).

<sup>167</sup> Art. 28octies, para 1, 1° of the Code of Criminal Procedure.

<sup>168</sup> Art. XV.30/1, para 1 subpara 2 of the Code of Economic Law.

<sup>169</sup> Art. XV.30/1, para 1 subpara 3 of the Code of Economic Law.

<sup>170</sup> Art. XV.30, paras 1 and 2 of the Code of Economic Law.

## Coordination and follow-up between various authorities

In their fight against counterfeiting, officials of FPS Economy and Customs may call on all the agencies of the State to collect information and documents necessary to identify and determine counterfeiting practices.<sup>171</sup> In addition, they can request the assistance of the local and federal police, judicial experts and experts recognised by the Minister in special matters to guarantee or verify the measures outlined in the foregoing or to establish the nature and the circumstances of an infringement.<sup>172</sup> If a judgment or decision of the court has been issued, it must be notified to the Intellectual Property Office (*'Dienst voor de Intellectuele Eigendom'*) by the registrar of the competent court. A number of formalities are associated with this procedure.<sup>173</sup>

There are a number of specific legal provisions for combating counterfeiting and piracy, which relate to information that can be shared that enables repressive or preventive interventions; information on new methods used to carry out counterfeiting or piracy activities; and finally, information collected by the competent authorities and public services through their observations and the results obtained as a result of new methods and techniques in the fight against counterfeiting and piracy.<sup>174</sup>

A Committee has been appointed to coordinate efforts effectively, namely the Interministerial Committee on Combating Counterfeiting and Piracy (*'Interministeriële Commissie voor de Bestrijding van Namaak en Piraterij'*).<sup>175</sup> The Committee was established in 2020 and is therefore fairly new.

## Prosecution

When instances of counterfeiting or piracy are detected by Customs or by FPS Economy, there are three potential forms of prosecution (see Figure 6): (1) the administrative transaction procedure, (2) administrative prosecution and (3) criminal prosecution.<sup>176</sup> All forms of prosecution are based on an official report drafted by the officials of FPS Economy.<sup>177</sup>

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<sup>171</sup> Art. XV.32 of the Code of Economic Law.

<sup>172</sup> Art. XV.33 of the Code of Economic Law.

<sup>173</sup> Art. XV.60 of the Code of Economic Law.

<sup>174</sup> Art. XV.59 of the Code of Economic Law.

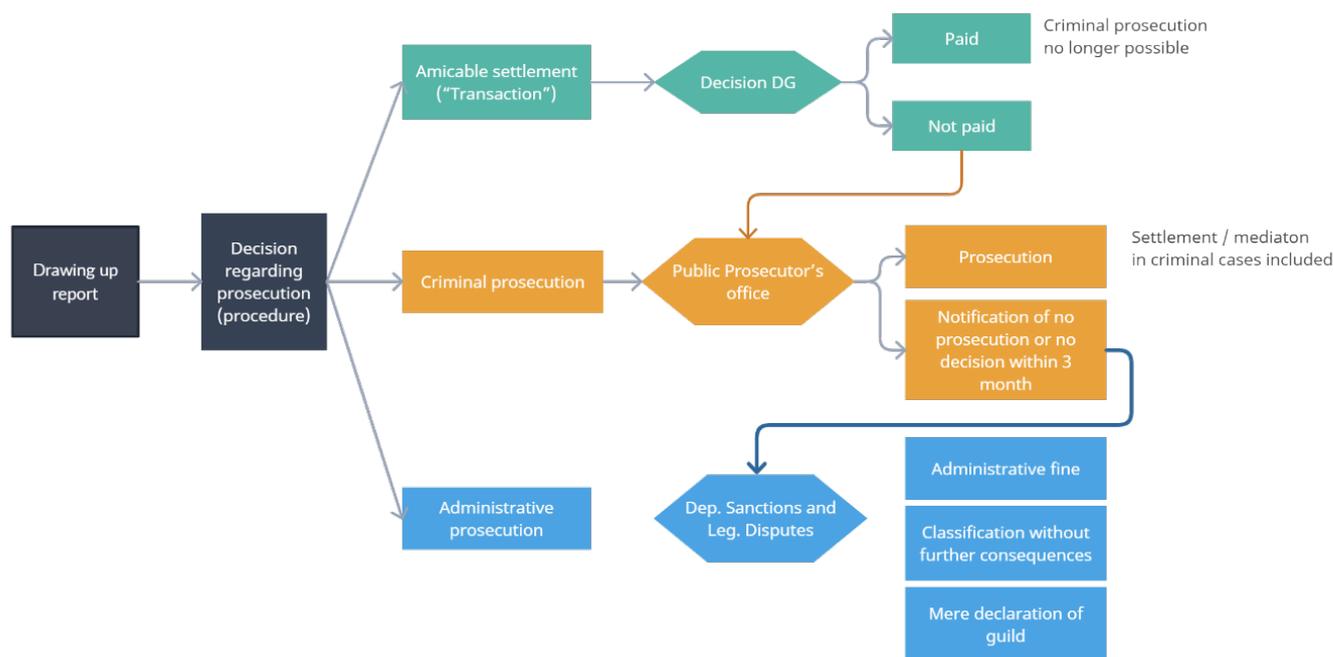
<sup>175</sup> Art. XV.58 of the Code of Economic Law in conjunction with Royal Decree of 4 May 2020 establishing the composition and organisation of the Interministerial Commission for the fight against counterfeiting and piracy for the implementation of the art. XV.58 and XV.59 of the Code of Economic Law, *Official Gazette*, 2 June 2020 (ed. 1).

<sup>176</sup> Art. XV.60/1, para 1 Code of Economic Law.

<sup>177</sup> Art. XV. 60/1, para 2 of the Code of Economic Law.

Figure 7 - Proceedings used after detection of counterfeiting by FPS Economy

Source: FPS Economy (2022). Translated by author for the purpose of this study.



#### Administrative prosecution: administrative fine

Within FPS Economy, the individual services determine whether to select in favour of penalising the infringement through the criminal or administrative route on the one hand and which administrative penalty should be selected (transaction or administrative fine), on the other. These options remain available if the official report is submitted to the Public Prosecutor's Office but it decides not to pursue criminal prosecution of the case.<sup>178</sup> By contrast, the administrative fine will cease to be an option if the Public Prosecutor's Office does choose to pursue criminal prosecution, even if this results in an acquittal. The same applies in the case of an amicable settlement (Art. 216 bis of the Code of Criminal Procedure) or mediation in criminal cases (Art. 216ter of the Code of Criminal Procedure).<sup>179</sup> As such, before a decision can be reached on whether to pursue an administrative procedure, a decision from the Public Prosecutor's Office must have been issued regarding the criminal prosecution of the case. The Public Prosecutor's Office has 3 months to issue such a decision.<sup>180</sup>

In accordance with Art. XV.60/2 of the Code of Economic Law, there are three possible outcomes if an administrative procedure has been pursued: (1) administrative fine, (2) conviction and (3) discontinuation of proceedings.<sup>181</sup> This study will only discuss the administrative fine.

#### Administrative fine

<sup>178</sup> Art. XV. 60/2(2) of the Code of Economic Law.

<sup>179</sup> Art. XV.60/3 of the Code of Economic Law.

<sup>180</sup> Art. XV.69/1 of the Code of Economic Law.

<sup>181</sup> Art. XV.60/2 of the Code of Economic Law.

First of all, only FPS Economy officials who have been designated and authorised by Royal Decree to do so may impose an administrative fine.<sup>182</sup> They must exercise this power with autonomy and impartiality, which equally means that if they have previously had a role in specific a case in another capacity, they may not make decisions in the same case.<sup>183</sup>

If the counterfeiting or piracy offences took place 5 years ago, an administrative fine can no longer be imposed for those offences due to the statute of limitations. However, the 5-year limitation period may be suspended if the Public Prosecutor's Office institutes criminal proceedings and the offender has been issued with a request for a defence statement.<sup>184</sup> In any case, no administrative fine can be imposed before the deadline if the defence statement submission has lapsed.<sup>185</sup> The decision has enforceable effect<sup>186</sup> and must meet certain formal requirements.<sup>187</sup> An appeal may be lodged against an administrative fine.<sup>188</sup>

In terms of the level of the administrative fine, reference is made to the minimum and maximum fines set out in Art. XV.70 of the Code of Economic Law, including applicable surcharges. The limits of the amount therefore correspond to those of the criminal fine for the relevant counterfeiting offence.<sup>189</sup> In terms of the specific determination of the fine, a number of factors, such as the nature, severity, scope and duration of the infringement are taken in account, as well as whether previous infringement was committed by the company, any financial gains were made, etc.<sup>190</sup>

If the offender commits a counterfeiting or piracy offence again with the 5-year period after having already become subject to the administrative procedure, the amount may be increased to twice the maximum amount.<sup>191</sup> In the event of several different infringements involving counterfeiting, the administrative fines may be accumulated if they do not exceed twice the maximum amount of the highest administrative fine.<sup>192</sup> Furthermore, it is possible that a single offence may give rise to several types of counterfeiting offences or several offences have contributed to a single counterfeiting offence, in which case only the administrative fine with the highest administrative fine limit will be applied. In the event that mitigating measures are involved, there is a possibility for the administrative fine to be decreased to below the minimum amount imposed by law.<sup>193</sup>

Administrative prosecution: the transaction procedure cf. Art. XV.62 of the Code of Economic Law etc.

The transaction procedure for counterfeiting and piracy is more appropriate and relates to a special procedure that deviates from the common law transaction procedure set out in Art. XV.61 of the Code of Economic Law. This is because it takes into account the particularities of combating counterfeiting and piracy, such as the removal from circulation on the market of counterfeit goods and the involvement of various parties (e.g. rights-holder of the IPR and the offender).<sup>194</sup> In the Anti-piracy Act, this procedure

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<sup>182</sup> Art. XV.60/4 of the Code of Economic Law.

<sup>183</sup> Art. XV.60/5 of the Code of Economic Law.

<sup>184</sup> Art. XV.60/10 of the Code of Economic Law.

<sup>185</sup> Art. XV.60/11 of the Code of Economic Law.

<sup>186</sup> Art. XV.60/14 of the Code of Economic Law.

<sup>187</sup> Art. XV.60/12 of the Code of Economic Law.

<sup>188</sup> Art. XV.60/15 of the Code of Economic Law.

<sup>189</sup> Art. XV.60/20, para 1 Code of Economic Law.

<sup>190</sup> Art. XV.60/20, para 2 Code of Economic Law.

<sup>191</sup> Art. XV.62/2 of the Code of Economic Law.

<sup>192</sup> Art. XV.62/3 of the Code of Economic Law.

<sup>193</sup> Art. XV.62/5 of the Code of Economic Law.

<sup>194</sup> *ibid* (n 134) 70.

was referred to as the ‘amicable settlement’ as opposed to the current term ‘transaction’.<sup>195</sup> The transaction procedure has the effect that any criminal proceedings are discontinued in exchange for the voluntary payment of a sum of money and on the condition that the offender surrenders the goods in favour of the Treasury. Conversely, this means that if the transaction procedure is not pursued, the official report will be submitted to the Public Prosecutor’s Office for criminal prosecution.<sup>196</sup>

Determining the level of the sum of money and other aspects are set out by Royal Decree<sup>197</sup>. If the goods that are the subject of the infringement of the official report are seized, the resulting storage and destruction costs will result in the amount of money to be paid being increased in accordance with these costs.<sup>198</sup>

There are only two exceptions in which the timely payment of the sum of money does not lead to discontinuation of criminal proceedings: (1) a complaint was submitted to the Public Prosecutor in advance and (2) the Examining Magistrate was asked to investigate whether or not the case was pending before the court. In these cases, the money will be refunded.<sup>199</sup>

The administrative fine discussed previously does not have this effect. The administrative fine ensures that there can be no criminal proceedings. Failure to pay an administrative fine will therefore result in compelled collection instead of criminal prosecution.<sup>200</sup> Only insofar as the Public Prosecutor’s Office decides not to prosecute but is of the opinion that FPS Economy should impose an administrative fine, can an administrative fine be imposed.<sup>201</sup>

## Criminal prosecution under the Code of Economic Law

### *Procedural remark*

The judgment in criminal proceedings for counterfeiting will be postponed if a civil-law injunction has been filed. The judgment can only be issued when the decision in the civil injunction has become final.<sup>202</sup> Additionally, the amounts are likewise doubled in the case of criminal prosecution if recidivism takes place within 5 years of a previous criminal conviction for counterfeiting that has the effect of *res judicata*.<sup>203</sup>

Criminal proceedings may be initiated by an official report submitted by Customs, an official report from FPS Economy or through a compliant from the rightsholder of the IPR or its representative (legal counsel or interest group representative (e.g. ABAC-BAAN or REACT)).<sup>204</sup> In some cases, a criminal investigation will also be initiated by chance discoveries made by the local police (district police).<sup>205</sup>

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<sup>195</sup> *ibid.*

<sup>196</sup> Art. XV.62, para 3 Code of Economic Law.

<sup>197</sup> Royal Decree of 10 April 2014 on the transaction in case of infringement of the provisions of the Code of Economic law and its implementing decrees, *Official Gazette*, 29 April 2014.

<sup>198</sup> Art. XV.62, para 1 Code of Economic Law.

<sup>199</sup> *ibid.*

<sup>200</sup> Interview with FPS Economy (25 November 2022).

<sup>201</sup> Art. XV.60/2, para 2 Code of Economic Law.

<sup>202</sup> Art. XV.71 of the Code of Economic Law.

<sup>203</sup> Art. XV.72 of the Code of Economic Law.

<sup>204</sup> Interview with Public prosecutor's office Halle-Vilvoorde (23 November 2022); Interview with Public prosecutor's office Antwerp (7 December 2022).

<sup>205</sup> *ibid.*

The investigation of counterfeiting cases is very closely linked to the resources that are allocated<sup>206</sup> and which are distributed unevenly across Belgium, meaning that certain Public Prosecutors will proceed to dismiss a case more quickly than others.<sup>207</sup>

### *Material and moral element of the counterfeiting offence*

In this context, we refer to the section 'description of the offence of counterfeiting' as discussed in the above.

### *Various sanctions aimed at deterring counterfeiting offenders*

It is clear that counterfeiting is about profit. As the legislator previously stated in its Explanatory Memorandum to the Anti-Piracy Act, the counterfeiting industry involves a 'low risk/high return' ratio. This principle makes counterfeiting very appealing and lucrative for organised crime groups.

First and foremost, the law provides for the standard custodial sentences and criminal fines<sup>208</sup> which are set at the highest level (level 6) of Art. X.70 of the Code of Economic Law. Opting for levels instead of setting out penalties in the legal provisions allows Art. X.70 of the Code of Economic Law to be amended in the future instead of requiring the amendment of every individual provision.<sup>209</sup>

Secondly, there is the option of confiscation of the goods that are the subject of the criminal proceedings, even if they are the property of a third party.<sup>210</sup> In addition to the counterfeit goods themselves, the production, processing, distribution or transport goods or any other object can likewise be confiscated, even if owned by a third party. There must, however, be a link with the object and the counterfeiting or piracy. For example, the object is used to manufacture the counterfeit goods.<sup>211</sup> The rules regarding special confiscation continue to apply in this case.<sup>212</sup> However, if goods from third parties are involved, the third party will be involved in the proceedings. Confiscation can subsequently only be pronounced if evidence has been provided that the third party acted in bad faith. Furthermore, profits illegally obtained from acts of counterfeiting and piracy may likewise be confiscated.<sup>213</sup>

If confiscation has been elected, the civil party in the case, who will often be the rightsholder of the intellectual property right, may request that the court assigns the confiscated instruments used to carry out the counterfeiting offence to this party insofar as this reasonably takes into account the severity of the infringement.<sup>214</sup> In the case of piracy, this will apply to the revenue of the convicted party as well as the confiscated objects. However, this transferred revenue will be deducted from or amount to maximum the amount of the loss suffered.<sup>215</sup> In terms of the counterfeit goods themselves and other goods that subject to special confiscation, the civil party may submit an application for destruction as long as this is proportionate to the severity of the infringement. This applies even if the goods are the property of a

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<sup>206</sup> *ibid.*

<sup>207</sup> Interview with ABAC-BAAN (25 November 2022).

<sup>208</sup> See art. XV.103 and art. XV.104 of the Code of Economic Law in conjunction with art. XI.293 of the Code of Economic Law

<sup>209</sup> Draft bill inserting Book XI 'Intellectual Property' into the Code of Economic Law and inserting provisions specific to Book XI into Books I, XV and XVII of the same Code, Parliamentary Papers, Chamber 2013-2014, n. 3391/001 69.

<sup>210</sup> Art. XV.130, para 1 Code of Economic Law.

<sup>211</sup> Art. XV.130, para 2 Code of Economic Law.

<sup>212</sup> Art. 42 of the Code of Criminal Law and Art. 43 *quarter* of the Code of Criminal Law

<sup>213</sup> Art. XV.130, para 2 Code of Economic Law.

<sup>214</sup> Art. XV.130/1, para 1 Code of Economic Law.

<sup>215</sup> Art. XV.130/2 of the Code of Economic Law.

third party. The costs incurred for the destruction of the goods will then be recovered from the convicted party.<sup>216</sup>

Thirdly, in the case of counterfeiting and piracy, the courts (of appeal) may also decide that the conviction may be published by the display of notices.<sup>217</sup>

Fourthly, the business of the party convicted of counterfeiting or piracy may also be ordered by the courts (of appeal) to close, either permanently or temporarily and either wholly or in part. The convicted party may also be subject to a permanent or temporary ban on exercising commercial activities.<sup>218</sup>

#### Civil-law remedies to combat counterfeiting practices

Only the FPS Economy, Customs and the Public Prosecutor's Office are able to act to combat counterfeiting, the rightsholder of the IPR that is the object of the counterfeit goods or pirated goods likewise as access to a number of legal remedies. The remedies are set out in both the Judicial Code and the Code of Economic Law.

#### Seizure in counterfeiting cases

##### Scope of application

If an infringement is suspected or anticipated, descriptive seizure in a counterfeiting case<sup>219</sup> can provide the rightsholder with an opportunity to obtain the necessary factual evidence that may assist in initiating an injunction to cease activities. This is why it is also referred to as an 'evidence-gathering procedure'<sup>220</sup>. This procedure is initiated by a unilateral petition to reassure the surprise effect. In essence, an expert is appointed who will identify all necessary objects, documents or methods linked to the counterfeiting. In addition to the possibility of this descriptive seizure, there is also the option for conservatory seizure<sup>221</sup> to be carried out. This type of seizure is intended to ensure that no evidence can be removed or destroyed following the descriptive seizure.<sup>222</sup>

Descriptive seizure is reserved for those parties who are able to submit a counterfeiting claim.<sup>223</sup> As such, this includes not only rightsholder of the infringed IPR, but the (licence) holders, the authorised representatives, the parties involved who have suffered damage, etc. The claimants will largely depend on which intellectual property right(s) has/have been infringed.<sup>224</sup>

There are two noteworthy elements to be mentioned in relation to the scope of application of this procedure. Firstly, holders of foreign intellectual property rights can likewise rely on this procedure. Secondly, the scope of application is not broad enough to allow claims based on a domain name, a patent application or a non-exclusive licensee.<sup>225</sup> This apparent loophole in the law appears to be compensated

<sup>216</sup> Art. XV.130/1, para 2 Code of Economic Law.

<sup>217</sup> Art. XV.131 of the Code of Economic Law.

<sup>218</sup> Art. XV. 131/2 of Code of Economic Law.

<sup>219</sup> Art. 1369bis/1 et seq. of the Belgian Judicial Code.

<sup>220</sup> Judith Bussé, Christian Dekoninck and Jurgen Figys, *Het beslag inzake namaak - een stand van zaken*, (2nd edition, Intersentia, 2020) 1.

<sup>221</sup> Art. 1369bis/1 para 4, first subpara of the Judicial Code.

<sup>222</sup> Judith Bussé, Christian Dekoninck and Jurgen Figys (n 227) 2.

<sup>223</sup> Art. 1369bis/1, para 1 of the Judicial Code.

<sup>224</sup> Judith Bussé, Christian Dekoninck and Jurgen Figys (n 227) 3-7.

<sup>225</sup> Judith Bussé, Christian Dekoninck and Jurgen Figys (n 227) 7.

by the procedure set out in Art. 584(3) of the Belgian Judicial Code where investigative and/or seizure measures with a similar effect can still be obtained via the regular unilateral procedure.<sup>226</sup>

### Specific conditions

In order for the descriptive seizure to be successful, the claimant must demonstrate two aspects. First and foremost, it must demonstrate that it holds an apparent (*prima facie*) legally valid intellectual property right.<sup>227</sup> The burden of proof in this context may be high or low depending on whether the right in question relates to a registered intellectual property right (e.g. trademark as opposed to copyright) or an unregistered one (e.g. copyright).<sup>228</sup> Secondly, the claimant must demonstrate that there are indications that an infringement has been committed or is imminent.<sup>229</sup> The claimant is subject to a special obligation to provide information which means that the requesting party must inform the president of all relevant circumstances. This is to somewhat safeguard the interests of the other party in this unilateral procedure.<sup>230</sup>

The conditions are more stringent in the event that a request is made for conservatory seizure to be carried out in the same submissions or in a new request. In such cases, the court will check whether an apparently valid intellectual property right is involved and whether the infringement cannot reasonably be contested. In addition, the court will ascertain whether the documents submitted justify such conservatory seizure in the context of the public interest and the other interests involved in the case.<sup>231</sup> The court may, if it deems necessary, also summon the opposing party to hear its position. However, it will first inform the claimant and give the claimant the opportunity to withdraw the request for conservatory seizure so that the descriptive seizure can still have its desired surprise effect.<sup>232</sup>

## The substantive claim

### Cessation order

If there is sufficient evidence demonstrating an infringement of an intellectual property right, the rightsholder of the apparent right may rely on the cessation order to ensure the infringement ceases.<sup>233</sup> This order can be used not only against the infringing party, but also against an intermediary whose services have been used by the infringing party or parties to carry out the infringement.<sup>234</sup> This, therefore, applies to intermediaries in the digital and material world and is open to quite broad interpretation.<sup>235</sup> Some examples of intermediaries in the material world include transporters of counterfeit goods, parties

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<sup>226</sup> *ibid* 8.

<sup>227</sup> Art. 1369bis/1, para 3 subpara 1 of the Judicial Code.

<sup>228</sup> Judith Bussé, Christian Dekoninck and Jurgen Figys (n 227) 8.

<sup>229</sup> Art. 1369bis/1, para 3 subpara of the Judicial Code.

<sup>230</sup> Judith Bussé, Christian Dekoninck and Jurgen Figys (n 227) 13.

<sup>231</sup> Art. 1369bis/1, para 5 of the Judicial Code.

<sup>232</sup> Art. 1369bis/1, para 4 subpara 2 Judicial Code.

<sup>233</sup> Art. XI.334, para 1 subpara 1 of the Code of Economic Law.

<sup>234</sup> Art. XI.334, para 1 subpara 2 of the Code of Economic Law.

<sup>235</sup> Gunther Meyer, Michiel Verlinden and Simone Vandewynckel, *Overzicht van procesregels inzake intellectuele eigendomsrechten* (Heule, INNI publishers, 2013) 67.

who rent stands to market vendors who sell counterfeit goods, etc.<sup>236</sup> Online intermediaries, for example, include internet providers, domain name registers, operators of online marketplaces, social media platforms, etc.<sup>237</sup>

It should be noted that there are limits to the actions that can be taken against online intermediaries. This is due to the 'safe harbour' regime that is provided for in Articles 12 to 14 of the Directive on electronic commerce<sup>238</sup> and more importantly the ban on the general monitoring obligation laid down in Article 15 of this Directive. The Court of Justice<sup>239</sup> had previously clarified the demarcation in this context. For example, hosting services will in principle not be required to actively monitor all data on its platform in order to prevent intellectual property rights infringements.<sup>240</sup> However, it can be compelled by a court to monitor content that is identical to the content that infringed the IPR as long as it also originates from the same offender.<sup>241</sup> Repeat offending carried out by another party therefore does not fall within the scope of application.

In the physical world, this reasoning can also be applied in respect of 'intermediaries whose services are used by third parties to infringe intellectual property rights', but to a more limited extent. For example, in the Tommy Hilfiger case<sup>242</sup> it was confirmed that a lessee of market halls who sublets market stalls to market vendors, some of whom end up selling counterfeit goods at their stalls, also qualifies as an intermediary.<sup>243</sup> It is important for the qualification as intermediary in this regard that their services have been used to commit an infringement on IPR<sup>244</sup> because their services have enabled the sale of counterfeiting practices.<sup>245</sup> Beyond that it is immaterial as to whether they can actually be held liable for the infringement itself.<sup>246</sup> Within the meaning of Art. XI.334 of the Code of Economic Law (and Article 11 of the Enforcement Directive), these types of physical market place operators can also be asked to carry out specific monitoring, for example, to ensure that previously detected counterfeit Tommy Hilfiger clothing is avoided by the same offenders, insofar as these are proportionate and fair measures and they are not unreasonably costly and do not impede legitimate trade.<sup>247</sup>

It is striking that trademarks and designs are excluded from the scope of this Article. The reason for this is that there is no such thing as a Belgian trademark or design, rather, these are Benelux trademarks/designs or Union trademarks/designs. Under Article 2.20(2) of the BCIP (trademark) and 3.16(1) of the BCIP (design) a similar type of cessation order can be obtained.<sup>248</sup> For Union trademarks and designs, Article 9(2) in conjunction with Article 130(1) of the European Union Trademark Regulation<sup>249</sup> and Article 89(1)(a) of the Community Design Regulation.

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<sup>236</sup> Karel Janssens, 'Targeting the middle man: het opleggen van maatregelen aan tussenpersonen in de strijd tegen namaak en piraterij' in Petillion, F. (dir.), *Handhaving van intellectuele rechten in België / Respect des droit intellectuels en Belgique* (1st edition, Intersentia, 2017) 40.

<sup>237</sup> *ibid.*

<sup>238</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [200] OJ L178/1.

<sup>239</sup> See C-70/10, *Scarlet Extended* ECR 2011; C-360/10, *SABAM* (2012, CJEU); C-275/06, *Promusicae* [2008] ECR I-0271; C-324/09, *L'Oréal e.a.*, [2011] ECR I-6011; C-314/12, *UPC Telekabel Wien* (2014, CJEU).

<sup>240</sup> C-324/09, *L'Oréal e.a.*, 2011, para 139.

<sup>241</sup> *ibid.*, para 140.

<sup>242</sup> C-494/15, *Tommy Hilfiger* (n 259)..

<sup>243</sup> *ibid.*, para 30.

<sup>244</sup> C-314/12, *UPC Telekabel Wien* (n 259) paras 32 and 35.

<sup>245</sup> C-494/15, *Tommy Hilfiger* (n 259) paras 28-29.

<sup>246</sup> C-314/12, *UPC Telekabel Wien* (n 259) paras 32 and 35.

<sup>247</sup> C-494/15, *Tommy Hilfiger* (n 259) para 34.

<sup>248</sup> Hendrik Vanhees, 'Remarks on S. XI.334 of the Code of Economic Law' 70 *OHRA* 2015 57, 69.

<sup>249</sup> See Art. 574, 14° of the Judicial Code in conjunction with Art. 633 quinquies, para 1 of the Judicial Code.

Nevertheless, in all these cases, the court will have no choice but to order the cessation if it determines infringement in a case on one of the intellectual property rights outlined in the above. Therefore, in principle no weighing of interests can take place. The inextricable link between the determination of infringement and the cessation order also means that if a claim is only made for the determination of an infringement and is not followed by a claim for a cessation order, the court cannot decide that an infringement exists.<sup>250</sup>

### Potential additional remedial measures

In contrast to the cessation order, the court does give the option of issuing an order for the following measures.<sup>251</sup> This includes the recall of the goods from channels of commerce, the definitive removal from channels of commerce or the destruction of the infringing goods and, where appropriate, the instruments used to manufacture the counterfeit goods.<sup>252</sup> These measures must expressly be requested by the rightsholder of the IPR if this party wishes to have these corrective measures.<sup>253</sup> The costs of these measures will be recovered from the infringing party, unless there are special circumstances that prevent this.<sup>254</sup> It is striking that a weighing of interests must take place in this context<sup>255</sup>, such as the interests of end users who act in good faith in the definitive removal of the goods from channels of commerce.<sup>256</sup> It is vital that these measures can be imposed by the court irrespective of whether compensation is awarded and without their cost having any influence on the amount of compensation awarded.<sup>257</sup>

### Optional informational measures

If a court determines IPR infringement, it can order the infringing party to provide information at the request of the injured party. This information includes details known to the infringing party about the origin, distribution channels of counterfeit goods and services, and the identity of involved parties.<sup>258</sup> In specific terms, this may relate to manufacturers, distributors, retailers and wholesalers, suppliers, etc.<sup>259</sup>

This includes not only those who manufacture, distribute and sell, but also those who own the goods on a commercial scale, the party that has made use of the services that constitute an infringement on a commercial scale and, finally, those who used the services on a commercial scale in the infringing act.<sup>260</sup> This could include transporters or internet service providers.<sup>261</sup> As such, the Belgian legislator has provided the Belgian equivalent of the measure laid down in Article 8 of the Enforcement Directive.<sup>262</sup> It should be noted that the criterion 'on a commercial scale' is used. The qualification of the intermediary

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<sup>250</sup> Hendrik Vanhees (n 259) 70.

<sup>251</sup> *ibid.*

<sup>252</sup> Art. XI.334, para 2 subparas 1-2 of the Code of Economic Law; Art. 130(2) of the EUTMR; Art. 2.22(4) of the BCIP; Art. 3.19(4) of the BCIP.

<sup>253</sup> Hendrik Vanhees (n 259) 70.

<sup>254</sup> Art. XI.334, para 2 first and second subpara of the Code of Economic Law; Art. 2.22(1) BCIP; Art. 3.18(1) BCIP.

<sup>255</sup> Art. XI.334, para 2 subpara 3 of the Code of Economic Law.

<sup>256</sup> Hendrik Vanhees (n 259) 71.

<sup>257</sup> *ibid.*

<sup>258</sup> Art. XI.334, para 3 subpara 1 of the Code of Economic Law; Article 130(2) of the EUTMR.

<sup>259</sup> Hendrik Vanhees (n 259) 72.

<sup>260</sup> Art. XI.334, para 3 subpara 2 of the Code of Economic Law; Article 130(2) of the EUTMR.

<sup>261</sup> Hendrik Vanhees (n 259) 73.

