

VIETNAM

New Customs enforcement regime

Tilleke & Gibbins

Hanoi



Linh Duy Mai

On January 30 2015, the Ministry of Finance introduced Circular 13/2015/TT-BTC guiding the implementation of regulations in the new Law on Customs on Customs enforcement against IP infringement. Circular 13 took effect on March 15 2015, and, in line with the new law, brought about changes to the border control measures that had been in place in Vietnam for the past decade. Two months into the new regime, it appears that these changes, though seemingly not substantial, have increased the transparency as well as the effectiveness of Customs enforcement.

Changes to Customs recordal

In Vietnam, Customs enforcement includes recordal of IP rights (trade marks, patents, etc) and seizure of suspicious shipments at the border. In most cases, Customs recordal lays the foundation for Customs seizure (suspension of the clearance of the goods, in other words). If IP rights are recorded with Customs, Customs will notify the holders upon the discovery of any goods suspected of infringing their IP rights. Without prior Customs recordal, IP right holders still have the right to call on Customs to seize a specific suspected shipment that is bound for Vietnam. When Customs independently detects counterfeits, the prevailing regulations enable Customs to act *ex officio* with or without a prior Customs recordal.

The new regulations extended the validity of Customs recordal from one year to two years, with the option to renew for another two years. In addition, they assigned a new agency to assume responsibility for Customs recordal. Previously, IPR holders had to submit applications for recordal to the Anti-Smuggling and Investigation Department under the

General Department of Vietnam Customs, which would review the applications and decide on the approval of the recordal. However, since the effective date of Circular 13, the Customs Control and Supervision Department has assumed responsibility for the recordal, allowing the Anti-Smuggling and Investigation Department to focus on actual IP enforcement instead of the paperwork of Customs recordal.

This shift of responsibility raised some concerns about the effectiveness of IP enforcement at the border if there was not frequent and close cooperation between the two departments. However, despite some lag time at the outset, the work of Customs recordal seems to be running smoothly under the Customs Control and Supervision Department, which is in close coordination with the Anti-Smuggling and Investigation Department and promptly informs them of decisions on recordal.

Changes to Customs seizure

Upon the detection of suspected infringing goods, Customs will suspend the clearance of the goods and notify the IP right holder or its authorised IP agency. Circular 13 introduced the requirement that this notification must include photos of the goods in question, to enable the holders to make a more precise decision on whether to pursue Customs enforcement actions.

The new laws go into further detail about the timing for the Customs seizure process. In principle, if the holders desire a seizure, they must file an application with Customs within three working days from receipt of the notification. However, the previous laws did not set forth an express time frame for Customs' follow-up actions. This loophole raised concerns about transparency in the process. Now, the system has changed, with Circular 13 specifying a time frame of five working days from the notification date for customs to decide whether to officially seize or release the goods. When the IP right holder calls for a Customs seizure, Customs must issue a decision on the official suspension of clearance of the goods within two working hours from the time it receives the complete application, if it accepts the holder's request.

Also, the new Law on Customs and Circular 13 stipulate a window for the Customs seizure of 10 working days starting from the notification date, rather than the date on which the IP right holder receives the notification, as mentioned in the IP Law. This can effectively shorten the window by several days, as the delivery of the notification can take as long as a week if sent by post. During this period, the holder is entitled to collect further relevant information about the shipments in question for the purpose of assessing the possible infringement. The holder can also obtain expert opinions to support the assessment process. The result of the assessment or the expert opinion should be submitted to Customs to facilitate their resolution of the case. If the holder cannot meet the deadline for the Customs seizure, it can call for an extension of 10 further working days. If an expert opinion on the possibility of infringement is necessary, Customs will continue suspending the clearance of the goods until it receives the opinion.

The new regulations also introduce a regime in which Customs can act *ex officio* in cases of not only counterfeits but also other infringing goods. According to Article 14.3 of Circular 13, even without a request for protection of IP rights, Customs will still inspect the goods, take samples and coordinate with the Anti-Smuggling and Investigation Department and/or other relevant Customs divisions to decide on the detention of goods suspected to infringe specific IP rights as a result of their inspection of the actual goods and/or the Customs dossier.

We believe that in light of the increased transparency in the process of Customs seizure as well as new *ex officio* power of Customs, the new regulations will lift the effectiveness of Customs enforcement to a new level.