<sup>262</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45.

whether or not as a non-profit association may be decisive in this regard.<sup>263</sup> In addition, the measure must be 'reasonable and justified'.<sup>264</sup> Specifically, according to the Council of State, this latter would mean that the claimant should be able to demonstrate that an infringement has taken place. The actual determination of such an infringement is not required for this.<sup>265</sup>

### Announcement of the judgment

As a last resort, in connection with a cessation order, the court may order that the judgment or a summary thereof must be made public through the display of notice for a period determined by the court. This will take place both inside and outside the premises of the businesses of the infringing party. The judgment may also be published in newspapers or in any other way. All costs of publication will subsequently be recovered from the infringing party.<sup>266</sup>

This measure has a two-pronged objective. First and foremost, it will contribute to the cessation of the infringement. Secondly, it should remedy the damage caused by the counterfeiting practices to some extent.<sup>267</sup>

### Compensation

If the court finds that an infringement has taken place in the context of a cessation order, then the aggrieved rightsholder of the IPR can reclaim the damage that it has suffered as a result of the counterfeiting. The rules regarding the determination of the compensation are laid down in Art. XI.335, §2.<sup>268</sup> In addition to compensation, confiscation may also be ordered if there is question of bad faith on the part of the infringing party.<sup>269</sup>

### Cessation order through interlocutory proceedings

An injunction in interlocutory proceedings can be claimed in respect of all intellectual property rights.<sup>270</sup> This follows from the transposition of Article 11 of the Enforcement Directive. The president of the Business Court whose territorial jurisdiction is determined by Art. XVII.14 §§1,2, and 3 of the Code of Economic Law in conjunction with Art. 574 of the Judicial code and Art. 633quinquies of the Judicial Code. The qualification of 'infringement' may be interpreted very broadly. For example, in the context of copyright, this not only relates to economic rights but to moral rights.<sup>271</sup>

The claim can be brought both against the infringing party and any intermediaries whose services were used to realise the infringement of the IPR<sup>272</sup>. These claims must be considered independently of one another. In other words, if a claim has already been filed against the infringing party, an injunction can still be brought against the intermediaries involved.<sup>273</sup> However, Art. XVII.14 §4 suggests that the intermediary is merely an example of all potential persons against whom an injunction can be brought.<sup>274</sup>

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<sup>263</sup> Hendrik Vanhees (n 259) 41.

<sup>264</sup> *ibid*, 45.

<sup>265</sup> *ibid*, 46; Parliamentary Papers Chamber 2006-07, doc. 51 2943/001 and 2944/001, 114.

<sup>266</sup> Art. XI.334, para 4 of the Code of Economic Law; Art. 2.22, para 7 of the BCIP and Art. 3.18, para 7 of the BCIP.

<sup>267</sup> *ibid* (n 268) 74.

<sup>268</sup> See Art. 2.21 of the BCIP and Art. 3.17 of the BCIP and Art. 130(2) of the EUTMR.

<sup>269</sup> Art. XI.334, §3 of the Code of Economic Law.

<sup>270</sup> Hendrik Vanhees, 'Remarks on Art. XVII.14-XVII.20 of the Code of Economic Law' 70 *OHRA* 2015 177, 200; Art. XVII.14 of the Code of Economic Law.

<sup>271</sup> *ibid* 201.

<sup>272</sup> Art. XVII.14, para 4 of the Code of Economic Law.

<sup>273</sup> Hendrik Vanhees (n 282) 199.

<sup>274</sup> Hendrik Vanhees (n 282) 197.

It is important in this regard that the measures ordered against the intermediary result in or contribute to the cessation of the established infringement or any consequences thereof.<sup>275</sup> In addition, just as is the case for substantive cessation, the optional corrective and information measures can likewise be claimed in this case if these measures could contribute to the termination of the infringement.<sup>276</sup>

What is very significant in the fight against counterfeiting is that this injunction can also be instituted in preliminary relief proceedings if an infringement is committed or threatens to be committed on an intellectual property right.<sup>277</sup> The basis for this lies in Art. 18§2 of the Judicial Code, which states the following: 'The legal action may be permitted if, even in the case of obtaining a declaratory judgment, it has been instituted in order to prevent the violation of a seriously threatened right'. However, it may be required that the case should relate to a category of practices where the threatened infringement is simply a type of act that falls within that category.<sup>278</sup> Even if the risk of repetition of the infringing practice is purely theoretical, an injunction remains feasible, even if the infringement has already ceased.<sup>279</sup>

The burden of proof for the existence of the infringement rests on the applicant and not on the infringing party.<sup>280</sup> Most of the principles of the basic injunction for the cessation of activities and the injunction in preliminary relief proceedings are identical, however, there are a number of differences. First and foremost, there are two exceptions to the rule that no weighing of interests must take place before the cessation order. The first exception relates to the abuse of rights, which means that the applicant is misusing its own IPR or misusing the injunction itself.<sup>281</sup> Secondly, no remedial measures can be imposed in the preliminary relief proceedings. This means that no claims for compensation can be made.<sup>282</sup> This also means that confiscation cannot be requested.<sup>283</sup> Thirdly, although the order to inform can be issued, it cannot relate to information that can be used to determine the extent of the damage as this question is reserved for the court handling the main action.<sup>284</sup>

It is striking that this is a procedure that is dealt with 'as in preliminary relief proceedings' but which does not require the necessary urgency in accordance with common law preliminary relief proceedings.<sup>285</sup> Nevertheless, this criterion of urgency will be taken into account when determining whether or not there is an abuse of rights.<sup>286</sup> The court will then rule on the merits of the case with a judgment that has the effect of *res judicata*.<sup>287</sup> As is the case with the substantive cessation claim<sup>288</sup>, the court will likewise be obliged to rule if criminal proceedings have been initiated for the same facts. It will be the criminal court that will have to suspend its judgment until the court has issued a judgment.<sup>289</sup>

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<sup>275</sup> Hendrik Vanhees (n 282) 199; Art. XVII.16 of the Code of Economic Law

<sup>276</sup> Art. XVII.16 of the Code of Economic Law.

<sup>277</sup> Hendrik Vanhees (n 282) 203.

<sup>278</sup> *ibid*; Voorz. Rb. Brussel 16 October 1996, AM 1996, 426.

<sup>279</sup> Hendrik Vanhees (n 282) 204.

<sup>280</sup> *ibid*.

<sup>281</sup> Antwerp 14 October 2002, AM 2003; Brussels 21 March 2003, AM 2003, 366, note B. VINCOTTE, where in concrete it concerned the exercise of moral rights; Voorz. Rb. Brussel 5 January 1996, IRDI 1996, 97; *ibid* (n 296) 205.

<sup>282</sup> Hendrik Vanhees (n 282) 210.

<sup>283</sup> *ibid*.

<sup>284</sup> Karel Janssens, 'Targeting the middle man: het opleggen van maatregelen aan tussenpersonen in de strijd tegen namaak en piraterij' in Petillion, F. (ed.), *Handhaving van intellectuele rechten in België / Respect des droit intellectuels en Belgique* (1<sup>st</sup> edn, Bruxelles, Intersentia 2017) 47; Vz. Kh. Brussels 4 March 2009, Jb.Hand. 2009, 707

<sup>285</sup> *ibid* 212.

<sup>286</sup> *ibid*.

<sup>287</sup> *ibid*.

<sup>288</sup> Art. XV.71 of the Code of Economic Law.

<sup>289</sup> Art. XVII.18 of the Code of Economic Law and Art. XV.71 of the Code of Economic Law.

The procedures often refer to IPR that must be registered or filed with a competent authority (e.g. a trademark or patent). The responsibility of proving the validity of this IPR rests with the applicant. The counterparty will naturally argue that the registration of deposited filing has expired or is null and void.<sup>290</sup> In these cases, the court will be authorised to declare the nullity or the lapsing of these registrations or filings, but only insofar as this has been requested on the basis of a counterclaim.<sup>291</sup> In contrast to the regular decision to terminate the infringement, this decision will not be automatically enforceable with immediate effect, but will depend on the rules relating to the IPR invoked.<sup>292</sup> However, the decision will be enforceable against third parties.<sup>293</sup>

## Provisional measures in respect of suspected infringing parties and intermediaries

Article 9 of the Enforcement Directive provides for the possibility of taking provisional measures, such as a provisional cessation order, against the alleged infringing party. This is a clear difference with the foregoing, which related to the definitive cessation of the infringing activity, both in interlocutory proceedings and in substantive proceedings. The Belgian legislator, however, elected not to explicitly transpose this into Belgian law, given that the same effect can already be obtained through Art. 19(3) of the Judicial Code (without urgency) or the general preliminary relief proceedings set out in Art. 584 of the Judicial Code, subject to evidence of urgency.<sup>294</sup>

## Legal remedies that indirectly combat counterfeiting

### Anti-money laundering legislation

Counterfeiting can take place to generate profits, which are then used to fund other crimes, such as drug production and trafficking as well as terrorism.<sup>295</sup> Large volumes of cash are therefore often found in relation to counterfeiting practices. In order to launder this cash, an investment must initially be made in order to bring the money into the national financial system. Subsequently, the origin of the money is obscured through various transactions that pass through different institutions, individuals, products and countries. This is also known as 'stacking'. Finally, the money is integrated into the legal channels of the national economy, after which 'legal money' is able to flow out.<sup>296</sup> The criminals sometimes combine legal trade with illegal trade in order to embezzle the income. In addition, crypto currency is occasionally used for money laundering purposes.<sup>297</sup> This is why effective anti-money laundering legislation is likewise crucial to combating or limiting counterfeiting.

The European Union has previously issued numerous anti-money laundering directives on this matter, which Member States have had to transpose, with the recent directive being the 6th EU Anti-Money laundering Directive 2018/1673298 (AMLD6). In Belgium, this legislation has not yet been transposed and the current Act of 18 September 2017 on the prevention of money laundering and the financing of

<sup>290</sup> Hendrik Vanhees (n 282) 214-215.

<sup>291</sup> Art. XVII.17, para 1 of the Code of Economic Law

<sup>292</sup> Art. XVII.17, para 2 of the Code of Economic Law

<sup>293</sup> Hendrik Vanhees (n 282) 215.

<sup>294</sup> Karel Janssens (n 296) 48.

<sup>295</sup> Europol, 'IP CRIME AND ITS LINK TO OTHER SERIOUS CRIMES Focus on Poly-Criminality' (2020) <[https://www.europol.europa.eu/cms/sites/default/files/documents/europol-euipo\\_polycriminality\\_report\\_2.pdf](https://www.europol.europa.eu/cms/sites/default/files/documents/europol-euipo_polycriminality_report_2.pdf)> 4 accessed on 10 December 2022.

<sup>296</sup> *ibid* 66.

<sup>297</sup> *ibid* 86.

<sup>298</sup> Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [2018] OJ L284/22.

terrorism and on the restriction of the use of cash<sup>299</sup> (the AML/CFT Act) which originally introduced the 4th AML Directive 2015/849 (AMLD4)<sup>300</sup>. This Act was then amended by the Act of 20 July 2020 containing various provisions for the prevention of money laundering and the financing of terrorism and on the restriction of the use of cash<sup>301</sup> to be partly in line with the Directive 2018/843 (AMLD5)<sup>302</sup>. The fifth AML Directive online intended to harmonise preventive measures:

- Expand anti-money laundering legislation to virtual currencies, tax services and works of art;
- Restrict the anonymous use of electronic money products to a certain number of situations;
- Provide the financial EU intelligence units with more powers and facilitate cooperation between them and between the regulatory authorities;
- ....<sup>303</sup>

The sixth AML Directive (Directive No 2018/1763<sup>304</sup>) by contrast provides for more criminal/repressive measures that will be harmonised. Specifically, they relate to:

- Making aiding, abetting or attempting money laundering crimes and the financing of terrorism a criminal offence across the EU. The EY also imposes a minimum sentence for such offences of 4 years. However, in Belgium we have been relying on sentence guidelines of 15 days to 5 years for some time, under Art. 505 of the Criminal Code
- Extension of liability to legal entities;<sup>305</sup>
- Rules on territorial demarcation in order to prevent double jeopardy;<sup>306</sup>  
Mandatory confiscation of capital gains obtained from money laundering practices; this element is similarly already covered under Art. 505 of the Criminal Code.

A more effective and deterrent system of sanctions can reduce money laundering practices and therefore also decrease the initiative to manufacture and sell counterfeit goods. This is certainly the case for confiscation sanctions.<sup>307</sup> Another major advantage of tackling counterfeiting through anti-money laundering legislation is that the burden of proof is lower for money laundering offences than it is for counterfeiting.<sup>308</sup>

The current Anti-money laundering legislation in Belgium imposes 3 primary due diligence obligations in addition to the general risk assessment.<sup>309</sup> in relation to the entities that fall under this legislation (e.g.

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<sup>299</sup> *Official Gazette* 6 October 2017.

<sup>300</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73.

<sup>301</sup> *Official Gazette* 8 August 2020.

<sup>302</sup> Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43.

<sup>303</sup> Oscar Canario da Cunha, 'Overzicht en samenvatting van de 5e AML-richtlijn - AMLD5' (*pideeco.be*, 12th May 2018) <<https://pideeco.be/nl/articles/overzicht-amld5-vijfde-aml-richtlijn-implicatie/>> accessed 9 December 2022

<sup>304</sup> Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law [2018] OJ L284/22.

<sup>305</sup> *ibid.*

<sup>306</sup> Directive (EU) 2018/1673 (n 317).

<sup>307</sup> If not forfeited, they can be reinvested in terrorism or other criminal acts, including counterfeiting; Directive (EU) 2018/1673 (n 317).

<sup>308</sup> Interview with Public prosecutor's office Halle-Vilvoorde (23 November 2022).

<sup>309</sup> Art. 16 of the Act of 18 September 2017; Dave van Moppes, 'De wet van 18 september 2017 tot voorkoming van het witwassen van geld en de financiering van terrorisme - Belangrijkste wijzigingen voor de verzekeringssector' (2018) 2 T.Verz./Bull.

banks, lawyers, listed companies, real estate agents, etc.).<sup>310</sup> This is also referred to as the 'Know Your Customer' (KYC) approach.<sup>311</sup> Primarily, the entity must identify who its client is and subsequently confirm its identity. This also applies to any agents and the ultimate beneficiaries of the (trans)action.<sup>312</sup> Secondly, the entity must also ascertain the intended purpose and nature of the occasional transaction and business relationship and if necessary, make active enquiries in this regard with the client.<sup>313</sup> Finally, the entity must exercise constant vigilance with regard to the business relationships and transactions, which means that a thorough study must be carried out of the transactions carried out and that this information is updated.<sup>314</sup> However, complying with and implementing all three obligations for all its clients is too intensive and not feasible. This is why the legislator uses a system in which these obligations will apply depending on whether the risk in relation to the client is high or low, on the basis of the individual risk assessment.<sup>315</sup> Based on the individual risk profile, further alertness measures can be taken.<sup>316</sup>

## Domain name registration checks

### Cybersquatting

Counterfeiters often use various cybersquatting techniques to sell their counterfeit or pirated goods online. Cybersquatting refers to the registration of a registered trademark belonging to another person or entity in bad faith.<sup>317</sup> This could be done to sell a trademark owner's domain name to the trademark owner for a very high price at a later stage or to prevent the trademark owner from registering the domain name and thereby damaging the brand's image or simply to take advantage of brand awareness.<sup>318</sup> This can take place in various ways (typosquatting, soundsquatting, etc.).<sup>319</sup> A study conducted by the EUIPO in 2021 shows that 62 million of the 239 million registered domain names could be considered suspicious. However, not all of these sites were used to sell counterfeit goods or pirated goods. Some related to parody sites or sites used to express criticism.<sup>320</sup> The EUIPO also emphasises that registering domain names defensively is more costly and necessary for protection against counterfeiting for B2C than for B2B. The probable reason for this, is that in a B2B situation (often in the medical or scientific industry) salespeople and managers are present who do their utmost to verify that the goods are authentic to avoid any inter alia liability, safety or protection issues from arising.<sup>321</sup>

The Domain Name System (DNS) is managed worldwide by the Internet Corporation for Assigned Names and Numbers (ICANN) and ensures that people do not have to memorise sequence of numbers off by

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Ass 157, 161.<sup>310</sup> *ibid*, 164.

<sup>311</sup> See for example: Pideeco, 'Know Your Customer KYC' (*pideeco.be*) <<https://pideeco.be/nl/services/compliance-consulting/financiele-misdrijven/know-your-customer-kyc/>> accessed 9 December 2022.

<sup>312</sup> Art. 19, para 1 Act of 18 September 2017; *ibid* (n 333) 164.

<sup>313</sup> *ibid*.

<sup>314</sup> *ibid*.

<sup>315</sup> Art. 19, §2 of the Act of 18 September 2022.

<sup>316</sup> Dave van Moppes (n 324) 164.

<sup>317</sup> Steven Wright, 'Cybersquatting at the Interart. of Internet Domain Names and Trademark Law' (2012) *IEEE COMMUNICATIONS SURVEYS & TUTORIALS* 193, 197.

<sup>318</sup> FPS Economy, S.M.E., Middle Class and Energy, 'Wat is cybersquatting? Wat zijn de rechtsmiddelen om tegen deze praktijk in te gaan?' (*economie.fgov.be*, 13 September 2022) <<https://economie.fgov.be/nl/themas/intellectuele-eigendom/intellectuele-eigendomsrechten/specifieke-beschermingsregimes/domeinnamen/wat-cybersquatting-wat-zijn-de>> accessed 12 December 2022.

<sup>319</sup> Kevin Holvoet, 'Het meten van cybersquatting-activiteit in België en de EU' (Masterproef Master of Science in de Toegepaste Informatica, K.U. Leuven, 2014-15).

<sup>320</sup> EUIPO, 'Focus on cybersquatting: monitoring and analysis' (2021) <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2021\\_Cybersquatting\\_Study/2021\\_Focus\\_on\\_Cybersquatting\\_Monitoring\\_and\\_Analysis\\_Study\\_FullR\\_en.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_Cybersquatting_Study/2021_Focus_on_Cybersquatting_Monitoring_and_Analysis_Study_FullR_en.pdf)> 1, 75 accessed 12 December 2012.

<sup>321</sup> *ibid*, 76.

heart but rather can navigate to certain internet domains more easily.<sup>322</sup> In Belgium, the extensions '.be', '.brussels' and '.vlaanderen' are used by DNS Belgium. The extension '.gent' is maintained by the Combell Group nv/sa.<sup>323</sup> EURid is responsible for the extension '.eu'.<sup>324</sup> To register a domain name in the register, the company or person must make use of an accredited intermediary, e.g. the registrars, since they cannot be consulted directly.<sup>325</sup> A number of registrars are available on the DNS Belgium website.<sup>326</sup> The registrars are likewise available for the extension .gent<sup>327</sup> and ICANN extensions<sup>328</sup>.

The following preventive measures can already be taken to combat cybersquatting:

- Companies can already register potential domain names and actively monitor the web for possible cases of cybersquatting. However, for SMEs and smaller businesses this can be very challenging and expensive.<sup>329</sup>

In the specific context of trademark protection, there is also the option at EU level to have the domain name registered before the EU trademark is published. This is an EURid initiative in collaboration with EUIPO.<sup>330</sup> In this way, companies are able to be the first to ensure domain name registration for their EU trademark. The trademark owners of Union trademarks can also sign up to receive notifications as soon as domain names with the '.eu' extension are registered that are identical to their EU trademark. This saves the proprietors the trouble and costs of actively monitoring the web for illegal domain names with the '.eu' extension.<sup>331</sup>

- In the context of trademark protection, ICANN has also set up the 'Trademark-Clearinghouse' initiative, which entails the development of two systems for generic Top-Level Domain Names (gTLD) to ensure better protection of trademark owners. Primarily, there is the Sunrise service that gives trademark owners a specific priority period to register a domain name with its trademark. Secondly, there is the Trademark Claims service, which sends a notification to the trademark owner after a fraudulent domain name has been registered and which then allows the trademark owner to take immediate action against the registered domain name.<sup>332</sup> The latter service is already very similar to the EURid initiative undertaken in partnership with EUIPO.

In terms of reactive measures, a number of steps have already been taken to restrict trademark infringements with regard to domain name registrations:

In the context of cybersquatting, the Belgian Centre for Arbitration and Mediation (CEPANI) has developed an alternative dispute resolution procedure (Alternative Dispute Resolution, ADR) to support companies or individuals who are victims of cybersquatting. However, this procedure

<sup>322</sup> ICANN, 'What Does ICANN Do?' (*icann.org*) <<https://www.icann.org/resources/pages/what-2012-02-25-en>> accessed 12 December 2022.

<sup>323</sup> FPS Economy, S.M.E., Middle Class and Energy, 'Domeinnamen: een essentiële uitdaging voor ondernemingen en kmo's' (*economie.fgov.be*) <<https://economie.fgov.be/nl/file/2503/download?token=fV3UijZ9>> accessed 12 December 2022.

<sup>324</sup> EURid, 'Over ons' (*eurid.eu*) <<https://eurid.eu/nl/welkom-bij-eurid/over-ons/>> accessed 12 December.

<sup>325</sup> *ibid.*, 8-9.

<sup>326</sup> DNS Belgium, 'Vind een registrar' (*dnsbelgium.be*) <<https://www.dnsbelgium.be/nl/domeinnaam-registreren/vind-registrar#/list/>> accessed 12 December 2022.

<sup>327</sup> .Gent, 'Registrars' (*nic.gent*) <<https://nic.gent/registrars>> accessed 12 December 2022.

<sup>328</sup> ICANN, 'List of Accredited Registrars' (*icann.org*) <<https://www.icann.org/en/accredited-registrars>> accessed 12 December.

<sup>329</sup> EUIPO (n 335) 11.

<sup>330</sup> EUIPO, 'EUIPO-EURid collaborate in a bid to protect EUTM applicants from domain name abuse' (*euipo.europa.eu*, 12 September 2019) <[https://euipo.europa.eu/ohimportal/nl/key-user-newsflash/-/asset\\_publisher/dlGJZDH66W8B/content/euipo-eurid-collaborate-in-a-bid-to-protect-eutm-applicants-from-domain-name-abuse](https://euipo.europa.eu/ohimportal/nl/key-user-newsflash/-/asset_publisher/dlGJZDH66W8B/content/euipo-eurid-collaborate-in-a-bid-to-protect-eutm-applicants-from-domain-name-abuse)> accessed 12 December 2022.

<sup>331</sup> *ibid.*

<sup>332</sup> ICANN, 'Trademark clearinghouse (TMCH)' (*newgtlds.icann.org*) <<https://newgtlds.icann.org/en/about/trademark-clearinghouse>> accessed 12 December 2022.

only applies to the extension ‘.be’.<sup>333</sup> The scope of application in this case is not only trademarks or trade names but also extends to (trade) company names, place names, personal names and geographical names. The conditions for this procedure require that (1) the domain name is identical or similar, (2) the registrant has no enforceable rights against the registered domain name, (3) the domain name has been registered in bad faith.<sup>334</sup> In respect of other extensions, the ICANN’s alternative dispute resolution procedure is available, which applies the same conditions but is limited to trademarks.<sup>335</sup>

- However, under Art. XII.22, XII.23 and XVII.23 of the Code of Economic Law it is equally possible to initiate legal proceedings to obtain a suspension of the registration and cancellation or transfer by the registrant.<sup>336</sup> The proceedings must be initiated before the Court of First Instance in preliminary relief proceedings. In terms of their content, the conditions are roughly identical to those of the alternative dispute resolution procedure.<sup>337</sup> In this case, similarly, certain restrictions apply to such claims. For example, the claim can only be brought against registrations using the ‘.be’ extension or against registrations of which the registrant has its place of residence or establishment in Belgium.<sup>338</sup> As such, claims against a company abroad that does not use ‘.be’ would be unsuccessful.
- In the case of trademark infringements, the proprietor will be able to obtain a cessation order in relation to the use of the trademark on the basis of the common law framework (BCIP or EU trademark regulation). This includes using the trademark in a domain name.<sup>339</sup> However, in this case, the domain name cannot be transferred<sup>340</sup>, which may be a problem if the trademark is used in an identical manner in the domain name and the trademark holder wishes to make use of it.

#### Other domain names that do not involve cybersquatting

Certain websites do not involve cybersquatting but sell generic counterfeit goods or pirated goods. A number of measures have likewise already been taken to combat such practices.

Primarily, in a preventive way, registrant verification can prevent a domain name from being registered fraudulently. This is an automated process that DNS Belgium uses to verify the personal data of the domain name holder. If this information is inaccurate, the registrar and the registrant will be contacted and the domain name will not be registered if correct information is not provided.<sup>341</sup> At the European level, EURid has developed the Abuse Prediction and Early Warning System (APEWS) which serves the same purpose.<sup>342</sup>

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<sup>333</sup> *ibid* (n 352) (1) 13.

<sup>334</sup> *ibid*.

<sup>335</sup> ICANN, ‘Uniform Domain-Name Dispute-Resolution Policy’ (*icann.org*) <<https://www.icann.org/resources/pages/help/dndr/udrp-en>> accessed 12 December 2022.

<sup>336</sup> *ibid*, 14.

<sup>337</sup> ICANN, ‘Uniform Domain-Name Dispute-Resolution Policy’ (*icann.org*) <<https://www.icann.org/resources/pages/help/dndr/udrp-en>> accessed 12 December 2022.

<sup>338</sup> *ibid*.

<sup>339</sup> *ibid*, 15.

<sup>340</sup> *ibid*.

<sup>341</sup> DNS Belgium, ‘Registrant verification maakt frauduleuze registraties onmogelijk’ (*dnsbelgium.be*, 28 November 2022) <<https://www.dnsbelgium.be/nl/nieuws/frauduleuze-registraties-onmogelijk>> accessed 12 december 2022.

<sup>342</sup> EURid, ‘Gegevenskwaliteit’ (*eurid.eu*) <<https://eurid.eu/nl/registreer-een-eu-domeinnaam/gegevenskwaliteit/>> accessed 12 December 2022.

Preventive protocols have also been drawn up between DNS Belgium and FPS Economy to combat fraudulent websites. This amounts to a 'Notice & Action procedure' where a notice is issued through FPS Economy regarding a violation of the legislation on a .be website (e.g. sale of counterfeit goods) after which DNS Belgium will initiate infringement proceedings against the registrant. Persons who subsequently visit the website will then be shown a warning about the matter. If the website terminates the infringement, the website will be made available again.<sup>343</sup> This system is already much less cumbersome and circuitous than the situation that existed prior to the protocols, in which the case file held by FPS Economy previously had to be transferred to the Public Prosecutor's Office, which would then refer the case to DNS Belgium.<sup>344</sup> The system has already been used in situations in which an existing domain name had been copied and a fake web shop could then be accessed on the website or in situations involving a fake collection agency.<sup>345</sup> This procedure is complementary to the 'registrant verification' (formerly revoke) procedure.<sup>346</sup>

Legal remedies aimed at protecting consumers against the harmful consequences of counterfeiting

## General

The EUIPO and OCED<sup>347</sup> (Organisation for Economic Co-operation and Development) suspect that most counterfeit products do not comply with the standards and regulations for product safety, public health and environmental protection.<sup>348</sup> The risks associated with counterfeit products based on reputable brands not only harm consumers due to the various health and safety risks involved but lead to well-known brands suffering reputational damage.<sup>349</sup>

The general framework for product safety is laid down in Book IX of the Code of Economic Law, which transposes Directive 2001/95/EC<sup>350</sup> into Belgian law.<sup>351</sup> This law applies insofar as there are risks for which no specific safety rules for certain products and services have been provided for in specific regulations.

Manufacturers are obliged to exclusively market products (and services) that are safe.<sup>352</sup> Products are considered safe if they meet the harmonised standards regarding risks and risk categories that are set out therein.<sup>353</sup> Furthermore, obligations are not only laid down for manufacturers but likewise for distributors.

<sup>343</sup> DNS Belgium, 'Een veilige .be-zone' (*dnsbelgium.be*, 17 december 2020) <<https://www.dnsbelgium.be/nl/nieuws/een-veilige-be-zone>> accessed 12 December 2022.

<sup>344</sup> DNS Belgium, 'Frauduleuze websites geblokkeerd' (*dnsbelgium.be*, 19 December 2019) <<https://www.dnsbelgium.be/nl/nieuws/frauduleuze-websites-neutraliseren>> accessed 12 December 2022.

<sup>345</sup> DNS Belgium, 'Frauduleuze websites geblokkeerd' (*dnsbelgium.be*, 19 December 2019) <<https://www.dnsbelgium.be/nl/nieuws/frauduleuze-websites-neutraliseren>> accessed 12 December 2022.

<sup>346</sup> *ibid.*

<sup>347</sup> Organization for Economic Cooperation and Development.

<sup>348</sup> OECD and EUIPO, *Dangerous Fakes Trade in Counterfeit Goods That Pose Health, Safety and Environmental Risks* (OECD Publishing, 2022) 14.

<sup>349</sup> Interview with SAMSUNG (18 November 2022).

<sup>350</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2002] OJ L11/4.

<sup>351</sup> Art. IX.1, para 1 of the Code of Economic Law.

<sup>352</sup> Art. IX.2 of the Code of Economic Law.

<sup>353</sup> Art. IX.3, para 1 of the Code of Economic Law.

## Legislative framework

### Electronics

The OECD and EUIPO report stresses that it is semiconductors, (lithium) batteries and chargers that are chiefly problematic to consumer safety. The associated risks are flammability, overheating, equipment failure, etc.<sup>354</sup>

The electronic devices targeted in this vision (e.g. smartphones, chargers, wireless earphones, chargers, etc.) fall under the classification of electrical equipment intended for a nominal alternating voltage between 50 V and 1,000 V and a nominal direct voltage between 75 V and 1,500 V<sup>355</sup>, meaning that they fall under the scope of the Low Voltage Directive. There are, however, some electronic devices that are excluded from this legislation.

In Belgium, these electronic devices fall under the general legislation of Book IX of the Code of Economic Law in conjunction with the Royal Decree of 21 April 2016 on the marketing of electrical equipment<sup>356</sup>. The Royal Decree transposes the more specific provisions of the Directive into Belgian law.

One of the most significant measures stipulated in the Royal Decree is the EU declaration of conformity as a condition for placing the product on the market.<sup>357</sup> This declaration indicates that the product complies with safety standards and must be constantly updated. After a manufacturer has obtained this declaration, it is permitted to affix the CE logo on the data plate of its products or on the product itself in a legible, visible and indelible manner.<sup>358</sup> The CE logo is based on Regulation 765/2008<sup>359</sup> (which has already been partially amended by Regulation 2019/1020<sup>360</sup>) and is fleshed out in greater detail in numerous directives.<sup>361</sup> This CE logo is also something that customs authorities look for when inspection goods<sup>362</sup> and must therefore already have been applied if the goods come from outside the EU.<sup>363</sup> A question submitted to the European Parliament shows that confusion may arise in connection with the so-called 'Chinese Export' symbol. The EU denies that such a symbol exists and believes that it is being used as a counterfeit CE mark despite not being in compliance with the regulations.<sup>364</sup>

### Toys

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<sup>354</sup> OECD/EUIPO, *Dangerous Fakes Trade in Counterfeit Goods That Pose Health, Safety and Environmental Risks*, (Paris, OECD Publishing 2022) 28-29.

<sup>355</sup> Art. 1, para 2 Directive 2014/35/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits (low voltage directive) [2014] OJ L96/357.

<sup>356</sup> *Official Gazette* 29 April 2016.

<sup>357</sup> Art. 14 Royal Decree of 21 April 2016 regarding the marketing of electrical equipment, *Official Gazette* 29 April 2016.

<sup>358</sup> *ibid*, Art. 16.

<sup>359</sup> Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 [2008] OJ L218/30.

<sup>360</sup> Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 [2019] OJ L169/1.

<sup>361</sup> Art. 16 Royal Decree of 19 January 2011 on the safety of toys, *Official Gazette* 10 February 2011.

<sup>362</sup> Kerstien Celis and Josse Verbeken, *Douane en Accijnzen* (third edition, Intersentia, 2018) 41.

<sup>363</sup> OECD/EUIPO, *Dangerous Fakes Trade in Counterfeit Goods That Pose Health, Safety and Environmental Risks*, (Paris, OECD Publishing 2022) 28-29.

<sup>364</sup> European Parliament, 'Answer given by Mr Verheugen on behalf of the Commission' (*europarl.europa.eu*, 12 March 2008) <[https://www.europarl.europa.eu/doceo/document/P-6-2007-5938-ASW\\_NL.html](https://www.europarl.europa.eu/doceo/document/P-6-2007-5938-ASW_NL.html)> accessed 14 December 2022.

Counterfeit toys pose a real threat to the health and safety of children and the general population. This is confirmed by the EUIPO in a study from June 2019.<sup>365</sup> Particularly during holiday seasons such as Christmas and "Sinterklaas", more counterfeit toys are sold because the genuine goods are often unavailable or low in stock. Cheaper alternatives to the desired on the internet also make counterfeit products appealing to parents and other individuals.<sup>366</sup> This may even increase further due to the current rise in inflation in Belgium and cost of living becoming more expensive.<sup>367</sup> During the Christmas season, Europol is likewise fully committed to informing parents and the general public of the dangers of counterfeit toys and how they can best avoid purchasing counterfeit toys.<sup>368</sup> Certain counterfeit toys are manufactured with chemicals that, for example, can be harmful to the lungs or liver.<sup>369</sup> Most counterfeit goods may also contain parts that, unlike the regular versions of the toy, have not been tested for parts that could become detached or swallowed and could cause choking or even damage to the internal organs, such as magnets.<sup>370</sup>

The safety of toys was regulated at EU level by way of the Toy Safety Directive 2009/48/EC<sup>371</sup>, which legislation was subsequently transposed into Belgian law through two Royal Decrees: Royal Decree of 19 January 2011 governing the safety of toys<sup>372</sup> and the Royal Decree of 19 January 2011 on the recognition of conformity assessment bodies for toys.<sup>373</sup>

However, not all entertainment products in the broad sense of the word qualify as toys. Only those that qualify according to the following definition are included:

*"Any product whether or not exclusively designed or clearly intended for use in play by children of less than 14 years of age"*<sup>374</sup>

An entire category of products that can be classified as toys in the broad sense is therefore not covered by this legislation and includes collector's items<sup>375</sup>, sports equipment, slings and slingshots, computer games and storage thereof, etc.<sup>376</sup>

In terms of their substance, the regulations are quite well put together with increased responsibility for the various operators in the commercial chain, rules regarding more effective cooperation, rules in relation to manufacturers, rules on guaranteeing internal controls relating to the manufacturing of the

<sup>365</sup> EUIPO, *Qualitative study on risk posed by counterfeits to consumers* (EUIPO, June 2019).

<sup>366</sup> *ibid* (n 371) 27.

<sup>367</sup> Stefan Grommen, 'Inflatie in oktober klit boven de 12 procent: prijzen van gas en voeding blijven grootste boosdoeners' (2022) <<https://vrtnews.be/p.QA7pMOPNo>> accessed 14 December 2022.

<sup>368</sup> Europol, 'How to recognise fake and hazardous toys' ([europol.europa.eu](https://europol.europa.eu), 5 January 2023) <<https://www.europol.europa.eu/operations-services-and-innovation/public-awareness-and-prevention-guides/how-to-recognise-fake-and-hazardous-toys>> accessed 14 December 2022.

<sup>369</sup> OECD/EUIPO, *Dangerous Fakes Trade in Counterfeit Goods That Pose Health, Safety and Environmental Risks*, (Paris, OECD Publishing 2022) 27.

<sup>370</sup> *ibid*.

<sup>371</sup> Directive 2009/48/EC of the European parliament and of the Council of 18 June 2009 on the safety of toys [2009] OJ L170/1.

<sup>372</sup> *Official Gazette* 10 February 2011.

<sup>373</sup> *Official Gazette* 10 February 2011.

<sup>374</sup> *ibid* (n 387) Art. 2, 1°.

<sup>375</sup> Provided the packaging clearly reads that it is intended for users of collectors aged 14 or older; FPS Economy, S.M.E., Middle class and Energy ([economie.fgov.be](https://economie.fgov.be), 2022) <<https://economie.fgov.be/nl/themas/kwaliteit-veiligheid/veiligheid-van-goederen-en/specifieke-reglementeringen/speelgoed-en-kinderartikelen/veiligheid-van-speelgoed#:~:text=het%20voldoet%20aan%20de%20essenti%C3%ABLE,gevaren%20bij%20gebruik%20te%20beperken>> accessed 13 December 2022.

<sup>376</sup> *ibid*.

toy, etc.<sup>377</sup> However, just as in the case of electronics, one of the most significant measures set out in the Royal Decree is the EC logo<sup>378</sup> and the EU declaration of conformity rules.<sup>379</sup>

### Cosmetics and perfumes

A report by the OECD and EUIPO shows that cosmetics are one of most hazardous type of counterfeit goods intercepted in the EU.<sup>380</sup> The same report also shows that counterfeit cosmetics and perfumes also entail a good number of health risks. Counterfeit cosmetics contain dangerous chemicals, large quantities of bacteria and even animal waste, which can cause acne, rash, and even eye infections. Counterfeit perfumes also often contain forms of urine that can likewise cause a severe rash.<sup>381</sup>

In Belgium, the relevant legislation is the EU Regulation 1223/2009<sup>382</sup>, EU Regulation 1069/2009<sup>383</sup>, whenever animal by-products are used and the Royal Decree of 17 July 2012 on cosmetic products.<sup>384</sup> The EU Regulation 1223/2009, for example, includes a key list of substances that are prohibited<sup>385</sup> or which may only be used to a limited degree<sup>386</sup> as well as a list of permitted substances, preservatives and UV filters.<sup>387</sup>

The principal measure to protect consumers can once again be found in the regulations on labelling set out in Article 19 of Regulation 1223/2009 in conjunction with Art. 5 of the Royal Decree of 17 July 2012 on cosmetic products. The principal obligations relate to the application of the logos that immediately catch the consumer's eye with regard to shelf life after opening, reference to enclosed or attached information and a minimum best before date<sup>388</sup>.

### Remarks on labelling legislation

Labelling rules with the necessary information and logos (e.g. the EC logo) are a good first step to ensure that regular companies are able to comply with the conformity rules. However, we are seeing that, for example, the CE logo, is already being counterfeited and that counterfeit products are given fake labels often containing incorrect information. It is therefore already becoming more difficult for the average consumer to assess the safety of a product on the basis of these resources. Market controls certainly stand to offer assistance in this case, as the European Parliament has already stressed. This will ultimately also require more funding. However, this still has a reactive impact rather than a preventive impact.

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<sup>377</sup> *ibid* (n 387).

<sup>378</sup> *ibid* (n 387) Art. 15.

<sup>379</sup> *ibid* (n 387) Art. 13.

<sup>380</sup> OESO/EUIPO, *Dangerous Fakes Trade in Counterfeit Goods That Pose Health, Safety and Environmental Risks*, (Paris, OECD Publishing 2022) 62.

<sup>381</sup> *ibid*, 24-25.

<sup>382</sup> Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, *Pbl. L.* 22 December 2009, afl. 342, 59.

<sup>383</sup> Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation, [2009] OJ L300/1).

<sup>384</sup> *Official Gazette* 3 September 2012.

<sup>385</sup> See Annex II of Regulation 1223/2009.

<sup>386</sup> See Annex III of Regulation 1223/2009.

<sup>387</sup> See Annex IV to VI of the Regulation 1223/2009.

<sup>388</sup> See Annex VII of the Regulation 1223/2009.

In addition, the EC logo is linked to a declaration of conformity, which can be obtained on a party's own initiative. The declaration is essentially a statement of the risk of liability run by the person signing it.<sup>389</sup> However, the signatory must then correspond to a valid identity and the logo must have been able to be applied without any verification for the consumer (outside the market surveillance of the competent authority) for the declaration to be used in a fair manner. Therefore, rather than being able to perform a potential informative, preventive function, it is essentially still reactive and dependent on the efficiency of the market surveillance of the competent authorities.

## Enforcement (market surveillance)

### Cooperation between various authorities

Enforcement of product safety is not centralised and delegated to a single agency, but rather these duties are divided between various federal government agencies. FPS Economy<sup>390</sup>, for example, has authority over electronics and toys,<sup>391</sup> whereas FPS Public Health, Food Chain Safety and Environment, more specifically the Directorate-General for Animals, Plants and Foodstuffs<sup>392</sup>, is responsible for cosmetics (and perfumes). The Safety Regulations Department of FPS Economy<sup>393</sup> is the competent agency in respect of general product safety, as regulated by Book IX of the Code of Economic Law.

Following Regulation 765/2008 on market surveillance and accreditation, the Internal Market Committee of the Interministerial Economic Committee was set up to coordinate the exchange of information between the various bodies.<sup>394</sup> A liaison office has also been set up at EU level<sup>395</sup>, which, in Belgium, is part of the Central Authority managed by the Safety Regulations Department of FPS Economy.<sup>396</sup>

A monthly coordination consultation also takes place that discusses the status of market surveillance with key stakeholders (e.g. FPS Economy, FPS Public Health, Food Chain Safety and Environment, the Federal Agency for Medicines and Health Products (FAGG) and the Belgian Institute for Postal Services and Telecommunications (BIPT), Rapex<sup>397</sup> and Customs.<sup>398</sup> In addition to this consultation, the government is also developing cooperation protocols aimed at optimising collaboration between the customs agencies and the various competent agencies.<sup>399</sup>

### Information exchange

The RAPEX warning system is used at EU level, which sees reports are communicated from the Central Authority (Centraal Meldpunt) to the competent authority by email and an assessment being carried out

<sup>389</sup> See Act of 25 February 1991 on liability for defective products, *Official Gazette* 22 March 1991.

<sup>390</sup> X, 'Nationaal Programma voor Markttoezicht 2021 België' (*economie.fgov.be*, 2021) <<https://economie.fgov.be/nl/file/280564/download?token=xa4P-0sA>> 7 accessed 13 December 2022.

<sup>391</sup> The study for toys shared between the Safety Department and the Directorate-General for Economic Inspection.

<sup>392</sup> Art. 1 Royal Decree of 17 July 2012 regarding cosmetic products.

<sup>393</sup> X, 'Nationaal Programma voor Markttoezicht 2021 België', <<https://economie.fgov.be/nl/file/280564/download?token=xa4P-0sA>> 9 accessed on 13 December 2022.

<sup>394</sup> X, 'Nationaal Programma voor Markttoezicht 2021 België', <<https://economie.fgov.be/nl/file/280564/download?token=xa4P-0sA>> 8 accessed on 13 December 2022.

<sup>395</sup> Chapter IV in Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011, [2019] 169/1.

<sup>396</sup> X (n 409) 8.

<sup>397</sup> The EU system for rapid information exchange.

<sup>398</sup> X (n 409) 8.

<sup>399</sup> *ibid*, 9.

on the probability that the product will be found on the Belgian market, which enables the competent authorities to carry out more effective and more targeted inspections.<sup>400</sup>

In addition to the RAPEX system, there is also the ICSMS (Information and Communication System for Market Surveillance) of the EU, which is a communications platform for all market surveillance issues relating to non-food related products and for the mutual recognition of goods.<sup>401</sup> Not all authorities submit information to this database, despite the fact that this is encouraged by the Central Authority.<sup>402</sup> Another major advantage of this database is that, for example, consumers and manufacturers are able to consult a limited art. of the database, which provides a description of the product as well as a description of why the product does not meet the conformity requirements.<sup>403</sup>

### Procedures of the Safety Department, FPS Economy

FPS Economy takes a both preventive and reactive approach and shares activity reports on the findings and results of its activities each year.<sup>404</sup>

On the preventive side, market surveys are carried out that are determined on the basis of statistics and scientific data, according to a specific procedure, as part of which a predetermined number of sample can be taken for selected products or which may include more general tests or observations.<sup>405</sup> A report is subsequently drawn up, although publication of that report is not guaranteed.<sup>406</sup> The authorities in other EU Member States are informed through the RAPEX system, for example.<sup>407</sup>

If we look at this from the point of view of one of sectors that is the focus of this study, we see that in the cosmetics sector regular controls take place on the Belgian market with regard to cosmetics as a whole at the import, wholesale, retail and manufacturing stages. If non-conformity is established (due to the composition or labelling), the offender is given a warning or an official report is drawn up and the goods are removed from the market (whether or not on the offender's own initiative) in accordance with Chapter XV of the Code of Economic Law.<sup>408</sup> The FPS also participates in control campaigns organised at EU level, an example of which is the European CASP 2019 Control campaign in relation to slime toys, the report of which has been published on the FPS Economy website.<sup>409</sup>

On the reactive side, there are a number of targeted interventions that are undertaken by FPS Economy based on intelligence on hazardous or non-compliant products, for example, through the RAPEX system. However, action can also be taken on the basis of investigations by consumer organisations and other reports of accidents or press releases.<sup>410</sup>

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<sup>400</sup> *ibid.*

<sup>401</sup> European Commission, 'Internal Market, Industry, Entrepreneurship and SMEs' (*webgate.ec.europa.eu*) <<https://webgate.ec.europa.eu/icsms/?locale=nl>> accessed 14 December 2022.

<sup>402</sup> X (n 409) 9.

<sup>403</sup> *ibid.*

<sup>404</sup> FPS Economy, S.M.E., Middle class and Energy, 'Activiteitenverslagen van de FOD Economie en zijn Algemene Directies' (*economie.fgov.be*) <<https://economie.fgov.be/nl/over-de-fod/strategische-publicaties/activiteitenverslagen-van-de>> accessed 14 December 2022.

<sup>405</sup> X (n 409) 10.

<sup>406</sup> *ibid.*

<sup>407</sup> *ibid.*, 11.

<sup>408</sup> *ibid.*, 18.

<sup>409</sup> FPS Economy, S.M.E., Middle class and Energy, 'Europese Controlecampagne CASP2019 Slijmspeelgoed - Belgische resultaten 2019' (*economie.fgov.be*, 2020) accessed <<http://economie.fgov.be/nl/publicaties/europese-controlecampagne-9>> accessed 14 December 2022.

<sup>410</sup> *ibid.*

The same avenues are also followed for sanctions as they are for counterfeiting (administrative transaction, criminal proceedings (other basis) or remedial measures whereby the goods are removed from the market.<sup>411</sup>

## 1.4.2. Technical and organisational resources in the fight against counterfeiting

At EU level

### EMPACT – Europol

EMPACT is a Europol project that stands for ‘*European Multidisciplinary Platform Against Criminal Threats*’. The project aims to provide an integrated approach to optimise internal security within the EU, involving measures that range from external border controls, police, customs and judicial cooperation to information management, training, etc.<sup>412</sup> EMPACT also aims to identify what the most threatening trends are to the European Union in order to be able to tackle them in a coherent way with all Member States.<sup>413</sup>

One of the trends that EMPACT has approached as a priority to tackle within the overall framework of fraud, economic and financial crime is counterfeiting (described as ‘IP crime’). More specifically, the EMPACT project emphasises that counterfeiting practices carried out by criminal organisations must be tackled and where possible their production process must be made more difficult and their (online and offline) sales or flow (of counterfeit goods or money) must be interrupted.<sup>414</sup> This signal from EMPACT makes it even more clear that projects or measures potentially coordinated at EU level can indeed be initiated and in which the competent authorities of the internal market can participate.

### Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet (2011)

This Memorandum of Understanding (MoU) establishes practical rules that online internet service providers must apply to tackle the online sale of counterfeit goods. In this way, the MoU also hopes to improve confidence and trust in the internet market.<sup>415</sup> Major brands, such as Apple, Moncler Spa, Adidas... have signed the Memorandum. The presence of the signatures of major online platforms that are used as web shops to sell counterfeit goods is by no means insignificant. More specifically, these signatures relate to platforms such as Alibaba, Amazon, bol.com (for Belgium and the Netherlands), eBay, Facebook, Marketplace, Vinted, etc. This demonstrates that these platforms are aware that their web shops are indeed used to sell counterfeit products and that they are prepared to take up the fight against such practices. The MoU is evaluated periodically, with its most recent evaluation taking place in August 2020. This revealed that increasing efforts were being made to remove counterfeit products from online web shops and marketplaces between June 2017 and October 2019. At present, the instrument is

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<sup>411</sup> *ibid.*

<sup>412</sup> Europol, ‘EU Policy Cycle – EMPACT’ (*europol.europa.eu*, 2022) <<https://www.europol.europa.eu/crime-areas-and-statistics/empact>> accessed 1 December 2022.

<sup>413</sup> *ibid.*

<sup>414</sup> *Ibid.*

<sup>415</sup> European Commission, ‘Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet’ (*single-market-economy.ec.europa.eu*, 2011) <(consulted on 1 December 2022).[https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/enforcement-intellectual-property-rights/memorandum-understanding-sale-counterfeit-goods-internet\\_en](https://single-market-economy.ec.europa.eu/industry/strategy/intellectual-property/enforcement-intellectual-property-rights/memorandum-understanding-sale-counterfeit-goods-internet_en)> accessed 1 December 2022.

regarded by both the platforms and the rights owners of the IPR as a valuable tool to realise and optimise the exchange of information as well as effective cooperation.

The 'best practices' that have been identified in the context of this MoU in themselves become standards that will ensure that other companies that have not signed the MoU may also comply in order to provide better services. It is vital that the MoU should not merely provide suggestions on what online platforms could do, but also on what rightsholder could do.

However, a major struggle is the fact that even more companies, such as registered advertising websites, social media companies, search engines, etc. would have to sign the MoU in order for it to have a greater impact. Given the voluntary nature of the MoU, the organisations and companies that do sign can also withdraw from the MoU at any time, which has already happened.<sup>416</sup> In addition, the signatory members to the MoU also want to be able to achieve more effective cooperation with the competent authorities in this arena.<sup>417</sup>

### Memorandum of Understanding on online advertising and intellectual property rights on the online advertising market (2018)

Websites that sell counterfeit goods or pirated goods on a commercial scale, thereby violating IPR, use advertisements on their websites to generate additional revenue. In 2018, the parties involved in making available, purchasing, selling and/or facilitating the advertising of counterfeit goods signed the MoU on online advertising and IPR on the online advertising market in order to foster greater cooperation. The ultimate goal of this MoU is to prevent advertising from being placed on websites and mobile apps that violate intellectual property rights on a commercial scale and thus prevent parties from deriving further income from such means.<sup>418</sup> The approach is a product of the EU's 'Follow the Money' approach which aims to deprive IPR offenders on a commercial scale of their profits (as much as possible) in order to make the general activity of counterfeiting and piracy less financially appealing to offenders.<sup>419</sup>

Due to the fact that advertising of genuine trademark holders is shown on these infringing apps or websites (including websites that offer and sell counterfeit goods), there are some obvious disadvantages. First of all, the display of these legitimate advertisements automatically gives consumers the impression that the app and the website (including the goods offered on it) are authentic and can be trusted. Secondly, the reputation of the trademark owners whose products are advertised on the infringing sites and apps without their knowledge is often damaged, for example, making it appear that the trademark owners are behind the infringing apps and mobile sites. Finally, the reputation of the companies that offer the advertising services is likewise damaged.<sup>420</sup>

The websites that were examined were divided into two categories: the illegal and high-risk websites. The illegal websites related to those websites already associated with a traceable (judicial, administrative or any other) conviction for IPR infringement or those that could be found on the 'Counterfeit and Piracy Watch List'<sup>421</sup> of the European Commission. This was not the case for high-risk websites, however their

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<sup>416</sup> 3 parties that previously signed the Memorandum have since withdrawn from the MoU. Commission, 'Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet' (2020) SWD(2020)166 final/2 6.

<sup>417</sup> *ibid.*

<sup>418</sup> European Commission, 'Memorandum of Understanding on Online Advertising and Intellectual Property Rights' (*ec.europa.eu*, 20 June 2018) <<https://ec.europa.eu/docsroom/documents/30226>> accessed 5 December 2022.

<sup>419</sup> *ibid.*, 2.

<sup>420</sup> European Commission, *Study on impact of the memorandum of understanding on online advertising and intellectual property rights on the online advertising market* (Publication Office Of the EU, 2021).

<sup>421</sup> See Commission, 'Counterfeit and Piracy Watch List' SWD(2018) 492 final.

infringing nature could still be confirmed, for example, by the rightsholder. These websites were considered high risk because they are popular with EU consumers.<sup>422</sup>

## EU-China Strategic Framework for Customs Cooperation

Our interviews and our systems analysis allow us to conclude that China is a major source of counterfeit goods. Enforcement in this instance is also often hampered due to the fact that investigation lead up to the borders of China and are subsequently unable to go any further. An initial initiative has already been undertaken at EU level to better tackle counterfeit products originating from China, i.e. through the 'EU-China Strategic Framework for Customs Cooperation'<sup>423</sup>, which initially ran between 2014-2017 and was renewed for the 2018-2020 period. One of the main objectives of the customs cooperation agreement is the enforcement of intellectual property rights.<sup>424</sup> Specifically, the agreement relates to:

- exchanging customs statistics in order to identify counterfeiting trends;
- focusing on high-risk shipments at major airports, ports and other key customs checkpoints;
- realising operational collaboration in the case of cross-border investigations;
- developing partnerships between the various business communities in the EU and in China;
- exchanging knowledge and experience in relation to IPR enforcement practices and policies at the borders.<sup>425</sup>

The EU is in the process of evaluating this customs cooperation agreement, but it appears that it has not yet published any results despite the fact that the report was scheduled for the end of 2021.

## The Counterfeit and Piracy Watch List

The European Commission has created a list of owners or operators of websites and/or physical marketplaces which have set themselves up outside of the EU, so to speak, and which facilitate counterfeiting or offer or reap financial gains from counterfeit products, referred to as the Counterfeit and Piracy Watch List<sup>426</sup>. The list is factual, not legal and is primarily used to improve cooperation with EU traders in the context of the fight against counterfeiting and piracy. The list is also used for cooperation programmes with China, Southeast Asia and Latin America. The European Commission is committed to monitoring measures and other actions undertaken by the competent authorities in the Member States as well as by operators, service providers and marketplaces in response to the companies or individuals included in this list.<sup>427</sup>

## Due Diligence in Supply Chain workshop 2015

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<sup>422</sup> European Commission, *Study on impact of the memorandum of understanding on online advertising and intellectual property rights on the online advertising market* (Publication Office Of the EU, 2021) 9.

<sup>423</sup> Council of European Union, *Enhancing EU-China Trade Security and Facilitation: Strategic Framework for Customs Cooperation 2018 - 2020 between the European Union and the Government of the People's Republic of China* (nr. 9548/17 UD 129, General Secretariat of the Council, 2017).

<sup>424</sup> European Commission, 'EU-China Customs Agreement Ares (2020)1404839' ([ec.europa.eu](https://ec.europa.eu), 2020) < (consulted on 29 November 2022). [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1941-EU-China-Customs-Agreement\\_nl](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1941-EU-China-Customs-Agreement_nl)> accessed 29 November 2022.

<sup>425</sup> European Commission, *Study on impact of the memorandum of understanding on online advertising and intellectual property rights on the online advertising market* (Publication Office of the EU, 2021).8.

<sup>426</sup> *ibid.*

<sup>427</sup> Directorate-General for Trade, 'Commission publishes latest Counterfeit and Piracy Watch List' (2022) <[https://policy.trade.ec.europa.eu/news/commission-publishes-latest-counterfeit-and-piracy-watch-list-2022-12-01\\_en](https://policy.trade.ec.europa.eu/news/commission-publishes-latest-counterfeit-and-piracy-watch-list-2022-12-01_en)> accessed 6 December 2022.

In December 2015, the European Commission conducted a survey among companies about due diligence and integrity in the commercial chain in order to identify what the companies themselves had already developed to safeguard their commercial supply chain against, for example, counterfeiting practices and also to make their commercial supply chain more secure. Apart from holding a workshop in June 2015, the Commission has not really taken any concrete action in this regard, for example, by publishing a communication or by submitting draft legislation.

### Enforcement Directive (IPRED) and Guidance Communication

As early as 2004, this Enforcement Directive<sup>428</sup> led to the minimum harmonisation of the measures, procedures and remedial measures to improve and strengthen the fight against counterfeiting through civil actions. This allows the rightsholder to make use of the measures, procedures and remedial measures described in this Directive, regardless of whether the violation has occurred in their own country or in another Member State. In 2017, the European Union offered additional clarification in this regard through the 'Guidance Communication'<sup>429</sup>.

In Belgium, the transposition of this Directive resulted in three pieces of legislation: the Act of 9 May 2007 on the civil-law aspects of the protection of intellectual property rights<sup>430</sup> and the Act of 10 May 2007 governing the judicial aspects of the protection of intellectual property rights;<sup>431</sup> Ultimately, these Acts would be incorporated into the Code of Economic Law.<sup>432</sup>

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<sup>428</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [2004] OJ L157/45.

<sup>429</sup> Commission, 'Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights' COM(2017) 708 final.

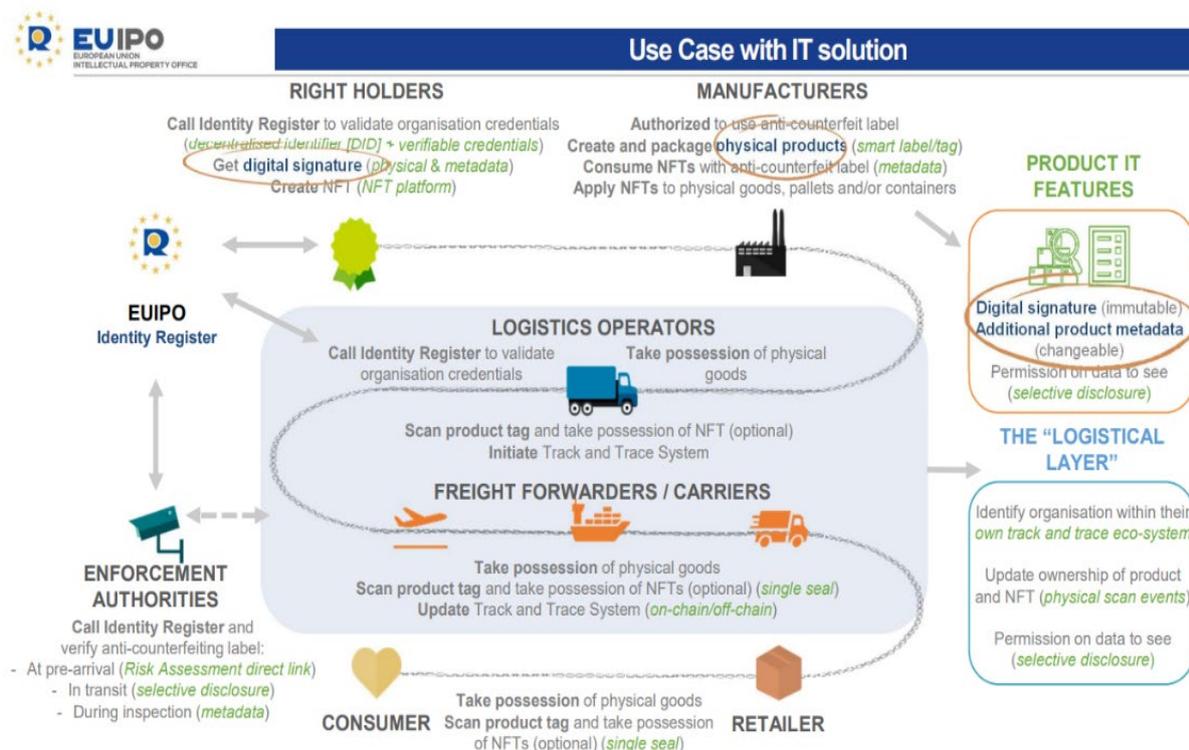
<sup>430</sup> *Official Gazette* 15 May 2007.

<sup>431</sup> *Official Gazette* 14 May 2007.

<sup>432</sup> *ibid* (n 267) 62-63.

## The BLOCKATHON initiative

Figure 8 - Overview of the BLOCKATHON process



Source: EUIPO, Anti-Counterfeiting Blockathon Infrastructure Project slides, 2020.

At present, companies already rely on blockchain technology to combat counterfeiting practices through the tracking and verification of authenticity, however, these systems are often tailored to their specific needs and are not interoperable. The Blockathon is an initiative of the European Union which aims to change this and is an initiative that both rightsholders, logistics partners, customs authorities and even consumers or retailers stand to benefit from. The major advantage in this regard remains the verification of authenticity throughout the commercial supply chain.<sup>433</sup>

The process works with NFTs (which form a kind of digital twin of the physical product) that can be created through a specific portal (The Blockchain Access Portal<sup>434</sup>) by the rightsholders. The centralised portal is managed by the EUIPO and allows the rightsholder to authorise other parties in the supply chain to create or handle the NFTs so that information and any further steps involving the product can be monitored.<sup>435</sup> The most significant advantage for the rightsholder is the verification and follow-up option for his or her product, even if the product enters the second-hand market.<sup>436</sup> The EUIPO itself, however, has already drawn attention to the high level of dependence of the partners in the supply chain for efficient verification of authenticity. In the event of a 'snag' at any point in the process, the proof of authenticity would likewise be lost despite the good in question being authentic.<sup>437</sup> In addition, to have

<sup>433</sup> EUIPO, 'The Anti-counterfeiting Blockathon Infrastructure' (euiipo.europa.eu) <<https://euiipo.europa.eu/ohimportal/en/web/observatory/blockathon/acbi>> accessed 8 December 2022.

<sup>434</sup> European Commission, *BLOCKATHON FORUM Blockchain Use Case* (EUIPO, 2019) 9.

<sup>435</sup> *ibid.*

<sup>436</sup> *ibid.*

<sup>437</sup> *ibid.* 8.

an optimal impact, the entire production line should also use blockchain technology. It would be best not to mix products with a digital twin and those without.<sup>438</sup>

For the time being, the system is also only intended for ‘simple’ products, i.e. products that do not have to be put together in the supply chain. There should be a direct connection between the manufacturer and the logistics operators.<sup>439</sup> In addition, the system will initially be best applied to goods that are sold in limited numbers, but which are high in value.<sup>440</sup>

For logistics operators, a better guarantee means that they do not transport illegal counterfeit goods and can foster trust and confidence with the customs authorities by demonstrating that they are doing their utmost to transport authentic goods.<sup>441</sup> For customs authorities, the blockchain technology is highly beneficial in verifying the authenticity of the goods. This does not always require contact to be made with the counterfeit holder for verification, rather, simple access to the database with the digital signatures of the trademark holders is sufficient.<sup>442</sup> As the technology is also being developed to be technology neutral, it will be interoperable with the already existing track-and-trace technologies used by the logistics operators, customs and other players in the supply chain.<sup>443</sup>

This technology can also provide end consumers with major advantages, for example, by providing them with certainty as to the fact that the goods for sale that have a verified digital signature from the rightsholder are authentic. This will certainly bear fruit on the second-hand market.<sup>444</sup> Due to the fact that consumers can reliably verify the authenticity of the goods, they can also assume that the goods are safe and meet the required standards. Finally, consumers will also become a new player in the enforcement domain, being able to signal the competent authorities or the rightsholder itself in the event that a good is counterfeit, meaning that these cases can be followed up more effectively.<sup>445</sup>

The project is highly promising and the BLOCKATHON FORUM hopes to release an initial version of the system by the end of 2023.<sup>446</sup>

## Digital Services Act Regulation

The Digital Services Act Regulation entered into force on 16 November 2022<sup>447</sup>. This Regulation is directly applicable in all EU Member States. The Digital Services Act Regulation serves to ‘update’ the outdated Directive on electronic commerce<sup>448</sup> of 2000 with standards and rules that meet the standards, values and needs of the present day.<sup>449</sup>

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<sup>438</sup> *ibid.*

<sup>439</sup> European Commission, *BLOCKATHON FORUM Blockchain Use Case* (EUIPO, 2019) 8.

<sup>440</sup> *ibid.*, 7-8.

<sup>441</sup> *ibid.*

<sup>442</sup> EUIPO, ‘The Anti-counterfeiting Blockathon Infrastructure’ (*euiipo.europa.eu*) <<https://euiipo.europa.eu/ohimportal/en/web/observatory/blockathon/acbi>> accessed 8 December 2022.

<sup>443</sup> European Commission, *BLOCKATHON FORUM Blockchain Use Case* (EUIPO, 2019), 7.

<sup>444</sup> *ibid.*, 8.

<sup>445</sup> EUIPO, ‘The Anti-counterfeiting Blockathon Infrastructure’ (*euiipo.europa.eu*) <<https://euiipo.europa.eu/ohimportal/en/web/observatory/blockathon/acbi>> accessed 8 December 2022.

<sup>446</sup> *ibid.*

<sup>447</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), [2022 OJ L277/1.

<sup>448</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1.

<sup>449</sup> European Commission, ‘Questions and Answers: Digital Services Act’ (*ec.europa.eu*, 14 November 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_2348](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348)> accessed 6 December 2022.

In addition, for example, to the rules regarding illegal content, the increased responsibility of major platforms and the country-of-origin principle, the DSA also provides measures to combat counterfeiting. First and foremost, the platforms will have to comply with the mandatory procedures for the removal of illegal goods.

Secondly, the platforms that serve as online marketplaces (e.g. Amazon, Bol.com, eBay, Facebook Market...) must carry out a type of background check according to the 'Know Your Business Customer' principle. The Know Your Business Customer (KYBC) principle means that before a trader can sell goods on the platform, the platform must have been able to confirm the identity of the trader to the best of its ability on the basis of certain types of data outlined in Article 30 of the Digital Services Act Regulation. This differs from the Know Your Customer approach for banks, insurance companies, lawyers, etc. under anti-money laundering legislation in Belgium, where the emphasis is not only on the confirmation of the identity of the individual but also on ascertaining the nature of the transaction and its business relationship.<sup>450</sup>

Furthermore, the sellers will have to be able to comply with the information obligations in accordance with the relevant legislation (in Belgium: Art. VI.2, Art. VI.2/1 and Art. VI.3 of the Code of Economic Law) on the basis of the changes to the organisation of the interface of the platform.<sup>451</sup>

In addition, trusted flaggers will also be used (for example, to flag whether a trademark of a trademark owner is violated). New tools will also be made available to enforcement authorities as the police and FPS Economy in Belgium that will facilitate the flagging and removal of suspected or established counterfeit goods. The operators of online marketplaces will also have to carry out random checks themselves to ascertain whether the product has already been confirmed as being counterfeit in an official database and take the necessary measures on that basis.<sup>452</sup>

Finally, the platforms that qualify as 'very large platforms' will be subject to a risk assessment to assess the risk of illegal goods being found on their platform. Based on this assessment, measures will then be proposed to mitigate this risk.<sup>453</sup>

At national level

Web shop checker – ECC Belgium

The European Consumer Centre in Belgium (ECC Belgium) is also committed to protecting consumers against fraudulent web shops, which is why it has developed the WebshopCheck, which allows consumers to find out whether their web shop is reliable by doing a simple online test.<sup>454</sup>

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<sup>450</sup>Please see infra 'anti-money laundering legislation'.

<sup>451</sup> European Commission, 'Questions and Answers: Digital Services Act' (*ec.europa.eu*, 14 November 2022 <[https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_2348](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348)> accessed 6 December 2022.

<sup>452</sup> *ibid.*

<sup>453</sup> *ibid.*

<sup>454</sup> ECC België, 'Is een webshop veilig? Check het hier!' (*eccbelgie.be*) <<https://www.eccbelgie.be/themas/onlineaankopen/doe-de-webshop-check>> accessed 28 November 2022.

## NANAC

NANAC or '*Neen aan Namaak en Piraterij*' (No to Counterfeiting and Piracy), is a foundation that was set up by Customs with ICC Belgium (Belgian Committee of the International Chamber of Commerce. The foundation works closely with FPS Economy and the European Consumer Centre (ECC Belgium), the Belgian Anti-Counterfeiting Association (ABAC-BAAN), etc. NANAC aims to increase awareness among companies and consumers of the dangers and disadvantages of counterfeiting and piracy.<sup>455</sup>

In addition, NANAC also provide companies with the option of acting as an intermediary between the company and the government and similarly provide an appropriate meeting place for such consultation and help coordinate actions against counterfeiting. They also offer to act as a point of contact for consumers who are victims of counterfeit deception. Finally, they also offer to act on behalf who have interests at stake before the competent authorities in order to defend those interests.<sup>456</sup>

This was a campaign that was conducted by the European Consumer Centre Belgium (ECC Belgium) to raise awareness about counterfeiting practices among young people. This campaign consisted of a multifaceted approach to make young people realise the problematic nature of purchasing counterfeit goods.<sup>457</sup>

The campaign inter alia involved a bus (i.e. the Federal Truck) going from school to school to raise awareness about counterfeiting among young people and also include distribution of a teaching pack for teachers, a brochure with tips to avoid counterfeit products offered online and information on how the goods are destroyed by customs, etc.<sup>458</sup> The campaign was put on the back burner due to the COVID-19 pandemic, however ABAC-BAAN has indicated that the campaign will be resumed very soon.<sup>459</sup>

### Intensified fight against counterfeiting and piracy 2022 – FPS Economy Campaign

A government awareness campaign about the dangers of counterfeiting, aimed at young people aged 15 to 24. The campaign involved promoting a fake website created by FPS Economy selling low-budget products, with Belgian influencers subsequently identifying all the various problems through their study videos. After a few days, the influencers opened up about the campaign and once again stressed the risks of counterfeit products,<sup>460</sup> for example, in relation to counterfeit cosmetics, the hazards of counterfeit electronic products, risks associated with toys.<sup>461</sup> The campaign also drew attention to counterfeiting as a source of funding for criminal activities (e.g. money laundering, terrorism, human trafficking...)<sup>462</sup>

## 1.5 Interim conclusion

### 1.5.1 Summary SWOT analysis

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<sup>455</sup> Neentegennamaak, 'Impact van namaak' (*neentegennamaak.be*) <<https://www.neentegennamaak.be/about>> accessed 28 November 2022.

<sup>456</sup> *ibid.*

<sup>457</sup> ECC België; 'Namaakgoederen kopen? Een slecht idee! #ImNotFake' (*eccbelgie.be*) <[#ImNotFake - ECC België \(eccbelgie.be\)](https://www.eccbelgie.be/#ImNotFake)> accessed 28 November 2022.

<sup>458</sup> *ibid.*

<sup>459</sup> Interview with ABAC-BAAN (25 November 2022).

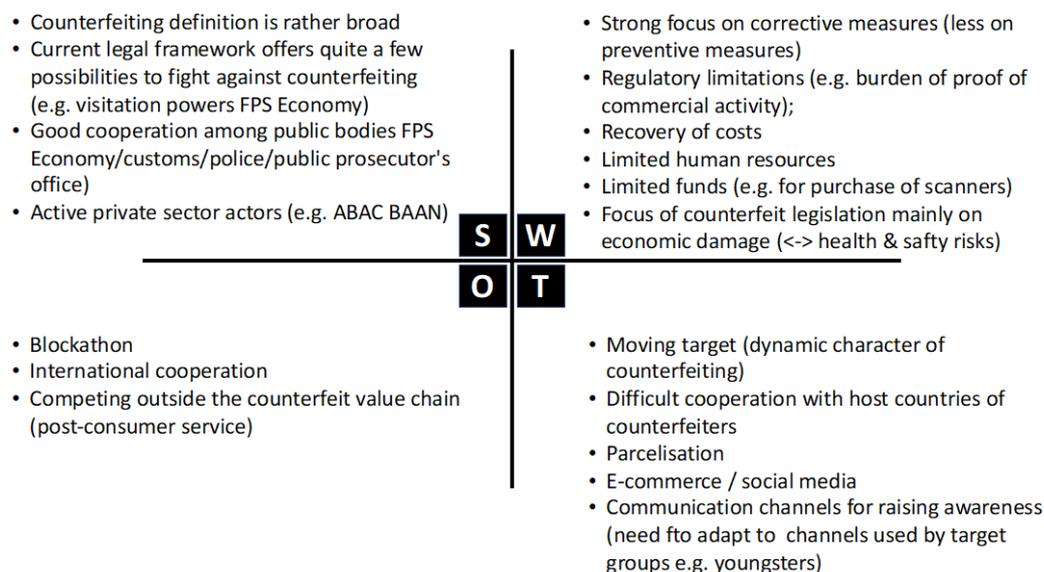
<sup>460</sup> FPS Economy, S.M.E., Middle classes and Energy, 'Vergeet het, het is fake!' (*news.economie.fgov.be*) <<https://news.economie.fgov.be/211184-vergeet-het-het-is-fake>> accessed 28 November 2022.

<sup>461</sup> *ibid.*

<sup>462</sup> *ibid.*

In conclusion to this initial sub-report, we would like to highlight a number of key points in a SWOT analysis. This will not be an exhaustive summary of all the various strengths, weaknesses, opportunities and threats, but rather is a selection of key elements that we wish to take into account in the remaining aspects of the study.

Figure 9 - Initial SWOT analysis



### Strengths

- The definition of counterfeiting is fairly broad, which allows for a broad scope for intervention.
- Within the current legal framework, there are already a number of options available to combat counterfeiting (e.g. FPS Economy inspection authorisation).
- Throughout our interviews with stakeholders, effective cooperation with and between the various authorities (FPS Economy/Customs/Police/Public Prosecutor) was consistently cited as a key element.
- Many rightsholders also work effectively with the government in the fight against counterfeiting either directly or through private service providers (e.g. ABAC-BAAN).

### Weaknesses

- The focus of the fight against counterfeiting is very heavily on corrective measures (detecting counterfeiting) and less on discouraging it.
- A number of restrictions in the legislation make it more difficult to establish cases of counterfeiting from the facts (e.g. burden of proof regarding performance of commercial activity).
- The recovery of costs can prevent some rightsholders from enforcing their rights.
- Available human resources limit effective enforcement options in the field. For example, there is little point in training police officers to be able to identify counterfeit goods if this is not

accompanied by an increase in the processing capacity to handle the increased number of official reports. The same applies to the limited financial resources that restrict the purchase of enforcement instruments (scanners, hardware and software).

- The focus of anti-counterfeiting legislation is chiefly on economic damage, whereas counterfeiting practices can also cause other types of harm (e.g. to health).

#### Opportunities

- The Blockathon initiative is widely regarded as a promising development in the fight against counterfeiting.
- International cooperation: the intensification of international cooperation inter alia with OLAF/Europol, EUIPO, etc. and the exchange of information allows for the fight against counterfeiting to be conducted more effectively and more efficiently.
- By competing on aspects not covered by the counterfeiting value chain (e.g. after-sales services), the appeal of counterfeit products will decrease, thereby ensuring the original product gains a competitive advantage.

#### Threats

- Moving target (dynamic narrative): counterfeiters are not tied to a particular product, country or distribution channel and can switch to alternatives fairly rapidly. These shifts make counterfeiting difficult to combat.
- It remains difficult to tackle the problem of country at the source in host countries. This is due to the conflicting interests between the host countries and the countries that experience the greatest negative socio-economic impact as a result of counterfeiting practices, which hampers any cooperation.
- Parcelisation: the atomisation of the shipments means that counterfeit products enter the country in a more dispersed manner and, as such, are more difficult to stop.
- E-commerce/social media; these digital innovations make it easier to, and increase anonymity in, trade in counterfeit products and stay out of reach of enforcing authorities.
- Communication channels to raise awareness? Young people make up a significant percentage of the consumer audience for counterfeit products. Reaching these young people who use different communication channels, which, in addition, change periodically, makes it more difficult to raise awareness about counterfeiting.

In addition to this strategic SWOT analysis, Annex B includes a number of more specific findings and preliminary conclusions as provisional input for the work packages to follow.

## Section 2: Estimating the extent and impact of counterfeit in Belgium

### 2.1. Setting the scene

The impact of counterfeiting takes several forms. Below we focus on the following impact categories: 1) economic impact; 2) impact on public finances, and 3) impact on consumer health and safety.

*Economic impact* - Counterfeit goods have a negative impact on the legal economy. The sale of counterfeit goods leads to a loss of revenue for companies producing the original goods. This has an impact on employment both directly and indirectly.<sup>463</sup> The table below gives an indication of economic loss in the EU for a selection of sectors for the period 2013-2017:

Table 6 - Average EU economic losses due to intellectual rights infringement for a selection of sectors (2013-2017)

Sector	Direct Lost Sales (EUR billion)	% of Sales	Total Lost Sales (EUR billion)	Direct Employment Loss	Total Employment Loss	Government Revenue Loss (EUR billion)
Smartphones*	4.2	8.3%	4.2	Not calculated	Not calculated	Not calculated
Pesticides & Agrochemicals	0.5	4.2%	1.0	767	3 854	0.1
Pharmaceuticals	6.0	2.4%	10.0	20 040	48 253	1.0
Spirits & Wine	2.3	5.3%	5.2	5 681	31 858	2.1
Recorded Music	0.1	1.6%	0.1	280	644	0.0
Jewellery & Watches	1.6	11.5%	3.0	12 146	22 908	0.5
Handbags & Luggage	0.9	6.4%	1.9	6 715	13 691	0.3
Toys & Games	1.0	7.8%	1.7	3 930	8 380	0.3
Sports Goods	0.6	7.7%	1.1	3 286	6 579	0.2
Clothing, Footwear and Accessories	23.3	7.8%	37.0	263 196	373 476	7.0
Cosmetics & Personal care	9.6	14.0%	17.9	99 963	161 792	3.5
<b>Total all sectors</b>	<b>50.0</b>	<b>6.4% (avg.)</b>	<b>83.2</b>	<b>416 004</b>	<b>671 435</b>	<b>15.0</b>

This loss of income has a negative impact on returns and can therefore jeopardise investment opportunities and willingness to invest. Further studies have also shown that the costs of fighting intellectual property rights infringements vary between 83.653 euros and 159.132 euros on average per year, depending on the size of the company.<sup>464</sup>

Impact on the health and safety of consumers - Sales of counterfeit products that can be hazardous to public health have increased over the last two years. For example, a significant increase in unsafe and counterfeit health products was observed during the COVID-19 pandemic.<sup>465</sup> In addition to health concerns, the safety of the consumer is also threatened by counterfeit products. For example, there has been a recent increase in the counterfeiting of auto parts, which are often

<sup>463</sup> EUIPO, 2020 Status Report on IPR Infringement (EUIPO, June 2020) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2020\\_Status\\_Report\\_on\\_IPR\\_infringement/2020\\_Status\\_Report\\_on\\_IPR\\_infringement\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2020_Status_Report_on_IPR_infringement/2020_Status_Report_on_IPR_infringement_en.pdf)> accessed on 20 August 2022.

<sup>464</sup> European Court of Auditors, 'Intellectuele eigendomsrechten van de EU: niet geheel waterdicht' (eca.europa.eu, 2022) <[Special Report 06/2022: EU intellectual property rights \(europa.eu\)](https://eca.europa.eu/eca/eu-intellectual-property-rights)> accessed 22 August 2022.

<sup>465</sup> Redactie Knack, 'Namaakproducten gaan steeds sneller over de (online) toonbank' (2022) KNACK <<https://weekend.knack.be/lifestyle/mode/nieuws-trends/namaakproducten-gaan-steeds-sneller-over-de-online-toonbank/>> accessed 22 August 2022.

manufactured with inferior materials, which can then lead to overheating, short circuiting and other malfunctions that can lead to safety risks.<sup>466</sup>

Impact on public finances – Counterfeiting also has a negative impact on public finances. After all, goods that are sold legally are subject to taxes, levies, etc. (e.g. VAT), which are generally not collected from counterfeit goods.

In this chapter, we will be outlining the key figures related to research questions surrounding the scope and specifics of counterfeiting in Belgium. In addition, we will be analysing these key figures and looking for explanatory factors to account for the findings of the analysis (root cause analysis). It is these explanatory factors that, at a later stage, will guide our search for relevant improvement proposals.

We will address the following research questions:

- What is the impact on the economy (loss of revenue/employment/reputational damage):
- Which sectors are primarily affected today?
  - What is the segmentation of the businesses within the sectors (small-medium – large)?
- What is the impact of public health, security, the environment?
- What is the impact on the government: loss of revenue (tax) and what are the costs of the fight against counterfeiting?
- What explanatory factors account for the identified impact? (e.g. position of the Port of Antwerp)

## 2.2. Volume of counterfeited goods

Below we find a general overview of the different product categories that have been retained/seized on the Belgian internal market. It provides a relative view of the importance of the categories that will be further analysed.

Table 7 - Product categories retained/seized on Belgian market in 2021

Product categories	Number of consignments of goods withheld	Number of products	Estimated value of original goods (€)	market
Products for body care	12	4.459	€	244.626
Clothing and accessories	189	37.333	€	5.912.045
Shoes	30	6.142	€	1.427.800
Personal accessories	66	1.904	€	1.948.575
Mobile phones including parts and technical accessories	73	14.628	€	501.795
Electrical/electronic devices and computer equipment	8	2.034	€	175.855
Toys, games and sports items	22	16.493	€	251.235
Tobacco products	2	1.850	€	12.380

<sup>466</sup> GRAJALES PEREZ-Y-SOTO D, 'Counterfeiting and piracy – the global impact' (WTR, 2022) <<https://www.worldtrademarkreview.com/global-guide/anti-counterfeiting-and-online-brand-enforcement/2022/article/counterfeiting-and-piracy-the-global-impact>> accessed on 17 July 2022

Other goods	31	19.333	€	704.972
Furniture	14	753	€	160.406
Online infringements	1	5	€	40.000
<b>Total</b>	<b>448</b>	<b>104.934</b>	<b>€</b>	<b>11.379.689</b>

The above figures provided by the FPS of economy are in practice complemented by the statistics on seized consignments by customs.

Table 8 - Volume and value of retained/seized counterfeited cosmetics

Product category and location	# of retained/seized consignments	Number of articles	of	Estimated market value of original products (€)
Products for body care (goods retained/seized on Belgian internal market)	12	4.459		244.626
Category 2a: perfumes and cosmetics (goods retained/seized at external borders)	135	7.056	€	40.507
<b>Total</b>	<b>147</b>	<b>11.515</b>	<b>€</b>	<b>285.133</b>

From the above we find that while the number of consignments retained on the Belgian market is substantially smaller than the number of consignments retained/seized at the border, the former consignments are substantially larger than the latter both in terms of the number of individual articles per consignment as well as the overall market value of these consignments.

This difference notably stems from the nature of the location where the controls are performed, e.g., smaller parcels at airports vs shops/warehouses on the Belgian market.

## 2.3. Methodological approach

We start by defining the *lost sales*. As the product categories selected (cosmetics, toys and mobile phones) are mainly sold to private individuals and that the demand for counterfeit products is largely linked to the consumption of households (as opposed to consumption by business or professional organisation) we start by defining the yearly expenditure of households. Hereto we use the data from the 2020 Household Budget Survey for Belgium<sup>467</sup> (hereafter HBS 2020) which provides average annual expenditure of households for a large basket of products.

Thereafter we refer to the EUIPO reports for the selected product categories to determine the share of counterfeit products (%) in the total sales<sup>468</sup>. By applying this share (%) to the total expenditure by households for that product category for a particular year (using the HBS 2020) we can calculate the lost sales. We note that this amount is likely to be an *overestimation* of lost sales. Indeed, if it were not possible by (cheap) counterfeit goods, part of the counterfeit buyers would not have bought the (more expensive) original products. Hence, part of the counterfeit purchases would not translate into additional sales if it were possible to ban all counterfeit products.

Starting from the lost sales we then formulate a number of hypotheses on conversion factors which allow us to roughly estimate the loss of jobs, loss of revenues in terms of personal and

<sup>467</sup> The results of the Household Budget Survey of 2020 performed by Statbel are available at: [https://statbel.fgov.be/sites/default/files/files/documents/Huishoudens/10.1%20Huishoudbudget/Plus/NL/EBM\\_0113\\_2020\\_NL\\_07SEP21.XLSX](https://statbel.fgov.be/sites/default/files/files/documents/Huishoudens/10.1%20Huishoudbudget/Plus/NL/EBM_0113_2020_NL_07SEP21.XLSX)

<sup>468</sup> See section 2.7 for a summary explanation of the methodology used for calculating the percentage of counterfeit in total sales in the EUIPO reports quantifying the economic impact of IPR infringements.

company taxes, loss of revenues from VAT in Belgium, stemming from counterfeit of each product category.

- loss of profit, points to the remaining margin, after deduction of costs but before taxes, we guesstimate that the average sales margin amounts to 30% of the sales value.
- Loss of jobs can mostly be calculated using the EUIPO studies for the selected product categories
- Loss of personal tax revenues are calculated considering the 2023 taxed rates<sup>469</sup> applied in Belgium and the average taxable income<sup>470</sup>, to determine the average amount of taxes paid per person (8.154 euro). By multiplying this amount with the number of jobs lost because of counterfeit we can estimate the loss of personal tax revenues.
- The lost VAT revenues are calculated by applying the VAT tariff of 21% to the overall estimated annual lost sales of cosmetics in Belgium.
- The lost corporate tax revenues are calculated by applying the tax of 25% on the lost profits.

## 2.4. Cosmetics

### 2.4.1. Lost sales

The 2020 Household Budget Survey for Belgium<sup>471</sup> (hereafter HBS 2020) points to the average household expenditure for product categories that pertain to cosmetics (see Table 9). By multiplying the number of households in the population with the average expenditure per household, we can calculate the (sub)total expenditure for a particular cosmetic product category. By summing up expenditure for all relevant cosmetic subcategories we can calculate the expenditure for cosmetics to amount to 404 million euro for all Belgian households in 2020.

<sup>469</sup> To estimate the average lost personal tax revenues, we used the applicable tax rates for each of the tax brackets

Tax rate per bracket (2023)	Tax per bracket	Thresholds (2023)
25%	€ 3.467,50	€ 13.870
40%	€ 4.452,00	€ 24.480
45%	€ 234,00	€ 42.370
50%	€ -	
<b>Total</b>	<b>€ 8.153,50</b>	
<b>Average tax rate</b>	<b>31,61%</b>	

<sup>470</sup> The average net income in 2020 was 19.671. This figure is calculated based on personal tax declarations and comprise the taxable income from professions, replacement income, pensions, dividends, the cadastral income and maintenance allowances. this amount includes <https://statbel.fgov.be/en/themes/households/taxable-income>. As we are interested in job loss we have assumed that the average is higher and therefore 2.500

<sup>471</sup> The results of the Household Budget Survey of 2020 performed by Statbel are available at: [https://statbel.fgov.be/sites/default/files/files/documents/Huishoudens/10.1%20Huishoudbudget/Plus/NL/EBM\\_0113\\_2020\\_NL\\_07SEP21.XLSX](https://statbel.fgov.be/sites/default/files/files/documents/Huishoudens/10.1%20Huishoudbudget/Plus/NL/EBM_0113_2020_NL_07SEP21.XLSX)

Table 9 - HBS 2020 – Household expenditure on cosmetics

		Number of households (sample)	Number of households (population)	Average expenditure for all households (per year in euro)	SUBTOTAL expenditure households (per year in euro)
12132A	Soap products: toilet soap, shampoo, toothpaste, shaving cream, shower gel ...	2.686	2.185.263	€ 100,74	€ 220.152.658
12132F	Fragrance products: perfume, eau de toilette, aftershave	230	182.472	€ 43,12	€ 7.868.418
12132G	Other beauty products (make-up, hairspray, hair gel, deodorant, hair dye, hair conditioner, nail polish, lipstick, day cream, night cream, fond de teint, eye shadow, blush, self-tanner, depilatory cream and wax, sun cream, après-soleil,	1.507	1.266.870	€ 138,64	€ 175.644.177
12132H	Esoteric products and wellness: essential oils, plant-based cures, medicinal stones, incense sticks ...	82	61.215	€ 5,04	€ 308.804
<b>TOTAL expenditure households (per year in euro)</b>					<b>€ 403.974.057</b>

Source: HBS 2020: 'Tab01\_BE - Gemiddelde uitgaven per huishouden en per jaar (€) – België' (2021)

Assuming a share of counterfeiting in Belgium of 15,1%<sup>472</sup> of the overall expenditure, the value of lost sales in Belgium can be estimated to amount to approximately 61 million euro (15,1% of 403.974.057 euro = 61.000.083 euro).

**Interpretation guidance:** We note that EUIPO report covers a broad set of product categories within the cosmetics product group<sup>473</sup>. Hence it seems logic to maintain such broad set of products when considering the household budget categories to determine total sales on which to apply the share of counterfeit from the EUIPO report. However, we understand from the FPS Economy that in practice most seized products pertain to a subset of the cosmetics product group '*Fragrance products: perfume, eau de toilette, aftershave*'. Hence, under the assumption that the seizures are a good indicator for the product categories that are counterfeited, then arguably the 15% share of counterfeit in total sales should only/mainly be calculated based on the sales of the subset of products that have been seized. In other words, taking into account the whole of the household budget for the broad set of cosmetics products may be overestimating the actual amount of lost sales and the importance of the impacts in relation hereto.

Similar caution may be needed when interpreting the results of other product categories.

## 2.4.2. Loss of profits

Assuming an average sales margin of 30% of the sales value, the 61.000.083 euro of lost sales translate into a loss of profits of 18.300.025 euro.

<sup>472</sup> *The economic cost of IPR infringement in the cosmetics and personal care sector: report of a pilot study (2015) - Quantification of infringement in Manufacture of perfumes and toilet preparations sector (NACE 20.42) from the Office for Harmonization in the Internal Market (OHIM, now EUIPO).* This source refers to min 12,3% – max 17,9% - 95% confidence interval.

<sup>473</sup> The report cover the following cosmetics product categories : perfumes and toilet water; beauty and make-up preparations; sunburn prevention and suntan preparations; manicure and pedicure preparations; shampoos, hair lacquers, waving and straightening preparations; dentifrices and preparations for oral hygiene, including denture fixative preparations; shaving preparations, including pre-shave and aftershave preparations; deodorants and bath salts; depilatories; manufacture of cosmetic soap

### 2.4.3. Loss of jobs

Estimating the job loss caused by counterfeiting starts with looking at the estimations made at EU level for the loss of jobs in manufacturing, wholesale and retail, in function of the lost sales in these value chain links. Based on the data provided at EU level we can estimate the level of job losses per euro of lost sales in manufacturing, wholesale and retail, and calculate the share of lost sales in manufacturing, wholesale and retail in the overall value of lost sales.

Table 10 - Estimated job loss cosmetics in EU

Supply chain component	Lost sales (€ million)	Job loss (#)	Job loss per € million of lost sales (#)	Share in lost sales (%)
Manufacturing	1.762	10.667	6,05	37,43%
Wholesale	1.938	14.010	7,23	41,16%
Retail	1.009	26.884	26,64	21,43%
Total	4.708	51.561	10,95	100%

Starting from the overall lost sales in Belgium estimated to amount to approximately 60 million euro (see 2.4.2), we can calculate the loss of sales in each segment of the cosmetics value chain (manufacturing, wholesale and retail) by applying the shares in lost sales calculate at EU level (respectively 37,43%, 41,16% and 21,43%). By applying the job loss estimations at EU level to the Belgian situation, we can estimate the lost jobs in manufacturing, wholesale and retail in Belgium (see Table 11).

Table 11 - Estimated job loss cosmetics in Belgium

Supply chain component	Lost sales (€)	Job loss (#)
Manufacturing	€ 22.829.682,58	138
Wholesale	€ 25.110.059,50	182
Retail	€ 13.073.297,23	348
Total	€ 61.013.039,31	668

Note that in a market characterised by a shortage of labour part of the jobs lost in the cosmetics sector would be compensated by hires in other sectors.

### 2.4.4. Loss of revenues from personal taxes

Taking into account the 2023 taxed rates applied in Belgium and the average taxable income, we can determine the average amount of taxes paid per person (7.920 euro). By multiplying the number of jobs lost because of counterfeiting, this means that a maximum of approximately 5,5 million euro is lost in terms of personal income tax. Note that this is a maximum, as people receiving unemployment benefits may also pay taxes and - in a market with labour shortage - part of the jobs lost in the cosmetics sector would be compensated by hires in other sectors.

Table 12 - Lost personal tax revenues – cosmetics

Average taxable income (€)	€ 25.000
Average taxes paid (%)	€ 7.920
Lost jobs (#)	668

Loss of personal tax revenues (€)	€ 5.290.699
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## 2.4.5. Lost VAT revenues

The lost VAT revenues are calculated by applying the VAT tariff of 21% to the overall estimated annual lost sales of cosmetics in Belgium.

Table 13 - Lost VAT revenues – cosmetics

Lost sales	€ 61.000.083
VAT on cosmetics	21%
<b>Lost VAT revenues</b>	<b>€ 12.810.017</b>

This calculation results in an estimated loss of approximately 13 million euro in VAT revenues for the public authorities.

## 2.4.6. Loss of revenues from corporate taxes

Taking into account an average tax rate of 25% applied to the lost profit defined above of 18.300.025 euro, the loss of revenues from corporate taxes amounts to 4.575.006 euro.

Table 14 - Lost corporate tax revenues – cosmetics

Taxable profit (€)	€ 4.248.872
Tax rate (%)	25%
<b>Lost corporate tax revenues (€)</b>	<b>€ 1.062.218</b>

## 2.5. Toys & games

### 2.5.1. Lost sales

The 2020 Household Budget Survey for Belgium<sup>474</sup> (hereafter HBS 2020) points to an average annual expenditure with regard to toys of 170 euro per household. This average amount pertains to the share of households in the HBS 2020 sample that indicated to have spent part of their household budget on toys. By extrapolating this share to the population of Belgian households, the number of households that purchased toys can be estimated to amount to 818.338 households. By multiplying the average toy expenditure of 170 euro per household, by the 818.338 households who are likely to have purchased toys the total expenditure and corresponding toy sales can be estimated to amount to 138.852.031 euro.

Table 15 - Average annual expenditure households

COICOP <sup>475</sup>	Description	# households (sample)	# households (population)	average annual expenditure households
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<sup>474</sup> The results of the Household Budget Survey of 2020 performed by Statbel are available at: [https://statbel.fgov.be/sites/default/files/files/documents/Huishoudens/10.1%20Huishoudbudget/Plus/NL/EBM\\_0113\\_2020\\_NL\\_07SEP21.XLSX](https://statbel.fgov.be/sites/default/files/files/documents/Huishoudens/10.1%20Huishoudbudget/Plus/NL/EBM_0113_2020_NL_07SEP21.XLSX)

<sup>475</sup> COICOP : Classification of individual consumption by purpose

0931	Games, toys and hobby	1.079	818.338	€ 170
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Source: HBS 2020: 'Tab01\_BE - Gemiddelde uitgaven per huishouden en per jaar (€) - België' (2021)

Assuming a share of counterfeiting in Belgium of 10,2%<sup>476</sup> of the overall expenditure, the value of lost sales in Belgium can be estimated to amounts around 14 million euro (10,2% of 138.852.031 euro. = 14.162.907 euro).

## 2.5.2. Loss of profits

Assuming an average sales margin of 30% of the sales value, the 14.162.907 euro of lost sales translate into a loss of profits of 4.248.872 euro.

## 2.5.3. Loss of jobs

Estimating the job loss caused by counterfeiting starts with looking at the estimations made at EU level for the loss of jobs in manufacturing, wholesale and retail, in function of the lost sales in these value chain links. The EUIPO report<sup>477</sup> only provides information of jobs lost in manufacturing for the major toy producers. Taking the hypothesis that job loss in manufacturing in Belgium is similar to the EU average of 7,2 jobs lost per million of lost sales we can calculate the jobs lost in Belgium to amount to 102 jobs.

Table 16 - Estimated job loss in manufacturing for toys in Belgium

Supply chain component	Lost sales (€)	Job loss (#)
Manufacturing	€ 14.162.907	102
Wholesale	€ ?	?
Retail	€ ?	?
Total	€ 14.162.907	102

Note that in a market characterised by a shortage of labour part of the jobs lost in the cosmetics sector would be compensated by hires in other sectors.

## 2.5.4. Loss of revenues from personal taxes

Taking into account the 2023 taxed rates applied in Belgium and the average taxable income, we can determine the average amount of taxes paid per person (7.920 euro). By multiplying the number of jobs lost as a consequence of counterfeiting, this means that a maximum of approximately 1 million euro is lost in terms of personal income tax. Note that this is a maximum, as people receiving unemployment benefits may also pay taxes and - in a market with labour shortage - part of the jobs lost in the cosmetics sector would be compensated by hires in other sectors.

<sup>476</sup> The economic cost of IPR infringement in Toys and games: report of a pilot study (2015) - Quantification of infringement in Quantification of infringement in Manufacture of toys and games (NACE 32.40) (NACE 20.42) from the Office for Harmonization in the Internal Market (OHIM, now EUIPO). This source refers to min. 6,3% and max. 14,1% with 95% confidence interval

<sup>477</sup> The economic cost of IPR infringement in Toys and games: report of a pilot study (2015) - Quantification of infringement in Quantification of infringement in Manufacture of toys and games (NACE 32.40) (NACE 20.42) OHIM, p. 9 and following.

Table 17 - Lost personal tax revenues – toys &amp; games

Average taxable income (€)	€ 25.000
average personal income taxes (€)	€ 7.920
lost jobs (#)	102
<b>Lost personal tax revenues</b>	<b>€ 806.199</b>

## 2.5.5. Lost VAT revenues

The lost VAT revenues are calculated by applying the VAT tariff of 21% to the overall estimated annual lost sales of cosmetics in Belgium.

Table 18 - Lost VAT revenues – toys &amp; games

Lost sales	€ 14.162.907
VAT on toys and games	21%
<b>Lost VAT revenues</b>	<b>€ 2.974.210</b>

This calculation results in an estimated loss of approximately 3 million euro in VAT revenues for the public authorities.

## 2.5.6. Loss of revenues from corporate taxes

Taking into account an average tax rate of 25% applied to the lost profit defined above of 4.248.872 euro, the loss of revenues from corporate taxes amounts to 1.062.218 euro.

Table 19 - Lost corporate tax revenues – toys &amp; games

Taxable profit (€)	€ 4.248.872
Tax rate (%)	25%
<b>Lost corporate tax revenues (€)</b>	<b>€ 1.062.218</b>

## 2.6. Electronic products (smartphones)

### 2.6.1. Lost sales<sup>478</sup>

The EU28 (excl. Bulgaria and Malta) sales for 2016 amounted to approximately 50 billion euro. Taking the hypothesis an even spread of the population, the share of these EU28 sales for Belgium amounts to approximately 1,2 billion euro.

Taking into account that 8% of the sales value is from counterfeit goods<sup>479</sup>, it is possible to calculate the lost sales for Belgium to amount to 93.088.315 euro.

<sup>478</sup> The economic cost of IPR infringement in Smartphone: report of a pilot study (2017) -EUIPO.

<sup>479</sup> The economic cost of IPR infringement in Smartphone: report of a pilot study (2017) -EUIPO

Table 20 - Lost sales – smartphones

	Total sales (EUR)	Total sales (units)	Average price per unit
EU28 (excl. Bulgaria & Malta)	€ 50.801.000.000	152.000.000	€ 333
Belgium (pro rata share in EU Population EU)	€ 1.163.603.933	3.481.581,03	
Total lost sales for Belgium (%)	8%		
Total lost sales (EUR)	€ 93.088.315		

## 2.6.2. Loss of profits

Assuming an average sales margin of 30% of the sales value, the 93.088.315 euro of lost sales translate into a loss of profits of 28.944.307 euro.

## 2.6.3. Loss of jobs

Estimating the job loss caused by counterfeiting starts with looking at the estimations made at EU level for the loss of jobs in manufacturing, wholesale and retail, in function of the lost sales in these value chain links. We formulate the hypothesis that there is no substantial manufacturing of smartphones in Belgium. As the EU IPO report does not provide relevant detailed information on job loss due to counterfeit, we formulate a further hypothesis that the wholesale and retail job losses are comparable to those in the cosmetics sector (also a B2C).

Based on a lost sales of around 93 million euro and an estimated 13,88 jobs lost per million we can calculate a job loss of 1.292 in Belgium.

Table 21 - Estimated job loss smartphones in Belgium

	lost sales (EUR)	Lost jobs per MEURO sales (#)	Lost jobs (#)
wholesale & retail	€ 93.088.315	13,88	1.292

Note that in a market characterised by a shortage of labour part of the jobs lost in the cosmetics sector would be compensated by hires in other sectors.

## 2.6.4. Loss of revenues from personal taxes

Taking into account the 2023 taxed rates applied in Belgium and the average taxable income, we can determine the average amount of taxes paid per person (7.920 euro). By multiplying the number of jobs lost as a consequence of counterfeiting, this means that a maximum of approximately 5,5 million euro is lost in terms of personal income tax. Note that this is a maximum, as people receiving unemployment benefits may also pay taxes and - in a market with labour shortage - part of the jobs lost in the smartphone sector would be compensated by hires in other sectors.

Table 22 - Lost personal tax revenues - smartphones

Average taxable income (€)	€ 25.000
average personal income taxes (€)	€ 7.920
lost jobs (#)	1.292
<b>Lost personal tax revenues</b>	<b>€ 10.229.924</b>

## 2.6.5. Lost VAT revenues

The lost VAT revenues are calculated by applying the VAT tariff of 21% to the overall estimated annual lost sales of smartphones in Belgium.

Table 23 - Lost VAT revenues – smartphones

Lost sales	€	<b>96.481.023,72</b>
VAT on smartphones		21%
<b>Lost VAT revenues</b>	€	<b>20.261.014,98</b>

This calculation results in an estimated loss of approximately 20 million euro in VAT revenues for the public authorities.

## 2.6.6. Loss of revenues from corporate taxes

Taking into account an average tax rate of 25% applied to the lost profit defined above of 28.944.307 euro, the loss of revenues from corporate taxes amounts to 7.236.077 euro.

Table 24 - Lost corporate tax revenues – smartphones

Taxable profit (€)	€ 28.944.307
Tax rate (%)	25%
<b>Lost corporate tax revenues (€)</b>	<b>€ 7.236.077</b>

## 2.7. Additional product categories

To complement the above analysis for the three selected product categories, we summarily analysed 10 additional product categories using the EUIPO reports on the quantification of the economic impact of IPR infringement for selected product categories<sup>480</sup>.

These EUIPO reports notably provide information on the estimated share of counterfeit in the total sales in Belgium for a series the goods (see Table 25).

<sup>480</sup> All EUIPO reports on the quantification of IPR infringements per product categories are available at [https://euiipo.europa.eu/ohimportal/nl/web/observatory/quantification-of-ipr-infringement?TSPD\\_101\\_R0=089375ec4aab2000286c3cd2a04bdc8e8cf14b6e606eb8275717d0d600fb99bd7588081d00bfd02108951c1f7c143000c464635c0409b4214facac0323661d62369dd8306e5cf957e6e8c9edd51cb6f99069221a5e0981af33b842f62e7301bc](https://euiipo.europa.eu/ohimportal/nl/web/observatory/quantification-of-ipr-infringement?TSPD_101_R0=089375ec4aab2000286c3cd2a04bdc8e8cf14b6e606eb8275717d0d600fb99bd7588081d00bfd02108951c1f7c143000c464635c0409b4214facac0323661d62369dd8306e5cf957e6e8c9edd51cb6f99069221a5e0981af33b842f62e7301bc)

Table 25 - Estimated share of counterfeit goods in total sales in Belgium for selected product categories

Product categories	Estimated share of counterfeit goods in total sales in Belgium (%)
clothing, footwear and accessories <sup>481</sup>	14,7
sport goods <sup>482</sup>	13,9
jewellery and watches <sup>483</sup>	12,5
handbags and luggage <sup>484</sup>	10,9
spirits <sup>485</sup>	9,5
wines <sup>486</sup>	3,2
pharmaceutical <sup>487</sup>	5,3
pesticides <sup>488</sup>	12,9
tyres <sup>489</sup>	15,6
batteries <sup>490</sup>	4,0
<i>Minimum</i>	3,2
<i>Maximum</i>	15,6
<i>Mean</i>	11,7

Interestingly some of the above product categories, such as wines, pharmaceuticals and batteries seem less exposed to counterfeiting (lower % of total sales) than others including clothing, footwear and accessories, sport goods, jewellery and tyres. While a number of explanations come to mind (e.g. possibility to assess the quality, and the importance thereof) it may be relevant to further investigate this finding in a future study, as a source of new or improved policy measures.

Methodological note
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<sup>481</sup> Office for harmonization in the Internal Market, 'The Economic Cost of IPR Infringement in the Clothing, Footwear and Accessories Sector' (2015) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study2/the\\_economic\\_cost\\_of\\_ipr\\_infringement\\_in\\_the\\_clothing\\_footwear\\_and\\_accessories\\_sector\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study2/the_economic_cost_of_ipr_infringement_in_the_clothing_footwear_and_accessories_sector_en.pdf)> accessed on 16 June 2023, 31.

<sup>482</sup> Office for harmonization in the Internal Market, 'The Economic Cost of IPR Infringement in the Sport Sector' (2015) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study3/sports\\_reports\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study3/sports_reports_en.pdf)> accessed on 16 June 2023, 14.

<sup>483</sup> Office for harmonization in the Internal Market, 'The Economic Cost of IPR Infringement in jewellery and watches' (2016) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study3/sports\\_reports\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study3/sports_reports_en.pdf)> accessed on 16 June 2023, 14

<sup>484</sup> Office for harmonization in the Internal Market, 'The Economic Cost of IPR Infringement in handbags and luggages' (2016) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study6/handbags\\_and\\_luggage\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study6/handbags_and_luggage_en.pdf)> accessed on 16 June 2023, 15.

<sup>485</sup> Office for harmonization in the Internal Market, 'The Economic Cost of IPR Infringement in the spirits and wine sector' (2016) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study8/wines\\_and\\_spirits\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study8/wines_and_spirits_en.pdf)> accessed on 16 June 2023, 14.

<sup>486</sup> Ibid 15.

<sup>487</sup> Office for harmonization in the Internal Market, 'The Economic Cost of IPR Infringement in the pharmaceutical sector' (2016) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study9/pharmaceutical\\_sector\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study9/pharmaceutical_sector_en.pdf)> accessed on 16 June 2023, 16.

<sup>488</sup> Office for harmonization in the Internal Market, 'The Economic Cost of IPR Infringement in the pesticides sector' (2017) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study10/pesticides\\_sector\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study10/pesticides_sector_en.pdf)> accessed on 16 June 2023, 14

<sup>489</sup> Office for harmonization in the Internal Market, 'The Economic Cost of IPR Infringement in tyres and batteries' (2018) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/research-and-studies/ip\\_infringement/study12/tyres\\_batteries\\_sector\\_sector\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study12/tyres_batteries_sector_sector_en.pdf)> accessed on 16 June 2023, 7.

<sup>490</sup> Ibid.

In the EUIPO reports, the shares of counterfeit goods in total sales were obtained using a two-step approach:

- The first step is comprised of a sales forecasting model which uses historic data (long time series) of sales for that country to predicts the value of sales in subsequent years. The “forecast error”, that is, the difference between the forecast resulting from the economic model and the observed sales, represents an estimate of the expected lost sales, without adjustments for the impact of socio-economic factors.
- The second step uses an econometric model which tries to calculate what part of the forecast error calculated in step 1 can be attributed to counterfeiting. Indeed, counterfeiting is likely to be only one of a number of economic factors that can explain the differential between the forecasted and observed sales. For example, if we consider the product categories “tyres and batteries”, variables related to the economic capacity of households (e.g. GDP growth or the euro exchange rate) or any other driver of expenditure on tyres and batteries (e.g. the number of cars or percentage of the population using cars as their usual mode of transport) can partially explain the aforementioned forecasting error. The econometric model is used to pinpoint the part of the forecast error that can be considered as lost sales attributable to counterfeiting.

The same EUIPO reports also provide an indication of the value of sales lost in Belgium to forfeiting activities for the same 10 product categories (see Table 26).

Table 26 - Value of lost sales in Belgium for selected product categories

Product categories	Lost sales in Belgium (million euros)
clothing, footwear and accessories	881
sport goods	6
jewellery and watches	113
handbags and luggage	28
spirits	27
wines	26
pharmaceutical	597
pesticides	45
tyres	96
batteries	3
<b>total lost sales (in million euro)</b>	<b>1.822</b>

From the above lost sales figures, we can also provide a gross estimate of the aggregated profit losses for private sector companies in Belgium, as well as a high-level estimation of lost revenues for the Belgian public authorities in the form of lost income from VAT and corporate taxes<sup>491</sup>. We use the same assumptions as before for the three product categories analysed in more detail.

Assuming an average sales margin of 30%, the aggregated lost profit for the above goods amounts to 547 million euro, i.e. 30% of the total lost sales amounting to 1.822 million euro.

From a public sector perspective, the lost sales translate into a revenue loss of 383 million euro of VAT (@ 21% of 1.822 million euro lost sales), and a loss of 137 million euro in corporate tax revenues assuming a tax rate of 25% of taxable profits 547 million euro.

<sup>491</sup> The job loss in Belgium associated with lost sales requires a more in-depth analysis that goes beyond the scope of the current report. This job loss is highly dependent on the location of the production facilities which may substantially differ from one product category to the other.

As relevant information on jobs lost due to counterfeit was only partially available for the 10 categories considered, we did not include it in this summary. Nor was the impact on lost personal tax revenues estimated for these product categories, as such estimation builds on the number of lost jobs.

## 2.8. Summary overview

Below we provide a summary overview of the results for the three product categories complemented for some aspects with the aggregated figures for the 10 additional product categories (see section 2.7).

Reminder : Estimating the global value of counterfeiting in Belgium and its impact on the Belgian economy is a challenging endeavour. This relates to the fact that counterfeiting activities are - per definition - part of the largely undocumented 'hidden' economy. Hence, it is important to keep in mind that the figures below are mainly based on a EUIPO's forecasting model approach allowing to estimate the 'share of counterfeiting in total sales', not on actual empirical evidence. Furthermore, the impact figures are based on a set of assumptions that allow an estimation of impacts starting from 'share of counterfeiting in total sales'. Hence, interpretation of the figures in the table below should be careful and merely be considered as a rough estimation of the importance of forfeiting in Belgium and its impact on the selected product categories within the Belgian economy.

Table 27 - Summary table with key impact results for three product categories<sup>492</sup>

	<i>Cosmetics</i>	<i>Toys &amp; games</i>	<i>Smartphones</i>	<i>10 additional product categories</i>	<i>all 13 product categories</i>
<b>Counterfeit as % of sales</b>	15,10%	10,20%	8%	11,7%*	10,55%*
<b>Private sector perspective</b>	<i>Cosmetics</i>	<i>Toys &amp; games</i>	<i>Smartphones</i>	<i>10 additional products</i>	<b>Total</b>
loss of sales (million €)	61	14	93	1.822	1990
loss of profit (million €)	18	4	28	547	597
loss of jobs (FTE)	668	102	1.292	N/A	2.062
<b>Public sector perspective</b>	<i>Cosmetics</i>	<i>Toys &amp; games</i>	<i>Smartphones</i>		<b>Total</b>
loss of VAT (million €)	13	3	20	383	418
loss op personal tax (million €)	5,3	0,8	10,2	N/A	16
loss of corporate tax (million €)	4,6	1,1	7,2	136,7	150
<b>Aggregated tax losses (million €)</b>	<b>23</b>	<b>5</b>	<b>37</b>	<b>519</b>	<b>584</b>

\* mean

From the above table we find that the mean of counterfeit losses expressed as a percentage of total sales amounts to 10,55% over the 13 product categories considered<sup>493</sup>.

These figures point to lost sales of approximately 2 billion euro for the products categories considered, and lost tax revenues for the public sector of around 600 million euro for a particular year.

<sup>492</sup> As pointed out upon the discussion of the additional 10 product categories, job loss figures were not included for these additional product categories (see N/A in table Table 27). Hence, the 2.062 estimated lost jobs only cover the three specific product categories (cosmetics, toys and smartphone). Likewise, the income tax losses are limited to these three product categories. The European Observatory on Infringements of Intellectual Property Rights total estimate for Belgium across all sectors was said to amount to 7.000 jobs, (see p. 20). As noted before jobs lost in one sector can be compensated by a job increase in another sectors. Hence, this compensation effect will only impact on the job loss figures for Belgium, which offer a cross sectoral view.

<sup>493</sup> Mean of the 13 products based on data from the EUIPO reports from 2016-2018.

As indicated in the section analysing the above figures may be on the upper side of the estimation range. However, the estimated losses are remain considerable taken into account that they are estimated on an annual basis and, hence, are likely to be repeated year after year. Moreover, the above figures only pertain to 13 product categories (based on the available EUIPO reports) and do not include other products such as cigarettes. Finally, not all economic impacts (e.g. certain taxes) are covered in the estimation (excise duties). Hence, when considering the average percentage applied throughout the set of products categories at high risk, the impact becomes substantial.

By comparison, the European Observatory on Infringements of Intellectual Property Rights estimated an annual loss of 1.315 million euros in direct sales for Belgian companies<sup>494</sup>. Hence, while a substantial difference exists between these estimations, they both point towards a substantial annual impact on the Belgian economy.

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<sup>494</sup> EUIPO, 'IP in Europe' (*euiipo.europa.eu*) <<https://euiipo.europa.eu/ohimportal/fr/web/observatory/ip-in-europe>> accessed 5 October 2022.

## Section 3. Foreign practices as source of inspiration (benchmark exercise)

### 3.1. Introduction

In this section, we aim to gain inspiration for a possible adaptation or extension of the various measures applied abroad to reduce counterfeiting in Belgium. To this end, we examine how the fight against counterfeiting is being tackled in a number of benchmark countries.

Here, we look at which initiatives, measures and instruments, in the broadest sense of the word (e.g. control and awareness-raising actions, the legal tools of the government and rightsholders, and the consultation measures between the players) have been implemented, and to what extent these were/are perceived to be successful in the respective benchmark country.

In organising the benchmarking exercise, our focus lied on whether and how the benchmark country has addressed hurdles identified in the Belgian context and what alternative approaches from the benchmark country may also be of interest to us. Indeed, it is on these two points that lessons from abroad could have the greatest added value for our country.

On a practical note, the benchmark exercise focuses on France, the Netherlands, Germany, Italy and Spain. The benchmark exercise was conducted during the period 30/01/2023 to 18/02/2023. Starting from the Belgian 'bottlenecks' and opportunities we identified in the earlier phases of the study, we formulated a number of specific questions and challenges and then examined how the country concerned deals with them. In addition, we also asked a number of more general questions (e.g. about critical success factors) that should allow us to contextualise the information received. This allows us to check whether a successful foreign measure can also be relevant in a Belgium context.

### 3.2. Benchmark results Germany

#### 3.2.1. General introduction

The following results mainly concern customs-related aspects as the most centralised body in Germany concerns customs with a Central Customs Office (Generalzolldirektion - GZD) situated in Munich, containing the Central Office for the Protection of Intellectual Property Rights (Zentralstelle Gewerblicher Rechtsschutz - ZGR). The regional and federal police and the regional market surveillance authorities combat counterfeiting on the internal market. However, due to the federal political structure in Germany consisting of the different states ("Bundesländer"), there is no harmonisation regarding internal market policies and analysing the different policy choices would be too complex.<sup>495</sup>

German customs authorities operate in a centralised and decentralised manner. At local/regional level, there are customs offices, each of which can carry out its own counterfeit risk analysis and detain goods if necessary. Simultaneously, there is a Central Customs Office (Generalzolldirektion - GZD) which harmonizes and arranges certain aspects of the regional customs offices. This GZD provides practically everything except criminal proceedings, which are left to police forces and prosecutors' offices. They deal with

- national and international intellectual property rights (IPR) investigations;
- customs procedures in accordance with Regulation 608/2013;
- providing legal advice to customs officers and rightsholders under Regulation No 608/2013;
- providing legal training related to IPR in customs training;

<sup>495</sup> Interview with Generalzolldirektion (Germany) (2 February 2023).

- organising at regional level customs fairs for citizens and rightsholders;
- harmonising risk profiling standards;
- developing technical tools.<sup>496</sup>

### 3.2.2. Digitisation and information exchange regarding customs procedures

Since 2022, applications for action (AFAs) under Regulation 608/2013 have been made through the "ZGR-Online" procedure (Zentrales Datenbanksystem zum Schutz von Geistigen EigentumsRechten online). This procedure was fully digitised following the Online Access Act (Onlinezugangsgesetz - OZG). All Customs' administrative procedures are currently performed through Portal for citizens and Business customers"). This is a database/portal specific to Germany where rightsholders can fill in their AFA without having to do any further paperwork or administration afterwards. The only physical document that is required, is a signed version of the AFA sent by post. Thereafter, the holder can automatically receive notifications regarding detentions made (e.g., in the context of small consignments) or notifications regarding e.g., costs incurred by customs in the context of an IPR investigation. Previously, this required an "ESTHER certificate", that served to identify and authenticate a company, but this is no longer required.

Noteworthy is how German customs authorities do not use EUIPO's IPEP (IP Enforcement Portal) and the European Commission's COPIS (Anti-Counterfeiting and Anti-Piracy Information System) for national AFAs. However, they do still use these databases for European AFAs. The reason for this is IPEP (which is then integrated with COPIS) does not contain final IPR decisions which German customs prefer to work with.<sup>497</sup>

In Germany, the AFA must, in accordance with Regulation 608/2013, contain all the necessary information to enable customs authorities to make a quick and easy decision on whether counterfeiting is suspected. If an application for action does not contain such information, customs officers have instructions to release the goods immediately.

### 3.2.3. The verification methods for counterfeit

To have the object or good properly verified by the rightsholder(s), the customs officers take photographs themselves which are subsequently sent to the GZD to be forwarded to the rightsholders through the BuG portal. The cost for these photographs is compensated through the fixed fee for the German customs procedures.<sup>498</sup> As an additional method, aside from the BuG, to enable customs officers to identify suspected counterfeiting correctly and efficiently, the GZD organises an annual regional fair at a regional or local level, not at a national level. The officers from the local customs office will then participate in these customs fair where 8 selected rightsholders are also chosen and invited to participate. These rightsholders are selected based on local customs statistics. The invitees do not consist of large companies but also SMEs and small businesses that are not so well-known. The very large well-known players (cf. LEGO, ADIDAS, NIKE, Apple, etc.) are mostly not invited because the customs officers are in most cases already experienced with their IPR and products. Rightsholders receive this fair very well and wish to actively participate in it. However, the selection keeps the participation diversity fair and balanced.<sup>499</sup>

The purpose of this customs fair is to allow rightsholders, in a 'speed-dating' format, to familiarise a customs officer with their IPR within a certain time limit so that they can more easily identify possible counterfeits of their IPR. The use of abstract methods such as a PowerPoint presentation is prohibited. Rightsholders are obliged to bring a physical product or object. Because it is

<sup>496</sup> Interview with Generalzolldirektion (Germany) (2 February 2023).

<sup>497</sup> *ibid.*

<sup>498</sup> See *supra*.

<sup>499</sup> Interview with Generalzolldirektion (Germany) (2 February 2023).

organised at a local/regional level, there is no need for an online exhibition and the problems with GDPR are excluded or somewhat mitigated.<sup>500</sup>

KURAS, a private Belgian company, organizes a similar annual anti-counterfeiting event in Wommel where the IPRHs can join voluntarily to inform customs officers on ways to verify the authenticity of their products. Additionally, the Belgian customs invite IPRHs on a regular basis to inform customs officers on how to distinguish their goods from counterfeited versions.<sup>501</sup>

However, customs authorities hope to rely on technology in the future for counterfeit verification. For instance, it appears that the GDZ is already developing a (mobile) application that can be based on a simple photo quickly link a suspected counterfeit product with one or more relevant AFA in order to more quickly and efficiently contact the appropriate rightsholder regarding suspected counterfeiting. This would be accomplished by using a trained artificial intelligence. The AI would mainly focus on brands and designs. The biggest challenge, however, will not be the technological aspect but rather the cooperation of rightsholders from whom the developers will need a significant amount of photographic material to adequately train and optimise the AI.<sup>502</sup> Noticeable is that such an AI-initiative already existed in the private sector. An example is the Entrupy application of fashion giant LVMH who uses AI-supported image technology to recognize whether something is a fake or not.<sup>503</sup>

### 3.2.4. The standard rule of fixed fee for customs procedure

Customs authorities in Germany apply fixed fees for the storage and destruction of counterfeits. For small shipments, this is EUR 15. And the larger the shipment, the larger the scale of fixed costs (e.g., 35, 50, ...) For very large shipments (e.g., a stopped container at the port), the actual costs are charged to IPRHs. This way allows IPRHs to estimate what the cost will be for an AFA procedure. However, it should be pointed out that even the use of fixed costs for small consignments cannot prevent the cumulative sum of all small consignments being very high. As a result, rightsholders are not financially motivated in the long run to fall back on the customs procedure unless it is a sufficiently large consignment. The problem of "threshold setting" by rightsholders thus also arises in this way in Germany. Moreover, the actual costs will be charged if larger consignments are involved, e.g. a container full of counterfeits detained at a port.

Only when it comes to criminal proceedings are the costs initially recovered from the infringer or from the rightsholder but in many cases they are in practice borne by the State. Therefore, it appears that rightsholders in Germany have come to prefer the criminal procedure over the customs procedure.<sup>504</sup>

## 3.3. Benchmarkresults the Netherlands

### 3.3.1. General introduction

The interview was conducted with REACT's department in the Netherlands. REACT is a non-profit anti-counterfeiting network/organisation that is not only situated in the Netherlands but is active in many countries, including China. Its main purpose is to support its members (mainly IPRHs of trademarks and designs) in enforcing their IPR and combatting counterfeit. It provides administrative support (by for example executing the necessary procedural steps to file an AFA with the country's customs in accordance with Regulation nr. 608/2013). REACT also provides

<sup>500</sup> *ibid.*

<sup>501</sup> Second interview with Belgian Customs (12 April 2023).

<sup>502</sup> Interview with Generalzollverwaltung (Germany) (2 February 2023).

<sup>503</sup> Xavier Koehoorn, Carlos Mendez and Vivianne Vermeulen, 'De rol van echtheidskenmerken bij vaststelling van IE-inbreuken in counterfeit-zaken' (2021) 47(1) *BBM Bulletin* 35, 35.

<sup>504</sup> Interview with Generalzollverwaltung (Germany) (2 February 2023).

trainings to the relevant authorities (e.g., police and customs) on how they can better identify counterfeit. Additionally, they have specialized teams that work on online enforcement. Lastly, they will also execute class-actions against larger companies (e.g., REACT v Wish.com<sup>505</sup>) in accordance with European Union's Enforcement Directive<sup>506</sup>.

REACT plays an important role in the fight against counterfeit in the Netherlands. Due to their expertise in counterfeit, they are even considered to be an "expert witness". This entails that in court cases a statement of REACT in a case concerning counterfeit has legal value as evidence. Moreover, REACT NL concerns itself with active monitoring on the internal market by sending out trained agents of them to local markets to scan for counterfeit. Sometimes, the police notify REACT whenever they plan to do a search and request REACT to participate in the search due to their expertise in counterfeit.

Other relevant forces are the police, the customs authorities, the Authority Consumer and Market ("Autoriteit Consument en Markt") and the market surveillance authority (Nederlandse Voedsel en Waren Autoriteit - NVWA). The latter occupies itself with checks on the CE-mark which in some cases strongly relates to counterfeit cases. However, they seem to have other priorities than counterfeit.<sup>507</sup> The Authority Consumer and Market on the other hand focus on misleading market practices and unfair competition of which counterfeit can be a part.

### 3.3.2. Aggravating circumstances in the criminal provision of counterfeit

The Netherlands added, remarkably, two aggravating circumstances that would influence the sanction linked to the crime of counterfeit. Firstly, the sanction will be more severe if the infringer is committing the crime of counterfeit<sup>508</sup> (including piracy<sup>509</sup>) as a business or as a profession. Secondly, if the crime of counterfeit causes a common danger for goods and people, then the sanction will also be more severe.<sup>510</sup> The positive aspect about the latter part is that the prosecution can on the basis of a single article that already relates specifically to counterfeit also prosecute counterfeit that is endangering the public's health and/or safety. In Belgium, on the contrary, it is not explicitly mentioned as an aggravating element in the context of counterfeit. Instead, it can be prosecuted on the basis of Book IX of the Belgian Code of Economic Law. Remarkable is that the sanctions provided for infringements on product safety and conformity are lower than the ones for counterfeit.<sup>511</sup> However, the courts do take into account 'all relevant circumstances' when deciding upon the sanction for a criminal offence regarding counterfeit. These relevant circumstances include whether the counterfeit is toxic, dangerous, etc. A higher sanction will be given to those counterfeiters whose counterfeited products are considered to be dangerous to a person's health or the environment.<sup>512</sup>

Like Belgium, the Netherlands have opted (although more explicitly) to exclude consumers for the criminal narrative. They do so by making it non-punishable to have 'some' goods, parts thereof or trademark infringing goods in his possession for private use.<sup>513</sup>

<sup>505</sup> District Court Amsterdam 26 April 2021, ECLI:NL:RBAMS:2021:2050 para 4.25.

<sup>506</sup> Directive 2004/48/EC of the Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45.

<sup>507</sup> Interview with REACT NL (2 February 2023).

<sup>508</sup> Art. 337, para 3 Dutch Criminal Code.

<sup>509</sup> Art. 31b Dutch Copyright Act.

<sup>510</sup> Art. 337, para 4 Dutch Criminal Code.

<sup>511</sup> See art. XV.102 of the Code of Economic Law.

<sup>512</sup> Information received from workshop in Section 4.

<sup>513</sup> Art. 337, para 2 Dutch Criminal Code.

### 3.3.3. Anti-counterfeiting organisations as expert witness in criminal cases

REACT has come to play an important role in criminal and civil court cases. They have aided the procedures by providing an objective statement regarding the objective criteria to verify counterfeit. Their testimony as expert witness has been confirmed to be legal evidence.<sup>514</sup> The Dutch courts additionally do not seem to agree with the notion that because REACT is an organisation that represents the interests of the IRPHs, that they are hence biased and lack objectivity.<sup>515</sup>

In Belgium, ABAC-BAAN plays a similar role. They are often asked by the authorities (police or public prosecutor) to verify whether something is or is not counterfeit. Yet, the situation of anti-counterfeit organisations getting a label as “expert witness” is something that has not yet been applied to ABAC-BAAN in Belgium.

### 3.3.4. Costs of storage and destruction of counterfeited goods

There are three different procedures in which goods can be destroyed: the customs procedure, the civil procedure, and the criminal procedure.

Regarding the customs procedure, the Netherlands do not seem to deviate from the Regulation 608/2013. Therefore, the costs of the destruction in the case of a customs procedure will always be borne by the rightsholder. However, there is still the possibility provided by the Regulation to seek compensation from the infringer (or potentially from an aiding intermediary<sup>516</sup>) for the costs of the destruction. REACT handles the destruction or even more so the recycling of the goods where possible for its members. They aim to include the processing costs of the destruction in their membership fee, but this will mostly only be possible for small consignments. For larger consignments, they will ask their members to pay the actual costs of the recycling or destruction. For the civil procedure, the infringer will as a rule need to pay the costs of destruction<sup>517</sup> in the same way as in Belgium<sup>518</sup>. This was also stipulated in the EU’s Enforcement Directive<sup>519</sup>. What is remarkably different from Belgium, is how the infringer also must pay the actual legal fees (unless such would be unreasonable) in accordance with article 14 of the Enforcement Directive.<sup>520</sup> In Belgium, the system regarding the legal fees is regulated by art. 1022 of the Belgian Judicial Code and consist of a fixed compensation for the honorary costs of the lawyers employed by the plaintiff. The CJEU in the *United Video Properties / Telenet* case<sup>521</sup> already stated that such a system can only be justified if the fixed fees resemble the actual costs made for the procedure (regarding lawyer fees) and that at least a significant and fitting amount of the actual made costs by the winning party (mostly the IPRHs) should be reimbursed by the infringer/unsuccessful party. Should such not be the case, then the useful effect of art. 14 IPRHs might diminish.<sup>522</sup>

In criminal cases the costs of storage<sup>523</sup> and destruction<sup>524</sup> of the counterfeit are entirely born by the State. The only exception is in the case after 10 days the goods are supposed to be returned

<sup>514</sup> Dutch Supreme Court 5 July 2011, ECLI:NL:HR:2011:BP8793.

<sup>515</sup> District Court Midden-Nederland 22 October 2013, ECLI:NL:RBMNE:2013:5216.

<sup>516</sup> Recital 24 of the Regulation 608/2013.

<sup>517</sup> Art. 1019h Dutch Code of Civil Procedure.

<sup>518</sup> Art. XI.334, para 2 of the Code of Economic Law.

<sup>519</sup> Art. 10(2) EU IPR Enforcement Directive 2004/48 (IPRED).

<sup>520</sup> Art. 1019h Dutch Code of Civil Procedure.

<sup>521</sup> Case C-57/15 *United Videos v Telenet* [2016] ECLI:EU:C:2016:611.

<sup>522</sup> *ibid*, para 30.

<sup>523</sup> Art. 11(1) Decree of 27 December 1995, establishing a general measure of governance for the implementation of articles 117, first to third paragraphs, and 118 of the Code of Criminal Procedure concerning the custody of confiscated objects (Hereafter: Confiscated Property Decree).

<sup>524</sup> Art. 15(4) Confiscated Property Decree.

to the original holder of the goods but due to circumstances outside of the fault of the third party who has the goods in custody, the goods are not returned and thus held in custody longer. Then the rightsholder will have to pay for the extra amount of time that the goods are being held in custody of the third party.<sup>525</sup> This is entirely different from the Belgian system where in the case of an administrative procedure or a criminal procedure, the cascade system comes into play. While the infringer is in theory the first party to normally pay for the costs of storage and destruction, in practice the costs are almost always paid by the IPRHs.

### 3.3.5. Intermediaries: MoUs and procedural consequences

REACT is actively involved in making intermediaries more responsible regarding the fight against counterfeit. So has REACT signed Memory of Understandings with the online platform Shopee<sup>526</sup> and the popular social media platform TikTok<sup>527</sup>.

There is, however, an element added that is meant to dissuade intermediaries from not-cooperating with IPRHs when the intermediary gets notified of the infringing act taking place on their platform or by using their services. If a court case is initiated against an to force the intermediary to give the asked for information and the intermediary is at fault, then the intermediary will not only need to provide the information but will also need to pay for all the legal fees of the rightsholder. This is hence a sanction that does not only apply to actual infringers but also non-cooperating intermediaries. The reasoning behind this is that due to the non-cooperation, the IPRH was forced to commence a court case which brought all those legal fees with it. Therefore, it is not the IPRH but the intermediary who let it go to trial who has to pay for all the legal fees.<sup>528</sup>

As for physical intermediaries, postal services are likely to benefit from the EU's Authorised Economic Operator Programme which allows for a reduction in customs formalities. This label of Authorised Economic Operator (AEO) can only be granted if you adhere to the AEO Guidelines<sup>529</sup> as set out by the European Union that emphasizes, they must sufficiently mitigate the risks as set therein. IP infringements are considered serious infringements against customs regulations. Hence, it is considered one of those risks. In the Netherlands, the customs authorities will see to the compliance by postal services to these guidelines.

If a postal service, however, is notified or obtains knowledge/awareness of the fact that they are transporting counterfeit, then any act of further movement of the goods (whether it is transported or exported) would qualify as a criminal act regarding piracy and/or counterfeit committed by the postal service provider and would mean an intentional infringement of the trademark/copyright of the IPRH.<sup>530</sup>

Overall, the Belgian legislation regarding civil and criminal procedure will most likely cover these aspects except for the extra punishment of the full payment of the legal fees and the signed MoUs.

<sup>525</sup> Art. 11(2) Confiscated Property Decree.

<sup>526</sup> REACT, 'Asia Annual Meeting' ([linkedin.com](https://www.linkedin.com/feed/update/urn:li:activity:7001109220754341889), 2022) <<https://www.linkedin.com/feed/update/urn:li:activity:7001109220754341889>> accessed 16 February 2023.

<sup>527</sup> REACT, 'REACT is proud to enter into an MOU with TikTok to raise awareness of online counterfeiting' ([linkedin.com](https://www.linkedin.com/feed/update/urn:li:activity:6971002863170813953), 2022) <<https://www.linkedin.com/feed/update/urn:li:activity:6971002863170813953>> accessed 16 February 2023.

<sup>528</sup> District Court Amsterdam 26 april 2021, ECLI:NL:RBAMS:2021:2050 para 4.25; Appeals Court Amsterdam Stichting BREIN / Ziggo & XS4all, par. 3.20.1 ("By not proceeding with the partial discontinuation, XS4all accepted the risk that it would be ordered to discontinue by the court upon the claim of the claimant, with all the consequences for the reimbursement of legal costs that the law, in principle, attaches to being the losing party. The general rules on the reimbursement of legal costs have no exception in favour of an internet service provider seeking such a court order, even if XS4all could have had doubts as to the meaning of the Dutch and EU law rules on Brein's request and its position on that point. In other words, defending a pleadable position does not exempt a party from an order for costs of proceedings.")

<sup>529</sup> European Commission, 'AEO legislation and management instruments' ([taxation-customs.ec.europa.eu](https://taxation-customs.ec.europa.eu/customs-4/aao-authorised-economic-operator/aao-legislation-and-management-instruments)) <<https://taxation-customs.ec.europa.eu/customs-4/aao-authorised-economic-operator/aao-legislation-and-management-instruments>> accessed 16 February 2023.

<sup>530</sup> District Court Rotterdam 7 January 2000 ECLI:NL:RBROT:2000:AK4231, par. 5.7.

## 3.4. Benchmarkresults France

### 3.4.1. General introduction

This interview was conducted with REACT's department in France. REACT is one of the world's most trusted partners in fighting counterfeit. The association has a large international network, supporting its members worldwide and covering all areas of industry.<sup>531</sup>

As a member of the European Union and the World Intellectual Property Organisation, France complies with EU regulations and directives, as well as all the major international treaties on IP rights. As such, similarly as in any other European country, material (IP infringement) and moral elements (general intent) must be proven to establish the crime of counterfeit.

France is one of the countries most affected by trade in counterfeit and pirated products<sup>532</sup>, resulting in stringent legal frameworks. IP rights infringement may be condemned through either a civil or criminal action. The French IP Code provides statutory provisions to protect IP rights<sup>533</sup>. It establishes three different levels of penalties, ranging from a 300.000 EUR fine and three-year imprisonment to 500.000 EUR fine and five-year imprisonment. The aggravating circumstances of committing trademark infringement that amounts to a real commercial strategy or infringement that is the work of an organised group, results in stricter penalties.<sup>534</sup>

### 3.4.2. End-purchaser liability

In contrast with Belgium, the French Intellectual Property Code imposes sanctions and liabilities on those purchasing and possessing counterfeit items<sup>535</sup>. Those end-consumers of counterfeit goods could face a fine of up to 300.000 EUR or three years in prison<sup>536</sup>. A consumer could possibly face sanctions on two distinct occasions as French sanctions regarding counterfeit purchasers are not limited to the moment in which a transaction is being carried out, but even extend to the possession of the item long after it has been purchased<sup>537</sup>.

In 1995, the French government created Le Comité National Anti-Contrefaçon (The National Anti-Counterfeiting Committee) (hereinafter "CNAC")<sup>538</sup>. CNAC works alongside the Comité Colbert, a French private association of French luxury goods companies that provides assistance in projects that aim to combat counterfeiting and aim to promote and protect French luxury heritage and craftsmanship. The CNAC and the Comité Colbert, focus on warning consumers about the dangers of counterfeit goods, as well as the possible penalties individuals could face when purchasing or possessing any counterfeit goods. These organisations have similar purposes as NANAC in Belgium due to their purpose of raising awareness of the potential consequences of counterfeit

<sup>531</sup> REACT, 'The Anti-Counterfeiting Network' (*react.org*) <<https://www.react.org/>> accessed 24 February 2023; See *infra*.

<sup>532</sup> EUIPO, 'Illicit trade: Trends in trade in counterfeit and pirated goods' (*euipo.europa.eu*, 2019) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/trends\\_in\\_trade\\_in\\_counterfeit\\_and\\_pirated\\_goods/trends\\_in\\_trade\\_in\\_counterfeit\\_and\\_pirated\\_goods\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/trends_in_trade_in_counterfeit_and_pirated_goods/trends_in_trade_in_counterfeit_and_pirated_goods_en.pdf)> accessed 2 March 2023.

<sup>533</sup> The IP Code was amended by Law 2014/315 (which entered into force on 13 March 2014) to transpose EU Customs Regulation 608/2013 and strengthen the fight against counterfeiting and infringement.

<sup>534</sup> Article L716-9 and -10 French Intellectual property Code.

<sup>535</sup> OECD, 'The Economic Impact on Counterfeiting and Piracy' (*oepm.es*, 2008) <[https://www.oepm.es/cs/OEPMsite/contenidos/ponen/InformeOCDE26feb09/2009\\_03\\_03\\_OECD\\_Study\\_on\\_Counterfeiting\\_and\\_Piracy.pdf](https://www.oepm.es/cs/OEPMsite/contenidos/ponen/InformeOCDE26feb09/2009_03_03_OECD_Study_on_Counterfeiting_and_Piracy.pdf)> accessed 24 February 2023.

<sup>536</sup> Article 716-10 French Intellectual Property Code.

<sup>537</sup> Dianna Michelle Martinez, 'Fashionable late: why the United States should copy France and Italy to reduce counterfeiting' (2014) 32 B.U. Int'l L.J. 115 <<https://www.bu.edu/ilj/files/2014/05/Martinez-Fashionably-Late.pdf>> accessed 2 March 2023.

<sup>538</sup> CNAC, 'Sur internet, un faux produit est-il une vraie affaire?' (*cnac-contrafacon.fr*) <<http://www.cnac-contrefacon.fr/>> accessed 2 March 2023.

with consumers<sup>539</sup>. These viral campaigns and extremely prevalent advertisements address the criticism of end-purchaser liability, namely customers' alleged lack of knowledge. By informing potential consumers of the consequences of participating in the counterfeit business by means of purchasing these items, and raising awareness of what tell-tale signs of a counterfeit item are, such campaigns increase the likelihood that an individual who purchases a counterfeit item does so knowingly.

### 3.4.3. French Customs' broad investigative and anti-counterfeiting powers

French Customs (DGDDI) authorities have extensive investigative and anti-counterfeiting powers to conduct operations against infringements of trademarks, copyright, design and models, whether held or circulating throughout the whole French territory. They can act anywhere in the country, including French overseas departments and territories. Two types of measures can be taken by the customs authorities: the detention procedure, subject to a preliminary customs application by the rightsholder; and the seizure procedure, limited to trademark and design infringement<sup>540</sup>.

The judicial police (predominantly *gendarmerie nationale* and police) conduct investigations into counterfeiting (including those involving organised networks) under the supervision of magistrates. The *gendarmerie*, however, solely acts in rural areas and in essence by coincidence (i.e. by discovering counterfeit in context of other investigations). This does not mean, however, that they cannot investigate urban cases. Should a claim concern counterfeit be found in the rural regions but the investigation eventually leads into the larger cities (urban region), then they are allowed to perform all necessary investigations based on the rural claim.

In Belgium, the Customs have the same broad investigative powers as the FPS Economy to investigate not only at the borders but also for counterfeit circulating on the Belgian internal market. Therefore, the overall difference in this regard might be limited.

For product safety and dangerous products, the *Direction Generale de la concurrence, de la consommation et de la répression des fraudes* (DGCCRF) can act ex officio or on the request of rightsholders. The DGCCRF is additionally responsible for addressing trademark offences on French soil. Furthermore, it can seize suspicious goods without court order if they are a hazardous to consumers' health and safety. In Belgium this is essentially centralized in the FPS Economy who does not only investigate counterfeit damaging to the economy but also to consumers' health and safety<sup>541</sup>.

### 3.4.4. Anti-counterfeiting taskforce

Remarkably, France has since 2003 a joint task force in place, called "Groupement d'Intervention régionale" (GIR)<sup>542</sup> that brings together police, *gendarmerie*, customs, social services and tax authorities. Each authority has their own database of which the data cannot simply be exchanged due to strict privacy laws.<sup>543</sup> Yet, due to their interdepartmental dimension, GIR does not only facilitate the exchange of information but also the implementation of multidisciplinary actions. Using counterfeit as point of entry, they have recourse to investigate based on the penal code,

<sup>539</sup> Thomas Adamson, 'New Campaign Fights Counterfeit Fashion' (YAHOO! Finance, May 2012) <<http://finance.yahoo.com/news/campaign-fights-counterfeit-fashion144539052-finance.html>> accessed 2 March 2023.

<sup>540</sup> Article 38 *juncto* art. 215-215bis and art. 323 French Customs Code.

<sup>541</sup> FPS Economy, 'Regulations regarding the safety or products and services' (*economie.fgov.be*) <<https://economie.fgov.be/en/themes/quality-and-safety/safety-products-and-services/regulations-regarding-safety>> accessed 2 March 2023.

<sup>542</sup> Police-Nationale, 'Les GIR, Groupes interministériels de recherches de la police et de gendarmerie' (*police-nationale.net*) <<https://www.police-nationale.net/gir/#missions-gir>> accessed 24 February 2023.

<sup>543</sup> Due to privacy legislations complications.

customs, taxes and more. On the basis of the customs code, the Customs authorities can enter commercial premises, seize an article and send it to the IPRH who confirms it is counterfeit. Subsequently they have brought seizure and search competences.

Thanks to this mode of action, the results of GIR are better than all the individual actions carried out by each administration engaged in the fight against counterfeit. Like Italy, collaboration and information exchange aids the development of strategies using the resources of all administrations<sup>544</sup>. To battle counterfeit more efficiently and effectively, FPS Economy could benefit from establishing a database<sup>545</sup>.

### 3.4.5. Storage and destruction costs born by the State

For customs related matters, the costs of destruction and warehousing are paid by the State (Ministry of Budget)<sup>546</sup>. This is in contrast with the Belgian customs proceedings where the rightsholder bears the cost of the destruction in first instance (i.e., vis-à-vis the public authorities). However, the rightsholder can always recover this cost from the infringer via judicial procedures or conclude a settlement with the latter in this regard. As of 1 January 2019, the procedural costs were to be paid per case and not by quantity by the IPRHs. This case-by-case basis made that in essence the fee for a customs procedure became a destruction tax rather than a destruction price. Consequently, the IPRHs protested the decree and, therefore, the decree was cancelled in July 2022.

Regarding criminal procedures, similarly to the Netherlands and Italy<sup>547</sup>, the State will similarly reimburse all procedural costs<sup>548</sup>. As previously indicated, this differs from the Belgian system, which uses the cascade approach when dealing with administrative or criminal procedures. In fact, the costs are nearly always covered by the IPRHs and thus rarely by the state<sup>549</sup>.

Regarding civil procedures, the general rule of “the losing party pays” is applied. However, unlike Belgium where the Judiciary Code prescribes fixed legal costs, France does not.<sup>550</sup>

### 3.4.6. Enhanced obligation of vigilance for e-commerce platforms

A Cyber Customs Unit<sup>551</sup> was set up in 2009 to detect Internet customs fraud, similarly to the Belgian Cybersquad set up by Customs in 2012, to tackle customs issues in the e-commerce market<sup>552</sup>.

The Cyber Customs Unit can resort to what is known as the “purchase procedure” in order to establish if illegal trading in counterfeit goods has occurred and to identify the offenders. Introduced into the Customs Code by the Law on the Orientation and Programming for Internal Security of March 14, 2011<sup>553</sup>, this allows customs officials to purchase a certain number of suspected counterfeit goods in order to verify if an offence has been committed or not. FPS

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<sup>544</sup> See *supra*.

<sup>545</sup> Interview with Public prosecutor's office Antwerp (7 December 2022).

<sup>546</sup> Interview with REACT (20 February 2023).

<sup>547</sup> See *infra*.

<sup>548</sup> *ibid*.

<sup>549</sup> See *supra*.

<sup>550</sup> See *supra*.

<sup>551</sup> WIPO Advisory committee on enforcement, 'French initiatives to prevent and combat cyber-counterfeiting' (10th session Geneva, 2015).

<sup>552</sup> De Kamer, 'Gedachtewisseling met de minister van Financiën over het beleidsplan van de Algemene Administratie Douane en Accijnzen' (*dekamer.be*, June 2015) <<https://www.dekamer.be/doc/flwb/pdf/54/1212/54k1212001.pdf>> accessed 2 March 2023.

<sup>553</sup> Law no 2011-267 of 14 March 2011 on orientation and programming for the performance of internal security (hereinafter Internal Security Law).

Economy and the Belgian customs authorities can and actively do the same thing to shut down illegal websites.

The Cyber Customs Unit cooperates with many public actors such as the police and PHAROS<sup>554</sup> (Plateforme d'harmonisation, d'analyse, de recoupement et d'orientation des signalements) for reporting illicit content on the Internet. Cyber Customs have also set up partnerships with private operators (online sales sites, rights owners, internet access providers, payment intermediaries). Furthermore, they have secure access to the website of the International Anti-Counterfeiting Coalition (IACC) which handles the reports of rights owners submitted regarding payment intermediaries (MasterCard, Visa, American Express, PayPal, etc.)<sup>555</sup>.

## 3.5. Benchmarkresults Spain

### 3.5.1. General introduction

For Spain the interview was conducted with a representative of the Central Criminal Intelligence Unit (also known as the Economic Crime Group) of the Spanish Civil Guard ("Guardia Civil"). The Guardia Civil is actively involved in international cooperation projects with the EUIPO and Europol. The Guardia Civil works alongside the National Police and the Customs Surveillance Service.

From the interview it became apparent that Spain seems to have certain aspects in common with Belgium:

- The threshold set by IPRHs to take action (for police and customs cases);
- Anti-Counterfeiting Organisation (ANDEMA) supports authorities by providing expertise during searches;
- To verify counterfeit they rely on legal reports from experts (e.g. REACT Spain, ANDEMA, etc.);
- Training to law enforcement authorities to recognize counterfeit;
- Goods are often destroyed, not recycled;
- Doing awareness raising campaigns not only about economic aspects but also the environmental aspects (which supposedly draws the attention of the youth);<sup>556</sup>
- The criminal definition of counterfeit requires in a similar way the material IP infringement, a commercial exploitation, and a form of intent similar to the Belgian's deceitful intent.

### 3.5.2. Awareness raising – law enforcement is not an exception

The Civil Guard does not only provide trainings to other police officers and custom authorities in order for them to verify counterfeit better but they similarly also provide these trainings to public prosecutors. These trainings aim to raise awareness about the importance of investigating and prosecuting counterfeit.<sup>557</sup> In Belgium, for example, the public prosecutor offices are set with a limited amount of budget and personnel and will need to prioritise certain cases above others. Raising awareness with regard to counterfeit might make them more likely to prosecute or investigate even though the consequences are less obvious and direct than other crimes (e.g. murder or theft)<sup>558</sup>.

<sup>554</sup> THALES, 'Pharos: how to report illegal, unwanted and harmful content' (*thalesgroup.com*, 14 April 2016) <<https://www.thalesgroup.com/en/critical-information-systems-and-cybersecurity/news/pharos-how-report-illegal-unwanted-and-harmful>> accessed 24 February 2023.

<sup>555</sup> WIPO Advisory committee on enforcement, 'French initiatives to prevent and combat cyber-counterfeiting' (10th session Geneva, 2015).

<sup>556</sup> Interview with the Spanish Civil Guard (3 February 2023).

<sup>557</sup> Interview with the Police of Antwerp (8 December 2022).

<sup>558</sup> Ibid.

### 3.5.3. Spain has a first step towards a coordinating Centre

One of the relevant aspects of Spain is its Intelligence Centre for Counter-Terrorism and Organized Crime (CITCO) that aims to coordinate the several criminal investigations executed by different law enforcement agencies (i.e. the National Police Corps, the Civil Guard, the Customs Surveillance Services, Prison officers, Armed officers and Centro Nacional de Inteligencia (CNI)). The idea is the following: whenever different law enforcement authorities are investigating the same person, they are notified by the Centre and formally requested to investigate whether it pertains to the same matter. If so, they are asked to coordinate their criminal investigations.<sup>559</sup> This avoids overlapping operational problems and could potentially expose organised crime or recidivism.

## 3.6. Benchmarkresults Italy

### 3.6.1. General introduction

For Italy, an interview was conducted with the Italian Financial Police (Guardia di Finanza). The Italian Financial Police enforces injunctions, carry out seizures and wage an ongoing battle against counterfeiting and piracy. Guardia di Finanza has personnel performing economic police tasks who possess the necessary competences to use and enforce different laws (administrative and/or judicial).

Duties are performed via territorial units carrying out all institutional tasks and ensuring the maintenance of economic and financial security. They are assisted by Specialized units carrying out investigative research. Among the Specialized Units, there is the Goods and Services Special Unit, inside which is the “*Anticounterfeiting & product safety Group*”, tasked with the protection of the economy from illegal actions such as counterfeiting, piracy, illegal trading, fake “Made in Italy” products and overall product safety<sup>560</sup>. The Group also participates in international forums and operations and provides administrative and technical support to the territorial units through analysis and investigations.

The Guardia di Finanza is unique as it centralizes both investigative and administrative enforcing competences within Italy<sup>561</sup>. In essence it is similar to the FPS Economy yet has a better coordination with local forces (i.e. local police forces) and the judicial authorities<sup>562</sup>. They can additionally rely on an impressive “Informational Backbone” existing out of several interoperable databases (criminal, fiscal and administrative) which can be relied upon within the conditions set out in the Italian law. This allows the Italian Guardia di Finanza to tackle counterfeit from a more holistic point of view.

### 3.6.2. SIAC – the Informational Backbone of IP enforcement in Italy

Guardia di Finanza manages the SIAC<sup>563</sup> (“Anti-Counterfeiting Information System”), an online platform developed in 2014. It came into existence through an awareness that a system is required

<sup>559</sup> Interview with the Spanish Civil Guard (3 February 2023).

<sup>560</sup> WIPO Advisory committee on enforcement, ‘The Italian experiences in the fight against intellectual property infringements on the internet’ (12th session Geneva, 2017) <[https://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_12/wipo\\_ace\\_12\\_10.pdf](https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_12/wipo_ace_12_10.pdf)> accessed 21 February 2023.

<sup>561</sup> *ibid.*

<sup>562</sup> Guardia Di Finanza, ‘Protection of the market of goods and services’ (*gdf.gov.it*) <<https://www.gdf.gov.it/en/institutional-tasks/the-fight-against-economic-and-financial-crimes/protection-of-the-market-for-goods-and-services>> accessed 21 February 2023.

<sup>563</sup> SIAC, ‘Anti-counterfeiting information system’ (*siac.gdf.it*, 2013) <<https://siac.gdf.it/en-US/progetto/Pagine/default.aspx>> accessed 21 February 2023.

among all institutional components and actors involved in the fight against the counterfeit industry.

The SIAC functions as:

- a(n) updated) library containing all the latest information regarding counterfeit;
- a news archive containing all the published press releases of the law enforcement agencies relating to counterfeit;
- a database of the events related to counterfeit (workshops, seminars, etc.) including the documents shared by the presenters and participants;
- a database of the statistical reports regarding the enforcement of an IP right – allows for objective oversight.

All IPRHs can upload information (pictures, dimensions, fabric composition, etc.) that is useful to help the authorities enforce their right. Simultaneously, it also asks for information not only of the IPRHs but also of their legal expert. That way the designated legal expert can be contacted when the enforcing authorities are doubting the qualification of a product as counterfeit and consequently can ask the legal expert to draft and send a legal report. This legal report will then also be stored in the SIAC database. Based on this information cross referenced with data from other national databases, the Guardia Finanzia HQ will conduct a first investigation. Subsequently, an analytical report will then be forwarded to the local units who will then perform an investigation at a local level. Once this investigation is finished, the local units will once again draft a report which will be uploaded to the SIAC database. Hence, the IPRH can follow the actions undertaken by the authorities with regard to his or her right through the SIAC database<sup>564</sup>.

The SIAC enables risk-management, identification of supply chains (due to mandatory electronic invoicing) and the tracking of the victims of fraudulent schemes through cross-referencing the data of the SIAC with other various databases available in Italy. The databases are all interoperable which enhances the cross-referencing possibilities. It holds possibilities for integration of not only other national databases within Italy (e.g., The National Agricultural Information System (SIAN) but also foreign databases and platforms operating in the specific sector of IP (e.g. IPEP of the EUIPO)<sup>565</sup>.

### 3.6.3. The Anti-Counterfeiting Direct Line

In addition to SIAC, there is the Anti-Counterfeiting Direct Line (LAC) of the Italian Trademark and Patent Office (UIBM)<sup>566</sup> that manages the registrations of trademarks and patents and is the reference point for all institutional actors to combat counterfeiting. The Anti-Counterfeiting Direct Line (LAC) is a dedicated telephone line where all citizens can request free-of-charge assistance and information on the means of IPR protection, in case of infringement of Industrial Property Rights. Furthermore, it is dedicated to users who want to report alleged infringements of IP rights, either perpetrated online or offline. The information received by the UIBM is forwarded to Guardia di Finanza for the consequent investigations.

### 3.6.4. The IPRH will in principle not pay any procedural costs.

<sup>564</sup> EUIPO, 'Regional Seminar for Enforcement of Intellectual Property Rights Mediterranean Countries' (*euipo.europa.eu*, 12/13/14 May 2015) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/Regional\\_seminars/Southern\\_European\\_Regional\\_Seminar\\_05-2015\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Regional_seminars/Southern_European_Regional_Seminar_05-2015_en.pdf)> accessed 21 February 2023.

<sup>565</sup> J. Francesca Gross, 'Baby, Bye, Bye, Bye: How the United States, Italy, & France Use Trademark Anti-Counterfeiting Mechanisms to Combat the Proliferation of Fake Goods in China' (2021) 7 TEX. A&MJ. Prop. L. 539.

<sup>566</sup> Ministry of Enterprises and Made in Italy, 'Anti-counterfeiting hotline' (*uibm.mise.gov.it*) <<https://uibm.mise.gov.it/index.php/en/services-to-the-public/anti-counterfeiting-hotline>> accessed 21 February 2023.

When counterfeited goods are seized in the context of criminal proceedings, the subsequent costs of destruction and prosecution are usually borne by the Office of the Public Prosecutor<sup>567</sup>. However, there are circumstances in which the Court may decide that the destruction is entrusted to public entities without costs. In addition - where possible and easily enforceable - the Public Prosecutor's Office might also decide to recycle the goods (e.g. give them away to charities<sup>568</sup>) after the mandatory removal of the counterfeit labels, trademark, distinctive sign...<sup>569</sup>

Issuing its sentence, the Court likewise decides on the costs incurred during the investigations where Article 535 of the Italian Criminal Procedure Code (entitled "Order for costs") states that "*the sentence condemns the punished person at the payment of all court costs linked with the crimes to which the sentence refers*".

This contrasts strongly with the practices applied in Belgium where in most cases the IPRH will not only have to pay for the costs of storage and destruction in the customs procedure, but also in the criminal and civil procedures. The procedural costs (e.g. legal fees) of the judicial procedure are in most cases also paid by the condemned person, however, in accordance with the fixed fee legislation.<sup>570</sup> As earlier discussed, could this be insufficient to cover all the costs.

### 3.6.5. Special Unit for Privacy Protection and Technological Fraud

In Guardia di Finanza, the Special Unit for Privacy Protection and Technological Fraud has been established<sup>571</sup>. It supports the special and territorial units in the fight against economic and financial illicit activities committed electronically (e.g., via the internet). It is a department that collaborates with the Agency for Digital Italy (Ag.I.D.) and is the leader of the exploration activities of the network. This special unit will ensure that investigations are receiving the most up to date technological support even when the crime is committed on the dark web.

### 3.6.6. The dissuasion of consumers and a new way to enable state funding

Article 1 paragraph 7 of Law Decree no. 35 of 14 March 2005 (converted into Law no. 80 of 14 May 2005) states that "*it is punished by a financial administrative sanction from 100 to 7.000 euros whoever buys goods or products which, for their quality or for the condition of the person offering them or for the cost, might lead to the conclusion that have been infringed the laws on the origin of the products or on the intellectual property. In any case, administrative confiscation will take place*"<sup>572</sup>. This does not remain a theoretical element of law but has been applied by the Guardia di Finanza several times<sup>573</sup>. The fines are then repurposed for the fight against counterfeit.<sup>574</sup> This is an important aspect because it not only dissuades consumers but helps state funding of the fight

<sup>567</sup> European Commission, Directorate-General for Taxation and Customs Union, 'Report on EU customs enforcement of intellectual property rights: results at the EU border 2015, 2016' (ec.europa.eu, 2016) <[https://ec.europa.eu/taxation\\_customs/sites/taxation/files/2016\\_ipr\\_statistics.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/2016_ipr_statistics.pdf)> accessed 21 February 2023.

<sup>568</sup> WIPO Magazine, 'Disposing of counterfeit goods: unseen challenges' (wipo.int, 2012) <[https://www.wipo.int/wipo\\_magazine/en/2012/06/article\\_0007.html](https://www.wipo.int/wipo_magazine/en/2012/06/article_0007.html)> accessed 21 February 2023.

<sup>569</sup> ibid.

<sup>570</sup> See *infra*.

<sup>571</sup> Guardia Di Finanza, 'Organisational structure' (gdf.gov.it) <<https://www.gdf.gov.it/en/institutional-tasks/organisational-structure>> accessed 21 February 2023.

<sup>572</sup> Changes introduced by Law no. 99 of 2009.

<sup>573</sup> Tom Kington, 'Fake Vuitton Purse Costs Tourist in Italy €1,000 - in fine'(The Guardian, 2010) <<http://www.guardian.co.uk/world/2010/jun/07/fake-vuitton-purseitaly-fine>> accessed 2 March 2023.

<sup>574</sup> Interview with the Head of the Guardia Finanzia (3 February 2023).

against counterfeit.<sup>575</sup> Due to changes introduced by Law no. 99/2009, criminal penalties are no longer applicable to final consumers, and administrative penalties for knowingly purchasing counterfeit goods were reduced<sup>576</sup>.

Like France, Comité Colbert has launched its high-impact poster campaigns in Italy as well, notifying individuals about the unlawful nature of purchasing counterfeits while also raising awareness about social harms<sup>577</sup>. Additionally, the Guardia di Finanza takes fully part in the national plan to promote legality by organizing and promoting conferences and conventions, in the field of education and training, to spread in schools the "culture of legality"<sup>578</sup>. Furthermore, through the SIAC platform, it provides detailed explanations, underlining the strong negative consequences of all illegal behaviours related to the purchase of counterfeit or non-compliant products. The goal is to raise public awareness on civil, cultural, and educational issues of our community and to encourage the birth of virtuous behaviours oriented to the growth of the common good.

### 3.6.7. National Council for the fight against counterfeiting and Italian Sounding

The National Council for the fight against counterfeiting and Italian Sounding is a governmental body in charge of the coordination of all the Italian administrative authorities in the fight against counterfeiting. It is a central contact point for various Ministries, law enforcement agencies as well as for the most important Italian trade and consumer protection associations.<sup>579</sup>

It provides strategic priorities of the national anti-counterfeiting approach. This is achieved through setting up the programming of coordinated actions and by reaching national results. This centralised body allows for a more streamlined communication and exchange of information between the relevant actors concerned with IP infringements. Additionally, through this Council amendments and improvements can be voiced to the relevant applicable laws as they acquire knowledge about the best practices in the fight against counterfeit.<sup>580</sup>

## 3.7. Conclusions

### 3.7.1. Digital transformation

The availability of qualitative and timely electronic data in a standardized and harmonized manner underpins the effective use of information and communication technologies in order to combat counterfeit. That is why in all countries technology and data become an essential aspect in the fight against counterfeit. This relates to country specific databases/portals/technologies as well as the use of tools such as IPEP by the EUIPO. National databases are being improved and digitised to be interoperable for customs. For example, in Germany, as customs authorities hope to rely on

<sup>575</sup> Confesercenti, 'Misbruik: confesercenti, omzet van 22 miljard euro. Digitale nieuwe grens' (*confesercenti.it*, April 2018) <<https://www.confesercenti.it/blog/abusivismo-confesercenti-giro-daffari-di-22-miliardi-di-euro-abusivismo-digitale-la-nuova-frontiera>> accessed 21 February 2023.

<sup>576</sup> UIBM, 'Counterfeiting: scope, characteristics and in-depth analyses of the phenomenon: final report' (*uibm.mise.gov.it*, July 2012) <[https://uibm.mise.gov.it/attachments/category/225/Counterfeiting\\_Scope,%20characteristics%20and%20analyses%202012.pdf](https://uibm.mise.gov.it/attachments/category/225/Counterfeiting_Scope,%20characteristics%20and%20analyses%202012.pdf)> accessed 2 March 2023.

<sup>577</sup> See *supra*.

<sup>578</sup> OECD, 'Trade in counterfeit goods and the Italian economy 2021 update' (*oecd.org*, 2021) <<https://www.oecd.org/gov/illicit-trade/Summary-Brochure-Italy-EN.pdf>> accessed 21 February 2023.

<sup>579</sup> X, 'Italy', (*The Global Legal Post* 2023) <<https://www.globallegalpost.com/lawverborders/anti-counterfeiting-1271659071/italy-1872018813#1>> accessed 22 March 2023.

<sup>580</sup> *Ibid*.

technology in the future for counterfeit verifications, initiatives are launched to develop AI image recognition apps to recognise counterfeit faster and link it to the possible AFAs.

### 3.7.2. Organisation

Within the current framework, all countries have many possibilities to overcome counterfeiting and have a good cooperation with and between the various authorities (e.g. customs/police/public prosecutor's office). A prime example is the tax police's Anti-Counterfeiting System ('SIAC') as the informational backbone in Italy. Furthermore, the intensification of international cooperation with Europol, EUIPO, etc. and the exchange of data (if legally possible) allows for a more effective and efficient approach against counterfeit.

In light of a far more enhanced coordinating approach, some countries have "joint task forces" in place where the possible different authorities involved come together to either share information or to prevent that one individual or organisation is being investigated twice at the same time while a connection can and should be made. These initiatives prove especially useful and be effective when it comes to counterfeit as organised crime. An example is the Coordinating Centre such as in Spain, that aims to coordinate the several criminal investigations executed by different law enforcement agencies.

Additionally, even though anti-counterfeiting organisations play an essential role (in some countries more than others) only REACT in The Netherlands were given an "expert witness" status by the national courts. Consequently, they can act in criminal and civil proceedings to confirm counterfeiting and their statements will have legal value as evidence.

Lastly, counterfeit is offered and bought more and more on the internet. Providing the necessary technological support and competences via specialized teams working on online enforcement and detecting Internet fraud could provide for a better detection and cooperation with not only other law enforcement agencies but also online intermediaries. The *Cybersquad* of the Belgian customs is a step in the right direction that specifically focuses on detecting and combatting internet fraud (including counterfeit sold online).

### 3.7.3. Building awareness

As an affirmation of the importance of strong IPR protection and enforcement and the security of supply chains against counterfeit and pirated goods, custom authorities organise special fairs. In Germany, for example, there is the organisation of annual customs fairs at the regional/local level which bring the relevant selected IPRHs in contact with local customs officers to identify possible counterfeits of their IPR more easily. Fairs are an effective tool for the fight against counterfeit to raise awareness of the importance of the fight against counterfeit with both IPRHs and custom officers. Additionally, it helps educate and inform customs officers on how to better recognize counterfeited goods by the information about products given by IPRHs.

### 3.7.4. Criminal definition of counterfeit and sanctions

Remarkably, the Netherlands and France added two aggravating circumstances that foresee heavier punishments. The sanction will be more severe if the infringer is committing the counterfeit crime as a business/profession or if it amounts to a real commercial strategy. Specifically in The Netherlands, creating a general hazard for goods and people and endangering public's health and/or safety are additional aggravating factors. In Belgium, on the contrary, there is no explicitly mentioned aggravating element in the context of counterfeit as the focus of legislation is mainly on economic damage. There is an option to enter aggravating circumstances in case of environmental damage or danger to consumer or criminal organizations, which is also applied to custom offenses but not the Belgian Code of Economic Law offenses.

### 3.7.5. Costs

IPRHs are in many cases (France, Italy, Germany) spared of the majority or all costs. Nevertheless, disparities remain.

In the criminal procedures, the costs are in all countries born by the State. This differs from Belgium which uses the cascade system where the costs are nearly always covered by the IPRHs.

Regarding the customs procedure, there are disparities. Germany has fixed fees for smaller shipments charged to IPRHs, so that costs can be better estimate. However, due to the explosiveness of e-commerce, the procedure can remain fairly expensive for trademarks which are often counterfeited. Therefore, fixed fees in customs procedures have not proven to discourage IPRHs from setting 'enforcement thresholds. The cost of destruction is usually born by the IPRHs (The Netherlands). However, there is the possibility for the IPRHs to file a recursive action against the infringer to recover this cost or conclude a settlement with the latter in this regard. But in France the costs are born by state and warehousing. Furthermore, goods are often destroyed, not recycled.

In civil proceedings, the losing party will mostly need to pay all procedural costs. In Belgium, the legislation provides fixed fees in relation to the claim. As the CJEU has pointed out, this could be problematic and discourage IPRHs to enforce their IP right if not all costs of the legal procedure are covered. As for the costs of destruction and storage, at least a reasonable and fitting amount should be recompensated for the IPRHs for all other costs (e.g., costs of destruction and storage) he or she has made to enforce their IP right.

In The Netherlands, the full compensation of all procedural costs was used as a tool to deter the lack of participation of online intermediaries when an IPRH intends to enforce his right. In particular, this will apply when the intermediary refuses to provide the information requested by the IPRH to enable him or her to enforce his or her right. For physical intermediaries like postal companies, a lack of rules or obligations can be found across all benchmark countries.

### 3.7.6. Consumer dissuasion

In contrast with Belgium and The Netherlands where the consumers are excluded from the criminal narrative, France and Italy impose sanctions and liabilities on those purchasing and possessing counterfeit items. However, in practice, only Italy issues penalties. These are then lawfully repurposed for the battle against counterfeit goods. This not only dissuades consumers from purchasing counterfeits and taking them back to their own country, but it also helps state funding by making money available to cover expenses such as destruction and storage.

On the informative side, Belgium has and is consistently making efforts to inform consumers of the (economical and hazardous) risks and downsides of purchasing counterfeit through several campaigns organized by NANAC, FPS Economy, etc. Therefore, no further improvement is needed in this regard.

## Section 4. Improving the fight against counterfeiting

### 4.1. Methodological elements

#### 4.1.1. Identifying options for policy measures

Based on the findings of Section 1, we identified several ‘bottlenecks’ that hamper the fight against counterfeit in Belgium. Overall, these bottlenecks can be structured into two groups depending on whether they pertain to the preventive pillar of the fight against counterfeit (dissuade the producers, consumers, and enablers to engage in counterfeiting activities) or the repressive/corrective pillar aimed at detecting, prosecuting and sentencing counterfeiting offences.

<b>Dissuade (preventive pillar)</b>	<ul style="list-style-type: none"> <li>Appeal for supply side (producers)</li> <li>Appeal for demand side (consumers)</li> <li>Appeal for enablers</li> </ul>
<b>Detect, prosecute and sentence (repressive/corrective pillar)</b>	<ul style="list-style-type: none"> <li>Difficulty to establish counterfeit</li> <li>Partial view on multi-faceted criminality</li> <li>Limited resources</li> <li>Parcelisation (many small consignments)</li> <li>New sales channels (e.g. e-commerce)</li> <li>Varying priority on counterfeit</li> <li>Storage/destruction cost borne by rightsholders</li> </ul>

The current section identifies, describes, and evaluates a series of policy options and measures tackling these bottlenecks. Said policy options and measures were notably identified upon the benchmark interviews (Section 3) and complemented with policy measures arising from a desk review of international or private initiatives and the researchers’ expertise in the field of economics and law.

The results of a preliminary analysis of the options’ potential to address the identified bottlenecks were presented in a synthetic scheme and handed to the commissioner of this study. This scheme evaluates the contribution of each policy measures in relation to each bottleneck. Each policy option was scored using a scale starting from ‘+’ (limited) to ‘+++’ (substantial) to indicate the option’s contribution to addressing a particular bottleneck. Blancs indicate that no noteworthy contribution is expected from a measure to address a particular bottleneck. Moreover, the matrix was complemented with the evaluation of key strengths and weaknesses for each of the individual policy measures.

#### 4.1.2. Stakeholder workshop

With a view to complementing the preliminary evaluation summarized in the above-mentioned matrix an evaluation workshop was held. Key stakeholders actively involved in the fight against counterfeit participated to this workshop, most of which already contributed in previous parts of the study (i.e., in Section 1). The policy options effectiveness, efficiency and feasibility were evaluated during the workshop. Albeit limited in number, workshop participants represented a large part of key stakeholders involved in the fight against counterfeit, notably the FPS Economy, the Belgian Customs, Antwerp Police (counterfeit point of contact) and Fedustria (a Belgian association representing companies in the textile, woodworking and furniture industries).

The workshop was composed of two parts. The first part focused on evaluating the policy options' effectiveness, feasibility, strengths, and weaknesses, etc. The participants' input was used to complement and partially validate the information of the policy measure matrix mentioned above. The second part consisted of the prioritisation of policy options with a view to combining them into a policy mix of measures to be implemented in the short term to address (part of the) bottlenecks identified.

## 4.2. Description and evaluation of policy measures

Below we list the 15 policy options that were identified and evaluated. While this list offers relevant policy options, it doesn't aspire to be exhaustive. Hence, other options may be relevant to take into consideration upon further improvement efforts.

- Digitalising the anti-counterfeit procedures and information
- Allowing access to product information to verify authenticity
- Financial responsibility of the consumer
- Storage and destruction costs borne by the government
- The creation of a "joint task force" or "coordinating information centre"
- The training and sensibilisation of law enforcement agencies and governmental institutions
- Implementing explicitly aggravating circumstances (dangerous for human or environment)
- Financing the fight against counterfeit through fines for counterfeit infringements
- Less focus on shipments in transit
- Obligated bank warranty for importers (limited to certain cases)
- Increasing resources to remove bottlenecks
- Financial responsibility of (real world) enablers
- Extending KYC obligation to other enablers
- Designated reference magistrates for counterfeit
- Dedicated Counterfeit Police Teams

Below we describe each of the above-listed policy options and evaluate their relevance considering the discussion during the workshop. Each description is followed by a summary table including the main bottleneck(s) addressed, strengths and weaknesses of the option under scrutiny.

### 4.2.1. Digitalising the anti-counterfeit procedures and information

#### Description

Most of the selected benchmark countries (Section 3) have digitalized the procedures used in the fight against counterfeit. Some countries limited this to the customs procedures, others like Italy have implemented this on a far broader scope by digitalizing for example police reports, scientific reports, statistics, events, etc.

This measure addresses the problem of limited human resources by increasing effectiveness and efficiency through automatization of (certain parts of) the information. For instance, by automating or facilitating identification processes for counterfeit. By ensuring an increased flow of digital information, the approach for the fight against counterfeit could become more holistic and solve the issue in Belgium where counterfeit is perceived as a phenomenon on its own, instead of a multifaceted crime.

We note that the EU's Multi-Annual Strategic Plan for electronic Customs (MASP-C)<sup>581</sup> requires Member States to digitalize the entire customs procedure by 2024. Hence, the increase in digital information is already set in motion by the European Commission.

Furthermore, the IP Enforcement Portal (IPEP) of EUIPO can be used in the same way as the national databases. The IPEP notably allows for:

- submitting and managing of entirely electronic (EU and national) applications for action (AFAs) with the further integration with COPIS. Since late 2022, AFAs that were not initially filed through IPEP can now also be amended and renewed through IPEP;
- the exchange of information on products with a view to their authentication by law enforcement agencies (including police forces as AFAs are only visible to custom authorities);
- communicating with the customs authorities in the case of detentions;
- sending alerts to law enforcement authorities about new trends or infringement cases, including online infringements (e.g., webshops selling counterfeit)<sup>582</sup>.

The IPEP has, however, its own challenges. Firstly, the implementation of the IPEP portal in the Belgian system requires an investment effort by the government. Secondly, part of the potential users is not familiar with IPEP and its uses. For example, the private actors (e.g. companies) and certain law enforcement authorities (e.g. police) indicated not to be aware that they can access and make use of IPEP. Hence, following the implementation of the IPEP in the Belgian system, resources will need to be invested to raise awareness on IPEP and promote its use with all relevant stakeholders.

#### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>• Difficulty verifying counterfeit for LEAs</li> <li>• Partial approach to a multi-crime phenomenon</li> <li>• Limited human resources to fight counterfeit that disables proper enforcement</li> </ul>	<p>Better information exchange could lead to a more effective and holistic approach</p> <p>Already existing public measures in place (EUIPO's IP Enforcement Portal)</p>	<p>IP Enforcement Portal faces a number of challenges:</p> <ul style="list-style-type: none"> <li>○ Insufficient awareness</li> <li>○ Costs remain to implement</li> <li>○ Costs remain to use for IPRHs</li> </ul>
	Generic measure (not product specific)	Insufficient in itself to solve bottlenecks

## 4.2.2. Facilitate product authentication

### Description

Improving verification of authenticity, raising awareness on counterfeited products and how to recognize them could benefit both law enforcement and consumers. Consumers can better verify if products are genuine or counterfeit and, hence, can help identifying counterfeit on the market. Technological solutions as well as training sessions and workshops informing relevant actors on how to verify authenticity of a specific product could play an essential role in achieving this. Germany invests, for example, in the development of an AI that uses image recognition to identify counterfeit products.

<sup>581</sup> European Commission, "Electronic Customs" <[https://taxation-customs.ec.europa.eu/customs-4/electronic-customs\\_en](https://taxation-customs.ec.europa.eu/customs-4/electronic-customs_en)> accessed on 21 April 2023.

<sup>582</sup> X, 'IP Enforcement Portal upgraded to allow for electronic filing of customs applications in the EU' (2022) <<https://www.engage.hoganlovells.com/knowledgeservices/news/ip-enforcement-portal-upgraded-to-allow-for-electronic-filing-of-customs-applications-in-the-eu>> accessed on 24 April 2023.

The above measure may contribute to a limited extent to facilitate identification of counterfeit by law enforcement agencies, increase efficiency of the limited resources and address e-commerce challenges (massive influx of small parcels).

It is possible for existing technologies to support authentication of counterfeiting goods. For example, workshop participants pointed to a Finish company that developed a QR-code that can support the fight against counterfeit. Note, however, that marking technologies such as QR-codes may – on their own - not offer adequate protection against counterfeit. It is therefore preferable to complement the marking with other authentication technologies to ensure a high degree of effectiveness.<sup>583</sup>

The complexity of products and available technologies today to invest in, whether already developed or not, makes it exceptionally challenging to implement a uniformised system for all products.

#### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>• Difficulty verifying counterfeit for LEAs</li> <li>• Massive influx of small packages due to e-commerce</li> </ul>	Enhances effectiveness of identification of counterfeit by LEA and consumer	Proper awareness of being used by LEA and consumer
		Implementation cost and complexity
		No “one technology fits all products” solution

### 4.2.3. Financial responsibility of the consumer

#### Description

Inspired by the Italian system, this measure aims to hold the consumer financially accountable for the purchase of counterfeit goods, for example, by using an administrative fine. Depending on the level of the fine and the probability to be fined, this measure may discourage consumers to purchase counterfeit products and, therefore, reduce the demand and – eventually - the supply side for counterfeit goods.

Despite the theoretical appeal of this measure, its implementation is deemed very challenging as it will require additional human resources to enforce these fines. Secondly, it is likely to be very hard to gain sufficient political support to provide for an administrative or criminal fine. If an administrative route is chosen, then it could be implemented in the general context of the administrative sanctions for small misdemeanours (i.e. “GAS-boetes” in Dutch). The latter, however, is part of the local authorities’ jurisdiction. Hence, over time different fine schemes may apply geographically, which could lead to forum shopping behaviour.

Note that due to private individuals’ insolvency issues, fines might ultimately be borne by public bodies (e.g. the Public Welfare Centres – OCMW/CPAS) as is already an issue for certain drug enforcement cases.

Workshop participants noted that other measures may further discourage consumers from buying counterfeit goods by expanding the competence to seize suspected counterfeited goods to police officers on the street. However, this entails several additional organisational implementation issues.

<sup>583</sup> EUIPO, ‘Anti-Counterfeiting Technology Guide’ (2021) <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2021\\_Anti\\_Counterfeiting\\_Technology\\_Guide/2021\\_Anti\\_Counterfeiting\\_Technology\\_Guide\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_Anti_Counterfeiting_Technology_Guide/2021_Anti_Counterfeiting_Technology_Guide_en.pdf)> 1, 35 accessed on 24 April 2023.

## Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>Discouraging offer (producer)</li> <li>Discouraging demand (consumer)</li> <li>Massive influx of small packages due to e-commerce</li> <li>New online sales channels (e-commerce and social media)</li> </ul>	Possible dissuasion based on the amount of the fine and chances of being caught	Increased administration
		<p>Difficult to implement but possibility through immediate amicable settlement or administrative sanction at municipal level (i.e. "GAS-boetes")</p> <p>Other alternatives: seizing goods (not only with customs but also on the streets) but implementation difficulties regarding with regard to legal basis.</p>

## 4.2.4. Storage and destruction costs borne by the government

## Description

Unlike most benchmark countries studied (Section 3), in Belgium (most) of the costs for storage and destruction of counterfeit in both administrative and criminal procedures as well as for civil procedures, are essentially borne by the IPRH. This is often perceived as unfair as the IPRH is a victim of counterfeit. Moreover, recovering these costs from the IPRH discourages them to participate to the full extent in fight against counterfeiting. Instead, some companies set thresholds for their participation in investigations or active enforcement of their IP.

Shifting the costs to the government may offer relief to the IPRH but impacts public budgets. As exemplified by the Italian case, the proceeds from administrative counterfeit fines could be used to balance (part of) this budgetary impact. In this respect it may be promising to increase the systematic analysis of financial resources of counterfeit infringers stemming from their counterfeiting activities. By being able to properly seize these resources in big counterfeit cases, the measure may help to transfer the detention and destruction costs to the infringers themselves. This may require organising a dedicated team to perform the wealth/assets analysis and confiscation activities, including those pertaining to foreign assets (cf. the KALI team in Antwerp).

## Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>Costs of storage and destruction are often born by the IPRH</li> </ul>	Motivates IPRH who tend to set thresholds to enforce their IP or participate in investigations	Cost for government (budget availability?)
	IPRH as victim of counterfeit should not have to make extra costs	Other alternatives at hand to diminish costs

#### 4.2.5. The creation of a “joint task force” or “coordinating information centre”

##### Description

Large counterfeiting operations are often not a stand-alone offence but are likely to be intertwined with other crimes and may be managed by criminal organisations. The problem of counterfeit will, therefore, not be solved if the focus lies only on the crime of counterfeit. Through the creation of a “joint task force” or “coordinating information centre” a more holistic approach could be achieved.

In relation hereto Belgium recently (2020) established the Interministerial Commission for the Fight against Counterfeiting and Piracy which notably is endowed with powers to act as a “coordinating information centre”<sup>584</sup>. While said Commission is not yet fully operational it is well underway to reach its full potential in the short or medium term.

##### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>Partial approach to a multifaceted crime</li> <li>Counterfeit detection/prosecution has varying priority</li> </ul>	Better to fight organised crime	No silver bullet
		Resource-intensive, hence only relevant for high-priority / high-profile cases

#### 4.2.6. The training and sensibilisation of law enforcement agencies and governmental institutions

##### Description

We found that the prosecution of counterfeit cases is often dismissed by the public prosecutor (see Section 1). This relates amongst other to the limited resources and the low visible impact on society (as compared to more violent crimes). This in turn explains the relatively low priority put on prosecuting counterfeit. Additionally, many police officers are lacking appropriate information to identify and assess the importance of counterfeit. Most finds by police happen by chance in other investigations unrelated to counterfeit and only in rare cases is such counterfeit notified to a specific cell within the police organisation (if such exists) or to the FPS Economy.

Workshop participants were rather favourable on targeted training and sensibilisation of law enforcement agencies and governmental institutions. This can be especially of use as the basic police training curriculum does not include a specific training on counterfeit. Hence, integrating counterfeiting in the police officers' basic training curriculum might increase detection of counterfeit on the internal market. Training is, however, no silver bullet and should be accompanied with adequate budgets, time, tools, human resources, etc. to detect and prosecute counterfeit. Note that an increase in detection can substantially increase the workload for other law enforcement agencies which already have scarce human and financial resources to tackle the fight against counterfeit. To avoid bottlenecks, a ‘triage’ or ‘funneling’ system will need to be in place, whereby the simple cases are addressed by the officers in the field and more complex cases are escalated higher up in the hierarchy.

##### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
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<sup>584</sup> See art. XV.58 and XV.59 of the Code of Economic Law and Royal Decree 4 May 2020 regarding the composition and organisation of the Interministerial Commission for Combating Counterfeiting and Piracy to implement Articles XV.58 and XV.59 of the Economic Code, BS 02 June 2020.

<ul style="list-style-type: none"> <li>• Difficulty verifying counterfeit for LEAs</li> <li>• Partial approach to a multifaceted crime</li> <li>• Counterfeit detection/prosecution has varying priority</li> <li>• New online sales channels (e-commerce and social media)</li> </ul>	Fairly simple to implement	Bottlenecks will emerge if the whole chain isn't adjusted to new influx of knowledge and participation
		No silver bullet and potentially labour-intensive

#### 4.2.7. Implementing explicitly aggravating circumstances (dangerous for human or environment)

##### Description

The Dutch penal code provides that when counterfeit is considered to be dangerous to humans or the environment, this fact constitutes an aggravating circumstance which allow for stricter sanctions. Similar provision on aggravating circumstances is not explicitly foreseen in Belgium. However, in practice, the courts determine the severity of a sanction taking into account all relevant circumstances. If counterfeit is deemed dangerous to humans or the environment a higher sanction is likely applied than in the absence of such a risk.

We note that the workshop participants were not convinced of the relevance this measure as in most cases it is difficult to prove that counterfeit is dangerous.

##### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>• Discourage enablers (and local producers)</li> <li>• Counterfeit detection/prosecution has varying priority</li> </ul>	Allows to make a distinction between the cases with merely economic impact and cases with an additional environmental or health risk	Need for definition of "dangerous"
		Difficult to prove counterfeit is dangerous
		Courts already consider "all relevant circumstances"
	Provides somewhat focus	Unlikely to discourage producers

#### 4.2.8. Financing the fight against counterfeit through fines for counterfeit infringements

##### Description

Financial resources are essential in the fight counterfeit. Hence, this measure was well received by the workshop participants. The criminal fines obtained from juridical sanctions or administrative fines because of the transaction procedure can help to fund the cost of the fight against counterfeit. The workshop participants suggested the implementation of an ad hoc fund dedicated to funding costs related to the enforcement of IP would be very welcome.

##### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
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<ul style="list-style-type: none"> <li>• Discouraging offer side (producers)</li> <li>• Discouraging demand side (consumers)</li> <li>• Discouraging enablers</li> <li>• Massive influx of small packages due to e-commerce</li> <li>• New online sales channels (e-commerce and social media)</li> </ul>	Can be implemented fast	Availability of resources does not necessary entail that they are well allocated. Hence, needs to be complemented with a resource allocation plan (= a condition rather than a weakness)
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#### 4.2.9. Less focus on shipments in transit

##### Description

The Belgian customs authorities suffer significantly under the consequences of e-commerce. With Belgium as transit country for other EU Member States, the workload can be partially lightened by focusing on those packages with Belgium as final destination. That way the limited resources available at the Belgian customs can be re-allocated to serve and protect the Belgian consumers by priority. The customs representative at the workshop indicated that is already the case in practice. Packages who are 'in transit' are not prioritized. Therefore, this measure was not considered to have a large added value to the fight against counterfeit.

##### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>• Limited human resources to fight counterfeit that disables proper enforcement</li> <li>• Massive influx of small packages due to e-commerce</li> <li>• New online sales channels (e-commerce and social media)</li> <li>• Costs of storage and destruction are often born by the IPRH</li> </ul>	Can be implemented fast	International agreements
	Allows for more focus on the Belgian market	Already occurs to some extent in practice due to prioritisation

#### 4.2.10. Bank guarantee for importers (possibly limited to certain cases)

##### Description

This measure was proposed to facilitate the reimbursement by infringers of costs storage and destruction casts currently borne by IPRHs. Infringers may not have the financial means to pay for the costs or may be untraceable. In order to ensure reimbursement, requiring a bank or other form of actionable guarantee could be considered for some of the links in the value chain (e.g. retailer). Workshop participants pointed out (bank) guarantees may not be available for all relevant economic actors. Moreover, other methods could achieve the same result (e.g. the freezing of a certain amount on bank accounts of the importer). This measure requires further investigation on how guarantees and/or other instruments with a similar effect could facilitate recovering costs from enablers in the forfeiting value chain.

## Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>Discourage offer side (producers)</li> <li>Discourage enablers</li> <li>Costs of storage and destruction are often born by the IPRH</li> </ul>	Reduces risk of IPRH carrying costs for destruction and storage	Uncertainty whether this can be done for importers from EU/OECD countries
	When providing a bank warranty, there is already some minimal control by banking institution	Difficulty to obtain bank warranty for certain companies

## 4.2.11. Increasing resources to remove bottlenecks

## Description

While a broad consensus exists that a judicious increase of resources to remove bottlenecks is likely to improve the impact of the actors fighting counterfeit, the budgetary impact of such increase should carefully be considered. This points to a broader question on how to finance the fight against counterfeiting. A few of the proposed measures above offer a source of inspiration to that effect, e.g. a dedicated fund constitutes by (part of) the proceeds from fines paid by counterfeiters.

## Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>All identified bottlenecks</li> </ul>	Finance possible through finds in criminal cases related to counterfeit; through administrative or criminal fines	Needs to be financially feasible

## 4.2.12. Financial responsibility of (real world!) enablers

## Description

Complementary to the proposed (bank) guarantee for retailers/importers, and additional measure could hold enablers financially responsible for counterfeit that is being commercially exploited through the services they provide. Said measure aims to shift the financial burden from the IPRH to the enabler. It pertains solely to 'real world' enablers and not online enablers as the latter are already under similar obligations under the EU's Digital Services Act.

Workshop participants point legal obstacles (as regard to jurisdiction) especially with regard to enablers established abroad. Additionally, political backing to properly implement this measure is deemed unlikely in the foreseeable future.

## Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>Discourage enablers</li> <li>Massive influx of small packages due to e-commerce</li> <li>New online sales channels (e-commerce and social media)</li> </ul>	By holding enablers financially accountable, an incentive could be created to do a preliminary check for counterfeit ('a first filter')	Territoriality and jurisdiction issues regarding foreign established enablers who provide services in Belgium
		Complexity to create an operational system for this

<ul style="list-style-type: none"> <li>Costs of storage and destruction are often born by the IPRH</li> </ul>		
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#### 4.2.13. Extending KYC obligation to other enablers

##### Description

Enablers are important actors in the counterfeiting value chain. The EU's Digital Services Act has introduced the KYBC principle ('Know Your Business Customer') to oblige enablers (e-commerce platforms) to verify certain basic personal information such as (company) name, address, and other contact details. This makes it easier to find and hold those who sell counterfeit accountable.

An interesting approach might be to apply the same standard to 'real world' enablers. Think about storage places, market holders, transport companies, etc. The sanction to not verifying this would then be financial accountability for the costs of storage and destruction.

The participants were not particularly fond of this measure. They preferred incentivizing real-world enablers through Memoranda of Understanding.

##### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>Counterfeit detection/prosecution has varying priority</li> </ul>	More focus on counterfeit	Difficult to enforce with foreign enablers
	Potentially less dismissals	

#### 4.2.14. Designated reference magistrates for counterfeit

##### Description

This measure pertains to the designation of reference magistrates (public prosecutors) for counterfeit. This is especially relevant in judicial districts known to contain counterfeit 'hot spots' such as (air)ports. Said measure aims to facilitate relevant knowledge and expertise build-up and ensure that counterfeit infringement receive appropriate treatment. Incidentally, this should reduce the number of cases being dismissed.

Workshop participants pointed to the fact that in practice some magistrates have already gained some expertise and degree of specialisation through the cases brought before them. The extent of said expertise is, however, uncertain and is likely to vary among magistrates, as these magistrates need to deal with all sorts of infringements, including forfeiting. Hence, unlike a dedicated magistrate, only a relatively small part of their time can be devoted to cover counterfeit infringements. Furthermore, it is unclear whether all of the judicial districts considered as 'counterfeit hotspots' have magistrates with appropriate experience levels. For all these reasons the measure was deemed relevant by workshop participants.

##### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>Counterfeit detection/prosecution has varying priority</li> </ul>	More focus on counterfeit	Impact on public resources

	Potentially less dismissals	
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#### 4.2.15. Dedicated Counterfeit Police Teams

##### Description

Currently, detection of counterfeit by local police officers in the field is largely a matter of chance. Furthermore, not all potential counterfeit cases are flagged as counterfeit or notified to the right instances<sup>585</sup>. As indicated above (see point 2.6) training and sensibilisation of law enforcement agencies may boost awareness and increase the identification of counterfeiting activities.

We note for example that the Antwerp police has, a dedicated cell dealing with several ‘niche’ offences including counterfeit. However, very few cases make their way to this specific cell or are reported to the FPS Economy.

Therefore, alongside a triage system and further training of police officers, a dedicated team in the ‘counterfeit hotspots’ might support optimisation of detection. This measure was generally well received by the participants.

In relation hereto we note that Europol's EMPACT refers to the fight against counterfeit as one of the key priorities on their EU Policy Cycle. EMPACT's prioritization of counterfeit could be used as a starting point or could create momentum to include dedicated counterfeit police teams in the Belgian's national safety plan. Finally, to be effective and efficient these dedicated teams would need to be properly staffed and trained.

##### Summary evaluation

Main bottleneck(s) addressed	Strengths	Weaknesses
<ul style="list-style-type: none"> <li>Counterfeit detection/prosecution has varying priority</li> </ul>	More focus on counterfeit	Impact on public resources
	Potentially less dismissals	

#### 4.2.16. Summary workshop conclusions

##### Preferred measures

As a final workshop exercise, we asked workshop participants to pick 5 measures which were deemed the most relevant in the short and medium term. From this exercise, the following measures were selected (starting with the measures that gained the most support).

- Digitalising the anti-counterfeit procedures and information
- The creation of a “joint task force” or “coordinating information centre”  
The training and sensibilisation of law enforcement agencies and governmental institutions
- Financing the fight against counterfeit through fines for counterfeit infringements
- Designated reference magistrates for counterfeit
- Facilitate product authentication

<sup>585</sup> Based on interviews referenced in Section 1.

## Other measures

Apart from these measures, participants generally agreed that “Increasing resources to remove bottlenecks” was also a good measure to intensify the fight against counterfeiting.

The following measures also gained support, be it somewhat lesser than the preferred measures listed above:

- Dedicated Counterfeit Police Teams
- Storage and destruction costs borne by the government
- Designated reference magistrates for counterfeit

Other measures were either considered to be of limited relevance (limited value added) or requiring further evaluation analyse, or could be envisaged under an alternative form:

- “Extending KYC obligation to other enablers” was considered to be more relevant in the form of a voluntary scheme or MoU (instead of an obligation).
- “Financial responsibility of the consumer” and “Financial responsibility of (real world!) enablers” were considered to lack the necessary political support;
- “Implementing explicitly aggravating circumstances (dangerous for human or environment)” and “Less focus on shipments in transit” were considered to add only limited value as the current organisation and measures already allow similar results;
- “Bank guarantee for importers (possibly limited to certain cases)” was at first sight deemed difficult to implement and should be analysed before further consideration.

## 4.3. Towards an improved policy mix

### 4.3.1. Introduction

The individual policy measures described-above address only part of the bottlenecks identified. In other words, there is no single measure that can tackle all bottlenecks (no *silver bullet*). In addition, the effectiveness and efficiency of most measures increases when combined with some of the other measures. For example, training policy officers in identifying counterfeit goods will only be effective (i.e., lead to more convictions) if the downstream capacity to follow-up on the forfeiting cases by prosecutors and other magistrates is aligned on the higher workload. Hence, to improve the effectiveness and efficiency of the fight against forfeiting we suggest a policy mix of measures, building on the workshop results and the insights from the previous sections. Said policy mix contributes to solving or reducing the key bottlenecks identified. In addition, we will indicate what measures may need further investigation.

Building on the following principles, such as coherence and links between, self-reinforcing mechanisms and budgetary equilibrium. In addition to ensure a balanced policy mix we have ensured our proposal covers three key dimensions of a law enforcement eco-system: people, systems, organisation.

Below we provide an overview of the recommendations we for improving the effectiveness and efficiency of the fight against counterfeiting.

### 4.3.2. Recommendations for an improved policy mix

Table 28 - Recommendations for the policy mix

1	Define a tailored curriculum for police and magistrates (people)
2	Establish designated / dedicated roles (people/organisation)
3	Support the IPEP acceptance, roll-out and use (systems)

4	Develop a funnelling approach with partners (organization)
5	Earmark proceedings of fines for fight against counterfeit (system)
6	improve fine collection capabilities (organisation)
7	Reduce cost barriers for rightsholders (systems)
8	Test and roll-out authentication technologies (systems)

**Recommendation 1:** Define a tailored curriculum for police and magistrates (people)

While the FPS Finance (customs) and FPS Economy have well trained dedicated Teams, other actors may lack awareness, training or focus to effectively support the fight against counterfeit. To raise awareness and develop the appropriate knowledge and expertise we suggest developing a tailored training curriculum for each of the relevant links in the law enforcement chain, including police force, prosecutors, and magistrates.

Additionally, it may be relevant to extend awareness and training to other key partners outside the Law enforcement community. For example, providing rightsholders training on the use of relevant tools such as IPEP to their full potential.

Upon implementation, this recommendation is to be aligned with recommendations 2 and 4, respectively on dedicated roles and the funnelling approach throughout of the law enforcement eco-system.

**Recommendation 2:** Establish designated / dedicated roles (people/organization)

Awareness raising and training (see recommendation 1) deliver better results when combined with a clear focus and sufficient time to apply the newly secured knowledge. This could notably take the form of the definition and designation of dedicated roles, such as a single point of contact within a local police unit, a reference magistrate for counterfeit in 'hotspot' judicial districts, etc. Obviously, this recommendation will also have an impact on the recommendation 1 and should be aligned on the funnelling approach proposed in recommendation 4.

**Recommendation 3:** Support the IPEP acceptance, roll-out and use (systems)

The digitalization of the information used in the fight against counterfeiting can be organised via the IP Enforcement Portal (IPEP). However, to reach its full potential, this instrument will need to be further implemented in Belgium and its use will need to be promoted and supported.

In practice, this measure will require the elaboration and implementation of a IPEP roll-out plan, including the marketing of the instrument with key users. Particular attention should be devoted to facilitating the on-boarding process of new users and ensuring that existing users of the IPEP system receive appropriate benefits to keep on using the system to its full extent.

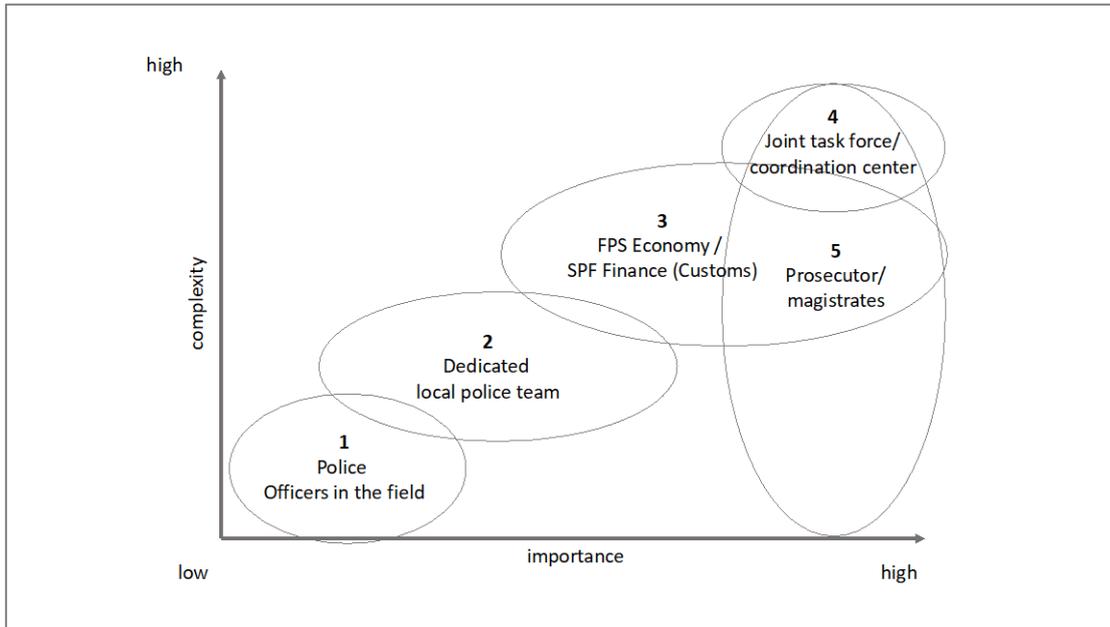
Upon implementation, this recommendation is to be aligned with recommendation 1 on awareness and training.

**Recommendation 4:** Develop a funneling approach with partners (organization)

Some of the previous recommendations are likely to increase the number of counterfeit cases identified. In the current organisation, this will invariably translate into an increase in workload and bottlenecks downstream in the prosecution chain. Increasing resources could be one way – albeit somewhat inefficient – to cope with an increased workload. Alternatively, a *funnelling approach* may spread the workload in a more efficient way, limiting the additional resources needed to reduce the risk of bottlenecks. The proposed funnelling approach builds on two findings: on the one hand, counterfeit cases come in different degrees of complexity and importance (e.g., in

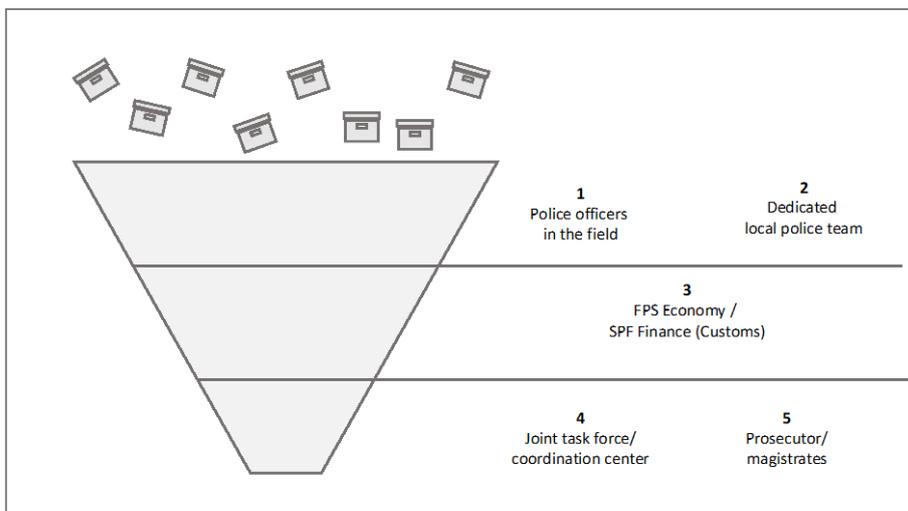
function of their size/volume, danger characteristics, relation to other crimes, etc.); on the other hand, the tools and expertise of law enforcement officers and magistrates (e.g. penal or administrative) also vary substantially. By matching the complexity and importance cases to the expertise and the tools of the law enforcement officers and magistrates' cases can be spread over the different actors in the prosecution chain.

Figure 10 - Matching roles with complexity and importance of the cases



This creates a funnel whereby the less complex/important cases are primarily dealt with at the level of the police; the cases of intermediate importance are covered by the FPS Economy and Customs and the more complex/highly important cases can be covered by a task force (which will normally include FPS Economy and/or Customs). For the highly important cases the prosecutor/magistrates will be involved who are more likely to be associated to the prosecution process.

Figure 11 - Funnelling approach



In relation to the recommended funnelling approach the recently established Interministerial Commission for the Fight against Counterfeiting and Piracy can contribute on two main aspects:

- it offers a much-needed coordination platform where all actors in the prosecution chain can agree upon a collaboration strategy. This is notably essential for bringing about the funnelling approach throughout the prosecution chain.
- It actively plays a role in tackling the most complex high importance cases through the creation of thematic or case driven joint task forces, bringing together the necessary expertise to address a particular challenge.

The quality of this Interministerial Commission is there for paramount to the efficiency of the whole law enforcement ecosystem. This measure is to be aligned with recommendations 1 and 2 and 5, which respectively pertain to training, the allocation of dedicated roles, and the funding of the law enforcement eco-system.

**Recommendation 5:** earmark proceedings of fines for the fight against counterfeit (system)

The fight against counterfeit is resource intensive. Hence, the effectiveness is dependent on the available resources. The fight against counterfeiting also generates some revenues for the public authorities in the form of fines or the proceeds from the sale of confiscated goods (other than the counterfeit goods, e.g. cars, and other assets of counterfeiters). Currently, the proceeds are allocated to the general budget, where they can be used to cover all sorts of public expenditure. By earmarking these proceeds - in part or in whole - for the fight against counterfeiting, the latter's resource needs could be somewhat alleviated. More importantly, it may create a virtuous cycle whereby the proceeds of successful countermeasures allow to intensify the fight against counterfeit, generating even more proceeds that can support further efforts.

Apart from addressing the need for resources, this measure - if implemented correctly - may also support the fight against counterfeit through its signalling function. Indeed, by informing law enforcement agencies and the general public on the use of the proceeds in the fight against counterfeit, the link between the countermeasures and the resources allocated to the fight against counterfeit becomes clear. This may incentivise the law enforcements officers and broaden support from the general public; Furthermore, said information measure may contribute to discourage (potential) offenders to single out Belgium for their criminal activities.

To ensure efficient use of the additional resources secured by this measure, the latter is best accompanied with a resource allocation plan. Said plan estimates the workload throughout the prosecution chain; identifies and prioritises bottlenecks; identifies and evaluates measures that can solve or reduce these bottlenecks; and, eventually, allocates the earmarked proceeds based on the needs assessment.

Upon implementation, this recommendation is to be aligned with recommendation 4 on the funnelling approach throughout of the law enforcement eco-system.

**Recommendation 6:** improve fine collection capabilities (organization)

A substantial part of the fines cannot be collected as many offenders claim to be insolvent. This means that offenders manage to avoid a sanction, save for the destruction of their counterfeit goods. Hence, it is key to find ways to improve the collection of fines.

For larger offenders it may be cost-efficient have a dedicated team performing wealth or assets analysis and conducting confiscation activities, including those pertaining to foreign assets, to collect fines. A source of inspiration can be found in the experience gained through the KALI team. This team is a joint task force of local and federal police officers tackling cocaine trafficking via the port of Antwerp. It deals with the illegal power base of Antwerp drug clans and investigates their activities in the parallel economy<sup>586</sup>.

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<sup>586</sup> See Ch. Colman, '[Samenvatting wetenschappelijke evaluatie van het Stroomplan](#)', Universiteit Gent, 2020.

For smaller infringements we recommend to further investigate whether more practical solutions exist for example in the form of a bank guarantee, a deposit, etc. that can facilitate identification and allow swift access to offenders' assets.

Upon implementation, this recommendation should be aligned with recommendations 2 and 4, respectively on the dedicated roles and funnelling approach throughout of the law enforcement eco-system, including joint task forces. An improved ability to collect will also increase the relevance of recommendation 5 on earmarking the proceeds of fines for the fight against counterfeiting.

Note that, *mutatis mutandis*, a similar approach could also be used facilitate the collection of costs for storage and destruction of counterfeit goods currently borne by the rightsholders (see below recommendation 7).

#### **Recommendation 7: Reduce cost barriers for rightsholders (systems)**

Economic considerations urge rightsholders to weigh costs against benefits of having counterfeit goods seized and destroyed. Whenever the costs are expected to outweigh the benefits (e.g., in the case of small or low value counterfeit shipments) rightsholders would probably not ask public authority to intervene nor would they want to engage resources in the authentication of goods. The fact that in Belgium rightsholders bear the cost of storage and destruction of the counterfeit goods increases the costs for rightsholders and, hence, raises a barrier to cooperating with law enforcement agencies. By transferring this cost to another party, this barrier is lifted. Such 'other party' can be either the public authority or the directly involved offender(s).

To avoid an excessive burden on the public budget this recommendation can be combined with some of the other recommendations:

- If the proceeds from fines are earmarked for the fight against (see recommendation 5), the proceeds can be used to cover (part of) the cost of storage and destruction.
- Improving collection capabilities (see recommendation 6) for example through the wealth/asset analysis can facilitate access to financial resources counterfeit offenders, be it for the collection of fines or costs of storage and destruction.

Note that it may be a good practice to ask a low (flat) contribution from rightsholders to avoid potential free-riding behaviour.

#### **Recommendation 8: Test and roll-out authentication technologies (systems)**

Several technologies on the market (e.g., QR codes) facilitate the verification of authenticity of products. These technologies could boost the effectiveness and efficiency of the fight against counterfeit. In general, the implementation of these technologies may require an investment both by rightsholders and law enforcement agencies. For example, production chains and software may need to be adapted to accommodate counterfeit countermeasures such as QR codes. Moreover, implementation of new authentication technologies is also likely to require adapting certain links of the prosecution chain, such as for example the acquisition of hand and/or fixed scanners or the organisation of physical checks.

As the adaptations will generally require some level of investment, we recommend carefully analysing existing alternative authentication technologies on the market and organise a pilot to test the most promising technologies in real life conditions. This pilot could focus on a selection of product categories and requires the collaboration of rightsholders.

If successful, the selected technology can be rolled-out can. Here again, several links can be made with some of the above-mentioned recommendations. For example, the earmarking of fines for the fight against counterfeit (recommendation 5) will facilitate the investments in material required to roll-out the technology and may be used to address the higher workload by hiring additional workforce in combination with a funnelling approach (recommendation 4).

**Recommendation 9:** Incentivize real world enablers to participate to voluntary KYBC scheme (systems)

Enablers are important actors in the counterfeiting value chain. By incentivising 'real world' enablers to participate in a voluntary KYBC scheme ('Know Your Business Customer') similar as the one imposed on e-commerce platforms, enablers may become partners in the fight against counterfeiting. Participating to such scheme would entail verification of certain basic personal information such as (company) name, address, and other contact details, which would make it easier to find and hold those who sell counterfeit accountable.

**General recommendation:** Monitor performance of the law enforcement ecosystem

As a general accompanying measure, we recommend monitoring the performance of the law enforcement ecosystem and prosecution chain with regard to counterfeit. Said performance could be monitored using indicators measuring input (e.g. resources invested), activities (e.g. controls), output (e.g. controls performed; shipments/value sized), intermediary outcome (e.g. knowledge build-up) and outcome (e.g. number of fines issued and collected).

This monitoring system will allow to systematically identify strong and weak points within the system, as a basis to formulate improvements that increase the ecosystem's performance as a whole (opposed to individual components of the system). In addition, a well-designed monitoring system looks beyond one's own organisation and includes indicators that allow capturing important changes in the environment, so as allow timely adaptation hereto.

The set-up of a monitoring as well as the analysis of the results thereof could be organised within the Interministerial Commission for the fight against counterfeiting.

### 4.3.3. Summary overview

With the exclusion of the general recommendation, the summary below provides an overview of the different recommendations and their contribution to solving key bottlenecks identified. The contribution is evaluated using a scale from low (L), over medium (M) to High (H). In some cases, we use the notation (NA) to indicate that the recommendation does not contribute (nor focus) on solving a particular bottleneck.

Table 29 - Overview of the recommendations in the policy mix with their low, high or medium impact

#	Recommendation	Dissuade (preventive pillar)			Detect, prosecute and sentence (repressive/corrective pillar)						
		Appeal for supply side (producers)	Appeal for demand side (consumers)	Appeal for enablers	Difficulty to establish counterfeit	Partial view on multi-faceted criminality	Limited resources	Parcelisation (many small consignments)	New sales channels (e.g. e-commerce)	Varying priority on counterfeit	Storage/destruction cost borne by rightholders
1	Define a tailored curriculum for police and magistrates (people)	L	L	L	M	L	L	L	L	M	NA
2	Establish designated / dedicated roles (people/organisation)	L	L	L	M	L	L	L	L	H	NA
3	Support the IPEP acceptance, roll-out and use (systems)	NA	NA	NA	M	M	L	L	NA	NA	NA
4	Develop a funneling approach with partners (organization)	L	L	L	M	H	M	M	M	M	NA
5	Earmark proceedings of fines for fight against counterfeit (system)	M	M	M	NA	NA	H	NA	NA	L	M
6	improve fine collection capabilities (organisation)	M	M	M	NA	L	M	NA	NA	L	L
7	Reduce cost barriers for rightholders (systems)	L	L	L	M	NA	L	L	L	L	H
8	Test and roll-out authentication technologies (systems)	M	M	M	H	NA	L	M	M	NA	NA
9	Incentivise participation to voluntary KYBC scheme (systems)	M	NA	M	NA	NA	L	M	M	NA	NA

From this overview it appears that the proposed set of policy measures contribute to all key bottlenecks identified.

# Annexes

## A. Summary indicative research methods for each research question

Strategic finality (= ultimate benchmark): identification of relevant measures that can help step up the fight against counterfeiting in an effective and efficient way			
operational finality	Research question	Research methodology (how?)	data/information requirements (what information?)
<b>Definition scope/focus assignment</b>			
	Identification of key relevant working definitions	desk research + interview	Definitie relevante wetgeving voor België (douane Verordeningen, etc.)
	Selection working definition: What should we focus on and how can we define the scope	Start establishing workable definition and focus of counterfeiting and piracy (80/20 rule) including research minutes + discussion in steering committee	Reviewing legislation and verify in interviews which rights are most affected by counterfeiting (trademark law?)
<b>Establish state of play</b>			
	• Which actors and what is their role? (counterfeiters, intermediaries, the service providers (online platforms, payment services), the Belgian and foreign institutions involved, the victims (natural persons or economic actors), the consumers (buyers whether or not consciously))	1) desk research and 2) interviews	See, among other things, annual reports FPS Economy and FPS Finance and reports OECD, Interpol/OIAF and EUIPO, etc.
	• What are the essential characteristics/key figures of the current situation?	1) desk research and 2) interviews	See, among other things, annual reports FPS Economy and FPS Finance and reports OECD, Interpol/OIAF and EUIPO, etc.
	• What are the main product categories (quantity and value) + context information: according to seizure, sector by sector, according to channels used, etc.);	1) desk research and 2) interviews	annual report FPS Economy and FPS Finance + underlying datasets
	• What factors lead to an increased risk of counterfeiting? • How can counterfeiting be identified in each link?	1) desk research, 2) interviews and survey 1) interviews en 2) desk research	a.o. EUIPO, Interpol a.o. EUIPO, Interpol
	• What is the origin (main countries/regions) of the counterfeit goods, including the manufacturing and transport countries;	1) desk research	EUIPO reports a.o. OECD/EUIPO, "Mapping the Real Routes of Trade in Fake Goods", Paris, OECD Publishing, 2017
	• What is the state of play of the fight against counterfeiting in Belgium? • Legal framework	Desk research: analysis of applicable legislation 1) desk research and 2) interviews	juridische analyse van de wetgeving aangevuld met interviews voor toepassing ervan in de praktijk
	• What risk management measures are adopted by companies? • What bottlenecks/challenges?	1) desk research and 2) interviews 1) interviews and 2) survey	
<b>Research questions regarding the impact of counterfeiting in Belgium?</b>			
	Start by establishing workable definition of counterfeiting and piracy (80/20 rule) indicating limitations + discussion in steering committee	1) desk research (proxy methods) en 2) interviews	Estimation of lost turnover based on international literature and application of this to Belgian datasets. Application of reference margins to turnover figures.
	• which sectors are mainly affected today?	1) desk research en 2) interviews	Based on statistics FPS Economy and FPS Finance + a more in-depth analysis on the basis of 3 selected sectors
	• Segmentation of enterprises within the sectors (SME - larger companies)?	1) desk research (relevant segmentation criteria)	NBB statistics
	• What impact on Health, Safety, Environment? • What impact on government: lost revenues from taxation and the costs of the fight against counterfeiting?	1) desk research en 2) interviews 1) desk research en 2) interviews	direct income foregone: Apply average corporate tax and VAT tax rates on goods (for the three selected sectors)
	• What explanatory factors for established impact? (e.g. position of the port of Antwerp)	1) desk research and 2) workshop or targeted interviews	
<b>Research questions regarding experiences abroad (Benchmark)</b>			
	What measures in benchmark countries?		Taking into account the identified bottlenecks, we examine whether and how the benchmark countries have addressed the identified bottlenecks in order to draw maximum lessons from their experiences
	France	We proceed as follows: a) layout of the survey guideline; (b) provide guidance to the benchmark country contact person; c) interview and d) additional analysis of document referenced by the benchmark country contact person	
	The Netherlands		
	Germany		
	Spain		
	What impact of the identified measures and their relevance in a Belgian context?	1) interviews + own evaluation based on predefined criteria + evaluation via stakeholder workshop	
<b>Research questions regarding improvement measures</b>			
	• What measures can help address bottlenecks (identification measures)?	1) based on results of benchmark countries, 2) own analyses from previous parts complemented by 3) a stakeholder survey or workshop	
	• Which measures are most relevant (evaluation measures)?	own evaluation on the basis of predefined criteria + evaluation via stakeholder workshop	

## B. Initial detailed findings regarding 'bottlenecks' in WP1

### PRODUCER: PRODUCT/CONTENT IS BEING COUNTERFEITED

Who? Mainly based in China, Turkey, etc. (EUIPO reports)

Enforcement and prosecution: Difficult; little chance of extradition or active cooperation from origin countries. Counterfeiting is part of their economy. However, regarding China, there is already an EU-China Strategic Framework for Customs Cooperation. This should make exports to other countries more difficult, but an evaluation has not yet been conducted by the EU.

Blockathon initiative by the EU can significantly complicate the feasible counterfeiting of physical products through NFT and digital signature technology on a decentralized blockchain database and control throughout the entire supply chain.

### E-COMMERCE: OFFERING GOODS TO CONSUMERS VIA THE INTERNET

Who is involved? Internet service providers, domain name registrars (e.g., DNS Belgium, EURid), social media, and online marketplace platforms.

Preventive initiatives against offering counterfeits online:

- MoU regarding counterfeit sales: involves social media and online marketplace platforms, major brand holders. It develops good cooperation and best practices but it does not have enough diverse types of stakeholders involved (no search engines, no advertising platforms, etc.).
- MoU regarding online ads on IPR infringing websites and apps (depriving counterfeiters of additional funding)
- Initiatives by domain name registrars against cybersquatting (e.g. Sunrise procedure) and generally preventing counterfeit websites from registering for a domain name (e.g. identity checks by DNS Belgium and EURid)

Reactive initiatives against offering e-commerce

- Possibility to get domain name transferred to trademark holder under ADR, WER, etc.;
- Cease and desist order against infringer to use domain name;
- Cease and desist order against intermediaries (social media platforms, online marketplace platforms, etc.);
- competence FPS Economy to make online test purchases (with fictitious identity);
- competence FPS Economy to compel internet service providers and social media platforms to have certain content blocked or made inaccessible, domain names deleted and re-registered in the name of the competent authority;
- Digital Services Regulation: trusted flaggers, KYBC (identity verification), etc.

Bottlenecks:

- Blocked or inaccessible content becomes available again after dismissal and interviews show that quite a few cases are dismissed;
- Difficult to gather evidence when using social media as sales channel (Snapchat in particular) due to volatility and temporary nature of the messages;
- Repeat infringements: accounts and websites are blocked or deleted and simply recreated under new names.

*TRANSPORTERS & SUPPLIERS: MOVING GOODS TO FINAL DESTINATION*

Who? Postal companies, airlines, shipping industry (containers),...

Protection against introduction of goods at (external) borders:

- Customs Regulation No 608/2013
- Customs offence Anti-piracy law (fine)
- Communication exchange with other countries and trademark holders:
- EUIPO's IP Enforcement Portal (still to a lesser extent in use in Belgium)
- COPIS
- OLAF/Europol

Customs enforcement bottlenecks

- Not enough information from IPR holder to act ex officio (unless represented by ABAC-BAAN, law firm, etc.);
- Request for action from customs too expensive to enforce for smaller companies and larger companies only focus on dangerous goods and larger shipments (destruction

costs and storage costs are almost always borne by IPR holder in practice). If not a member of an interest group (e.g. REACT, ABAC-BAAN) or law firm too much administration for larger companies. Procedure small shipments may alleviate this if opted for but destruction costs still remain the responsibility of the IPR holder;

- Need for more resources (staff, better scanners, etc.) to better handle quantity of small consignments due to e-commerce;
- No focus on parallel imports or goods in transit.

#### Prosecution of suppliers

- Art. XV.103 and XV.104 WER unlikely unless in bad faith (special intent requirement)
- Strike order against intermediaries (art. XI.334 WER/art. XVII.14, §§1,2, and 3 WER in combination with art. 574 Judicial Code. and art. 633quinquies Judicial code) & possible damages;
- Information obligations relating to distributor channel and identity in the context of civil proceedings.

#### Bottlenecks relating to suppliers and transporters

- Cannot verify whether a product is counterfeit or not (if in good faith). Blockathon initiative may address this in the future.
- No obligation to verify who uses its services; relies on customs to filter out counterfeits from shipments.
- Are not informed about which individuals are involved in counterfeiting and do not act on it.

#### *DETECTION AND ENFORCEMENT OF COUNTERFEIT INTERNAL MARKET: COUNTERFEITED GOODS ARE SOLD LOCALLY*

Who: Traders, peddlers, landlords of warehouses, landlords of marketplaces and market stalls, etc.

#### Detection:

- Through market surveillance (based on product safety) (e.g. market surveys, consumer complaint);
- Extended search competences and investigative powers in case of suspected counterfeiting for FPS Economy and Customs authorities;
- Accidental findings by police
- EU's Counterfeit and Piracy Watch List helps identify which companies have already been involved in counterfeiting;
- Actions by ABAC-BAAN (mystery shopper initiatives);
- EMPACT (Europol) helps prioritise counterfeiting and set up EU-wide actions in which agencies such as FPS Economy can participate;
- The (future) Blockathon initiative will possibly help identify counterfeiting if it occurs anywhere in the trade chain.

#### Enforcement: private and criminal law

- (provisional or permanent) cease and desist order and possibility to claim damages, remedial measures (e.g. removal from market or destruction) and information obligation;
- Cease and desist order can be issued in proceedings for interim relief without the need to prove urgency;
- Variety of sanctions in criminal proceedings (broad forfeiture, high penalties, stricter sanctions for repeat infringers);
- Seizure and destruction as part of an investigation FPS Economy;
- IPEP portal to communicate with other competent authorities and rightsholders.

Bottlenecks:

- No oversight on repeat infringers due to lack of a good information exchange between different police zones, Lack of oversight in a similar way caused by FPS Economy and Prosecutor's Office in combination with amicable settlements or dismissals (e.g. 2 times transaction procedure at FPS Economy and third time forwarded to Prosecutor's Office). Due to amicable settlements, heavier penalties for recidivism will not apply due to lack of previous conviction;
- Motivation behind enforcement depends on resources and time (e.g. dismissals);

*FINANCING OF COUNTERFEITING AND COUNTERFEIT FINANCES OTHER CRIMINAL ACTIVITIES:*

Who: Banks, art dealers, counterfeit sellers (criminal organization)

Reactive:

- Anti-money laundering legislation: quite advanced in Belgium. The latest directive has not been implemented yet, but Belgian legislation already complies with almost all the new requirements.
- Cease and desist orders regarding intermediaries, including information obligations regarding identity;
- Forfeiture as both a civil penalty and a criminal penalty.

*DANGERS OF COUNTERFEITING: HEALTH AND SAFETY RISKS.*

Greatest damage to: companies holding rights (reputation) and consumers.

Measures to protect consumers?

- Rigorous product safety legislation (EU legislation in combination with Belgian legislation);
- Investigations based on complaints, but also proactive market research based on information exchanges;
- Awareness campaigns by the Federal Public Service Economy and NANAC;
- Databases such as RAPEX for information exchange on dangerous circulating products;
- The Blockathon initiative can help inform consumers better about the authenticity of the product and therefore also its safety and reliability.

Bottlenecks:

- Current labeling regulations (e.g., EC logo) are only relevant if market supervision is efficient;

- Consumers need to be more aware of the dangers of counterfeiting, not just the economic impact of counterfeiting on the EU economy.

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